NORTH CAROLINA COURT OF APPEALS REPORTS

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. DONNIE RAY HALL

No. 8917SC623

(Filed 3 April 1990)

1. Criminal Law § 34.8 (NCI3d); Rape and Allied Offenses § 4.1 (NCI3d) — rape of stepdaughter — prior offenses against victim

In a prosecution of defendant for the second degree rape of his stepdaughter, evidence that defendant had pled guilty to two counts of taking indecent liberties with the victim three years earlier was properly admitted to show defendant's common scheme or plan. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 326; Rape § 70.

2. Rape and Allied Offenses § 4 (NCI3d) — post-traumatic stress disorder — characteristics of sexually abused children

Expert testimony that an alleged rape victim suffered from post-traumatic stress disorder and from a conversion disorder was admissible to help the jury determine if a rape in fact occurred. Furthermore, expert testimony about symptoms and characteristics typically exhibited by sexually abused children was admissible to help the jury understand the behavior

patterns of sexually abused children and assist it in assessing the credibility of the victim.

Am Jur 2d, Expert and Opinion Evidence §§ 196, 197; Infants § 17.5; Rape § 68.5.

3. Criminal Law § 51 (NCI3d); Rape and Allied Offenses § 4 (NCI3d)— expert in child psychiatry—qualification to testify about PTSD

An expert in the field of child psychiatry was properly permitted to testify about post-traumatic stress disorder even though there was no evidence that he had received specialized training in such disorder.

Am Jur 2d, Expert and Opinion Evidence §§ 196, 197; Infants § 17.5; Rape § 68.5.

4. Criminal Law § 51 (NCI3d)— clinical social worker—qualification to testify—profile of sexually abused children

The trial court properly exercised its discretion in permitting a clinical social worker to testify regarding the profile of sexually abused children where the witness has a degree in psychology and a Masters degree in counseling; she has had specific training in family violence issues; and she has handled a case load as a social worker of at least fifty percent child sexual abuse victims.

Am Jur 2d, Expert and Opinion Evidence §§ 196, 197; Infants § 17.5; Rape § 68.5.

5. Rape and Allied Offenses § 4 (NCI3d)— PTSD in rape victim—length of symptoms—relevancy

Testimony by a child psychiatrist regarding the length of time that characteristics of sexual abuse, including PTSD, could persist in a sexual abuse victim was relevant to show that diagnoses of PTSD and conversion disorder made in April and May of 1988 were consistent with a rape occurring in February 1988. Furthermore, even if this evidence was irrelevant under N.C.G.S. § 8C-1, Rule 401, defendant failed to show that he was prejudiced thereby.

Am Jur 2d, Expert and Opinion Evidence §§ 196, 197; Infants § 17.5; Rape § 68.5.

6. Criminal Law § 89.1 (NCI3d)— attack on victim's credibility— admissibility of character evidence

Cross-examination of a child rape victim about prior inconsistent statements made to her doctor, her mother, and at the preliminary hearing constituted an attack on her credibility such that the State could present reputation or opinion evidence as to the victim's character for truthfulness. N.C.G.S. § 8C-1, Rule 608.

Am Jur 2d, Evidence §§ 339, 342, 343.

7. Criminal Law § 89.1 (NCI3d)— character witness—sufficient contact with community

A school guidance counselor had sufficient contact with an appreciable group of people who had an adequate basis upon which to form their opinion of an alleged rape victim's reputation for truthfulness to permit her to testify as to the victim's reputation for truthfulness among the faculty at her school.

Am Jur 2d, Evidence §§ 339, 342, 343.

8. Criminal Law § 50.1 (NCI3d); Rape and Allied Offenses § 4.3 (NCI3d)— rape victim—improper expert testimony on credibility

Testimony by a clinical social worker who counseled an alleged rape victim that the victim had a reputation for truthfulness in her school community constituted improper expert testimony on the credibility of the victim as a witness. However, defendant failed to show prejudice from the erroneous admission of this testimony. N.C.G.S. § 8C-1, Rules 405(a) and 608.

Am Jur 2d, Expert and Opinion Evidence § 191.

9. Criminal Law § 158 (NCI3d)— ruling on examination of witness's notes—absence of notes from record

The appellate court had no basis to review the trial judge's ruling under N.C.G.S. § 8C-1, Rule 612 that defendant was not entitled to examine a portion of an officer's investigative notes in preparation for cross-examining the officer where the notes were not in the record on appeal.

Am Jur 2d, Appeal and Error §§ 397-400.

10. Rape and Allied Offenses § 5 (NCI3d)— second degree rape— sufficient evidence of force

There was sufficient evidence that defendant acted "by force and against the will of the other person" to support his conviction of second degree rape of his fifteen-year-old stepdaughter where the State's evidence tended to show that defendant pushed the victim onto her back when she tried to turn away and held her arms or hands during the act of intercourse; defendant repeatedly told the victim not to tell anyone and threatened to kill her and her family members if she did; the victim told defendant several times to leave her alone but did not scream because she was afraid; and defendant was the male parent figure in the victim's household. N.C.G.S. § 14-27.3(a)(1).

Am Jur 2d, Rape §§ 88-92.

APPEAL by defendant from judgments entered 20 January 1989 by *Judge Melzer A. Morgan, Jr.*, in SURRY County Superior Court. Heard in the Court of Appeals 17 January 1990.

Defendant was indicted for second degree rape of his stepdaughter in violation of N.C. Gen. Stat. § 14-27.3(a)(1) and for sexual activity by a substitute parent in violation of N.C. Gen. Stat. § 14-27.7. The State's evidence tended to show the following: Defendant, his fifteen-year-old stepdaughter, and a family friend returned from visiting friends after midnight on Sunday, 14 February 1988. That night, defendant came into the bedroom the victim shared with her younger stepsister and had intercourse with the victim. Over the next few days, the victim reported the incident to Detective Gray Shelton of the Mount Airy Police Department, Sandra Miller, her school guidance counselor, and the Department of Social Services. Approximately six weeks after the alleged rape, the victim was admitted to Baptist Hospital and diagnosed as suffering from post-traumatic stress disorder and a conversion disorder. The victim was re-admitted to the hospital in July after taking an overdose of prescription drugs. During her second hospital stay, with the assistance of Detective Shelton, the victim telephoned the defendant and taped their conversation. The tape was played to the jury. In this conversation, defendant promised "never to do that again" and stated "Yeah I know'd it was wrong. Common sense . . . . "

According to testimony from both the victim and the defendant, defendant had pleaded guilty to two counts of taking indecent liberties with the victim in 1985. Additional pertinent evidence is set out in the opinion.

Defendant was convicted of both offenses and sentenced to a total of thirty-six years imprisonment. From this judgment defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John F. Maddrey, for the State.

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

ARNOLD, Judge.

[1] Defendant first assigns error to the admission of testimony from the victim that he had pleaded guilty to two counts of taking indecent liberties with the victim in 1985. The trial judge, in ruling on defendant's motion to suppress those convictions, found that the 1985 and 1988 events involved the same victim and occurred in the same bedroom. He also found and concluded that the 1985 events were not too remote in time from the 1988 event since the defendant had been imprisoned for some time less than one year following his October 1985 conviction and did not return to the family residence until April 1987, ten months before the alleged rape occurred. The judge further concluded that the 1985 events "are relevant to the defendant's motive, intent, or common plan in February 1988. . . . The danger of unfair prejudice is outweighed by the probative value where the issue is that no such event occurred."

Defendant argues and we agree that his motive or intent was not at issue in this case, since the issue was whether the alleged victim was raped at all. The only remaining basis in the judge's order for admitting the evidence is "common plan." Defendant argues that evidence of his prior crimes shows only that he had engaged in conduct similar to the charged offense in the past. He further argues that admitting such evidence for that purpose violates the N.C. Gen. Stat. § 8C-1, Rule 404(b) prohibition against using evidence of defendant's past sexual misconduct to show he committed the rape in question. He further contends that admitting his convictions as evidence of a "common plan" defeats the purpose of the Rule

404(b) prohibition. Therefore, defendant argues that the evidence should have been excluded under Rule 404(b) and if admitted under Rule 404(b), should have been excluded under N.C. Gen. Stat. § 8C-1, Rule 403 as unfairly prejudicial.

As a general rule, extrinsic evidence of a defendant's past criminal activities or misconduct is not admissible when its only logical relevancy is to suggest defendant's propensity or predisposition to commit the offense with which he is charged. *State v. Shane*, 304 N.C. 643, 653-4, 285 S.E.2d 813, 820 (1982); Rule 404(b). However, such evidence is admissible when it bears on "genuine questions concerning knowledge, identity, intent, motive, plan or design, connected crimes . . . . " *Id.* at 654, 285 S.E.2d at 820. "Common plan," the basis for admission relied upon here, has been explained as follows. "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged. . . ." *State v. McClain*, 240 N.C. 171, 176, 81 S.E.2d 364, 367 (1954). When plan, design, or scheme is the basis for admitting evidence of similar acts to prove the act charged, the rationale is that all the acts show "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." 2 Wigmore on Evidence § 304 at 202 (3d ed. 1940).

Rule 404(b) has been interpreted quite liberally by our courts when the prior acts sought to be admitted are prior sex offenses. 1 Brandis on North Carolina Evidence, § 92 at 420 (3d ed. 1988). Evidence of other sex acts or crimes committed by the defendant against the same victim has been held admissible in numerous cases under the "common scheme or plan" exception in Rule 404(b). *State v. Shamsid-Deen*, 324 N.C. 437, 445, 379 S.E.2d 842, 847 (1989) (rape; prior similar sex acts over eleven-year period against same victim, defendant's daughter, admissible to show "defendant's common scheme to abuse the victim sexually"); *State v. Frazier*, 319 N.C. 388, 390, 354 S.E.2d 475, 477 (1987) (first degree sex offense; several instances of prior sexual conduct with victim, defendant's stepson, aged nine, admissible to show a "continuing scheme to commit sexual acts against the victim"); *State v. Sills*, 311 N.C. 370, 377-8, 317 S.E.2d 379, 383-84 (1984) (rape; one instance of prior intercourse with same child victim); *State v. Summers*, 92 N.C. App. 453, 459-60, 374 S.E.2d 631, 635 (1988), *disc. rev. denied*, 324

N.C. 341, 378 S.E.2d 806 (1989) (rape; approximately ten instances of prior sexual contact with child victim, admissible to "establish a plan or scheme by defendant to sexually abuse the victim when the victim's mother went to work").

We recognize that the distinction between admitting evidence of other crimes to show a propensity or predisposition to commit the crime charged and admitting such evidence to show a common scheme or plan can be extremely difficult to draw. When evidence is offered for the latter purpose, it "should be examined with especial care to see that it is really relevant to the establishment of a system, design or plan, and does not merely show character or a disposition to commit the offense charged." 1 Brandis, *supra*, § 92 at 415.

In this case, the issue was whether the alleged rape did in fact occur. Since the victim did not report the alleged rape for several days, no physical evidence could be obtained. Thus, the admission of defendant's prior convictions was significant in establishing whether a rape occurred. Given our courts' liberal attitude toward admitting evidence of similar sex offenses under Rule 404(b), we find no error in the trial court's admission of defendant's prior convictions for taking indecent liberties with the prosecutrix.

Even if evidence is admissible under Rule 404(b), the trial court must still weigh its probative value against any danger of unfair prejudice to the defendant under Rule 403. This decision rests in the sound discretion of the trial judge and, given the liberal interpretation of Rule 404(b) in this setting, we find no abuse of discretion here.

[2] Defendant next assigns error to several aspects of the expert testimony about post-traumatic stress disorder ("PTSD"), conversion reaction, and the characteristics of sexual abuse victims. First, defendant argues that PTSD, conversion disorders, and the characteristics of child victims of sexual abuse are not proper subjects for expert testimony in North Carolina. Dr. Roy Haberkern, a child psychiatrist, testified that the prosecutrix had been diagnosed as suffering from PTSD and conversion disorder. Dr. Sarah Sinal, a pediatrician, also testified that a diagnosis of conversion reaction had been made. Judy Stadler, a clinical social worker, testified about a "profile" or set of characteristics typical of children who have been sexually abused.

In general, expert opinion testimony is admissible when specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. N.C. Gen. Stat. § 8C-1, Rule 702. In this case, the occurrence of the rape itself was the central fact in issue. A recent case from this Court, *State v. Strickland*, 96 N.C. App. 642, 387 S.E.2d 62 (1990), held that, based on the trend in other jurisdictions as well as statements by our Supreme Court, "evidence on PTSD would be admissible in North Carolina courts." Dr. Haberkern's testimony regarding PTSD was, therefore, properly admitted to help the jury determine if a rape had in fact occurred. Testimony by qualified experts about symptoms and characteristics typically exhibited by sexually abused children is also a proper topic for expert testimony because it could "help the jury understand the behavior patterns of sexually abused children and assist it in assessing the credibility of the victim." *State v. Kennedy*, 320 N.C. 20, 31-2, 357 S.E.2d 359, 366 (1987). Judy Stadler's testimony on this topic was also properly admitted. Similarly, testimony from the two physicians that the prosecutrix suffered from a conversion disorder, a paralysis without any neurological basis resulting from severe anxiety or depression and consistent with having been sexually abused, was a proper subject for expert testimony. This testimony, if believed, would help the jury determine the question of whether the prosecutrix had been raped.

[3] Defendant next argues that even if testimony on PTSD was properly admitted, Dr. Haberkern was not qualified to testify regarding this disorder because there was no evidence that he received specialized training in PTSD. Whether a witness is qualified as an expert is within the discretion of the trial judge and will not be reversed on appeal absent a complete lack of evidence to support the ruling. *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *disc. rev. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986). Furthermore, an expert need not have had experience in the very subject at issue to qualify. *Id.* Dr. Haberkern is Chief of Child Psychiatry at Baptist Hospital, a trained pediatrician and had experience diagnosing and treating sexually abused children in his training and practice and as part of the Child Medical Evaluation Program in this state. Since Dr. Haberkern was qualified as an expert witness in the field of child psychiatry and PTSD is a recognized psychiatric diagnosis, *Strickland*, 96 N.C. App. 646, at 387 S.E.2d 65, the trial court properly exercised its discretion in allowing Dr. Haberkern to testify regarding PTSD.

[4] Defendant next argues that Judy Stadler, the clinical social worker, was not qualified to testify to the profile or characteristics of sexually abused children. Ms. Stadler has an undergraduate Psychology degree, a Masters degree in Counseling, specific training in family violence issues and, during her employment as a social worker in Surry County, handled a case load of at least fifty percent child victims of sexual abuse. The trial court properly exercised its discretion in allowing Ms. Stadler to testify regarding the profile of sexual abuse victims. *See Howard* at 270, 337 S.E.2d at 603.

[5] Defendant next argues that the doctors' testimony regarding the length of time that characteristics of sexual abuse, including PTSD, could persist in a sexual abuse victim should have been excluded as irrelevant to the issue of defendant's guilt under N.C. Gen. Stat. § 8C-1, Rule 401. Defendant further argues that the testimony was likely to inflame the jury. The central issue at trial was whether a rape had in fact occurred. Because of the lack of physical evidence, the State relied heavily on expert testimony that the prosecutrix exhibited characteristics typical of sexual abuse victims to prove that she had been abused. The State argues that the testimony at issue here was relevant to show that the diagnoses made by Drs. Sinal and Haberkern in April and May of 1988 were consistent with a rape occurring in February 1988. Furthermore, even if this evidence was irrelevant under Rule 401, defendant has not shown a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a).

Defendant next assigns error to the admission of testimony during the State's case in chief regarding the victim's reputation for truthfulness. N.C. Gen. Stat. § 8C-1, Rule 608 in pertinent part provides:

> (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be . . . supported by evidence in the form of reputation or opinion . . . subject to these limitations:
>
> (1) the evidence may refer only to character for truthfulness or untruthfulness, and
>
> (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

[6] Defendant first argues that the second limitation of subdivision (a), the requirement that the victim's character for truthfulness has been attacked, was not met. The rule allows character evidence for truthfulness after an attack "by opinion or reputation evidence *or otherwise*." Rule 608 (emphasis added). On cross-examination of the victim, the defendant's attorney repeatedly attempted to impeach her by asking her about prior inconsistent statements made to her doctor, her mother, and at the preliminary hearing. This cross-examination constituted an attack on her credibility such that the State could then present reputation or opinion evidence as to the victim's reputation for truthfulness.

[7] Defendant next argues that the testimony from Sandra Miller and Judy Stadler regarding the victim's reputation for truthfulness was inadmissible. As to Miller's testimony, defendant argues that the State failed to lay a proper foundation to introduce reputation evidence of the victim's character for truthfulness. Before a witness may testify to another's reputation, the proponent of that evidence must demonstrate that the testifying witness has sufficient contact with the community to qualify him as knowing the general reputation of the person in question. *State v. Morrison*, 84 N.C. App. 41, 47, 351 S.E.2d 810, 814, *cert. denied*, 319 N.C. 408, 354 S.E.2d 724 (1987). Sandra Miller, who testified to the victim's reputation for truthfulness among the faculty at the victim's school, was a guidance counselor at that school during the school year in which the rape allegedly occurred. She was, therefore, sufficiently familiar with "an appreciable group of people who have adequate basis upon which to form their opinion," *id.* at 48, 351 S.E.2d at 814, of the victim's reputation for truthfulness.

As to Stadler's testimony, defendant argues that it was inadmissible on two grounds: first, under N.C. Gen. Stat. § 8C-1, Rule 405(a), which prohibits "[e]xpert testimony on character or a trait of character . . . as circumstantial evidence of behavior," and second, because the State failed to lay a proper foundation for this evidence of the victim's reputation. Because of our disposition of defendant's first argument, we need not reach the second.

[8] Judy Stadler was a clinical social worker with Surry County community agencies who counseled the victim for about two months in 1986 and then on an emergency visit in March 1988. Although she was initially allowed to testify to her *opinion* of the victim's character for truthfulness, the trial judge reversed his ruling

moments later, sustained defendant's objection to this testimony, and instructed the jury to disregard the testimony. Following a *voir dire* and arguments, the trial judge allowed Stadler to testify to the victim's *reputation* for truthfulness in the school community.

Defendant contends, and we agree, that the admission of Stadler's testimony that the victim had a reputation for truthfulness in her school community was error. Expert testimony on the credibility of a witness is not admissible. *See* N.C. Gen. Stat. § 8C-1, Rules 405(a), 608; *State v. Kim*, 318 N.C. 614, 620-1, 350 S.E.2d 347, 351 (1986). The error does not, however, entitle defendant to a new trial. To warrant a new trial, defendant must show that the error was prejudicial according to the standard set out in N.C. Gen. Stat. § 15A-1443(a).

In this case, defendant has failed to show prejudice resulting from the error in admitting the testimony at issue. Our courts have found prejudicial error when the State's case against the defendant hinged almost entirely on the credibility of the victim. *Kim* at 622, 350 S.E.2d at 352; *State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 82 (1986); *State v. Jenkins*, 83 N.C. App. 616, 624-5, 351 S.E.2d 299, 304 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987); *State v. Holloway*, 82 N.C. App. 586, 587-8, 347 S.E.2d 72, 73-4 (1986). In this case, the State's case was not entirely dependent on the victim's testimony. *See State v. Teeter*, 85 N.C. App. 624, 633, 355 S.E.2d 804, 809, *disc. rev. denied*, 320 N.C. 175, 358 S.E.2d 67 (1987). Also, before Stadler testified to the victim's reputation for truthfulness, the jury had already heard lengthy testimony from the victim and testimony from two other witnesses to whom the victim had spoken about the alleged rape. The jury, therefore, could make their own assessment of the victim's credibility apart from Stadler's testimony on that subject. *See id.* at 632-33, 355 S.E.2d at 809. Under these circumstances, defendant has not shown a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C. Gen. Stat. § 15A-1443(a).

[9] Defendant next assigns error to the trial judge's ruling under N.C. Gen. Stat. § 8C-1, Rule 612, that defendant could not review a portion of a witness's notes designated "Court's Exhibit #1." Detective Gray Shelton, who had investigated the offenses for which defendant was tried, brought his investigative notes to the witness stand. Following Shelton's direct examination, defendant asked to

examine Shelton's notes in preparation for cross-examination. The State raised no objection to the defendant reviewing those notes the witness had used during his testimony, but argued that one separate section of the notes contained information on the victim's drug overdose the summer following the rape. Because this information was unrelated to Shelton's testimony, the State argued, it was not subject to defendant's review. The trial judge marked that particular section of Shelton's notes "Court's Exhibit #1." After reviewing the exhibit and questioning Shelton, the trial judge found that Shelton had not used the section in question before or during his testimony and alternatively that it was not in the interests of justice to disclose the exhibit to defendant. The judge then ordered the exhibit sealed for appellate review.

Defendant asks this Court to review the exhibit to determine whether defendant was entitled to its production. However, because Court's Exhibit #1 is not in the record, we have no basis to review the trial judge's application of Rule 612 to Shelton's notes. *See State v. Steele*, 86 N.C. App. 476, 478, 358 S.E.2d 98, 99, *disc. rev. denied*, 320 N.C. 797, 361 S.E.2d 86 (1987).

[10] In his last assignment of error, defendant contends the trial court erroneously denied his motion to dismiss the charge of second degree rape. He argues that the State failed to present evidence of force, actual or constructive, and that even if such evidence were present, there was no evidence that the victim resisted or wanted to resist that force. Second degree rape is vaginal intercourse by force and against the will of the victim. N.C. Gen. Stat. § 14-27.3(a)(1).

> The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright or coercion. Constructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim's submission to sexual acts. Threats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.

State v. Etheridge, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987) (citations omitted). The circumstances surrounding a particular parent-child relationship may support an inference of constructive force. *See id.* at 47, 352 S.E.2d at 681. "[E]vidence of physical resistance is not necessary to prove lack of consent . . . . [C]onsent

which is induced by fear of violence is void . . . ." *State v. Hall*, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (1977).

In this case, the victim testified that the defendant pushed her onto her back when she tried to turn away and held her arms or hands during the act of intercourse. She also stated that defendant repeatedly told her not to tell anyone and threatened to kill her and her family members if she did. She testified that she told him several times to leave her alone, but did not scream because she was afraid. Additionally, defendant was the male parent figure in the victim's household. We find this evidence sufficient to show that the defendant acted "by force and against the will of the other person," as required by N.C. Gen. Stat. § 14-27.3(a)(1). *See State v. Hosey*, 79 N.C. App. 196, 200-201, 339 S.E.2d 414, 416, *aff'd*, 318 N.C. 330, 348 S.E.2d 805 (1986).

No error.

Chief Judge HEDRICK and Judge WELLS concur.

ROBERT E. KINLAW v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 8916SC729

(Filed 3 April 1990)

1. Insurance § 113 (NCI3d)— fire insurance—misrepresentation in application not material and prejudicial

In an action to recover on a policy of homeowners insurance for losses sustained in a house fire, the trial court did not err in denying defendant's motion for summary judgment on the issue of whether an alleged misrepresentation in the application was material and prejudicial where plaintiff had three mortgages on his house; the application for insurance listed two; the application did not specifically state that one had to disclose all outstanding mortgages; plaintiff testified that he orally disclosed the other outstanding lien to defendant's agent; and there was no allegation or evidence of collusion between plaintiff and defendant's agent.

Am Jur 2d, Insurance §§ 1013, 1014, 1129-1133.

2. Witnesses § 1.4 (NCI3d)— absence of witness from list furnished defendant—testimony properly allowed

The trial court did not err in allowing plaintiff to present testimony of an expert witness who had not previously been listed by plaintiff, since plaintiff included on his list of prospective witnesses "[a]ny witnesses listed by the Defendant"; the witness in question was listed as one of defendant's prospective witnesses; plaintiff called him as a rebuttal expert witness, but, prior to introduction of his testimony, the trial court conducted a voir dire hearing to determine the underlying basis of his testimony and allowed defense counsel to tape record that information so he could confer with his expert prior to cross-examining the witness; and the trial court also gave defense counsel additional time after the witness testified prior to his cross-examination of the witness to confer with defendant's expert.

Am Jur 2d, Depositions and Discovery §§ 70, 71.

3. Insurance § 130 (NCI3d)— fire insurance—sufficiency of evidence of value of house

In an action to recover on a policy of homeowners insurance for losses sustained in a house fire, evidence was sufficient to go to the jury on plaintiff's claim for damages to real property where plaintiff introduced a Sworn Statement in Proof of Loss which stated the actual cash value of the real property at the time of the loss was $80,000, and plaintiff also introduced as evidence of value the fireman's Report of Fire, the Robeson County Statement of Taxes Due, and the insurance policy itself.

Am Jur 2d, Insurance § 1961.

4. Insurance § 131 (NCI3d)— fire insurance—loss within policy limit—replacement cost rider inapplicable—propriety of instruction—irrelevant

Where the damages which were awarded in an action on a homeowners policy did not exceed the policy limit, the replacement cost rider was inapplicable, and even if the trial court's instruction on replacement cost was in error, there was no resulting harm to defendant.

Am Jur 2d, Insurance § 1506.

5. Insurance § 132 (NCI3d)— prejudgment interest—time for commencement

Any prejudgment interest awarded by the trial court in this action to recover on a homeowners insurance policy should have commenced sixty days after the date of the proof of loss.

Am Jur 2d, Insurance § 1523.

6. Costs § 4.1 (NCI3d)— nontestifying expert witness—fee properly allowed as part of costs

The trial court did not abuse its discretion by awarding costs which included a fee for a nontestifying expert witness. N.C.G.S. § 7A-314(a), (d).

Am Jur 2d, Expert and Opinion Evidence § 25.

APPEAL by defendant from judgment entered 24 October 1988 by *Judge Robert H. Hobgood* in ROBESON County Superior Court. Heard in the Court of Appeals 7 December 1989.

This is an action to recover on a policy of homeowners insurance for losses sustained in a house fire. Plaintiff brought this action after defendant denied his claim. In its answer defendant asserted that it denied plaintiff's claim because plaintiff made material misrepresentations in his application for homeowner's insurance and because there was evidence of intentional burning.

After discovery was completed, defendant moved for summary judgment on the issue of material misrepresentation by plaintiff in his application for homeowner's insurance. Defendant filed a supporting affidavit from Shirley P. Swett, the underwriting agent for plaintiff's policy. Plaintiff filed an affidavit disputing Swett's allegations. The trial court denied defendant's motion and the case was subsequently tried.

At the close of plaintiff's evidence, defendant moved for directed verdict on the issue of damages to real property which was denied. In rebuttal, plaintiff introduced testimony by Joe Hubbell, an expert witness. Mr. Hubbell had not previously been disclosed by plaintiff as an expert witness during trial and defendant objected to the introduction of his testimony. The trial court permitted the witness to testify. At the close of all of the evidence, both parties moved for directed verdict and their motions were denied. The jury answered "no" to the first two issues concerning whether

the plaintiff intentionally burned or procured the burning of his house and whether the plaintiff willfully misrepresented or falsely swore to any material fact or circumstance concerning the insurance. The jury verdict awarded damages in the amount of $85,000. Defendant then moved for judgment notwithstanding the verdict and, in the alternative, a new trial. Both motions were denied. Plaintiff moved for and was granted court costs in the amount of $17,008.07. Defendant appeals.

Musselwhite, Musselwhite and McIntyre, by James W. Musselwhite, for plaintiff-appellee.

Anderson, Cox, Collier and Ennis, by J. Thomas Cox, Jr., for defendant-appellant.

EAGLES, Judge.

[1] Defendant first contends that the trial court erred in denying its motion for summary judgment on the issue of whether the alleged misrepresentation in the application was material and prejudicial. Defendant argues that at the time of its motion for summary judgment, there existed no material issue of fact. Defendant's agent, Shirley Swett, stated in her affidavit that she was familiar with the procedure utilized in completing a homeowner's policy and that this procedure required her to obtain information on all outstanding mortgages on the property of the insured and that plaintiff only disclosed one mortgage on the property. Ms. Swett also swore that she would not have "submitted the Kinlaw application" if she had known there were three mortgages. Defendant further contends that plaintiff's failure to disclose all mortgages secured by the property at the time of his application for homeowner's insurance constituted a material misrepresentation.

"It is well established that the standard for reviewing a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file along with the affidavits submitted in support thereof, show the absence of a genuine issue of any material fact, and that a party is entitled to judgment as a matter of law." *Bullock v. Newman*, 93 N.C. App. 545, 548, 378 S.E.2d 562, 564 (1989).

Initially, we note that G.S. § 58-176 (renumbered as G.S. 58-44-15) sets out the "Standard Fire Insurance Policy for North Carolina" which includes a provision which reads as follows: "This entire

policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto." The statute further provides that contracts for fire insurance should conform in substance with the provisions of the statute. Where the terms of a policy are in the form prescribed by statute, they are a clear and full statement of the law. *See Greene v. Aetna Insurance Co.*, 196 N.C. 335, 145 S.E. 616 (1928).

"It is a basic principle of insurance law that the insurer may avoid his obligation under the insurance contract by a showing that the insured made representations in his application that were material and false." *Pittman v. First Protection Life Insurance Co.*, 72 N.C. App. 428, 433, 325 S.E.2d 287, 291, *cert. denied*, 313 N.C. 509, 329 S.E.2d 393 (1985). Misrepresentations on an insurance application are material if "the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract and accepting the risk." *Bryant v. Nationwide Mutual Insurance Co.*, 67 N.C. App. 616, 621, 313 S.E.2d 803, 807 (1984), *rev. on other grounds*, 313 N.C. 362, 329 S.E.2d 333 (1985). "Although '[a]n insurer's duty under an insurance contract may be avoided by a showing that the insured made representations in his insurance application which were material and false,' [. . .] 'an insurance company cannot avoid liability on a life insurance policy on the basis of facts known to it at the time the policy went into effect.' " *Ward v. Durham Life Insurance Co.*, 90 N.C. App. 286, 290, 368 S.E.2d 391, 393-4, *rev. allowed*, 322 N.C. 838, 371 S.E.2d 284, *aff'd by* 325 N.C. 202, 381 S.E.2d 698 (1989). " '[K]nowledge of or notice to an agent of an insurer is imputed to the insurer itself, absent collusion between the agent and the insured.' " *Id.*, 368 S.E.2d at 394.

Here plaintiff submitted an application for homeowner's insurance on which were listed two mortgagees' names (defendant's Exhibit #17) when in fact there were three liens on the insured property. We note in passing that although Ms. Swett's affidavit said that plaintiff disclosed to her only one mortgage, the face of the application signed by plaintiff and Ms. Swett discloses the names of United Carolina Bank and Robeson Savings and Loan in the place for listing mortgagees. In his affidavit plaintiff stated that at the time he applied for insurance he told defendant's agent

"that there were three liens outstanding on the house which included Robeson Savings and Loan, United Carolina Bank and Midstate Oil."

Defendant argues that this court should affirm the principles set forth in *Roper v. National Fire Insurance Co.*, 161 N.C. 151, 76 S.E. 869 (1912). Defendant contends that *Roper* provides that concealment of an encumbrance on property will prevent recovery on the policy. While *Roper* did address the effect of concealing an encumbrance on insured property, the facts of *Roper* are clearly distinguishable from the instant case. The policy in *Roper* explicitly required the insured to disclose mortgages on the property. After careful review of the application here, we see no statement explicitly requiring the insured to disclose all mortgages on the property. There is merely a place on the application for the applicant to list the "mortgagee name." The issue of fact in dispute here is whether plaintiff orally disclosed to defendant's agent the other outstanding mortgage when they were completing the insurance application. Plaintiff's forecast of evidence and evidence at trial indicated plaintiff orally informed defendant's agent about all three liens but defendant's agent failed to list the additional mortgagee on the application.

Defendant further argues that by simply denying the allegations in its agent's affidavit plaintiff does not raise a genuine issue of fact. Defendant contends that by signing the insurance application plaintiff adopted the incomplete information on the application as his own statement. We disagree.

In *Ward v. Durham, supra*, our State Supreme Court stated that "an applicant's signature on an application for insurance, known by the agent to contain false answers is [not] under all circumstances enough to preclude imputation of the agent's knowledge to the insurer." 325 N.C. at 215, 381 S.E.2d at 705. The court then articulated the general rule that "where an insured understandingly executes an application he knows contains false material answers or executes it under circumstances that would put a reasonable person on notice that the application contains such answers, he ipso facto colludes with the agent in misleading the company." *Id.* at 216, 381 S.E.2d at 706.

Here, since the application does not specifically state that one must disclose all outstanding mortgages and the plaintiff testified that he orally disclosed the other outstanding lien to defendant's

agent and there is no allegation or evidence of collusion between plaintiff and defendant's agent, there is sufficient evidence to establish that a material issue of fact exists. Accordingly, the trial court's denial of defendant's motion for summary judgment was proper.

[2] Defendant next contends that the trial court erred in allowing plaintiff to present the testimony of Joe Hubbell since he had not previously been listed as an expert witness by the plaintiff and that allowing him to testify without sufficient notice to defendant was prejudicial. We disagree.

Initially, we note that the admissibility of testimony by a surprise witness is within the discretion of the trial judge and is not reviewable on appeal absent a showing of abuse. *In re Will of Maynard*, 64 N.C. App. 211, 307 S.E.2d 416 (1983), *disc. rev. denied*, 310 N.C. 477, 312 S.E.2d 885 (1984). A "[d]efendant should not [be] prejudiced by surprise testimony by his own witnesses." *Jennings Glass Co., Inc. v. Brummer*, 88 N.C. App. 44, 49, 362 S.E.2d 578, 582, *disc. rev. denied*, 321 N.C. 473, 364 S.E.2d 921 (1988).

Here we note that plaintiff called Joe Hubbell as a rebuttal expert witness. In the pretrial order plaintiff listed the names of his prospective witnesses and did not name Joe Hubbell on that list but included "[a]ny witnesses listed by the Defendant." Joe Hubbell was listed as one of defendant's prospective witnesses. Prior to the introduction of Hubbell's rebuttal testimony, the trial court conducted a *voir dire* hearing to determine the underlying basis of Hubbell's testimony. Defense counsel was also allowed to tape record that information so that he could confer with his expert prior to beginning his cross-examination of Hubbell. The trial court also gave defense counsel additional time after Hubbell testified prior to his cross-examination of Hubbell to confer with defendant's expert. On this record, we find no abuse of discretion.

[3] Defendant next assigns as error the trial court's denial of its motion for directed verdict on plaintiff's claim for damages to real property at the close of plaintiff's evidence and at the close of all evidence on the grounds that there was insufficient evidence of damages to support a claim. Defendant argues that the evidence presented to the trial court on the issue of damages to real property was insufficient as a matter of law. Defendant contends that no evidence of the actual cash value of the home was presented during the trial. We disagree.

"The proper test of actual cash value in a particular case depends upon the nature of the property insured, its condition, and other circumstances existing at the time of the loss." *Surratt v. Grain Dealers Mutual Ins. Co.*, 74 N.C. App. 288, 293, 328 S.E.2d 16, 20 (1985). "The tests generally used to determine actual cash value are the market value of the property, the reproduction or replacement cost of the property, and the broad evidence rule. Under the broad evidence rule, any evidence logically tending to the formation of a correct estimate of the value of the insured property at the time of the loss, including evidence of the fair market value and the replacement cost of the property, may be considered." *Id.* at 293-4, 328 S.E.2d at 20.

Here, during his case in chief plaintiff introduced a Sworn Statement in Proof of Loss which stated the actual cash value of the real property at the time of the loss was $80,000. During defendant's case in chief, plaintiff introduced additional evidence of the value of the property and the amount of property damages through the fireman's Report of Fire, the Robeson County Statement of Taxes Due and the insurance policy itself. From this we conclude that, at the close of all of the evidence, there was sufficient evidence to go to the jury on plaintiff's claim for damages to real property.

[4] Defendant next assigns as error the trial court's instruction on the amount of damages because the instruction was not supported by the evidence and was contrary to the terms of the contract. We disagree.

Initially we note that the insurance policy in question includes a replacement value clause which for an additional premium becomes effective. It amends present coverage amounts when the insured has "elected to repair or replace the damaged building." Under the clause the insurer would increase the policy limits to "equal the current replacement cost of the dwelling if the amount of loss to the dwelling is more than the limit of liability indicated on the Declarations page." While the trial court instructed the jury to award $85,467.51 in damages pursuant to the stipulated replacement cost of plaintiff's dwelling, the jury awarded $80,000 in damages which is equal to the actual value of the lost property as indicated by the plaintiff's sworn proof of loss statement and other evidence introduced during trial. The amount of real property damages which was actually awarded did not equal the stipulated replacement

cost of plaintiff's dwelling. Since the damages which were awarded did not exceed the policy limit, the replacement costs rider was inapplicable here. Accordingly, even if the trial court's instruction was in error, there was no resulting harm to the defendant.

Defendant next contends that the trial court erred in denying its motion for judgment notwithstanding the verdict on the dual grounds that the chemist Joe Hubbell should not have been allowed to testify since he was not previously listed as an expert witness of plaintiff and that the evidence was insufficient to support a finding of damages to real property by the jury. These arguments have been discussed. Defendant also asserts the use of Joe Hubbell's testimony and insufficiency of evidence to justify the verdict as grounds for a new trial under G.S. 1A-1, Rule 59(a). We disagree.

> A motion for judgment notwithstanding the verdict, or judgment N.O.V. is in effect a directed verdict granted after the jury verdict. A motion for judgment N.O.V. ". . . shall be granted if it appears that the motion for directed verdict could properly have been granted." A motion for judgment N.O.V., like a motion for a directed verdict, raises the question whether there was sufficient evidence to go to the jury, viewing all the evidence in the light most favorable to the nonmovant.

Bryant v. Nationwide Mutual Fire Ins. Co., 67 N.C. App. 616, 618-19, 313 S.E.2d 803, 806 (1984), *disc. rev. allowed*, 311 N.C. 399, 319 S.E.2d 267, *aff'd in part, rev. in part*, 313 N.C. 362, 329 S.E.2d 333 (1985). G.S. § 1A-1, Rule 59(a) provides that a new trial may be granted to all or any of the parties and on all or part of the issues for any of the several causes or grounds none of which existed in this proceeding.

We have previously determined that the trial court correctly denied defendant's motion for directed verdict and accordingly this assignment of error must also fail.

[5] Defendant next argues that the trial court erred in awarding interest on the judgment from March 26, 1986 on the grounds that this award was contrary to law and contrary to the terms of the contract between the parties. Defendant contends that the trial court failed to follow *Dailey v. Integon General Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985), which held that "prejudgment interest on a fire insurance policy recovery and [sic] begins sixty days

after the date of the proof of loss is filed with the insurer." We agree.

In ruling on the motion for prejudgment interest, the trial court stated that "[p]rejudgment interest shall be allowed from sixty days after the date of the proof of loss. That is, sixty days after February 25, 1986." The trial court then awarded interest commencing 26 March 1986 and continuing thereafter until satisfied. The 26 March 1986 date is clearly not sixty days after the date of the proof of loss. Sixty days after the date of the proof of loss would have been 26 April 1986. Accordingly, we remand the case for entry of an amended judgment awarding prejudgment interest consistent with this opinion.

[6] Finally, defendant contends that the trial court erred in awarding costs to the plaintiff on the grounds that the award is excessive, contrary to law and not supported by the evidence. Defendant argues that the trial court abused its discretion in awarding the expert fees of Norman Cope who never took the stand to testify during any portion of the trial. Defendant further asserts that the legislative intent of G.S. 7A-314(d) was to allow expert witness fees to be added to court costs only when that expert has testified in court. We disagree.

The express language of the statute provides that "[a] witness under subpoena, bound over, or recognized, . . . shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court; . . . (d) An expert witness, . . . shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize."

In *State v. Johnson*, 282 N.C. 1, 191 S.E.2d 641 (1972), the Supreme Court stated that subsections (a) and (d) of G.S. 7A-314 must be considered together.

> Section (a) makes a witness fee for any witness, except those specifically exempted therein, dependent upon his having been subpoenaed to testify in the case, and it fixes his fee at $5.00 per day. As to expert witnesses, Section (d) modifies Section (a) by permitting the court, in its discretion, to increase their compensation and allowances. The modification relates only to the amount of an expert witness's fee; it does not

abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation.

Id. at 27-8, 191 S.E.2d at 659.

Here by defendant's own admission, Norman Cope attended trial and was listed as a potential expert witness. Since the statute does not state that the expert must testify, the trial court did not abuse its discretion by awarding costs which included a fee for a nontestifying expert witness.

Accordingly, we remand this cause for entry of an amended judgment consistent with this opinion. In all respects other than the prejudgment interest issue, we affirm the trial court.

Affirmed in part, reversed in part and remanded.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. LARRY ANTHONY EVERETT

No. 8912SC816

(Filed 3 April 1990)

1. **Witnesses § 1.2 (NCI3d)— rape and sexual offense—four-year-old witness—competent**

A four-year-old rape victim's testimony met the standards of N.C.G.S. § 8C-1, Rule 601 and the trial court did not err in finding that she was competent to testify where, as in *State v. Hicks*, 319 N.C. 84, the victim did not understand her obligation to tell the truth from a religious standpoint and had no fear of certain retribution for mendacity, but demonstrated her capability to understand the duty of a witness to tell the truth.

Am Jur 2d, Rape § 101.

2. **Criminal Law § 50.1 (NCI3d)— child rape victim—opinion of pediatrician—admissible**

The trial court did not err in a prosecution for first degree rape and first degree sexual offense of a victim who was four years old at the time of trial by allowing a pediatrician to

testify that in his best opinion penetration occurred more than two or three times, but that he could not be more specific. The pediatrician possessed an adequate foundation for his conclusion, and his opinion testimony would be of assistance to the jury in evaluating his specific medical findings. It is for the jury to determine the weight of his testimony in light of the manner in which the witness qualified his opinion.

Am Jur 2d, Rape § 100.

3. Criminal Law § 34.8 (NCI3d)— rape of child—testimony concerning prior acts—admissible

Testimony of defendant's daughter concerning prior acts of misconduct was admissible in a prosecution for first degree rape and first degree sexual offense where the relationship between the defendant and the two victims was emotionally a father-daughter relationship, sexual assaults on both victims occurred when each was approximately the same age, defendant put each victim onto his bed and then had sexual intercourse with her after first covering her face with a cloth, the assaults took place while his wife was at work, and defendant in both instances would afterwards get a towel to wipe off each victim. The evidence tends to prove a common scheme or plan on defendant's part to sexually abuse his daughters; moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under N.C.G.S. § 8C-1, Rule 403, N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 326; Rape §§ 70, 71.

4. Rape and Allied Offenses § 5 (NCI3d)— rape of child—sufficiency of evidence as to time

Where defendant was indicted and convicted for rape and first degree sexual offense with indictments covering the periods 1 February to 29 February, 1 March to 31 March, and 1 April to 14 April, the Court of Appeals found insufficient evidence for the first two indictments in that the State's evidence depended on the testimony of defendant's daughter, who testified as to when she was told of defendant's assaults by the victim, but did not testify with certainty as to when the assaults took place. There was sufficient evidence to prove at least one incidence of each of the alleged crimes in April.

Am Jur 2d, Rape §§ 88-92.

Judge COZORT concurring in part and dissenting in part.

APPEAL by defendant from a judgment entered 16 March 1989 by *Judge Joe Freeman Britt* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 13 February 1990.

The defendant is the stepfather of the victim who, at the time of trial, was four years of age. The victim and her mother resided in a trailer with the defendant for two and a half months. During those months, the victim stayed with her maternal grandmother each day while the mother was at work until such time as the defendant would come and pick up the victim and take her home. The State's evidence tended to show that when the victim made a statement to her grandmother in the presence of the defendant that "when [the defendant] pull off his britches, he hurt my tail," the grandmother contacted other relatives to whom the victim later made similar statements. A complaint was made to the Department of Social Services and an investigation begun. The victim was examined by a local pediatrician and by a pediatrician at North Carolina Memorial Hospital.

At trial, the latter testified about his examination of the victim including his opinion as to the number of times that sexual penetration took place. The defendant's natural daughter who was eight years of age testified that the defendant had performed similar acts on her some three years prior to trial. The defendant denied performing any sexual act with either the victim or with his daughter.

The jury found the defendant guilty of three counts of first degree rape and three counts of first degree sexual offense and the trial judge sentenced him to five concurrent and one consecutive life sentences. Defendant appeals.

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

Reid, Lewis, Deese & Nance, by James R. Nance, Jr., for defendant-appellant.

LEWIS, Judge.

Defendant presents four assignments of error on appeal.

I. The competence of the victim to testify.

[1] Defendant alleges that the court erred in determining that the victim was competent to testify because the victim did not have "the capacity to understand the obligation of an oath." The competency of witnesses to testify is determined by Rule 601 of the North Carolina Evidence Code which provides in pertinent part that "[e]very person is competent to be a witness" except "when the court determines that he is . . . (2) incapable of understanding the duty of a witness to tell the truth." G.S. § 8C-1, Rule 601(a) & (b). The North Carolina Supreme Court has defined competency as "the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth of the matters as to which it is called upon to decide." *State v. Fearing*, 315 N.C. 167, 173, 337 S.E.2d 551, 554 (1985), *quoting State v. Jones*, 310 N.C. 716, 722, 314 S.E.2d 529, 533 (1984).

The portions of the *voir dire* record which are relevant to this discussion are included below:

DIRECT EXAMINATION BY THE STATE

. . . .

Counsel for the State: Your Honor, if we could let the record reflect that I'm holding up a pencil. . . .

Q: If you told your grandma this was an umbrella when it's really a pencil, what might your grandma do to you?

A: I guess might spank me.

. . . .

VOIR DIRE EXAMINATION BY THE COURT

. . . .

Q: . . . Do you know what happens to little boys and girls who don't tell the truth?

. . . .

A: I don't know.

. . . .

Q: You've told us that you know the difference between the truth and a lie. Is that right? Do you know what a lie is?

A: (Pause.) Um, (pause), I don't know.

Q: Okay. But in any event, you are telling me that you promise to tell the truth, is that right?

A: (No response.)

Q: Is that what you're promising?

A: Hum?

Q: Pardon me? Do you promise to tell the truth?

A: Um-hum.

The victim also testified that it would not be the truth if the Assistant District Attorney said that a shoe was "Sammy or Lady," or if she said that a cup was a dress. On two different subsequent occasions during *voir dire*, the victim stated that her grandma might spank her if the victim said something that wasn't true.

The testimony in this case is very similar to that in *State v. Hicks*, a case involving the competency of a seven-year-old victim to testify, in which the Court held:

> [A]lthough [the victim] did not understand her obligation to tell the truth from a religious point of view, and although she had no fear of certain retribution for mendacity, she knew the difference between the truth and a lie. . . . She indicated a capacity to understand and relate facts to the jury concerning defendant's assaults upon her, and a comprehension of the difference between truth and untruth. She also . . . affirmed her intention to [tell the truth].

319 N.C. 84, 88-89, 352 S.E.2d at 424, 426 (1987). The victim in this case also demonstrated her capability to understand "the duty of a witness to tell the truth" as required by Rule 601.

The competency of a witness "is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness." *State v. Turner*, 268 N.C. 225, 230, 150 S.E.2d 406, 410 (1966). "Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v.*

Hicks, 319 N.C. at 89, 352 S.E.2d at 426. We hold that the victim's testimony met the standards of Rule 601 and that the trial court did not err in finding that she was competent to testify.

II. The pediatrician's testimony concerning the number of times sexual penetration took place.

[2] The defendant brings forward on appeal a "limited objection" that the witness was allowed to give an opinion as to the number of times penetration had taken place.

The pediatrician testified that the victim stated, in response to the question: "Has anybody ever touched you down there [the vaginal area]?" "Um, [the defendant] touches me there," and "He also puts his thing in me." When the victim was asked "how many times," she responded by holding "up two hands each with three fingers on them." The expert witness then examined the victim.

The testimony to which the defendant objects was that penetration occurred, according to the witness' "best judgment," "more than twice or three times" but he could not "say any more specifically."

Rule 702 of the North Carolina Rules of Evidence provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." G.S. § 8C-1, Rule 702. The expert witness could base his opinion on (1) his medical findings about the condition of the victim's vaginal area and how it differed from normal, (2) his medical conclusion that such a condition would not usually occur from one assault or digital manipulation alone, and (3) the response of the victim when asked about the frequency of assault. He therefore possessed an adequate foundation for his conclusion.

The expert witness' opinion testimony would be of assistance to the jury in evaluating his specific medical findings. It is for the jury to determine the weight of his testimony in light of the manner in which the witness qualified his opinion. The trial court did not err.

III. The testimony of the defendant's daughter as to other crimes committed by defendant.

[3] Defendant contends that the testimony of the defendant's daughter concerning prior acts of misconduct should not have been admitted since that evidence does not meet any of the exceptions to the rule against such testimony and since it was unfairly prejudicial. The relevant Rule of Evidence, Rule 404(b) states:

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

The Supreme Court has been quite "liberal in admitting evidence of similar sex crimes" under the common plan or scheme exception. *State v. Effler*, 309 N.C. 742, 748, 309 S.E.2d 203, 207 (1983).

State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986), is controlling in determining the admissibility of the evidence in the instant case. According to State's evidence, the relationship between the defendant and the two victims was emotionally a father-daughter relationship; sexual assaults on both victims occurred when each was approximately the same age; defendant put each victim onto his bed and then had sexual intercourse with her after first covering her face with a cloth; the assaults took place while his wife was away at work; and afterwards, in both instances, defendant would get a towel to wipe off each victim. The evidence tends to prove a common scheme or plan on defendant's part to sexually abuse his "daughters."

Defendant also contends that the evidence has "a prejudicial effect on the fundamental right of the accused to a fair trial," referring evidently to Rule 403 which excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." G.S. § 8C-1, Rule 403. This rule requires a balancing test and the Court in the comparable case of *State v. Gordon*, discussed above, concluded: "[I]t cannot be said that [the evidence] was *unfairly* prejudicial. The testimony was not unduly cumulative nor grossly shocking." (Emphasis in original.) 316 N.C. at 505, 342 S.E.2d at 514.

We hold that the trial court did not err in allowing the testimony of the defendant's daughter as to other crimes committed by the defendant.

IV. Insufficiency of the evidence.

[4] The State charged the defendant in three separate indictments alleging that assaults took place (1) between 1 February and 29 February of 1988—in the first indictment, (2) between 1 March and 31 March of 1988—in the second indictment, and (3) between 1 April and 14 April of 1988—in the third indictment. The defense argues that, since "we still do not know when the acts occurred," the State has violated the defendant's due process rights. At the end of the State's evidence and at the end of all the evidence, defense counsel made motions to dismiss. The Court addressed this particular concern as follows:

> Now, madam solicitor, rather than the State alleging an umbrella period, if you will, from 1 February to 14 April, the State has chosen to go forward with three separate indictments, one indictment covering the month of February, one indictment covering the month of March, and one indictment covering the period of 1 through 14 April. . . . Now, what I need to hear from [the State] are your contentions concerning the evidence supporting each of those counts as to each of those time periods. That is, February separately, March separately, and April 1 through 14 separately.

The State relies on *State v. Wood*, 311 N.C. 739, 319 S.E.2d 247 (1984), and its statement of the policy concerning specificity of alleged dates of assault in sex-related offenses involving young children.

> We have stated repeatedly that in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child's uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence. [Citations omitted.] Nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time for the offense where there is sufficient evidence that defendant committed each essential act of the offense.

Id. at 742, 319 S.E.2d at 249. In that case, defendant contended that the evidence was insufficient to convict him because the State failed to prove that the alleged rape occurred on a specific day, April 18, as alleged in the one indictment. In this case, on the other hand, the State has presented three separate indictments each of which are specific as to time. The case at bar is distinguishable. Defendant is not alleging that he should not be convicted at all since the State cannot prove the exact dates of the assaults. In fact, at trial, defendant concedes "that the State's evidence in its best light would show that if any occurrences occurred, they occurred during [April 1 to April 14] and not during the February or even the March one." Defendant in the case at bar is objecting to "the 'stacking of' sentences" through three separate indictments.

The State's evidence addressing the three separate indictments depends upon testimony by defendant's daughter and by the victim's aunt. The evidence presented for each indictment is discussed below.

A. *Indictment covering the period of February 1 to February 29, 1988.*

For the February indictment, the State relies on the following testimony by the defendant's daughter.

> Q: . . . When you would see [the victim] over there at the trailer, how many times did she tell you something had happened between she [sic] and your father?
>
> A: Every time.

The defendant's daughter stated that she had taken her father a Valentine in February. However, when she was asked if she had seen the victim on that February visit, her response twice was "I think so." The testimony of defendant's daughter on which the State relies does not include any indication concerning *when* the assaults took place but only refer to the victim's propensity to tell defendant's daughter about the assaults whenever the two girls were together. The defendant's daughter does not state with certainty that she saw the victim at any time during the month of February. There is insufficient evidence of criminal activity during the month of February 1988.

B. *Indictment covering the period of March 1 to March 31, 1988.*

For the March indictment, the State relies once again on the same question and answer exchange quoted above and points to the fact that defendant's daughter went to a birthday party for the victim at defendant's trailer. Defendant's daughter was also asked at trial: ". . . When you think back to that birthday party, do you remember [the victim] telling you anything about what had happened to her?" Defendant's daughter stated: "Near the birthday." "Near the birthday" could refer to (1) when an assault took place, or (2) when the victim *told* defendant's daughter about an assault. This evidence, as to March, was insufficient as a matter of law, to go to the jury as to either rape or first-degree sex offense.

C. *Indictment covering the period of April 1 to April 14, 1988.*

With regard to the April indictment, the testimony of the victim's maternal grandmother and aunts indicates that the victim spoke directly of defendant's assaults without indicating a specific time; she indirectly indicated when she was playing with a doll that the alleged acts occurred; and the victim stated that her "tail was sore" the second or third weekend in April. The victim's aunt described at trial a particular incident which occurred when she was with the victim during April on a weekend.

> [Testimony of the victim's aunt]: . . . I was going to give [the victim] her bath. . . . And [the victim] said she didn't want to take a bath, and I asked her why. She said she was sore. . . . I asked her why was she sore. . . . She told me that her daddy had been messing with her. So I asked her what she meant, and she says, um, "I can't tell you but I can show you. . . ." And she showed me on her baby doll. . . . She just opened the Barbie's doll's legs and showed where her daddy had been messing with her at.

The State has presented sufficient evidence to prove that at least one instance of each of the alleged crimes of rape and sexual offense occurred in April.

The defendant received multiple sentences based on three separate indictments with two counts in each indictment; one for rape, the other for first-degree sex offense. We find sufficient evidence for the jury to have considered the April indictment but insufficient evidence for the February and March indictments. Thus, we affirm the two April concurrent life sentences. We reverse

the other four life sentences from the February and March indictments.

88 CRS 21621 (April indictment)—Affirmed. Two concurrent life sentences.

88 CRS 21622 (March indictment—two life sentences) and

88 CRS 21623 (February indictment—two life sentences)—Reversed.

Judge WELLS concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I concur with all of the majority opinion except for that portion which reverses four of the convictions.

The defendant was convicted of three counts of first-degree rape and three counts of first-degree sex offense. A review of the evidence in the light most favorable to the State reveals that the defendant raped the four-year-old victim and committed first-degree sex offense upon her on at least three separate and distinct occasions. The State's error in attempting to specify in the indictments the exact times the alleged offenses occurred should not be deemed a fatal variance from the evidence showing that multiple offenses occurred. *See State v. Wood*, 311 N.C. 739, 319 S.E.2d 247 (1984). In my view, the defendant was not prejudiced by the State's inability to show that one rape and one sex offense occurred in February, one of each in March, and one of each in April. It was sufficient for the State to show that at least three distinct rapes and at least three distinct sex offenses occurred. I find no error in the trial court's imposing a life sentence for one count of rape, a consecutive life sentence for another count of rape, and four concurrent life sentences in the remaining counts.

DONALD GRANTHAM, PLAINTIFF v. CHERRY HOSPITAL, EMPLOYER, SELF-INSURED, DEFENDANT

No. 8910IC867

(Filed 3 April 1990)

Master and Servant § 69 (NCI3d)— workers' compensation—payment of consumer debt not rehabilitative service

N.C.G.S. § 97-29 of the Workers' Compensation Act does not authorize the Industrial Commission to order an employer to pay a totally disabled employee's common consumer debts as a "rehabilitative service."

Am Jur 2d, Workmen's Compensation §§ 340, 363.

APPEAL by defendant from award filed on 1 June 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals on 6 March 1990.

This workers' compensation case was first tried on 3 March 1988 with Deputy Commissioner Richard B. Ford presiding. An opinion and award for the plaintiff were filed on 24 August 1988. Defendant appealed in timely fashion to the Full Commission, which affirmed and adopted as its own the deputy commissioner's opinion and award with one commissioner dissenting. Defendant appealed to this court.

It is undisputed that on 25 November 1984 Donald Grantham suffered a closed-head injury, an accident that arose out of and occurred in the course of his employment with Cherry Hospital. Mr. Grantham is now permanently and totally disabled from his injuries. He suffers from expressive dysphasia (extreme difficulty in speaking), hemiparesis (weakness) of his upper and lower right extremities, attention and memory lapses, depression and "persistent cognitive, psychological and behavioral difficulties."

The plaintiff claims that prior to his injury he worked two jobs, and that as a result of his injury and disability, his and his wife's combined income fell for over two years by nearly $1,100 a month. Mr. Grantham did not begin receiving disability retirement income until December 1987. The record indicates that as a consequence of his injuries, certain family debts were incurred totaling $27,865.07. These debts were as follows:

1. Wayne Oil Company	$969.69
2. Wayne County Tax Collector's Office	$267.80
3. Howard Brothers Food	$83.87
4. Heilig-Meyers (furniture)	$3,469.00
5. State Employee's Credit Unit	$16,592.82
6. Musgrave Tire and Gas	$428.30
7. Pate's Service Station and Garage	$533.59
8. Babysitter (138 wks. @ $40/wk)	$5,520.00
TOTAL	$27,865.07

None of this debt involved medical expenses attributable to the plaintiff's injuries.

It is also clear from the record that through his own highly commendable efforts and the work of his neuropsychiatrist, Dr. Thomas Gualtieri, Mr. Grantham has begun to rehabilitate himself. These efforts at self-help probably have saved the State of North Carolina the expense of placing Mr. Grantham in a rehabilitation residence, which could cost as much as $30,000 a month. The doctors who treated Mr. Grantham immediately after his injury recommended his placement in an inpatient unit.

At the hearing before the deputy commissioner, Dr. Gualtieri testified that payment of the debts and relief from the burden and worry of the indebtedness would be "the best thing for Donald's rehabilitation that we could do." The debt and resulting depression were interfering with Mr. Grantham's rehabilitation, Dr. Gualtieri said.

After the hearing, Deputy Commissioner Ford made the following findings and conclusions of law:

> 9. The Plaintiff, as of the date of the hearing on March 3, 1988 had incurred a family indebtedness of $27,865.07 as the result of his injury, his inability to earn income and the mental, psychological and physical disabilities which he suffers.
>
> 10. This indebtedness is of great concern to the Plaintiff, causes him stress, and effects his mental and emotional well-being and is efficient in preventing his recovery from the mental and psychological depression and illness from which he suffers as a result of the injury on November 24, 1984.
>
> . . . .

12. While there is no cure for the Plaintiff's physical condition, the payment of his indebtedness will tend to effect a cure and give him relief from the mental and emotional depression and illness from which he suffers as a result of this injury on November 25, 1984 and the resulting indebtedness; and is a reasonable and necessary rehabilitative service and care for the Plaintiff's wellbeing.

. . . .

14. Further the Plaintiff is entitled to be relieved from the indebtedness . . . in an amount not to exceed $27,865.07 as a rehabilitation service which may reasonably be required to effect . . . a cure or give the Plaintiff relief from the injury related psychological and emotional problems caused by the brain damage resulting from the injury occurring on November 25, 1984.

James T. Bryan, III, for employee-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the appellant.

ARNOLD, Judge.

In this case we must decide if N.C. Gen. Stat. § 97-29 of the Workers' Compensation Act authorizes the Industrial Commission to order an employer to pay an employee's common consumer debts as a "rehabilitative service." N.C. Gen. Stat. § 97-29 requires that "[i]n cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and *other treatment or care or rehabilitative services* shall be paid for by the employer during the lifetime of the injured employee" (emphasis added). N.C. Gen. Stat. § 97-29 (Supp. 1989). (In the original statute, the word between care and rehabilitative services is "of." This is a misprint. It should be "or." *See* 1973 N.C. Sess. Laws ch. 1308, § 2. The mistake has been corrected in the statutory supplement that we cited.)

A decision of the Industrial Commission will not be overturned on appeal absent an abuse of discretion. "The test for abuse of discretion is whether a decision 'is manifestly unsupported by reason,' or 'so arbitrary that it could not have been the result of a reasoned decision' (citations omitted)." *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). The purpose of the review-

ing court is not to substitute its judgment in place of the decision maker, but rather to insure that the decision, in light of the factual context in which it is made, could be the product of reason. *Id.*

We recognize the general principle that the provisions of the Workers' Compensation Act should be construed liberally so that benefits are not denied to an employee based on a narrow or strict interpretation of the statute's provisions. *See Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E.2d 321 (1970). We also realize that this case arises in an important and dynamic area of workers' compensation law—defining the parameters of employer responsibility for employee rehabilitation. As one commentator has noted:

> It is too obvious for argument that rehabilitation, where possible, is the most satisfactory disposition of industrial injury cases, from the point of view of the insurer, employer and public as well as of the claimant. Apart from the incalculable gain to the worker himself, the cost to insurers and employers of permanent disability claims under a properly adjusted system is reduced; and, so far as the public is concerned, it has been said on good authority that for every dollar spent on rehabilitation by the Federal Government it has received back ten in the form of income taxes on the earnings of the persons rehabilitated. (citation omitted) It is probably no exaggeration to say that in this field lies the greatest single opportunity for significant improvement in the benefits afforded by the workmen's compensation system.

Larson, 2 Workmen's Compensation Law § 61.25 (1987). Furthermore, Mr. Grantham's request falls into one of the most controversial corners of rehabilitation compensation—providing services of a *non-medical nature* that somehow might be relevant to the employee's rehabilitation. *See id.* at § 61.13(a).

It may be true in this case that the most cost-effective decision would be to uphold the Commission's award. Such a determination might stave off the much more expensive possibility of placing Mr. Grantham in an inpatient rehabilitation program. Nevertheless, cost-effectiveness is not the sole goal of our Workers' Compensation Act, and as the Act is presently written, we hold that it is not a reasonable interpretation of the statute to classify the payment of consumer debt as a rehabilitative service. We believe that any other decision undermines the integrity of the Act.

We base our conclusion on an analysis of the structure of the Act, case law that develops the relevant provisions, and also on common sense. We simply fail to see how the term "services," in the context of medical rehabilitative services, can reasonably be read to encompass a monetary payment for basic necessities.

Furthermore, the structure of the Workers' Compensation Act indicates the decision below is incorrect. The Act provides a dual approach to employee compensation. *Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 205-06, 347 S.E.2d 814, 822 (1986) (Billings, J., dissenting in part). First, disability compensation, which is calculated based upon the individual employee's earning power, is provided as a substitute for the wages lost due to the injury. This compensation is the employer's contribution for items that wages ordinarily purchase—the basic necessities of life such as food, clothing and shelter. *Id.* The Act, however, also requires employers to compensate injured employees for medical costs related to their injuries; specifically, employers must pay a permanently disabled employee such as Mr. Grantham for "necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services . . . . " N.C. Gen. Stat. § 97-29. In the case before us, we believe the Commission erroneously attempted to engraft one prong of the Act onto the other. By ordering a payment to cover the injured employee's expenses for basic necessities under the guise of "rehabilitative services," the Commission has turned the statute on its head.

In two limited situations, our Supreme Court has upheld payments under the language of "other treatment or care or rehabilitative services" to claimants for medically related expenses that are not listed in the statute. But neither of these cases attempts to stretch the language of the statute as far as the plaintiff here, and we see no conflict between those holdings and our decision in this case. In all, three North Carolina cases have interpreted the questioned language of N.C. Gen. Stat. § 97-29. In *Godwin v. Swift & Co.*, 270 N.C. 690, 155 S.E.2d 157 (1967), the Supreme Court held that the phrase "other treatment or care" covered compensation to pay in-laws of a claimant who needed around-the-clock attention and care. *Id.*

In *McDonald v. Brunswick Electric Membership Corp.*, 77 N.C. App. 753, 336 S.E.2d 407 (1985) (Wells, J., dissenting), this Court held that the statute could not be interpreted to include compensa-

tion for a specially equipped van for a wheelchair-bound claimant. The employee in *McDonald* sustained an employment-related injury which resulted in amputation of both of his legs and left arm. Although the employee could drive a specially adapted car that could carry a regular wheelchair, he wanted the van to transport himself and his motorized wheelchair. Claimant's employer agreed to pay for the special adaptive equipment installed in the van, but balked at paying for the van itself. *Id.* at 754, 336 S.E.2d at 408. At the hearing before the deputy commissioner, the employee's rehabilitation nurse testified it was important for the claimant's rehabilitation that he learn to do things independently and therefore the specially equipped van was necessary to fully rehabilitate the employee. His physician also testified that the van was an important and necessary part of his rehabilitation. The deputy commissioner concluded that the specially equipped van was a rehabilitative service within the meaning of N.C. Gen. Stat. § 97-29 and ordered the employer to reimburse the claimant for the cost of the van itself. *Id.* On appeal, the Full Commission affirmed and adopted the Opinion and Award of the deputy commissioner. In reversing the Commission, we stated in *McDonald*:

> [N]either the phrase "other treatment or care" nor the term "rehabilitative services" in G.S. 97-29 can reasonably be interpreted to include a specially-equipped van. This language in the statute plainly refers to services or treatment, rather than tangible, non-medically related items such as van; thus, it would be contrary to the ordinary meaning of the statute to hold that it includes the van purchased by plaintiff.

McDonald, at 756-57, 336 S.E.2d at 409. Our decision in *McDonald*, which follows the majority rule in this country, was not appealed.

In *McDonald*, we relied in part on another Court of Appeals decision, the third case in our jurisdiction to interpret this section of N.C. Gen. Stat. § 97-29, *Derebery v. Pitt County Fire Marshall*, 76 N.C. App. 67, 332 S.E.2d 94 (1985). In *Derebery*, this Court held that an employer's statutory duty to provide "other treatment or care" did not extend to furnishing a wheelchair-accessible mobile home for an injured employee. However, with three justices dissenting, the Supreme Court overturned that opinion and ordered the employer to pay for the residence. *Derebery*, 318 N.C. 192, 347 S.E.2d 814; *accord Squeo v. Comfort Control Corp.*, 99 N.J. 588, 494 A.2d 313 (1985). Nevertheless, *Derebery* does not control

on the facts before us, and we believe that the holding of the Industrial Commission in this case strays far beyond the boundaries of the statute as outlined by *Derebery* and *Godwin*.

Whether or not specially adaptive vehicles and wheelchair-accessible housing are compensable under the statute are debatable issues, as the four dissents in *Derebery* and *McDonald* indicate. We can see a strong nexus between the words "other treatment or care or rehabilitative service" and requiring adaptive vehicles and housing for wheelchair-bound persons. The connection between that language and paying compensation for consumer debt, on the other hand, is much more tenuous, and we believe not reasonable.

A survey of holdings from other jurisdictions reinforces our determination here. To our knowledge no other court has come close to holding that "rehabilitative services" could encompass consumer debt. The outer limits of this concept are much narrower than the plaintiff before us argues. The Florida Court of Appeals, which has been one of the most generous courts in interpreting the scope of medical services, ordered an employer to pay the nursery school costs for the child of a woman who had to spend much of the day in traction. *Doctors Hosp. of Lake Worth v. Robinson*, 411 So. 2d 958 (1982). The court cautioned, however, that child care expenses would not be construed as a medical necessity in cases involving "less extreme" circumstances. *Id.* Even Florida, however, refused to provide compensation for paying workplace assistants to perform the part of a job that a claimant was unable to do because of her work-induced disability. *Ulmer v. Jon David Coiffures*, 458 So. 2d 1218 (1984). The court recognized that under certain circumstances medical allowances had been made for vehicles, pools, child care and the like, but that no cases authorized compensation for the cost of aid in performing the job functions of a disabled worker. *Id.*

One purpose of the Workers' Compensation Act is to insure a limited and determinate liability for employers. To this end, courts must not legislate expanded liability under the guise of construing a statute liberally. *McDonald*, 77 N.C. App. at 756, 336 S.E.2d at 409. While the Act should be liberally construed to benefit the employee, the plain and unmistakable language of the statute must be followed. *Hardy v. Small*, 246 N.C. 581, 99 S.E.2d 862 (1957). We do not believe that the General Assembly intended to include compensation for an employee's consumer debt within the meaning

of "rehabilitative services." The Industrial Commission, therefore, was without authority to require the defendant to bear that responsibility. Accordingly, we reverse the opinion and award below.

Reversed.

Judges JOHNSON and ORR concur.

NORTH CAROLINA REINSURANCE FACILITY, PETITIONER v. JAMES E. LONG, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND UNIVERSAL INSURANCE COMPANY, RESPONDENT

UNIVERSAL INSURANCE CO., PETITIONER v. JAMES E. LONG, COMMISSIONER OF INSURANCE OF THE STATE OF NORTH CAROLINA, AND THE NORTH CAROLINA REINSURANCE FACILITY, RESPONDENTS

No. 8910SC509

(Filed 3 April 1990)

1. **Administrative Law § 5 (NCI3d)— Reinsurance Facility—appeal from superior court order overturning Commissioner of Insurance**

In an appeal from a superior court ruling overturning an order of the Insurance Commissioner involving the North Carolina Reinsurance Facility, it was held that the controlling judicial review statute was N.C.G.S. § 150B-51; the review standards articulated in both N.C.G.S. § 150B-51 and N.C.G.S. § 58-2-75 were applied to the extent that N.C.G.S. § 58-2-75 adds to and is consistent with the judicial function of N.C.G.S. § 150B-51.

Am Jur 2d, Administrative Law §§ 610 et seq.

2. **Insurance § 1 (NCI3d)— Reinsurance Facility—ceding expense allowance—retroactive change—not allowed**

There was substantial evidence to support a trial court order vacating the Commissioner of Insurance's decision to increase Universal's ceding expense allowance where Universal contended that it had made an honest mistake when choosing the allocation method for calculating the ceding expense allowance and did not contend that the calculations were incor-

rect or that the data which it reported to the Facility were incorrect. The hearing officer for the Insurance Commission set out his own decision with respect to the treatment which should be afforded Universal on its ceding expense allowance, and the powers given to the Commissioner by N.C.G.S. § 58-37-40 do not permit the Commissioner to make findings of fact which are not supported by material and substantial evidence.

Am Jur 2d, Insurance §§ 19, 1835, 1841.

3. **Appeal and Error § 3 (NCI3d)— Reinsurance Facility— retroactive change in expense ceding—constitutional issue— not considered**

Universal's constitutional contention that the board of the Reinsurance Facility lacked statutory authority and jurisdiction to exercise adjudicatory powers was not addressed where Universal failed to comply with Rule 10 of the N. C. Rules of Civil Procedure.

Am Jur 2d, Insurance §§ 19, 1835, 1841.

APPEAL by respondent from order entered 5 December 1988 by *Judge B. Craig Ellis* in WAKE County Superior Court. Heard in the Court of Appeals 8 November 1989.

Respondent Universal Insurance Company appeals from an order vacating the decision of the Commissioner of Insurance to increase Universal's ceding expense allowances.

Young, Moore, Henderson & Alvis, P.A., by Charles H. Young, Jr., R. Michael Strickland and Marvin M. Spivey, Jr., for petitioner-appellee.

Howard, From, Stallings & Hutson, P.A., by William M. Black, Jr., for respondent-appellant.

JOHNSON, Judge.

Appellee North Carolina Reinsurance Facility ("Facility") is a nonprofit unincorporated entity created by the 1973 General Assembly and organized pursuant to Article 25A of Chapter 58 of the North Carolina General Statutes ("Facility Act"). The Facility was created to insure the availability of automobile insurance to all North Carolina drivers. Appellant, Universal Insurance Company ("Universal"), a licensed automobile liability insurer, is a member of the Facility.

Universal and all other members of the Facility are required to issue liability policies to "eligible risk" applicants, but may cede the policies to the Facility. By ceding the policies, each insurance company receives reimbursement for its underwriting expenses by retaining a certain percentage of the premiums collected. The Facility determines the ceding expense allowance for each company for each fiscal year by analyzing the data each company submits. Such data is designed to illustrate the company's expenses attributable to the ceded policies for the preceding calendar year. The ceding expense allowance, calculated by the Facility for each company, is intended to reimburse each company for its expenses up to a maximum cap which is equal to the average ceding expense allowance for all member companies. Each company's ceding expense allowance is developed based upon an annual "call for expense experience" which is annually submitted by all companies to the North Carolina Rate Bureau.

In April 1987, Universal notified the Facility that it wanted to change, retroactively, the data it had submitted for the years 1984 and 1985. Universal alleged that all data was based upon allocations of combined automobile liability and physical damage expenses. If further advised the Facility that as a result of its new allocation method Facility owed Universal an additional ceding expense allowance of $229,282.00 for 1 October 1985 through 30 September 1986.

Shortly thereafter, members of the Facility met with representatives of Universal and Universal was advised that the Facility staff did not have the authority to grant Universal's request. It was also advised that the request would have to be presented to the Facility's Board of Governors ("Board") for consideration. The Board is comprised of executives from five insurance companies who are members of the Facility and four insurance agents appointed by the Commissioner of Insurance.

On 24 June 1987, the Board met and Universal's request was heard. At the conclusion of Universal's presentation and after discussion and deliberation, the Board unanimously voted: "(i) to deny the request for retroactive change in the allocation method and retroactive increase in the ceding expense allowance for the period October 1, 1986 through September 30, 1987; and (ii) to defer action on the request with respect to the period October 1, 1985 through September 30, 1986."

On 26 August 1987, the Board met once again to consider Universal's request for the period 1 October 1985 through 30 September 1986. The request was subsequently denied. Universal appealed this decision to the Commissioner of Insurance ("Commissioner") by letters dated 22 September 1987 and 23 September 1987. The Commissioner thereafter appointed a hearing officer to review the action of the Board.

An order issued 6 January 1988 by the Commissioner through his designated hearing officer resulted in the disapproval of the action taken by the Board. Through petitions dated 8 February 1988 and 10 February 1988, both the Facility and Universal sought judicial review of the Commissioner's order. Such review was requested of the Superior Court of Wake County.

Oral arguments on the matter were heard in superior court on 7 November 1988. On 5 December 1988, the Honorable B. Craig Ellis ruled in favor of the Facility and vacated the order of the Commissioner. Universal appealed in apt time.

[1] By its first Assignment of Error, Universal contends that the trial court erred in vacating the order of the hearing officer. Universal argues that the order was entered pursuant to statutory authority and was supported by material and substantial evidence. We disagree.

G.S. sec. 150B-43, a part of the Administrative Procedure Act ("APA"), provides in part that

> [a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by another statute, in which case the review shall be under such other statute.

The Department of Insurance is an "agency" subject to the provisions of APA, G.S. sec. 150B-2(1), and therefore the threshold question is whether "another statute" provides "adequate procedure for judicial review." Our Supreme Court has held that adequate procedure for judicial review exists "only if the scope of review is equal to that under present Article 4 of G.S. Chapter 150A." Effective 1 January 1986, G.S. Chapter 150A was recodified as G.S. Chapter 150B. *Comr. of Insurance v. Rate Bureau*, 300 N.C.

381, 395, 269 S.E.2d 547, 559, *pet. reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980).

Another statute, namely the Facility Act, provides guidance for judicial review of decisions made by the Insurance Commissioner. G.S. sec. 58-37-65(f) of the Facility Act provides that "[a]ll rulings or orders of the Commissioner . . . shall be subject to judicial review as approved by G.S. sec. 58-2-75." G.S. sec. 58-2-75(a) provides that "[a]ny order or decision made, issued or executed by the Commissioner [of Insurance] . . . shall be subject to review in the Superior Court of Wake County on petition by any person aggrieved." Such appeals shall be based upon the transcript of the record for a review of the findings of fact and errors of law only. Cases involving judicial review before a court other than the Wake County Superior Court, by statutory interpretation and implication extends the application of G.S. sec. 58-2-75 to higher appeals, particularly, appeals to this Court. *See State Farm Mutual Automobile Ins. Co. v. Com'r of Insurance*, 288 N.C. 381, 218 S.E.2d 364 (1975).

G.S. sec. 58-2-75(c) is somewhat limited in that it merely provides that "[t]he trial judge shall have jurisdiction to affirm or to set aside the order or decision of the Commissioner and to restrain the enforcement thereof." We find this provision to be virtually identical to the broader review set forth in G.S. sec. 150B-51(b). The standard of review set forth in G.S. sec. 150B-51 has come to be known as the "whole record" test and provides that

> the [trial] court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> . . . .
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; . . .

As stated by the Supreme Court,

> [t]he "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably

> conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Recognizing that these two provisions (G.S. sec. 58-2-75 and G.S. sec. 150B-51) are comparable, we nonetheless hold that G.S. sec. 150B-51 is the controlling judicial review statute. To the extent that G.S. sec. 58-2-75 adds to and is consistent with the judicial review function of G.S. sec. 150B-51, we will proceed by applying the review standards articulated in both statutes.

[2] It is a well-settled rule that the Commissioner has no authority other than that granted to him by statute. *See* G.S. sec. 58-2-40; *Charlotte Liberty Mutual Ins. Co. v. State Ex Rel. Lanier*, 16 N.C. App. 381, 192 S.E.2d 57 (1972). The Commissioner, in reviewing the actions of the Board, must "issue an order approving the action or decision, disapproving the action or decision, or directing the Board of Governors to reconsider the ruling." G.S. sec. 58-37-65(c). In determining allowable credits, the Board is expected to evaluate each request on a case by case basis and may make reasonable exceptions when it is demonstrated that serious inequities may result from the application of Article XII of the Plan of Operation. Article XII, paragraph 9, in particular, provides that:

> [t]he Board shall make provisions for and promulgate rules for determining allowable credits to be applicable to newly admitted members and other members for whom the allowances developed under paragraphs (1) and (2) above are determined to be inappropriate. On a case by case basis, the Board, on its own motion or upon request, may also make reasonable exceptions for any member with respect to which it is determined to demonstrate that serious inequities result from the application of this Article or the rules promulgated pursuant thereto.

In the case *sub judice*, the issue before the Board was whether Universal was entitled, under Article XII of the Plan of Operation, to a retroactive amendment of its ceding expense allowance. The Board, following consideration, unanimously decided that Universal was not entitled to such an amendment. Upon appeal, it became the Commissioner's responsibility to determine whether the Board acted within and in accordance with the Plan of Operation. The Commissioner, through its hearing officer, concluded as a matter of law that the Board did not comply with Article XII, paragraph 9 of the Plan of Operation and that Universal suffered serious inequities as a result of such noncompliance. The trial court thereafter made the following Conclusions of Law:

> 1. The decision by the Facility's Board of Governors to reject the request by Universal that it be allowed to change its 1984 and 1985 expense data based on retroactive adoption of its new expense allocation method did not violate Article XII, Paragraph 9 of the Facility's Plan of Operation.
>
> . . . .
>
> 3. The order entered by the hearing officer on January 6, 1988 was erroneous as a matter of law, unsupported by material and substantial evidence and in excess of his statutory authority.

Guided by the "whole record" test, we must now look at the trial court's decision to determine whether any errors of law were committed.

Universal argues that it has suffered serious inequities as a result of the trial court's decision to vacate the order of the Commissioner to increase Universal's fiscal year expenses. In making such an argument, Universal contends that it made an honest mistake when choosing the appropriate allocation method. Universal does not, however, contend that the calculations were incorrect nor does it contend that the data which it reported to the Facility were incorrect. It simply contends that a different allocation method would have been more appropriate. Hence, Universal, not Facility, elected to use this allocation method and such fact cannot go unnoticed.

In disapproving the decision of the Board, the hearing officer, in essence, set out his own decision with respect to the treatment that should be afforded Universal on its ceding expense allowance. In doing so, he disregarded the fact that Universal's original calcula-

tions were correct given the allocation method it elected to adopt and use. The hearing officer also disregarded the effect of retroactively changing Universal's expense data on the average ceding expense allowance for all member companies as well as the ultimate effect such change would have on the public.

The Commissioner, not the superior court, is vested with the power to determine if Universal is entitled, under the Plan of Operation, to a retroactive amendment of its ceding expense allowance. However, the powers given to the Commissioner by G.S. sec. 58-37-40 do not permit the Commissioner to make findings of fact which are not supported by material and substantial evidence. In light of the above-mentioned facts, we find substantial evidence to support the trial court's order vacating the Commissioner's decision to increase Universal's ceding expense allowance. Assignment of Error number one is therefore overruled.

[3] By its second Assignment of Error, Universal contends that the Board lacked statutory authority and jurisdiction to exercise adjudicatory powers. We have reviewed Universal's constitutional argument and find it to be improperly before this Court. Universal, in assigning this contention as error, has failed to comply with Rule 10 of the N.C. Rules of Appellate Procedure. Recognizing that we, in our discretion, may address an argument that fails to comply with Rule 10, we are compelled to state that the N.C. Supreme Court has firmly established that

> the constitutionality of a statute will not be reviewed in the appellate court unless it was raised and passed upon in the proceedings below, *City of Durham v. Mason*, 285 N.C. 741, 208 S.E.2d 662 (1974), usually by the trial court. "[W]e will not pass upon a constitutional question unless it affirmatively appears that such question was raised *and passed upon* in the court below." *State v. Dorsett & Yow*, 272 N.C. 227, 229, 158 S.E.2d 15, 17 (1967) (emphasis in the original).

Comr. of Insurance v. Rate Bureau, supra, at 428, 269 S.E.2d at 577. We therefore decline to address this argument.

We find Universal's last Assignment of Error to be wholly without merit, and we do not address it.

For all the foregoing reasons, the order of the superior court vacating the decision of the Commissioner of Insurance to retroactively increase Universal's ceding expense allowance is

Affirmed.

Judges COZORT and LEWIS concur.

H. C. KIRKHART v. THOMAS A. SAIEED AND MARILYN SAIEED v. BOARDWALK DEVELOPMENT COMPANY, INC., A NORTH CAROLINA CORPORATION; RONALD A CHUPKA, SANDY CHUPKA, DAVID ROCK WHITTEN, AND MONICA F. WHITTEN

No. 895SC553

(Filed 3 April 1990)

Guaranty § 2 (NCI3d)— modification of guaranty agreement—not material—guarantors not released

The trial court did not err by finding and concluding that a Loan Modification Agreement did not materially alter a note which defendants had guaranteed and did not release defendants from their original obligation where plaintiffs released certain property to be sold, the release schedule for certain units was changed, and plaintiff agreed to forebear foreclosure for a consideration of $10,000. The general rule states that there can be no material alterations without a guarantor's consent; it does not state that there can be no modifications.

Am Jur 2d, Guaranty §§ 81, 82.

APPEAL by defendants Thomas A. Saieed and Marilyn Saieed from *Barefoot (Napoleon B.), Judge.* Judgment entered out of session on 10 April 1989 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 9 November 1989.

Plaintiff filed an action against defendants on 16 December 1986, alleging that defendants were personal guarantors of a promissory note executed to plaintiff by Boardwalk Development Company, Inc. (hereinafter Boardwalk) on 12 April 1985. Plaintiff requested that defendants be held liable on the unpaid note for the principal sum of $150,000.00, plus interest and attorney fees.

This action was heard without a jury on 16 March 1986. Judgment was rendered in plaintiff's favor out of session on 10 April 1989. From this judgment, defendants appeal.

Shipman & Lea, by James W. Lea, III, for plaintiff-appellee, H. C. Kirkhart.

Marshall, Williams, Gorham & Brawley, by Ronald H. Woodruff, for defendant-appellants, Thomas A. Saieed and Marilyn Saieed.

ORR, Judge.

On 12 April 1985, defendants signed a promissory note between plaintiff and Boardwalk as guarantors of the principal amount of $150,000.00. Additional guarantors were Ronald Chupka, Sandi Chupka, David Rock Whitten and Monica F. Whitten. Plaintiff received an additional $25,000.00 as fee to "boost the yield" for the promissory note.

To secure the note, plaintiff received a deed of trust executed by Boardwalk encumbering the construction project (a motelominium at Carolina Beach) for which the funds borrowed were to be used. The deed of trust was secondary to the deed of trust for the primary construction loan from Carolina Savings and Loan to Boardwalk in the amount of 3.2 million dollars.

The promissory note between Boardwalk and plaintiff dictated that Boardwalk would pay $1,562.50 per month in interest (12½%) from 1 May 1985 until 12 November 1986 at which time the entire $150,000.00 principal would be due and payable. There was no provision that the principal amount could be paid earlier than 12 November 1986.

Plaintiff also entered into a separate agreement exclusively with David Rock Whitten whereby Whitten was given power of attorney to release from the deed of trust certain units to be sold, and Whitten was to report on the status of the project and provide other documentation to plaintiff. Whitten did not provide such reports or documentation, and plaintiff subsequently revoked Whitten's power of attorney and substituted another trustee under the original deed of trust.

By spring 1986, Boardwalk was experiencing serious financial problems. It was behind in its payments on the original construction loan to Carolina Savings and Loan and had made only late or partial interest payments to plaintiff, although it was not in actual default of the interest payments. Because Boardwalk was in default of the original construction loan, however, it was in technical default of its promissory note with plaintiff. Under the note, in these cir-

cumstances, plaintiff had the right to accelerate the schedule and demand payment in full.

Instead of accelerating the schedule for payment, however, plaintiff entered into a Loan Modification Agreement (hereinafter the agreement) with Boardwalk. Defendant Thomas Saieed was aware of this agreement and its terms. Although he expressed some objections to the terms to plaintiff and others and did not sign the agreement as an officer of the corporation, Mr. Saieed testified he acquiesced in the agreement in order to benefit Boardwalk.

The terms of the agreement provided that in consideration for plaintiff's forbearance of his right to foreclose, Boardwalk would pay plaintiff an interest payment of $10,000.00 in addition to the interest due as set forth in the original note. Plaintiff also agreed to release the lien of his deed of trust on additional property in the construction project (known as the restaurant property). Boardwalk needed this piece of property to raise additional funds of $100,000.00, which plaintiff believed Boardwalk would use to cure its default with Carolina Savings and Loan. The remaining terms of the agreement set forth a new release schedule on the remaining units to be sold in the construction project, which affected only the release agreement between plaintiff and David Rock Whitten. (The promissory note had no provisions regarding release of units.)

The release schedule in the agreement further required payments to reduce the principal amount of the note. Paragraph 6 of the agreement stated that the note and deed of trust would remain fully enforceable except as modified by the agreement.

Boardwalk sold the restaurant property for $100,000.00. Of this amount, plaintiff received $10,000.00 pursuant to the agreement, Carolina Savings and Loan received a portion for interest, and an attorney received a portion to pay bankruptcy filing fees for Boardwalk on 6 May 1986.

Since 6 May 1986, plaintiff pursued other members of Boardwalk to collect the amount due on the promissory note. Plaintiff testified that he has obtained a judgment against the Whittens, but David Rock Whitten had been incarcerated and the Chupkas moved out of state and were "essentially judgment proof."

After considering testimony from plaintiff, defendants, and attorney Jim Snow (who handled the closing on the restaurant proper-

ty) and a deposition from attorney Algernon Butler (who handled the bankruptcy filing), the trial court made the following findings of fact and conclusions of law:

> 13. The Defendant, Thomas Saieed, was present at the closing and rendered no objection, express or implied, or lack of knowledge about the terms of the agreement, and acquiesced in its execution. The Defendant then tendered the signed Loan Modification Agreement to the drafting attorney.
>
> 14. Though termed a "Loan Modification Agreement" the terms of this document, namely, the release of the restaurant property for $10,000.00 and the release schedule for units at Cabana de Mar did not change at all the original terms and conditions of the Promissory Note, but instead, merely affected and regulated matters collateral to the subject matter of the original Note.
>
> 15. The Plaintiff received $10,000.00 for the release of the property which was not covered by the original Deed of Trust and for which payment he forebore to foreclose, a remedy to which he was entitled. Under the terms of the Promissory Note, such forebearance has been waived as a defense by all parties to the Note.
>
> 16. The new release schedule on the remaining units left to be sold at Cabana de Mar affected only the agreement executed between Plaintiff and David Rock Whitten, an agreement to which no provision in the Promissory Note or Deed of Trust refers or incorporates.
>
> 17. The interest payments called for in the release schedule are in addition to, and separate and distinct from, the interest called for in the original Note, and so do not affect the interest rate or terms of the original Note guaranteed by the Defendants.
>
> . . .
>
> 19. Boardwalk Development Company, Inc. paid Plaintiff $10,000.00. Defendant, Thomas A. Saieed, as a principal stockholder and negotiator of the "Loan Modification Agreement" has stated that he had actual knowledge of these terms and presented no facts to substantiate that he had any objection to its payment.

20. Defendants, Boardwalk Development Company, Inc. and Thomas A. Saieed, accepted the benefits made available to them under the "Loan Modification Agreement", namely, Plaintiff's forebearance to foreclose and the sale of the restaurant property.

21. Through the course of this transaction, Thomas Saieed has acted on behalf of, and as the agent for, his wife, Marilyn Saieed.

CONCLUSIONS OF LAW

1. The Defendants, Thomas and Marilyn Saieed, signed a Promissory Note executed by Boardwalk Development Company, Inc. to H.C. Kirkhart on April 12, 1985, in the individual capacity as personal guarantors of payment.

2. That the "Loan Modification Agreement" executed between Plaintiff and Boardwalk Development Company, Inc. addressed matters collateral to the subject matter of the Promissory Note, therefore leaving the original agreement intact and denying any discharge of the guarantors under the theory of material alteration.

3. Thomas Saieed at the time of the execution of the "Loan Modification Agreement" was acting agent for Marilyn Saieed and in doing so ratified the Loan Modification Agreement on her behalf.

4. The Defendants, Thomas and Marilyn Saieed, ratified the "Loan Modification Agreement" due to their knowledge of its terms, their acquiescence in its execution, their acceptance of its benefits, and their affirmative execution of its provisions and are therefore bound by its terms.

5. That the Defendants, Thomas A. Saieed and Marilyn Saieed, have defaulted in their agreement with the Plaintiff as guarantors and are liable for principal and interest, as well as attorney's fees from the date of breach, April 1, 1986, as set out in the terms of the Promissory Note.

(Exceptions omitted.)

The trial court then ordered defendants to pay plaintiff $150,000.00 plus interest and attorneys fees and allowed defendants

to recover this amount from Boardwalk and the other named defendants.

In a non-jury trial, Rule 52(a) of the N.C. Rules of Civil Procedure, requires that the trial court "find the facts specially and state separately its conclusions of law thereon . . . ." So long as there is some evidence to support the trial court's findings, the appellate courts are bound by such findings, even though there is contrary evidence to sustain other findings. *Lyerly v. Malpass*, 82 N.C. App. 224, 225, 346 S.E.2d 254, 256 (1986), *disc. rev. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987), *citing In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). The trial court is in the best position to weigh the evidence, determine the credibility of witnesses and "the weight to be given their testimony, and draws the reasonable inferences therefrom." *Id.* at 225-26, 346 S.E.2d at 256 (citation omitted).

In the case *sub judice*, defendants argue that the loan modification agreement materially altered the original note, thereby releasing them from their status as guarantors. The general rule in this State is that a material alteration of a contract between a principal debtor and creditor without the guarantor's consent will discharge the guarantor from its obligation. N.C. Gen. Stat. sec. 25-3-606; *First American Savings Bank, F.S.B. v. Adams*, 87 N.C. App. 226, 230, 360 S.E.2d 490, 493 (1987) (citation omitted).

We agree with the trial court that the terms of the agreement, namely plaintiff's release of the restaurant property for $10,000.00 and the release schedule for certain units and plaintiff's forbearance, did not change the terms of the original note. Plaintiff and defendant Tom Saieed testified that the terms of the original note were still in full force and effect at the time of the agreement. Other than the $10,000.00 lump sum plaintiff received when Boardwalk sold the restaurant property, there were no increases in the interest payments under the original note. The only thing that changed under the agreement was that a portion of the sales from certain units would be applied to reduce the principal of the note. Had this occurred prior to Boardwalk's filing for bankruptcy, defendants would have benefitted by a reduction in the principal amount owed.

We find that the trial court correctly determined that the terms of the agreement were collateral to the original note and did not *materially* alter the note. The general rule does not state that there can be *no* modifications to the original contract; it simply

states that there can be no *material* alterations without a guarantor's consent, or the guarantor will be released from its obligation.

Because we find that the loan modification agreement did not release defendants from their original obligation under the promissory note, we need not reach defendants' remaining exceptions and assignments of error. We have, however, reviewed the complete transcripts and other evidence and find that there was ample evidence to support all of the trial court's findings of facts and conclusions of law.

For the reasons set forth above, we find no error by the trial court.

Affirmed.

Judges EAGLES and PARKER concur.

CLYDE P. MURPHEY v. GEORGIA PACIFIC CORPORATION

No. 8913SC315

(Filed 3 April 1990)

Electricity § 7.1 (NCI3d)— injuries from electrical fire—arc and fault of unknown origin—insufficiency of evidence of proximate cause

In an action to recover for personal injuries which arose out of an electrical fire, there were genuine issues of material fact as to whether defendant owed plaintiff electrician a duty of care and whether defendant breached that duty, but there was no evidence at all that defendant's alleged negligence was the proximate cause of plaintiff's injuries where plaintiff attempted to revive a reportedly defective meter at defendant's sawmill; when plaintiff opened the switchgear power cabinet, he observed that the ground fault interruptor had been disconnected; this had been disconnected by one of defendant's electricians because it was considered faulty; the GFI was not considered to be a safety device, its primary function being to protect the equipment from damage; and an arc and fault of unknown origin occurred in the switch-

gear power cabinet resulting in a fireball which severely burned plaintiff.

Am Jur 2d, Electricity, Gas, and Steam §§ 51-53, 105, 120.

Judge WELLS dissenting.

APPEAL by plaintiff from *Johnson (E. Lynn), Judge.* Judgment signed 22 October 1988 and filed out of session 10 November 1988. Heard in the Court of Appeals 12 October 1989.

On 2 February 1984, plaintiff filed an action against defendant for personal injuries, which arose out of an electrical fire on 8 August 1981, at a chip and saw facility (sawmill plant) near Whiteville, North Carolina, owned by defendant. Voluntary dismissal without prejudice was taken, and a new action filed on 14 May 1987. Defendant moved for summary judgment on 27 September 1988. Plaintiff and defendant provided the trial court with several depositions and affidavits prior to the hearing on defendant's motion on 10 October 1988.

The trial court granted defendant's motion for summary judgment by order signed out of session and entered 10 November 1988. From this order, plaintiff appeals.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by William E. Anderson, for plaintiff-appellant.

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

ORR, Judge.

The dispositive issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant. For the reasons set forth below, we hold that there was no error.

On 8 August 1981, plaintiff, an electrician with over 20 years' experience, and Ralph Ireland, plaintiff's boss and owner of Ireland Electric Company, attempted to rewire a reportedly defective meter at defendant's sawmill. The meter had previously been installed at an electrical substation constructed, installed and maintained by Ireland Electric. The meter was located inside a switchgear power cabinet on a concrete pad. Other electrical equipment, including a transformer, also was located on the pad. The equipment

was serviced by an Ireland Electric employee in February 1981, who determined that the equipment was functioning properly. There is no evidence that any of defendant's employees or anyone other than Ireland Electric employees had ever serviced or tampered with any of the electrical equipment at this substation since it had been serviced in 1981.

Plaintiff was a general job superintendent for Ireland Electric on 8 August 1981, and was acting in the course and scope of his employment. Plaintiff and Ireland were met at the sawmill by defendant's employee, Sterling Ward, who offered to shut down the power to the substation. Plaintiff and Ireland discussed whether to disconnect the power to the substation and switchgear cabinet and concluded that they had sufficient clearance to complete the required work without de-energizing the substation. As a result, plaintiff disconnected only the circuit from some transformers to the meter. It would have taken plaintiff from one to five minutes to disconnect power for the entire substation.

Ireland was standing directly behind plaintiff when they opened the switchgear power cabinet. Plaintiff observed nothing unusual or hazardous. Both plaintiff and Ireland observed that the ground fault interruptor (hereinafter GFI) had been disconnected. The evidence established that the GFI had been disconnected in 1977 or 1978 by one of defendant's electricians because it was considered faulty. A GFI is equipment that senses when there is an abnormal amount of power running from phase to ground and signals a circuit breaker to shut down the power. It is not considered a safety device, and its primary function is to protect the equipment from damage. Plaintiff acknowledges that the disconnected GFI did not cause his accident.

Plaintiff performed his work inside the switchgear cabinet pursuant to the procedure he and Ireland discussed. Ireland returned to his car to retrieve the meter glass and heard a loud roaring noise. When he returned, plaintiff's body had been burned severely by a fire of electrical origin.

The evidence before the trial court established that an arc and a fault of unknown origin occurred in the switchgear power cabinet which caused plaintiff's burns. Plaintiff did not come into direct contact with any electrical current.

Ireland stated in his deposition that plaintiff told him that the last thing he remembered before the explosion was placing a crescent wrench on the nut on the neutral bus bar and having such difficulty loosening it that he "showered down on it or pulled on it real hard." Plaintiff was not wearing any protective clothing or equipment.

Four experts, including Ireland, were deposed. All stated that the disconnected GFI did not cause plaintiff's injuries and they did not know what caused the fault or arc that burned plaintiff. Plaintiff's experts stated in affidavits that the GFI was required by good industry safety practices and by the National Electric Code, and had the GFI been operational, it may have greatly diminished the power into the arc, thereby possibly reducing plaintiff's injuries.

Plaintiff argues that the trial court erred in granting summary judgment for the defendant. Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. sec. 1A-1, Rule 56(c). The evidence presented must be viewed in the light most favorable to the non-moving party. *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986) (citation omitted).

Although summary judgment usually is not appropriate in negligence actions, it may be granted when the credibility of witnesses is not an issue, and the evidence shows either that the defendant was not at all negligent or that plaintiff was contributorily negligent as a matter of law. *Id.* at 650-51, 331 S.E.2d at 131.

The trial court did not specify the grounds upon which it granted defendant's motion. Our review of the evidence, however, reveals that the trial court's order may be supported on the issue of negligence. Accordingly, we affirm.

When a defendant moves for summary judgment in a negligence action, the defendant has the burden of establishing that plaintiff was not injured by defendant's negligence. *Durham v. Vine*, 40 N.C. App. 564, 568, 253 S.E.2d 316, 318 (1979). If a defendant clearly can establish that its negligence was not the proximate cause of plaintiff's injury, summary judgment is appropriate. *Southern Watch Supply v. Regal Chrysler-Plymouth*, 69 N.C. App. 164, 166, 316

S.E.2d 318, 319, *disc. rev. denied*, 312 N.C. 496, 322 S.E.2d 560 (1984) (citation omitted).

Viewing the evidence in plaintiff's favor in the case before us, we find that there are genuine issues of material fact for summary judgment purposes regarding whether defendant owed plaintiff a duty of care and whether defendant breached that duty. However, we further find that there is no evidence at all that defendant's alleged negligence was the proximate cause of plaintiff's injuries.

To establish proximate cause in any negligence action, the plaintiff must produce evidence beyond mere speculation or conjecture that defendant's alleged negligence caused plaintiff's injuries. *Jackson v. Gin Co.*, 255 N.C. 194, 196, 120 S.E.2d 540, 542 (1961). We find that plaintiff's allegations and evidence of proximate cause in the case *sub judice* do not go beyond speculation or conjecture.

First, plaintiff acknowledged in his deposition that the disconnected GFI did not cause the arc and fire. Second, plaintiff's experts offering depositions and affidavits stated that the disconnected GFI was not the cause of the accident. Plaintiff's expert, James S. McKnight, Ph.D., further testified that there was no evidence that defendant "did or might have done [anything] which could have caused the arc or fault." Plaintiff's expert, Edward W. McNally, concurred.

Plaintiff contends that the absence of the GFI caused the *injuries* by allowing the fireball to grow and to spread. The witnesses and experts, however, testified that the fault and arc would have occurred even if the GFI had been connected on the day of the accident. Plaintiff's experts concede that the GFI is not considered a safety device and is meant to protect equipment from ground fault damage. Moreover, only expert McNally surmised that the fire definitely would have been reduced in size if the GFI had been connected but offered no conclusive evidence to support his statements. Moreover, McNally provided no evidence that even if the fire had been reduced in size, then plaintiff's injuries also would have been reduced. There is simply no connecting evidence in this case between the GFI, the size of the fire and plaintiff's injuries.

Conversely, expert Charles Browning, who inspected the accident scene, stated that "an operational GFI would not have reduced

the magnitude of the fault in the case . . . [because] the GFI was downstream, . . . , from the fault. It would be very much like having a smoke detector here and one in the next room. If you had a fire in the next room, this detector here wouldn't go off."

Plaintiff's reliance on *Adams v. Carolina Telephone*, 59 N.C. App. 687, 297 S.E.2d 785 (1982), and *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E.2d 249 (1989) is misplaced. In *Adams*, the court held that plaintiff's evidence of proximate cause was sufficient to withstand a motion for directed verdict. 59 N.C. App. at 689, 297 S.E.2d at 787. Plaintiff's evidence in *Adams*, however, was substantially more than in the case *sub judice*. Here, plaintiff has produced only one witness alleging that the fire would have been reduced in size had the GFI been connected. This witness offered no basis for his assertions nor was there evidence relating to a reduced ball of fire to plaintiff's injuries. In view of the evidence defendant presented on this issue, we find plaintiff's evidence to be speculative, and therefore insufficient to raise a genuine issue of material fact.

In *Warren*, an enhanced injuries case, this Court held plaintiff's complaint sufficient to withstand dismissal under Rule 12(b)(6) of the N.C. Rules of Civil Procedure. 93 N.C. App. at 102, 377 S.E.2d at 254. There, plaintiff alleged that a defendant school bus manufacturer was negligent in its design of a school bus, thereby causing enhanced injuries to plaintiff (a passenger), when the bus was hit by a tractor-trailer truck. The initial impact was in no way caused by defendant bus manufacturer.

We find no relationship between *Warren* and the case at bar. Our case addresses sufficiency of the evidence to withstand a summary judgment motion. In *Warren*, we held only that plaintiff's complaint sufficiently alleged a cause of action for enhanced injuries in an automobile collision case. We noted in *Warren* that the sufficiency of plaintiff's evidence would "be tested upon motions for summary judgment and directed verdict . . . ." *Id.* at 101, 377 S.E.2d at 255. For the foregoing reasons, we find that defendant met its burden that its negligence, if any, was not the proximate cause of plaintiff's injuries. Therefore, we hold that the trial court did not err in granting summary judgment for defendant.

Because we find that defendant was not negligent, we decline to address the issues of plaintiff's contributory negligence, assumption of the risk or punitive damages.

Affirmed.

Judge JOHNSON concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The forecast of plaintiff's evidence was that the absence of the ground fault interruptor (hereinafter GFI) was the proximate cause of plaintiff's injuries. Plaintiff's evidence tended to show that had the GFI been connected, the electrical fault and resulting arc would have been of brief duration and limited to a small space; and conversely, that it was the absence of the GFI which allowed the fault or arc to explode into the large fireball which engulfed plaintiff's body. Defendant's forecast disputes this aspect of proximate cause. There is an issue of fact here to be properly resolved by the trier of fact, and I am therefore of the opinion that summary judgment for defendant was improvidently entered.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. BETTY M. FOX, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JERRY HASSEL FOX; CAROL F. LONG AND HUSBAND, JAMES A. LONG, III; VIRGINIA ELOISE CLARK AND HUSBAND, ROBERT THURMAN CLARK, DEFENDANTS

No. 899SC651

(Filed 3 April 1990)

1. Eminent Domain § 6.9 (NCI3d) — cross-examination of appraisal witness — questions about property values in vicinity

In a condemnation action to acquire property for expansion of a two-lane highway to four lanes, defendants' counsel committed reversible error where, during cross-examination of plaintiff's expert appraisal witness, counsel referred to the value of three noncomparable properties fifteen times in his questions, and it was obvious from the transcript that counsel's primary intent was to allow the jury to hear the values of those tracts, not to impeach the credibility of plaintiff's witness.

Am Jur 2d, Eminent Domain § 429.

2. Eminent Domain § 5.8 (NCI3d) — construction of median strip — no compensation

Defendants were not entitled to any compensation resulting from the construction of a median strip in front of their remaining property as part of a project to expand a two-lane highway to four lanes.

Am Jur 2d, Eminent Domain § 210.

Judge WELLS concurring in the result.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from judgment entered by *Judge Milton Read, Jr.*, in PERSON County Superior Court. Heard in the Court of Appeals 12 December 1989.

This appeal arises out of a condemnation action filed 6 August 1986 in which the plaintiff Department of Transportation (DOT) condemned 5.02 acres of new right-of-way and .01 acre of temporary drainage easement across the property of defendants Betty Fox and others for the four-laning of US 15-501, starting at a point just north of the city limits of Roxboro, North Carolina. The property taken by DOT was part of a 125-acre tract owned by the families of the defendants. The portion condemned consisted of a ninety-one foot strip bordering the highway's western side for a distance of 2,345.81 feet. The case went to trial on 23 January 1989, and after hearing the evidence presented, a jury awarded defendants $150,000 plus interest for the appropriation. Plaintiff appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas B. Wood, for the State, appellant.

Maxwell, Martin, Freeman & Beason, by James B. Maxwell and John C. Martin, for defendant appellees.

ARNOLD, Judge.

Appellant makes a number of assignments of error, but we examine only two.

[1] The State contends it was prejudicial error for the trial court to allow cross-examination of the State's appraisal witness concerning his knowledge of the sale prices of several noncomparable properties located in the area. This cross-examination was an attempt to impeach the witness by testing his knowledge of nearby property.

Larry Bowes, a licensed auctioneer and insurance agent, testified for DOT that the appropriation of appellee's five acres had increased the value of their remaining property by more than $500,000. On cross-examination, the following exchanges occurred between Mr. Maxwell, defendants' counsel, and Mr. Bowes:

Q: (Mr. Maxwell) . . . Now, are you aware Mr. Whitfield bought that particular piece of property for the Express Mart for about five thousand dollars an acre—

HARRIS (plaintiff's counsel): Objection.

MAXWELL: I'm asking if he's aware of it.

COURT: Go ahead and finish your question.

Q: Okay. And, that he actually sold it in 1986 for sixty-five thousand dollars an acre?

COURT: You may answer that question.

A: I was aware that he bought it, but not of the figures he got for it.

Q: Well, let's put it this way. Have you had a chance in preparation for this to actually check the sale of a property that was about one mile from the subject property we're talking about, the Fox property. The Express Mart, purchased in 1987 for ninety-seven thousand dollars—

HARRIS: Objection. Objection, Your Honor.

COURT: He's just asking if he's aware of it.

HARRIS: Well, I'm objecting to him giving the figures.

COURT: Objection is overruled.

Q: And, if they sold that for ninety-seven thousand dollars according to the tax stamps downstairs, for sixty-four thousand dollars per acre—

HARRIS: Objection.

COURT: Overruled.

Q: —are you aware of that?

A: No, sir. I wasn't aware of that figure. . . . .

Q: Okay. And, you mentioned Neb King's property in your testimony, did you not? That particular piece of property is about one point two miles from this property. It's between, closer to the Fox property than Mr. Chambers' property and a little bit further than the Express Mart, is it not?

A: Yes, sir.

Q: Okay. Were you aware that that particular piece of property sold for fifty-two thousand—

HARRIS: We object to the figures, Your Honor.

COURT: If he is aware, he may answer.

Q: Were you aware that that particular piece of property sold for fifty-two thousand dollars?

A: I was aware of that particular property.

Q: And, based on what you know about the properties, you're not surprised, or wouldn't be surprised, that Mr. Chambers paid eighty-five thousand dollars for—

HARRIS: Objection.

COURT: Well, sustained as to that.

Q: Okay. You used that as a comparable. You know that one sold for a hundred and twenty-five thousand dollars?

A: Yes, sir.

Q: Which is eighty-five thousand dollars an acre?

A: Yes, sir. I have on there that average.

Q: Okay. And, what do you know about Mr. Chambers' property selling for eighty-five thousand dollars an acre?

HARRIS: Objection.

Q: The Neb King selling for fifty-two thousand dollars?

HARRIS: Objection.

Q: Is the Express Mart selling for sixty-four thousand dollars an acre—

HARRIS: Objection.

Q: —closer to this property?

COURT: The three objections are overruled.

In *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E.2d 227 (1980), the Supreme Court, in a similar situation, ordered a new trial for the defendants when improper references were made to values and sales prices of property not comparable to the land at issue. During cross-examination in *Winebarger* of defendants' value experts, plaintiff's counsel continually alluded to alleged sales prices of parcels of land not involved in the case. *Id.* at 59-61, 265 S.E.2d at 229-30.

As in the case before us, there was no showing in *Winebarger* that any of the properties referred to in the questions were comparable to defendants' land. Generally, if a proper foundation is laid showing similarity in nature, location, and condition to the land involved, the price paid at a voluntary sale of land is admissible as substantive evidence of the value of the property in question. 1 Brandis on North Carolina Evidence § 100 (3d ed. 1988); *Winebarger*, at 62, 265 S.E.2d at 230. Whether two properties are sufficiently similar is a question to be determined by the trial judge. *Id.* at 65, 265 S.E.2d at 232. "Conversely, where a particular property is markedly dissimilar to the property at issue, the sales price of the former may not be introduced or alluded to in any manner which suggests to the jury that it has a bearing on the estimation of the value of the latter." *Id.* at 66, 265 S.E.2d at 232.

If a witness has offered testimony concerning the value of property directly in issue, that witness' knowledge of the values and sales prices of dissimilar properties in the area may be cross-examined to impeach his credibility and expertise. *Id.*

> Under these limited impeachment circumstances, however, it is improper for the cross-examiner to refer to specific values or prices of noncomparable properties *in his questions to the witness* (citation omitted). Moreover, if the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted (citation omitted). If, on the other hand, the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge

> determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues (emphasis added).

Id. at 66, 265 S.E.2d at 232-33.

Applying *Winebarger* to the case before us, it is clear that appellees' counsel committed reversible error. During his cross-examination of Mr. Bowes, counsel referred to the value of three noncomparable properties fifteen times *in his questions*. It is obvious from the transcript that counsel's primary intent was to allow the jury to hear the values of these tracts, not to impeach the credibility of State's witness. Counsel repeatedly stated the prices in his questions, sometimes reciting figures concerning one piece of property three times in one question. He would state the figure two different ways in the same question—by the total sales price of the tract and then by the price per acre.

This Court has held that *one* reference to the sales price of a noncomparable piece of property is an error requiring a new trial. In *Bd. of Transportation v. Chewning*, 50 N.C. App. 670, 274 S.E.2d 902, *disc. rev. denied*, 303 N.C. 180, 280 S.E.2d 453 (1981), defendants called a witness to testify concerning the value of their property, which was being appropriated by the State. On cross-examination, the witness testified that he had purchased a small parcel of property in the area. The State's attorney asked him the price of the property. *Id.* at 671, 274 S.E.2d at 903. No showing had been made that the two properties were comparable. The question was intended to impeach the witness and probe his knowledge of land values in the area. On appeal, Judge Martin ordered a new trial because in allowing the witness to state the sales price, the trial judge failed to confine the cross-examination to matters relevant to the limited impeachment purposes. *Id.* at 673, 274 S.E.2d at 905.

In the present case, State's witness apparently knew the sales price of one tract, the Chambers property. When a witness states that he knows the price, his answer *may* be relevant even for the purposes of impeachment. *Winebarger*, at 66, 265 S.E.2d at 232-33. Nevertheless, counsel's questions concerning the Chambers property were also in error because *any* reference to prices in the cross-examination questions is improper. *Id.* at 66, 265 S.E.2d at 232. It is the witness who should state the price, if he knows it, and the probative value of allowing the admission of such evidence

will outweigh the possibility of confusing the jury only in a "rare case." *Id.*

[2] Finally, we also point out that appellees are not entitled to any compensation resulting from the construction of a median strip in front of their remaining property as part of the four-lane expansion project. In *Highway Comm. v. Yarborough*, 6 N.C. App. 294, 170 S.E.2d 159 (1969), Judge Graham, writing for this Court, said:

> [T]he construction of a median strip so as to limit landowners' ingress and egress to lanes for southbound travel when he formerly had direct access to both the north and southbound lanes has been held to be a valid exercise of the police power vested in it by statutes. Injury, if any, caused thereby is not compensable.

Id. at 301, 170 S.E.2d at 164-65; *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E.2d 732 (1962).

For the reasons set forth above, appellant is entitled to a

New trial.

Judge WELLS concurs in the result.

Chief Judge HEDRICK dissents.

Judge WELLS concurring in the result.

I wish to put an emphasis on this case which is somewhat different from the majority.

In cases such as this, the measure of damages for the portion of land condemned and taken is the difference between the fair market value of the entire tract before the taking and the fair market value of the tract remaining after the taking. N.C. Gen. Stat. § 136-112. In this case, defendants attempted to show by their witnesses—Gentry and Smith—that the "after" value of their remaining land was substantially less than the "before" value. (Gentry, $226,651.00 less; Smith, $301,120.00 less.) Plaintiff attempted to show through the witness Bowes that the "after" value was substantially more than the "before" value, and that therefore defendants had suffered no damages for which they were entitled to compensation.

In their cross-examination of Bowes, defendants simply highlighted that property in the vicinity of defendants' property had gone up in value in recent times. I cannot perceive how this could have prejudiced plaintiff, and I would therefore not agree that the disputed cross-examination of Bowes requires a new trial.

Rather, I conclude that plaintiff is entitled to a new trial on different grounds. In their direct case, defendants' valuation witnesses were allowed to testify that in reaching their "after" value they considered the fact that the presence of a divider median in the new four-lane highway had an adverse impact on the value of defendants' property for commercial purposes, its highest and best use. Under the rules established by our Supreme Court in *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E.2d 732 (1962), and followed by this Court in *Highway Commission v. Yarborough*, 6 N.C. App. 294, 170 S.E.2d 159 (1969), this was clearly prejudicial error. Both *Barnes* and *Yarborough* plainly held that changes in highway design such as happened here do not entitle the affected landowner to compensation.

This case is not distinguishable from either *Barnes* or *Yarborough*, and on this basis, I am of the opinion that plaintiff is entitled to a new trial.

Chief Judge HEDRICK dissenting.

Assuming errors were made in the trial of this action, as pointed out in the separate opinions of my colleagues, I do not believe the errors were so prejudicial as to require a new trial in this case.

STATE OF NORTH CAROLINA v. GLENN WILLIAMS

No. 8912SC838

(Filed 3 April 1990)

1. Criminal Law § 753 (NCI4th) — robbery — requested instruction on burden of proving defendant's identity — denied — no error

There was no error in a robbery prosecution where the trial court failed to give defendant's requested instruction

that the State had the burden of proving the identity of the defendant as the perpetrator of the crimes charged. Assuming that the issue was properly raised, the facts indicate that the victim identified defendant as his assailant in the hospital and at trial and the trial judge instructed the jury that the State must prove defendant guilty beyond a reasonable doubt.

Am Jur 2d, Trial § 725.

2. **Criminal Law § 753 (NCI4th)— robbery—requested instruction on number of witnesses and quantity of evidence—denied—no error**

The fact that defendant in a robbery prosecution presented no evidence did not give rise to the necessity of an instruction that the number of witnesses and quantity of evidence is not determinative of guilt where the instructions given were substantially the same as those which were requested.

Am Jur 2d, Trial §§ 752, 753; Robbery § 73.

3. **Criminal Law § 745 (NCI4th)— robbery—requested instruction on law enforcement officer as interested witness—not given—no error**

The trial court did not err in a robbery prosecution by not instructing the jury that the testimony of law enforcement officers is to be evaluated as any other witness where the jury was instructed to apply the same tests of truthfulness which they applied in their everyday affairs. Moreover, the instruction defendant requested is essentially an interested witness instruction and there was no evidence to show that clear advancement or other gain might be given to the officer if defendant were convicted. Instructing the jury to give special scrutiny to the officer's testimony would have been an improper expression of an opinion as to the credibility of the witness.

Am Jur 2d, Trial § 861.

4. **Criminal Law § 1114 (NCI4th)— robbery—sentencing—pending charges—lack of remorse as aggravating factor—error**

The trial court erred when sentencing defendant for conspiracy to commit armed robbery, attempted robbery, and assault with a deadly weapon inflicting serious injury by aggravating his sentence for failure to admit and express remorse

for shooting the prosecuting witness when there were pending charges against defendant and any statement made at the sentencing hearing might be used against him.

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

APPEAL by defendant from judgment entered 7 April 1989 in CUMBERLAND County Superior Court by *Judge Samuel T. Currin.* Heard in the Court of Appeals 14 February 1990.

Attorney General Lacy H. Thornburg, by Associate Attorney General P. Bly Hall, for the State.

James R. Parish for defendant-appellant.

DUNCAN, Judge.

From a judgment imposing concurrent sentences, later amended to impose consecutive sentences, following his conviction of conspiracy to commit robbery with a dangerous weapon, attempted robbery with a dangerous weapon and assault with a deadly weapon inflicting serious injury, defendant appeals. We find no prejudicial error in the defendant's trial, but for the reasons that follow we remand for resentencing.

I

Evidence for the State tended to show that on 10 May 1988 at about 5:30 P.M., Mr. and Mrs. Fuller were preparing to leave the Fuller Oil Company, when two men entered the office. One man asked Mr. Fuller about a job application. Mr. Fuller told him that he was not hiring at that time and that he should come back in October. As Mr. Fuller turned his back, the man pulled out a gun. Mrs. Fuller cried out to warn him and Mr. Fuller struck at the man's hand. The man fired five shots, two of which struck Mr. Fuller in the leg and the abdomen. The man's companion fled when the shooting first started and the assailant fled after the fifth shot had been fired.

While in the hospital, Mr. Fuller was shown a photographic lineup and he selected defendant's picture. He also positively identified the defendant at trial as his assailant.

The State's evidence further tended to show that defendant and two accomplices agreed earlier that afternoon to rob Fuller Oil Company. Joshua Johnson, a former employee of the company,

was familiar with the cash that would be on the premises on that day of the week. He drove the three of them over to the oil company and waited with the car while the defendant and Lynwood Melvin, the third man, went inside. After the incident, crime scene technicians found two fingerprints that matched those of Lynwood Melvin on the entrance door. Joshua Johnson testified that when defendant returned to the car he asked what happened. Johnson said defendant "said he shot him." Officer Melton Brown testified that defendant admitted to him that he was present when Mr. Fuller was shot but claimed that Melvin had done the shooting.

II

Defendant's first three assignments of error are to the trial judge's instructions to the jury. He contends that the judge committed reversible error in not instructing the jury, despite proper requests, that 1) the State had the burden of proving the identity of the defendant as the perpetrator of the crimes charged; 2) the number of witnesses and quantity of evidence introduced was not determinative of guilt; and 3) the testimony of law enforcement officers is to be evaluated as that of any other witness. We find no merit to these contentions and overrule these assignments of error.

[1] With respect to defendant's first assignment of error, it is well established that a request for a specific instruction which is correct in law and supported by the evidence must be granted at least in substance. *See State v. Davis*, 291 N.C. 1, 229 S.E.2d 285 (1976). However, the trial judge is not required to give the requested instruction verbatim. *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988).

Defendant contends that the issue of the identity of the perpetrator was material to the State's case because the victim's wife could not identify her husband's assailant. This contention is without merit. Assuming, arguendo, that this raised the issue of identity, the facts indicate the victim identified the defendant as his assailant in the hospital and at trial.

Furthermore, in this case, the trial judge instructed the jury, "The State must prove to you that the Defendant is guilty beyond a reasonable doubt." In instructing the jury on the elements required to find defendant guilty of conspiring to commit robbery with a dangerous weapon, the judge said, ". . . the State must prove . . . beyond a reasonable doubt . . . that the Defendant,

Glenn Williams, and at least one other person, entered into an agreement." The jury could reasonably infer from these instructions that the State had to prove that the defendant was the perpetrator of the crimes charged. We therefore find no reversible error.

[2] As to defendant's second assignment of error, he contends that the fact that he presented no evidence gives rise to the necessity of an instruction that the number of witnesses and quantity of evidence introduced is not determinative of guilt. This contention is without merit.

The jury was instructed, "You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness said on the stand." The trial judge further instructed, "You are also the sole judges of the weight to be given any evidence in this case . . . should you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all the other believable evidence in the case." Based upon those instructions, it is reasonable for a jury to conclude that the number of witnesses and quantity of evidence are not unassailable proof of defendant's guilt, and that they had to determine the credibility of each witness' testimony and each piece of evidence and then determine their weight or significance. The instructions given were substantively the same as those which were requested, and we therefore find no reversible error.

[3] As to defendant's third assignment of error, he contends that the police officer's testimony that the defendant confessed orally contradicts the Miranda rights form. The Miranda rights form indicates that defendant refused to sign the waiver of rights; however, Officer Brown testified that in a conversation he had with the defendant, the defendant admitted to being present when Mr. Fuller was shot. Because of that contradiction, defendant argues that the jury should have been instructed that the testimony of law enforcement officers is to be evaluated as any other witness. This contention is without merit.

First, we note that the jury was instructed that they were to apply "the same tests of truthfulness which [they] apply in [their] everyday affairs." From that they were free to conclude that a police officer, as well as any other person, may not always tell

the truth and to determine whether Officer Brown was telling the truth.

Second, the instruction which defendant requested is in substance an interested-witness instruction. That is, defendant's requested instruction was that the jury scrutinize Officer Brown's testimony in light of his interest or bias as a law enforcement officer and accord it the same weight as any other witness. When an interested-witness instruction is justified by the evidence, a trial judge, upon request, is required to give it. *State v. Richardson*, 36 N.C. App. 373, 376, 242 S.E.2d 918, 920 (1978). In this case, there is no evidence of record to show that any career advancement or other gain might be given to Officer Brown if the defendant were convicted. Furthermore, to have instructed the jury to give special scrutiny to Officer Brown's testimony and treat it as that of any other witness would have been an improper expression of an opinion as to the credibility of the witness and the weight to be accorded his testimony. N.C. Gen. Stat. Sec. 15A-1222 (1988). Therefore, as to this assignment of error, we find no reversible error.

III

[4] Defendant's fourth and fifth assignments of error are 1) to the trial judge's aggravating his sentence for failure to admit shooting the prosecuting witness and express remorse for doing so, and, 2) to the trial judge's amending his sentences to be served consecutively rather than concurrently after defendant gave notice of appeal. We agree with defendant's fourth assignment of error and remand this case for a new sentencing hearing.

First, we note that the record reflects that the only statutory aggravating factor the trial judge found was a prior conviction for a criminal offense punishable by more than sixty days. It is, however, the exchange between the defendant and the trial judge prior to sentencing that concerns this court. The trial judge asked the defendant if he had any remorse "about what [he] did," whereupon defendant replied that he did not commit the crime with which he was charged but that he "hate[d] for anybody to get hurt." The defendant's attorney then informed the trial judge that there were two cases pending against the defendant, and that any statement made at the sentencing hearing might be used against him. The assistant district attorney confirmed that the State would be proceeding with those cases as soon as possible. Then the trial judge said:

> The second thing that concerns me about your case is the fact that you have not been willing to turn around and face Mr. Fuller and say you're sorry. About all you have had to say is, Well, the jury found me guilty, and that is about all I am willing to accept. And whenever I sentence a Defendant, I am always looking for some remorse, some step on the road to recovery that I can work with, but I am afraid you haven't given me very much that I can work with.

This court has stated that, "it is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation." *State v. Coleman*, 80 N.C. App. 271, 277, 341 S.E.2d 750, 753 (1986) (citing *State v. Rivers*, 64 N.C. App. 554, 558, 307 S.E.2d 588, 590 (1983)), *disc. rev. denied*, 318 N.C. 285, 347 S.E.2d 466 (1986). Thus, while an expression of remorse might have mitigated this defendant's sentence, the lack of such an expression, which took the form of exercising the right against self-incrimination, cannot be an aggravating factor in the defendant's sentence.

The exchange between the defendant and the trial judge indicates that the trial judge improperly considered the defendant's unwillingness to incriminate himself and proceeded to give the defendant the maximum sentence for all three of the convictions. When a defendant has pled not guilty and maintains his plea, finding as a nonstatutory aggravating factor that he has not exhibited any remorse and imposing a sentence beyond the presumptive term is error warranting a new sentencing hearing. *See State v. Brown*, 64 N.C. App. 578, 582, 307 S.E.2d 831, 834 (1983).

Having found that defendant is entitled to a new sentencing hearing on the basis of his fourth assignment of error it is not necessary to address his fifth assignment of error.

For the foregoing reasons, this case is

Remanded for resentencing.

Chief Judge HEDRICK and Judge PHILLIPS concur.

DAVID M. LYNN AND WIFE, LORNA L. LYNN, PLAINTIFFS v. OVERLOOK DEVELOPMENT, A JOINT VENTURE; ROGER L. JONES AND WIFE, MYRA E. JONES; MARSHALL N. KANNER; CITY OF ASHEVILLE, A MUNICIPAL CORPORATION; J. R. SMITH; MARK RUMFELT; WIND-IN-THE-OAKS HOMEOWNERS ASSOCIATION, INC., A NORTH CAROLINA CORPORATION; JOE C. SWICEGOOD, SR. AND WIFE, DOROTHY C. SWICEGOOD; GARLAND L. NORTON; JOE P. EBLEN AND WIFE, ROBERTA S. EBLEN; BEN KANNER AND WIFE, SYLVIA KANNER; GARY PHILLIPS AND WIFE, DEBBIE PHILLIPS; DEAN J. SCHRANZ AND WIFE, MARGIE SCHRANZ; REBECCA M. PRESSLEY; MICHAEL D. BRANDSON AND STEVIE A. SALIDO; JOSEPH CARR SWICEGOOD, JR.; J. DEAN DEWEESE, JR.; B. PAUL GOODMAN; KEITH J. DUNN; DEBRA M. LEATHERWOOD; BENJAMIN BIBER AND WIFE, ENGLISH W. BIBER; ROBERTA HORVATH; ROBERT C. NEWTON, JR.; ROBERT M. SMITH AND WIFE, SANDY SMITH; PAUL E. GILSDORF AND WIFE, LAURA L. GILSDORF; PAUL A. ROBICHAUD; TERRENCE W. BURT; SOUTHEASTERN SAVINGS AND LOAN COMPANY, A NORTH CAROLINA CORPORATION; DAVID E. MATNEY, III, TRUSTEE; KENNETH M. MICHALOVE, WILHELMINA B. BRATTON, MARY LLOYD FRANK, RUSSELL M. MARTIN, NORMA T. PRICE AND ROBERT YORK, MEMBERS OF THE ASHEVILLE CITY COUNCIL IN THEIR OFFICIAL CAPACITIES; AND W. LOUIS BISSETTE, JR., MAYOR OF THE CITY OF ASHEVILLE IN HIS OFFICIAL CAPACITY, DEFENDANTS

No. 8928SC732

(Filed 3 April 1990)

1. **Municipal Corporations § 10 (NCI3d)— building inspector— negligence claim—claim dismissed**

The trial court properly granted defendant building inspector's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of a negligence claim for compensatory damages against him in his official capacity where the duty of the City of Asheville and its building inspectors in issuing a building permit, observing code violations, and taking remedial measures was owed to the general public rather than to plaintiffs individually.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 39, 78, 221, 222.

2. **Municipal Corporations § 12.3 (NCI3d)— conduct of building inspector—liability of City—waiver of immunity**

The trial court erred by granting a motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) by the City of Asheville on a claim for compensatory damages arising from a building inspector's alleged willful and wanton conduct where, although

plaintiffs did not allege the specific provisions of the City's liability policy, plaintiffs' allegations that the policy was in force and indemnifies the City under these circumstances were taken as true. The trial court did not err by dismissing plaintiffs' claim against the City based on the inspector's negligence.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 39, 78, 221, 222.

APPEAL by plaintiffs from order entered 10 May 1989 in BUNCOMBE County Superior Court by *Charles C. Lamm, Judge.* Heard in the Court of Appeals 6 February 1990.

This action arises out of a purchase contract for a new condominium unit which plaintiffs entered into with Overlook Development (not a party to this appeal) in January 1985. Construction of the unit was completed in August 1985, and plaintiffs immediately assumed occupancy. Sometime thereafter, plaintiffs discovered numerous defects in the construction of their unit. These defects were the subject of a later condemnation proceeding brought by the City of Asheville against plaintiffs in December 1988, resulting in a determination that plaintiffs' unit was unfit for human habitation.

On 6 March 1989, plaintiffs filed their complaint, enumerating eleven causes of action, seeking relief against numerous defendants on a variety of theories of recovery. Pertinent to this appeal, plaintiffs sought compensatory and punitive damages against defendants City of Asheville and city building inspector J.R. Smith, in both his official and individual capacities, for Smith's alleged acts and omissions pertaining to the inspection of plaintiffs' unit. Plaintiffs also sought relief against the Mayor and City Council of the City of Asheville in the form of a mandatory injunction requiring these defendants to either take action to enforce State and local laws pertaining to construction or turn such enforcement over to the State.

Prior to answering, the foregoing defendants interposed motions under N.C. R. Civ. P., Rule 12(b)(6), to dismiss plaintiffs' claims. Following a hearing on these motions, the trial court entered its order, dismissing all claims against these defendants save those against J.R. Smith, in his individual capacity, for compensatory and punitive damages arising out of Smith's alleged willful and wanton conduct. From this order, plaintiffs appeal.

Charles R. Brewer for plaintiffs-appellants.

Womble, Carlyle, Sandridge & Rice, by Tyrus V. Dahl, Jr. and Ellen M. Gregg, for defendants-appellees.

WELLS, Judge.

We note at the outset that plaintiffs have abandoned their challenge to that portion of the trial court's order allowing defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claims for punitive damages against the City of Asheville and J.R. Smith in his official capacity. We further note that plaintiffs, beyond a bare restatement of their assignment of error, did not present argument in the brief in support of their challenge to the trial court's dismissal of their claim for injunctive relief against the Mayor and City Council of Asheville. This challenge is therefore deemed to be waived. N.C. R. App. P., Rule 28.

Two principal issues remain to be determined, namely, whether the trial court erred in allowing defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claims for compensatory damages against defendant J.R. Smith, in his official capacity, based on allegations of negligence and whether the trial court erred in allowing defendants' Rule 12(b)(6) motion to dismiss plaintiffs' claims for compensatory damages against the City of Asheville, his employer.

A motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure presents the question, "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). In resolving this question, the complaint must be liberally construed, and the court should not dismiss the complaint "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). With these standards in mind, we proceed to an examination of plaintiffs' claims against each defendant.

Plaintiffs' Claim Against J.R. Smith

[1] Plaintiffs' prayer for relief in the form of compensatory damages against inspector Smith, in his official capacity, is grounded on the allegations contained in that portion of the complaint denominated

as the sixth cause of action. There, plaintiffs allege that inspector Smith was negligent under the standards set forth at N.C. Gen. Stat. §§ 160A-411, *et seq.*, and N.C. Building Code § 105 in that he improperly issued a building permit to Overlook Development (which held no general contractor's license), failed to observe code violations in the construction of plaintiffs' unit, or alternatively, having observed such violations, failed to take appropriate remedial measures, including notifying plaintiffs and revoking the building permit. Plaintiffs contend that these allegations are sufficient to withstand defendants' 12(b)(6) motion. We disagree.

It is fundamental that actionable negligence is predicated on the existence of a legal duty owed by the defendant to the plaintiff. *Martin v. Mondie*, 94 N.C. App. 750, 381 S.E.2d 481 (1989) (and cases cited therein). In affording protection to the public pursuant to its statutory police powers, a municipality "ordinarily acts for the benefit of the public at large and not for a specific individual." *Id.* (*quoting Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988)). Because the duty in such circumstances flows from the municipality to the public at large, no liability attaches to a municipality for its failure to carry out its statutory duty toward a specific individual. *Id.*

In the present case, it is undeniable that the referenced statutes and code provisions impose a duty on the part of the City of Asheville and its building inspectors to properly carry out the enumerated enforcement powers. It is equally undeniable, however, that such powers fall within the City's statutory police powers, and consequently, the duty owed in this case is not to the plaintiffs, individually, but to the general public. There being no duty owed to plaintiffs, their allegations charging inspector Smith with negligence clearly do not state a claim upon which relief can be granted. The trial court therefore did not err in allowing defendants' 12(b)(6) motion with respect to this theory of recovery.

Plaintiffs' Claims Against the City of Asheville

[2] Plaintiffs also seek recovery of compensatory damages against the City based on the allegations in the sixth cause of action of their complaint. Two discernible theories of recovery are alleged. First, plaintiffs allege that the City, as inspector Smith's employer, is liable for Smith's negligence. Second, plaintiffs allege that the City is liable in that inspector Smith corruptly permitted serious violations of the building code, corruptly omitted to take remedial

action, and wrongfully concealed his corrupt acts and omissions.[1] Plaintiffs further allege that defendant City was insured for its potential liability on plaintiffs' claims and therefore waived its immunity to the extent of such insurance.

In those circumstances where a duty is owed, a city is nevertheless generally immune under the common law from civil liability in tort; but it may waive such immunity by purchasing liability insurance, and this waiver is effective "to the extent that the city is indemnified by the insurance contract[.]" N.C. Gen. Stat. § 160A-485(a). Where such a waiver has been effected, a city may be held liable for acts of a city building inspector that are corrupt, malicious, or outside the scope of his duties. *Wiggins v. City of Monroe*, 73 N.C. App. 44, 326 S.E.2d 39 (1985) (and cases cited therein). A waiver of governmental immunity, however, does not give rise to a cause of action where none previously existed. *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988).

Plaintiffs did not allege the specific provisions of the City's liability insurance policy; consequently, we cannot determine whether the policy, in fact, indemnifies the City for the torts alleged to have been committed by inspector Smith in the claims against him which were not dismissed. This omission, however, is not fatal at this stage of the proceedings. For purposes of reviewing the sufficiency of plaintiffs' complaint under Rule 12(b)(6), we must take as true their allegations that the policy is in force and indemnifies the City under these circumstances. These allegations are therefore sufficient to establish the City's waiver of immunity within the limited context of Rule 12(b)(6).

Such a waiver clearly does not entitle plaintiffs to proceed against the City by predicating recovery on those claims against defendant Smith that were properly dismissed. Therefore, the trial court did not err in allowing defendants' 12(b)(6) motion with respect to plaintiffs' claim against the City predicated on inspector Smith's negligence.

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1. We note that the trial court denied defendants' motion to dismiss plaintiffs' claims against Smith, in his individual capacity, for Smith's alleged willful and wanton conduct. We further note that the trial court did not address in its order defendants' motion to dismiss as directed to plaintiffs' claims against Smith, in his official capacity, for Smith's alleged willful and wanton conduct. These claims against inspector Smith therefore remain alive.

However, plaintiffs' allegations of the City's waiver of immunity, coupled with their allegations of inspector Smith's willful and wanton conduct in the surviving claims against him, clearly state a cognizable claim against the City under *Wiggins*. We therefore conclude that the trial court erred in dismissing plaintiffs' complaint against the City with respect to this theory of recovery.

Conclusion

In summary, we reverse the trial court's dismissal of plaintiffs' claim for compensatory damages against the City of Asheville predicated on allegations of inspector Smith's willful and wanton conduct. In all other respects, the trial court's order is affirmed.

Affirmed in part, reversed in part.

Judges COZORT and LEWIS concur.

ANN L. STILLER v. LEWIS E. STILLER

No. 8922DC538

(Filed 3 April 1990)

1. **Divorce and Alimony § 30 (NCI3d)— equitable distribution— correspondence between defense attorney and judge—no undue influence**

There was no merit to plaintiff's contention in an equitable distribution proceeding that correspondence from defendant's counsel to the trial court unduly influenced the court in favor of defendant, since the letters concerned plaintiff's lack of timely response to the trial court's instructions and defendant's objections to plaintiff's proposed order of distribution; defendant's counsel always sent copies of his letters to opposing counsel; plaintiff failed to show any undue influence on the court; and if defendant's counsel violated a Rule of Professional Conduct, the appropriate forum for that inquiry was the State Bar.

Am Jur 2d, Attorneys at Law § 42.

2. Divorce and Alimony § 30 (NCI3d)— equitable distribution— retirement benefits—improper method of valuation

The trial court in an equitable distribution proceeding erred in using the "withdrawal value" to determine the respective values of the parties' vested retirement benefits.

Am Jur 2d, Divorce and Separation §§ 905, 906, 921.

3. Divorce and Alimony § 30 (NCI3d)— equitable distribution— expenses of parties properly considered

The trial court in an equitable distribution proceeding did not err in failing to credit plaintiff with the value of repairs made to the marital home and payment of property taxes, both paid and coming due after the date of separation, nor did the court use these payments made by plaintiff as an "offset" against the fair rental value of the house during the period of separation.

Am Jur 2d, Divorce and Separation § 903.

APPEAL by plaintiff from judgment entered 2 February 1989 by *Judge Robert W. Johnson* in DAVIE County District Court. Heard in the Court of Appeals 21 December 1989.

This is an equitable distribution of marital property case. Plaintiff Ann Stiller and defendant Lewis Eugene (Gene) Stiller were married on 25 May 1963, separated on 19 November 1986 and divorced on 27 January 1988. On 28 November 1988 at the parties' request an equitable distribution hearing was held. Both parties presented evidence as to the existence and value of their marital property. Most of the evidence presented dealt with each party's individual pension and retirement benefits. From 1 November 1977 through the date of separation plaintiff was employed by the Davie County Hospital. From 13 July 1970 through the date of separation defendant was employed by Ingersoll-Rand. As of the date of separation both parties' pensions and retirement benefits were vested. Pursuant to G.S. 50-20(b)(1) the trial court properly included them as marital property.

The parties stipulated to the value of their assets other than their retirement and pension plans. The values the trial court placed on the parties' other assets are not in dispute here.

The trial court concluded as a matter of law that an equal division of the marital property would be equitable. The trial court found that the total value of the marital property was $151,378.18 ($137,427 stipulated value plus value of plaintiff's vested pension) and that the total marital debt equaled $63,220.85 of which defendant had paid or assumed $8,866.95. After making adjustments based on stipulations of the parties, the net value of the marital property was $88,157.33. The trial court also valued the parties' pension benefits, finding the plaintiff's interest was worth $13,951.18 and defendant's interest was worth $.00. The trial court ordered plaintiff to pay a distributive award to defendant of $40,413.61. From the trial court's order establishing valuation and providing for a distributive award, plaintiff appeals.

Hall and Vogler, by William E. Hall, for plaintiff-appellant.

Brock & McClamrock, by Grady L. McClamrock, Jr. and Michael J. Parker, for defendant-appellee.

EAGLES, Judge.

Plaintiff asserts various bases for her argument that the order of the trial court should be reversed. First, plaintiff argues that the trial court was unduly influenced by correspondence from defendant's attorney after oral argument. Plaintiff also argues that the court erred in determining the value of defendant's retirement benefits. Third, plaintiff argues that the trial court erred in failing to give her credit for the value of repairs she made to the marital home after the date of separation and the property taxes she paid on the marital home. Plaintiff's fourth argument is that the court erred in its distribution of marital property and failed to support its distribution with sufficient findings of fact. Plaintiff also argues that the trial court erred in assigning marital debts to her that were not supported by sufficient findings of fact. Finally, plaintiff asserts that the trial court failed to make sufficient findings of fact to support its order and judgment. We agree with plaintiff's argument regarding the values the court placed on the parties' vested pension benefits. However, we disagree with plaintiff's other arguments. Therefore, we reverse and remand for re-evaluation of the parties' pension benefits.

[1] Plaintiff's first argument is that the correspondence between defendant's counsel and the trial court unduly influenced the court in favor of defendant. Plaintiff argues that defendant's counsel

violated various Rules of Professional Conduct in sending letters to the trial court after the hearing was completed. We find no merit in plaintiff's argument. The letters concern plaintiff's lack of timely response to the trial court's instructions and defendant's objections to plaintiff's proposed order of distribution. Defendant's counsel always sent copies of his letters to opposing counsel. Although the letters arguably may contain remarks and references that were not absolutely necessary to carry out the court's business, plaintiff has failed to show that these remarks resulted in "undue influence" on the trial court. Additionally, we note that if plaintiff feels that defendant's counsel has violated a Rule of Professional Conduct the appropriate forum for that inquiry is the State Bar.

[2] Plaintiff's second argument is that the trial court erred in failing to place a value on defendant's vested retirement benefits. The trial court found that it was

> unable to make a finding of fact as to the present worth of future expected benefits based upon the evidence presented by the plaintiff. Consequently, the court bases its valuation of retirement benefits on present value and finds as a fact that the plaintiff's vested retirement at Davie County Hospital is valued at $13,951.18 and the value of the defendant's vested retirement at Ingersoll-Rand Company is $.00.

It is clear from the record that the court determined the value of the retirement benefits by using the "withdrawal value" of the parties' vested pensions. Defendant's employer submitted an affidavit to the effect that defendant could not withdraw any sum from his retirement plan prior to retiring. The trial court also used the "withdrawal value" of plaintiff's pension to arrive at its value. We find that the trial court erred in using the "withdrawal value" to determine the respective values of the parties' vested retirement benefits.

G.S. 50-20(b)(1) provides, in pertinent part, that "[m]arital property includes all vested pension, retirement, and other deferred compensation rights. . . ." Our Supreme Court has stated that "both present value and fixed percentage are permissible methods of evaluating pension and retirement benefits in arriving at an equitable distribution of marital property." *Seifert v. Seifert*, 319 N.C. 367, 371, 354 S.E.2d 506, 509, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 790 (1987). We have found no reported case in this jurisdiction where a court has used the "withdrawal value" to deter-

mine the value of vested pension and retirement benefits in an equitable distribution action. We decline to accept this valuation method where, as here, the pension plan does not allow early withdrawal of accumulated monies. We note that there was evidence that defendant's "accrued monthly benefit," calculated as of 1 December 1986, was $312.00. A value of $.00 placed on defendant's right to receive this money in the future does not "reasonably approximate[ ] the net value of the [defendant's] interest." *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).

Defendant argues that, even if the trial court erred in using the "withdrawal value" of the pensions, plaintiff is not prejudiced by the error because both parties' pensions were evaluated using the same method. The facts are to be found by the trial court and we decline to speculate as to the value, determined by either a present value method or fixed percentage of future payments method, of the parties' respective pension and retirement benefits. Therefore, we cannot say plaintiff suffered no prejudice by this error.

[3] Plaintiff's third argument is that the trial court erred in failing to credit her with the value of repairs made to the marital home and payment of property taxes, both paid and coming due after the date of separation. Plaintiff also argues that the trial court erroneously used these payments made by plaintiff as an "offset" against the fair rental value of the house during the period of separation. The basis of plaintiff's argument is finding of fact #9 where the court stated

> any taxes, insurance, repairs and maintenance on the marital home from and after the separation paid for by the plaintiff would be more than offset by the fair rental value of the house which the plaintiff gained the benefit of, and that any repairs to the house that increased its value occurred after the stipulation of value between the parties hereto and consequently the plaintiff would retain the benefit of it by the distribution of the house to her in kind.

Plaintiff argues that this finding effectively awarded to the defendant the fair rental value of the house which is prohibited by *Black v. Black*, 94 N.C. App. 220, 379 S.E.2d 879 (1989). We are unpersuaded by plaintiff's argument. In *Black* this court reiterated that "a trial court may not award rental value of the marital residence for the post-separation period as a part of the equitable distribution

proceeding." *Id.* at 221-22, 379 S.E. 2d at 880. In *Becker v. Becker*, 88 N.C. App. 606, 364 S.E.2d 175 (1988), this court stated that the trial court could consider as a distribution factor exclusive use of the marital home by one party during the period of separation while that party maintained the home and paid taxes and insurance. Here the trial court's finding related to its conclusion that an equal distribution would be equitable. We find no error.

Plaintiff also argues that the trial court erred in its distribution of marital property and that it failed to support its conclusions with sufficient findings of fact. Plaintiff argues that the equal distribution in this case is not equitable. Plaintiff relies on the parties' earning disparity (her salary is almost twice as much as defendant's), her debt burden compared to defendant's, her post-separation expenditures on the marital home and her contention that she contributed more to the marital estate than defendant. These arguments are without merit. The Equitable Distribution Act was enacted to protect the party whose contribution to the marital estate was not necessarily monetary. *See White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). To accept plaintiff's argument here would be contrary to the spirit and letter of the Act.

Plaintiff also argues that the trial court relied on disputed stipulations to make its distribution of the marital property, "stipulations" to which plaintiff never agreed. Specifically, plaintiff asserts that the trial court's finding of fact #11 was in error. The trial court found that

> the parties hereto have stipulated and agreed that each party is to have as their sole and separate property under equitable distribution the following marital property:
>
> TO ANN L. STILLER
>
> (a) House and lot. . . .

All evidence in the record reflects that plaintiff wanted to retain the home and we find no error in the trial court's finding.

Plaintiff argues that the trial court erred in concluding that certain marital debts ought to be assigned to her on the ground that the conclusion was not supported by sufficient findings of fact. Plaintiff asserts that the court improperly assigned debts to her without sufficient findings that the assignment would not impose an "undue hardship" on plaintiff. Plaintiff has cited no authori-

ty to support her argument that the trial court must find that a party is financially able to undertake debt payments without undue hardship before assigning a debt to that party. We are not persuaded and accordingly overrule this assignment of error.

Plaintiff's final argument is that the trial court erred in failing to make sufficient findings of fact to support its order. Plaintiff asserts that there was never a stipulation that she would assume possession of certain properties given the enormous amount of debt she was assigned. The trial court found that an equal distribution of the marital assets and debts would be equitable and made its award on that basis. We find no error in that determination. However, one aspect of the court's order of final distribution is erroneous and for that reason the cause must be remanded. The trial court erred in determining the values of the parties' vested pension and retirement benefits.

Accordingly, the order of the trial court is reversed and remanded for reevaluation of the parties' vested pension benefits and entry of an appropriate equitable distribution order consistent with this opinion.

Reversed and remanded.

Judges PHILLIPS and ORR concur.

STATE OF NORTH CAROLINA v. STEPHON RENEE WILSON

No. 8921SC454

(Filed 3 April 1990)

1. Criminal Law § 425 (NCI4th) — prosecutor's closing argument — failure of alibi witness to appear — beyond evidence

The trial court erred in a prosecution for felonious breaking or entering of a motor vehicle and misdemeanor larceny from a motor vehicle by allowing the prosecutor to argue that an alibi witness for defendant had not appeared because she had not wanted to lie. It was a fact that the witness

had not testified, but it was not a fact that she did not want to testify.

Am Jur 2d, Trial §§ 245, 250.

2. **Criminal Law § 86.3 (NCI3d)— prior convictions—cross-examination—further questions**

The trial court erred in a prosecution for felonious breaking or entering of a motor vehicle and misdemeanor larceny from a vehicle by allowing the prosecutor to cross-examine defendant about a prior conviction for accessory after the fact of armed robbery by asking whether he had had the money and the gun on him after he was arrested. The prosecutor was clearly trying to prejudice defendant by aligning the prior conviction with the current offense, and was not merely trying to determine if defendant's conviction was in reality for a more serious offense.

Am Jur 2d, Evidence § 341.

APPEAL by defendant from *Martin (Lester P.), Judge*. Judgment entered 12 January 1989 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 November 1989.

Defendant was charged under N.C. Gen. Stat. sec. 14-56 with felonious breaking and entering a motor vehicle, and under N.C. Gen. Stat. sec. 14-72 with misdemeanor larceny from a vehicle. Defendant was tried by a jury, convicted of both crimes and received a five-year and two-year sentence, respectively.

At trial, the State's evidence tended to show that on 1 June 1988 at approximately 10:10 a.m., the victim parked her car on Peters Creek Parkway in Winston-Salem, North Carolina, and proceeded to enter a clothing store to return some merchandise. Upon completing the transaction, the victim returned to her car at approximately 10:15 a.m.

The victim opened her car door and placed her purse on the floor behind the driver's seat. Her purse contained twenty-seven dollars, credit cards, a gold pen and pencil, and several other items of personal value. As she was bending down, she saw a black hand reaching for her purse. As she looked up, she saw a black man very close to her looking at her. The man took her purse and ran across the parking lot.

The victim ran after the man but lost sight of him as he ran toward National Drive. The victim then went into Liberty Lincoln-Mercury across the street and called the police. The victim described the suspect to law enforcement officers as a black male, medium build, five feet ten inches tall, with short hair, wearing a light blue shirt and navy shorts.

Officer M. T. Tucker immediately cruised the area looking for a person who fit that description. Within a few minutes, Officer Tucker observed a suspect fitting that description at an apartment complex on Hutton Street, less than a half mile away. After speaking with the suspect, who was later identified as Stephon Renee Wilson, the defendant in this action, Officer J. P. Davis brought the victim to the apartment complex. The victim observed the suspect for several minutes and identified him as the man who stole her purse. After the victim made the identification, the police searched defendant's apartment and found no incriminating evidence. The victim identified the same person at trial as the defendant.

Defendant and his wife testified at trial that they were in their apartment the entire morning. They stated that they were awakened at approximately 9:35 a.m. by Cynthia Caldwell and someone named "Vertie," who stayed about an hour. Defendant's attorney made several attempts to subpoena Ms. Caldwell to testify as an alibi witness for defendant, but she was not located.

The trial court denied defendant's motion for a continuance to locate the alibi witness and proceeded with the trial. At trial, defendant's wife testified as an alibi witness. Willie Wall also testified for defendant and alleged that he saw a man named Darryl Roseboro with the victim's purse shortly after the theft incident. Mr. Roseboro also generally fit defendant's description.

Mr. Roseboro testified at trial that he did not take the victim's purse. The victim did not waiver from her identification that defendant was the person who stole her purse. Benjamin Dease, an employee of Liberty Lincoln-Mercury, testified that he saw defendant walk by Liberty between 9:00 a.m. and 10:00 a.m. on the morning of 1 June 1988.

After closing arguments, the jury deliberated and convicted defendant of felonious breaking and entering a motor vehicle and misdemeanor larceny. From this conviction and judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Elisha H. Bunting, Jr., for the State.

Wilson, DeGraw, Johnson & Rutledge, by Dean B. Rutledge, for defendant-appellant.

ORR, Judge.

Defendant brings forward five assignments of error for which he maintains a new trial is required. We agree for the reasons set forth below and find that defendant is entitled to a new trial.

[1] Defendant argues that the trial court impermissibly overruled defendant's objection to the prosecutor's jury argument about Cynthia Caldwell's absence as an alibi witness.

In his closing remarks, the prosecutor stated that defendant's two alibi witnesses (other than his wife), Cynthia Caldwell and "Vertie," did not testify for defendant because they did not want to lie. The prosecutor stated:

> Account even from the defendant's own mouth and his wife's own mouth, there would only be two people, two people that could account for him on that morning. Cynthia Caldwell and somebody named Vertie. And did they come in here and put their hand on the Bible and tell you that? No, they didn't. And I submit to you they didn't for one reason because they couldn't do it. They didn't want to lie.

Defendant objected on the basis that the statement was unfair and exceeded the bounds of propriety. Defendant previously testified that Ms. Caldwell did not testify because she was unable to be located after numerous attempts to do so.

Closing arguments are left usually to the discretion of the trial court, and counsel must be permitted wide latitude. *State v. King*, 299 N.C. 707, 712, 264 S.E.2d 40, 44 (1980) (citations omitted). Both sides are permitted to argue to the jury the law and facts in evidence and all reasonable inferences therefrom. *Id.* (citations omitted). Counsel may not argue incompetent and prejudicial matters and "may not 'travel outside the record' by injecting into his argument facts of his own knowledge or other facts not included in the evidence." *Id.* at 712-13, 264 S.E.2d at 44 (citations omitted). *See also* N.C. Gen. Stat. sec. 15A-1230(a).

In the case before us, both defendant and his wife testified that they were in their apartment during the period of time in which the crime occurred. The prosecutor, on cross-examination, questioned defendant and his wife about Cynthia Caldwell and "Vertie." Defendant testified that he had tried to get in touch with Ms. Caldwell "numerous of [sic] times, . . . did every possible thing I could to get her in here," and that "[s]he knew she had to come [to court]."

The prosecutor then asked defendant if he asked Ms. Caldwell to come to court and testify that defendant was at his apartment on the morning of 1 June 1988. Defendant replied affirmatively, and the prosecutor then pointed out to defendant that Ms. Caldwell was not present. In his closing argument, the prosecutor stated in a conclusive manner that the only reason Ms. Caldwell and "Vertie" did not testify for defendant was because they did not want to lie for him.

We hold that this was an impermissible argument to the jury. The prosecutor was arguing a fact not in evidence. It is a fact that Ms. Caldwell did not testify for defendant. It is not a fact that she did not *want* to testify for him. Moreover, while our State allows a prosecutor to argue to a jury "defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State," *State v. Howard*, 320 N.C. 718, 728, 360 S.E.2d 790, 796 (1987) (citations omitted), we find that the prosecutor's arguments in the case before us went beyond arguing that defendant failed to produce exculpatory evidence. In our case, the prosecutor argued that defendant failed to produce his alibi witnesses *because* the witnesses did not want to lie.

[2] Defendant further argues that the trial court erred in allowing the prosecutor to cross-examine defendant about a prior conviction and cross-examine defendant's wife concerning defendant's affidavit of indigence.

On cross-examination, defendant testified as follows:

Q. All right. Records show on July 6, 1987, you were convicted of accessory after the fact of armed robbery?

A. I was convicted of that, yes.

. . .

Q. And when you were arrested on the robbery charge, did you have the money on you then?

. . .

MR. RUTLEDGE: Objection, Your Honor, has no relevance at all to this case.

MR. SAUNDERS: Does so, Your Honor.

THE COURT: Overruled.

. . .

Q. Did you have the money on you then?

A. I had some of it.

Q. Did you have the gun on you?

A. No sir, I didn't.

For impeachment purposes, any witness, including a defendant, may be cross-examined concerning prior convictions. N.C. Gen. Stat. sec. 8C-1, Rule 609(a); *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977) (citations omitted), *abrogation recognized by, State v. Harrison*, 90 N.C. App. 629, 360 S.E.2d 624 (1988). *See also State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984). If a conviction is established, the witness may be questioned further concerning the time and place of the conviction and the punishment imposed. *Id.* (citation omitted). "Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached . . . [because such details] unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial. . . ." *Id.*

Any inquiry that exceeds these bounds is reversible error. *State v. Greenhill*, 66 N.C. App. 719, 311 S.E.2d 641 (1984); *State v. Bryant*, 56 N.C. App. 734, 289 S.E.2d 630 (1982). We hold that the prosecutor exceeded these bounds, and the trial court committed reversible error by allowing this line of questioning. The record is clear that when the prosecutor asked defendant if he had the money or the gun on him, the prosecutor was trying to prejudice the jury by aligning the prior conviction with the current offense.

The State's reliance on *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E.2d 582 (1986), is misplaced. In *Rathbone*, this Court held that it is

not error for a prosecutor to question a defendant about details of a prior conviction when the questions are no more than an inquiry into whether the conviction was for a more serious offense. *Id.* at 64, 336 S.E.2d at 705. We find that the prosecutor's questions in the case *sub judice* were not merely to determine if defendant's conviction, in reality, was for a more serious offense. It is clear to this Court that the prosecutor's questions had the potential to prejudice the jury and harass the witness. Moreover, we are unable to conclude that this evidence was not prejudicial to defendant. The evidence at trial was frequently controverted, and the credibility of the witnesses was crucial to the determination of defendant's guilt.

Because we hold that the trial court committed reversible error on the above grounds, we need not reach defendant's remaining assignments of error.

New trial.

Judges EAGLES and PARKER concur.

IN THE MATTER OF: MEGAN MICHELLE McMAHON, A MINOR CHILD

No. 8918DC804

(Filed 3 April 1990)

Parent and Child § 1.6 (NCI3d)— termination of parental rights—grounds—best interests of child—sufficiency of evidence

Clear, cogent, and convincing evidence existed to support the trial court's conclusion that substantial grounds existed for the termination of parental rights and that termination of parental rights was in the best interests of the child where the evidence tended to show that respondent never made any child support payments, though he was employed and supported his new family; there were no visits between the child and respondent during the year preceding the filing of the petition and no gifts or other acknowledgements from respondent from the time the parents separated; respondent never pursued any of his statutory options to enforce his visitation rights through the court system; and the child's guardian ad

litem testified that termination was in the best interests of the child. N.C.G.S. § 7A-289.32(5), (8).

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

Judge COZORT dissenting.

APPEAL by respondent from a judgment entered, *nunc pro tunc*, 5 April 1989 by *Judge Sherry Alloway* in GUILFORD County District Court. Heard in the Court of Appeals 8 February 1990.

Petitioner and respondent are the parents of Megan Michelle McMahon. The child was born on 28 April 1982. The parents were divorced in 1985. Both parents have remarried.

On 2 February 1988, the child's mother, Suzanne Beasley, served the respondent with a petition to terminate his parental rights, alleging that the respondent father, Robert Lewis McMahon, had willfully failed and refused to pay for the care, support and education of their child for more than one year next preceding the filing of the petition. Petitioner further alleged that respondent willfully abandoned the minor child for at least six months next preceding the filing of the petition. On 18 February 1988, respondent filed a handwritten response opposing the proceeding and requesting appointed counsel. Counsel for the respondent was appointed and the case was heard on 20 December 1988 and reconvened and concluded on 4 January 1989 before Judge Alloway. The District Court's order, filed 6 April 1989, terminated respondent's parental rights in the minor child. It is from this judgment that respondent appeals.

Walker, Warren, Blackmon, Younce, Dowda, White, Cooke & Tisdale, by D. Lamar Dowda, for appellee Suzanne Beasley.

Booth, Harrington, Johns & Campbell, by David B. Puryear, Jr. and Margaret Robison Kantlehner, for respondent-appellant, Robert Lewis McMahon, Jr.

Rivenbark, Kirkman, Alspaugh & Moore, by Douglas E. Moore, for guardian ad litem-appellee.

LEWIS, Judge.

Petitioner alleged and proved in the trial court that respondent's parental rights should be terminated on the grounds of willful abandonment and nonpayment of support. Respondent appeals argu-

ing that the findings and conclusions are not supported by the evidence.

G.S. 7A-289.30(e) sets forth the appropriate standard of proof in termination of parental rights proceedings: "All findings of fact shall be based on clear, cogent, and convincing evidence. . . ." This intermediate standard is greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases. *In re Montgomery*, 311 N.C. 101, 109-110, 316 S.E.2d 246, 252 (1984) (*citing, Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed. 2d 599 (1982)). Since this case involves a higher evidentiary standard, we must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and that the findings support the conclusions of law. *Id.* at 111, 316 S.E.2d 253.

Under the requirements of Chapter 7A, the trial court must make a two-step inquiry. First, it must consider whether substantial grounds exist for the termination of parental rights. Upon that finding, the court must as a second inquiry determine whether the termination of parental rights is in the best interest of the child. G.S. 7A-289.31(a) and (b). We first address whether the trial court's findings support a conclusion that substantial grounds exist for the termination of respondent's parental rights.

I. Substantial Grounds

G.S. 7A-289.32 lists the grounds upon which parental rights may be terminated; of these, numbers (5) and (8) are pertinent:

> *Grounds for terminating parental rights.* The court may terminate the parental rights upon a finding of one or more of the following:
>
> (5) 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. . . .

(8) The parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. . . .

G.S. 7A-289.32.

The respondent first argues that the trial court erred in its finding of fact number five which states:

(5) That on October 17, 1988 *nunc pro tunc* to April 5, 1988, the Honorable Robert E. Bencini, Jr. entered an order at the request of the guardian Ad Litem and the consent of the petitioner setting forth a meeting between the petitioner, respondent and minor child and a six month visitation schedule between the minor child and respondent. Said order also provided for the respondent to pay child support at the rate of $40.00 per week for the use and benefit of the minor child. Although the respondent visited with the minor child under the supervision of the guardian Ad Litem, the respondent paid no child support as ordered during this time. There was some confusion in the order in that the order referred to Ms. McMahon as "Ms. Lewis" but there was no follow through on anyone's part as to the wage withholding being sent to the hospital and the respondent made no attempts to make child support payments as directed and made no attempt to correct the error.

After carefully reviewing the trial transcript, we find that this finding is supported by the evidence. Respondent himself never made any child support payments. Although the respondent's second wife testified that she made some phone calls about the withholding of support payments out of her paycheck, there is no evidence documenting these calls, and respondent never attempted to make payments directly to the guardian ad litem, or the Clerk of Court or inquired as to what to do.

The respondent further asserts that the trial court erred in its finding of fact number seven which states that

substantial grounds exists for the termination of parental rights in this case . . . in that the respondent has willfully failed and refused to pay for the care, support and education of the minor child for more than one year next preceding the filing of the petition in this case.

We find ample evidence to support the court's findings. Evidence at trial showed that the respondent was employed during the one year preceding the filing of the petition as a construction worker at the Adams' Farm complex and then for J.H. Allen Construction on a project. Furthermore, the respondent testified that during this period he was contributing to the support of his stepchild and his new wife. The respondent made no showing that he made any support payments for his own child during this time period. His only offering on this point was that he was suffering from Post Traumatic Stress Disorder (PTSD) which kept him from maintaining steady employment. However, respondent did admit that even while he was suffering from this disorder, he did maintain various jobs during the relevant time period and he still contributed to the support of his new family. We find that there was sufficient evidence to support the trial court's findings, and they are binding upon us on appeal, even though there may be some evidence contra. *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 655, 273 S.E.2d 268, 273 (1981).

Because we find that these findings are supported by clear, cogent and convincing evidence, the trial court did not err in concluding that substantial grounds exist for the termination of parental rights.

We now address the exceptions assigned by respondent to the findings of the trial court that termination of respondent's parental rights was in the best interest of the child.

II. Best Interest

G.S. 7A-289.31(a), which governs the disposition stage of a termination proceeding, provides:

> (a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

G.S. 71-239.31(a). This statute gives the trial court discretion not to terminate rights where it concludes that termination is not in the best interest of the child. Here the trial court concluded that it was in the best interest of the child to terminate respondent's rights. It based this conclusion on the respondent's above discussed

failure to support the child as required in his court order and on respondent's

> willful lack of contact with the minor child since the separation of the petitioner and respondent . . . The respondent alleges that the reason he did not visit the minor child was because he did not know the whereabouts of the minor child although the petitioner never left the city of Greensboro. The court finds that the respondent made very little effort to discover the whereabouts of the minor child since the petitioner's address was on file with this court in her pending action against the respondent for non-support. . . .

We find that the evidence supports the above findings. Petitioner testified that there had been no visits in 1987 between the child and the child's father. She could not recall any birthday presents, Christmas presents, or Father's Day acknowledgements from respondent since the date of separation with the exception of dropping off gifts to the child's maternal grandmother's home in December of 1987. The respondent argues that he has made numerous efforts to see his daughter but was unable to locate her whereabouts. However, petitioner's address was on file with the court. Furthermore, respondent admitted that he never pursued any of his statutory options to enforce his visitation rights through the court system. Lastly, we find it significant that the child's Guardian Ad Litem testified that termination was in the best interest of the child. We find that the evidence supports the lower court's findings.

We hold the findings of fact are supported by clear, cogent, convincing and competent evidence. They are, therefore, conclusive upon appeal. The findings support the conclusions of law and the judgment entered.

The judgment of the trial court is

Affirmed.

Judge WELLS concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I do not agree with the majority's conclusion that the trial court's findings of fact relating to grounds for termination of parental rights are supported by clear, cogent, and convincing evidence.

The only ground for termination relied upon by the trial court is that the respondent willfully failed without justification to pay for the care, support, and education of the minor child for more than one year next preceding the filing of the petition in this case. *See* N.C. Gen. Stat. § 7A-289.32(5) (1989). In arriving at that ultimate finding of fact, the trial court also found that "the respondent has supplied no support for the minor child since October of 1986 although he has been substantially employed and had the ability to pay." I do not find clear, cogent, and convincing evidence to support that key finding of fact.

The petition for termination of parental rights was filed in January of 1988. Therefore, under the statutes, the pertinent time period regarding respondent's ability to pay is for calendar year 1987. The petitioner testified that she did not know anything about respondent's work status.

The petitioner called the respondent as an adverse witness and attempted to elicit testimony from the respondent about his employment history and his ability to pay. When asked about his failure to pay child support during the relevant time period, petitioner testified that he had been involved with alcohol and drugs and was unable to keep a job. (He testified that he had worked at Adams Farm, a construction project in Guilford County. When asked whether he worked there the full year, he first testified that he had worked during the summer. He could not remember specific dates. He then testified about having worked for another construction company; however, he could not remember what dates he was employed. Petitioner's counsel then asked respondent again about his work in 1987: "From January 1 of '87, up until shortly after you talked with Ms. Hatley in this case, and that would be 1988, you were employed at the places you told me about?" The respondent answered: "I think so. To the best I can remember, I think so."

Respondent then testified that the reason for his alcohol and drug abuse was that he suffered from post-traumatic stress syndrome. On cross-examination, he was asked why he got behind

on his support payments in 1987. The respondent stated: "I just —I got behind. I couldn't work. The pressure got to me." When asked how many jobs respondent had in 1987, he stated: "Just a ballpark figure, and I don't know if this would be true, I'd say five—one." Upon examination by the attorney for the guardian ad litem, respondent stated that he had not filed a tax return for 1987 and did not know the gross amount of money he earned for that year.

The respondent's current wife testified that she married the respondent in February of 1986. She further testified that the respondent did not work for most of 1987, although he tried to work.

There was no further evidence about respondent's employment during 1987 or his ability to pay during that year.

A fair reading of the record and the transcript below shows that respondent is a war veteran suffering from post-traumatic stress syndrome which has led to a dependency on alcohol and drugs which has further led to an inability to maintain steady employment. At the hearing below, the respondent was obviously confused and was unable to give accurate testimony about his employment and his wages earned during 1987. The petitioner, who has the burden of proof, never presented any evidence of any amount of wages earned by the respondent. It would be sheer speculation to state that he had the ability to pay when there is no evidence of whether he earned $10, $1,000, or $10,000 for the year in question.

This case is factually distinguishable from the recent case of *In re Roberson*, 97 N.C. App. 277, 387 S.E.2d 668 (1990). In rejecting respondent's contention in that case that his failure to pay child support was not willful, this Court noted that the respondent "was continuously employed and earning between $1,300 and $1,700 a month during the relevant statutory time period . . . ." *Id.* at 281, 387 S.E.2d at 670. No such evidence exists in this case.

I vote to reverse the trial court's order terminating parental rights because I think petitioner has failed to meet her burden of proof.

GENEVA N. RUCKER v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA, AND FIRST UNION CORPORATION

No. 8921SC352

(Filed 3 April 1990)

1. **Master and Servant § 10.2 (NCI3d)— discharge of employee —employment manual—not part of contract**

The trial court did not err by granting defendants' motion for dismissal of plaintiff's claim for wrongful discharge where plaintiff contended that defendants' issuance of two employee handbooks created a unilateral contract between the parties and removed plaintiff from the status of an at-will employee, but plaintiff did not receive the first of the manuals until she had worked for defendants for almost five and one-half years; plaintiff does not allege nor was there any evidence that the manuals were expressly included in any employment contract; and plaintiff did not allege that she had signed a statement that she had read the policy manual or had taken some other step which would evidence that the manuals were expressly included in her employment contract; and applying a unilateral contract analysis to the issue of wrongful discharge would in effect abandon the at-will doctrine.

Am Jur 2d, Master and Servant §§ 32, 48.3.

2. **Master and Servant § 10.2 (NCI3d)— wrongful discharge— misrepresentation of employment manual—not part of employment contract**

The trial court did not err by dismissing plaintiff's claim for punitive damages based on alleged misrepresentation of the terms of employment manuals where the manuals were not expressly included in plaintiff's employment contract and could not be considered part of plaintiff's employment contract.

Am Jur 2d, Master and Servant §§ 32, 48.3.

3. **Master and Servant § 10.2 (NCI3d)— wrongful discharge— vacation pay**

The trial court erred in dismissing plaintiff's claim for vacation pay following her dismissal where plaintiff stated a prima facie claim by alleging that she was not terminated for cause and that defendants' employment manual entitled

her to compensation for unused vacation time. Furthermore, this claim is not preempted by federal law. N.C.G.S. § 95-25.12.

Am Jur 2d, Master and Servant § 80.

4. Master and Servant § 10.2 (NCI3d)— wrongful discharge—severance pay—claim preempted by ERISA

A claim for severance pay was properly dismissed because the Fourth Circuit Court of Appeals has specifically held that N.C.G.S. § 95-25.7 is preempted by ERISA.

Am Jur 2d, Master and Servant § 81.

APPEAL by plaintiff from judgment entered 15 December 1988 by *Judge Thomas W. Ross* in FORSYTH County Superior Court. Heard in the Court of Appeals 17 October 1989.

Plaintiff, Geneva N. Rucker, was employed by defendants, First Union National Bank and First Union Corporation ("First Union") from 6 September 1978 until her termination on 12 June 1987. On 6 September 1988 she brought this action against her former employers for compensatory and punitive damages alleging (1) failure to pay vacation and severance pay; (2) breach of contract; (3) negligence and negligent misrepresentation; and (4) intentional and fraudulent misrepresentation. On 5 October defendants moved to dismiss all of plaintiff's claims pursuant to G.S. sec. 1A-1, Rule 12(b)(6). On 6 December plaintiff amended her complaint to include an alternative claim for vacation and severance pay pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. sec. 1001 *et seq.*

After a hearing the trial court granted defendant's motion to dismiss all of plaintiff's claims except her claim for vacation and severance pay pursuant to ERISA. The court certified the order as a final judgment from which appeal may be taken, there being no just reason for delay. Plaintiff appealed to this Court in apt time.

Morgan & Morgan, by J. Griffin Morgan and J. Kevin Morton, and North Carolina Academy of Trial Lawyers, by J. Wilson Parker and Deborah Leonard Parker, for plaintiff-appellant.

Smith, Currie & Hancock, by J. Thomas Kilpatrick and R. Steve Ensor, and Petree Stockton and Robinson, by W. R. Loftis, Jr. and Penni P. Bradshaw, for defendant-appellees.

JOHNSON, Judge.

Plaintiff's complaint alleges the following: During the years she worked for First Union, plaintiff received praise from her supervisors and was promoted to the position of teller supervisor. On 12 June 1987, she was told that she was being discharged for failing to check the night depository on 17 April 1987. Prior to the next business day following 17 April 1987, approximately $22,000 had been taken from the depository. All employees, including plaintiff, were cleared of any involvement in the theft. Plaintiff received no prior warning or disciplinary action before her termination. Also, she alleges she had never previously been told to check the night depository. Plaintiff contends that a memo circulated ten days after her dismissal made it clear that it had not been part of her duties.

Plaintiff alleges that she has been unable to find similar work since her discharge, and that the termination has caused her to lose substantial income and fringe benefits and suffer extreme mental distress.

[1] In this appeal plaintiff recognizes that North Carolina adheres to the doctrine that, in the absence of an employment contract for a definite time period, both employer and employee are generally free to terminate their association at any time and without any reason. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). She admits that she was not working under an employment contract for a definite period of time, but contends that defendants' issuance of two employee handbooks to plaintiff, one in January, 1984 and a second in March, 1987, created a unilateral contract between the parties and removed plaintiff from the status of an "at-will" employee.

It is well settled in North Carolina that "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 81, 370 S.E.2d 605, 608, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988), *quoting Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). In the case *sub judice* plaintiff did not receive the first of her employment manuals until she had already worked for defendants for almost five and one-half years. Plaintiff does not allege nor is there evidence that the employment manuals were expressly included in any employment contract. Therefore,

the manuals may not be relied on by plaintiff as being part of, or creating, an employment contract. *Id.* This case is distinguishable on its facts from the situation in *Trought v. Richardson*, 78 N.C. App. 758, 338 S.E.2d 617, *disc. rev. denied*, 316 N.C. 557, 344 S.E.2d 18 (1986), in which this Court held that the discharged plaintiff-employee sufficiently alleged that a policy manual was part of her employment contract to withstand the employer's Rule 12(b)(6) motion. In *Trought* the plaintiff alleged that she was required to sign a statement that she had read the employer's policy manual when she was hired. In the instant case, plaintiff does not allege that she signed such a statement or took some other step which would be evidence that the manuals were expressly included in her employment contract. We therefore must conclude that the manuals were not part of plaintiff's contract and she may not legally rely upon them for relief.

Plaintiff argues essentially that we should not have to find that the manuals were expressly included in an employment contract because, she contends, her continued employment after distribution of the handbooks created a unilateral contract which bound defendants to the terms of the manuals. In support of this argument, she cites cases in which a unilateral contract analysis has been either implicitly or expressly recognized in North Carolina cases relating to various types of employment benefits. *Morton v. Thornton*, 257 N.C. 259, 125 S.E.2d 464 (1962) (unpaid wages); *Roberts v. Mays Mills*, 184 N.C. 406, 114 S.E.2d 530 (1922) (bonus); *Welsh v. Northern Telecom, Inc.*, 85 N.C. App. 281, 354 S.E.2d 746, *disc. rev. denied*, 320 N.C. 638, 360 S.E.2d 107 (1987) (vacation and retirement benefits); *Brooks v. Carolina Telephone*, 56 N.C. App. 801, 290 S.E.2d 370 (1982) (severance payments). We decline to apply a unilateral contract analysis to the issue of wrongful discharge. This Court has previously distinguished between issues of benefits or compensation earned during employment and the issue of an employee entitlement to continued employment. *Id.* The former addresses earned benefits, while the latter concerns a future benefit not yet earned. Further, to apply a unilateral contract analysis to the situation before us would, in effect, require us to abandon the "at-will" doctrine which is the law in this State. This we cannot do. We find no error in the trial court's granting defendants' motion for dismissal as it concerns plaintiff's claim for wrongful discharge.

[2] We turn now to plaintiff's appeal of the trial court's denial of her claims for relief based on negligence, negligent misrepresentation, intentional misrepresentation, and fraudulent misrepresentation. Each of these tort claims involves allegations that defendants misrepresented the terms of the employment manuals, and that defendants failed to follow the policies set forth in the manuals. We have concluded above that the employment manuals cannot be considered part of plaintiff's employment contract since they were not expressly included in it. *Walker v. Westinghouse, supra.* Therefore, plaintiff cannot establish a legal claim to having been mislead based on the manuals. *Id.* We find no error in the dismissal of plaintiff's tort claims. Because we find plaintiff has no cognizable tort claims, we must also conclude that the trial court was correct in dismissing her claim for punitive damages.

[3] Last, we address plaintiff's argument that the trial court erred in dismissing her claims for vacation pay and severance pay pursuant to G.S. sec. 95-25.1 *et seq.* Plaintiff alleges in her brief that she was not discharged for cause, and that at the time of her termination she had accumulated unused vacation time under First Union's vacation policy. Pursuant to defendants' manual, an employee not dismissed for cause is entitled to compensation for unused vacation time. Also, G.S. sec. 95-25.12, entitled "Vacation pay," provides that

> if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss of forfeiture.

Therefore, by alleging that she was not terminated for cause and the terms of the manual concerning vacation pay, plaintiff has stated a *prima facie* claim for vacation pay. Further, as defendants properly concede, this claim is not preempted by federal law, the United States Supreme Court having recently held that an employer's policy of paying discharged employees vacation pay for unused vacation time does not constitute an "employee welfare benefit plan" within the meaning of the Employment Retirement Income and Security Act of 1974 (ERISA), as amended, 29 U.S.C. sec. 1001 *et seq. Massachusetts v. Morash,* --- U.S. ---, 104 L.Ed.2d 98

(1989). We therefore reverse the trial court's dismissal of plaintiff's statutory claim for vacation pay.

[4] The Fourth Circuit Court of Appeals has specifically held that G.S. sec. 95-25.7, which concerns severance pay, is preempted by ERISA. *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *affirmed, Brooks v. Burlington Industries, Inc.*, 477 U.S. 901, 91 L.Ed.2d 559 (1986). Therefore, the trial court did not err in dismissing plaintiff's claim pursuant to G.S. sec. 95-25.7 for severance pay.

In sum, we affirm the trial court's dismissal of plaintiff's actions for breach of contract, negligence and negligent misrepresentation, intentional and fraudulent misrepresentation, and plaintiff's state statutory claim for severance pay. We reverse the trial court's dismissal of plaintiff's state claim for vacation pay. Plaintiff's alternative claims for vacation and severance pay pursuant to ERISA are unaffected by this opinion and remain viable causes of action.

Affirmed in part; reversed in part.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. ALFRED RAY VANCE

No. 8921SC705

(Filed 3 April 1990)

1. Automobiles and Other Vehicles § 113.1; Homicide § 21.7 (NCI3d)— death in auto accident—intoxicated defendant—identity of defendant as driver—sufficiency of evidence of second degree murder

In a prosecution of defendant for second degree murder, evidence was sufficient to prove that defendant was driving the vehicle at the time of the accident, to prove that defendant was at fault in causing the collision, and to give rise to a legitimate inference of malice where the evidence tended to show that the car involved in the accident was defendant's car to drive; defendant was driving when he and another person left a friend's house only 15 minutes before the collision

occurred; the passenger side of defendant's car had the most extensive damage and defendant's companion rather than defendant was thrown from the vehicle and died from injuries sustained in the crash; defendant's blood alcohol level was still over the legal limit two and one-half hours after the time of the accident; the point of impact was in the westbound lane, while defendant had been traveling east; there was a strong smell of alcohol noticed on defendant's breath at the scene of the accident; and defendant drove his vehicle while intoxicated, at night, and at a high rate of speed.

Am Jur 2d, Automobiles and Highway Traffic §§ 338, 383, 384.

2. **Automobiles and Other Vehicles § 113.1; Homicide § 21.7 (NCI3d) — death resulting from injuries in auto accident — year and a day rule inapplicable**

In a prosecution for second degree murder arising from an automobile accident where the victim did not die until fourteen months after the accident, the "year and a day" rule did not require dismissal of the case against defendant, since the evidence in this case was sufficient to support the conclusion that the victim's death was the proximate result of injuries he received in the collision.

Am Jur 2d, Homicide § 14.

3. **Criminal Law § 1189 (NCI4th) — sentence aggravated for prior convictions — joinable offenses not included**

There was no merit to defendant's contention that the trial court erred by aggravating defendant's sentence for second degree murder on the basis of prior convictions for joinable offenses for which defendant had been sentenced previously, since defendant's prior convictions for breaking and entering, larceny, carrying a concealed weapon, and possession of stolen goods supported the trial judge's finding of an aggravating factor for sentencing purposes.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554.

4. **Criminal Law § 1079 (NCI4th) — defendant sentenced to greater than presumptive term — aggravating and mitigating factors properly considered**

There was no merit to defendant's contention that the trial court considered improper factors in sentencing defendant

to greater than the presumptive term for second degree murder where the trial judge properly found one aggravating factor and no mitigating factors, and then imposed a sentence only five years greater than the presumptive term but thirty years less than the maximum term for second degree murder.

Am Jur 2d, Criminal Law §§ 598, 599; Homicide §§ 552, 554.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 2 February 1988 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 February 1990.

Defendant was charged in a proper bill of indictment with second degree murder in violation of G.S. 14-17 for the death of Lanny Lee Bradley. Evidence presented at trial tends to show the following:

At approximately 5:00 p.m. on 10 March 1987, defendant drove his 1974 Chevrolet Nova to the Friendly Inn on Old Lexington Road. Accompanying defendant were Bobby Lee Jarvis and Bobby Caddell. While at the Friendly Inn, defendant had at least three to four beers. At about 11:45 p.m., with defendant driving, the three men left the Friendly Inn and took Bobby Lee Jarvis to his home one and one-half miles away. About five minutes after arriving at Jarvis' home, defendant and Caddell left in defendant's car to take Caddell to a trailer park off of Union Cross Road where he planned to spend the night. After going approximately four and one-half miles, defendant and Caddell were traveling east on Union Cross Road when they collided with a Datsun pick-up truck in the westbound lane. The force of the impact tore the Nova into two pieces with the front section (occupied by defendant) traveling approximately 170 feet beyond the point of impact.

Where the two vehicles collided Union Cross Road is a paved two-lane rural highway running east and west. The point of impact was in the middle of a no passing zone, and the speed limit there is posted at 55 miles per hour. Proceeding from west to east, the section of Union Cross Road where the accident took place begins with a hillcrest immediately followed by a slight bend to the left and then a straightaway and another bend to the left. Black marks about 188 feet long were left on the road by the Nova beginning just over the hillcrest and extending through the bend to the left up to the point of impact. The Datsun left black marks about 49 feet long ending at the point of impact. Although

the weather was cloudy at the time of the accident, there had been no rain, and the road surface was dry. As a result of the collision, the passenger's side of the front half of the Nova was caved in, and Bobby Caddell's body was thrown from the vehicle. Defendant was discovered lying on the inside roof of the overturned Nova by Deputy Sheriff L. E. Gordon at approximately 12:15 a.m. Gordon helped defendant from the vehicle, wrapped him in a blanket, and told him to sit tight and be calm. When defendant spoke, Officer Gordon noticed a strong smell of alcohol on his breath. While Gordon was checking on the occupants of the Datsun, defendant left the scene of the accident and hitched a ride to his mother's home. Shortly after 1:00 a.m., defendant was taken by ambulance from his mother's house to the hospital. When defendant was questioned at the hospital about what happened he responded, "I guess [I'm here] because I had a wreck." At approximately 2:30 a.m. (two and one-half hours after the collision), a sample of defendant's blood was taken indicating a blood alcohol level of 0.104 grams per 100 milliliters.

As a result of the collision, Bobby Caddell and Nancy Bradley (the passenger in the Datsun) died. Lanny Lee Bradley (driver of the Datsun) sustained injuries which eventually led to his death on 3 May 1988. Defendant was convicted of second degree murder for the death of Mr. Bradley. From a judgment imposing a prison sentence of 20 years, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

Assistant Appellate Defender Constance H. Everhart for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant assigns as error the denial of his motions to dismiss at the close of the evidence. He argues that "the evidence was insufficient, as a matter of law, to support all of the elements necessary to a conviction" for second degree murder. Defendant claims the evidence presented at trial was legally insufficient to 1) prove that defendant was driving the Chevrolet Nova at the time of the accident, 2) prove that defendant was at fault in causing the collision, and 3) give rise to a legitimate inference of malice. We disagree.

In ruling on a motion to dismiss for insufficiency of the evidence in a criminal action, "all of the evidence favorable to the State . . . must be deemed true and considered in the light most favorable." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977). Furthermore, any "discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom." *Id.* Evidence presented in the case before us tends to show 1) the car involved in the accident was defendant's car to drive, 2) defendant was driving the car when he and Bobby Caddell left Bobby Lee Jarvis' house only 15 minutes before the collision occurred, and 3) the passenger side of the Nova had the most extensive damage and Bobby Caddell, rather than defendant, was thrown from the vehicle and died from injuries sustained in the crash. Such evidence was sufficient to give rise to an inference that defendant was driving the Nova at the time of the collision. Evidence in the record also supports the inference that defendant was at fault regarding the collision in that 1) his blood alcohol level was still over the legal limit two and one-half hours after the time of the accident, 2) the point of impact was in the westbound lane where defendant had been traveling east, and 3) there was a strong smell of alcohol noticed on defendant's breath at the scene of the accident. With respect to the existence of malice in the present case, defendant's argument again has no merit. In legal terms, "malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse [which demonstrates] . . . a willful disregard of the rights of others." *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978) (*quoting State v. Wrenn*, 279 N.C. 676, 686, 185 S.E.2d 129, 135 (1971) (Sharp, J., dissenting)). The evidence presented suggests that defendant drove his vehicle while intoxicated, at night, and at a high rate of speed. Such evidence is sufficient to support the inference that defendant acted with a "willful disregard of the rights of others."

[2] Defendant next argues that the common law "year and a day rule" required dismissal of the case against him. He relies on *State v. Hefler*, 310 N.C. 135, 310 S.E.2d 310 (1984), as support for the proposition that the "year and a day rule" still applies to murder cases. The Court in *Hefler* declined to extend the rule to bar prosecution for manslaughter but expressed no opinion as to its application in murder prosecutions. Defendant therefore concludes

that the rule still applies in cases like the one now before this Court. The common law "year and a day rule" purports to bar a prosecution for a person's death where death actually occurs more than a year and a day after the time of the injuries inflicted by the defendant. The rationale for this rule was that causation was less certain when the victim's death occurred so long after the defendant's act or omission. *Id.* In the present case, however, there was sufficient evidence to support the conclusion that Lanny Lee Bradley's death was the proximate result of injuries he received in the collision on 11 March 1987. Consequently, defendant's assignment of error is overruled.

Defendant further contends that the trial court erred "in instructing the jury on flight, because the instruction was not supported by the evidence and constituted an improper and prejudicial expression of opinion regarding the evidence." Nevertheless, defendant did not object to the instruction at trial. Thus, he cannot now raise the question for the first time on appeal. This assignment of error has no merit.

[3] Defendant also complains the trial court erred at sentencing by "aggravating defendant's sentence on the basis of prior convictions . . . for joinable offenses for which defendant had been sentenced previously and offenses which did not tend to increase defendant's culpability for this crime." We disagree. At the sentencing hearing, the Assistant District Attorney, while addressing the subject of aggravating factors, informed the trial judge that defendant had been convicted and sentenced for the deaths of Nancy Bradley and Bobby Caddell. Nevertheless, "it is presumed that a trial judge, when sitting as a fact finder, is able to and does sift through the evidence presented, considering only that which is competent, and discarding the rest." *Ayden Tractors v. Gaskins*, 61 N.C. App. 654, 661-62, 301 S.E.2d 523, 528 (1983). In addition to the convictions for joinable offenses, defendant had prior convictions for breaking and entering, larceny, carrying a concealed weapon, and possession of stolen goods. These convictions support the trial judge's finding of an aggravating factor for sentencing purposes. Consequently, defendant's argument has no merit.

[4] Finally, defendant argues that the trial court considered improper factors in sentencing defendant to greater than the presumptive term for second degree murder. The record, however, does not support defendant's contention. Although the trial judge ex-

pressed his frustration with the difficulty of arriving at a just sentence, he properly found one aggravating factor and no mitigating factors. He then imposed a sentence only five years greater than the presumptive term but 30 years less than the maximum term for second degree murder. The record discloses no evidence that the trial judge relied on any factor other than the one he specifically found in sentencing defendant. We therefore conclude that the court considered only competent evidence at the sentencing hearing.

Defendant had a fair trial free from prejudicial error.

No error.

Judges PHILLIPS and EAGLES concur.

GUY G. OSBORNE, AVERY OSBORNE, GWEN O. PERKINS, GUY G. OSBORNE, JR., ANSEL L. OSBORNE, GARY OSBORNE, DONNIE RAY OSBORNE, TERICA OSBORNE McNEIL, TED RAY PERKINS, JR., LEE OSBORNE, JADE A. OSBORNE, GERALDINE OSBORNE CULLIE, GENE LEE OSBORNE, DONNA OSBORNE (MINOR), SAMANTHA CAROL HARWARD (MINOR), ANGELA ELIZABETH HARWARD (MINOR), JEFFREY DAVID PERKINS (MINOR), ZEB PATRICK OSBORNE (MINOR), JEANNIE MICHELL OSBORNE (MINOR), HEATHER OSBORNE (MINOR), SARA OSBORNE (MINOR), AND DIANE OSBORNE (MINOR), PLAINTIFFS v. THELMA O. HODGIN, R. KERMIT HODGIN, JAMES ALSON HODGIN, ANNA HODGIN GARRETT, SANDRA GARRETT SMITH, MELISSA SMITH (MINOR), DEBORAH GARRETT STEED, TRAVIS STEED (MINOR), STEVEN GARRETT, SARAH V. OSBORNE, SARAH MAE OSBORNE SHARPE, GARY L. SHARPE, DAWN SHARPE, CORY SHARPE (MINOR), JOHN SHARPE, TIM SHARPE, CHRIS SHARPE (MINOR), CORDELLA OSBORNE BLACKWOOD, JEFF BLACKWOOD, RANDY BLACKWOOD (MINOR), TOMMY BLACKWOOD (MINOR), ALL UNKNOWN HEIRS OF J. ALLEN OSBORNE AND ALL POTENTIAL HEIRS OF J. ALLEN OSBORNE AS YET UNBORN, DEFENDANTS

No. 8918SC535

(Filed 3 April 1990)

Wills § 34 (NCI3d)— holographic will—fee simple devise—gift over not limitation on devise

A holographic will devised a 128-acre tract in fee simple to testator's widow, and the last paragraph of the will which stated that, upon his wife's death, his daughter was to have

the tract for her lifetime did not limit the devise to his widow to a life estate.

Am Jur 2d, Estates §§ 18, 19.

APPEAL by plaintiff from *Crawley (Jack B., Jr.), Judge.* Judgment entered 28 December 1988 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 November 1989.

This action originally arose on 9 November 1987 from plaintiffs' (Guy G. and Avery Osborne; hereinafter plaintiff) attempt to quiet title to an approximately 128-acre tract of land known as the Daniel Osborne Farm. Plaintiff also requested a declaratory judgment to interpret the will of J. Allen Osborne. Pursuant to the trial court's order of 3 February 1988, plaintiff joined all lineal descendants and all other unborn and unknown persons who may now have or might hereafter acquire an interest in the property.

On 15 June 1988, plaintiff filed a motion for summary judgment. On 28 December 1988, after considering the pleadings, defendants' affidavits, oral arguments and memorandum of law submitted by the parties, the trial court denied plaintiff's motion and granted summary judgment in favor of defendant.

From this judgment, plaintiff appeals.

Shope and McNeil, by Richard I. Shope and Michael L. Burton, for plaintiff-appellants.

Berry and McKinney, by James H. McKinney, for minor plaintiffs.

Adams, Kleemeier, Hagan, Hannah & Fouts, by W. Winburne King, III and Katherine Bonan McDiarmid, for defendant-appellees.

Kornegay, Lung & Angle, by Robert B. Angle, Jr., for defendant-appellees.

Stern, Graham & Klepfer, by Robert L. Johnston, for defendant-appellees.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in granting summary judgment. For the reasons set forth below, we hold that the trial court did not err in granting summary judgment in defendants' favor.

J. Allen Osborne died in 1958, leaving a holographic will, which was duly admitted to probate. The first sentence of the will stated:

> I, J. Allen Osborne, will the home place nown [sic] as the Daniel Osborne Farm containing 128 acrs [sic] to my Wife, Almedia Osborne.

Mr. Osborne bequeathed the household and kitchen furniture and the farm and shop tools to his wife. He then restricted her right to sell or give any saw timber during her lifetime. The will provided further:

> at Almedia Osborne death i will to my dauter [sic] Felma Hogin [sic] the Home Farm kown [sic] as the Daniel Osborne Farm 128 acres her lifetime . . . .

The will then specifically bequeathed money to Mr. Osborne's sons, Vernon and Guy Osborne, each of whom had received a farm for nominal consideration from Mr. Osborne during his lifetime. Mr. Osborne made no other provision for the Daniel Osborne farm. In 1959, Almedia Osborne executed a general warranty deed conveying the farm to her daughter, Thelma Hodgin, in fee simple. Mrs. Hodgin and her husband later conveyed the land to their children in 1983.

In this action, plaintiff Guy G. Osborne is one of the sons of J. Allen Osborne, and plaintiff Avery Osborne is the son of J. Allen Osborne's deceased son. The remaining plaintiffs include the lineal descendants of Guy G. and Avery Osborne.

Defendant Thelma Hodgin is the daughter of Almedia and J. Allen Osborne. Other defendants include Thelma's husband, R. Kermit Hodgin, their children, James Alson Hodgin and Anna Hodgin Garrett, and their lineal descendants. Defendant Sarah V. Osborne is the widow of Vernon Osborne, and the remaining defendants are the children and issue of Vernon and Sarah V. Osborne, except for plaintiff Avery Osborne.

Plaintiff filed this cause of action attempting to quiet title on the 128-acre farm described in J. Allen Osborne's will. Plaintiff further sought a declaratory judgment that the devise of the farm to Almedia Osborne was a devise of a life estate and not a devise in fee simple absolute.

Under N.C. Gen. Stat. sec. 1A-1, Rule 56(c) (1983), summary judgment "shall be rendered . . . if the pleadings, depositions,

answers to interrogatories, . . . 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 summary judgment as a matter of law." This remedy permits the trial court to decide whether a genuine issue of fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted).

In a summary judgment proceeding, the trial court must view all evidence in the light most favorable to the nonmoving party. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 258, 335 S.E.2d 79, 83 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). Summary judgment may be granted to the nonmoving party when the evidence establishes that there are no material issues of fact. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447-48 (1979).

It is well-settled law that the testator's intent is the key in construing and interpreting a will, and such intent must be determined from the four corners of the will. *Carroll v. Herring*, 180 N.C. 369, 373, 104 S.E. 892, 894 (1920).

In the case *sub judice*, plaintiff argues that the 128-acre tract devised to Almedia Osborne by her husband was a life estate because in the last paragraph of the will, J. Allen Osborne stated that upon his wife's death, his daughter, Thelma Hodgin, was to have the 128-acre tract for her lifetime. We disagree.

We hold that J. Allen Osborne's devise of the land to his wife in the first paragraph of the will was a devise in fee simple. There were no limitations on this devise. Mr. Osborne then made several other bequests of personal property including specific limitations concerning the timber on the devised tract of land. In the next to the last paragraph of the will, Mr. Osborne directed that his daughter, Thelma Hodgin, receive the tract of land upon Almedia Osborne's death. We do not believe these instructions are sufficient to turn the devise in fee simple to Almedia Osborne in the first paragraph of the will into a life estate.

N.C. Gen. Stat. secs. 31-38 (1984) creates the presumption that any devise of property is a devise in fee simple. Such presumption may be overcome only by "the plain or express words of the will or where the will plainly reflects the testator's intention to convey a lesser estate." *Leonard v. Dillard*, 87 N.C. App. 79, 82, 359 S.E.2d

497, 499 (1987) (citation omitted). There are no express words in J. Allen Osborne's will which would convey a life estate to Almedia Osborne.

We have examined the statutory and case law in this State and find that the will in our case is very similar to that in *Leonard*. There, the subject will devised all property "with full power to sell or convey [the property]" to the testator's daughter, "[provided], that" if the daughter owned any part of the property at her death, the property would descend to her children or the heirs of such children. *Id.* at 80, 359 S.E.2d at 498.

Although the will in *Leonard* gave the devisee full power to sell or convey the property, we do not believe this to be a material difference. The *Leonard* court held that the will devised the property to the testator's daughter in fee simple, and that the gift over to her children did not limit the devise to a life estate. *Id.* at 82-83, 359 S.E.2d at 499.

We hold that the will in the case before us devised the 128-acre tract in fee simple to Almedia Osborne and that the gift over to Thelma Osborne did not limit the devise to a life estate.

Because we find that the trial court did not err in granting summary judgment in defendant's favor on the above issue, we need not address plaintiff's remaining assignments of error.

Affirmed.

Judges EAGLES and PARKER concur.

WILLIAM F. FLIPPO (SUCCESSOR IN INTEREST TO L.M.F., INC.), PLAINTIFF v. RICHARD JONES HAYES, JR., DEFENDANT

No. 8925SC339

(Filed 3 April 1990)

Malicious Prosecution § 13.1 (NCI3d)— wrong offense charged—second charge barred by double jeopardy—existence of probable cause

Where defendant counterclaimed for malicious prosecution of a worthless check charge and of a breaking charge,

plaintiff was entitled to a directed verdict on the claim of malicious prosecution of the breaking charge, since defendant admitted breaking into plaintiff's storage building; he was originally charged with "breaking and entering" but was found not guilty; plaintiff then swore out a warrant against defendant for breaking; this charge was dismissed because it was barred by double jeopardy; and there was thus no want of probable cause when the act defendant admitted having committed gave rise to criminal liability but the magistrate improperly drafted the warrant to charge the wrong offense. Furthermore, plaintiff was entitled to a new trial on the issue of punitive damages for malicious prosecution of the worthless check charge, since it was impossible to ascertain from the jury's verdict how much of the punitive award was based on the erroneous finding that plaintiff had procured the institution of the criminal proceeding for breaking with malice and without probable cause.

Am Jur 2d, Malicious Prosecution §§ 36, 37, 50, 55.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from Judgment of *Judge Forrest A. Ferrell* entered 14 October 1988 and Order entered 8 November 1988 in CATAWBA County Superior Court. Heard in the Court of Appeals 21 September 1989.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Clayton M. Custer, for plaintiff appellant.

Thomas N. Hannah for defendant appellee.

COZORT, Judge.

Plaintiff appeals from a jury verdict in favor of defendant on defendant's counterclaim for malicious prosecution. We award plaintiff a new trial on the issue of punitive damages.

In May of 1985, plaintiff and defendant entered into a lease agreement whereby defendant rented a portion of plaintiff's lake home for $500 per month. When defendant, who had lost his job as a truck driver, began to have financial difficulties, plaintiff offered him a job in his Virginia business. Plaintiff agreed to allow defendant to store his pickup truck in plaintiff's storage building located near the lake house. After working in Virginia for several weeks, defendant quit his job and returned to North Carolina.

He did not return to live at the lake house and made no rent payments after January of 1986. Defendant testified that, upon returning to North Carolina, he encountered some difficulty retrieving his property from the house and the truck that he had left in the storage building. On one occasion, defendant went to the lake house to get his truck, but plaintiff would not talk to him. Defendant then went to the storage building and attempted to cut the lock on the door with a pair of bolt cutters. Failing in that, he used a ladder to climb to the top of the building, opened a door on the roof, looked inside, and saw that his truck was not there.

Plaintiff swore out a warrant against defendant for "breaking and entering" the storage building in violation of N.C. Gen. Stat. § 14-54(b). At trial on that charge, the trial court directed a verdict of not guilty. Plaintiff testified that the assistant district attorney prosecuting the charge told him that they had proved breaking but not entering. Plaintiff also testified that he talked to the magistrate that same day about issuing a warrant for breaking only, and that the magistrate said that he would have to confer with the assistant district attorney. The assistant district attorney testified that he recalled talking to plaintiff but could not remember the specifics of their conversation. He did not believe, however, that he had given any thought to the double jeopardy issue at that time. He further testified that he had spoken to the magistrate later that day and had left issuance of the second warrant to the magistrate's discretion. Plaintiff testified that when he returned the next day, another magistrate was on duty. After discussing the matter with plaintiff, this second magistrate issued a warrant for breaking. When the matter came on for hearing, the district attorney dropped the charge as barred by the prior jeopardy.

Plaintiff also swore out a warrant against defendant for writing a worthless check. Defendant was found not guilty.

Plaintiff later filed a complaint against defendant for breach of the lease agreement. In answer, defendant asserted as a counterclaim the claims alleged in a separate action he had filed against plaintiff on various legal theories, including conversion and malicious prosecution. The two actions were later consolidated for trial.

After presentation of the evidence, the trial court denied plaintiff's motions for directed verdict on defendant's counterclaims for conversion and malicious prosecution. The jury subsequently returned

a verdict in favor of plaintiff on his claims in the amount of $800.00. On defendant's counterclaims, the jury awarded defendant $1,500.00 for conversion, $800.00 for malicious prosecution of the worthless check charge, $10.00 for malicious prosecution of the breaking charge, and $45,000.00 in punitive damages. (The jury initially found malicious prosecution of the breaking charge but awarded no damages. The trial court asked the jury to reconsider those two issues and further instructed the jury to award at least nominal damages if the first issue was decided in defendant's favor. The jury returned with the $10.00 award.) Plaintiff's motions for judgment notwithstanding the verdict, to set aside the verdict, and for new trial were denied. Plaintiff appeals.

Plaintiff assigns error to the trial court's denial of his motion for directed verdict on the claim of malicious prosecution of the breaking charge. He contends that defendant failed to present sufficient evidence of want of probable cause. He further contends that he is entitled to a new trial on the issue of punitive damages because the jury's award could have been affected by its verdict on the malicious prosecution claim based on the breaking charge. We agree.

In proving a cause of action for malicious prosecution, the claimant must show that the defendant initiated the earlier proceeding maliciously and without probable cause and that the proceeding terminated in the claimant's favor. *Jones v. Gwynne*, 312 N.C. 393, 323 S.E.2d 9 (1984). Probable cause in malicious prosecution cases has been defined as "the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978) (quoting *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907)). The burden of proving want of probable cause is on the party pursuing the malicious prosecution claim. *Gray v. Gray*, 30 N.C. App. 205, 207, 226 S.E.2d 417, 419 (1976). Such proof is not established by proof that the proceeding was instituted maliciously. *Id.* at 208, 226 S.E.2d at 419 (*citing Tucker v. Davis*, 77 N.C. 330 (1877)). If the facts are admitted or established, the question of probable cause is for the court, but when the facts are in dispute the question is one of fact for the jury. *Pitts*, 296 N.C. at 87, 249 S.E.2d at 379.

In this jurisdiction, want of probable cause may be found when an accuser swears out a criminal warrant but the conduct of the accused does not constitute a crime. *See Gray v. Bennett*, 250 N.C. 707, 110 S.E.2d 324 (1959); *Smith v. Deaver*, 49 N.C. 513 (1857). In the appeal before us, the question is whether want of probable cause is established by plaintiff's mistake of law in procuring the institution of a second prosecution which was barred by the prior jeopardy. The rule that a defendant in a malicious prosecution action may be held liable for a mistake of law has been criticized as harsh, *see* Prosser and Keeton, The Law of Torts, § 119 (5th ed. 1984), and *see also* Byrd, Malicious Prosecution in North Carolina, 47 N.C.L. Rev. 285, 294 (1968-69), and is made harsher yet by the companion rule that advice of counsel does not afford a complete defense but is merely one factor to be considered by the jury in assessing the reasonableness of the defendant's conduct. *See Bassinov v. Finkle*, 261 N.C. 109, 112, 134 S.E.2d 130, 132 (1964).

There is no want of probable cause, however, when the act which the accused admits having committed gives rise to criminal liability but the magistrate improperly drafts the warrant to charge the wrong offense. *Johnson v. Whittington*, 42 N.C. App. 74, 255 S.E.2d 588 (1979). As in *Johnson*, there is no question that defendant committed the act alleged and that such conduct as a matter of law gave rise to probable cause for procuring a criminal warrant. That a subsequent prosecution was barred by the principle of double jeopardy is a refinement in the law which plaintiff could not reasonably be expected to anticipate. We will not impose upon plaintiff the responsibility for making further inquiry about the law of double jeopardy prior to swearing out the second warrant particularly when the magistrate discussed the warrant with the assistant district attorney who did not give any thought to the double jeopardy rule and left issuance of the warrant to the magistrate's discretion. We therefore hold that defendant failed to produce evidence of want of probable cause and that it was error to submit to the jury the issue of malicious prosecution of the breaking charge. The trial court's denial of plaintiff's motion for directed verdict on that issue must be reversed.

Plaintiff is thus entitled to a new trial on the issue of punitive damages. Although the jury awarded only nominal damages for malicious prosecution of the breaking charge, it is impossible to ascertain from the jury's verdict how much of the punitive award was based on the erroneous finding that plaintiff had procured

the institution of the criminal proceeding for breaking with malice and without probable cause.

Reversed in part and remanded for new trial on punitive damages.

Judge LEWIS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

I cannot agree that plaintiff is not chargeable with knowledge that his prosecution of defendant for breaking was barred by the law. For under the ancient maxim *ignorantia legis neminem excusat*—[ignorance of law excuses no one; Black's Law Dictionary 916 (3rd ed. 1933); H. Broom, Commentaries on the Common Law, pp. 864, 865 (1856)]—he is presumed to have known that and direct proof of that fact was therefore unnecessary. I vote no error.

HARTRICK ERECTORS, INC. v. MAXSON-BETTS, INC.

No. 8928SC605

(Filed 3 April 1990)

Indemnity § 3.1 (NCI3d)— defective glass installed by subcontractor at contractor's direction—sufficiency of complaint to state action for indemnity

Plaintiff's complaint was sufficient to state a cause of action for indemnity where plaintiff subcontractor alleged that it was under the direct supervision and control of defendant contractor, was supplied damaged glass by defendant, and was instructed by defendant to install the damaged glass; the glass was blown out by high winds and injured a worker employed by neither party; and plaintiff was compelled to reimburse the workers' compensation carrier which had paid the injured worker.

Am Jur 2d, Indemnity § 24.

APPEAL by plaintiff from order entered 14 February 1989 by *Judge Hollis M. Owens, Jr.*, in BUNCOMBE County Superior Court. Heard in the Court of Appeals 14 November 1989.

This is an action for indemnity. Plaintiff is a subcontractor who was hired by defendant to perform work on defendant's hospital construction project. In its complaint plaintiff made the following allegations: It performed labor "under Defendant's direct supervision and control on a costs plus basis"; defendant provided it with damaged glass, instructed it to install the damaged glass, and supervised its installation of the damaged glass. The glass was to be reglazed later. After it was installed but before the damaged glass was reglazed, high winds caused some of the glass to fall out, hitting and injuring a construction worker who was not employed by either plaintiff or defendant. The injured worker received workers' compensation benefits and the workers' compensation insurance carrier demanded reimbursement from plaintiff. Plaintiff then requested contribution towards the defense and payment of the claim, but defendant refused to pay any portion of the injured worker's claim. In April 1986 plaintiff was eventually compelled to pay the insurance carrier $37,500.

Plaintiff then brought this action against defendant for recovery of the sum paid to the insurance carrier based upon the theory that the "accident was caused by the primary and active negligence of the Defendant; and Plaintiff's negligence, if any, was only secondary and passive." On that theory plaintiff sought indemnification from defendant for the sum of $37,500. Defendant moved to dismiss the action pursuant to Rule 12(b)(6) on the grounds that plaintiff failed to state a claim upon which relief could be granted. In its motion defendant stated that plaintiff admitted in its complaint that it installed the glass and that "the action of the Plaintiff's was, by definition, active and cannot, by definition be passive." The trial court granted defendant's motion to dismiss. Plaintiff appeals.

Steven Andrew Jackson for plaintiff-appellant.

Roberts, Stevens and Cogburn, by Steven D. Cogburn and Marjorie Rowe Mann, for defendant-appellee.

EAGLES, Judge.

Plaintiff's sole assignment of error is whether the trial court erred in granting defendant's motion to dismiss on the grounds

that plaintiff failed to state a claim upon which relief could be granted. Plaintiff contends that it has properly alleged a claim for indemnity in its complaint. Plaintiff further contends that it acted "solely under the direction and control of Defendant." Plaintiff argues that defendant provided the damaged glass and that plaintiff installed the glass under defendant's supervision. Plaintiff contends that because it "passively followed the Defendant's instructions in installing the glass," plaintiff now has a proper claim for indemnity. We agree.

Initially we note that "[a] complaint may be dismissed on motion filed under Rule 12(b)(6) if it is clearly without merit; such lack of merit may consist of an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim." *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981).

"Tort law provides for indemnity of one secondarily liable by one who is primarily liable." *In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 793, 309 S.E.2d 183, 187 (1983). "Primary and secondary liability between defendants exists only when (1) they are jointly and severally liable to the plaintiff, and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other, or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former." *Ingram v. Smith*, 16 N.C. App. 147, 152, 191 S.E.2d 390, 394, *cert. denied*, 382 N.C. 304, 192 S.E.2d 195 (1972), citing *Edwards v. Hamill*, 262 N.C. 528, 138 S.E.2d 151 (1964).

Our research discloses no cases directly on point. Plaintiff in a memorandum of additional authority has cited *Sullivan v. Smith*, 56 N.C. App. 525, 289 S.E.2d 870, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982), *reconsideration denied*, 294 S.E.2d 741 (1982), as grounds for reversing the trial court. In *Sullivan*, this court discussed whether a general contractor had a right to indemnity from a subcontractor. In *Sullivan*, defendant Smith was the general contractor in construction of a house. Smith hired defendant Hooker to construct a fireplace and chimney. Plaintiffs sued both defendants for damages resulting from a fire which spread from the fireplace to other parts of plaintiffs' property. Before trial, plaintiffs released defendant Hooker and dismissed the action against him. At trial,

the trial court ruled in favor of plaintiffs and subsequently granted defendant Smith's motion for judgment notwithstanding the verdict (j.n.o.v.). Plaintiffs appealed from the trial court's decision. This court noted that our Supreme Court by denial of certiorari in *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E.2d 749, *cert. denied*, 281 N.C. 757, 191 S.E.2d 361 (1972), approved the principle enunciated in the following jury instruction:

> "[The contractor]" would be responsible for any actions of his subcontractors either in failing to use good quality materials or to construct in a workmanlike manner, or any negligent conduct on their part, if he knew or reasonably should have known as a general contractor or builder of the house of those conditions. He is not to be responsible for any such things which a reasonable man in his position as builder and contractor of the house would not have discovered, but the mere fact that work was done by a subcontractor does not relieve the contractor of responsibility if he by the exercise of reasonable care knew or should have known of those conditions.

Id. at 528, 289 S.E.2d at 872. The *Sullivan* court stated that a general contractor could be actively negligent in the exercise of, or failure to exercise, his duty of supervision of the subcontractor. *Id.* at 531, 289 S.E.2d at 874. However, the court held that " '[i]t has long been . . . the general rule that there is no vicarious liability upon the employer' for the torts of an independent contractor." *Id.* at 532, 289 S.E.2d at 874. Accordingly, "defendant Smith was not 'derivatively liable' for the negligence of defendant Hooker." *Id.*

We believe that *Sullivan* is factually distinguishable from the instant case. Here, the subcontractor and not the general contractor is seeking indemnification. The holding in *Sullivan* should not preclude an independent contractor from seeking indemnity from the general contractor upon a proper factual basis. While plaintiff alone did the act producing the injury (installing the glass) defendant was the supervisor of the plaintiff who allegedly instructed plaintiff to install the damaged glass with knowledge that it was already damaged. Accordingly, on this record, defendant is derivatively liable for the negligence of plaintiff. We find several cases from other jurisdictions persuasive on this point.

In *Richard v. Illinois Bell Telephone Co.*, 66 Ill. App. 3d 825, 840, 383 N.E.2d 1242, 1255 (1978), an Illinois appellate court stated that "in situations wherein one party controls or instructs another party and an accident results, the controlling party may be held actively negligent and the obeying party passively negligent. This obtains even though the obeying party actually committed the act which caused the injury." "[A]ction or movement, under some circumstances, could be passive negligence." *Id.* at 844, 383 N.E.2d at 1257. The Illinois court further stated that "[c]ategorizing negligence as active or passive, involves making a 'qualitative distinction between the negligence of two tortfeasors.' " *Id.* at 843, 383 N.E.2d at 1257. *See also Lundy v. Whiting Corp.*, 93 Ill. App. 3d 244, 417 N.E.2d 154 (1981).

In *Hawkins Construction v. First Federal Savings and Loan Association*, 416 F. Supp. 388 (S.D. Iowa 1976), a federal district court in Iowa recognized as one of the four situations where one negligent person could be indemnified by another is "[w]here the one seeking indemnity has incurred liability by action at the direction, in the interest of and in reliance upon the one sought to be charged." *Id.* at 396, citing Restatement of Restitution, section 90.

In its complaint plaintiff has alleged that it was under the direct supervision and control of defendant and was instructed by defendant to install the damaged glass. Since under the rationale of *Sullivan*, a general contractor can be "actively negligent in the exercise of, or failure to exercise, his duty of supervision of the subcontractor," we find plaintiff's complaint sufficient to state a cause of action for indemnity.

Accordingly, we reverse the decision of the lower court and remand for further proceedings.

Reversed and remanded.

Judges PARKER and ORR concur.

ONE NORTH McDOWELL ASSOCIATION OF UNIT OWNERS, INC.; PEAZEL TREE ASSOCIATES, A NORTH CAROLINA GENERAL PARTNERSHIP; A. RAY MATHIS, SAMUEL M. MILLETTE AND ROBERT G. SANDERS, PARTNERS; RODNEY S. TOTH; ARTHUR S. LONG, III, AND WIFE, CYNTHIA S. LONG; RONALD C. WILLIAMS; GEORGE L. FITZGERALD; W. THOMAS RAY, AND WIFE, MARGARET W. RAY; GEORGE DALY, AND WIFE, MARY H. DALY; PARKER WHEDON; AND BART WILLIAM SHUSTER, PLAINTIFFS v. McDOWELL DEVELOPMENT COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP; B. D. RODGERS, EDWIN E. HARRIS, HUGH G. CASEY, JR., AND HAL H. TRIBBLE; RODGERS BUILDERS, INC.; P. C. GODFREY, INC.; AND HAL H. TRIBBLE, ARCHITECT, DEFENDANTS

No. 8926SC893

(Filed 3 April 1990)

Estoppel § 4.1 (NCI3d)— representations made by defendant— reliance by plaintiff—benefits reaped by defendant from representations—defendant estopped to deny representations

In an action for breach of warranty and negligence arising from a defective air conditioning system in an office condominium project where defendants claimed that the action was barred by the six-year statute of repose in N.C.G.S. § 1-50(5), but plaintiffs claimed that defendants expressly waived the right to assert any defense based upon a time bar by virtue of extension agreements entered into by the parties, defendants were estopped from raising N.C.G.S. § 1-50(5) in bar of plaintiffs' action on two grounds: (1) having made representations upon which plaintiffs relied, defendants could not in good faith repudiate such representations to plaintiffs' detriment, and (2) having reaped the benefits from the extension agreements, defendants could not later challenge the terms thereof.

Am Jur 2d, Limitation of Actions §§ 426, 427, 431, 434, 435.

APPEAL by plaintiffs from judgment entered 15 June 1989 and order entered 2 August 1989 in MECKLENBURG County Superior Court by *Frank W. Snepp, Judge*. Heard in the Court of Appeals 6 March 1990.

The undisputed material facts are as follows. Plaintiffs purchased office condominium units in a development project known as One North McDowell, located in Charlotte, which project was developed and constructed by defendants. Immediately upon assum-

ing occupancy in September 1982, plaintiffs experienced problems with the air conditioning system. Plaintiffs notified defendants and requested repairs be made. Although repairs were attempted, the problems persisted throughout the summers of 1983-85. Defendants continued to assure plaintiffs that further corrective measures would be taken and, in the summer of 1985, requested more time to repair the system. Concerned that the lapse of additional time would cause their claims regarding the defective air conditioning system to be time-barred, plaintiffs entered into an extension agreement with defendants in which defendants agreed not to raise a defense based on any statute of limitations to a claim filed by any unit owner prior to 1 September 1987. Repairs over the course of the next two years continued to be ineffective, but based on further assurances by defendants that additional corrective measures would be taken, a second extension agreement was executed on 11 August 1987, continuing defendants' agreement not to assert defenses based on any statute of limitations to claims filed by a unit owner prior to 1 November 1988.

After subsequent attempts to repair the air conditioning system failed, plaintiffs brought this action on 28 October 1988, asserting claims for breach of express warranty, breach of implied warranty, and negligence. Defendants McDowell Development Company (developer), Edwin E. Harris, Hugh G. Casey, Jr., and Hal H. Tribble (its general partners), P. C. Godfrey, Inc. (air conditioning subcontractor), and Hal H. Tribble (as architect) interposed a motion to dismiss on the grounds that plaintiffs were barred by the six-year "statute of repose" in G.S. § 1-50(5). By their verified response to this motion, plaintiffs asserted that these defendants expressly waived the right to assert any defense based upon a time bar and were thus estopped from raising such a defense by virtue of the extension agreements. The trial court, treating the motion to dismiss as one for summary judgment, allowed the motion and entered judgment for these defendants on 15 June 1989.

The remaining defendants, Rodgers Builders, Inc. (general contractor) and B. D. Rodgers (general partner in McDowell Development Company) were granted leave to amend their answer to include a defense based on G.S. § 1-50(5). These defendants then moved for summary judgment which the court allowed by its order of 2 August 1989.

Plaintiffs appeal.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., for plaintiff-appellants.

Weinstein & Sturgis, P. A., by James P. Crews and Michael C. Daisley, for defendant-appellee P. C. Godfrey, Inc.

Smith, Helms, Mullis & Moore, by W. Donald Carroll, Jr., and William R. Purcell II, for defendant-appellees McDowell Development Company and Harris, Casey, and Tribble.

Jones, Hewson & Woolard, by H. C. Hewson, for defendant-appellees Rodgers Builders, Inc., and B. D. Rodgers.

WELLS, Judge.

The pertinent language of the extension agreements provides that defendants will not "assert any defense . . . based upon the expiration of any statute of limitations[.]" Defendants contend that this language does not preclude them from raising a defense based on G.S. § 1-50(5)[1] because this statute has been construed by our courts to be a "statute of repose," whereas the language of the agreements merely waives defenses based on "statutes of limitation." Plaintiffs argue that the language of the agreements embraces all statutes of limitation, including the "statute of repose" set forth in G.S. § 1-50(5). Alternatively, plaintiffs contend that G.S. § 1-50(5) is inapplicable because the time limit provided for in that statute had not expired at the time this action was filed. It is unnecessary for us to address these contentions, for we conclude that defendants are estopped as a matter of law from challenging the terms of the extension agreements.

It is well established that the doctrine of equitable estoppel will deny the right to assert a defense based on lapse of time "when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Duke University v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987) (and cases cited therein); *see also Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E.2d 673 (1979). It is equally well established

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1. N.C. Gen. Stat. § 1-50(5) (1983) provides in pertinent part: "a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement."

that a party who accepts the benefits of a transaction may not thereafter attack the validity of such transaction. *Thompson v. Soles*, 299 N.C. 484, 263 S.E.2d 599 (1980) (and cases cited therein). Although the question of estoppel is ordinarily one of fact for the jury, it becomes a question of law for the court to determine when a single inference can reasonably be drawn from the undisputed facts. *Stereo Center v. Hodson, supra* (*citing Peek v. Wachovia Bank and Trust Company*, 242 N.C. 1, 86 S.E.2d 745 (1955)).

It is undisputed that the initial extension agreements, effective until 1 September 1987, were entered into by the parties (1) in response to defendants' request, made during the summer of 1985, for an additional opportunity to correct the air conditioning system and (2) out of plaintiffs' concern that further delay could result in the loss of their claims. It is likewise undisputed that the subsequent extension agreements, effective until 1 November 1988, were entered into pursuant to defendants' additional assurances that further corrective measures would be attempted. Thus, the purpose of the agreements is plain: to preserve the rights and remedies of plaintiffs while affording defendants the additional time they requested in order to attempt corrections of the alleged defects. Public policy favors such agreements as a means of fostering flexibility in the pretrial negotiation process and encouraging alternative resolutions to disputes.

Any delay in bringing the present action was clearly occasioned by plaintiffs' reliance on defendants' representations. Moreover, it is undeniable that defendants fully received the benefit of their bargain. By virtue of the multiple extensions of time afforded by the agreements—encompassing well over three additional years—defendants gained the requested time to make corrections to the system. Defendants also gained the concomitant benefit of the financial flexibility to either avoid the expense of litigation upon the successful completion of the corrections, or shift the burden of incurring the costs of litigation to a significantly later date should corrective measures prove unsuccessful.

Defendants are therefore estopped from raising G.S. § 1-50(5) in bar of plaintiffs' action on two grounds: (1) having made representations upon which plaintiffs relied, defendants may not in good faith repudiate such representations to plaintiffs' detriment, and (2) having reaped the benefits from the extension agreements, defendants may not now challenge the terms thereof.

Summary judgment is appropriate only where there exists no genuine issue as to the material facts and the movant is entitled to judgment as a matter of law. N.C. R. Civ. P., Rule 56. Because defendants are not entitled to summary judgment as a matter of law, the judgment and order entered below must be and are

Reversed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. DONALD ARNOLD REDFERN

No. 8920SC832

(Filed 3 April 1990)

1. **Criminal Law § 400 (NCI4th)— trial court's remarks and questions—no expression of opinion**

There was no merit to defendant's contention that the trial court expressed an opinion as to the strength of the State's case and defendant's guilt by making too many remarks and posing too many questions to witnesses at trial where defendant identified over 175 questions and remarks, but none of them intimated any opinion as to defendant's guilt, and many of them took place out of the jury's presence.

Am Jur 2d, Trial §§ 88, 91.

2. **Criminal Law § 382 (NCI4th)— trial court's questioning of witness—clarification**

The trial court's questions to a fingerprint expert about certain fingerprints taken from several beer cans found at the victim's house clarified and promoted a better understanding of the witness's testimony and in no way amounted to an expression of opinion by the court with regard to defendant's guilt of the crimes charged.

Am Jur 2d, Trial §§ 88, 91.

3. Criminal Law § 500 (NCI4th)— juror's request to be dismissed after deliberations began—denial—no error

The trial court did not err in refusing to grant a mistrial or set aside the verdicts where one of the jurors asked to be dismissed after the alternate jurors had already been excused and deliberations had begun, since the juror, though perhaps pressured into fulfilling his obligation to vote, was not "intimidated" or forced to vote in favor of conviction.

Am Jur 2d, Trial § 1055.

4. Criminal Law § 1223 (NCI4th)— mitigating circumstances of voluntary intoxication and limited mental capacity—failure to show reduced culpability

The trial court was not required to find voluntary intoxication or limited mental capacity as a factor in mitigation where defendant offered evidence that he was intoxicated on the night in question and that he had only fourth or fifth grade reading and writing skills, but he failed to show conclusively that either disability somehow reduced his culpability for the offenses charged.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from *Greeson, Judge*. Judgments entered 16 March 1989 in Superior Court, UNION County. Heard in the Court of Appeals 14 February 1990.

Defendant was charged in proper bills of indictment with first degree burglary in violation of G.S. 14-51, attempted second degree rape in violation of G.S. 14-27.3, and common law robbery. Evidence presented at trial tends to show that on the evening of 14 July 1989, defendant forced his way into the home of the female victim, took money from her billfold, and attempted to rape her before being scared away by the sound of a police scanner in the next room.

A jury found defendant guilty as charged. From judgments imposing prison sentences of life imprisonment for first degree burglary, ten years for attempted second degree rape and ten years for common law robbery, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for the State.

John H. Painter for defendant, appellant.

HEDRICK, Chief Judge.

[1] Through numerous assignments of error, defendant contends the trial court erred by failing to remain fair and impartial throughout his trial. He complains that the trial court expressed an opinion as to the strength of the State's case and defendant's guilt by making too many remarks and posing too many questions to witnesses at trial. We disagree.

G.S. 15A-1222 prohibits a trial court from expressing "any opinion in the presence of the jury on any question of fact to be decided by the jury." The trial judge may, however, properly question a witness in order to clarify and promote a proper understanding of his or her testimony. *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986). Such questioning of witnesses amounts to prejudicial error only when a jury could reasonably infer that by their tenor, frequency, or persistence the questions and comments intimated an opinion as to the witnesses' credibility, the defendant's guilt, or as to a factual controversy to be resolved by the jury. *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986); *State v. Rinck*, 303 N.C. 551, 280 S.E.2d 912 (1981).

In the present case, defendant identifies over 175 questions and remarks by the trial judge and argues that the mere frequency of intervention by the court prejudiced his defense. He cites *State v. Steele*, 23 N.C. App. 524, 209 S.E.2d 372 (1972), a case in which this Court awarded the defendant a new trial after noting that the trial judge had intervened over 100 times during trial with questions or comments. The granting of a new trial in *Steele*, however, was not compelled merely by the multitude number of questions and remarks. The Court also relied on the fact that "many of the questions posed to witnesses by the trial judge went beyond an effort to obtain a proper understanding and clarification of their testimony." 23 N.C. App. at 526, 209 S.E.2d at 373. Moreover, the Court emphasized that "several of the judge's comments tended to belittle and humiliate defense counsel in the eyes of the jury" and that "the trial judge assumed the role of the solicitor in sustaining his own objections to testimony offered by the defendant." *Id.* at 526-27, 209 S.E.2d at 373-74.

Upon examination of the record on appeal, we conclude that the numerous questions and comments propounded by the trial court did not intimate any opinion as to defendant's guilt. In fact, many of the questions and remarks complained of by defend-

ant took place out of the jury's presence. This argument has no merit.

[2] Defendant also contends the trial court erred by questioning the State's fingerprint expert about certain fingerprints taken from several beer cans found at the victim's house. Following cross-examination by defense counsel, the trial judge asked a few questions about what effect condensation on the outside of a beer can would have on any latent fingerprints. Defendant argues that this questioning was an attempt to rehabilitate the witness and "convey to the jury that the fingerprints of the Defendant/Appellant could only have been on the can of beer because the Defendant/Appellant was guilty of the crimes charged." Defendant claims that by conveying such a suggestion to the jury the trial judge failed to remain fair and impartial. In asking the disputed questions, however, we find that the trial judge merely acted to clarify and promote a better understanding of the witness' testimony. Such questions were therefore within the scope of the trial court's authority. *Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986).

[3] Defendant next assigns as error the trial court's refusal to either grant a mistrial or set aside the verdicts where one of the jurors asked to be dismissed after the alternate jurors had already been excused and deliberations had begun. He complains that the recalcitrant juror was "intimidated" and forced to vote in favor of conviction. In support of his argument, defendant points out that the trial judge refused to allow dismissal and warned that "we will just have to deal with jurors who forsake their oath [sic] at another time and another place." Nevertheless, the court also emphasized that "[a]ll jurors are supposed to go by the evidence and the law in this case, as I have instructed them." Later, the trial court reminded the foreperson, in the jury's presence, that "[e]very juror has a conscientious responsibility to go by the evidence and the law, and that person and any person on this jury should vote according to their conscience and their evaluation of the evidence." While the reluctant juror may have been pressured into fulfilling his obligation to vote, we conclude that he was not "intimidated" or forced to vote in favor of conviction. Defendant's argument has no merit.

[4] Finally, defendant complains the trial court erred at sentencing by failing to find two factors in mitigation and by determining that the aggravating factors outweighed the mitigating factors,

thereby justifying the maximum prison term for each offense. Defendant argues the trial court should have found as mitigating factors 1) that defendant had a limited mental capacity which reduced his culpability and 2) that he was voluntarily intoxicated when he committed the offenses charged.

To justify a trial court's finding of limited mental capacity as a mitigating factor defendant must show: (1) limited mental capacity and (2) that such lack of capacity reduced his culpability for the offense in question. *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250, *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987). Voluntary intoxication of a defendant may also be appropriately considered in mitigation under G.S. 15A-1340.4(a)(2) as a "mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *disc. rev. denied*, 311 N.C. 406, 319 S.E.2d 278 (1984). However, defendant "bears the burden of showing that the evidence regarding the existence of . . . [either] factor 'so clearly establishes the fact in issue that no reasonable inference to the contrary can be drawn.' " *Hall*, 85 N.C. App. at 455, 355 S.E.2d at 255 (*quoting*, *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983)). Although defendant offers evidence that he was intoxicated on the night in question and that he has only fourth or fifth grade reading and writing skills, he fails to show conclusively that either disability somehow reduced his culpability for the offenses charged. Thus, we hold that the trial court was not required to find voluntary intoxication or limited mental capacity as a factor in mitigation.

Defendant makes numerous other assignments of error which we have reviewed and find to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges PHILLIPS and COZORT concur.

MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC., PLAINTIFF v. BALDEV G. PATEL, DEFENDANT

No. 8928SC442

(Filed 3 April 1990)

1. **Rules of Civil Procedure § 50.2 (NCI3d)— verdict directed for party with burden of proof—no error**

In an action to recover from defendant money allegedly owed to plaintiff as the result of an overdue investment account maintained by defendant with plaintiff, the trial court did not err in directing a verdict for the party with the burden of proof since plaintiff established its claim through documentary evidence, the correctness and authenticity of which defendant did not dispute, and defendant admitted the basic facts upon which plaintiff's claim depended.

Am Jur 2d, Trial §§ 483, 484, 493, 519, 520.

2. **Rules of Civil Procedure § 15.1 (NCI3d)— motion to amend answer—motion to file counterclaim—denial proper**

The trial court did not err in refusing to allow defendant to amend his answer and file a counterclaim where defendant filed his motions more than six months after the filing of plaintiff's complaint and less than one month before trial; the motions would have changed a simple action on an account into a complex action based on new legal theories and dealing with alleged security violations; and this would have resulted in the need for greatly increased trial preparation by plaintiff to its prejudice.

Am Jur 2d, Counterclaim, Recoupment, and Setoff § 29; Pleading §§ 310, 312, 315, 322.

3. **Brokers and Factors § 4 (NCI3d)—liquidation of stock account—issue not pleaded—evidence properly excluded**

The trial court did not err in excluding testimony of two of defendant's witnesses as to whether plaintiff should have liquidated defendant's stock sooner, since the issue of whether plaintiff acted improperly in the handling of defendant's account was not pleaded and not properly before the trial court,

and the testimony of the witnesses was therefore irrelevant to the matters raised by the pleadings.

Am Jur 2d, Pleading § 127.

APPEAL by defendant from judgment entered 13 October 1988 by *Judge Robert E. Gaines* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 7 November 1989.

Plaintiff brought this civil action on 12 January 1988, seeking to recover from defendant the sum of $44,423.76 plus interest, costs and attorney fees allegedly owed to plaintiff as the result of an overdue investment account maintained by defendant with the plaintiff corporation ("Merrill Lynch"). Defendant filed responsive pleadings, and on 6 June 1988, plaintiff moved for summary judgment. Defendant orally moved to amend his answer and to bring a counterclaim. On 8 July, the trial court denied both parties' motions. Defendant renewed his motions in writing, and his motions were again denied. This matter was heard before a jury, and at the close of all the evidence, the court directed a verdict for plaintiff. Defendant appeals.

In July of 1985, defendant entered into a customer agreement with plaintiff which enabled defendant to purchase stocks "on margin," using cash or the value of stock already owned as collateral for new purchases. Defendant was required to maintain a certain percentage of equity in his account in order to buy on margin. If he failed to do so, Merrill Lynch, pursuant to certain in-house policies and requirements of the New York Stock Exchange, was to sell stock in defendant's account to raise the needed equity. In October of 1987, defendant's stock began to plummet. He failed to meet margin calls issued by Merrill Lynch. On 23 October, Merrill Lynch sold the stock in defendant's account to meet the margin calls. Based on the amount received in the stock transaction, Merrill Lynch calculated that defendant's account was in arrears $44,423.76.

Adams, Hendon, Carson, Crow & Saenger, P.A., by George Ward Hendon and Lori M. Glenn, for plaintiff-appellee.

Donald O'Brien Mayer for defendant-appellant.

JOHNSON, Judge.

[1] By his first Assignment of Error, defendant contends that the trial court erred in directing a verdict for plaintiff, which had the burden of proof. We disagree. Our Supreme Court has held that "there are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where *the credibility of movant's evidence is manifest as a matter of law.*" *Bank v. Burnette*, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979). While recognizing that the establishment of credibility as a matter of law depends on the evidence in a particular case, the Court in *Burnette* went on to enumerate three recurring situations in which credibility is manifest:

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.
>
> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

Id. at 537-38, 256 S.E.2d at 396 (citations omitted).

We note at the outset that plaintiff has alleged the existence of an account with a debit balance and the exact amount owing on the account. Defendant admits the existence of the account and that the debt was properly calculated. Second, the evidence offered by plaintiff of the debt is documentary, and defendant does not dispute the authenticity or correctness of the documents.

The only issue raised by defendant regarding the amount due is his contention that Merrill Lynch acted improperly in failing to sell his stocks earlier when they would have brought a higher price. However, these allegations were not raised by defendant in his answer. Pursuant to our "notice theory of pleading," a case must be tried on the issues raised by the pleadings. *Gilbert v. Thomas*, 64 N.C. App. 582, 307 S.E.2d 853 (1983). We do not find this to be a situation in which the issue of a possible breach of contract was tried by implied consent. Therefore, we must conclude that defendant's argument that Merrill Lynch should have sold

his stock sooner is irrelevant to the disposition of this matter. We find that the trial court did not err in directing a verdict for the party with the burden of proof in this case since plaintiff established its claim through documentary evidence, the correctness and authenticity of which defendant did not dispute, and defendant admitted the basic facts upon which plaintiff's claim depends.

[2] Next, defendant argues that the trial court erred in refusing to allow him to amend his answer and file a counterclaim. We find no error.

After the statutory period for amending has expired, G.S. sec. 1A-1, Rule 15(a) provides that leave to amend shall be freely given "when justice so requires." A motion to amend may be denied for "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). Further, the trial court has broad discretion in ruling on motions to amend, *Banner v. Banner*, 86 N.C. App. 397, 358 S.E.2d 110, *disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), and its ruling will not be disturbed 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).

In the instant case, plaintiff brought the action on 12 January 1988. Defendant did not file his motion for leave to amend and to file a counterclaim until 20 July 1988, over six months after the filing of plaintiff's complaint. At the time of defendant's motion, the matter had been calendared for trial on 15 August 1988 since May. At the late date of less than a month before trial and over six months since institution of the suit, defendant's motion would have changed a simple action on an account into a complex action based on new legal theories and dealing with alleged security violations. This would have resulted in the need for greatly increased trial preparation by plaintiff to his prejudice. Defendant argues that plaintiff could have obtained a continuance and would have received interest during the delay, thereby curing any prejudice to plaintiff. We agree with plaintiff, however, that as the amount claimed increases by the accrual of interest, so does the risk that plaintiff will be unable to collect the debt if its action is successful. Defendant has failed to carry his burden of proving that the trial court abused its discretion in denying his motion to amend.

[3] Last, defendant argues that the trial court erred in excluding the testimony of two of his witnesses which, defendant contends, would have demonstrated that plaintiff failed to comply with industry standards in handling defendant's account. Again, defendant is referring to his argument that plaintiff should have liquidated his shares of stock sooner.

"It is elementary that evidence not supported by factual allegations is properly excluded by the trial court." *Briggs v. Morgan*, 70 N.C. App. 57, 60, 318 S.E.2d 878, 881 (1984). We concluded above that the issue of whether Merrill Lynch acted improperly in the handling of defendant's account was not pleaded and not properly before the trial court, and that the court did not err in denying defendant's motion to amend. Consistent with this analysis, we determine that the court acted properly in excluding the testimony of the two witnesses in question since their testimony was irrelevant to the matters raised by the pleadings.

For all the foregoing reasons, we hold that the defendant received a fair trial free of prejudicial error.

Affirmed.

Judges COZORT and LEWIS concur.

KAREN McHATTON LEWIS v. MARK LEMUEL LEWIS

No. 895DC985

(Filed 3 April 1990)

Divorce and Alimony § 30 (NCI3d) — equitable distribution — home — not marital property

The trial court erred in an equitable distribution action by classifying the parties' home as marital property where defendant built a shrimp boat prior to his marriage, the shrimp boat was subsequently sold, and the parties financed the construction of the house with monies received from the sale of the boat. There is no requirement that the spouse who owns separate property declare his or her intention that the property remain separate or that the property for which

separate property is exchanged be separate; absent a finding that title to the home was taken by the entireties or that defendant in some other manner made a gift to plaintiff, the judge could not conclude that the house was subject to equitable distribution.

Am Jur 2d, Divorce and Separation §§ 887, 903.

APPEAL by defendant from order entered 6 June 1989 in PENDER County District Court by *Judge Elton Tucker*. Heard in the Court of Appeals 14 March 1990.

Shipman and Lea, by James W. Lea, III, for plaintiff-appellee.

Johnson and Lambeth, by Carter T. Lambeth and Maynard M. Brown, for defendant-appellant.

DUNCAN, Judge.

In this equitable-distribution action, defendant challenges the classification of the parties' home as marital property. The judge ordered that plaintiff and defendant take an equal interest in the home, with defendant enjoying the use and benefit thereof and plaintiff receiving $21,000.00 for her share of the property. For the reasons that follow, we hold that the house is the separate property of defendant, and we reverse the order of the trial judge.

I

Plaintiff, Karen McHatton Lewis, and defendant, Mark Lemuel Lewis, married in April 1985. At the time of the parties' marriage, Mr. Lewis owned a shrimp boat, the "Captain Jack." Mr. Lewis had built the Captain Jack himself, with the construction being essentially complete prior to his marriage to Ms. Lewis. In August 1985, the Captain Jack was sold for $120,000.00. Of the sale proceeds, Mr. Lewis received between $60,000.00 and $90,000.00.

Also in August 1985, the Lewises began building a house on land owned by Mr. Lewis' father. The parties financed the construction with the monies received from the sale of the Captain Jack, and they expended approximately $42,000.00 of those funds. The home was completed in September 1986.

II

A

Mr. Lewis argues that the marital home, construction of which was financed with the proceeds from the sale of the boat, was his separate property and not, as the judge ruled, property belonging to the marriage. In his equitable-distribution order, the judge made the following pertinent findings of fact:

> 9. That during the course of the parties' marriage [Mr. Lewis] was employed in the boat building and commercial fishing business.
>
> 10. That the parties' 1985 tax return revealed income from commercial fishing in the amount of $695.00 net, and interest income of $2,079.00. That the balance of [Mr. Lewis'] income was that received from the sale of the aforementioned boat. That the parties' 1986 and 1987 tax returns revealed virtually no income from the commercial fishing business and revealed that any income the Defendant earned was from the boat building business.
>
> 11. That [Ms. Lewis] was not employed outside the home during the course of the marriage . . . .
>
> 12. That [Ms. Lewis] contends that the monies derived from the sale of the aforementioned boat were monies earned in the ordinary course of business in that [Mr. Lewis'] primary occupation was the business of building and selling boats and that his engagement in commercial fishing only realized a small amount of income.
>
> 13. That no evidence has been offered by either party to show at the time the house was built that there was an intention that the house was to be the separate property of [Mr. Lewis].

Among his conclusions of law, the judge ruled that

> 2. . . . whether or not the income from the sale of the boat was separate or marital property is immaterial as there was no evidence showing that there was an intention that the money put into the marital home was to remain separate and that the home was to remain separate property and owned exclusively by [Mr. Lewis].

B

In an action for equitable distribution, the judge must first classify property as either marital or separate. *E.g., McLeod v. McLeod,* 74 N.C. App. 144, 147, 327 S.E.2d 910, 912, *cert. denied,* 314 N.C. 331, 333 S.E.2d 488 (1985). Marital property is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate property . . . . " N.C. Gen. Stat. Sec. 50-20(b)(1) (1987). Separate property is "all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. Sec. 50-20(b)(2) (1987). Separate property remains the property of the spouse who owns it, and it is not subject to equitable distribution. *See* N.C. Gen. Stat. Sec. 50-20(c) (1987); *Loeb v. Loeb,* 72 N.C. App. 205, 209, 324 S.E.2d 33, 37, *cert. denied,* 313 N.C. 508, 329 S.E.2d 393 (1985); *McLeod,* 74 N.C. App. at 147, 327 S.E.2d at 913.

"[W]hen both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Wade v. Wade,* 72 N.C. App. 372, 382, 325 S.E.2d 260, 269, *disc. rev. denied,* 313 N.C. 612, 330 S.E.2d 616 (1985) (citation omitted). This "source of funds" theory, *see id.,* recognizes that because property is acquired over time, it "may have a dual nature and must therefore be designated according to whether the funds used for acquisition were marital or separate." *Tiryakian v. Tiryakian,* 91 N.C. App. 128, 135, 370 S.E.2d 852, 856 (1988) (citations and internal punctuation omitted).

Applying a source-of-funds analysis to this case, we hold that the house should be deemed to be the separate property of Mr. Lewis. The facts, as found by the trial judge, are that the Captain Jack was built by Mr. Lewis prior to his marriage to Ms. Lewis. In the absence of any evidence in the record showing that Mr. Lewis conveyed the boat as a gift to Ms. Lewis, this asset remained his separate property after marriage. The proceeds from the subsequent sale of the boat likewise belonged to him, as the source of those funds—the boat—was his. When, finally, the monies were used to construct the house, the house became the separate property of Mr. Lewis. *See McLean v. McLean,* 88 N.C. App. 285, 290,

363 S.E.2d 95, 99 (1987), *aff'd*, 323 N.C. 543, 374 S.E.2d 376 (1988) (separate property retains separate character when exchanged for other separate property).

The trial judge concluded that the character of the house as separate or marital property was "immaterial" to the question of its distribution. The judge's conclusion stemmed from the lack of evidence showing an intention that "the money put into the marital home was to remain separate and that the home was to remain [the] separate property [of Mr. Lewis]." There is, however, no requirement that the spouse who owns separate property declare his or her intention that the property remain separate, or that the property for which separate property is exchanged be separate. In *Johnson v. Johnson*, for example, our Supreme Court rejected any presumption that all property acquired during the course of marriage is marital. 317 N.C. 437, 454-55 n.4, 346 S.E.2d 430, 440 n.4 (1986).

When a spouse who furnishes consideration from his or her separate property causes property to be conveyed to the other spouse as a tenant by the entirety, there is, at that point, a presumption of a gift of the separate property to the marital estate. *McLeod*, 74 N.C. App. at 154, 327 S.E.2d at 916-17; *accord McLean*, 323 N.C. at 555, 374 S.E.2d at 383. The record in this case, however, is devoid of evidence as to how the Lewis home is titled, and the judge's findings of fact do not address this issue. Absent a finding that title to the home was taken by the entireties, or that Mr. Lewis in some other manner made a gift of the house to Ms. Lewis, the judge could not conclude that the house was subject to equitable distribution. We disagree with the judge that the character of the home as separate or marital property was "immaterial"; proper classification of the nature of the real and personal property held by the parties is the necessary first step in the three-step equitable-distribution procedure. *See Johnson*, 317 N.C. at 444, 346 S.E.2d at 434 (1986). Because, under the source-of-funds analysis, the house was the separate property of Mr. Lewis, the judge erred in concluding that Ms. Lewis was entitled to an equal share of that property.

III

For the foregoing reasons, the order of the trial judge is

Reversed.

Judges ARNOLD and LEWIS concur.

OCIE F. MURRAY, JR. v. CUMBERLAND COUNTY; BILLY CAIN AND YVONNE L. CAIN

No. 8912SC448

(Filed 3 April 1990)

Taxation § 40 (NCI3d)— foreclosure sale—insufficiency of notice

The trial court properly set aside a tax foreclosure sale conducted on 7 September 1988 where petitioner was never given notice, and at least from 31 January 1988 and at all times thereafter, petitioner was a listing owner and, pursuant to N.C.G.S. § 105-375(i)(2), should have received notice of the sale under execution.

Am Jur 2d, State and Local Taxation §§ 923, 926.

APPEAL by respondents Billy C. Cain and Yvonne L. Cain from Order of *Judge Giles R. Clark* entered 6 February 1989 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 7 November 1989.

Singleton, Murray & Craven, by Rudolph G. Singleton, Jr., and Stephen G. Inman, for petitioner appellee.

Bain & Marshall, by Edgar R. Bain and Alton D. Bain, for respondent appellants.

COZORT, Judge.

Purchasers of real property at foreclosure sale appeal an order of the trial court rescinding the sale and declaring purchasers' deed void due to the County's failure to give property owner notice as required by tax foreclosure statute. We affirm the trial court's order.

The parties stipulated to the following facts:

On 26 February 1974, H. H. Jacobs conveyed the property at issue to Nat Burwell, Trustee, under a land sale contract for

the benefit of Donald L. Bray and wife, Glenda. The deed was recorded in the deed book in the Cumberland County Office of Register of Deeds.

On 14 November 1983, Nat Burwell, Trustee, executed a deed to Robert G. Bailey, P.O. Box 35832, Fayetteville, North Carolina. The deed was not recorded until 30 November 1988.

From 1 January 1984 to 31 December 1986, property taxes assessed against the property were not paid. During that time, property was listed in the name of Nat Burwell, Trustee.

On 12 February 1987, a deed conveying the property from Robert Gene Bailey, P.O. Box 35832, Fayetteville, North Carolina, to Ocie F. Murray, Jr., Trustee (petitioner herein), was recorded in the Cumberland County Deeds Office.

On 8 May 1987, delinquent tax bills for 1984, 1985 and 1986 were referred to the Cumberland County Attorney's Office for foreclosure proceedings under N.C. Gen. Stat. § 105-375. The taxpayer listed was Nat Burwell, Trustee, c/o R. Bailey, Rt. 12, Box 702, Fayetteville, North Carolina. The property was identified as Parcel No. 29.—2102—48, PIN (parcel identification number) 9494-51-1683.

On 20 May 1987, the County Attorney's Office completed a title search in the Register of Deeds Office showing record title in the name of Nat Burwell, Trustee, with no outconveyances.

On 22 May 1987, the County sent a first notice pursuant to N.C. Gen. Stat. § 105-375 to Nat Burwell, Trustee, c/o R. Bailey, Rt. 12, Box 702, Fayetteville, North Carolina. The notice was returned "Attempted, Not Known."

On 7 October 1987, notice sent to R. Bailey at the same address was returned with the same notation.

On 20 November 1987, the Land Records Management Office assigned PIN 9494-51-1683 to the property in the name of Ocie F. Muray [*sic*], Jr. (but not deleting the name of Nat Burwell, Trustee, from the listing). The PIN was not identified as a double listing. The County Attorney's Office was not notified of the listing.

On 23 and 30 December 1987, notice of service by publication on Nat Burwell, Trustee, and R. Bailey was published in the *Fayetteville Observer*.

In January of 1988, the property was listed by Ocie F. Murray, Jr., in the Tax Assessor's Office. The Tax Collector and County Attorney were not notified, as there was no procedure for such notification.

On 20 January 1988, judgment against the property in the name of Nat Burwell, Trustee, was filed and docketed. A title search conducted in the Office of Register of Deeds showed no outconveyance from Nat Burwell, Trustee.

On 22 July 1988, execution against the property was sent to the sheriff. Nat Burwell, Trustee, c/o R. Bailey, was identified as the current owner.

Between 22 July 1988 and 20 August 1988, notice of sale sent by the sheriff to Nat Burwell, Trustee, c/o R. Bailey, was not delivered, and timely service of notice was had by publication on Nat Burwell, Trustee.

On 2 September 1988, the bill for the 1988 property tax assessment was sent to Ocie F. Murray, Jr.

On 7 September 1988, the property was sold at an execution sale conducted by the sheriff to Billy Cain and Yvonne C. Cain, respondents herein, for $448.00. The deed to respondents was recorded on 20 September 1988.

The 1988 Cumberland County tax valuation of the property was $10,290.00.

The trial court further found that the County was "on notice of an apparent ownership interest by Grantor R. Bailey in the Property deeded to Petitioner Ocie F. Murray, Jr." The court concluded that petitioner was the current owner of the property; that the County Tax Collector, through the exercise of due diligence, could have obtained petitioner's address; and that the County at all times after 20 November 1987 had actual notice that petitioner was the current owner of the property; and that the interests of justice and equity required that the sale be rescinded and the deed voided. The court therefore ordered that the foreclosure sale be set aside, the sale rescinded, the deed declared void, and all monies paid be refunded to respondent purchasers. Respondent purchasers appeal.

N.C. Gen. Stat. § 105-375 authorizes an *in rem* procedure whereby local governments may enforce the payment of taxes by

foreclosure of a tax lien by judgment and execution. Subsection (c) of the statute requires that, at least thirty days prior to docketing the judgment, the tax collector must, by registered or certified mail, send notice that judgment will be docketed and that execution will be issued thereon to (1) the listing taxpayer, (2) lienholders of record, and (3) the current owner of the property if the current owner is different from the listing owner and if the following two conditions are present:

> (i) a deed or other instrument transferring title to and containing the name of the current owner was recorded in the office of the register of deeds or filed or docketed in the office of the clerk of superior court after January 1 of the first year in which the property was listed in the name of the listing owner, and (ii) the tax collector can obtain the current owner's mailing address through the exercise of due diligence.

N.C. Gen. Stat. § 105-375(c) (1989). Subsection (i)(2) provides that the tax collector may request issuance of execution of the lien at any time after six months and before two years from indexing of the judgment. Notice of sale under execution shall be given to the listing owner (and to the current owner if notice was required under subsection (c)) at least thirty days prior to the day fixed for the sale. N.C. Gen. Stat. § 105-375(i) (1989). The giving of the notice of sale under execution as required by N.C. Gen. Stat. § 105-375(i)(2) is constitutionally indispensable to a valid sale under the statute. *Annas v. Davis*, 40 N.C. App. 51, 53, 252 S.E.2d 28, 29 (1979) (citing *Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977)).

In November of 1987, the County's Land Records Management Office assigned the property the same parcel identification number in petitioner's name as it previously had assigned the property in the name of Nat Burwell, Trustee, c/o R. Bailey. In January of 1988, petitioner listed the property in the Tax Assessor's Office. Notice of sale was not attempted until July of 1988. Therefore, at least by 31 January 1988 and at all times thereafter, petitioner was a listing owner and, pursuant to N.C. Gen. Stat. § 105-375(i)(2), should have received notice of the sale under execution. The trial court properly set aside the foreclosure sale.

Affirmed.

Judges JOHNSON and LEWIS concur.

RUTH ELIZABETH JOHNSON v. CITY OF RALEIGH, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 8910SC167

(Filed 3 April 1990)

Municipal Corporations § 42.1 (NCI3d); Rules of Civil Procedure § 41.1 (NCI3d)— delivery of summons to improper person—no personal jurisdiction over defendant—voluntary dismissal based on defective process—second action barred by statute of limitations

While delivery of a summons to the mayor's assistant was sufficient to give defendant city notice of plaintiff's suit, the delivery of the summons to a person other than the official named in N.C.G.S. § 1A-1, Rule 4(j)(5) was insufficient to confer personal jurisdiction over defendant city before plaintiff voluntarily dismissed the suit; therefore, because plaintiff's first voluntarily-dismissed suit was based on defective process, her second action was barred by the statute of limitations, and the trial court properly entered summary judgment for defendant.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 691, 696, 854.

APPEAL by plaintiff from order entered 7 December 1988 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 14 September 1989.

Winborne & Winborne, by Vaughan S. Winborne, Jr., for plaintiff-appellant.

Bailey & Dixon, by Gary S. Parsons and Cathleen M. Plaut, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals the court's grant of summary judgment for defendant.

The record shows that plaintiff filed suit on 7 December 1987 against the City of Raleigh ("City") for personal injuries arising out of plaintiff's fall on a wet sidewalk on 10 December 1984. The clerk of superior court issued summons on 7 December 1987, ad-

dressed to "Mayor . . . or City Attorney Dempsey Benton," which was served at the City Mayor's office on 10 December 1987. The server left a copy of the complaint and summons with the mayor's assistant. The City answered, asserting lack of personal jurisdiction, insufficiency of process and insufficient service of process. City also denied negligence and asserted affirmative defenses of contributory negligence and assumption of the risk. Without reissuing process, plaintiff voluntarily dismissed suit on 25 August 1988.

Plaintiff refiled suit on 5 October 1988. The clerk issued summons on 5 October 1988, addressed to "[t]he *person* of . . . City Manager Dempsey Benton" (emphasis in original Civil Summons). The summons was served on the City Manager on 7 October 1988. On 10 November 1988, the City moved to dismiss plaintiff's action for insufficient process, insufficient service of process, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted, and subsequently moved for summary judgment.

In support of its motions, the City offered the affidavit of the Safety Co-ordinator for the City, stating that plaintiff previously commenced an action against the City arising out of the same facts or circumstances as that of the current suit.

The issue presented is whether the trial court obtained personal jurisdiction over the City in plaintiff's first lawsuit. Determination of this issue resolves the ultimate issue of whether plaintiff brought suit within the statute of limitations for negligence.

The statute of limitations for personal injury allegedly due to negligence is three years. N.C.G.S. § 1-52(5) (1989). Under the statute, plaintiff was required to file suit by 10 December 1987. If plaintiff obtains proper service on defendant within the statute of limitations time, plaintiff's voluntary dismissal of the first suit tolls the statute of limitations for one year. N.C.G.S. § 1A-1, Rule 41 (a)(1) (1989). However, a voluntarily-dismissed suit which is based on defective service does not toll the statute of limitations. *Hall v. Lassiter*, 44 N.C. App. 23, 26-27, 260 S.E.2d 155, 157, *review denied*, 299 N.C. 330, 265 S.E.2d 395 (1980). Defective or failed original service in a suit may be remedied by endorsement of the original summons or by application for alias and pluries summons within ninety days of original issue or last endorsement. N.C.G.S. § 1A-1, Rule 4(d) (1989). If a party fails to use either method to extend time for service, the suit is discontinued, and treated as

if it had never been filed. Rule 4(e); *Hall*, 44 N.C. App. at 26-27, 260 S.E.2d at 158. If a new summons is issued after the original suit is discontinued, it begins a new action. Rule 4(e); *Everhart v. Sowers*, 63 N.C. App. 747, 751, 306 S.E.2d 472, 475 (1983).

When a statute prescribes the manner for proper notification, the summons must be issued and served in that manner. *Long v. Cabarrus County Bd. of Educ.*, 52 N.C. App. 625, 626, 279 S.E.2d 95, 96 (1981). Moreover, when a statute authorizes substituted process, the court strictly construes the statute to determine whether a party obtained effective service. *Huggins v. Hallmark Enterprises, Inc.*, 84 N.C. App. 15, 20, 351 S.E.2d 779, 782 (1987) (citation omitted). While the defective method of service may be sufficient to give the party actual notification of the proceedings, such actual notice does not give the court jurisdiction over the party. *Hunter v. Hunter*, 69 N.C. App. 659, 662, 317 S.E.2d 910, 911 (1984).

The statute at issue provides:

> (j) *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> (5) Counties, Cities, Towns, Villages and Other Local Public Bodies.—
>
> a. Upon a city, town, or village by *personally* delivering a copy of the summons and of the complaint to its *mayor, city manager* or *clerk* or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk.
>
> . . . .
>
> d. In any case where none of the *officials, officers* or *directors* specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the

> *Attorney General* or *any deputy or assistant attorney general* of the State of North Carolina, or by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

N.C.G.S. § 1A-1, Rule 4(j)(5) (1989) (emphases added). Clearly, the statute does not provide for substituted personal process on any persons other than those named in provisions (j)(5)(a) and (j)(5)(d).

When the summons is directed to a natural person, the server may leave the process with other persons to obtain substitute process. Rule 4(j)(1)(a). A city is not a natural person and such substituted process is "defective and insufficient to obtain personal jurisdiction over the [public body]." *Long*, at 626, 279 S.E.2d at 96.

The circumstances of this case show that, while delivery of the summons to the mayor's assistant was sufficient to give the City notice of the suit, the delivery of the summons to a person other than the named official was insufficient to give the court personal jurisdiction over the City. Plaintiff failed to remedy defective process by the methods set out above, after receiving notice in the City's answer to plaintiff's first suit that service was insufficient to confer personal jurisdiction over the City and before plaintiff voluntarily dismissed suit. Accordingly, because plaintiff's first voluntarily-dismissed suit was based on defective process, the second action, filed on 5 October 1988, was barred by the statute of limitations and the trial court properly entered summary judgment.

Affirmed.

Judges JOHNSON and EAGLES concur.

McGLADREY, HENDRICKSON & PULLEN, A PARTNERSHIP (FORMERLY A. M. PULLEN & CO.) v. SYNTEK FINANCE CORPORATION (FORMERLY THE WASHINGTON GROUP, INCORPORATED)

No. 8918SC1056

(Filed 3 April 1990)

Attorneys at Law § 7.5 (NCI3d)— action to recover dividend— shareholder entitled to recover attorney's fees

Pursuant to N.C.G.S. § 55-50(k), plaintiff shareholder in defendant corporation was entitled to recover reasonable attorney's fees incurred in prosecuting an action to recover a dividend paid by defendant to all other Preferred A shareholders.

Am Jur 2d, Corporations §§ 2485, 2493, 2495.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiff from an order entered 21 August 1989 in GUILFORD County Superior Court by *Judge Lester P. Martin, Jr.* Heard in the Court of Appeals 16 February 1990.

Plaintiff seeks to recover attorney's fees and expenses pursuant to G.S. 55-50(k). The record discloses the following: Plaintiff-shareholder brought an action against defendant-corporation on 14 October 1986 seeking to recover a dividend that defendant paid to all other Preferred A shareholders on or about 10 July 1984. Defendant answered and alleged as a defense that plaintiff's action was barred by the execution of a mutual release entered into by the parties. On 2 December 1987, Judge Robert A. Collier, Jr. denied plaintiff's motion for summary judgment and entered an order granting defendant's motion for summary judgment. On appeal, this Court found that the release signed by plaintiff did not concern plaintiff's rights to its Preferred Stock or the dividends on it. *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 92 N.C. App. 708, 375 S.E.2d 689, *disc. rev. denied*, 324 N.C. 433, 379 S.E.2d 243 (1989). As a result of this finding this Court vacated the trial court's order and remanded the matter to the superior court for the entry of judgment for plaintiff. A judgment in the dividend amount of $10,687.00 was entered for plaintiff by Superior Court Judge W. Douglas Albright on 10 July 1989. On 27 June 1989, plaintiff filed a motion pursuant to G.S. 55-50(k) seeking to

recover attorney's fees and expenses in the amount of $27,301.99 incurred in prosecuting the action to recover the dividend. From the order of 21 August 1989 denying this motion, plaintiff appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Reid L. Phillips, and Jeffrey A. Batts, for plaintiff-appellant.

Petree, Stockton & Robinson, by Norwood Robinson, Robert J. Lawing, and Jane C. Jackson, for defendant-appellee.

LEWIS, Judge.

Plaintiff's sole contention on appeal is the trial court erred in denying its motion for attorney's fees "since an award of such fees is required by G.S. 55-50(k)." Plaintiff argues that each of the required elements set out in G.S. 55-50(k) is present in this case; therefore, the trial court had no discretion to deny an award of attorney's fees.

G.S. 55-50(k) states:

> Any action by a shareholder to compel the payment of dividends may be brought against the directors, or against the corporation with or without joining the directors as parties. The shareholder bringing such action shall be entitled, in the event that the court orders the payment of a dividend, to recover from the corporation all reasonable expenses, including attorney's fees, incurred in maintaining such action. If a court orders the payment of a dividend, the amount ordered to be paid shall be a debt of the corporation.

We have found no previous interpretation of the scope of G.S. 55-50(k). We find that the plaintiff is entitled to recover reasonable attorney's fees under this statute. The plaintiff brought this action "as the record owner of 42,748 shares of Preferred A stock of defendant corporation to recover a dividend. . . ." By using the word "any" without limitation in this section, the legislature plainly intended a very broad interpretation. "[T]he word 'any' is defined: 'It is synonymous with "either" and is given the full force of "every" or "all." Frequently used in the sense of "all" or "every," and when thus used it has a very comprehensive meaning. . . .' " *Southern Rwy. Co. v. Gaston Co.*, 200 N.C. 780, 783, 158 S.E. 481, 483 (1931) (citations omitted); *see also Britt v. Schindler Elevator Corp.*, 637 F. Supp. 734, 736 (D.D.C. 1986) (plain language of "any action" is broad and includes actions excluded by statute). Plaintiff's action

falls within the broad statutory language of G.S. 55-50(k), and it is entitled to recover reasonable expenses, including attorney's fees.

Reversed and remanded for entry of an award of attorney's fees.

Judge COZORT concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I believe that plaintiff, by bringing this action, was not seeking "to compel the payment of dividends" within the meaning of N.C. Gen. Stat. 55-50(k). Rather, plaintiff's action was brought to recover a debt owed to plaintiff by defendant. It is merely a dispute between an individual shareholder and a corporation, not a suit brought to compel the declaration and payment of a dividend for the benefit of all shareholders. *See, e.g., Dowd v. Foundry Co.*, 263 N.C. 101, 139 S.E.2d 10 (1954) (suit brought by stockholder for failure of the board of directors to declare and pay dividends from the corporation's earnings). Here, the dividend had already been declared by defendant and paid to all other Preferred A shareholders. Construing N.C. Gen. Stat. 55-50 as a whole, I find plaintiff's argument that attorney's fees and expenses are recoverable in this situation to be unconvincing. For this reason, I cannot subscribe to the majority's conclusion that plaintiff is entitled to recover reasonable expenses, including attorney's fees.

I vote to affirm.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 APRIL 1990

BRITT v. JOYNER No. 8911DC638	Harnett (87CVD649)	Affirmed & Remanded
EASTMAN v. BRADY No. 893SC462	Craven (87CVS797)	Reversed & Remanded
GAMMONS v. GAMMONS No. 8923DC898	Yadkin (86CVD337)	Affirmed
GREENE v. N. C. DEPT. OF ADMINISTRATION No. 8910IC748	Ind. Comm. (TA-10598)	Affirmed
HIGGINS v. TOWN OF CHINA GROVE No. 8919SC817	Rowan (88CVS619)	Reversed in part & affirmed in part
IN RE CHAAR v. CHAAR No. 899DC1062	Vance (85J17)	Affirmed
IN RE FORECLOSURE OF STEWART No. 8922SC791	Davidson (88SP202)	Affirmed
JETHWA v. BEAN No. 895SC453	New Hanover (86CVS2460)	New Trial
KING v. DUKE POWER CO. No. 8930SC629	Swain (88CVS121)	Affirmed
MITCHELL v. GOLDEN No. 8921SC710	Forsyth (87CVS3227)	Reversed
MOONEY v. COLE No. 8930SC961	Cherokee (88CVS41)	Dismissed
MORALES v. MYERS No. 8930SC480	Jackson (88CVS31)	Affirmed in part & reversed in part
PANNELL v. PANNELL No. 8929DC858	McDowell (86CVD513)	Affirmed
PFOHE v. SMITH No. 8921SC772	Forsyth (88CVS3510)	Affirmed
PFOUTS v. THE VILLAGE BANK No. 8915SC604	Orange (87SP147)	Affirmed
PIPPIN v. PIPPIN No. 8912DC864	Hoke (89CVD0033)	Affirmed

STATE v. BRYANT No. 8918SC746	Guilford (88CRS41557) (88CRS47564)	No Error
STATE v. BUCHANAN STATE v. MORGAN No. 8925SC933	Catawba (88CRS10998) (88CRS10999)	No Error Remanded for resentencing
STATE v. BULLARD No. 8921SC757	Forsyth (88CRS26859)	No Error
STATE v. CESAR No. 8926SC1046	Mecklenburg (89CRS4620)	No Error
STATE v. CHANDLER No. 8926SC1070	Mecklenburg (89CRS8242)	No Error
STATE v. FARMER No. 8912SC821	Cumberland (88CRS1790)	No Error
STATE v. FLOOD No. 8927SC1066	Gaston (88CRS29011) (88CRS29013)	No Error
STATE v. FRANKS No. 895SC1059	New Hanover (89CRS05923)	No Error
STATE v. FREY No. 8912SC946	Cumberland (88CRS29035) (88CRS29036)	New Trial
STATE v. GALLMAN No. 8929SC1011	Rutherford (89CRS0591)	No Error
STATE v. GANDY No. 8921SC795	Forsyth (88CRS5353)	No Error
STATE v. GARY No. 8921SC736	Forsyth (88CRS28208)	No Error
STATE v. HARLEY No. 8926SC1025	Mecklenburg (89CRS2533)	No Error
STATE v. HUGHES No. 8926SC944	Mecklenburg (88CRS6396)	No Error
STATE v. JONES No. 8927SC1067	Gaston (88CRS4313) (88CRS4314)	No Error
STATE v. KING No. 8923SC1008	Wilkes (89CRS1883) (89CRS1902)	Reversed & Remanded
STATE v. LOCKLEAR No. 8916SC1010	Robeson (88CRS400)	No Error

STATE v. McCASKILL No. 8927SC1146	Cleveland (89CRS325)	No Error
STATE v. MACK No. 8927SC753	Gaston (88CRS27205) (88CRS27206) (88CRS27207)	No Error
STATE v. PARHAM No. 8918SC1009	Guilford (88CRS2003) (88CRS2004)	No Error
STATE v. STUFFEL No. 894SC856	Sampson (87CRS760) (87CRS761)	Affirmed
STATE v. TEET No. 8914SC1166	Durham (88CRS27473)	No Error
STATE v. TRAMMELL No. 8930SC840	Haywood (88CRS2770)	No Error
STATE v. WALSH No. 8923SC493	WILKES (88CRS4046) (88CRS4047) (88CRS4049) (88CRS5135)	No Error
STATE v. WILLIS No. 8916SC1089	Robeson (88CRS18073) (89CRS18074)	No Error
STATE v. WORLEY No. 895SC418	New Hanover (88CRS8014) (88CRS8015) (88CRS8018) (88CRS8020)	No Error
STEVENS v. HWK BUILDERS No. 8912DC565	Cumberland (88CVD6674)	Affirmed
STEVENS v. HWK BUILDERS No. 8912DC566	Cumberland (88CVD6675)	Affirmed
SUNAMERICA FINANCIAL CORP. v. BONHAM No. 8926DC610	Mecklenburg (87CVD10266)	Affirmed
TENNESSEE VALLEY HAM CO. v. PRESNELL No. 8923SC660	Alleghany (88CVS97)	Affirmed
TRIVETTE v. TRIVETTE No. 8922DC387	Davie (87CVD197)	Vacated & Remanded

VANDERVOORT v. McKENZIE No. 8929SC977	McDowell (87CVS232)	Affirmed
VANDERVOORT v. McKENZIE No. 8929SC978	McDowell (87CVS232)	Affirmed

RICHARD G. CHEEK v. SAMUEL H. POOLE AND JOHNSON, POOLE, WEBSTER & BOST

No. 8920SC9

(Filed 17 April 1990)

1. **Limitation of Actions § 8 (NCI3d)— legal malpractice—statute of limitations—not readily apparent exception—summary judgment improper**

The trial court erred by granting summary judgment for defendants on the statute of limitations in a legal malpractice action where plaintiff alleged that defendants had been negligent in failing to advise him that a consent judgment would require him to pay his ex-wife one-half his retirement pay even after his wife remarried. Although plaintiff filed the complaint more than three years from the date of the allegedly negligent acts of defendants, the "not readily apparent" exception to N.C.G.S. § 1-15(c) would grant an additional one year; there was a genuine issue of fact as to whether a reasonable person should have discovered that the provision in the consent judgment relating to retirement benefits did not provide for its termination upon the wife's remarriage.

Am Jur 2d, Attorneys at Law §§ 220, 221.

2. **Attorneys at Law § 5.1 (NCI3d)— legal malpractice—contributory negligence—summary judgment improper**

Defendants were not entitled to summary judgment as a matter of law on the issue of contributory negligence in a legal malpractice claim based on a failure to adequately advise plaintiff on the terms of the separation agreement where the evidence raised genuine issues of fact on the question of plaintiff's reasonableness in executing the consent judgment.

Am Jur 2d, Attorneys at Law §§ 224, 227.

3. **Rules of Civil Procedure § 56.2 (NCI3d); Attorneys at Law § 5.1 (NCI3d)— legal malpractice—summary judgment hearing—burden of proof**

Plaintiff in a legal malpractice action did not have the burden of proving at a summary judgment hearing that defendants breached the applicable standard of care. Plaintiff was required to produce evidence on the standard of care only

if defendants first produced evidence that they had complied with the standard of care in the community; since defendants offered no evidence on the standard of care in the community or on proximate cause, they cannot now complain that plaintiff offered no evidence on these issues.

Am Jur 2d, Attorneys at Law § 223.

4. **Appeal and Error § 45.1 (NCI3d)— failure to argue issue in brief—issue not addressed**

Defendants' contention that plaintiff's acceptance of remedies under a consent judgment barred his action for legal malpractice arising from the consent judgment was not addressed since it was not argued in defendants' brief. N. C. Rules of Appellate Procedure, Rule 28(a).

Am Jur 2d, Appeal and Error § 491.

APPEAL by plaintiff from judgment entered 15 August 1988 by *Judge Thomas W. Seay, Jr.* in MOORE County Superior Court. Heard in the Court of Appeals 25 August 1989.

Thigpen and Evans, by John B. Evans, for plaintiff-appellant.

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

GREENE, Judge.

Plaintiff appeals the trial court's entry of summary judgment for defendants Samuel H. Poole ("Poole"), William C. Bost ("Bost"), and Johnson, Poole, Webster & Bost ("law firm") in plaintiff's legal malpractice lawsuit.

Plaintiff retained defendants to represent him in defense of claims by plaintiff's wife ("Wife"). Wife had filed suit against plaintiff, alleging adultery and requesting divorce, alimony pendente lite, permanent alimony and expenses of the action. Plaintiff corresponded with Poole for approximately nine months, stating his desired terms of agreement settling Wife's claims. Before actual trial, Poole and Wife's counsel negotiated and reached settlement. Subsequently, the matter was again set before the trial court, at which time a consent judgment was presented to the court, signed by plaintiff and Wife and to which all consented. At that hearing, Bost was present, representing plaintiff. The trial judge

approved the terms of the proposed judgment and signed the judgment on 9 August 1984. The terms of the judgment, which also granted the parties an uncontested final divorce, included the following provisions:

> 1. Defendant shall pay to plaintiff Five Hundred ($500.00) Dollars a month as permanent alimony[,] which sum of permanent alimony shall be increased to Six Hundred ($600.00) Dollars a month when their daughter completes her schooling. The permanent alimony shall be paid to plaintiff by the first day of ea[c]h month until plaintiff remarries or dies, or defendant dies.
>
> 2. Defendant shall pay to plaintiff one-half (½) of his net Air Force retirement pay.
>
> 3. Defendant shall pay plaintiff's medical and dental bills through his Air Force benefits and NATO benefits.
>
> 4. Defendant shall obtain a life insurance policy in the amount of One Hundred Thousand ($100,000.00) Dollars, making plaintiff the irrevocable beneficiary and shall provide a copy of the policy and yearly statements from the company showing the premiums are paid in full and a statement from the insurance company that [plaintiff] is the irrevocable beneficiary of that policy within fifteen (15) days from the date of this Consent Judgment.
>
> 5. As a mutually satisfactory division of all marital property in full and complete satisfaction of any and all claims either may have against the other, including the right to equitable distribution under the North Carolina General Statute § 50-20, the plaintiff shall have the following properties as her sole and separate property. . . .

After Wife remarried on 6 June 1987, plaintiff terminated his payments to Wife of one-half of his Air Force retirement pay. Subsequently, Wife instituted contempt proceedings on the grounds that plaintiff had failed to comply with the consent judgment and the court found plaintiff in contempt of court.

In the complaint filed on 9 September 1987, plaintiff alleged that defendants were negligent in failing to advise him that plaintiff's payments of half of the Air Force retirement benefits would continue after Wife's remarriage and that as a direct and proximate result of the negligence of defendants, the plaintiff suffered damages.

In answer, defendants denied the allegations of the complaint and asserted several affirmative defenses, including statutes of limitation, contributory negligence, and election of remedies. Defendants moved for summary judgment. At the summary judgment hearing, defendants introduced into evidence an affidavit from the attorney representing Wife in the divorce proceedings, stating that plaintiff reviewed and read the consent judgment moments before signing it on 9 August 1984. Defendant Poole submitted an affidavit stating

> At no time was [plaintiff] ever advised that the payment of one-half of his net retirement pay from the U. S. Government would be treated as an alimony payment or would terminate upon remarriage by [Wife]. . . . Remarriage by [Wife] would have no effect on [plaintiff's] continuing obligation to pay one-half of his retirement pay to [Wife] as an equitable distribution of their marital property.

Both affidavits introduced by defendants contained language expressing the opinion that the remarriage of Wife would have no effect on the plaintiff's continuing obligation to pay one-half of the Air Force retirement benefits to the Wife.

In response, plaintiff introduced evidence at the summary judgment hearing that it was always his understanding that any requirement to pay a portion of his Air Force retirement benefits to Wife was to be terminated upon Wife's remarriage. Plaintiff introduced into evidence a document typed on defendant's stationery, the terms of which plaintiff said he received from Poole several days after the parties had reached oral settlement in court. This document contained the following language:

> She is to receive ½ of the net retirement pay from the U.S. Government plus $500.00 per month until the last daughter is out of school, at which time it increases to $600.00 per month. (This terminates on her death or remarriage, and is identified as alimony.) There is to be up to $100,000.00 in insurance on his life payable to her (this provision also terminates at her death or remarriage).

On 3 May 1987, Wife requested plaintiff sign a form which would ensure her continued receipt directly from the Air Force of one-half of plaintiff's retirement benefits after her remarriage. Plaintiff immediately telephoned defendant law firm to inquire about Wife's request and according to plaintiff, defendant Bost advised

him that it would be appropriate to "pro rate" the retirement payments until 6 June 1987, the date of Wife's remarriage, then cease the payments. At a later date, plaintiff also talked to Poole, who told plaintiff that he was in full agreement that the payments should be 'pro-rated' up until the date of Wife's remarriage, according to plaintiff's testimony. Plaintiff also testified that Poole stated that "everything is supposed to be terminated upon the remarriage as I understand it. . . . Well, it may—it may take a hearing to clarify it . . . [t]his may take a hearing."

The issues presented are: I) whether plaintiff's action against defendants is barred by the statute of limitations; II) whether plaintiff was contributorily negligent as a matter of law; and III) whether defendants were free of negligence as a matter of law.

Summary judgment is appropriate if the movant shows no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Foard v. Jarman*, 93 N.C. App. 515, 518, 378 S.E.2d 571, 572, *reversed on other grounds*, 326 N.C. 24, 387 S.E.2d 162 (1990). An issue is material when the facts on which it is based would constitute a legal defense which would prevent a nonmovant from prevailing. *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). To entitle one to summary judgment, the movant must conclusively establish "a complete defense or legal bar to the non-movant's claim." *Virginia Elec. and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 190-91, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986) (citations omitted). "The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence." *Id.* (citation omitted). When movant is the defendant, this rule placing the burden on the movant reverses the usual trial burdens. *Clodfelter v. Bates*, 44 N.C. App. 107, 111, 260 S.E.2d 672, 675, *cert. denied*, 299 N.C. 329, 265 S.E.2d 394 (1980). If movant fails in this showing, summary judgment is improper, regardless of whether nonmovant makes any showing. *Bernick v. Jurden*, 306 N.C. 435, 441, 293 S.E.2d 405, 409 (1982) (citations omitted). "In the absence of such proof, plaintiff [nonmovant is] not required to show anything at the hearing; for in a hearing on a motion for summary judgment[,] the non-movant, unlike a plaintiff at trial, does not have to automatically make out a *prima facie* case, but only has to refute any showing made that his case is fatally deficient." *Riddle v. Nelson*, 84 N.C. App.

656, 659, 353 S.E.2d 866, 868 (1987) (citation omitted). Guided by these principles, we review the issues presented by this appeal.

I

Statute of Limitations

[1] Plaintiff claims that defendants were negligent on 9 August 1984, when they failed to advise him of the consequences of signing the consent judgment. This action for legal malpractice was filed on 9 September 1987, within four years of the allegedly negligent act.

Because the complaint was filed beyond three years from the date of the allegedly negligent acts of defendants, we must decide whether plaintiff qualifies for a statutory one-year extension of the primary three-year statute of limitations. N.C.G.S. §§ 1-15(c) (1989); 1-52(5) (1989). Section 1-15(c) provides for a minimum three-year statute of limitations, with two exceptions:

> [(1)] an additional one-year-from-discovery period for injuries 'not readily apparent[,]' subject to a four-year period of repose commencing with defendant's last act giving rise to the cause of action; and
>
> [(2)] an additional one-year-from-discovery period for foreign objects[,] subject to a ten-year period of repose again commencing with the last act of defendant giving rise to the cause of action.

Foard, at 520, 378 S.E.2d at 573, citing *Black v. Littlejohn*, 312 N.C. 626, 634, 325 S.E.2d 469, 475 (1985).

The 'foreign object' exception does not apply to this case, and the question is whether the injury to plaintiff was "not readily apparent" within the meaning of the first exception, above. Generally, injuries or harm caused are

> "not readily apparent" until plaintiff discovers or "in the exercise of reasonable care, should [discover] . . . that [he] . . . was injured as a result of defendant's wrongdoing. . . ." Discovery of the injury does not occur in a legal sense, "[u]ntil plaintiff discovers the wrongful conduct of the defendant. . . ." When the evidence is not conclusive or is conflicting, the question of when the plaintiff first discovered or should have discovered that [he] was injured as a result of the defendant's alleged

> negligence . . . is one of fact for the jury and summary judgment is inappropriate.

Foard, at 520-21, 378 S.E.2d at 574.

Plaintiff, while admitting that he read the consent judgment before signing it, asserts that the import of the retirement pay provision was 'not readily apparent' to him in light of his previous conversations with defendant Poole, and thus his cause of action did not accrue until Wife, on 3 May 1987, requested that he execute a document ensuring the continued payment of the retirement benefits. Defendants countered this assertion by arguing that a " 'person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents.' " *Biesecker v. Biesecker*, 62 N.C. App. 282, 285, 302 S.E.2d 826, 828-29 (1983) (citations omitted). Defendants argue that plaintiff cannot now claim that plaintiff's injuries caused by defendants' negligence on 9 August 1984 were 'not readily apparent' because as a matter of law plaintiff had knowledge of the legal significance of the language in the consent judgment.

The general rule is that one executing a document drafted by another has knowledge of its contents, "subject to the qualification that nothing has been said or done to mislead [that person] or to put a man of reasonable business prudence off his guard in the matter." *Elam v. Smithdeal Realty and Ins. Co.*, 182 N.C. 600, 603, 109 S.E. 632, 634 (1921) (citations omitted).

In this case, plaintiff argues and there is evidence in the record, when considered in the light most favorable to plaintiff, that defendants advised plaintiff both before and after the execution of the consent judgment, and contrary to the terms of the consent judgment,[1] that the retirement payment obligation terminated upon remarriage of Wife. If these facts are true, they are some evidence that defendants either did not "exercise reasonable and ordinary care and diligence in the use of [their] skill and in the application of [their] knowledge to [their] client's cause" or that they did not "exert [their] best judgment in the prosecution of the litigation

1. Because neither party argues the issue, we assume for the purposes of this opinion, that the language of the consent judgment regarding the Air Force retirement benefits requires plaintiff to continue making retirement payments to Wife beyond her remarriage.

entrusted to [them]."[2] *Hodges v. Carter*, 239 N.C. 517, 519, 80 S.E.2d 144, 146 (1954); *see* R. Mallen & J. Smith, *Legal Malpractice* § 19.5 (3d ed. 1989) ("The attorney should review the contract and advise the client concerning its import and the consequences which will result from its execution."). Assuming defendants were negligent in failing to advise the plaintiff of the consequences of the judgment, a question not now before us, plaintiff must nonetheless act with reasonable prudence in his execution of the consent judgment. *Harris v. Bingham*, 246 N.C. 77, 79, 97 S.E.2d 453, 455 (1957) (when plaintiff "observes a violation of duty which imperils him, he must be vigilant in attempting to avoid injury to himself").

Viewed in the light most favorable to plaintiff, the evidence in this record discloses genuine issues of fact regarding whether defendants' allegedly negligent acts were 'readily apparent' to plaintiff at the time he executed the consent judgment. Although the evidence is that plaintiff read the consent judgment, a genuine issue of fact remains as to whether a reasonable person should have discovered that the provision in the consent judgment relating to retirement benefits did not provide for its termination upon Wife's remarriage. What is reasonable must be evaluated in the context of any advice from the attorney that the benefits would terminate upon Wife's remarriage. Accordingly, the question of whether plaintiff is entitled to the one-year extension provided for in N.C.G.S. § 1-15(c) is not subject to resolution as a matter of law and must be resolved by a factfinder.

II

Contributory Negligence

[2] Our determination that the statute of limitations issue presents genuine issues of fact also affects disposition of the contributory negligence issue. In both instances, the question is whether plaintiff acted with reasonable prudence in executing the consent judgment. *See Hodge v. First Atlantic Corp.*, 6 N.C. App. 353, 358, 169 S.E.2d 917, 921 (1969) ("the test of the negligence of the client is whether he acted as a man of ordinary prudence while engaged in transacting important business . . ."). Since we have decided that the evidence

2. Plaintiff did not allege and does not now contend that defendants did not possess "the requisite degree of learning, skill, and ability necessary to the practice of [their] profession, and which others similarly situated ordinarily possess . . ." *See Hodges*, at 519, 80 S.E.2d at 145-46.

presented raises genuine issues of fact on the question of plaintiff's reasonableness in executing the consent judgment, defendants are not entitled to summary judgment as a matter of law, based on plaintiff's contributory negligence.

III

Defendants' Negligence

[3] Defendants argue that even assuming they failed to properly advise plaintiff of the consequences of the consent judgment, summary judgment was nonetheless appropriate because plaintiff presented no evidence that "the applicable standard of care required defendants to explain [to plaintiff] every paragraph of the consent judgment." We disagree.

At trial, plaintiff has the burden of proving that defendants breached the standard of care of other "members of the profession in the same or similar locality under similar circumstances." *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 55, 356 S.E.2d 372, 375 (1987) ("[a] plaintiff in a legal malpractice action must prove by a preponderance of the evidence that the attorney breached the duties owed to his client . . ."). However, in this summary judgment proceeding, plaintiff was required to produce evidence on the standard of care only if defendants first produced evidence that they in fact complied with the standard of care in the community. *Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985). As noted earlier, in a summary judgment proceeding, the nonmovant, here plaintiff, is not required to make out a *prima facie* case, but only "has to refute any showing made that his case is fatally deficient." *Riddle*, at 659, 353 S.E.2d at 868. Accordingly, since defendants offered no evidence on the standard of care in the community, they cannot now complain that plaintiff offered no evidence on this issue. *See Foard*, 326 N.C. at 27, 387 S.E.2d at 166 (in a medical malpractice action, defendants were entitled to summary judgment when they offered evidence that their actions met the standard of care in similar communities and plaintiff offered no contrary evidence).

Defendants further argue that they are entitled to summary judgment "on the ground that plaintiff failed to offer any evidence on the element of proximate causation." Again, we disagree. Plaintiff has no obligation to offer any evidence on proximate causation

until after defendants come forward as movants in the summary judgment proceeding and offer some evidence on the lack of proximate causation. *See Rorrer v. Cooke*, 313 N.C. 338, 360, 329 S.E.2d 355, 369 (1985) (summary judgment for defendant-attorneys is proper when plaintiff-client fails to offer evidence countering defendants' evidence on the issue of proximate cause). In *Rorrer*, unlike the facts presented in this case, defendants "submitted many affidavits, a number of which specifically address the issue of whether the alleged negligence of [defendant] was a proximate cause" of plaintiff's injuries. *Id.* Our Supreme Court concluded that defendant had placed the issue of causation before the trial court and that it "became incumbent upon plaintiff to submit affidavits in opposition to this and other issues so presented." *Id.*

IV

Election of Remedies

[4] In their answer, defendants pled as a further defense that plaintiff's action against them was barred by the doctrine of "election of remedies." Essentially, they pled that when plaintiff elected to receive benefits under the consent judgment, including the avoidance of contested permanent alimony and equitable distribution, plaintiff was then barred from seeking further relief against the defendants. We do not address the merits of this defense, because defendants abandoned this issue by not arguing it in their brief. N.C.R. App. P. 28(a).

Vacated and remanded.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. RICKY EUGENE SUMMERLIN

No. 898SC428

(Filed 17 April 1990)

1. Criminal Law § 417 (NCI4th) — robbery — prosecutor's opening statement — description of victim — no error

The trial court did not err in an armed robbery prosecution by allowing the prosecutor to mention in his opening

statement that the victim had graduated second in his high school class and obtained a college scholarship. Those statements merely served to introduce the victim to the jury; even assuming that they went beyond the scope of opening argument, defendant failed to establish prejudicial error. N.C.G.S. § 15A-1221(a)(4).

Am Jur 2d, Trial § 207.

2. **Robbery § 3 (NCI3d)— testimony concerning victim's scholastic achievements—not prejudicial**

The trial court did not err in an armed robbery prosecution by permitting testimony regarding the victim's scholastic achievements where the evidence was presented by the district attorney during preliminary questioning; the evidence was offered as a means of introducing the victim to the court and the jury; and, considering the fact that defendant later portrayed the victim as the aggressor, the challenged testimony was not prejudicial. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence § 342.

3. **Criminal Law § 87.2 (NCI3d)— robbery—leading questions by prosecutor—no abuse of discretion**

The trial court did not abuse its discretion in an armed robbery prosecution by allowing the prosecutor to pose leading questions to the victim where the questions complained of were either necessary to develop the witness's testimony or were questions which elicited testimony already received into evidence without objection.

Am Jur 2d, Trial § 194.

4. **Criminal Law § 374 (NCI4th)— judge's comment when ruling on evidence—not prejudicial**

The trial court's comment following a witness's answer in an armed robbery prosecution did not import an expressed opinion or demonstrate favoritism, was not prejudicial, and did not warrant the granting of a new trial for defendant.

Am Jur 2d, Trial § 98.

5. **Robbery § 5.4 (NCI3d)— armed robbery—failure to charge on misdemeanor larceny—no error**

The trial court did not err in an armed robbery prosecution by failing to charge the jury on the offense of misde-

meanor larceny where the State's evidence sufficiently established the requisite elements of robbery with a dangerous weapon, and defendant's version of events was consistent with the State's evidence to the time the crime actually began, at which time defendant consistently portrayed himself as a victim and innocent bystander.

Am Jur 2d, Trial § 727.

6. **Criminal Law § 1114 (NCI4th) — robbery — sentencing — allegation of punishment for not pleading guilty — unsupported**

Defendant's assertion that a prison term of twenty-five years for armed robbery was punishment for failing to plead guilty was unsupported by the evidence.

Am Jur 2d, Criminal Law § 525.

7. **Criminal Law § 1082 (NCI4th) — robbery — sentence in excess of presumptive term — no error**

The trial court did not err when sentencing defendant for armed robbery by imposing a sentence in excess of the presumptive term after finding one factor in aggravation and none in mitigation where there was neither an error in finding that an aggravating factor existed nor an abuse of discretion in imposing a sentence greater than the presumptive term.

Am Jur 2d, Criminal Law § 538.

APPEAL by defendant from judgment entered 4 January 1989 by *Judge Samuel Currin, Jr.* in WAYNE County Superior Court. Heard in the Court of Appeals 15 November 1989.

After a trial by jury, defendant was convicted of robbery with a dangerous weapon in violation of G.S. § 14-87. Upon conviction, the trial court imposed an active prison term of twenty-five years. Defendant gave notice of appeal in open court.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Julia F. Renfrow, for the State.

Michael A. Ellis for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: On the evening of 14 August 1988, Leonard Davis, the victim of the alleged

robbery, was visiting a friend's house in Goldsboro. At about 10:30 p.m. he decided to walk home and headed down Highway 13 carrying a backpack which contained approximately $145.00 in cash, a pair of eyeglasses, a compact disc, several paperback books and an expired driver's permit.

Shortly thereafter, Davis turned off Highway 13 and headed south on Highway 117. Defendant Ricky Summerlin and his companion and co-defendant, Vincent L. Creel, were also walking along Highway 117, but were a short distance ahead of Davis. When Davis approached defendant and Creel, he spoke but received no response. Concerned about his safety, Davis crossed the highway. He then turned around and noticed that the men had also crossed and appeared to be following him.

In an attempt to get away from the men, Davis walked faster. Defendant and Creel called out for Davis and he stopped momentarily. Pleasant words were exchanged and defendant warned Davis of the dangers of walking down Highway 117. Davis then shook Creel's hand and walked hurriedly away from the men.

Moments later, defendant and Creel, using obscene words, called out to Davis once again. In anticipation of possible trouble, Davis took his pocketknife out of his pocket, opened the blade and returned it to his pocket, leaving it protruding slightly. He then turned around to see what defendant and Creel wanted. Despite Davis' plea to be left alone, the men began to physically assault him.

In response to being pushed into a ditch, jumped upon and continuously punched, Davis reached for his pocketknife and stabbed Creel in the side. Hearing Creel's scream, defendant grabbed the pocketknife out of Davis' hand and proceeded to cut him on the back of his neck. As Davis lay on the ground injured, the men demanded his money and backpack. Davis complied.

Davis sustained injuries to his neck, lip, head and shoulders and was also robbed of personal property valued at over $300.00.

Defendant's testimonial account of the incident portrayed Davis as the aggressor. Defendant stated that on the night in question, he and Creel were walking along Highway 117 and some words were exchanged between them and Davis. Davis then walked toward them and he (defendant) put his hand on Davis' chest and asked him if there was a problem. Creel and Davis then shook hands and Davis left. Moments later, more words were exchanged be-

tween the men and Davis once again walked toward them. This time, however, Davis had his hand in his pocket. A fight ensued between Creel and Davis and Davis subsequently stabbed Creel in the side.

Testimony elicited from Creel also portrayed Davis as the aggressor. Creel, however, also testified that he, not defendant, held the knife to Davis' throat and demanded his money and backpack.

[1] By his first Assignment of Error, defendant contends that the trial court committed reversible error in allowing the assistant district attorney to mention in his opening statement that the victim had graduated second in his high school class and obtained a college scholarship.

G.S. § 15A-1221(a)(4) provides that "[e]ach party [in a criminal jury trial] must be given the opportunity to make a brief opening statement." This specific statute does not, however, define the scope of the opening statement. Our Supreme Court has nonetheless spoken on this particular issue in *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986). Quoting this Court, the Supreme Court said:

> *While the exact scope and extent of an opening statement rests largely in the discretion of the trial judge*, we believe the proper function of an opening statement is to allow the party to inform the court and jury of the nature of his case and the evidence he plans to offer in support of it.

Id. at 648, 343 S.E.2d at 859 (*quoting State v. Elliott*, 69 N.C. App. 89, 93, 316 S.E.2d 632, 636, *disc. rev. denied, appeal dismissed*, 311 N.C. 765, 321 S.E.2d 148 (1984) (emphasis added)). A determination of whether an opening statement is proper must be made in light of the purpose of an opening statement. *See State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). Counsel representing each party is generally afforded wide latitude with respect to the scope of the opening statement. *Id.*

We have reviewed the complained of portions of the assistant district attorney's opening statement and find them to be entirely proper. The statements concerning Leonard Davis' scholastic achievements merely served to introduce the victim to the jury. Assuming *arguendo* that the statements went beyond the permissible scope of an opening statement, defendant has nevertheless

failed to establish prejudicial error. Accordingly, this assignment of error is overruled.

[2] Second, defendant challenges the admissibility of testimonial evidence concerning the victim's scholastic achievements. We find defendant's contention that the trial court improperly admitted this evidence to be without merit.

As a general rule, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. § 8C-1, Rule 401. If relevant, the evidence is admissible. G.S. § 8C-1, Rule 402. With respect to whether certain background information is relevant and therefore admissible, this Court has previously stated that

> when a witness has been sworn and takes the stand, preliminary questions are properly put to him as to name, residence, knowledge of the case, etc. The purpose of such questions is generally to introduce the witness to the court and the jury and to show why he is there testifying . . . . Evidence offered for this purpose is relevant at trial, if it does in fact establish an introduction for the witness. Moreover, relevant evidence should not be excluded "simply because it may tend to prejudice the opponent or excite sympathy for the cause of the party who offers it."

State v. Sports, 41 N.C. App. 687, 690, 255 S.E.2d 631, 633 (1979).

In the case *sub judice*, evidence of Davis' scholastic achievements was presented by the assistant district attorney during preliminary questioning. After reviewing the transcript, we find that the challenged testimony was relevant. We further find that the evidence was offered as a means of introducing the victim to the court and jury and to assist in explaining the victim's background. Considering the fact that defendant later portrayed Davis as the aggressor, we do not believe that the challenged testimony was prejudicial. This assignment of error is therefore overruled.

[3] Third, defendant contends that the trial court erred in allowing the assistant district attorney to pose leading questions concerning critical issues to the victim during direct examination. Specifically, defendant argues that the admission of the following interchange resulted in reversible error:

Q. So are you absolutely sure Mr. Summerlin got the knife from you?

A. Yes.

MR. ELLIS: Object to leading,

THE COURT: Well, overruled.

[Defendant's Exception No. 6]

. . . .

Q. Summerlin said that about if you call the police?

A. Yes.

MR. ELLIS: Objection to leading, Your Honor.

THE COURT: Well, overruled.

[Defendant's Exception No. 7]

"A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977). Historically, leading questions were generally only permissible on cross-examination, however, over the years other permissible circumstances have evolved. G.S. § 8-C, Rule 611(a). Our Supreme Court has cataloged eight circumstances in which leading questions are deemed permissible on direct examination. *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, *cert. denied*, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 301 (1976). Rulings by the trial court on the use of leading questions are discretionary and reversible only for an abuse of discretion. *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986).

We have reviewed the record and find no abuse of discretion. The leading questions complained of were either necessary to develop the witness's testimony or were questions which elicited testimony already received into evidence without objection. *See State v. Smith*, *supra*. This assignment is overruled.

[4] Fourth, defendant contends that the trial court improperly commented on the evidence in front of the jury. The following exchange occurred:

Q. There is no weigh [sic] they could have known you had any money; is there?

A. It's a common assumption by thieves that you have money.

Q. That's not my question, sir?

A. I have no idea if they could have known. I had my own—it is a common assumption by thieves the person they are robbing from has money.

MRS. HEAD: Objection, Your Honor. Motion to Strike.

THE COURT: Well, that's the opinion.

[Defendant's Exception No. 8]

G.S. § 15A-1222 provides that "[a] 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." Even so, not every improper remark made by the trial judge requires a new trial. *State v. Guffey*, 39 N.C. App. 359, 250 S.E.2d 96 (1979). When considering an improper remark in light of the circumstances under which it was made, the underlying result may manifest mere harmless error. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984). Defendant nonetheless bears the burden of establishing that the trial judge's remarks were prejudicial. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

Defendant contends that one of the victim's answers to the prosecutor's questions constituted something other than an opinion. Further, defendant contends that the trial judge's response (Defendant's Exception No. 8) to the motion to strike the victim's answer was both improper and prejudicial and therefore a basis for a new trial.

After considering the statement made by the trial judge and the circumstances in which it was made, we are unable to reach the conclusion defendant desires. The trial judge's statement does not import an expressed opinion nor does it demonstrate any favoritism. As such, it is not prejudicial and does not warrant the granting of a new trial for defendant. This assignment is overruled.

[5] Fifth, defendant contends that the trial court erred by failing to charge the jury on the offense of misdemeanor larceny, the lesser included offense of robbery. We disagree.

Recently, our Supreme Court, in analyzing G.S. § 14-87, has implicitly stated that larceny is a lesser included offense of robbery.

State v. White, 322 N.C. 506, 369 S.E.2d 813 (1988). Moreover, the Court has stated that

> [t]he law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense.

State v. Rhinehart, 322 N.C. 53, 59, 366 S.E.2d 429, 432-33 (1988) (*quoting State v. Boykin*, 310 N.C. 118, 121, 310 S.E.2d 315, 317 (1984)). Hence, "when all the evidence tends to show that defendant committed the crime charged . . . and there is no evidence of the lesser-included offense, the court should refuse to charge on the lesser-included offense." *State v. Summitt*, 301 N.C. 591, 596, 273 S.E.2d 425, 427, *cert. denied*, 451 U.S. 970, 101 S.Ct. 2048, 68 L.Ed.2d 349 (1981). Notably, the trial court is not required to instruct on a lesser included offense when the defendant's evidence merely tends to show that he committed no crime at all. *State v. Coats*, 301 N.C. 216, 270 S.E.2d 422 (1980). The determinative factor of whether the trial court is to instruct the jury on the lesser included offense is the presence of evidence which tends to support a conviction of the lesser included offense. *Id.*

To convict pursuant to G.S. § 14-87(a), there must be proof that defendant: (1) unlawfully took or attempted to take personal property from the person or in the presence of another (2) by use of a firearm or other dangerous weapon (3) whereby the life of a person was endangered or threatened. *State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986).

Applying the foregoing principles to the instant case, we find that the State's evidence sufficiently establishes the requisite elements of robbery with a dangerous weapon. We also find defendant's version of the events to be consistent with the State's evidence up until the time criminal activity begins. At such time, defendant conveniently portrays himself as both a victim and an innocent bystander who is helpless to the mischievous but criminal conduct of his co-defendant Creel. Holding that the trial court erred in failing to instruct the jury on the lesser included offense of misde-

meanor larceny would be like putting on blinders to what is just. This we decline to do. Accordingly, this assignment is overruled.

[6] Sixth, defendant contends that the trial court's imposition of a prison term of twenty-five years reflects a punishment for defendant's failure to plead guilty and for the exercising of his right to a trial by jury. We disagree.

G.S. § 15A-1340.4(a) explicitly prohibits a judge from considering as an aggravating factor the fact that the defendant exercised his right to a jury trial. We find defendant's blanket assertion to be unsupported by the evidence. This assignment is overruled.

[7] By his seventh Assignment of Error, defendant contends that the trial court committed reversible error by imposing a sentence in excess of the presumptive term after finding one factor in aggravation and no factors in mitigation. Specifically, defendant argues that the trial court acted in contravention of the Fair Sentencing Act. We disagree.

Before addressing the issue presented to this Court, we feel compelled to articulate the purposes of sentencing as set out in the Fair Sentencing Act. *See* G.S. § 15A-1340 *et seq.*

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

G.S. § 15A-1340.3. Unquestionably, sentencing judges are to be guided by these purposes.

We now turn to the instant case. At sentencing, the trial court found as an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than sixty days in prison. The trial court did not, however, find any factor in mitigation. It was then determined that the aggravating factors outweighed the mitigating factors and, on this basis, defendant was sentenced to twenty-five years in prison for robbery with a dangerous weapon.

In an attempt to navigate a balance between the inflexibility of a presumptive sentence and the flexibility of permitting punish-

ment to adapt to the offense committed, established principles have provided guidance for our sentencing judges.

> [A] sentencing judge's discretion to impose a sentence within the statutory limits, but greater . . . than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence.

State v. Ahearn, 307 N.C. 584, 596, 300 S.E.2d 689, 696-97 (1983). The factors in aggravation must be found to outweigh the factors in mitigation. *State v. Attmore*, 92 N.C. App. 385, 374 S.E.2d 649 (1988). However, in the instances where the trial judge finds aggravating, but no mitigating factors, specific findings that such factors outweigh the nonexisting mitigating factors are unnecessary. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

A defendant who has been found guilty is entitled to appellate review of the issue of whether his sentence is supported by the evidence presented at trial or during the sentencing hearing. *See* G.S. § 15A-1444(a1). The reviewing court must also determine whether the trial court abused its discretion in weighing the aggravating and mitigating factors. *State v. Cannon*, 92 N.C. App. 246, 374 S.E.2d 604 (1988), *disc. rev. denied on additional issues*, 324 N.C. 249, 377 S.E.2d 757 (1989), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). The applicable standard of review for sentencing procedures which deviate from the presumptive term is as follows:

> [t]here is a presumption that the judgment of a court is valid and just. The burden is upon appellant to show error amounting to a denial of some substantial right. A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play. (Citations omitted.)

Id. at 249-50, 374 S.E.2d at 606 (*quoting State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)).

From our review of the record, we detect neither an error in the trial judge's finding that an aggravating factor existed nor an abuse of the trial judge's discretion in imposing a sentence greater than the presumptive term. We therefore find the twenty-

five year sentence for robbery with a dangerous weapon to be valid, just and in accordance with the purposes of the Fair Sentencing Act. Thus, we overrule this assignment of error.

In light of defendant's other assignments of error and our holdings, we have considered, but find no merit to his contention that the trial court considered its opinion of the defendant's truthfulness as a factor in the sentencing hearing. Assignment of Error number eight is therefore not discussed.

For all the aforementioned reasons, we find that defendant had a fair trial free of prejudicial error.

No error.

Judges COZORT and LEWIS concur.

LENOIR MEMORIAL HOSPITAL, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT

No. 8910DHR766

(Filed 17 April 1990)

1. **Administrative Law § 8 (NCI3d); Hospitals § 2.1 (NCI3d) — allocation of hospital beds — application denied — legislative purpose contravened**

The North Carolina Department of Human Resources erred in its calculation of the number of beds made available for development under the 1987 State Medical Facilities Plan in that it should have included an adjustment for twenty-six psychiatric beds which had been approved for development but subsequently abandoned. The legislative purpose stated in N.C.G.S. § 131E-175(2) would be contravened by the policy decision to refuse to reallocate those needed beds.

Am Jur 2d, Administrative Law § 553.

2. **Hospitals § 2.1 (NCI3d) — allocation of hospital beds — focus on numerical projections — other policy considerations excluded**

An application for a Certificate of Need to convert twenty-two existing but unused acute care beds to psychiatric beds

was remanded where the Department of Human Resources denied the proposal after focusing exclusively on the numerical projection of the need for psychiatric beds to the exclusion of other important policy considerations.

Am Jur 2d, Administrative Law § 553.

3. Hospitals § 2.1 (NCI3d); Administrative Law § 8 (NCI3d)—allocation of hospital beds—basis of decision

The Department of Human Resources erred in deciding that petitioner's proposal to convert unused acute care beds to psychiatric beds was not needed where the Department of Human Resources relied exclusively on the State Medical Facilities Plan projections. The new Administrative Procedure Act allows administrative law judges to determine that a rule as applied in a particular case is void because it is not reasonably necessary to enable the agency to perform a function assigned to it by statute or to enable or facilitate the implementation of a program or policy in aid of which the rule was adopted. The Certificate of Need decision is not bound solely by the bed-need formula in the State Medical Facilities Plan and other criteria should be considered and weighed when the Agency is making its decision concerning this application. N.C.G.S. § 150B-33(b)(9).

Am Jur 2d, Administrative Law § 553.

APPEAL by petitioner from opinion filed 14 February 1989 by the North Carolina Department of Human Resources, the Division of Facility Services. Earlier, *Administrative Law Judge Thomas R. West* issued a Recommended Decision on 8 November 1988 in favor of the petitioner. Heard in the Court of Appeals 6 February 1990.

Moore & Van Allen, by Noah H. Huffstetler, III and Margaret A. Nowell, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Meg Scott Phipps and Assistant Attorney General Richard A. Hinnant, Jr., for respondent-appellee.

LEWIS, Judge.

Lenoir Memorial Hospital, Inc. ("Lenoir") is a general, acute care hospital located in Kinston, North Carolina. The primary serv-

ice area for Lenoir is Lenoir County, and its secondary service area includes Greene and Jones Counties. For planning purposes, these three counties are included with twenty-six others in Health Systems Area ("HSA") VI by the 1987 State Medical Facilities Plan ("SMFP").

The 1987 SMFP showed that HSA VI had a total projected need in 1989 of 354 psychiatric beds, but only 308 existing beds. However, because 42 beds had previously been approved for development within the area, the unmet need for HSA VI was defined in the 1987 SMFP to be 4 beds.

HSA VI

1989 PSYCHIATRIC BED NEED DETERMINATION
(Excludes Chemical Dependency)

1989 Bed Need	Existing Inventory	Approved Changes	Adjusted Inventory	(Surplus) Deficit
354	308	42	350	4

In calculating the inventory of existing psychiatric beds in HSA VI, 26 beds which had been approved for the Community Hospital of Rocky Mount ("Community Hospital") but not yet developed were included in the "Adjusted Inventory" under the category of "Approved Changes." Community Hospital surrendered its Certificate of Need for those beds. The Respondent then gave notice "that there are 26 additional psychiatric beds available in Eastern Carolina Health Systems Area (VI)" which "brings the total needed for . . . HSA (VI) to 30 psychiatric beds." Six weeks later, the Respondent ("Agency") sent out a memorandum stating that the 30 beds previously announced were not available. That memorandum stated: "To: All Interested Parties: This decision is being made in the interest of fairness to all parties who may have wanted to apply for the psychiatric beds relinquished by the Community Hospital of Rocky Mount because ample notice could not be provided to all interested parties in a timely manner for a review this year."

At the time of the announcement, there were no operational psychiatric beds within the three-county area served by Lenoir. In response to the Agency's first announcement, Lenoir applied for a Certificate of Need to convert 22 of its existing but currently

unused beds for use as psychiatric beds. The Agency notified Lenoir that its application had been determined complete, evaluated but disapproved as "not consistent with need projections in the 1987 SMFP." The Agency did not adjust the Inventory to reflect the fact that the Certificate of Need for the development of 26 additional beds by Community Hospital had been surrendered.

Pursuant to G.S. § 131E-188(a), Lenoir appealed for a review by an Administrative Law Judge. After a hearing, the Administrative Law Judge issued a Recommended Decision which concluded, *inter alia*, that the Agency's decision was erroneous as a matter of law and recommended that the North Carolina Department of Human Resources (the "Department") grant a Certificate of Need to Lenoir. Under G.S. § 131E-188(a), this Recommended Decision was subject to further review by the Department. The Department upheld the decision of the Agency to deny a Certificate of Need to Lenoir, rejecting the Administrative Law Judge's recommendation. The petitioner, Lenoir Memorial Hospital, appeals.

The applicable standard of judicial review of a final decision of the Department of Human Resources with respect to an application for a Certificate of Need was set out in G.S. § 150A-51 (1983), *amended and recodified* at G.S. § 150B-51 (1985) (effective 1 January 1986). *In re Charter Pines Hosp. v. N.C. Dep't. of Human Resources*, 83 N.C. App. 161, 164-65, 349 S.E.2d 639, 642 (1986), *cert. denied*, 319 N.C. 105, 353 S.E.2d 106 (1987). Relying on that statute, the petitioner argues that the decision of respondent was "arbitrary, capricious and erroneous as a matter of law" in the Agency's determination (1) that Lenoir's proposal was inconsistent with the 1987 State Medical Facilities Plan (SMFP), and (2) that Lenoir's proposal is not needed. The decision of an administrative agency may be contested on the grounds that the Agency "[a]cted arbitrarily or capriciously." G.S. § 150B-23(a)(4). In *State ex rel. Comm'r. of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980), "arbitrary and capricious" is defined as:

> Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they fail to indicate "any course of reasoning and the exercise of judgment," *Board of Education [of Blount County] v. Phillips*, 264 Ala. 603, 89 So. 2d 96 (1956). . . . "The ultimate purpose

> of rulemaking review is to insure 'reasoned decisionmaking' . . . ." Daye, [*North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L.Rev. 833 (1975)] at 922, citing Verkuil, Judicial Review of Informal Rulemaking, 60 Va.L.Rev. 185, 230 (1974).

Id. at 420, 269 S.E.2d at 573.

I: The Agency's Determination that Lenoir's Proposal was Inconsistent with the 1987 SMFP.

In examining the decision by the Agency that Lenoir's proposal was inconsistent with the 1987 SMFP, petitioner addresses two assignments of error: (A.) the calculation of the number of beds made available for development under the 1987 SMFP, and (B.) the failure to consider applicable provisions of the SMFP in the Agency's review of Lenoir's proposal.

A. *The calculation of the number of beds.*

[1] The North Carolina Administrative Code describes the procedure for applying for a Certificate of Need in 10 N.C. Admin. Code 3R.0313(b) (Oct. 1981). The 1987 SMFP requires that the Agency have an inventory and that inventory is to be "continuously updated" and "[b]ed counts are revised in the state's inventory as changes are reported and approved."

Petitioner contends that when Community Hospital surrendered its certificate to develop 26 psychiatric beds which had been included in the "approved changes" and "adjusted Inventory," the effect should have been to increase the number of beds available from 4 to 30. Petitioner supports its argument by (1) citing "the Agency's own statements" and (2) pointing to the adjustment made by the Agency for the beds at Duplin General Hospital.

(1) The Agency sent a letter to Community Hospital in which it requested the surrender of its 26 beds because the "need of 4 beds [as stated in the 1987 SMFP] was determined after placement in the inventory the 26 beds for which you are approved. Thus, the real need in the Service [Eastern Carolina HSA (VI)] Area is 30 beds." Also, the Agency sent an announcement to area mental health centers and to two newspapers stating the availability of 26 additional beds, "[bringing] the total needed for Eastern Carolina HSA (VI) to 30 psychiatric beds" after the Community Hospital beds were surrendered.

(2) When eight acute care beds at Duplin General Hospital were converted from acute care beds to psychiatric beds, an adjustment was made decreasing the number of beds available in the HSA VI area. During the deposition of Tim Ford, the Agency employee who was the project analyst for the review of Lenoir's application, the manner of adding and subtracting beds to the Inventory during the year was discussed.

> Q. Would it be fair to say, Mr. Ford, that the Agency policy would be that, if additional beds became available during the year, they were added to the Inventory, but that, if beds were, for some reason, turned back in, as the Community Hospital did in this case, those beds were not subtracted out of the Inventory?
>
> A. . . . This situation never came up before, . . . but it was addressed at this time.
>
> Q. So, prior to this particular decision, to your knowledge, there was no agency policy on what happens when beds are returned?
>
> A. This is correct, not to my knowledge.
>
> Q. Would it be fair to say that, in accordance with the policy decision that [the Chief of the Certificate of Need Section] made in this review, that we have discussed, beds could be subtracted from the need figure that is added to the inventory, making less need, but the reverse could not happen; that is, beds would not be subtracted from the inventory and added to the need in the middle of the year?
>
> A. Not in the middle of the year. . . .

The Respondent contends "policy did exist for the downward adjustment of bed need, but not for the upward adjustment" and that "to count the returned 26 beds in the bed need would have been an application of an unpromulgated rule and thus, invalid." Lenoir argues that "the Agency's refusal to adjust the inventory [to reflect the Community Hospital beds] violates the legislative intent underlying the Certificate of Need Law." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972), held:

> The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the courts should consider the

language of the statute, the spirit of the act, and what the act seeks to accomplish. (Citations omitted.)

"The General Assembly of North Carolina makes the following findings: . . . that citizens need assurance of economical and readily available health care." G.S. § 131E-175(2). The Agency itself stated, as discussed above, that "the real need [for psychiatric beds] in the Service [Eastern Carolina HSA (VI)] Area is 30 beds." The legislative purpose would therefore be contravened by the Agency's policy decision to refuse to reallocate those needed beds. Professor Charles Daye stated in *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L.Rev. 833, 922 n.410 (1975), that "[a]gency decisions have been regarded as arbitrary or capricious . . . when such decisions . . . amount to a willful disregard of statutory purposes."

The Agency has erred in its calculation of the number of beds made available for development under the 1987 SMFP in that it should have included an adjustment for the 26 psychiatric beds which had been approved for development by Community Hospital but were subsequently abandoned.

B. *Failure to consider applicable provisions of the SMFP.*

[2] According to N.C. Administrative Code 3R.1003(a)(4), policy statements are to be considered in the review process: The "policies related to acute care facilities . . . [and] psychiatric facilities . . . are used with other criteria . . . and need projections to determine whether applications proposing additional beds and services of these types may be approved under the certificate of need program." 10 N.C. Admin. Code 3R.1003(a)(4) (Jun. 1979). Appellant contends that Lenoir's proposal "must be considered as a whole in making Certificate of Need determinations, and that such decisions cannot be made on the basis of need projections alone."

Lenoir Memorial Hospital states that there are two "policy statements" which the Agency did not adequately consider in its review of the Lenoir application. (1) Because the utilization of Lenoir's acute care beds was less than the target occupancy rates set forth in the 1987 SMFP for two consecutive years, its facility is deemed to be chronically underutilized. The 1987 SMFP includes in its official policy statements an endorsement of the "conversion of underutilized existing facilities to uses for which there is a demonstrated need." Lenoir contends that its proposal to convert

22 chronically underutilized acute care beds to meet the "demonstrated need" for psychiatric care in its service area precisely implements these official policy statements. (2) Lenoir provided information in its application that the expected impact of the conversion would be a net decrease in the hospital's total cost per patient day of 3.1 percent. Appellant states that the proposed conversion of beds at Lenoir which would generate additional revenues is in keeping with the intent of the Certificate of Need Law to provide "economical . . . health care" for "the citizens of this State." G.S. § 131E-175(2).

The Agency stated that its reason for disapproving Lenoir's proposal was based solely on Lenoir's alleged inconsistency with the numerical projection of need contained in the 1987 SMFP. Since the Agency chose to focus exclusively on the numerical projection of the need for psychiatric beds to the exclusion of other important policy considerations, we remand this case to the Agency so that it can weigh the benefits of Lenoir's proposal against any alleged detriments in making its Certificate of Need determination.

II: The Agency's Determination that Lenoir's Proposal was Not Needed

[3] Appellant argues that the Agency was arbitrary, capricious and erroneous as a matter of law in deciding that Lenoir's proposal was not needed because the Agency relied exclusively on the SMFP projections. The Agency's project analyst stated on deposition that "we have to look, first of all, at independent verification of need, and we look to the State's Medical Facilities Plan for that verification of need." Since there was no "independent verification of need" for psychiatric beds in HSA VI according to the calculations done by the Agency utilizing the SMFP projections, then there was no competitive or comparative review made of Lenoir's application. Lenoir contends that the Agency's refusal to consider "the compelling evidence set forth in Lenoir's application that there is a need for 22 psychiatric beds to be located in the three-county area which it proposes to serve" is reversible error.

The North Carolina Administrative Code states: "The correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." 10 N.C. Admin. Code 3R.0420 (Oct. 1984). This regulation would prohibit consideration during appellate review of this contested decision of the adequacy of the 1987 SMFP projections. However, in 1987 the new

Administrative Procedure Act allowed administrative law judges to "[d]etermine that a rule as applied in a particular case is void because . . . (3) [it] is not reasonably necessary to enable the agency to perform a function assigned to it by statute or to enable or facilitate the implementation of a program or policy in aid of which the rule was adopted." G.S. § 150B-33(b)(9).

North Carolina appellate courts have not yet addressed the question of whether or not consideration of the actual need may be made when the applicant for a Certificate of Need appears to violate numerical projections such as those contained in the 1987 SMFP. Other jurisdictions have addressed this question and have concluded that the state plan may not be used as the sole determinant of the need for a proposal, even though consistency with the plan was one of the statutory review criteria. *Balsam v. Dep't of Health and Rehabilitative Services*, 486 So.2d 1341 (Fla. Dist. Ct. App. 1986); *American Medical Int'l v. Charter Lake Hosp.*, 186 Ga. App. 204, 366 S.E.2d 795 (1988); *Charter Medical of Cook County v. HCA Health Services of Midwest*, 185 Ill. App. 3d 983, 542 N.E.2d 82 (1989); *Martin County Nursing Center v. Medco Centers*, 441 N.E.2d 964 (Ind. Ct. App. 1982); *Irvington General Hosp. v. Dep't of Health*, 149 N.J. Super. Ct. App. Div. 461, 374 A.2d 49 (1977); *Sturman v. Ingraham*, 383 N.Y.S.2d 60, 52 A.D. 2d 882 (1976); *Roanoke Memorial Hospitals v. Kenley*, 3 Va. App. 599, 352 S.E.2d 525 (1987). The Agency cites two cases in which the courts held that the State did not err in refusing to deviate from its regulatory bed need methodology. *Health Quest Realty XII v. Dep't of Health and Rehabilitative Services*, 477 So.2d 576 (Fla. Dist. Ct. App. 1985); *Princeton Community Hosp. v. State Health Planning*, 328 S.E.2d 164 (W.Va. 1985). In distinguishing two cases on which the appellant relies (*Irvington and Sturman*), the Agency states: "[T]hese cases did not address the bed need issue within the context of a statutory mandate of SHP [State Health Plan] consistency." Appellate review of this issue, however, is allowed in North Carolina under the new Administrative Procedure Act, even when a statutory mandate exists. We hold that the Certificate of Need decision is not bound solely by the bed-need formula in the 1987 SMFP and that other criteria should be considered and weighed when the Agency is making its decision concerning Lenoir Memorial Hospital's application.

III: Conclusion

Genuine issues of fact exist to preclude the granting of summary judgment in favor of Lenoir. However, we hold that the Agency has acted arbitrarily and capriciously (1) in its calculation of the number of beds made available for development under the 1987 SMFP, and (2) in failing to consider the positive impact on health care costs which would result from Lenoir's proposed conversion of presently unused beds. Additionally, the Agency's refusal to consider the alleged need for 22 psychiatric beds to be located in the three-county area which Lenoir serves is reversible error.

We remand this case to the Agency to reconsider Lenoir's application and the recommendations of the Administrative Law Judge.

Reversed and remanded.

Judges WELLS and COZORT concur.

LINDA FULLER McFETTERS v. RICHARD WAYNE McFETTERS, DAVID MARSHALL McDARIS AND JAMES C. RICE, JR.

No. 8918SC161

(Filed 17 April 1990)

1. **Automobiles and Other Vehicles § 47.3 (NCI3d)— automobile accident—directed verdict based on physical facts—more than one explanation—error**

The trial court erred in an action arising from an automobile accident by directing verdict for defendants on defendant driver's negligence where defendants' milk truck was traveling on the dominant highway through a "T" intersection controlled by a stop sign on the servient highway; plaintiff's car pulled into the dominant highway and stopped; occupants of plaintiff's car testified that defendant driver was traveling at a speed exceeding posted speed limits; and defendant argued that it was physically impossible for defendant to have been traveling at that speed based on the distance traveled after the collision. In light of evidence that defendant slowed and veered after

seeing plaintiff's car, that the impact between the two vehicles was not devastating to either vehicle and the only injuries were a split lip and injured ankle, and plaintiff's testimony that defendant was traveling in excess of the speed limit at the time it appeared over the crest of a hill, there was more than one reasonable explanation for the short distance the vehicles traveled after impact.

Am Jur 2d, Automobiles and Highway Traffic §§ 1098, 1099.

2. Automobiles and Other Vehicles § 95.2 (NCI3d)— automobile accident—driver with learner's permit—control of vehicle—directed verdict for defendant erroneous

The trial court erred by directing a verdict for defendants in an automobile accident case in which defendants raised contributory negligence where plaintiff was injured while riding in the front passenger seat with her fifteen-year-old son driving; her son was operating the vehicle pursuant to a learner's permit; N.C.G.S. § 20-11(b) creates a presumption that the statutorily approved person occupying the front passenger seat has the right to control and direct the operation of the vehicle; the facts of this case create the conflicting presumption that the owner of the vehicle (plaintiff's husband) who was a passenger in the vehicle had the right to control and direct its operation; the conflicting presumptions are irreconcilable; identical policy considerations support each presumption; the person who actually exercised control over the son's driving should bear responsibility for that driving; and all of the evidence was that plaintiff's husband rather than plaintiff exercised control over their son's driving.

Am Jur 2d, Automobiles and Highway Traffic §§ 1098, 1099.

APPEAL by plaintiff from judgment entered 6 October 1988 by *Judge Carlton E. Fellers* in GUILFORD County Superior Court. Heard in the Court of Appeals 14 September 1989.

Robert S. Cahoon for plaintiff-appellant.

Frazier, Frazier & Mahler, by Harold C. Mahler and James D. McKinney, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals the trial court's directed verdict for defendants at the close of plaintiff's evidence in a motor vehicle collision personal-injury suit.

The evidence in the light most favorable to plaintiff shows that plaintiff was a front-seat passenger in a station wagon car driven by her 15-year-old son, Scott. Plaintiff later dismissed suit against her husband, but original defendants were plaintiff's husband, Richard McFetters ("Richard"), the driver of the milk truck with which plaintiff's car collided, David M. McDaris ("McDaris"), and the owner of the company employing McDaris, James C. Rice Jr. ("Rice"). A "learner's permit" authorized Scott to drive the car, subject to a licensed driver's oversight. The evidence tends to show that plaintiff, Richard, her son Scott, and another son were riding in the car together. Richard owned the car and was also owner of a landscaping business. On the day of the collision, Richard and Scott were on their way to inspect landscaping materials for a future job. Plaintiff had joined Richard and Scott on their business trip so that she could visit relatives in the area. Plaintiff and her other son had joined Scott and Richard for breakfast, and were riding with Richard and Scott. Plaintiff's family began the trip with Richard driving and plaintiff riding in the back seat. Plaintiff became carsick. Richard stopped the car at a convenience store to buy plaintiff a soft drink, told plaintiff to ride in the front seat, and asked Scott to drive. Richard, Scott and plaintiff testified that Richard was in charge of the car, and actually directed Scott in his driving.

After Scott began driving, the car traveled approximately three miles, approached and stopped at a stop sign controlling a T-shaped intersection. The servient highway connected with the dominant highway at an angle. Another car was already at the intersection, and it pulled away from the intersection ahead of plaintiff's car. Scott intended to turn left onto the dominant highway perpendicular to the servient highway on which the car approached the intersection. McDaris was driving a fully-loaded milk tanker-truck which approached the intersection from the left arm of the "T" intersection. Scott looked right and left at the intersection, saw no approaching vehicle, drove the car into the truck's lane of travel. After plaintiff's car entered the dominant highway, Richard saw defendant's truck crest a hill some 250 feet away and yelled for

Scott to stop the vehicle. Scott stopped the vehicle in the truck's lane of travel after traveling five feet. The posted speed limit was 20 miles per hour at the crest of the hill, pursuant to a road sign alerting dominant highway travelers that the intersection lay ahead. The posted speed limit on the dominant highway between the crest of the hill and the intersection was 45 miles per hour. Richard and Scott testified that the truck appeared on the dominant highway moving northward toward the car at a speed of 50 miles per hour. McDaris testified that he was unaware that the speed limit was 20 miles per hour at the crest of the hill, first admitted that he stated that he was traveling at 45 miles per hour, then stated that he was unaware of his speed prior to the collision. McDaris saw another, brown, car turn left from the intersection, and he braked momentarily, but did not see plaintiff's car pull into his lane of travel until approximately twenty-five feet before colliding with it as it sat in the truck's lane. Just before the collision, McDaris looked to the other lane of travel, braked, and swerved toward the stopped car. The collision occurred in the truck's lane of travel. No traffic approached on the opposite lane that would have prevented the truck from entering the other lane of traffic to avoid the automobile. Plaintiff gave evidence showing that the car caught the corner of the truck's bumper, and both vehicles came to rest astride the centerline of the highway, approximately 30 feet from impact. The car was damaged in the front and left front panels.

Plaintiff was injured in the collision and brought suit against Richard, McDaris and Rice. Scott also suffered a split lip in the collision, but did not file suit. No one else was injured. Plaintiff alleged that McDaris was negligent in failing to keep a proper lookout, failing to reduce his speed to avoid the collision, failing to keep the truck under control, driving at a speed exceeding the posted speed limit and greater than was reasonable and prudent under existing conditions. Defendants answered, denying plaintiff's allegations, alleging that Scott was contributorily negligent, and that Scott's negligence was imputed to plaintiff. At the close of her evidence, plaintiff voluntarily dismissed her suit against Richard. Defendants McDaris and Rice moved for directed verdict and the trial court entered directed verdict for defendants.

The issues presented for our review are whether the trial court erred in directing verdict for defendants (I) on defendant's negligence and (II) on plaintiff's contributory negligence.

The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence for submission to the jury and to support a verdict for the non-moving party. N.C.G.S. § 1A-1, Rule 50 (1989); *Eatman v. Bunn*, 72 N.C. App. 504, 506, 325 S.E.2d 50, 51 (1985). In deciding the motion, the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence. *Id.*, at 506, 325 S.E.2d at 51-52. Non-movant's evidence which raises a mere possibility or conjecture cannot defeat a motion for directed verdict. *Alston v. Herrick*, 76 N.C. App. 246, 249, 332 S.E.2d 720, 722, *affirmed*, 315 N.C. 386, 337 S.E.2d 851 (1986). If, however, non-movant shows more than a scintilla of evidence, the court must deny the motion. *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). Grant of motion for directed verdict in negligence cases is rare; the issues "are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury." *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987). "A verdict may never be directed when there is conflicting evidence on contested issues of fact." *DeHart v. R/S Financial Corp.*, 78 N.C. App. 93, 98, 337 S.E.2d 94, 98, *cert. denied*, 316 N.C. 376, 342 S.E.2d 893 (1986) (citation omitted).

I

Defendant's Negligence

[1] A driver on a dominant highway favored by a stop sign does not have an absolute right-of-way over cars approaching from the intersecting servient highway. *Primm v. King*, 249 N.C. 228, 234, 106 S.E.2d 223, 228 (1958). The driver on such a dominant highway has a duty to exercise ordinary care in (1) driving at a speed no greater than is reasonable and prudent under existing conditions, (2) keeping his vehicle under control, (3) keeping a reasonably careful lookout, and (4) after he discovers or should have discovered the danger of a collision, taking the action an ordinarily prudent person would take to avoid the collision. *Murrell v. Jennings*, 15 N.C. App. 658, 664, 190 S.E.2d 686, 690 (1972) (citation omitted).

If the driver fails to exercise such ordinary care, and the failure is a proximate cause of plaintiff's injury, the driver is liable to plaintiff. *Id.*, at 660, 190 S.E.2d at 687. Whether there has been compliance with each of these duties is an issue of fact for the jury. *Alston*, at 249, 332 S.E.2d at 722.

Regarding the vehicle's speed, defendant argues that despite Richard and McDaris's testimony that McDaris was exceeding the posted speed limits, it was physically impossible for the truck to have been traveling 50 miles per hour at the time of the collision because if so, the defendant's truck would have traveled substantially more than 30 feet after the collision.

When the physical laws of nature refute testimony as inherently impossible, no issue of fact exists, and the judge has the duty to take the case from the jury. *Jones v. Schaeffer*, 252 N.C. 368, 378, 114 S.E.2d 105, 112 (1960) (citation omitted). In a motion for directed verdict against plaintiff, only if plaintiff's uncontradicted evidence shows that physical facts irreconcilably conflict with plaintiff's evidence is a trial judge warranted in taking the case from the jury. *Id.* When defendant asserts post-collision physical evidence such as stopping distances to show the impossibility of plaintiff's testimony evidence, the physical evidence must have only one possible explanation, which is inconsistent with the testimony. *Honeycutt v. Bess*, 43 N.C. App. 684, 687, 259 S.E.2d 798, 800 (1979). If a number of explanations for the physical evidence are possible, the jury must determine which explanation applies. *Id.*

Defendant asserts that the post-collision physical evidence shows conclusively only that the truck must have been traveling at a lower speed. We disagree. First, defendant's assertion is based on defendant's assumption that plaintiff's testimony was that the truck was traveling at 50 miles per hour *when the collision occurred*, so that it was physically impossible for the truck to stop 30 feet after impact. Plaintiff's testimony was that the truck was traveling in excess of the speed limit *at the time it appeared* on the dominant highway coming over the crest of the hill, and after Scott had attempted to cross the dominant highway. The plaintiff did not offer evidence nor does she now contend, that defendant collided with plaintiff traveling at speed of 50 miles per hour. Second, McDaris's testimony was that he braked and somewhat slowed the truck after seeing the car and before the collision. This testimony is consistent with the rest of the testimony

inferring the truck's lessened speed before impact: the impact between the two vehicles was not devastating to either vehicle, and the only injuries resulting from the impact were Scott's split lip and plaintiff's injured ankle. Third, other physical evidence shows that the car and truck did not collide on the perpendicular because McDaris "veered" his steering and because the car started off from the stop sign at an angle away from the truck. In light of this evidence, more than one reasonable explanation exists for the relatively short distance which the vehicles traveled after impact.

We conclude from the evidence that the question of defendant's speed, failure to keep a proper lookout, maintain control of the truck and avoid the collision are factual issues for the jury to resolve and directed verdict was improvidently entered.

II

Plaintiff's Contributory Negligence

[2] Since defendants plead plaintiff's contributory negligence as a defense, they have the burden of proof on the issue, and since they have offered no evidence, a directed verdict for defendants based on plaintiff's contributory negligence is appropriate only when there are no genuine issues of fact, W. Shuford, *North Carolina Civil Practice and Procedure* § 50-6 (3d ed. 1988), and "non-movant's contributory negligence [is so clearly established] that no other reasonable inference or conclusion may be drawn therefrom." *Frye v. Anderson*, 86 N.C. App. 94, 96, 356 S.E.2d 370, 372, *review denied*, 320 N.C. 791, 361 S.E.2d 74 (1987).

Defendants contend they are entitled to a directed verdict on plaintiff's contributory negligence on the grounds that the plaintiff's own evidence undisputably shows that plaintiff was in control of the operation of the vehicle and that the vehicle was operated in a negligent manner. While we agree with the defendants that any negligence imputed to the plaintiff would bar her recovery against the defendants, the evidence in this case does not impute Scott's negligence to plaintiff as a matter of law. *See Etheridge v. Norfolk-Southern Ry. Co.*, 7 N.C. App. 140, 145, 171 S.E.2d 459, 463 (1970) (imputed negligence bars recovery).

Scott, the driver of the vehicle, was operating the vehicle pursuant to a 'learner's permit' issued by the Department of Motor Vehicles, which authorized him to operate a motor vehicle when accompanied by a "parent, guardian or other person approved by

the Department of Motor Vehicles . . . who is actually occupying a seat beside the driver . . ." N.C.G.S. § 20-11(b) (1988). Section 20-11(b) creates a presumption that the statutorily approved person occupying the front passenger seat has the right to control and direct the operation of the vehicle. However, the facts of this case also implicate a conflicting presumption, the rule of law that the owner of a vehicle who is a passenger in the vehicle has the right to control and direct its operation unless he or she relinquishes that right. *Shoe v. Hood*, 251 N.C. 719, 723, 112 S.E.2d 543, 547 (1960).

Since these conflicting presumptions are irreconcilable when they arise in the same case, we view the presumptions in light of "weightier considerations of policy" to determine whether either or neither of the presumptions shall operate. *See* 2 Brandis on North Carolina Evidence § 221, fn. 55 (3rd. ed. 1988) (citation omitted). Here, the effect of the presumptions is not merely distribution of evidentiary burdens, it is to ensure oversight of operation of the vehicle by logical assignment of responsibility for the driver's negligent acts. We determine that identical policy considerations support each presumption, so that neither presumption outweighs the other. *Id.* However, our determination that the presumptions are of equal weight does not affect the existence of both adult passengers' rights to control Scott's driving, properly derived from different rules of law. Based on plaintiff's and Richard's equal rights to control Scott's operation of the vehicle, we determine that the person who actually exercised her or his right to control Scott's driving should bear responsibility for Scott's driving.

On the question of control, all of the evidence adduced at trial shows that Richard, not plaintiff, exercised his right to control Scott's driving. Plaintiff, Richard and Scott each testified that Richard was in control of Scott's operation of the vehicle, that Richard requested Scott to drive the vehicle and that Richard gave Scott directions while Scott was operating the vehicle. Furthermore, plaintiff was riding in the front seat only because she became ill and was unable to ride in the back seat. Accordingly, even if we assume that Scott was negligent, defendants were not entitled to a directed verdict on this issue because there is no evidence that plaintiff actually controlled operation of the vehicle.

In summary, the judgment of the trial court directing verdict for defendants and dismissing the complaint is vacated and the case is remanded for new trial.

New trial.

Judges JOHNSON and EAGLES concur.

MOUNTAIN FEDERAL LAND BANK AND SOUTH ATLANTIC PRODUCTION CREDIT ASSOCIATION v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA

No. 8928SC114

(Filed 17 April 1990)

Contracts § 3 (NCI3d); Uniform Commercial Code § 39.1 (NCI3d) — letter of credit — not issued — action by third party — summary judgment for defendant

Plaintiffs were not entitled to summary judgment, and summary judgment should have been granted for defendant, in an action to recover $108,000 pursuant to a written contract where First Union had loaned $350,000 to Earl Stewart, obtaining a note and security interest in an apple crop; plaintiffs' predecessor loaned the Stewarts funds with the real property as collateral; plaintiff declared all of its notes in default and a foreclosure order was entered against the Stewarts; a consent judgment was entered settling the disputed issues and allowing the trustee to conduct a sale; the parties agreed to a stipulation by which First Union was to issue a loan and letter of credit to the Stewarts in a total amount of $108,000 in exchange for plaintiff's consent to stay foreclosure in a pending federal court action; the Stewarts did not respond to the letter of commitment and never applied for the letter of credit; First Union did not issue a standby letter of credit; and plaintiffs were not paid any sums under the agreement. The provision permitting future agreement between First Union and the Stewarts renders the contract between First Union and plaintiffs void for indefiniteness and invalid as a matter of law.

Am Jur 2d, Contracts § 75.

APPEAL by defendant from judgment entered 1 September 1988 by *Judge W. Terry Sherrill* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 13 September 1989.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for plaintiff-appellees.

McGuire, Wood & Bissette, P.A., by Joseph P. McGuire, for defendant-appellant.

GREENE, Judge.

Defendant appeals the trial court's entry of summary judgment for plaintiffs in plaintiffs' action to recover $108,000.00 plus interest, pursuant to a written contract.

Defendant First Union National Bank ("First Union") is a North Carolina bank. Plaintiff Mountain Federal Land Bank ("Mountain Federal") is a federal bank doing business in North Carolina, and successor to Federal Land Bank of Columbia. Plaintiff South Atlantic Production Credit Association ("Association") is a corporate successor to Mountain Federal.

This suit involves loans on real property owned by Earl D. Stewart and Frances M. Stewart. Earl and Frances Stewart leased the property to Gerald L. and Glenn G. Stewart (the "Stewarts"), who used the property for apple orchards.

On 26 August 1980, First Union loaned $350,000.00 to Earl Stewart, obtaining a note and security interest in the apple crop growing on the property. Earl and Frances Stewart also executed an unconditional guaranty agreement for the note.

Federal Land Bank agreed to lend the Stewarts funds, using the real property as collateral. The Stewarts also cosigned a note evidencing their repayment obligation. On 11 September 1981, all of the Stewarts executed two deeds of trust on the property, to secure two notes in the total amount of $1,244,000.00 payable to Federal Land Bank of Columbia, which was succeeded in interest by Mountain Federal and Association, respectively, who each took one note and deed of trust. On 15 December 1982, all of the Stewarts executed a note to Association in the principal amount of $5,070.00. On 12 May 1983, all of the Stewarts executed a note to Association in the principal amount of $300,000.00. On 24 September 1984, all of the Stewarts executed a note in the principal amount of $18,015.00,

payable to Association. Plaintiffs declared all of these notes in default on 15 April 1987.

On 10 August 1987, the clerk of superior court entered an order of foreclosure against the Stewarts, who appealed the order. On 24 August 1987, all parties consented to judgment settling the disputed issues on appeal and allowing the foreclosure trustee to conduct a sale of the property. In exchange for plaintiffs' consent to stay foreclosure and federal court action on a pending suit until 31 January 1988, the parties agreed that First Union would be involved in payment of interest on the notes during the stay of foreclosure.

After negotiation, the parties agreed to these provisions, which they embodied in a document denominated a "Stipulation:"

10. . . . .

B. First Union National Bank shall issue its Standby Letter of Credit in favor of South Atlantic Production Credit Association (SAPCA) and Mountain Federal Land Bank (MFLB) jointly. This Letter of Credit shall be called upon in the event the Stewarts fail to pay the sum of $18,000.00 to the SAPCA and MFLB on the appointed due date and First Union is notified in writing of such default. Under the terms of this Letter of Credit, only the monthly payment is collectable and these events are limited to payments due August 31, 1987, September 30, 1987, October 31, 1987, November 30, 1987, December 31, 1987 and January 31, 1988. The lenders shall apply those payments to accrued interest on the notes. First Union National Bank acknowledges that the agreement of SAPCA and MFLB to stay the foreclosure constitutes consideration for its obligation to make these payments, inasmuch as a foreclosure would jeopardize First Union's security interest in the growing crop. As Additional [sic] consideration for First Union's agreement to make these payments, SAPCA and MFLB and the other undersigned parties do hereby stipulate and agree that the security interest of First Union in the apple crop now growing on the land covered by their deeds of trust and in any proceeds of that apple crop is superior to any claim of MFLB or SAPCA to that crop or those proceeds. The parties acknowledge that the principal amount secured by First Union's security interest is $350,000.00, plus accrued interest, plus the

advances which shall be made under the provisions of this subparagraph and interest on those advances.

. . . .

11. By entering into this stipulation neither the Stewarts nor either of them shall be deemed to have waived any legal or equitable claim which might properly be raised under the provisions of G.S. Section 45-21.34. The Stewarts acknowledge that an action is pending in the United States District Court for the Western District of North Carolina styled *Mountain Federal Land Bank, et al., vs. Earl D. Stewart, et al,* docket No. A-C-87-175, in which these lenders are plaintiffs and the Stewarts and the substitute trustee are defendants. With regard to that action, the parties agree:

A. On or before 31 August 1987 the Stewarts will acknowledge service of process in that action.

B. The parties to that action will request that the Presiding Judge stay further proceedings therein until 31 January 1988, without prejudice to any party. The Stewarts acknowledge that in entering into this stipulation, neither of the lenders has made any further concession to them with regard to the pending lawsuit, and if the court does not stay that action without prejudice, the lender's prosecution of that action shall not in any way be deemed a breach of this stipulation.

On 15 September 1987, First Union sent a "letter of commitment" to the Stewarts, for issuance of a loan and letter of credit in the total amount of $108,000.00. The letter stated that First Union would loan the Stewarts $18,000.00 and issue a letter of credit for $90,000.00 in behalf of the Stewarts, jointly payable to Mountain Federal Land Bank and Association. These amounts would be secured by all apple crops, apple inventory, and accounts receivable, and be unconditionally guaranteed by all of the Stewarts. The Stewarts did not respond to the letter of commitment, never applied for the letter of credit, and First Union did not issue a "standby" letter of credit. Plaintiffs were not paid any sums pursuant to the agreement.

On 23 September 1987, First Union notified plaintiffs' counsel that the Stewarts had not applied for the letter of credit, and First Union could not honor requests for interest payments until application and agreement, and that First Union "stands ready

to arrive at an agreement with the Stewarts which will permit it to issue this contemplated Standby Letter of Credit promptly." On 23 September 1987, plaintiffs telephoned notice of the Stewarts' default on the first interest payment and made demand on First Union.

On 2 December 1987, plaintiffs sued First Union, alleging that First Union anticipatorily repudiated Stipulation provision 10B by failing to pay the monthly interest payments after the Stewarts defaulted. Plaintiffs requested specific performance of the payments.

First Union answered, denying liability for the Stewarts' default because of an unperformed condition precedent to their performance, the Stewarts' failure to apply for the letter of credit. First Union also asserted the plaintiffs' failure to mitigate its damages by foreclosing or pursuing other damages against the Stewarts.

On 3 February 1988, plaintiffs filed the foreclosure agreement and the trustee sold the property.

First Union moved for summary judgment. Plaintiffs offered the affidavit of Mountain Federal's president, Jacob Grigg ("Grigg"). Grigg stated:

> [i]t is well understood in the banking industry that . . . the bank's commitment to issue a letter of credit necessarily *implies* the existence of a commitment by the customer to repay the bank . . . [a] commitment by a bank to issue a standby letter of credit operates as a guarantee that the account will be paid . . . [plaintiffs] acted in reliance on the commitment of First Union . . . to 'issue its standby letter of credit' . . . in accordance with the general usage of trade within the banking industry [the commitment to issue] would constitute the unconditional obligation on the part of First Union . . . to issue and honor the letter of credit [emphasis added].

First Union objected in writing to these assertions on evidentiary grounds and because Grigg was not qualified to testify about banking industry usage or practice. The trial court did not rule on First Union's motion.

In support of its motion, First Union submitted two affidavits, one from one of its officers, and one from an officer of another banking institution, to show that First Union's obligation under

a standby letter of credit arose only after the customer's application and the bank's acceptance of the application.

The court entered summary judgment for plaintiffs, citing the parties' stipulation that no material issue of fact existed.

The dispositive issue is whether Stipulation provision 10B was an enforceable contract of absolute guaranty between plaintiffs and First Union.

First Union asserts that provision 10B of the Stipulation with plaintiffs was a mere "agreement to agree," rather than a meeting of the minds as to the material terms of a contract. We agree with First Union's assertions.

> "One of the essential elements of every contract is mutual[ity] of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to *all* the terms. If *any* portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement." . . . A contract, and by implication[,] a provision, "leaving material portions open for future agreement is nugatory and void for indefiniteness." . . . Consequently, any contract provision . . . failing to specify either directly or by implication a material term is invalid as a matter of law.

MCB Ltd. v. McGowan, 86 N.C. App. 607, 608-9, 359 S.E.2d 50, 51 (1987) (emphases in original) (citations omitted) (construing a mortgage subordination provision).

The rule is that when the language of a contract is plain and unambiguous, construction of the language is a matter of law for the court. *Clear Fir Sales Co. v. Carolina Plywood Distributors, Inc.*, 13 N.C. App. 429, 430, 185 S.E.2d 737, 738 (1972). In determining the nature of a contract, we give the contract language the construction that the parties intended at the time of formation, as discerned from their writings and actions. *Walker v. Goodson Farms, Inc.*, 90 N.C. App. 478, 486, 369 S.E.2d 122, 126, *review denied*, 323 N.C. 370, 373 S.E.2d 556 (1988).

The language of Stipulation provision 10B plainly and unambiguously indicates that the parties intended to limit First Union's

obligation to indemnify plaintiffs to a "standby" letter of credit based on, in plaintiffs' terms, a "promise to issue a letter of credit."

A "standby" letter of credit functions "to indemnify the beneficiary in the event of breach by the customer of an obligation owed by [the customer] to the beneficiary. . . . [also] commonly called a . . . guaranty letter." 7 R. Anderson, *Anderson on The Uniform Commercial Code* § 5-102:15 (3d ed. 1985) (hereafter "*Anderson*"). An "indemnity" is a "collateral contract . . . by which one . . . engages to secure another against an anticipated loss . . . by the legal consequences of . . . forbearance on the part of one of the parties . . . [the] term pertains to liability for loss shifted from one person held legally responsible to another person." Black's Law Dictionary 692 (5th ed. 1979).

A letter of credit is essentially a contract between the issuer and the beneficiary, independent of the underlying contract between the customer and the beneficiary. *O'Grady v. First Union National Bank*, 296 N.C. 212, 232, 250 S.E.2d 587, 600 (1978).

> [T]he letter is merely one of three contracts . . . (1) a preliminary contract between the customer and the issuer that the issuer will issue a letter of credit to make payment *in accordance with the terms of the preliminary contract*, (2) the letter of credit by which the issuer *undertakes the obligation that he had agreed to assume by the preliminary contract*, and (3) an underlying contract between the customer and the beneficiary of the letter.

Anderson, at § 5-102:10 (emphases added). "The [UCC] does not impose any duty on a bank . . . to accept the customer's application and issue a letter of credit." *Id.*, at § 5-102:18.

Several sources govern letter-of-credit law, including Article 5 of the Uniform Commercial Code ("UCC"). *Sunset Investments Ltd. v. Sargent*, 52 N.C. App. 284, 287-88, 278 S.E.2d 558, 561, *review denied*, 303 N.C. 550, 281 S.E.2d 401 (1981), N.C.G.S. § 25-5-101-117 (1989). The UCC applies to letters encompassing certain types of "credits" set out in G.S. § 25-5-102(1)(a-c). The UCC defines a "credit" as

> an engagement by a bank . . . *at the request of a customer* . . . and within the scope of . . . G.S. 25-5-102 . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. . . .

> The engagement may be either an *agreement to honor* or a statement that the bank . . . is authorized to honor.

N.C.G.S. § 25-5-103(1)(a) (emphases added).

The Stipulation states that First Union "shall issue [a] Standby Letter of Credit in favor of" plaintiffs, as beneficiaries. It is evident that until an issuer (here, First Union) and a customer or principal (here, the Stewarts) formed the underlying 'preliminary contract,' no letter of credit contract could issue, because the letter was no more than the 'undertaking' of the preliminary agreement. Therefore, formation of the underlying 'preliminary contract' constitutes not only a material portion of the letter of credit contract, but is the substance of the letter's 'engagement' or 'undertaking,' and thus is a material portion provision 10B.

Review of the provision reveals that on its face the Stipulation left open and unsettled the future formation of the requisite 'preliminary contract' between First Union and the Stewarts, and provided no mode of ensuring execution of the 'preliminary contract.' As commercial business entities contracting with the Stewarts and First Union at arm's length, by their own affidavits familiar with letter-of-credit law, and as holders of a foreclosure order regarding the deeds of trust on which the Stewarts had defaulted, plaintiffs had at the time the parties executed the Stipulation the power to require that First Union and the Stewarts form the 'preliminary agreement' for the standby letter of credit contract *before* entering into the Stipulation to forbear from foreclosure.

We determine that the provision permitting future agreement between First Union and the Stewarts renders the contract between First Union and plaintiffs void for indefiniteness and invalid as a matter of law. Therefore, plaintiffs were not entitled to judgment as a matter of law against First Union on the invalid provision. Instead, First Union is entitled to summary judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c); *N.C. Coastal Motor Line, Inc. v. Everette Truck Line, Inc.*, 77 N.C. App. 149, 151, 334 S.E.2d 499, 501, *review denied*, 315 N.C. 391, 338 S.E.2d 880 (1986) (any party is entitled to summary judgment as a matter of law).

Reversed.

Judges JOHNSON and EAGLES concur.

ROBERT B. BARBER, EMPLOYEE, PLAINTIFF-APPELLANT v. BABCOCK & WILCOX CONSTRUCTION COMPANY, EMPLOYER, DEFENDANT-APPELLEE AND INA/AETNA INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLEE

No. 8910IC588

(Filed 17 April 1990)

1. **Master and Servant § 93 (NCI3d)— workers' compensation— asbestosis—expert witness not listed during discovery**

The Industrial Commission Deputy Commissioner did not abuse her discretion during a workers' compensation asbestosis hearing by accepting a defense witness as an expert on corporate safety despite defendant's failure to list the witness as an expert where plaintiff knew that the witness would testify as the main defense witness, apparently knew the substance of the testimony, and the matter had been continued more than once.

Am Jur 2d, Workmen's Compensation § 540.

2. **Master and Servant § 93.3 (NCI3d)— workers' compensation —asbestosis—safety expert—competent to testify**

A corporate safety expert was competent to testify pursuant to N.C.G.S. § 8C-1, Rule 406 concerning the routine practice of the defendant employer in removing asbestos even though he was not present at the jobsite where plaintiff worked.

Am Jur 2d, Workmen's Compensation § 544.

3. **Master and Servant § 93.2 (NCI3d)— workers' compensation— asbestosis—air sample test data—admissible as corroboration that tests performed**

Air sample test data were admissible in a workers' compensation asbestosis hearing as corroborative of an expert witness's testimony that testing was routinely done when asbestos was removed, but the specific test data regarding the asbestos level at the project while plaintiff was working there were not admissible as corroborative evidence because the witness had no independent knowledge of the air quality at plaintiff's jobsite.

Am Jur 2d, Workmen's Compensation § 542.

4. Master and Servant § 93.2 (NCI3d) — workers' compensation — asbestosis — air sample test results — admissible under business records exception

Although the Industrial Commission erred by stating that specific air sample test data in a workers' compensation asbestosis hearing were not being received into evidence to prove the truth and accuracy of the results reached and then relying on that data in reaching its determination, the error was harmless because the test results were admissible under the business records exception to the hearsay rule. Although the witness was not personally knowledgeable about the scientific method used in obtaining the data, he was familiar with the system used by his company in obtaining tests and filing the results with his office and, considering also the high level of trustworthiness associated with the data, the witness was qualified to introduce the test results. N.C.G.S. § 8C-1, Rule 803(6).

Am Jur 2d, Workmen's Compensation § 542.

5. Master and Servant § 68.1 (NCI3d) — workers' compensation — asbestosis — last injurious exposure

The Industrial Commission did not err by holding that plaintiff was not last injuriously exposed to the hazards of asbestos while in the employment of defendant where N.C.G.S. § 97-57 provides that the employer in whose employment the employee was last injuriously exposed shall be liable; "last injuriously exposed" means an exposure which proximately augmented the disease to any extent, however slight; there is nothing in the medical reports in the record to indicate that plaintiff's exposure to asbestos worsened his condition; and plaintiff himself did not testify that the exposure had any effect on his condition.

Am Jur 2d, Workmen's Compensation § 549.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 8 December 1988. Heard in the Court of Appeals 14 November 1989.

Plaintiff filed this claim for workers' compensation benefits on 7 August 1985 alleging that he had contracted the occupational disease of asbestosis in his job as an insulation worker. After a

hearing, a Deputy Commissioner of the Industrial Commission ruled on 21 January 1988 that plaintiff does suffer from asbestosis, but that the defendant-employer is not liable for payment of workers' compensation pursuant to G.S. § 97-53(24) because plaintiff was not exposed to the hazards of asbestos for as much as thirty working days or parts thereof during the course of his employment with defendant-employer as required by G.S. § 97-57. The Full Commission issued an Opinion and Award on 8 December 1988 affirming the Deputy Commissioner's decision. Plaintiff appeals.

Leonard T. Jernigan, Jr., P.A., by Leonard T. Jernigan, Jr., for plaintiff-appellant.

Petree Stockton & Robinson, by Jane C. Jackson and Barbara E. Brady, for defendant-appellees.

JOHNSON, Judge.

The Industrial Commission (the "Commission") made the following findings of fact: Plaintiff began working as an insulator in 1947, and for the next thirty years was exposed to the hazards of asbestos. He was last exposed to the inhalation of asbestos dust in 1984, and in the ten years prior to that time, he was exposed from 1975 to 1978. Plaintiff was employed by defendant construction company on a project for a total of forty-eight days from 27 February 1984 to 4 May 1984. It was his job to insulate boilers and pipes with non-asbestos material after other workers known as laborers had removed old asbestos insulation.

Ninety-eight percent of the old asbestos (in terms of square footage) had been removed when plaintiff began work at the project. Asbestos was removed on four occasions at the project during the time plaintiff worked there. These removals were done by laborers working within an airtight containment area. The asbestos was sealed in special bags and taken to a toxic waste dump. Plaintiff was not involved in the asbestos removal. The project manager testified that air sample tests were done outside and below the containment area each time asbestos was removed. The Deputy Commissioner accepted defense witness Craig Robinson as an expert in corporate safety. This expert testified without objection that the air sample tests showed the amount of asbestos in the air at the project was negligible. The data showing results of the air tests was admitted only for the purpose of corroborating the expert's testimony. The Commission also found that before

insulators began applying new insulation, old insulation was incapsulated in a latex-base liquid which formed an airtight impermeable barrier to inhibit migration of asbestos fibers.

By his first and third Assignments of Error, plaintiff contends that the Industrial Commission relied on inadmissible evidence to support its decision that he was not exposed to asbestos dust for thirty working days. By this, plaintiff is referring to the Deputy Commissioner's allowing the defendant-employer's corporate safety specialist, Craig Robinson, to testify as an expert, and also admitting the air sample test reports as corroborative evidence.

On appeal of a decision of the Industrial Commission, we are limited to addressing two questions: Was there any competent evidence to support the Commission's findings of fact, and do the findings of fact justify the legal conclusions and decision? *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981). The findings of fact are conclusive on appeal if supported by any competent evidence, even if there is evidence to support contrary findings. *Id.*

[1] Plaintiff objected at the hearing to Robinson's being accepted as an expert on the grounds that the witness had not been listed by defendants as an expert during discovery. The decision of whether a witness should be qualified as an expert is addressed to the discretion of the court. *Wells v. French Broad Electric Membership Corp.*, 68 N.C. App. 410, 315 S.E.2d 316, *disc. rev. denied*, 312 N.C. 498, 322 S.E.2d 565 (1984). Here, plaintiff knew that Robinson would testify as the main defense witness, but he did not know that defendants intended to qualify him as an expert. Plaintiff also apparently knew generally the substance of the witness's testimony since he had received copies of the air sample reports during discovery. This matter had been continued more than once and, in qualifying defendants' witness as an expert, the Deputy Commissioner noted the need to avoid further delay. We cannot say that the Deputy Commissioner abused her discretion in rejecting plaintiff's argument and allowing Robinson to testify as an expert.

[2, 3] Plaintiff also contends that Robinson's being allowed to testify was error because, although he is employed by the defendant-employer, the witness was not actually present at the jobsite where plaintiff worked. Although this argument was not raised by plaintiff at the hearing, we shall in our discretion address it.

Witness Robinson was competent to testify concerning the routine practice of the defendant-employer in removing asbestos pursuant to G.S. § 8C-1, Rule 406 which provides in part that "[e]vidence of the . . . routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the habit or routine practice." To the extent that the air sample tests showed that testing was routinely done when asbestos was removed, the tests added weight or credibility to Robinson's testimony and were admissible as corroborative evidence. *State v. Reynolds*, 91 N.C. App. 103, 370 S.E.2d 600 (1988). We think, however, that the specific test data regarding the asbestos level at the project while plaintiff was working there was not admissible as corroborative evidence. Robinson had no independent knowledge of the air quality at plaintiff's jobsite, and could not testify to it. The specific test data was not, therefore, corroborative of testimony he was competent to give. *See Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E.2d 884 (1960). This Court has stated that a party objecting to the introduction of evidence has the duty to bring to the trial court's attention any statements which do not corroborate a witness's testimony. *State v. McNeill*, 90 N.C. App. 257, 368 S.E.2d 206 (1988); *State v. Harris*, 46 N.C. App. 284, 264 S.E.2d 790 (1980). In this case, plaintiff failed to object to any portions of the test data as not corroborating the witness's testimony. He therefore may not raise this issue on appeal.

[4] Although the Commission stated that the specific test data were not being received into evidence to prove the truth and accuracy of the results reached, the Commission went on to quote those results in the findings of fact and clearly relied on them in reaching its determination that plaintiff had not been injuriously exposed to the hazards of asbestos while employed by the defendant-employer. This was error, but we consider it to have been harmless because the test results were admissible under G.S. § 8C-1, Rule 803(6), the business records exception to the rule against hearsay.

The tests were kept by the defendant-employer in the regular course of business, and Robinson testified that the tests were performed for the defendant-employer by a private laboratory, Health and Hygiene, Inc., which he stated is certified by the federal government to perform tests required of the defendant-employer by the Occupational Safety and Health Administration. We think the source

of this data may be regarded as trustworthy. The Commission excluded the information substantively because it found that it was not authenticated by a witness who was familiar with the system under which the tests were performed. We think witness Robinson's knowledge of and relationship to the tests were sufficient to qualify him as a "qualified other witness" under Rule 803(6) who could introduce the data. *State v. Miller*, 80 N.C. App. 425, 342 S.E.2d 553, *disc. rev. denied, appeal dismissed*, 317 N.C. 711, 347 S.E.2d 448 (1986). The test results were sent to him as safety specialist for defendant-employer, and he was aware of Health and Hygiene's credentials with the federal government and that the defendant-employer had authorized Health and Hygiene to perform the tests. Robinson was in effect a custodian for the data. Although he was not personally knowledgeable about the scientific method used in obtaining the data, he was familiar with the system used by his company in obtaining tests and filing the results with his office. For these reasons, and also in light of the high level of trustworthiness associated with the data, we find that Robinson was qualified to introduce the test results in question.

[5] By his second Assignment of Error, plaintiff contends that the Commission erred in applying an injurious exposure standard to plaintiff's claim instead of the thirty-day presumption set by G.S. § 97-57. He points out that there was asbestos in the air at plaintiff's jobsite. Plaintiff is apparently corrrect in this. The Commission found as a fact that plaintiff had last been exposed to the inhalation of asbestos in 1984, which we understand to refer to his work for the defendant-employer. The Commission went on to find as a fact that only a negligible amount of asbestos was in the air, and concluded as a matter of law that plaintiff was not "injuriously exposed to the hazards of asbestos."

G.S. § 97-57 provides in part that "[i]n any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." Our Supreme Court has held that the term "last injuriously exposed" means "an exposure which proximately augmented the disease to any extent, however slight." *Caulder v. Waverly Mills*, 314 N.C. 70, 73, 331 S.E.2d 646, 648 (1985), and *Rutledge v. Tultex Corp.*, 308 N.C. 85, 89, 301 S.E.2d 359, 363

(1983), *quoting Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 166, 22 S.E.2d 275, 277 (1942).

In the instant case, the parties stipulated to certain medical reports by doctors who had examined plaintiff. However, no medical experts were called to testify at the hearing. We have carefully reviewed the medical reports in the record, and find nothing in them to indicate that plaintiff's exposure to asbestos while employed by the defendant-employer worsened his condition "to any extent, however slight." *Id.* Neither did plaintiff himself testify that the exposure had any effect on his condition. In the face of this lack of evidence, we must conclude that the Commission did not err in holding that plaintiff was not last injuriously exposed to the hazards of asbestos while in the employment of the defendant-employer.

In light of our determination to uphold the decision of the Commission, we find it unnecessary to review the defendants' contention that plaintiff's claim is time barred.

For all the foregoing reasons, the decision of the Industrial Commission is

Affirmed.

Judges COZORT and LEWIS concur.

CHARLES SIMPSON, PLAINTIFF v. N. GRANT COTTON, DEFENDANT

No. 8914SC584

(Filed 17 April 1990)

1. Negligence § 31 (NCI3d)— motel shower—sudden surge of hot water—res ipsa loquitur inapplicable

The doctrine of res ipsa loquitur did not apply to create an inference of negligence by defendant motel owner in an action by plaintiff motel guest to recover for injuries received when a sudden surge of scalding hot water came out of a shower head after he had stopped the flow of water from the shower head by pushing in the shower-bath control knob where the evidence showed that, although defendant had ex-

clusive control of the shower-bathtub controls and water heater for purposes of maintenance and inspection, defendant did not have exclusive control of the shower-bathtub controls at the time of plaintiff's injury; the physical cause of the sudden burst of hot water was a matter of sheer conjecture; and no evidence indicated that improved maintenance or inspection by defendant would have prevented the accident.

Am Jur 2d, Negligence §§ 1819 et seq.

2. **Negligence § 57.11 (NCI3d)— motel shower—absence of non-skid strips—no negligence**

The absence of non-skid strips on the floor of a shower in a motel would not give rise to a claim for negligence against the motel owner.

Am Jur 2d, Negligence §§ 78 et seq.

APPEAL by plaintiff from judgment entered 27 February 1989 by *Judge Robert L. Farmer* in DURHAM County Superior Court. Heard in the Court of Appeals 5 December 1989.

Plaintiff instituted this negligence action on 10 April 1987 by the filing of his complaint in which he alleges that defendant was negligent in the maintenance, repair and inspection of a bathtub-shower fixture and water heater under defendant's control, and that plaintiff was injured as a result of defendant's negligence. Defendant's answer denied negligence. The trial court granted defendant's motion for summary judgment. Plaintiff appeals.

On 10 April 1984, plaintiff was a paying guest at the Econo-Lodge Motel in Durham, North Carolina owned by defendant. Plaintiff and his brother were given room number 27. Plaintiff alleges that after checking into the room, he went into the bathroom to take a shower in the combination bathtub-shower (the "shower"). He adjusted the hot and cold water control knobs to a comfortable temperature. He then pulled out the shower-bath control knob so that water came out of the shower head. Plaintiff finished his shower and pushed in the shower-bath control knob. The water from the shower head stopped, but moments later, a sudden burst of scalding hot water gushed out of the shower head hitting plaintiff. Plaintiff jumped to get away from the hot water, slipped, lost his balance, and fell. Plaintiff fell on the tile floor and sustained injuries to his left leg and knee.

Alexander Charns for plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by J. A. Webster, III, for defendant-appellee.

JOHNSON, Judge.

Plaintiff contends on appeal that the trial court committed reversible error in granting defendant's motion for summary judgment because genuine issues as to material facts exist. A motion for summary judgment should be granted only when, taking the evidence in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E.2d 897 (1972). A moving party may prevail by proving that the opposing party would be unable at trial to produce evidence to support an essential element of his claim. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

To establish a *prima facie* case of negligence, plaintiff must put on evidence that defendant had a duty to conform to a certain standard of conduct, that defendant breached that duty, that plaintiff was injured, and that plaintiff's injury was proximately caused by the breach. *Jenkins v. Stewart & Everett Theaters, Inc.*, 41 N.C. App. 262, 254 S.E.2d 776, *disc. rev. denied*, 297 N.C. 698, 259 S.E.2d 295 (1979). Also, a hotel owner is liable to a guest, who is considered a business invitee, for injuries resulting from the owner's failure to use ordinary care to keep his premises in a reasonably safe condition. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979). A defendant owner also has a duty to warn of hidden dangers or unsafe conditions on the premises of which the defendant knows or of which, through the exercise of ordinary inspection he should know. *Porter v. Mid-State Oil Co.*, 89 N.C. App. 519, 366 S.E.2d 245 (1988); *Little v. Oil Corp.*, 249 N.C. 773, 107 S.E.2d 729 (1959).

[1] Plaintiff apparently recognizes that he is unable to show exactly what negligent act or omission by defendant caused his injury. Plaintiff therefore invites us to hold that the doctrine of *res ipsa loquitur* is applicable to create an inference of negligence from the occurrence of the incident itself under the facts of this case. This would take the question of negligence to the jury.

The doctrine of *res ipsa loquitur* has been applied to negligence actions

> when a thing which causes injury is shown to be under the management of the defendant, and the accident is such that in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

McPherson v. Hospital, 43 N.C. App. 164, 167, 258 S.E.2d 410, 412 (1979), *quoting Newton v. Texas Co.*, 180 N.C. 561, 567, 105 S.E. 433, 436 (1920).

Our Supreme Court has stated that in order for the doctrine of *res ipsa loquitur* to be appropriate, the court must be able to infer negligence from the *physical* cause of an accident, without knowing the circumstances of the responsible human cause. *Kekelis v. Machine Works*, 273 N.C. 439, 160 S.E.2d 320 (1968). Also, the doctrine has no application if more than one inference may be drawn regarding negligence. *Porter v. Mid-State Oil Co., supra.* Further, use of the doctrine is improper when the existence of negligence is not the more reasonable probability, or the cause of the accident is a matter of conjecture. *Lane v. Dorney*, 250 N.C. 15, 108 S.E.2d 55 (1959), *reversed on other grounds*, 252 N.C. 90, 113 S.E.2d 33 (1960); Strong's Index 3d, Negligence §§ 6 and 6.1.

Applying these principles to the instant case, we find the doctrine of *res ipsa loquitur* inapposite. It is true that defendant had exclusive control of the shower-tub controls and water heater for purposes of maintenance and inspection. We do not find that defendant had exclusive control at the time of plaintiff's injury since plaintiff was then operating the control knobs and guests prior to him also had access to the controls. *Porter v. Mid-State Oil Co., supra.* The principal reason, however, that we decline to apply the *res ipsa* doctrine is that the cause of the sudden burst of hot water seems to us to be a matter of sheer conjecture. *Lane v. Dorney, supra.* The physical cause of the accident is unknown, *Kekelis v. Machine Works, supra,* and nothing indicates that improved maintenance or inspection by the defendant would have prevented the incident. Defendant presented uncontroverted evidence that the shower in room 27 had been used more than a thousand times both before and after plaintiff's accident without incident. We do not think that the more reasonable probable cause of the hot water surge was negligence. We, therefore, decline to

apply the evidentiary principle of *res ipsa loquitur* to the facts of this case.

[2] Last, plaintiff urges that a material issue of fact remains for the jury as to whether there were non-skid strips on the floor of the shower. We do not find the determination of this question to be material to the outcome of this dispute so as to preclude the granting of summary judgment. This Court recently upheld the granting of directed verdict for a defendant hotel in which the plaintiff alleged that while he was a guest in defendant's hotel, he slipped in the bathtub and that one-half of the bathtub's bottom was not covered by non-skid strips. *Kutz v. Koury Corp.*, 93 N.C. App. 300, 377 S.E.2d 811 (1989). We stated that "[t]he bathtub here was not so unnecessarily dangerous so as to give rise to a claim of negligence." *Id.* at 304, 377 S.E.2d at 814. The *Kutz* opinion also cites with approval two cases from other jurisdictions in which the lack of a bathmat was not held to create actionable negligence. *LaBart v. Hotel Vendome Corp.*, 213 F. Supp. 958 (D. Mass 1963), and *Coyle v. Beryl's Motor Hotel*, 171 N.E.2d 355 (Ohio App. 1961). In line with *Kutz v. Koury Corp., supra*, we hold that even if a jury were to determine that plaintiff is correct in asserting that there were no non-skid strips on the shower floor, this would not give rise to a claim for negligence. Therefore, this issue does not preclude the granting of summary judgment.

For the foregoing reasons, we affirm the judgment of the court below.

Affirmed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. MOLLIE REED HYATT

No. 8916SC322

(Filed 17 April 1990)

Narcotics § 4.7 (NCI3d)— charges of possession with intent to manufacture and intent to sell or deliver cocaine—instruction on felony possession of cocaine as lesser-included offense—erroneous

The trial court erred by instructing a jury that possession of more than one gram of cocaine is a lesser-included offense of N.C.G.S. § 90-95(a)(1) because, while the quantity of the drugs seized is evidence of intent to sell, it is not an element of possession with intent to sell. Because the jury necessarily found facts supporting the conviction of misdemeanor possession of cocaine when it found defendant guilty of possession of more than one gram of cocaine, the case was remanded for entry of judgment on a verdict of guilty of misdemeanor of possession of cocaine.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 40-48.

APPEAL by defendant from judgment entered 9 November 1988 by *Judge George M. Fountain* in ROBESON County Superior Court. Heard in the Court of Appeals 15 November 1989.

Defendant was charged under N.C. Gen. Stat. sec. 90-95(a)(1) (1985) with possession with intent to manufacture cocaine and possession with intent to sell or deliver cocaine on 16 June 1988. The charges were consolidated for trial.

On 7 November 1988 defendant was tried before a jury and subsequently convicted of felony possession of one gram or more of cocaine. Judgment was entered on 9 November 1988. From this judgment, defendant appeals.

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

Murray, Regan and Regan, by Cabell J. Regan, for defendant-appellant.

ORR, Judge.

The sole issue on appeal is whether the trial court erred by submitting to the jury the charge of felonious possession of more than one gram of cocaine. For the reasons set forth below, we hold that the trial court erred.

At trial, the State's evidence tended to show that on 16 June 1988, a valid search was conducted by narcotics detectives at the residence of Dean and Charlene Oxendine. Neither Dean nor Charlene Oxendine was present during the search, but defendant and others were on the premises. Defendant is Dean Oxendine's half-sister. A quantity of cocaine was discovered in several packets in the residence.

Defendant was charged by warrant and subsequently indicted for possession of cocaine with intent to manufacture by repackaging and possession with intent to sell or deliver cocaine.

At the charge conference at trial, defendant requested that the trial court instruct and submit a possible verdict of a lesser included offense of misdemeanor possession in addition to the felony charge of possession with intent to sell or deliver. The trial court denied defendant's request, and advised the parties that it would submit possible verdicts of guilty of possession with intent to sell or deliver cocaine, not guilty of the same, or guilty of possession of more than one gram of cocaine.

Defendant objected to the proposed charge on the ground that defendant was not charged with possession of more than one gram of cocaine, and the trial court overruled the objection. The jury returned a verdict of not guilty of possession of cocaine with intent to manufacture by repackaging and guilty of the felony charge of possession of one gram or more of cocaine. The jury returned no verdict on the charge of possession with intent to sell or deliver cocaine.

Defendant argues that the trial court erred in submitting the charge of possession of one gram or more of cocaine because defendant was not formally charged with that offense, and it is not a lesser included offense of possession with intent to sell or deliver cocaine. We agree.

Defendant was charged under N.C. Gen. Stat. sec. 90-95(a)(1) (1985), which states:

> Except as authorized by this Article, it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

There is nothing in sec. 90-95(a)(1) to indicate that possession of more than one gram of cocaine is a lesser included offense. In fact, there are only two elements of the statute: "1) knowing possession of the controlled substance and 2) possession with intent to sell or deliver it." *State v. Thobourne*, 59 N.C. App. 584, 590, 297 S.E.2d 774, 778-79 (1982). While the quantity of drugs seized is evidence of the intent to sell, "it is not an element of G.S. 90-95(a)(1)." *Id.*, 297 S.E.2d at 779.

Moreover, in *State v. Peoples*, 65 N.C. App. 168, 308 S.E.2d 500 (1983), we held that the amount of hashish possessed is not an element of the crime of possessing hashish with the intent to sell and deliver under sec. 90-95(a)(1). In *Peoples*, this Court stated:

> [S]ince the indictment he [defendant] was tried under did not allege that the amount of hashish possessed weighed more than one-tenth of an ounce, an element of the crime, he has been convicted of a crime that he has not been properly indicted for. This is not permissible under our law and the conviction cannot stand. *State v. Baldwin*, 61 N.C. App. 688, 301 S.E.2d 725 (1983).

Id. at 169, 308 S.E.2d at 501.

Although hashish, cocaine and marijuana are different controlled substances, the elements of possession with intent to sell and deliver under sec. 90-95(a)(1) are the same. Nowhere in this statute is an element specifying the amount of the controlled substance for which a defendant may be charged and convicted.

In the case *sub judice*, the trial court charged the jury that possession of more than one gram of cocaine is a lesser included offense under sec. 90-95(a)(1). This was an incorrect charge. Possession of more than one gram of cocaine is not a *lesser* included offense under sec. 90-95(a)(1). It is an offense by itself under sec. 90-95(d) and punishable as a Class I felony under sec. 90-95(d)(2). It is a well-settled law that "a crime is not a lesser included offense of another crime if the former contains any element that the latter

does not." 65 N.C. App. at 168, 308 S.E.2d at 501, *citing State v. Overman*, 269 N.C. 453, 153 S.E.2d 44 (1967).

We therefore hold that the crime of possession of more than one gram of cocaine contains an element (the specific amount of the substance) that sec. 90-95(a)(1) does not. Therefore, possession of more than one gram of cocaine is not a lesser included offense under sec. 90-95(a)(1). Defendant's felony conviction cannot stand because she was charged only with violations of that statute. *Id.* at 169, 308 S.E.2d at 501 (citations omitted).

When the jury found defendant guilty of possession of more than one gram of cocaine, it necessarily found facts supporting a conviction of misdemeanor possession of cocaine. Knowing possession of cocaine is one element of sec. 90-95(a)(1). *State v. Thobourne*, 59 N.C. App. 584, 590, 297 S.E.2d 774, 779 (1982). *See also State v. Gooch*, 307 N.C. 253, 297 S.E.2d 599 (1982) (simple possession of a controlled substance (marijuana) under N.C. Gen. Stat. sec. 90-95(a)(3) (1981) is a lesser included offense of possession with intent to manufacture, sell, or deliver under sec. 90-95(a)(1)). Therefore, instead of returning the case for reindictment and retrial, we remand it for entry of judgment on a verdict of guilty of misdemeanor possession of cocaine. *See Gooch; State v. Dawkins*, 305 N.C. 289, 291, 287 S.E.2d 885, 887 (1982).

Remanded for judgment.

Judges PHILLIPS and GREENE concur.

LANCE MONROE MIDDLETON AND FRANCES J. MIDDLETON, PLAINTIFFS v. BESSIE D. MIDDLETON, DEFENDANT v. HERMAN CLAYTON MIDDLETON, THIRD-PARTY DEFENDANT

No. 8822SC1237

(Filed 17 April 1990)

Appeal and Error § 14 (NCI3d)— appeal dismissed as untimely —written motions following denial of oral motions—time for notice of appeal not tolled

Plaintiffs' appeal was dismissed as untimely in an action to recover monies due under an oral contract where plaintiffs

made oral motions for judgment n.o.v. and a new trial in open court on 14 April 1988, which were denied; plaintiffs then made written motions for judgment n.o.v. and for a new trial on 22 April, which were denied on 6 June; and plaintiffs entered written notice of appeal within ten days of 6 June. Plaintiffs were not entitled to file written motions requesting relief previously denied and thereby toll the period for filing written notice of appeal. N. C. Rules of Appellate Procedure, Rule 3. N.C.G.S. § 1A-1, Rule 50.

Am Jur 2d, Appeal and Error §§ 292 et seq.

APPEAL by plaintiffs from judgment entered 21 April 1988 by *Judge Thomas W. Ross* in DAVIDSON County Superior Court. Heard in the Court of Appeals 24 July 1989.

Plaintiffs instituted this action to recover money allegedly due under an oral contract between plaintiffs and defendant. Plaintiffs are the brother and sister of defendant's ex-husband. Defendant filed a third party complaint alleging that if there was an oral contract between the parties, her ex-husband, H.C. Middleton, negotiated and executed the contract with plaintiffs. Defendant also alleged that, by virtue of her purchase of clear title to certain property under the terms of a separation agreement, she was no longer liable for the unsecured debt incurred during the marriage for the improvement of said property.

Plaintiffs allege that over the course of the spring, summer, and fall of 1984 they loaned defendant, who was then married to their brother, approximately $50,000.00 to start her own day-care center in Lexington, North Carolina. In order to do this, plaintiffs had to borrow $50,000.00 and were required to secure this loan by mortgaging the home of plaintiff Frances Middleton. Defendant allegedly agreed to reimburse plaintiffs according to the terms at which plaintiffs obtained the loan from the bank; however, no written agreement to this effect was executed and plaintiffs did not require that defendant provide security for her loan.

The day-care center opened for business in September 1984. In October 1984, defendant and H.C. Middleton separated. Defendant made two payments to plaintiffs—one in September 1984 and one in October 1984. In December 1984, defendant and H.C. Middleton executed a separation agreement whereby defendant purchased the day-care center and additional property from her husband for

the sum of $125,000.00. Defendant never made another payment to plaintiffs.

The case was tried to a jury at the 11 April 1988 Civil Session of the Superior Court of Davidson County. The jury found: (i) that there was no oral contract between plaintiffs and defendant whereby defendant was obligated to repay any monies loaned and (ii) that plaintiffs did not deliver money to defendant under such circumstances that defendant should be required to repay plaintiffs that money. Accordingly, the trial court entered judgment for defendant. Plaintiffs moved for judgment notwithstanding the verdict and for a new trial. These motions were denied and plaintiffs appealed. The case was calendared for hearing in this Court on 12 May 1989. On account of the pendency of a bankruptcy proceeding by defendant, the case was continued to 24 July 1989.

James E. Snyder, Jr. for plaintiff-appellants.

No brief filed for defendant-appellee.

PARKER, Judge.

After review of the transcript and record on appeal, we conclude that this appeal was not timely filed. We, therefore, dismiss the appeal pursuant to Rule 3 of the N.C. Rules of Appellate Procedure. The transcript reveals the following dialogue between the trial judge and counsel at the conclusion of the trial, after the jury had returned its verdict:

> THE COURT: . . . Any motions at the conclusion of the Verdict being recorded?
>
> MR. SNYDER: At the conclusion of the Verdict, the Plaintiffs would make a motion to set aside the Verdict as being against the greater weight of the evidence.
>
> THE COURT: Do you wish to be heard?
>
> MR. SNYDER: No, sir.
>
> THE COURT: Does the Defendant wish to be heard?
>
> MR. GRAY: No, Your Honor.
>
> THE COURT: Third Party Defendant wish to be heard?
>
> MR. LEONARD: No, sir.

THE COURT: The Court would deny that motion.

MR. SNYDER: Further, Your Honor, the Plaintiffs would make a motion for a new trial for reasons of the—

THE COURT: The Court would deny that at this time. Do you wish to give Notice of Appeal?

MR. SNYDER: Not at this time.

THE COURT: Third Party Defendant wish to give Notice of Appeal?

MR. LEONARD: No, Your Honor.

The written judgment was signed and filed 21 April 1988. On 22 April 1988 counsel for plaintiffs filed a written motion for judgment notwithstanding the verdict and, alternatively, for a new trial. A hearing on the motions was held 6 June 1988 and the motions were again denied. Finally, on 13 June 1988 plaintiffs filed their written notice of appeal.

General Statute 1A-1, Rule 50 provides in pertinent part the following:

> Not later than 10 days after entry of judgment, 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 motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

G.S. 1A-1, Rule 50(b)(1). Under Rule 3 of the N.C. Rules of Appellate Procedure, timely filing of a motion for judgment notwithstanding the verdict or for a new trial pursuant to G.S. 1A-1, Rule 50(b) and Rule 59 tolls the period for filing and serving written notice of appeal in civil actions. The full time for appeal commences to run and is to be computed from the entry of the order granting or denying the motions under Rule 50(b) or Rule 59. N.C. Rules App. Proc., Rule 3(c).

In the present case, plaintiffs entered their written notice of appeal within 10 days after the entry of the 6 June order denying their 22 April written motions for judgment notwithstanding the verdict and for a new trial. In our opinion, however, plaintiffs were not entitled to make these written motions or to a hearing on these motions because they had previously made oral motions for judgment notwithstanding the verdict and for a new trial in open court on 14 April 1988 and were afforded an opportunity to be heard which they declined. Their Rule 50(b) and Rule 59 motions having been denied in open court at that time, plaintiffs were not entitled to file written motions requesting the same relief and thereby toll the period for filing written notice of appeal. Since the 13 June 1988 written notice of appeal was not filed within 10 days of entry of judgment, which by the terms of the judgment was 14 April 1988, we dismiss the appeal as untimely.

Appeal dismissed.

Judges EAGLES and ORR concur.

JEAN STILLWELL MILLER, PLAINTIFF v. MICHAEL F. D. MILLER, DEFENDANT

No. 8926DC967

(Filed 17 April 1990)

Divorce and Alimony § 21.1 (NCI3d)— alimony arrearages— assignment of wages—service of notice on attorney of record

The trial court obtained personal jurisdiction over defendant in a 1988 proceeding to recover alimony arrearages from defendant by assignment of his monthly wages pursuant to N.C.G.S. § 50-16.7(b) where plaintiff served the motion for assignment of wages and the show cause order on the attorney of record who represented defendant in the original divorce and alimony action in 1976. N.C.G.S. § 1A-1, Rule 5(b).

Am Jur 2d, Courts §§ 118, 143; Divorce and Separation § 856.

APPEAL by defendant from *Jones, Judge*. Order entered 10 July 1989 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 March 1990.

This is a civil proceeding in which plaintiff seeks to recover alimony arrearages from defendant by assignment of defendant's monthly wages pursuant to G.S. 50-16.7(b). Evidence in the record tends to show the following:

1. On 27 February 1976, pursuant to a judgment entered in District Court, defendant was ordered to pay plaintiff $275.00 every month in permanent alimony and to maintain until his death a life insurance policy for no less than $10,000 with plaintiff as the named beneficiary.

2. On 18 February 1988, plaintiff filed a motion in District Court, Mecklenburg County for a show cause order asking that defendant be held in contempt for refusing to abide by the judgment of 27 February 1976. Plaintiff also made a motion for attachment and garnishment of defendant's wages alleging alimony arrearages of $33,000.00.

3. Because defendant's whereabouts were unknown to plaintiff at the time, the above described motion was served upon the attorney who represented defendant at the original divorce proceedings in 1976 and upon the commander of the United States Army Finance and Accounting Center.

4. On 22 February 1988, the District Court granted plaintiff's motion for a show cause order. When defendant did not appear on 30 March 1988, the court adjudged defendant to be in wilful contempt and ordered the United States Army to begin monthly payments to plaintiff's attorney in an amount equal to sixty-five (65%) percent of defendant's monthly disposable income. The Army, however, refused to honor this garnishment order.

5. On 4 May 1988, plaintiff filed a motion to amend the judgment ordering garnishment and a motion for involuntary assignment of defendant's wages pursuant to G.S. 50-16.7(b).

6. Plaintiff's motions along with another show cause order by the District Court were served by certified mail upon the Commander of the United States Army Finance Center, the United States Attorney for the Western District of North

Carolina, and by first class mail upon the attorney who represented defendant at the original divorce proceedings.

7. Although the show cause order of 4 May 1988 gave notice of a hearing on 1 June 1988, defendant did not appear or have an attorney present at the hearing. On 6 June 1988, the court authorized assignment of sixty-five (65%) percent of defendant's monthly Army retirement pay to satisfy his alimony arrearages, current alimony and plaintiff's attorney's fees.

8. On 26 April 1989, defendant filed a motion to vacate the orders of 30 March and 6 June 1988 and the involuntary assignment of his wages pursuant to Rule 60(b).

From an order prohibiting assignment of defendant's retirement pay for current alimony but otherwise denying his motion for relief, defendant appealed.

W. Richard Moore for plaintiff, appellee.

Bailey, Patterson, Caddell & Bailey, P.A., by Sheri A. Harrison, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant's sole argument on appeal is that the district court erred by denying his Rule 60(b) motion for relief from the order for involuntary assignment of his wages. He contends that the court lacked jurisdiction over his person because he never received proper notice of the proceedings or service of process. We disagree.

Divorce actions in which alimony is awarded are not ended merely by the rendition of judgment. "Such actions are always open for motions in the cause . . . for the enforcement of the order for alimony." *Barber v. Barber*, 216 N.C. 232, 234, 4 S.E.2d 447, 448 (1939). Consequently, a plaintiff seeking enforcement of an order for alimony need not serve the defendant with a new summons. Simply serving him with notice of the motion for enforcement is sufficient. *Id.* Unless otherwise ordered by the court, G.S. 1A-1, Rule 5(b) allows service of notice of written motions by service on the defendant's attorney of record. *Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30, *disc. rev. denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).

In the present case, plaintiff served James E. Walker, defendant's attorney of record, with copies of the motion for assignment of wages and the show cause order of 4 May 1988. Defendant, however, points out that Mr. Walker was hired only to "protect the defendant's interest in the dissolution of his marriage" in 1976. Therefore, he claims that service upon Mr. Walker in 1988 could not be "reasonably calculated to inform the defendant of the hearings and thus denied the defendant due process." Nevertheless, this Court has held that absent extraordinary circumstances, "[t]he relationship between a party and his attorney of record continues so long as the opposing party may enter a motion in the matter or apply to the court for further relief." *Griffith*, 38 N.C. App. at 29, 247 S.E.2d at 33. Upon review of the record, we conclude that the circumstances in this case do not justify a deviation from this well-established rule. Accordingly, we hold that plaintiff's service of notice was proper and that the district court correctly denied defendant's Rule 60(b) motion for relief.

The judgment of the district court is affirmed.

Affirmed.

Judges PARKER and COZORT concur.

GLADYS J. JENKINS AND HUSBAND, ELBERT LEE JENKINS, PETITIONERS v. VERNON FOX AND WIFE, DONNA FOX, AND RANDALL FOX, RESPONDENTS

No. 8924SC803

(Filed 17 April 1990)

Partition § 7.2 (NCI3d)— appeal to superior court—exception without specific grounds—appeal dismissed—error

The trial court erred in dismissing an appeal from the Clerk of Court's acceptance of a commissioner's report in an action for partition by sale of real property where the trial court rejected the appeal on the grounds that the document filed by petitioners did not state specific grounds for any exception. N.C.G.S. § 46-19 does not require that exceptions be specific or contain specific grounds; the only issue before the

trial court was whether the report should be confirmed, and, in making this determination, the trial court has *de novo* authority to review the report, hear the evidence, and render the appropriate judgment. The court does not have the authority to dismiss the appeal for a lack of a statement of specific grounds for not accepting the commissioner's report.

Am Jur 2d, Courts §§ 98, 122.

APPEAL by petitioners from judgment entered 5 June 1989 by *Judge John Mull Gardner*. Judgment entered out of session and out of term in YANCEY County Superior Court. Heard in the Court of Appeals 7 December 1989.

This action arose on 28 December 1987 when petitioners requested partition by sale of certain property under N.C. Gen. Stat. § 46-1, *et seq.* Respondents answered and requested that the land be partitioned by actual division.

In February 1988, the Clerk of Superior Court in Yancey County entered an order that actual partition of the land would be made. The clerk also appointed three duly qualified commissioners to divide the property.

After viewing the property, the commissioners filed a report on 23 May 1988, setting forth the recommended division of the property. Petitioners excepted to this report on 2 May 1988, on "the grounds that the partition is not in accordance with the value of the property."

On 24 June 1988, a hearing was held to consider this exception, and the clerk ordered that the report be further considered by the commissioners. A supplemental report was filed by the commissioners on 21 July 1988, reaffirming their original division of the property.

The petitioners filed a handwritten document on 1 August 1988, with no caption, which stated: "Now Comes Petitioners [and] respectfully excepts to the report of the Commissioners of record herein." The clerk subsequently rendered an Order of Confirmation on 29 September 1988.

Petitioners appealed to superior court. On 10 May 1989, the trial court dismissed the appeal on the grounds that the document filed by petitioners on 1 August 1988 did not state specific grounds

for any exceptions and was therefore invalid. An order was entered 5 June 1989.

From this order, petitioners appeal.

Hal G. Harrison, P.A., for petitioners-appellants.

Dennis L. Howell for respondents-appellees.

ORR, Judge.

The sole issue on appeal is whether the evidence supported the trial court's findings of fact and conclusions of law. For the reasons set forth below, we reverse the trial court's order.

Under N.C. Gen. Stat. § 46-19 (1984), "If no exception to the report of the commissioners is filed within 10 days, the same shall be confirmed." The petitioners excepted to the report of the commissioners in a document filed on 1 August 1988, but stated no grounds for their exceptions. The statute does not require that exceptions be specific or contain specific grounds.

Respondents argue that exceptions must be specific in order to put the opposing parties and the trial court on notice of what issues will be argued before the court. Further, respondents argue that it would place an undue burden on the court to examine the entire record and determine the grounds for exceptions.

While we agree that the trial court and parties should have notice of the issues involved in any case, the only issue on appeal under § 46-19 is "whether the report of the commissioners *should be confirmed* . . . by the clerk and, upon appeal from his order, by the judge." *Allen v. Allen*, 258 N.C. 305, 307, 128 S.E.2d 385, 386 (1962) (emphasis in the original). In determining whether the report should be confirmed, the trial court may "review the report in the light of the exceptions filed, hear evidence as to the alleged inequity of division and render such judgment . . . , as he deem[s] proper under all the circumstances . . . ." *Langley v. Langley*, 236 N.C. 184, 186, 72 S.E.2d 235, 236 (1952).

An action for partition under N.C. Gen. Stat. § 46-1 (1984) is a special proceeding. When such action is appealed from the clerk to the superior court "for any ground whatever . . . ," the trial court has the authority to consider the matter *de novo. Id.* (citations omitted).

In the case before us, petitioners excepted to the commissioners' report under § 46-19. The above principles of law make it clear that the only issue before the trial court was whether the report should be confirmed. In making this determination, the trial court has the authority, *de novo*, to review the report, hear evidence and render the appropriate judgment. The trial court does not have the authority under § 46-1, *et seq.* to dismiss the appeal because petitioners did not state specific grounds why the commissioners' report should not be confirmed.

We note that originally petitioners excepted to the commissioners' report because the "partition was not in accordance with the value of the property." The commissioners reconsidered the partition and resubmitted it as before which was confirmed by the clerk. There is no question that petitioners' basis for excepting was as originally noted.

We therefore hold that the trial court erred in dismissing the appeal and remand for further proceedings consistent with this opinion.

Vacated and remanded.

Judges EAGLES and PARKER concur.

GRANT POWELL, PLAINTIFF v. FIRST UNION NATIONAL BANK AND MELANIE POWELL, ADMINISTRATRIX OF THE ESTATE OF CASEY POWELL, JR., DEFENDANT AND INTERVENOR/DEFENDANT

No. 894SC728

(Filed 17 April 1990)

1. Banks and Banking § 4 (NCI3d)— joint savings account— survivorship agreement not signed

The trial court did not err by granting summary judgment for a bank and an administratrix on the issue of whether a bank account was a joint savings account with the right of survivorship where the materials showed without contradiction that, although plaintiff and decedent intended to establish

a joint bank account with the right of survivorship, decedent died before signing the agreement. N.C.G.S. § 41-2.1.

Am Jur 2d, Banks §§ 369 et seq.

2. **Banks and Banking § 4 (NCI3d)— joint account—presumption of equal ownership—rebutted**

The trial court did not err by granting summary judgment for defendants on plaintiff's contention that he was entitled to have the funds in a joint bank account where plaintiff designated himself as codepositor in opening the account; the law presumes equal ownership of such joint accounts; and materials of record show without contradiction that the funds deposited were entirely those of decedent.

Am Jur 2d, Banks §§ 369 et seq.

3. **Rules of Civil Procedure § 56.4 (NCI3d)— decedent's property—claim of ownership—assertion of ownership in administratrix's counterclaim—no reply—summary judgment for administratrix**

In an action in which plaintiff sought ownership of certain items of personal property from the administratrix of an estate, plaintiff's affidavit claiming ownership was irrelevant to the case and summary judgment was properly granted for the administratrix where the only mention of the items of personal property in the pleadings was in the administratrix's counterclaim asserting that they belonged to her intestate, and that claim was not responded to by plaintiff.

Am Jur 2d, Summary Judgment §§ 35, 36.

APPEAL by plaintiff from order entered 6 April 1989, *nunc pro tunc* 3 April 1989, by *McLelland, Judge*, in SAMPSON County Superior Court. Heard in the Court of Appeals 17 January 1990.

Prince E. N. Shyllon for plaintiff appellant.

Benjamin R. Warrick for defendant intervenor appellee Melanie Powell.

PHILLIPS, Judge.

Plaintiff's action seeking the release of funds held in a savings account titled in his name and that of the decedent, Casey Powell, Jr., his nephew, was dismissed by an order of summary judgment.

The only question presented by the appeal is whether the materials before the court raise an issue of fact as to the bank account involved being a joint savings account with the right of survivorship. We hold that no such issue is raised and affirm the order.

[1] G.S. 41-2.1, the only authority for creating a joint bank account with the right of survivorship, provides as follows:

> (a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

In substance, the materials of the parties show without contradiction that though plaintiff and Casey Powell, Jr. intended to establish a joint savings account with the right of survivorship, Casey Powell, Jr. died before signing the agreement. Since the statutory terms for creating a survivorship account were not complied with, plaintiff's action has no basis.

[2] Nor is there any basis for plaintiff's contention that in any event he is entitled to half the funds since in opening the account he designated himself as a co-depositor and the law presumes equal ownership of such joint accounts. This presumption is rebuttable, however, and the materials of record show without contradiction that the funds deposited were entirely those of Casey Powell, Jr. *McAulliffe v. Wilson*, 41 N.C. App. 117, 254 S.E.2d 547 (1979).

[3] Plaintiff's further argument that an issue of fact exists as to the ownership of certain items of personal property that he was ordered to turn over to defendant administratrix is likewise without basis. The only mention of those items in the pleadings is in the administratrix's counterclaim—not responded to by plaintiff—in which she asserted that they belonged to her intestate. That fact having been adjudicated against plaintiff by his failure to plead to the counterclaim, his affidavit claiming ownership is irrelevant to the case. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424, *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971).

Affirmed.

Judges EAGLES and ORR concur.

VEVENCIA WILSON, PLAINTIFF-APPELLEE v. CHARLES WILSON, DEFENDANT-APPELLANT

No. 894DC513

(Filed 17 April 1990)

1. **Appearance § 2 (NCI3d)— absence of service of process— general appearance—personal jurisdiction**

Defendant made a general appearance in an action for divorce from bed and board and thus submitted himself to the jurisdiction of the court when he signed a consent judgment even though he was never served with process.

Am Jur 2d, Divorce and Separation §§ 310-317.

2. **Judgments § 21 (NCI3d)— consent judgment—lack of counsel— misrepresentation to court—no grounds for setting aside**

Defendant was not entitled to have a consent judgment granting plaintiff a divorce from bed and board set aside on the ground that defendant was not represented by counsel when he consented to the judgment or on the ground that the parties misrepresented to the court that they were separated.

Am Jur 2d, Divorce and Separation §§ 460, 463, 478.

APPEAL by defendant from order entered 10 January 1989 and amended 12 April 1989 by *Williamson, Judge*, in ONSLOW County District Court. Heard in the Court of Appeals 4 December 1989.

Larry J. Miner for plaintiff appellee.

Paul A. Hardison for defendant appellant.

PHILLIPS, Judge.

On 15 October 1987 plaintiff brought this action for a divorce from bed and board. Though defendant was never served with the summons and complaint nor with the alias and pluries summons, which were duly issued, when the matter came on for hearing on 29 December 1987 a judgment for divorce from bed and board that defendant consented to was entered. On 20 January 1988 plaintiff was killed in an automobile accident. On 26 July 1988 defendant moved to set the consent judgment aside, asserting that he was

not then represented by counsel and was not advised of the judgment's effect, and that at the time the judgment was entered the parties had resumed the marital relationship. Following a hearing, defendant's motion for relief under Rule 60(b), N.C. Rules of Civil Procedure, was denied. We affirm.

[1] Defendant's principal argument that the court had no jurisdiction over him since he was never served with process has no basis. By signing the consent judgment, which he admits, defendant made a general appearance in the case and thus submitted himself to the jurisdiction of the court. *M. G. Newell Company, Inc. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988); *Blackwell v. Massey*, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

[2] The other grounds defendant asserts state no basis for judicial relief: Obtaining counsel if he needed one was his responsibility, not the plaintiff's or the court's; and having participated in obtaining the judgment by misrepresenting to the court that the parties were separated, rather than reconciled, is no ground for releasing him from the judgment. Furthermore, except for the jurisdictional contention the motion was addressed to the sound discretion of the trial court, *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975), and no abuse is apparent. *Harris v. Harris*, 307 N.C. 684, 300 S.E.2d 369 (1983).

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

MICHAEL KEITH BRASWELL, ADMINISTRATOR OF THE ESTATE OF LILLIE STANCIL BRASWELL, DECEASED, PLAINTIFF v. BILLY R. BRASWELL AND RALPH L. TYSON, SHERIFF OF PITT COUNTY, DEFENDANTS

No. 883SC463

(Filed 1 May 1990)

1. Sheriffs and Constables § 4 (NCI3d); Public Officers § 10 (NCI3d) — sheriff's promise of protection — liability for failure to protect — sufficiency of evidence

Plaintiff's evidence was sufficient for the jury on the issue of defendant sheriff's negligence in failing to protect plain-

tiff's intestate from her husband, a deputy sheriff, where it tended to show that the sheriff was aware that decedent had been physically abused by her husband in the past; decedent told the sheriff she was going to leave her husband and asked for protection; decedent advised the sheriff about a letter written by her husband indicating an intent to kill her; the sheriff promised to protect her from her husband and to see that she got to and from work safely but failed to do so; decedent's husband shot her to death while she was on her way to work a few days after leaving him; and decedent's reliance on the promise of protection was causally related to her death in that she took no other steps for her safety because she believed the sheriff's officers were monitoring her movements and those of her husband.

Am Jur 2d, Sheriffs, Police, and Constables §§ 94, 150.

2. Sheriffs and Constables § 4 (NCI3d); Public Officers § 10 (NCI3d)— law officers—failure to protect domestic violence victims—no statutory liability

N.C.G.S. Ch. 50B does not establish an affirmative duty on the part of law enforcement agencies to protect victims or threatened victims of domestic violence upon request so as to give the victim a cause of action for a breach of that duty. Furthermore, Ch. 50B does not apply where the victim failed to seek protection by filing the authorized civil action. N.C.G.S. § 50B-5(b).

Am Jur 2d, Sheriffs, Police, and Constables §§ 94, 150.

3. Sheriffs and Constables § 4 (NCI3d); Public Officers § 10 (NCI3d)— shooting by deputy sheriff—negligent retention and supervision by sheriff—insufficiency of evidence

A sheriff was not liable in damages for the shooting death of a deputy's wife by the deputy on the theory of negligent retention and supervision after learning that the deputy was unfit to carry a gun where the shooting occurred while the deputy was off duty; there was no evidence that the deputy was required to carry a gun while off duty or that his service revolver was the fatal weapon; and the evidence thus did not show that the victim's death was proximately caused by the sheriff's entrustment of a service revolver to the deputy.

Am Jur 2d, Sheriffs, Police, and Constables §§ 94, 150.

Judge COZORT concurring.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiff from *Smith, Judge*. Judgment entered 8 October 1987 in Superior Court, PITT County. Heard in the Court of Appeals 7 December 1988.

On 27 September 1982 plaintiff's decedent was shot and killed by defendant Braswell, her estranged husband, who was then employed by defendant Sheriff as a Deputy Sheriff, as he had been for eight years. Before trial plaintiff's wrongful death action against defendant Braswell was voluntarily dismissed and the part of his action against the defendant Sheriff based upon *respondeat superior* was dismissed by summary judgment. At trial the remaining claims against defendant Sheriff based upon his independent negligence were dismissed by a directed verdict at the close of plaintiff's evidence. Only the trial dismissal is contested by the appeal. Plaintiff's evidence pertinent thereto—consisting largely of the deposition testimony of defendant Tyson and Lillie Braswell's hearsay statements to various friends during the last ten days of her life—when viewed in the light most favorable to the plaintiff is to the following effect:

Defendant Sheriff had known for ten years that Billy Braswell had beaten Lillie Braswell on several occasions, and that five years earlier he had beaten her to the point where hospitalization was required. On Wednesday, 22 September 1982, Lillie Braswell went to Sheriff Tyson's office and told him that because of Braswell's long abuse she was going to leave him and was afraid that he would hurt her; that Braswell had stated "you're not going anywhere . . . none of us is going anywhere . . . [i]f I can't have you, nobody is going to have you"; that in fear of him she had locked herself in her bedroom for two days; that several years earlier he held a gun at her head; that since telling him she was going to leave he had been sitting around the house staring directly at her for long periods of time and had three letters or envelopes in his hand that he tapped on his knee as he stared at her. The Sheriff told her that if she found out what was in those letters to let him know. She asked to have deputies stand by her house while she moved out and he promised to send somebody. Later that afternoon when she called Tyson about no one being there he informed her that he had sent Ivan Harris, a Deputy Sheriff, to

talk with Braswell and that Braswell was not going to hurt her; while she was moving out Mike Braswell, their son, arrived and she showed him an envelope addressed to him that contained a letter written by Braswell which stated:

> Well, Mike by now you already know what has happen[ed] . . . . All I can say is son I loved your mother, and I just couldn't stand to see her leave me . . . . I just hope Mike that you didn't have to see this mess. But if you did, please put it out of your mind. And please don't ever go back to this house again, it'll only hurt you more. Mike get Jimmy to help you with the property settlement, he knows what to do . . . . Please, Mike don't hold this against me. I know it's the worst thing anyone can do, but I feel there is a reason for doing this. I just need the rest, and I couldn't go alone . . . . Mike there is one thing I would like for you to make sure it is done. I would like very much for me and Lillie [to] be placed side by side, along with granddaddy in Wilson. There might be some talk about that, but please be sure that we are placed beside each other . . . . And Mike I'm sorry for doing this to you, but I just can't see any other way. I just love Lillie too much to see her leave me . . . . Dad.

Envelopes addressed to Jimmy Braswell, his brother, and to Deputy Sheriff Brooks Oakley, a friend and co-worker, were also found but not opened before her death. She telephoned defendant about finding the three letters and told him what the one to their son said.

After moving out of the house Lillie Braswell spent the first three nights in Greenville with Marguerite Taylor, a friend, who telephoned defendant that she was there. She spent the following night in Farmville with Lila Joyner and the next in Fountain with Hilda Joyner and told both friends that defendant had promised her protection and had assured her that she did not have to leave Pitt County, that Braswell was not going to hurt her, that he would see that she got back and forth to work safely and would see that Braswell did not bother her, and that his men would be keeping an eye on her. On Monday morning, 27 September 1982, when she left Hilda Joyner's house to go to her job in Greenville she stated that she was going to be alright. While in her car alone on Chinquapin Road, Braswell, in a vehicle of the Sheriff's, pulled her car over to the shoulder of the road and shot her to

death. Braswell then went home and shot himself; but he recovered and was eventually convicted of murder and given a life sentence.

Marvin Blount, Jr. and Joseph T. Edwards for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and J. Daniel McNatt, for defendant appellee Ralph L. Tyson.

PHILLIPS, Judge.

[1] The claim based upon *respondeat superior* having been eliminated from the case, the determinative question presented by this appeal is whether plaintiff's evidence tends to show that some independent negligence of defendant Sheriff proximately contributed to plaintiff's intestate being killed by Deputy Braswell. Plaintiff contends that the evidence tends to show defendant's negligence in three respects, the first of which was failing to protect plaintiff's decedent from an attack by Billy Braswell after promising her that such protection would be provided. This theory of legal liability is authorized by our law, though the general rule is that ordinarily law enforcement officers have no duty to protect individuals from criminal attack, their duty being only to the public at large. In *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), it was held that the general rule is subject to two exceptions: The first, obviously not applicable to this case, is based on the special relationship that exists between an undercover agent, informant or a State's witness and the police when a person dangerous to the cooperating person is being investigated or prosecuted. The other exception, a "special relationship" exception of another type, arises when (1) police protection is promised to an individual; (2) the protection is not forthcoming; and (3) the individual's reliance on the promise of protection is causally related to the injury suffered. This exception to the general rule was adopted because it is unjust to deny redress when a victim of violence is lulled into not taking steps for his or her own safety by voluntary assurances of protection by the police. *Cuffy v. City of New York*, 69 N.Y. 2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987).

Plaintiff's contention that his evidence *prima facie* establishes the three elements of the foregoing exception to the general rule is well taken, and a new trial on the issues raised by this claim is ordered. The evidence as to the first two elements—that defendant promised to protect plaintiff's intestate from Billy Braswell

and did not do so—is both obvious and plenary. The argument that the evidence as to the Sheriff's promise of protection should be disregarded because it is erroneously based upon the hearsay statements of Lillie Braswell has no basis. The court received the hearsay statements into evidence after making the determinations required by Rules 803(24) and 804(b)(5), N.C. Rules of Evidence, and all of the determinations are well supported by evidence and reason. As to the third element of this claim—that the reliance of plaintiff's intestate on the promise of protection was causally related to her death—the evidence, though not without conflict, supports the inference that she did rely on the promised protection and that her death causally resulted therefrom. Leaving aside the evidence that indicates that she sometimes doubted that defendant was keeping his promise to protect her, since for the purposes of the appeal contradictions and inconsistencies in the evidence unfavorable to the plaintiff must be disregarded, *Murray v. Murray*, 296 N.C. 405, 250 S.E.2d 276 (1979), this element is supported by evidence that though Braswell had threatened to kill her she did not leave the county or go into hiding; did not have or seek to obtain a traveling companion; did not carry a weapon or quit going to her job; did not file an action under Chapter 50B of the General Statutes to restrain him from molesting her; and stated on the morning she was killed that she was going to be safe. These actions and words tend to show that she believed that the Sheriff's officers were monitering her movements and those of her husband; that under their protection she could safely continue to live and work in the county; and that because she followed that belief without taking any other steps for her own safety Braswell was able to shoot her in broad daylight on a public highway.

[2] The second respect in which the evidence indicates defendant Sheriff was negligent, so plaintiff contends, was in failing to protect Lillie Braswell, a reported victim of domestic violence, in compliance with the provisions of Chapter 50B of the General Statutes. His argument is that Chapter 50B, entitled Domestic Violence, establishes an affirmative duty on the part of law enforcement agencies to protect victims or threatened victims of domestic violence upon request and that a breach of that duty gives rise to a cause of action. We do not so understand this legislation, and overrule this argument. In gist, Chapter 50B does the following: By G.S. 50B-2 it authorizes one threatened with domestic violence to file a civil action and seek the court's protection; by G.S. 50B-3 it

authorizes the court to hear and determine such actions; by G.S. 50B-4 it provides for enforcing the court's orders; by G.S. 50B-5(a) it authorizes one allegedly threatened with domestic violence to request the assistance of local law enforcement agencies, requires a law enforcement agency so requested to respond as soon as practicable and authorizes such agencies to advise complainants of sources of shelter, recommend treatment facilities, transport them to such facilities when feasible, and to take such other steps as are reasonably necessary to protect a complainant from domestic violence. G.S. 50B-5(b), especially relied upon by plaintiff, reads as follows:

> In providing the assistance authorized by subsection (a), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (a).

G.S. 50B-6 states in pertinent part, "This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein." G.S. 50B-7 provides that the remedies are in addition to others authorized by law, and G.S. 50B-8 concerns protective orders. None of these provisions, in our opinion, nor all of them collectively, make it the affirmative duty of a law enforcement agency to assist anyone threatened with domestic violence. Their effect, it seems to us, is limited to enabling such persons to more readily obtain the court's protection and such assistance as any local agency approached sees fit to give. The provision of G.S. 50B-5(b) absolving officers from liability if reasonable measures are taken cannot be construed as a directive to take such measures. *See Turner v. City of North Charleston*, 675 F.Supp. 314 (D.S.C. 1987). In all events Chapter 50B has no application to this case because Lillie Braswell sought no relief under it by filing the authorized civil action.

[3] The final negligence of the defendant that plaintiff contends his evidence tends to show was continuing Billy Braswell in his employ and failing to properly supervise him after learning that he was unfit to carry a gun. Recovery from a law enforcement agency under this theory has been authorized by some courts under certain circumstances. *Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir. 1982) and *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973) stand for the proposition that a law enforcement agency or other employer can be liable for a shooting injury or death which was proximately caused by the employer's negligence in hiring, training, retaining, or supervising the officer. In both

cases, the shootings occurred while the officers were off duty, their service revolvers were the fatal weapons, and each officer was required by regulation to have his service revolver with him at the time involved. Assuming *arguendo* that this theory of legal liability is valid here, it cannot benefit plaintiff because the evidence does not indicate that Lillie Braswell's death proximately resulted from Billy Braswell being entrusted with a gun by the Sheriff. For the evidence does not indicate either that he was required by defendant to carry a gun while off duty, as he was at the time of the shooting, or that his service revolver was the fatal weapon. Whether Billy Braswell killed her with the service revolver furnished by defendant or with one of the several other guns that he owned, the evidence does not show. Thus, entrusting Billy Braswell with a police revolver has not been shown to be a proximate cause of him shooting plaintiff's intestate, and this claim was also properly eliminated from the case.

New trial.

Judge COZORT concurs.

Judge GREENE concurs in part and dissents in part.

Judge COZORT concurring.

I write only to emphasize that this opinion does not either establish new law or create a new cause of action. As Judge Phillips pointed out, *Coleman v. Cooper*, 89 N.C. App. 188, 366 S.E.2d 2, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), stands for the proposition that liability arises when a law enforcement officer creates a special duty to an individual by promising protection to that individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *Id.* at 194, 366 S.E.2d at 6. This panel is bound by the holding in *Coleman. In Re Harris*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Our task in the case below is to apply the principles enunciated in *Coleman* to the evidence presented at trial. Our review of the evidence reveals that, contrary to the facts in *Coleman*, plaintiff produced some evidence of each essential element, *i.e.*, the promise of protection, the lack of protection, and a causal relation between the reliance and the injury. The inconsistencies in the plaintiff's evidence and the defendant's evidence

to the contrary present questions for the jury to resolve. Thus, plaintiff is entitled to a new trial on this theory alone.

Judge GREENE concurring in part and dissenting in part.

I

The plaintiff alleges three bases of recovery. First, under the *Coleman* theory the plaintiff essentially seeks to show that the defendant breached a promise to provide protection. Second, the plaintiff seeks to show defendant's liability arising from defendant's alleged breach of a duty arising from N.C.G.S. § 50B. Third, the plaintiff seeks to hold the defendant liable for negligent supervision or retention. On the first basis I concur with the majority. On the second basis I concur in the result, and on the third basis I dissent.

II

I disagree with the majority's interpretation of N.C.G.S. § 50B. The majority opinion states: "None of these provisions, in our opinion, nor all of them collectively, make it the affirmative duty of a law enforcement agency to assist anyone threatened with domestic violence." Section 50B-5, entitled "Emergency assistance" requires that, when called upon by a person alleging that he or she is the victim of domestic violence, a "law-enforcement agency shall respond to the request for assistance as soon as practicable . . . ." N.C.G.S. § 50B-5(a).

N.C.G.S. § 50B-5(b) states that an officer providing assistance pursuant to § 50B-5(a) may not "be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (a)." Section 50B-5(b) does not eliminate liability where the officer acts unreasonably in his response or in his lack of response to a § 50B-5(a) request for emergency assistance. It is not necessary, as the majority suggests, as a prerequisite to imposition of liability, for the plaintiff to have sought and received a domestic violence order. Section 50B-5(a) operates to protect victims of domestic violence in emergency situations where no order has been issued. Section 50B-4(b) operates to protect victims of domestic violence where an order has been issued.

An emergency situation is presented when the victim is confronted with "[a]n *unexpected* . . . or *sudden* occurrence of a serious and urgent nature that demands immediate action." American

Heritage Dictionary 488 (2d ed. 1976) (emphases added). Here the victim was not confronted with an emergency. The threats to her life occurred over a period of several days, and at the time of the attack she was no longer living under the constant threat of Billy Braswell's (Billy's) presence. Therefore, I concur with the majority that the trial court did not err in granting the defendant a directed verdict on this theory of recovery.

III

Regarding plaintiff's third theory of recovery, the majority finds the asserted theory inapplicable since the evidence does not show that Billy used his service revolver to kill the victim. I disagree.

"The general rule is that the relationship of master and servant does not render the master liable for the torts of the servant unless connected with his duties as such servant, or within the scope or course of his employment." *McArthur Jersey Farm Dairy, Inc. v. Burke*, 240 So.2d 198, 200 (Fla. Dist. Ct. App. 1970); *see O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 182, 352 S.E.2d 267, 270 (1987) (employer responsible if act of employee was within scope of employment). However, as an exception to the general rule, the employer is liable for tortious conduct of an employee committed outside the scope of employment where:

> (a) the employee is engaging in or shows a propensity to engage in conduct that is in its nature dangerous to members of the general public; (b) the employer has notice that the employee is acting or in all probability will act in a manner dangerous to other persons; (c) the employer has the ability to control the employee such as to substantially reduce the probability of harm to other persons; and (d) the other person must in fact have been injured by an act of the employee which could reasonably have been anticipated by the employer and which by exercising due diligence and authority over the employee the employer might reasonably have prevented.

240 So.2d at 201. This cause of action is outlined in the Restatement of Torts as follows:

> § 317. Duty of Master to Control Conduct of Servant
>
> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others

> or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965). Furthermore:

> There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.

Id., at Comment c. *See also* Restatement (Second) of Agency § 213 (1958) (person acting through agents liable for harm resulting from his reckless or negligent supervision, or in failing to prevent tortious conduct by others using instrumentalities under his control); 53 Am. Jur. 2d *Master and Servant* § 422, at 436-38 (1970). This Court has previously recognized the viability of Restatement (Second) of Torts § 317 for determining the liability of employers for tortious conduct of employees committed outside the scope of employment. *See O'Connor*, 84 N.C. App. at 182-86, 352 S.E.2d at 270-72 (action for negligent hiring or retention).

The evidence in the light most favorable to the plaintiff reveals that: the victim was shot to death by Billy and was found in a ditch beside her car which was located alongside a public road in Pitt County; that at the time of the homicide, Billy was operating a patrol car entrusted to him by the defendant; that the defendant was aware that Billy had physically abused the victim in the past; that Billy was acting in a strange and peculiarly threatening man-

ner toward her at the time; and had written letters indicating intent to kill her. From this evidence a jury could find that Billy was showing a propensity to engage in conduct dangerous to the victim; that the defendant had notice of such conduct; and that the defendant could have, by refusing to provide him with a gun and patrol car or by discharging him from employment, reduced the probability of harm to the victim, in that the victim was in fact harmed in a manner that could have been anticipated and might reasonably have been prevented by the defendant.

Thus, I would hold that the trial court erred in directing a verdict for the defendant on this theory of recovery.

ROY L. KIRKMAN AND WIFE, LULA B. KIRKMAN; CLINTON (NMI) KIRKMAN AND WIFE, ANN LYVONNE KIRKMAN; AND JAMES E. KIRKMAN (UNMARRIED), PLAINTIFFS v. ADDIE WILSON (WIDOW); ZENO M. EVERETTE, JR. AND WIFE, CAROL H. EVERETTE; ERNEST F. BOYD AND WIFE, SYBIL E. BOYD; BRENDA H. MANNING; LOUIS EARL TOLER AND WIFE, JOYCE D. TOLER; LINWOOD EARL BRAXTON AND WIFE, EARLINE BRAXTON; ELVIRA JOHNSON (WIDOW); RICHARD D. JEWELL AND WIFE, PATSY JOHNSON JEWELL; AND MARIE H. WISE (WIDOW), DEFENDANTS AND THIRD PARTY PLAINTIFFS v. J. L. WILSON AND WIFE, ADDIE WILSON; CORA LEE BAILEY AND HUSBAND, DENNIS BAILEY; JIMMY MORRIS AND WIFE, JANICE MARLINE MORRIS; DORIS EVELYN SADLER AND HUSBAND, CLEM M. SADLER; BRITT ANNIE WARREN AND HUSBAND, JAMES W. WARREN; DORA LEE SUMRELL AND HUSBAND, WILLIAM H. SUMRELL; STEPHEN KITE AND WIFE, JULIA LAURA KITE; GUY C. FORNES AND WIFE, LENA FRANCES FORNES; JAMES S. DIXON AND WIFE, AMANDA DIXON; AND CLAUDIS DIXON AND WIFE, ADA MAE DIXON, THIRD PARTY DEFENDANTS

No. 893SC407

(Filed 1 May 1990)

1. Quieting Title § 2.2 (NCI3d); Trespass to Try Title § 4 (NCI3d) — vested remainders — extinguishment under Real Property Marketable Title Act — when exempted

Vested remainders are exempted from extinguishment under the Real Property Marketable Title Act if they are disclosed by the muniments of title of which the competing titleholder's thirty-year chain of record title is formed provided they are referred to specifically by book and page of the recorded

title transaction which imposed, transferred or continued those remainders. N.C.G.S. § 47B-3(1).

Am Jur 2d, Quieting Title §§ 10, 50, 55, 56; Records and Recording §§ 129-134, 146, 147, 173.

2. Quieting Title § 2.2 (NCI3d); Trespass to Try Title § 4 (NCI3d)— vested remainders—extinguishment under Real Property Marketable Title Act

Where testator's will devised all of his property to his son for life without the privilege to sell or convey with the remainder to the son's children (plaintiffs), but the transcription in the will book in the Clerk of Court's office erroneously stated that the property was devised to the son "with the right or privilege to sell or convey," the son and his wife conveyed in fee simple all the devised lands by various general warranty deeds, and each defendant claims title as a result of mesne conveyances from the son and his wife, plaintiffs' nonpossessory vested remainder interests were extinguished under the Real Property Marketable Title Act by the marketable record title of certain defendants where (1) plaintiffs did not register their interests pursuant to N.C.G.S. § 47B-4, and (2) no deed in the thirty-year record chain of title of each of those defendants referred specifically to testator's will. However, plaintiffs' vested remainder interests were not extinguished by the marketable record title of other defendants whose thirty-year record chain of title contained deeds specifically referring to testator's will by book and page number.

Am Jur 2d, Quieting Title §§ 10, 50, 55, 56; Records and Recording §§ 129-134, 146, 147, 173.

3. Appeal and Error § 3 (NCI3d)— review of constitutional question—consideration by trial court as prerequisite

The Court of Appeals will not pass upon the constitutionality of the Real Property Marketable Title Act when applied to extinguish vested remainders where the record does not affirmatively reveal that the constitutional question was raised, discussed, considered or passed upon by the trial court.

Am Jur 2d, Appeal and Error § 14.

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiffs from judgment entered 23 November 1988 by *Judge Charles B. Winberry, Jr.* in CRAVEN County Superior Court. Heard in the Court of Appeals 18 October 1989.

This is a declaratory judgment action in which plaintiffs seek a judgment declaring them fee simple owners of a tract of land in Craven County, ejecting defendants and giving plaintiffs possession of the property.

The parties agree that fee simple title to all of the land in question was vested in A. E. Kirkman some time before 22 August 1936. A. E. Kirkman died testate on 11 May 1941. In his will dated 22 August 1936, he devised all of his property to his son, G. C. Kirkman "to have and to use during his life time [sic], with out [sic] the right or privilige [sic] to sell or convey the said relstate [sic] in any form or manner," with the remainder left to the children of his son, G. C. Kirkman. Plaintiffs are the sons of G. C. Kirkman who were living at the time of their grandfather's death.

A. E. Kirkman's original will was filed in Folio Number 27 in the Office of the Clerk of Superior Court in Craven County but was also recorded by transcription in Will Book K, page 27 in the Craven County's Clerk's Office. The transcription in Will Book K erroneously included that the property was devised to G. C. Kirkman "with the right or privilege to sell or convey" the property.

Between January 1947 and October 1949, G. C. Kirkman and wife, Sabrah L. Kirkman (also known as Sabrah E. Kirkman, Sabrah Elizabeth Kirkman and Sabra Elizabeth Kirkman), conveyed in fee simple all the lands inherited by general warranty deeds. Each defendant here claims title as a direct result of mesne conveyances from G. C. Kirkman and Sabrah L. Kirkman.

G. C. Kirkman died on 13 November 1982. Plaintiffs brought this action in 1985 claiming superior title in the tracts of land by virtue of the vested remainder interest allegedly granted by A. E. Kirkman's will. Defendants argue that plaintiffs' interests were extinguished by the Marketable Title Act. In 1984 the error in the transcription of A. E. Kirkman's will was corrected in Will Book K, page 27 at the foot of the original transcription.

At trial, the trial judge found that several defendants were listed on the tax records as owners of the real property in issue and had been listed as owners for more than 30 years next preceding

the institution of this action. The trial judge also found that none of plaintiffs were listed on the tax records as owners or had paid the taxes. The trial judge further found that defendants were bona fide purchasers for value when they acquired the property and had no notice of plaintiffs' claim until the institution of this suit.

The trial judge concluded that "[a]ny rights of the plaintiffs in the lands owned by A. E. Kirkman at the time of his death, as vested remaindermen under the Will of A. E. Kirkman, have been extinguished by Chapter 47B of the General Statutes of North Carolina (Real Property Marketable Title Act)." Plaintiffs appeal.

Ward & Smith, by J. Randall Hiner and Leigh A. Allred, for plaintiff-appellants.

LeBoeuf, Lamb, Leiby & MacRae, by Jane Flowers Finch, for defendant-appellees Zeno M. Everette, Jr. and Carol H. Everette.

EAGLES, Judge.

Initially, we note that the trial court ordered a bifurcated trial because there were numerous issues in controversy. There still remain several unresolved issues of law and fact that were raised by the pleadings. After the parties agreed and stipulated that the issue raised by the Marketable Title Act was most significant, the trial judge ordered a separate trial on the issue involving the Marketable Title Act. " 'Pursuant to G.S. section 1-277 and G.S. section 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination.' " *Thompson v. Newman*, 74 N.C. App. 597, 598, 328 S.E. 2d 597, 598 (1985) [citations omitted]. While this appeal is interlocutory in nature, because of the substantial rights involved we elect to treat plaintiffs' appeal as a petition for certiorari and will consider their appeal.

Plaintiffs' sole assignment of error is the trial court's conclusion that the North Carolina Real Property Marketable Title Act extinguished their vested remainder interest. Plaintiffs argue that the "application of the Act so as to extinguish Appellant's vested remainder in fee would be unconstitutional under both the United States and North Carolina Constitutions." Plaintiffs also argue that even if the application of the North Carolina Real Property Marketable Title Act can extinguish appellants' vested remainder

in fee, appellants' interest is excepted from extinguishment pursuant to North Carolina General Statutes section 47B-3(1).

I. North Carolina Real Property Marketable Title Act

Initially, we note that "[t]he Real Property Marketable Title Act was enacted by the General Assembly of North Carolina in an effort to expedite the alienation and marketability of real property." *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E. 2d 244, 247 (1983), *citing* Note, *North Carolina Marketable Title Act Section 47B-2(D)—Proof of Title—Relief at Last for the Plaintiff Instituting Land Actions*, 10 W.F.L. Rev. 312 (1974).

G.S. 47B-2 provides:

> Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.
>
> (a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.
>
> (b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:
>
> (1) The person claiming such estate; or
>
> (2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;
>
> with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.
>
> (c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person

sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1; c. 881; 1981, c. 682, s. 11.)

"A person seeking to establish marketable record title under the Act must directly or through predecessors in title establish a root of title that is at least 30 years old. This is done by tracing back to a 'title transaction' located at or beyond the 30 year period." P. Hetrick, Webster's Real Estate Law in North Carolina, section 508.3 (rev. ed. 1988). "The term 'title transaction' means any transaction affecting title to any interest in real property, including but not limited to title by will or descent, title by tax deed, or by trustee's, referee's, commissioner's, guardian's, executor's, administrator's, or sheriff's deed, contract, lease or reservation, or judgment or order of any court, as well as warranty deed, quitclaim deed, or mortgage." G.S. 47B-8(2).

[1] Whether the North Carolina Real Property Marketable Title Act (hereinafter Act) can extinguish vested remainders has not been determined in this State. In order to facilitate the transferability and marketability of real property, the Act requires that a person claiming a right, estate, interest or charge which is non-possessory and would be extinguished by the Act to register that interest in the county's Register of Deeds' Office. G.S. 47B-4. In order to protect the rights of those with non-possessory interests in property in the years immediately following the Act's enactment, the 1973 Act did not become effective against those interests created prior to the Act's enactment until three years after the enactment of the Act. G.S. 47B-5. Nothing in the Act indicates that the General Assembly intended to except vested remainders from its application. The only exceptions are stated in G.S. 47B-3 which enumerates the rights left unaffected by the Act. While G.S. 47B-3 does not explicitly list vested remainders, we infer that vested remainders are exempted if they are "disclosed by . . . the muniments of title of which such 30 year chain of record title is formed" provided they are referred to *specifically* by reference to book and page of recorded title transaction which imposed, transferred, or con-

tinued those rights, estates, interests, claims, or charges. G.S. 47B-3(l); *see also Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E. 2d 560 (1986), *aff'd*, 318 N.C. 690, 351 S.E. 2d 298 (1987).

[2] Here the record does not indicate that plaintiffs registered their interest pursuant to G.S. 47B-4. Accordingly, in order for plaintiffs' interest to be preserved, the interest must be revealed in the muniments of title during the 30 year period. Because plaintiffs' vested remainder here resulted from devise of the life estate to G. C. Kirkman in the Kirkman will, if any of the deeds in each respective defendant's 30 year record chain of title refers to A. E. Kirkman's will specifically by book and page number, plaintiffs' interest would then be revealed in the muniments of title and plaintiffs' vested remainder would survive as to that defendant's competing claim.

II.

We now examine the record chain of title of each defendant to ascertain if plaintiffs' interest appears in the muniments of title thereby excepting their interest from extinguishment by operation of the Act.

First, we note that this action for declaratory judgment was instituted on 22 January 1985. Pursuant to G.S. 47B *et seq.* this is the operative date for determining the record chain of title. The 30 year period would have commenced on 22 January 1955. If a title transaction has not occurred on this date, we then proceed to the next earliest title transaction before commencement of the 30 year period. If plaintiffs' interest does not appear in any instrument in the record chain of title executed from the last title transaction to the date of purchase of that property, plaintiffs' vested remainder is extinguished and defendants are entitled to remain in possession of the property. *See also* P. Hetrick, Webster's Real Estate Law in North Carolina, Section 508.3 (rev. ed. 1988).

A. Defendant Elvira Johnson

Defendant Elvira Johnson acquired her property on 4 November 1949. This was the first title transaction beyond the 30 year period. The deed conveying the property to Johnson specifically refers to the A. E. Kirkman will probated on 17 May 1941 and appearing in Will Book K, at page 27, in the Office of the Clerk of Superior Court of Craven County. Since the will containing plaintiffs' interest is found in defendant's record chain of title, plaintiffs' in-

terest with respect to this particular defendant is excepted from the Act and is not extinguished.

B. Defendants Richard Jewell and wife, Patsy Jewell

On 4 March 1959, defendants Jewell received their property from Clyde Johnson and wife, Elvira Johnson. The next title transaction occurring after the expiration of the 30 year period was the deed from W. H. Buck and wife, Sallie G. Buck, to the Johnsons. Since the Johnson deed which is part of the record chain of title specifically refers to the Kirkman will, the defendants had notice of plaintiffs' interest as contemplated by the Act and plaintiffs' interest is not extinguished.

C. Defendant Marie H. Wise

Defendant Marie H. Wise became owner of her tract of land on 18 May 1977 after a conveyance from defendant Elvira Johnson. The next preceding title transaction after the expiration of the 30 year period was the deed from Will Buck and wife, Sallie G. Buck, to defendant Johnson. Accordingly, because plaintiffs' interest was revealed in the muniments of title, plaintiffs' interest is not extinguished by the Act.

D. Defendant Addie Wilson

On 7 October 1949, G. C. Kirkman and wife, Sabrah L. Kirkman, conveyed a tract of land directly to defendant Addie Wilson and her deceased husband, G. L. Wilson. We note that the record reflects that defendant Addie Wilson has died and that plaintiffs have submitted a motion to substitute Addie Wilson's successors in interest as defendants in this matter. This conveyance was the next preceding title transaction occurring after the 30 year period. The Wilson deed specifically referred to the Kirkman will. As a result, plaintiffs' interest in this particular land was not extinguished by the Act.

E. Defendants Ernest F. Boyd and wife, Sybil E. Boyd

Defendants Ernest and Sybil Boyd received their property on 5 March 1962 from Jimmie and Janice Morris. The next title transaction following the expiration of the 30 year period was the conveyance from G. L. and Addie Wilson to Dennis and Cora Bailey on 10 September 1952. None of the deeds in defendants' record chain of title specifically refers to the Kirkman will. Accordingly, plaintiffs' interest was extinguished by operation of the Act.

F. Defendants Zeno M. Everette and wife, Carol Everette

On 15 May 1978, W. H. Gurkin and wife, Carthene Gurkin, conveyed a portion of the disputed land to defendants Zeno M. and wife, Carol Everette. The next preceding title transaction following the expiration of the 30 year period was the Kirkman to Wilson deed on 7 October 1949. Since this deed specifically mentions the Kirkman will, plaintiffs' interest in this land was not extinguished by the Act.

G. Defendant Brenda H. Manning

On 7 July 1975, Sallie G. Buck conveyed a tract of land to defendant Brenda H. Manning. Buck's predecessor in interest received the property on 16 October 1947 by deed from G. C. and Sabrah Kirkman. This constituted the next preceding title transaction following the expiration of the thirty year period. There is no mention of the Kirkman will in this deed from G. C. and Sabrah Kirkman. As a result, defendant Manning had no notice of plaintiffs' interest as contemplated by G.S. 47B-3. Plaintiffs' right is extinguished by operation of the Act.

H. Defendant Linwood E. Braxton and wife, Earline Braxton

Defendants Braxton received their parcel as a result of a conveyance from defendants Claude and Ada M. Dixon. The next preceding title transaction following the expiration of the 30 year period was the transfer from Guy and Lena Fornes to James and Amanda Dixon. Neither this deed nor any other deed in defendants' record chain of title mentioned the Kirkman will. Accordingly, plaintiffs' interest did not appear in the muniments of title as contemplated by G.S. 47B-3, and plaintiffs' right is extinguished by operation of the Act.

I. Defendants Louis Earl Toler and wife, Joyce D. Toler

Defendants Toler received their property from the heirs at law of Sallie G. Buck, devisee of the disputed property. W. R. Buck received the property from G. C. and Sabrah Kirkman on 16 October 1947. This was the next preceding title transaction following the expiration of the thirty year period. This deed does not mention the Kirkman will. Accordingly, plaintiffs' interest is not revealed by muniments of title and is extinguished by operation of the Act.

III. Constitutionality of the Act

[3] We now address plaintiffs' contention that the application of the Act to extinguish vested remainders is unconstitutional under the United States and North Carolina Constitutions. Plaintiffs argue that "[a]n interpretation of the Act which extinguishes Appellants' vested property rights, and vests title in Appellees is in violation of the prohibition against retroactive impairment of vested rights implicit in the Due Process Clause of the United States Constitution and the Law of the Land provision of the North Carolina Constitution." The plaintiffs further argue that the Act is unconstitutional because "it imposes a new duty with respect to transactions already passed, by requiring the registering of notice of an already vested interest and thereby transforming a vested property right into a mere contingency." The plaintiffs also argue that the Act is unconstitutional because it extinguishes rights "without providing any constitutionally required notice."

The well-established rule of this Court is that it will not pass upon a constitutional question which was not raised or considered in the court below. *Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 274 S.E. 2d 853, *disc. rev. denied and appeal dismissed*, 303 N.C. 181, 280 S.E. 2d 453 (1981), *citing Wilcox v. Highway Comm.*, 279 N.C. 185, 181 S.E. 2d 435 (1971); *Boehm v. Board of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979); *see also State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985); *Tetterton v. Long Mfg. Co., Inc.*, 67 N.C. App. 628, 313 S.E. 2d 250 (1984). In *Midrex*, plaintiff argued that a tax statute was unconstitutional when applied under the facts of the case. Plaintiff advanced the argument for the first time on appeal. In rejecting plaintiff's argument, the *Midrex* court stated that "[t]he record does not contain anything in the pleadings, evidence, judgment or otherwise, to indicate that any constitutional argument was presented to the trial court. . . ." The record must affirmatively show that the question was raised and passed upon in the trial court. This is in accord with the decisions of the United States Supreme Court. *Id.* at 618, 274 S.E. 2d at 857-8.

After careful review of the record before us, we find that it does not affirmatively reveal that the constitutionality of the Act was raised, discussed, considered or passed upon by the court below. *See Tetterton, supra.* We note that plaintiffs contended in the pre-trial order that one of the questions of law to be deter-

mined by the trial judge was "[w]ould the application of Marketable Title Act to extinguish a non-possessory vested remainder violate the due process clause of the United States Constitution or the Law of the Land provision of the North Carolina Constitution?" This contention was never raised in any of the pleadings. In the non-jury trial, the trial court concluded that plaintiffs' rights were extinguished without ruling on the constitutionality of the Act. The constitutionality of the Act was not properly raised before the trial tribunal and we decline to discuss it for the first time on appeal.

IV. Conclusion

In summary, the Act operates to extinguish non-possessory interests that either do not fall within one of the exceptions set out in G.S. 47B-3 or are not registered pursuant to G.S. 47B-4. As to the claims of defendants Elvira Johnson; Richard Jewell and wife, Patsy Jewell; Marie H. Wise; Addie Wilson; and Zeno Everette and wife, Carol Everette; plaintiffs prevail because plaintiffs' interest was not extinguished by the Act because it was revealed in the muniments of title in their record chain of title. With respect to defendants Ernest Boyd and wife, Sybil Boyd; Louis Toler and wife, Joyce Toler; Brenda H. Manning; and Linwood Braxton and wife, Earline Braxton; because no registration of their interests by plaintiffs occurred pursuant to G.S. 47B-4 and no mention of the Kirkman will appeared in the muniments of title in their respective 30 year chain of record title, plaintiffs' interest was extinguished by the Act and these defendants prevail.

Accordingly, the decision of the lower court is reversed in part and affirmed in part.

Judge PARKER concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I accept that a vested remainder interest which is either specifically referenced in or a part of the thirty-year chain of record title is sufficient to protect the interests of the vested remaindermen. However, I would go further. I do not accept that the General Assembly intended by its enactment of the Marketable Title Act to eliminate *any* vested remainder interests, including those not

specifically referenced in the thirty-year chain of record title. It appears more consistent with the policy and purposes enunciated by the General Assembly, N.C.G.S. § 47B-1, that the Act was "intended by the General Assembly to eliminate ancient nonpossessory interests, obsolete restrictions and technical defects in title—not vested remainders. Any other interpretation would require that remaindermen take precautionary steps to preserve their interests, including the filing of periodic notices of their claim pursuant to North Carolina General Statutes, § 47B-4." P. Hetrick & J. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 508.5, at 698-699 (3d ed. 1988) (footnote omitted).

Accordingly, I determine the trial court erred in concluding as a matter of law that the plaintiffs' interests in the property were "extinguished by Chapter 47B of the General Statutes of North Carolina." I would therefore vacate the order of the trial court in its entirety and remand the matter for further proceedings.

CENTRAL CAROLINA NISSAN, INC., PLAINTIFF (J. DOUGLAS MORETZ, RESPONDENT-APPELLANT) v. KIP D. STURGIS AND JAMES C. GULICK, DEFENDANTS, PETITIONERS-APPELLEES

No. 8911SC618

(Filed 1 May 1990)

1. Rules of Civil Procedure § 11 (NCI3d); Declaratory Judgment Act § 4 (NCI3d)— declaratory judgment action seeking preemptive ruling on defenses and limit to prosecutorial discretion—not supported by case law—Rule 11(a) sanctions

The trial court did not err in a proceeding in which sanctions were sought against an attorney under N.C.G.S. § 1A-1, Rule 11(a) by finding that the attorney failed to produce case law or plausible legal argument in support of his attempt to prelitigate defenses to an anticipated action or to challenge prosecutorial discretion in the Attorney General's Office in a declaratory judgment action. There is settled authority against the attorney's use of the Declaratory Judgment Act under these circumstances, and use of such preemptive strikes would tend to discourage the sound practice of the Attorney General's

Office of attempting to settle cases prior to litigation when possible.

Am Jur 2d, Attorney General § 16; Costs § 30; Declaratory Judgments § 253.

2. **Rules of Civil Procedure § 11 (NCI3d)— suit filed for harassment—Rule 11(a) sanctions against attorney—no error**

The circumstantial evidence in a proceeding for sanctions against an attorney under N.C.G.S. § 1A-1, Rule 11(a) was sufficient for the court to find that the attorney's purpose in filing a suit against members of the Attorney General's Office in their individual capacity was to disqualify them as opposing counsel, thereby delaying the Attorney General's suit, harassing the attorneys and the State, and unnecessarily increasing the State's litigation costs.

Am Jur 2d, Attorney General § 16; Costs § 30; Declaratory Judgments § 253.

3. **Constitutional Law § 23.4 (NCI3d)— Rule 11(a) sanctions against attorney—standard of reasonable inquiry—not unconstitutionally vague**

The N.C.G.S. § 1A-1, Rule 11(a) standard of reasonable inquiry was not unconstitutionally vague as applied where there was ample evidence that the assertions made by the attorney here were unfounded and that he had access to that information when his complaint was filed. The standard of objective reasonableness under the circumstances provided the attorney with fair warning of what was required of him under the circumstances and he cannot legitimately claim to have been an innocent entrapped by vagueness in the rule.

Am Jur 2d, Attorney General § 16; Costs § 30; Declaratory Judgments § 253.

4. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11(a) sanctions—reduced by trial court—abuse of discretion**

The trial court abused its discretion in a proceeding under N.C.G.S. § 1A-1, Rule 11(a) by reducing the attorney fee award of $14,400 to $4,800 because the professional damages had been mitigated considerably by the extremely honest, candid and competent representation of the respondent by his attorney in the Rule 11 hearing. There was no showing that

the commendable qualities of respondent's attorney in any way affected the amount of time and money the Attorney General's Office was forced to devote to defending the action brought by respondent. The holding was reversed and remanded for reinstatement of sanctions in the original amount.

Am Jur 2d, Attorney General § 16; Costs § 30; Declaratory Judgments § 253.

APPEAL by respondent James Douglas Moretz and cross-appeal by petitioners from order entered 30 December 1988 by *Judge Anthony M. Brannon* in LEE County Superior Court. Heard in the Court of Appeals 5 December 1989.

This is a civil action in which respondent-appellant attorney Moretz appeals the imposition of sanctions against him in the amount of $4,800 in attorneys' fees pursuant to G.S. § 1A-1, Rule 11(a). Petitioner Kip D. Sturgis, at all relevant times an Assistant Attorney General in the Consumer Protection/Antitrust Section of the North Carolina Attorney General's Office, and petitioner James C. Gulick, Special Deputy Attorney General in charge of that section, appeal the reduction of the sanction by the trial court from $14,400 to $4,800.

Attorney General Lacy H. Thornburg, by Chief Deputy Attorney General Andrew A. Vanore, Jr., for petitioners-appellees and cross-appellants Kip D. Sturgis and James C. Gulick.

Respondent-appellant James Douglas Moretz pro se.

JOHNSON, Judge.

Before turning to the substance of this case, we note for the sake of clarity the party status of all those originally involved in this lawsuit. Plaintiff Central Carolina Nissan ("CCN"), through its attorney J. Douglas Moretz, instituted an action for declaratory judgment and injunction against defendants Kip D. Sturgis and James C. Gulick in their individual capacities. Sturgis and Gulick moved to dismiss CCN's action and also petitioned for sanctions under Rule 11(a) of the N.C. Rules of Civil Procedure against CCN's attorney, Moretz. Both motions were granted. The only issue on this appeal is the propriety of imposing sanctions on Moretz. On the issue of sanctions, Sturgis and Gulick are properly termed petitioners, having petitioned the court for sanctions, and Moretz

is respondent. We shall so refer to them in this opinion. CCN is not involved in this appeal.

After considering the affidavits, testimony, and arguments of counsel, Superior Court Judge Brannon made the following pertinent findings of fact:

The North Carolina Attorney General's Office began an investigation of certain trade practices of CCN prior to the institution of this lawsuit. In December of 1987, the Attorney General's Office and CCN, through its then counsel, Dennis Wicker, entered into detailed negotiations for the purpose of resolving the Attorney General's claim that CCN had engaged in various unfair or deceptive trade practices in violation of Chapter 75 of the General Statutes. Assistant Attorney General Sturgis and Special Deputy Attorney General Gulick, with the approval of Chief Deputy Attorney General Andrew A. Vanore, Jr., handled the initial negotiations. They indicated early on to CCN that if settlement could not be reached, the Attorney General's Office intended to file suit. Chief Deputy Attorney General Vanore, at the request of CCN's president, became more involved with negotiations during the later stages.

Negotiations reached a point at which CCN, through attorney Wicker, tentatively agreed to pay $60,693.94 (restitution and civil penalties) as the monetary portion of the settlement, and the Attorney General's Office found this acceptable. At this stage, CCN engaged attorney Moretz to represent it in the negotiations. Moretz met with Sturgis and Gulick on 2 June 1988, at which time he repudiated the tentative settlement and offered to settle for $30,000. Sturgis and Gulick rejected the offer, but made a modified final offer which increased the time for making the $60,693.94 payment from three to nine months. They also informed Moretz that a response was needed by Friday, June 10. Moretz agreed to advise his client of the offer and respond to the Attorney General's Office.

Instead of responding to the Attorney General's Office, Moretz signed and filed the original complaint of the instant action on behalf of CCN in Lee County Superior Court on 10 June 1988. The complaint, which named only Sturgis as a defendant and did not include either the State or the Attorney General as a party, charged Sturgis with selectively prosecuting CCN. It also alleged that Sturgis was engaged in "a frolic of his own," and that Sturgis had threatened a lawsuit against CCN unless the dealership paid an amount in excess of $100,000. The complaint sought an injunction

to bar Sturgis from filing the State's complaint against CCN and a declaratory judgment that CCN's defenses against the State's anticipated action were meritorious. On 13 June, Moretz also filed a separate motion for a preliminary injunction to bar Sturgis from instituting the Attorney General's action against CCN.

On 15 June, Sturgis, acting in his capacity as Assistant Attorney General in the Consumer Protection Division of the Attorney General's Office, filed the anticipated action against CCN in Wake County Superior Court. The complaint was signed by Vanore, Gulick and Sturgis. On the same day, Sturgis, through counsel Vanore and Gulick, filed a motion to dismiss the action filed by Moretz pursuant to G.S. § 1A-1, Rule 12(b)(6) and for sanctions under Rule 11.

On 21 June 1988, Moretz signed and filed an amended complaint adding Gulick as a party defendant and alleging that Gulick was conspiring with CCN's competitors to drive the dealership out of business. The amended complaint sought to enjoin Gulick as well as Sturgis from prosecuting the Wake County action against CCN.

On 24 June, Moretz instituted discovery by serving on Vanore, as counsel for Sturgis and Gulick, interrogatories, requests for production, and a notice of deposition along with a motion to shorten the time to take defendants' depositions. Moretz sought "[a]ll internal memoranda concerning the plaintiff." The trial court granted Moretz's ex parte motion to shorten the time to take depositions on 28 June, but vacated the order on 30 June after a hearing.

On 1 July, Sturgis and Gulick moved to dismiss CCN's amended complaint and renewed their motion for sanctions against Moretz. After hearing arguments on the motion for dismissal, Superior Court Judge Wiley F. Bowen dismissed the action against Sturgis and Gulick in an order dated 18 July 1988. Judge Bowen held that the action brought by Moretz on behalf of CCN constituted an abuse of the Declaratory Judgment Act in that the "disputes" raised by plaintiff's amended complaint could only be properly raised as defenses to the State's Wake County action against CCN. The court retained jurisdiction of the Rule 11 motion. Judge Bowen, however, recused himself from hearing that motion.

Judge Brannon, who, as stated above, presided at the Rule 11 hearing, also made extensive findings of fact from the evidence

as to what Moretz knew as a factual basis for his complaint and amended complaint when he filed the declaratory judgment action: He found that the only basis for the selective prosecution allegation was that CCN had been "selected" for prosecution, and that Moretz knew or after reasonable inquiry should have known that defendants had pursued similar claims against other dealerships; that Sturgis was acting with the assent of his superiors and therefore was not on a "frolic of his own"; that Moretz knew that the State would settle for $60,693.94; that there was no factual basis for the allegation that in excess of $100,000 was demanded; and that Moretz made no pre-filing inquiry into the conspiracy charge against Gulick. The court also found as fact that Moretz knew that the filing of the complaint against Sturgis would not have the effect of preventing the State from instituting suit against his client as he claimed in his request for injunctive relief.

The court went on to find that Moretz's purposes in filing the suit were to harass Sturgis and Gulick; to delay the State in its enforcement action against CCN; and to increase the State's litigation costs by making Sturgis and Gulick witnesses, thereby disqualifying them as prosecuting attorneys and requiring State resources to defend them.

The court also found that Moretz failed to come forward with any plausible legal basis for "suing subordinate attorneys in the Attorney General's Office while seeking declaratory and injunctive relief which would be meaningful only if it bound the Attorney General or the State." It further found that Moretz failed to provide a legal basis for attempting to discover the State's attorney work product. Last, the attorney articulated no legal basis for his "effort in this case to prelitigate defenses to an anticipated law enforcement action by the Attorney General where he does not attack the constitutionality of a statute, and to challenge by declaratory judgment action the exercise of prosecutorial discretion by the Attorney General and his staff."

The court determined that the Attorney General's Office had reasonably spent more than 160 hours defending this action, and that $90 per hour (which was found to be Moretz's hourly rate) was a reasonable rate for the work. This resulted in a reasonable attorneys' fee for defending this action of $14,400.

Based on the above findings of fact, the court concluded that there existed three independent and alternative grounds for its

legal conclusion that attorney Moretz violated Rule 11(a) of the N.C. Rules of Civil Procedure:

> A1. Mr. Moretz . . . signed and filed pleadings which were not well grounded in fact to the best of his knowledge, information and belief formed after reasonable inquiry, . . .
>
> 2. Mr. Moretz . . . signed and filed pleadings, a motion for injunction, and discovery papers which were not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.
>
> 3. Mr. Moretz . . . signed and filed pleadings, a motion for injunction, and discovery papers in this case for the improper purposes of harassing the defendants and the Attorney General's Office and causing the Attorney General's Office unnecessary delay and needless increase in the cost of litigation.

The court went on to hold that "the professional damages in this case have been mitigated considerably by the extremely honest, candid and competent representation of the respondent Moretz by his current counsel Mr. McNeill Smith of the Greensboro bar." For that reason, the court reduced what it found to be a reasonable attorneys' fee of $14,400 by two-thirds, thereby requiring respondent Moretz to pay attorneys' fees of $4,800 to the Attorney General's Office as sanctions for his violations of Rule 11.

By this appeal, respondent brings forward twenty-five assignments of error in which he ascribes error to virtually every material finding of fact and conclusion of law made by the trial court except its conclusion of law to reduce the amount of sanctions. Before addressing the merits of respondent's arguments, we set forth the standard for appellate review enunciated by our Supreme Court for cases in which sanctions have been imposed pursuant to G.S. § 1A-1, Rule 11(a):

> The trial court's decision to impose or not to impose mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold

the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). The Court in *Turner* also held that "subjective bad faith is no longer required to trigger the Rule's sanctions." *Id.* at 164, 381 S.E.2d at 713. The standard is one of "objective reasonableness under the circumstances." *Id.*

After carefully reviewing the record in this case, we conclude that there is ample evidence to support the extensive findings of fact made by the trial court concerning what facts attorney Moretz knew or upon reasonable inquiry should have known at the time he instituted the declaratory judgment action. For the sake of brevity, we find it unnecessary to recite all of the evidence undergirding those findings. We consider respondent's assignments of error as to these findings to be without merit and we do not address them. We shall confine our decision to an analysis of certain legal questions raised by the parties which we believe are determinative.

[1] By his ninth Assignment of Error, attorney Moretz argues that the trial court erred in finding that he failed to produce case law or plausible legal argument in support of his attempt to prelitigate defenses to an anticipated enforcement action or to challenge prosecutorial discretion. In support of his declaratory judgment action, Moretz relies on *Lewis v. White*, 287 N.C. 625, 216 S.E.2d 134 (1975), and *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 325 S.E.2d 642 (1985). We find both of these cases clearly distinguishable from the instant case and not supportive of respondent's position. Both *Lewis* and *Sperry Corp.* involved plaintiffs seeking injunctive relief from State officials who had taken administrative actions which the plaintiffs found objectionable. Neither involved the Declaratory Judgment Act. In the absence of an action by these plaintiffs, there would have been no opportunity for judicial review of the defendants' acts. We do not find that these cases support the proposition that a prospective defendant in an anticipated enforcement action by the State may prelitigate its defenses and seek to determine the scope of prosecutorial discretion in a declaratory judgment action and request for injunction.

Chapter 75 of the General Statutes gives the Attorney General both the power and the duty to investigate and prosecute corporations and persons doing business in North Carolina which engage

in unfair methods of competition and unfair or deceptive trade practices. G.S. §§ 75-9 through -15.2; *In re Investigation by Attorney General*, 30 N.C. App. 585, 227 S.E.2d 645 (1976). The fulfillment of this enforcement duty necessarily requires the exercise of prosecutorial discretion. The thrust of CCN's complaint, signed and filed by respondent Moretz, was to attempt to limit the legitimate exercise of this discretion. Our Supreme Court spoke to this issue in *N.A.A.C.P. v. Eure, Secretary of State*, 245 N.C. 331, 95 S.E.2d 893 (1957), a case involving in part the Attorney General's duty to prosecute violations of then current G.S. § 55-118 (requiring foreign corporations doing business in this State to register with the Secretary of State). In *N.A.A.C.P. v. Eure*, the Court stated that "[t]his duty [to prosecute violations of G.S. § 55-118] calls for the exercise of some discretion and judgment on his [the Attorney General's] part. It seems that it cannot be successfully contended that our Declaratory Judgment Act authorizes a proceeding against the Attorney General to determine the permissible scope of his official duty under a given statute." *Id.* at 337, 95 S.E.2d at 898. We believe this rule of *N.A.A.C.P. v. Eure* is sound, and that it prohibits the use of the Declaratory Judgment Act which respondent attempted here. *See also Ven-Fuel, Inc. v. Department of the Treasury*, 673 F.2d 1194 (11th Cir. 1982), and *United States v. Cincinnati Transit, Inc.*, 337 F. Supp. 1068 (S.D. Ohio 1972). We also find persuasive petitioners' argument that allowing the use of such preemptive strikes would tend to discourage the sound practice of the Attorney General's Office of attempting to settle cases prior to litigation when possible since the Office would continually be concerned about losing a race to the courthouse.

There is settled authority in this State against respondent's attempted use of the declaratory judgment action under the circumstances. Respondent has also failed to articulate any reasons why the law should be changed. We hold that the trial court did not err in finding that attorney Moretz failed to present case law or a plausible legal argument in support of his use of the Declaratory Judgment Act. Further, this abuse of the Act properly constituted grounds for the trial court's holding that the attorney violated Rule 11 in signing and filing pleadings which were not warranted by existing law or a good faith argument for the modification or reversal of existing law.

[2] By his tenth and twelfth Assignments of Error, Moretz contends that the trial court erred in finding that his purpose in

filing suit against Sturgis and Gulick was to disqualify them as opposing counsel, thereby delaying the Attorney General's suit, harassing Sturgis, Gulick and the State, and unnecessarily increasing the State's litigation costs. We find no error.

In support of his argument, attorney Moretz points to his own self-serving testimony that he did not institute the action against Sturgis and Gulick for an improper purpose. It is of course well settled that intent and motive, like other facts, may be inferred from circumstantial evidence. 1 Brandis on North Carolina Evidence § 83 (3d ed. 1988) and cases cited therein. The circumstantial evidence in this case is sufficient to support the findings.

Respondent's original complaint of 10 June 1988 against Sturgis, the States's lead attorney in the suit against CCN, was largely based on unfounded assertions. After Gulick signed pleadings in the Wake County enforcement action against CCN about five days later, Moretz amended on 21 June to add Gulick as a defendant on a charge of conspiracy. Moretz's only basis for the charge was that CCN's president told Moretz that he had heard that other automobile dealerships had met with Gulick to complain about CCN's advertising practices. Although this raised no inference of impermissible conduct, Moretz nonetheless filed his amended complaint without making any inquiry. Moretz also proceeded to attempt to delay the Wake County action by twice moving for extensions of time.

At the time he filed his essentially baseless and uninvestigated complaints against Sturgis and Gulick, Moretz was certainly aware that under Rule 5.2 of the N.C. State Bar Rules of Professional Conduct, the two State attorneys, as witnesses in the Lee County suit, would be disqualified from prosecuting the State's Wake County enforcement action against CCN. It would also result in delay and cost to the State in substituting new attorneys in the enforcement action who would likely be unfamiliar with it. The total picture of Moretz's actions fully support the trial court's findings that attorney Moretz's purpose in filing suit was improper.

[3] Next, we turn to respondent's argument that the Rule 11(a) standard of "reasonable inquiry" is unconstitutionally vague as applied to this case. He correctly points out that the standard to be applied in examining a statute for vagueness is whether it "gives a person of ordinary intelligence fair notice of what is forbidden by its terms." *State v. Nelson*, 69 N.C. App. 638, 641, 317 S.E.2d

711, 713 (1984). Statutes not involving First Amendments freedoms are to be examined "in light of the facts of the particular case." *Id.*

Moretz contends in his brief that he was "faced with a set of facts which implied that certain conduct had occurred, which if true, would have been improper. The information necessary to make certain that the claims were well grounded in fact resided in the hands of the alleged wrongdoers." We believe this argument is diversionary. There is ample evidence that the assertions made by Moretz were unfounded and he had access to this information when his complaints were filed. For example, the allegation of "selective prosecution," the claim that Sturgis was acting "on a frolic of his own," and the charge that the State was demanding in excess of $100,000 to settle out of court, are totally unsupported by any credible evidence in the record on appeal. Moretz also made no effort to investigate the seemingly innocuous statements made to him that Gulick had spoken with other dealerships regarding their complaints about CCN.

As stated above, the standard to be applied in assessing an attorney's conduct under Rule 11(a) is "objective reasonableness under the circumstances." *Turner v. Duke University, supra.* Even taking into account respondent's argument that he, like most other attorneys, was working under the pressure of time constraints, we have no difficulty concluding that his actions were not objectively reasonable under the circumstances. This standard also was not void for vagueness as applied to Moretz. It provided him with fair warning of what was required of him under the circumstances. Plaintiff cannot legitimately claim to have been an innocent entrapped by vagueness in the rule. *Grayned v. City of Rockford,* 408 U.S. 104, 33 L.Ed.2d 222 (1972).

[4] Last, we address the petitioners' argument that the trial court erred in reducing the attorneys' fees award for an irrelevant reason. When a trial court determines that Rule 11(a) has been violated,

> the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1989) (effective 1 January 1987).

Again, turning to *Turner v. Duke University, supra,* for guidance, we note that the proper standard for reviewing the appropriateness of the sanction imposed in a given case is whether the trial court has abused its discretion. We are mindful that this standard is intended to give great leeway to the trial court and a clear abuse of discretion must be shown. *Pryse v. Strickland Lumber and Bldg. Supply*, 66 N.C. App. 361, 311 S.E.2d 598 (1984). However, it is fundamental to the administration of justice that a trial court not rely on irrelevant or improper matters in deciding issues entrusted to its discretion. *See State v. Spears*, 314 N.C. 319, 333 S.E.2d 242 (1985), and *State v. Edwards*, 310 N.C. 142, 310 S.E.2d 610 (1984); *State v. Swinney*, 271 N.C. 130, 155 S.E.2d 545 (1967).

In the case *sub judice*, the trial court found as fact that petitioners had expended a reasonable attorneys' fee of $14,400 in defending the action signed and filed by Moretz, but reduced that figure to $4,800 because it found the professional damages to have been "mitigated considerably by the extremely honest, candid and competent representation" of respondent Moretz by his attorney in the Rule 11 hearing. We fail to see the relevance of this as a mitigating factor. There is no showing that these commendable qualities of respondent's attorney in any way affected the amount of time and money the Attorney General's Office was forced to devote to defending the action brought by respondent. Respondent argues that the court may have actually had other unarticulated reasons for reducing the amount of sanctions. We decline to engage in such speculation, and must rely solely on the record before us. Because we believe that the factor supporting the trial court's decision to reduce sanctions was wholly unrelated to determining the "reasonable expenses incurred because of the filing of the pleading," as stated in Rule 11(a), we hold that the trial court abused its discretion in basing its reduction on that factor. We therefore reverse the trial court's holding as to this matter only, and remand for reinstatement of sanctions in the original amount of $14,400.

Affirmed in part; reversed in part and remanded.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. THOMAS ALLEN O'KELLY, JR.

No. 891SC376

(Filed 1 May 1990)

1. Searches and Seizures § 23 (NCI3d)— search of residence— search warrant—probable cause

There was probable cause to issue a warrant to search defendant's residence where Lt. Eck, who was in charge of the Dare County Sheriff's Dept. Narcotics Enforcement Unit, received a tip that one of defendant's neighbors suspected that a methamphetamine laboratory was being operated at defendant's residence and was afraid for the safety of herself and her child; Eck and other officers conducted a background check, communicated with other law enforcement agencies, and conducted a surveillance of defendant's residence; defendant had a prior drug conviction involving methamphetamine and Eck smelled an unusual chemical odor near the premises; a reliable confidential source who had been inside defendant's residence within the last two weeks said that defendant was making speed and stated that defendant would sometimes put some of his laboratory equipment in the trunk of his automobile; officers saw defendant removing bags and boxes from his car in the early hours of the morning; and consultation with an SBI agent specializing in clandestine laboratory investigations led Eck to believe that unusual hoses and electrical wiring could be signs of a clandestine laboratory. The totality of the circumstances presented to the magistrate at the time of the warrant application constituted substantial evidence from which a detached and neutral magistrate could find probable cause for believing that the fruits and instruments of criminal activity would be discovered in defendant's residence.

Am Jur 2d, Searches and Seizures §§ 68, 69.

2. Searches and Seizures § 23 (NCI3d)— narcotics—search of rented storage unit—probable cause for warrant

The facts in an affidavit supporting an application for a search warrant supported the magistrate's finding of probable cause to search a rented storage unit because a reasonably prudent person with the information that remnants of a clandestine drug laboratory had been found in defendant's

residence and that defendant had been seen putting parts of his laboratory in his automobile would be justified in believing that a storage unit rented by defendant would hold other parts of that laboratory, the chemicals used in producing the drugs, or the drugs themselves.

Am Jur 2d, Searches and Seizures §§ 68, 69.

3. Searches and Seizures § 42 (NCI3d)— narcotics—search of residence pursuant to warrant—procedure for execution of warrant

The trial court properly refused to suppress evidence seized pursuant to a search warrant on the grounds that the warrant was not read to defendant and that defendant was not given inventory of the items seized where two officers testified at the suppression hearing that the warrant was read to defendant, the trial court found that the officer in charge prepared an inventory of the seized items and mailed the inventory to defendant, who had been transferred at that point to Central Prison, defendant cites nothing to contradict the findings and conclusions, and the findings and conclusions were fully supported by the evidence. N.C.G.S. § 15A-252, N.C.G.S. § 15A-254.

Am Jur 2d, Searches and Seizures §§ 83, 115.

APPEAL by defendant from Order of *Judge James R. Strickland* entered 13 July 1988 and Order of *Judge Thomas S. Watts* entered 21 July 1988 in DARE County Superior Court. Heard in the Court of Appeals 15 November 1989.

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

Aldridge, Seawell & Khoury, by G. Irvin Aldridge and Joe G. Adams, for defendant appellant.

COZORT, Judge.

Defendant was indicted for possession with intent to manufacture a Schedule II controlled substance (amphetamine), manufacture of amphetamine, possession of more than the equivalent of 100 dosage units of amphetamine, possession of more than the equivalent of 100 dosage units of phenyl-2-propanone, possession with intent to sell and deliver cocaine, possession with intent to sell and deliver amphetamine, and maintaining a dwelling to keep a controlled

substance. The trial court denied defendant's motions to suppress evidence seized from searches of his residence and a rented storage unit. Reserving his right to appeal the court's rulings on his motions to suppress, defendant pled guilty to two counts of felonious possession of Schedule II controlled substance and one count of felonious maintaining of a dwelling to keep a controlled substance. Defendant appeals.

In his affidavit supporting his application for a search warrant, Lieutenant Robert Eck with the Dare County Sheriff's Department alleged the following in support of a finding of probable cause:

Lieutenant Eck had been a law enforcement officer for twelve years, had specialized training in conducting narcotics investigations, and had been involved in more than 300 narcotics investigations. He was currently in charge of the Dare County Sheriff's Department narcotics enforcement unit. On 23 March 1988, Eck received information from Charles Dail, a private investigator with "extensive law enforcement experience," that Patricia Bailey, who resided at Sea Retreat Cottages in Kitty Hawk, had informed Dail that defendant, a neighbor residing at Cottage 3 of the Sea Retreat Cottages, was operating a methamphetamine laboratory at his residence and that Bailey was afraid that the laboratory would ignite or explode and cause harm to her or her child. Eck conducted an investigation and surveillance of the area surrounding defendant's cottage. The investigation included an exchange of information among the Hanover County, Virginia, Sheriff's Office, the North Carolina SBI, and the Richmond, Virginia, Office of the DEA. Eck received information that the car parked in front of Cottage 3 was registered to defendant; that defendant had been convicted in Virginia for distribution of methamphetamine in December of 1979; that in November of 1986 "Crimestoppers" received information that defendant was manufacturing methamphetamine at his residence in Virginia; and that, in April of 1987, the SBI had received information that defendant was involved in the manufacture, sale, and distribution of methamphetamine and had moved from Virginia to Kill Devil Hills in Dare County, North Carolina. A description of defendant was obtained through Virginia DMV files.

The affidavit further alleged that, on 30 March 1988, Eck photographed the premises at Cottage 3. He noted an electrical wire running out of one window of the cottage and back into another, window shades and other non-transparent materials covering the

windows, an air conditioning unit, and a water hose outside the house. While near the premises, he smelled a "chemical odor not associated with usual household chemicals." On consulting with Special Agent Clark, a Special Services Coordinator for clandestine laboratory investigations for the State Bureau of Investigation, Eck was informed that his observations were consistent with the operation of a clandestine laboratory. In particular, Clark said that water and electricity are used in the illegal manufacture of methamphetamine, that window coverings are used to prevent visual observations and to keep chemical odors from escaping to the outside, and that air conditioners are used to provide ventilation.

Further surveillance conducted on 6 April 1988 showed a water hose running from underneath the house to a "Y" connector, with two hoses then running from the connector through a slightly opened window. A larger hose ran from the rear window of the house to the ground outside. Officers and agents observed defendant stand in the front door of the cottage, look around, exit the cottage, and walk around looking in all directions. This conduct was viewed by Special Agent Clark as being consistent with the paranoia associated with clandestine laboratory operators.

The following day, Patricia Bailey was seen leaving her cottage, entering defendant's cottage, and then returning to her own. That same day, Eck met with a "confidential, reliable source of information" who said that, sometime during the last two weeks, he had been in defendant's residence where he saw defendant cooking "speed" (the "street name" for methamphetamine), chemistry equipment (tubes, bottles, and beakers), and a container with "Meth—" written on it. This confidential informant also said that defendant would dismantle his lab when not using it and move the larger pieces to the trunk of his car. Special Agents informed Eck that vehicles and outbuildings are frequently used to store chemicals and equipment and that the chemical "methylamine" is commonly used in the illegal manufacture of methamphetamine.

On 7 April 1988, defendant was followed while driving his automobile from his residence and traveling northbound on Highway 158 toward Virginia. Surveillance was lost somewhere in Currituck County. That afternoon, a white male driving a vehicle registered to Warren Pemberton of Richmond, Virginia, and matching Pemberton's description was seen entering defendant's residence. A special agent from the Richmond DEA office informed investigating of-

ficers that the DEA had received information in 1981 from a confidential source that Pemberton was involved in the distribution of methamphetamine and marijuana in the Richmond area.

At 1:30 a.m. on 8 April 1988, defendant returned to his home and was seen exiting the cottage several times, retrieving a bag or container from his car, and reentering the cottage. Someone inside the house adjusted the windows and lights in the area where the lab was believed to be located. At 2:00 a.m. the window shades were closed and the lights turned off. At 3 a.m. a white male and a white female left the residence, and at 4 a.m. the porch light went out and defendant exited the cottage, walked down the side of the cottage in the rain and then went back inside. According to Special Agent Clark, clandestine laboratory operators operate their labs in the early morning hours to minimize detection. At 9 a.m. defendant stood at the front door of his residence looking outside. At 9:50 a.m. he went to his car, retrieved what looked like a tool box and reentered the cottage.

On the basis of the foregoing information contained in Eck's affidavit, the magistrate issued a warrant authorizing search of defendant's residence. As a result of the search, various items were seized, including methamphetamine, cocaine, marijuana, a "roach clip," a heating plate, $7,900.00 in bills of various denominations, a set of triple beam balance scales, white residue on various surfaces in the room, white hard crystalline substance in a plastic bag, and five pieces of "chemical glassware." Officers also found a lease for a storage unit at a "self-storage" facility in Nags Head.

A warrant for search of the storage unit was issued and executed on 8 April 1988. In his affidavit supporting issuance of that warrant, Eck referred to the first warrant and stated that, during the search conducted pursuant to the first warrant, officers and agents had discovered the storage lease and the "remnants of a clandestine laboratory used in the illegal manufacture of methamphetamine," along with approximately one ounce of cocaine, one ounce of methamphetamine and an undetermined amount of "P-2-P" (phenyl-2-propanone), identified as "a chemical precursor used in the illegal manufacture of methamphetamine." As a result of the search of the storage unit, officers seized a 500 ml. beaker containing white residue, a 500 ml. beaker containing brown and white residue, several flasks containing residue, a bag containing hot plates and water circulators, a bag containing clamps, ring-stands

and other laboratory items, a five-pound jar of sodium acetate, a bottle labeled phosphoric acid, "Red Devil" lye drain opener, two plastic bottles labeled sodium acetate, two sealed bottles containing 500 grams of phenylacetic acid, a glass jug containing 99% formamide, a glass bottle containing 99% acetic anhydride, and other items.

Defendant was arrested and indicted. He moved to suppress the evidence seized on grounds that no probable cause existed for issuance of the warrant and that the evidence seized was obtained as a result of substantial violations of Chapter 15A of the General Statutes, including failure of law enforcement officers to read the search warrant to defendant, inadequate return of service on the search warrant, failure to provide defendant with an inventory of the items seized, and failure to give defendant a copy of the search warrant. At the suppression hearing, Bailey testified that she had told Dail that something strange was going on at defendant's residence but that she did not say that she had seen a methamphetamine laboratory there, that she did not know what one looked like, and that she was afraid that defendant would believe that she had made such statements about him. Dail testified that he was a private investigator, that he had been fired from his position as Nags Head Chief of Police, and that Bailey had not specifically said "methamphetamine laboratory" but had mentioned "drugs," something being cooked, and a "strange odor" coming from defendant's residence, and had said she was afraid for the safety of her child. He also testified that Lieutenant Eck's affidavit "basically" conformed to the information he received from Bailey. Other evidence received from defendant at the hearing showed that the hose running from the window at the rear of the house was connected to a washing machine and that the electrical wire was connected to a clothes dryer. There was no evidence of anything unusual about the air conditioner or window shades.

[1] Defendant contends that there was no probable cause to issue a warrant for the search of his residence because the affidavit in support of the warrant was a recital of innocent and unprovocative details about defendant's actions and the appearance of his residence, contained stale references to defendant's past criminal activity, and failed to give underlying information demonstrating the reliability of Eck's sources. He further contends that the search of the storage unit was unlawful because it was based on evidence seized during the first illegal search and was, accordingly, the "fruit of the poisonous

tree," and, alternatively, that there was no independent probable cause justifying the search of the storage facility. We disagree.

Whether a search warrant should issue is controlled by the "totality of the circumstances" test, which has been described as follows:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257-58 (1984) (quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)). The reviewing court should give great deference to the magistrate's determination of probable cause and should not conduct a de novo review of the evidence to determine whether probable cause existed at the time the warrant was issued. *State v. Williams*, 319 N.C. 73, 81, 352 S.E.2d 428, 434 (1987).

While none of the pieces of information contained in Lieutenant Eck's first affidavit, standing alone, might give rise to probable cause for issuance of the warrant, the totality of the circumstances presented to the magistrate at the time of the warrant application constituted substantial evidence from which a detached and neutral magistrate could find probable cause for believing that the fruits and instruments of criminal activity would be discovered in defendant's residence. Eck had received a tip from Dail that Bailey, defendant's neighbor, suspected that a methamphetamine laboratory was being operated at defendant's residence and was afraid for her and her child's safety. Eck and other officers conducted a background check, communicated with other law enforcement agencies, and conducted a surveillance of defendant's residence. Defendant had a prior drug conviction involving methamphetamine. Eck smelled an unusual chemical odor near the premises. A reliable, confidential source who had been inside defendant's residence within the last two weeks said that defendant was making "speed" and stated that defendant would sometimes put some of his labora-

tory equipment in the trunk of his automobile. Officers saw defendant removing bags and boxes from his car in the early hours of the morning. Consultation with an SBI agent specializing in clandestine laboratory investigations led Eck to believe that the unusual hoses and electrical wiring could be signs of a clandestine laboratory. Giving due deference to the magistrate's determination, we hold that the totality of the circumstances set forth in the affidavit was sufficient to support the finding of probable cause.

[2] We further hold that the facts set forth in the second affidavit supported the magistrate's finding of probable cause to search the storage unit. This Court has held that outbuildings can be searched when there is probable cause to believe that drugs are located in the main residence, *see State v. Leonard*, 87 N.C. App. 448, 454, 361 S.E.2d 397, 401 (1987), *appeal dismissed and disc. review denied*, 321 N.C. 746, 366 S.E.2d 867 (1988), and that there is probable cause to search a student's automobile located 100 yards from his dormitory even though drugs had been seen only in his dormitory room. *State v. Mavrogianis*, 57 N.C. App. 178, 291 S.E.2d 163, *disc. review denied*, 306 N.C. 562, 294 S.E.2d 227 (1982). We hold here that a reasonably prudent person with the information that "remnants" of a clandestine laboratory were found in defendant's residence and that defendant had been seen putting parts of his laboratory in his automobile would be justified in believing that a storage unit rented by defendant would hold other parts of that laboratory, the chemicals used in producing the drugs, or the drugs themselves.

[3] Defendant next contends that, pursuant to N.C. Gen. Stat. § 15A-974, the evidence seized must be suppressed because (1) the warrant to search his residence was not read to him, in violation of N.C. Gen. Stat. § 15A-252, and (2) he was not given inventories of the items taken from his residence or the storage unit, in violation of N.C. Gen. Stat. § 15A-254. We find no merit to this contention. At the suppression hearing, both Officer Eck and Officer McLawhorn testified that Eck read the warrant to defendant. With respect to the inventory of defendant's residence, the trial court found that "Lt. Eck prepared an inventory of the seized items and mailed the inventory to the defendant by U.S. mail" and concluded that "Lt. Eck exercised due diligence in attempting to comply with the requirement that the defendant be supplied with the inventory of seized property." With respect to the inventory of the storage unit, the trial court found that

Eck undertook diligent and reasonable efforts to procure from the Kitty Hawk Police Department (a separate law enforcement agency not under control of Eck or his department but which had actual physical control of the items seized) a complete and accurate inventory of the items which had been taken from the B-104 storage unit; that the items seized had been stored with the Kitty Hawk Police Department for both safety and security reasons and Eck acted with proper dispatch to attempt to comply with the provisions of G.S. 15A-254 and 15A-257; that as soon as he received the written inventory from the Chief of the Kitty Hawk Police Department, Eck attached a copy of same to the original search warrant and returned it promptly to the magistrate on April 14, 1988, at 10:30 a.m.; that in addition thereto, Eck promptly and on the same day placed a copy of the inventory of seized items in the United States mail addressed to the Defendant who at that point had been transferred to Central Prison for safe keeping pursuant to an Order which appears of record in this court file; that such actions on the part of Eck substantially complied with the provisions of Article 11 of North Carolina General Statute 15A and the same do not constitute any ground or reason to exclude or suppress evidence seized as a result of the incident search.

The court concluded that the search warrant was executed and served in full accordance with Chapter 15A. Defendant cites nothing to contradict these findings and conclusions, which we find fully supported by the evidence. Accordingly, this assignment of error is overruled.

For the foregoing reasons, the orders below denying defendant's motions to suppress are

Affirmed.

Judges JOHNSON and LEWIS concur.

STATE OF NORTH CAROLINA v. CLAWSON L. WILLIAMS

No. 8920SC479

(Filed 1 May 1990)

1. **Corporations § 16.1 (NCI3d)— sale of unregistered stock— evidence insufficient**

There was insufficient evidence to support a conviction for the sale of unregistered stock where the circumstances of the case did not indicate that defendant sold the unregistered stock certificates in question and his actions did not meet the definitional test for a sale set out in N.C.G.S. § 78A-2(8)a and N.C.G.S. § 78A-24. The definition of sale does not include the mere signing of a stock certificate by a corporate officer and defendant's actions did not constitute a sale under *Pinter v. Dahl*, 486 U.S. 622, because there was neither evidence at trial that he was the owner of the security nor that he was the one who successfully solicited the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner.

Am Jur 2d, Securities Regulation— State §§ 15, 29, 100, 102.

2. **Corporations § 16.1 (NCI3d)— sale of stock— unregistered salesman— evidence insufficient**

The evidence was insufficient to support a conviction for selling stock as an unregistered salesman because defendant did not sell the unregistered security in question. N.C.G.S. § 78A-36.

Am Jur 2d, Securities Regulation— State §§ 15, 29, 100, 102.

3. **Corporations § 16.1 (NCI3d)— sale of stock— failure to disclose risks— evidence insufficient**

The evidence was insufficient to convict defendant of violating N.C.G.S. § 78A-8 by failing to disclose risks in the sale of stock where defendant did not participate in any way in the offer, sale, or purchase of the security.

Am Jur 2d, Securities Regulation— State §§ 15, 29, 100, 102.

APPEAL by defendant from judgment entered 10 November 1988 by *Judge Melzer A. Morgan* in MOORE County Superior Court. Heard in the Court of Appeals 9 January 1990.

On 16 May 1988, defendant was indicted for three separate violations of the North Carolina securities laws: (1) N.C. Gen. Stat. § 78A-24 (1985), wilful failure to register a security prior to sale or offer to sell; (2) § 78A-36, wilful failure to register as a securities dealer or salesman prior to transacting business by selling a security; and (3) § 78A-8, wilful failure to disclose the risks of an investment or material facts to the buyer of a security.

Defendant was tried before a jury on the above felony charges on 7 November 1988. The jury returned verdicts of guilty on all three counts on 10 November 1988. On 20 December 1988, the trial court sentenced defendant to one year's imprisonment, suspended for five years on each count.

Defendant filed a motion for appropriate relief on 19 December 1988, which was denied on 13 January 1989. From his conviction on 10 November 1988, defendant appeals.

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

Van Camp, West, Webb & Hayes, by James R. Van Camp, for defendant-appellant.

ORR, Judge.

Defendant contends that the State failed to present sufficient evidence to prove any of the offenses charged. For the reasons set forth below, we agree with defendant and reverse his convictions on all counts.

Defendant's indictments on 16 May 1988 arose from his alleged participation in selling an unregistered stock in Moore Advantage Corporation. The evidence tends to show that prior to March 1983, defendant, an attorney, drafted the articles of incorporation for Moore Advantage Corporation (hereinafter Advantage) at the request of Fred Lawrence (hereinafter Lawrence). Defendant had prepared deeds and drafted articles of incorporation for numerous corporations at Lawrence's request prior to drafting those for Advantage. Many of these corporations were formed to finance and purchase land for Seven Lakes Development, which was formed by Lawrence around 1971.

In February or March 1982, Lawrence was enjoined by the Securities and Exchange Commission (S.E.C.) and the Secretary

of State of North Carolina from further violations of the securities laws. Lawrence allegedly had several securities registration violations in 1981 and 1982 in connection with Seven Lakes Development. The evidence established that defendant knew that Lawrence had been at least warned by the S.E.C. when defendant drafted the articles of incorporation for Advantage. Defendant testified that he did not know the specifics of the S.E.C. investigation until after 11 March 1983.

The articles of incorporation for Advantage were signed on 2 March 1983, naming defendant, Jon Giles and Warren Grant as the original directors. The initial meeting of the board of directors was scheduled for 11 March 1983. On 11 March 1983, Leo Van Leiderkerke, who had been contacted by Lawrence in January 1983 about a possible investment in Advantage, tendered to Lawrence a check for $30,000.00 for stock in Advantage prior to the board's official meeting. There were eight equal shareholders in Advantage, including defendant and Van Leiderkerke, and all but one (Giles) attended the 11 March 1983 meeting. At the meeting, Dr. Dennis Deibler was elected president and defendant was elected secretary-treasurer.

The stock certificates to each of the shareholders, including Van Leiderkerke, had been typed previously by Lawrence's bookkeeper, Joann Halverstadt. After the election of officers, Dr. Deibler and defendant signed the certificates in their official capacity as officers, and then distributed them to the individual shareholders. At no time during the meeting did defendant offer any information concerning Lawrence's alleged S.E.C. violations.

Van Leiderkerke never discussed his purchase of stock in Advantage with defendant and paid Lawrence for the stock prior to the meeting. Van Leiderkerke testified that had he known of Lawrence's alleged S.E.C. violations, he would not have purchased stock in Advantage.

Defendant stipulated prior to trial that the security (stock certificate) issued to Van Leiderkerke on 11 March 1983 was unregistered in violation of § 78A-24, and that the security was required to be sold by a registered dealer and salesman under § 78A-36.

At the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss all charges because there

was insufficient evidence presented at trial. Upon defendant's conviction on all counts, defendant moved for appropriate relief to set aside the verdict, which the trial court denied.

[1] Defendant first contends that although unregistered stocks in Advantage were sold, neither his signing of the stock certificates at the 11 March meeting nor any other action on his part constitutes a sale under Chapter 78A.

Under § 78A-2(8)a., "sale" is defined as "every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value."

The State relies upon *State v. Franks*, 262 N.C. 94, 136 S.E.2d 623 (1964) for the proposition that a court must look at all the facts in a particular case to determine if a "sale" of securities occurred. The State argues and presented evidence at trial that the following circumstances prove that defendant sold an unregistered security under *Franks* and in violation of § 78A-24.

a. Defendant prepared the Articles of Incorporation, ordered the stock book and minute book, and received a legal fee from Moore Advantage Corporation for this legal work;

b. Defendant listed himself as an incorporator, and initial director, and initial registered agent on the Articles of Incorporation;

c. Defendant attended the initial meeting of directors;

d. Defendant was an investor in the corporation;

e. Defendant was an officer in the corporation;

f. Defendant was present when the developer gave the sales pitch to those present;

g. Defendant was present when Leo Van Leiderkerke gave his check to Fred Lawrence for the stock;

h. Defendant signed the stock certificates as an officer; and

i. Defendant was present when the signed stock certificates were distributed.

Defendant does not deny a. through e. or h. and i. above. Evidence of those facts is uncontroverted. Defendant argues that there was no evidence presented that Lawrence gave a sales pitch

at the 11 March meeting or that defendant was present when Van Leiderkerke gave his check to Lawrence. We agree.

First, Joann Halverstadt, Lawrence's secretary and bookkeeper who was present at the meeting to take notes and prepare the minutes, testified that the minutes reflect that during the meeting, the officers were elected and defendant then signed the stock certificates in his capacity as secretary of the corporation. Ms. Halverstadt testified that she had already typed the names of the stock recipients, the number of shares, the date and which officers were signing on the certificates prior to this meeting. The stock certificates were then given to their respective owners.

Van Leiderkerke testified that he had never met defendant prior to the 11 March meeting. He testified that the meeting took place as the minutes reflected, and that Lawrence spoke at the meeting concerning the purpose of Advantage, which was to invest in local secured mortgages to yield a high return for the investors. Van Leiderkerke testified that Lawrence spoke at the meeting in general terms, which was "basically . . . the same conversation" that he had with Lawrence prior to the meeting. We find that the above testimony does not prove that a "sales pitch" took place at the 11 March meeting and the evidence is uncontradicted that the parties present had previously agreed with Lawrence to purchase the stock and tendered payment.

Second, Van Leiderkerke testified that he gave his check for $30,000.00 for the stock to Lawrence on 11 March prior to the meeting. Although defendant may have been present in the room when Van Leiderkerke gave his check to Lawrence (and there is no evidence that he was or was not present), there is no evidence that defendant was a part of, or even observed, this transaction.

Therefore, we hold that under *Franks*, the circumstances of the case *sub judice* do not indicate that *defendant* sold the unregistered stock certificates in question and that his actions do not meet the definitional test for a sale as set out in §§ 78A-2(8)a. and 24.

In addition, the State argues that defendant's signing the stock certificate constituted a sale under Chapter 78A. Although we agree that "sale" should be broadly construed under § 78A-(8)a., we do not find that the definition of "sale" includes the mere signing of a stock certificate by a corporate officer.

The State cites *Pinter v. Dahl*, 486 U.S. 622, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988), for the proposition that a seller is one who passes title (or other interest in the security), to the buyer for value. In reviewing *Pinter*, we find that it does not state the above proposition in the same manner. *Pinter* states that an *owner* of a security is liable as a seller when the *owner* passes title, or other interest in the security, to the buyer for value. *Id.* at 642, 108 S.Ct. at 2076, 100 L.Ed.2d at 679.

The State also maintains that defendant meets the second test in *Pinter* to determine if a person "sold" a security because defendant received personal financial benefit or financial benefit for another. The only evidence of defendant's personal financial benefit presented at trial is that he received a standard attorney's fee for incorporating Advantage. The State also asserts that Van Leiderkerke's investment enhanced defendant's investment. While this may be true, there was no evidence before the jury explaining how defendant's investment was enhanced or that defendant's investment was, in fact, enhanced in any way.

Further, the Supreme Court in *Pinter* placed great emphasis on the *solicitation* of the buyer as the "most critical stage of the selling transaction." *Id.* at 646, 108 S.Ct. at 2078, 100 L.Ed.2d at 682. All the evidence in the case *sub judice* indicates that defendant never solicited Van Leiderkerke's investment in any way and, in fact, never met Van Leiderkerke until 11 March 1983. The uncontroverted evidence is that *Lawrence* solicited Van Leiderkerke's participation in Advantage, and that Lawrence arranged to sell the stock in Advantage.

Therefore, we hold that defendant's actions do not constitute a "sale" and defendant is not a "seller" under *Pinter v. Dahl*, because there was neither evidence at trial that he was the owner of the security, nor that he was the one who "successfully solicit[ed] the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id.* at 647, 108 S.Ct. at 2078, 100 L.Ed.2d at 682.

[2] Defendant next contends that he did not violate § 78A-36, which requires that any person transacting "business in this State as a dealer or salesman [must be registered] under this Chapter." Because we hold that defendant did not sell the unregistered security in question, he was not a "salesman" (or a dealer), and therefore was not subject to the requirements of § 78A-36.

[3] Finally, defendant contends that there was insufficient evidence presented at trial to convict him of violating § 78A-8. Under § 78A-8,

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, ...

Sec. 78A-8 closely parallels the S.E.C. Rule 10(b)-5 antifraud provision, which is designed to ensure that investors are aware of market risks. *Skinner v. E. F. Hutton & Co.*, 70 N.C. App. 517, 520, 320 S.E.2d 424, 427 (1984), *aff'd in part and rev'd in part*, 314 N.C. 267, 333 S.E.2d 236 (1985). Under the statute, to determine if an omitted fact is material, evidence must be presented that "there is a substantial likelihood that a reasonable [purchaser] would consider it important in deciding [whether or not to purchase]." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757, 766 (1976).

The State contends that under § 78A-8, defendant should have disclosed to Van Leiderkerke at the 11 March meeting that the investment in Advantage was risky because the stock was unregistered, that Lawrence had formed a large number of corporations and businesses in connection with Seven Lakes, that the capital for Advantage was being financed on credit, and that Lawrence had received a warning from the S.E.C. against selling securities in violation of S.E.C. regulations. The State's contentions are without merit.

Sec. 78A-8(2) applies only when the alleged material statements are made or omitted "in connection with the *offer*, *sale* or *purchase* of any security, ..." (Emphasis added.) We found above that the offer and sale of the security in question occurred prior to the 11 March 1983 meeting, and that defendant did not participate in any way in such offer or sale. We further find that defendant did not participate in the *purchase* of such security.

Although "purchase" is not defined in Chapter 78A, it is generally defined as "obtain[ing] merchandise by paying money or its equivalent." Webster's Third New International Dictionary (1968). *See also* Black's Law Dictionary 1110 (5th ed. 1979) ("Purchase. Transmission of property from one person to another by voluntary

act and agreement, founded on valuable consideration."). Van Leiderkerke testified at trial that he gave his check for $30,000.00 to Lawrence prior to the beginning of the business meeting and election of officers on 11 March 1983. There is no evidence in defendant's testimony, or the testimony of any other witness present at the 11 March 1983 meeting, that defendant observed or was present when Van Leiderkerke gave his check to Lawrence for the security.

Therefore, we find that there is simply no evidence in the record before us that defendant acted or failed to act under § 78A-8, "in connection with the offer, sale or purchase of any security, ..." This statute does not pertain to the specific circumstances surrounding defendant's acts or omissions at the 11 March 1983 meeting. Moreover, the scope of § 78A-8 applies only to those "persons who sell or offer to sell [a security] . . . ." N.C. Gen. Stat. § 78A-63(a) (1985).

For the reasons set forth above, we reverse defendant's convictions on all counts.

Reversed.

Judges PHILLIPS and LEWIS concur.

MINNA SUSAN GOLDBERG TALIAN, ADMINISTRATRIX OF THE ESTATE OF SHERRI LYNN GOLDBERG, AND DANA KING, PLAINTIFFS v. THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, DEFENDANT

No. 8926SC145

(Filed 1 May 1990)

Highways and Cartways § 7 (NCI3d)— collision at intersection— failure of city to install left turn light—directed verdict for city proper

The trial court properly granted directed verdict for the city in a wrongful death action arising from a motorcycle-truck accident where plaintiff contended that the city was negligent in failing to install a protected left turn signal at the intersection pursuant to a duty to install such a device according to national uniform traffic control and highway safety stand-

ards. The federal statutes and regulations cited by plaintiffs in no way create or impose a national standard which cities must follow with respect to installation of protected left turn signals, there are no mandates or warrants contained in the Manual on Uniform Traffic Control Devices regarding left turn signalization, the traffic control devices handbook is in permissive rather than mandatory terms, North Carolina case law has consistently held that installation, maintenance and timing of traffic control signals at intersections are discretionary government functions, there is no mandate regarding left turn signalization in the Charlotte Charter and Code, and, since the traffic signals existing at the intersection at the time of the accident were in proper working order and complied in every way with all requirements of the Manual on Uniform Traffic Control Devices, defendant was also in compliance with the Charlotte Code and the North Carolina Department of Transportation's Signal Manual and supplement to the MUTCD. Although the accident occurred on 26 June 1984 and the city had made the decision in December of 1982 to install a left turn signal, the city had been required by law to reinitiate the bidding process after only one bid was received and plaintiffs offered no evidence other than the delay from which the jury could infer that the delay was unreasonable. Mere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable or that the municipality abused its discretion.

Am Jur 2d, Highways, Streets, and Bridges §§ 407, 491, 599.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs from judgment entered 29 September 1988 by *Judge Charles C. Lamm, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 14 September 1989.

Levine and Levine, by Miles S. Levine, for plaintiff-appellant Minna Susan Goldberg Talian (Administratrix of the Estate of Sherri Lynn Goldberg).

Ronald Williams for plaintiff-appellant Dana Scott King.

Golding, Meekins, Holden, Cosper & Stiles, by Emily S. Reeve and Fred C. Meekins, for defendant-appellee.

PARKER, Judge.

Plaintiffs Minna Susan Goldberg Talian, Administratrix of the Estate of Sherri Lynn Goldberg, and Dana King instituted this wrongful death and personal injury action against the City of Charlotte to recover damages arising out of a motorcycle-truck accident which occurred at the intersection of North Sharon Amity Road and Central Avenue within the city of Charlotte, North Carolina (herein "the City"). Plaintiffs contend that the City was negligent in failing to install a protected left turn signal at the intersection and that this omission on the part of the City proximately caused the death of Talian's intestate and personal injuries to King. Plaintiffs appeal from the trial court's entry of a directed verdict in favor of defendant.

On a motion for a directed verdict under Rule 50(a) of the N.C. Rules of Civil Procedure, the Court must determine "[w]hether the evidence, taken in the light most favorable to plaintiff, was sufficient for submission to the jury." *Helvy v. Sweat*, 58 N.C. App. 197, 199, 292 S.E.2d 733, 734 (1982), *disc. rev. denied*, 306 N.C. 741, 295 S.E.2d 477 (1982) (citing *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644, 272 S.E.2d 357, 359 (1980)).

In order to prove that defendant was negligent, plaintiff must show:

> (1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff;
>
> (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and
>
> (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed.

Jordan v. Jones, 314 N.C. 106, 108, 331 S.E.2d 662, 663 (1985). If plaintiff fails to present evidence as to any one of these elements, directed verdict is proper. *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 173, 293 S.E.2d 235, 236 (1982).

On 26 June 1984 plaintiff King and Goldberg, riding King's motorcycle, were traveling north on North Sharon Amity Road about 9:40 p.m. At the same time, Jacqueline Rogers was traveling south on North Sharon Amity Road and was in the left turn lane preparing to turn east onto Central Avenue at its intersection

with North Sharon Amity. As King's motorcycle approached the intersection at forty miles per hour, in a forty-five mile per hour zone, King saw Rogers' pickup truck with the left turn signal blinking but assumed that Rogers was going to yield the right-of-way to him. Rogers, however, turned just as plaintiff King crossed through the intersection, and the motorcycle hit the right front fender of the truck. Goldberg was killed instantly and King received serious injuries.

At the time of the collision, the southbound traffic at the intersection of North Sharon Amity Road and Central Avenue was controlled by a standard three-light traffic control signal which was properly operating. The other three approaches to the intersection were protected by traffic control devices having protected left turn signals. On 31 July 1984 defendant installed a protected left turn signal at the southbound intersection.

The determinative legal question in this appeal is whether the city had a duty to install a traffic control device having a protected left turn signal. Plaintiffs contend that such a duty exists because various statutes, codes and manuals pertaining to traffic control and highway safety create national uniform standards. Plaintiffs cite 23 U.S.C. § 402(a) under the Highway Safety Act, which provides that "[e]ach State shall have a highway safety program approved by the Secretary, designed to reduce traffic accidents and deaths, injuries, and property damage resulting therefrom. Such programs shall be in accordance with uniform standards promulgated by the Secretary." 23 U.S.C. § 402(a) (1982).

Additionally, 23 C.F.R. § 1204.4 provides that:

> Each State, in cooperation with its political subdivisions, and each Federal department or agency which controls highways open to public travel or supervises traffic operations, shall have a program for applying traffic engineering measures and techniques, including the use of traffic control devices, to reduce the number and severity of traffic accidents.

23 C.F.R. § 1204.4 (1984). 23 U.S.C. § 402(e) further states that the "[u]niform standards promulgated by the Secretary to carry out this section shall be developed in cooperation with the States, their political subdivisions, appropriate Federal departments and agencies, and such other public and private organizations as the Secretary deems appropriate." 23 U.S.C. § 402(e) (1982).

Plaintiffs contend that the City was under an obligation to install a protected left turn signal at the intersection by virtue of these statutes and two manuals published by the Federal Highway Administration, namely, the Manual on Uniform Traffic Control Devices (herein "MUTCD") and the Traffic Control Devices Handbook (herein "TCDH"). To form the connective State link, plaintiff cites Title 19A of the North Carolina Administrative Code, which reads as follows:

> Uniform Traffic Control Devices
>
> (a) The United States Department of Transportation publishes a volume entitled "Manual on Uniform Traffic Control Devices." This publication has been adopted by the Federal Highway Administrator as a national standard that is applicable to all classes of highways. This volume contains standards for the design and deployment of traffic control devices. The 1978 edition is hereby adopted and incorporated by reference. Revision 1 dated 1979, Revision 2 dated 1983 and Revision 3 dated 1984 of the 1978 edition of the Manual on Uniform Traffic [Control] Devices for Streets and Highways (MUTCD) published by the Federal Highway Administrator are hereby adopted and incorporated by reference.

N.C. Admin. Code tit. 19A, r. 02.0208 (Jan. 1986). The federal statutes cited by plaintiffs do not, however, direct the City to follow any uniform guidelines for left turn signalization. For example, 23 U.S.C. § 402(a) only directs states to have a state highway safety program which is in accordance with uniform guidelines promulgated by the Secretary. These regulations in no way create or impose a national standard which cities must follow with respect to installation of protected left turn signals.

The MUTCD does require full signalization of an intersection when five or more accidents involving personal injury or property damage of one hundred dollars or more have occurred within a twelve month period. The undisputed evidence offered at trial showed, however, that the traffic signal devices in place and properly operating at the time of the accident complied in every way with all requirements of the MUTCD. Although plaintiffs' expert witness testified that in his opinion defendant failed to exercise good engineering judgment, principles and practices when it failed to install a protected left turn signal, the record shows, and plain-

tiffs' expert admitted, that there are no mandates or warrants contained in the MUTCD regarding left turn signalization.

The TCDH does contain guidelines for the installation of left turn signals. The first full paragraph of the introduction to the TCDH expressly states:

> This Traffic Control Devices Handbook is primarily intended to augment [the MUTCD] by serving an interpretative function and by linking the MUTCD standards and warrants with the activities related to complying with these national uniform standards. As such, the Handbook does not establish Federal Highway Administration (FHWA) policies or standards. Nor does it attempt to detail basic engineering and design techniques. . . . The Handbook offers guidelines for implementing the standards and applications contained in the Manual.

Traffic Control Devices Handbook 1-1 (1983). All information regarding left turn signalization is located in the 1983 Edition of the TCDH under a section labeled "Left-Turn Phase Criteria." In this section, the TCDH expressly states: "These warrants are not mandated by the MUTCD and are provided here for informational purposes only." TCDH 4-18 (1983). Thereafter, under a section expressly labeled "Suggested Guidelines," the TCDH states, "The following guidelines may be used when considering the addition of separate left-turn phasing." Following this preface, the TCDH recommends installing left turn phasing if the critical number of accidents has occurred at an intersection. The critical numbers for one approach are four left turn accidents in one year, or six in two years. TCDH 4-19 (1983).

Plaintiffs' attempt to establish a duty based on these statutes and manuals fails for two reasons. First, the plain language of the 1983 TCDH, the only manual mentioning left turn signalization, is in permissive, not mandatory terms. Secondly, under the North Carolina General Statutes, municipalities are required to conform to the traffic control device standards promulgated in the MUTCD only with respect to state highways. G.S. 20-169. Neither Central Avenue nor North Sharon Amity Road is part of the state highway system.

North Carolina case law has consistently held that installation, maintenance and timing of traffic control signals at intersections are discretionary governmental functions. *See Hamilton v. Hamlet*,

238 N.C. 741, 78 S.E.2d 770 (1953); *Hodges v. Charlotte*, 214 N.C. 737, 200 S.E. 889 (1939); and *Rappe v. Carr*, 4 N.C. App. 497, 167 S.E.2d 48 (1969). As this Court stated in *Cooper v. Town of Southern Pines*, 58 N.C. App. 170, 293 S.E.2d 235 (1982):

> The fact that a city has the *authority* to make certain decisions, however does not mean that the city is under an *obligation* to do so. The words "authority" and "power" are not synonymous with the word "duty." . . . There is no mandate of action. Courts will not interfere with discretionary powers conferred on a municipality for the public welfare unless the exercise (or non-exercise) of those powers is so clearly unreasonable as to constitute an abuse of discretion.

58 N.C. App. at 173, 293 S.E.2d at 236 (emphasis in original) (citing *Riddle v. Ledbetter*, 216 N.C. 491, 493-94, 5 S.E.2d 542, 544 (1939)). General Statute 160A-300, alleged in plaintiffs' complaint, but not argued in their brief to this Court, grants cities discretionary authority but imposes no affirmative duty on them to control vehicular traffic on the public streets of the city.

Plaintiffs also argue that the Charlotte Charter and Code create a duty for the City to install protected left turn signalization. Section 6.21(a) of the Charlotte Charter states:

> The City Council, upon finding as a fact that the density of population and volume of vehicular and pedestrian traffic in the City of Charlotte requires prompt, continuing, and effective control of such traffic through the installation, removal, relocation and change of official traffic-control devices in order to protect and promote the public safety and convenience, may designate, by ordinance, an official of the city to make or cause to be made, upon the basis of engineering and traffic investigations, installations, removals, relocations and changes of official traffic control devices in accordance with accepted traffic engineering principals and standards and in accordance with the procedures hereinafter set forth.

Charlotte, NC, Charter § 6.21(a) (1965). This section, however, merely grants to the City Council power to designate an official of the City to make installations, relocations, removals and changes of official traffic control devices. There is no mandate regarding left turn signalization.

Plaintiff also cites Charlotte Code § 14-57(d) which states:

> All traffic-control devices shall conform to the manual and specifications approved by the state board of transportation or resolution adopted by the city council. All traffic-control devices so erected and not inconsistent with the provisions of State law or this chapter shall be official traffic-control devices.

Charlotte, NC, Code § 14-57(d) (1961). The term "official traffic-control device" as used in the charter is expressly defined as, "a sign, signal, marking or device . . . which is designed and intended to regulate vehicular or pedestrian traffic." Charlotte, NC, Charter § 6.21(b) (1965).

The manual with specifications approved by the State Board of Transportation and referred to in the Charlotte Code Section 14-57(d) is the North Carolina Department of Transportation publication entitled "Traffic Signal Manual and Supplement to the MUTCD." Under a section captioned "1A-6, Legal Authority," the supplement states, "[A]ll traffic signals installed . . . shall be in substantial conformance with this manual and the MUTCD."

Plaintiffs have presented no evidence suggesting that the traffic signals installed at the intersection were not in compliance with the MUTCD and the North Carolina Traffic Signal Manual. In fact, all the evidence was to the contrary. Since the traffic signals existing at the intersection at the time of the accident were in proper working order and complied in every way with all requirements of the MUTCD, defendant was also in compliance with the Charlotte Code and the North Carolina Department of Transportation's Signal Manual and Supplement to the MUTCD.

Plaintiffs' reliance on *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985), is misplaced. In *Jordan*, the intersection had only a stop sign, which according to plaintiffs' evidence was not properly placed. *Jordan*, 314 N.C. at 108-9, 331 S.E.2d at 664. Since the intersection was part of the state highway system, the MUTCD applied and mandated signalization of an intersection after five or more accidents in a twelve month period. Unlike the situation in *Jordan*, in the instant case, there were no clear criteria promulgated by the MUTCD that the City failed to follow.

Finally, plaintiffs contend the City was negligent in failing to install the signal within a reasonable time after the decision to do so was made. Plaintiffs note that the City undertook various

evaluations and studies of the traffic and accident patterns at the intersection, and in December 1982 made the decision to install a left turn signal in "about a year." The signal was not installed until 31 July 1984. The uncontradicted evidence showed, however, that the projected installation of the left turn signal for the southbound lane of North Sharon Amity at Central Avenue was a part of the new Sharon Amity signal system. When bids were solicited, the City received only one bid. Therefore, by law the City was required to reinitiate the bidding process. Other than the fact that a delay beyond the projected target date occurred, plaintiffs have offered no evidence from which the jury could infer that the delay was unreasonable. Budgeting and setting priorities within the restraints of budgetary limitations are elements of a municipality's exercise of discretion. Mere delay in meeting a recognized need does not, without more, establish that the delay was unreasonable or that the municipality abused its discretion.

The undisputed evidence of record showed that the traffic signal in place at the time of the collision complied with all requirements of federal, state, and local law and was in proper working order. Plaintiffs having failed to offer evidence legally sufficient to support a finding of negligence, the trial court did not err in granting a directed verdict for defendant.

No error.

Judge WELLS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the decisive point in the case is that in December, 1982 the City determined that the intersection was unsafe, but had not made the correction authorized eighteen months later when plaintiff's intestate was killed. Having made the determination the excuse of discretion is irrelevant. The question properly posed by the record is whether between the determination that additional signals were necessary and the accident more than a reasonable time went by without the improvement being made. In my opinion the question is one of fact that should have been submitted to the jury.

STATE OF NORTH CAROLINA v. BERNARD ANTHONY JOHNSON

No. 8912SC466

(Filed 1 May 1990)

1. Searches and Seizures § 3 (NCI3d)— search of luggage on bus—defendant not seized by officers

The trial court correctly concluded in a prosecution for trafficking in cocaine that neither the bus on which defendant was riding nor defendant were seized by officers during a rest stop when two officers boarded the bus and began asking passengers questions regarding their travel destinations, where they had begun their journeys, and which bags belonged to whom. The officer who spoke with the passengers did not shout or talk in a loud manner, the officers were not acting in a hostile manner, the bus door was open at all times, and officers did not block passenger ingress and egress. There is no seizure of a person until an officer demonstrably restricts that person's liberty.

Am Jur 2d, Arrest §§ 1, 3; Searches and Seizures § 37.

2. Searches and Seizures § 15 (NCI3d)— trafficking in cocaine—bus search—abandoned luggage—no expectation of privacy

The trial court correctly found in a prosecution for trafficking in cocaine that defendant did not have a reasonable expectation of privacy in certain luggage and therefore did not have standing to contest the search and seizure of that luggage where officers boarded a bus during a rest stop and began asking passengers about the origin and destination of their journey and which bags belonged to whom, one bag had not been claimed after officers had spoken with all of the passengers, the officers asked each passenger including defendant whether the bag belonged to them, no one claimed the bag, and officers removed the bag from the bus and searched it. Defendant lost all legitimate expectations of privacy he may have had in the luggage when he denied he owned or controlled the luggage.

Am Jur 2d, Searches and Seizures §§ 9, 21.

3. Searches and Seizures § 15 (NCI3d)— trafficking in cocaine—search of luggage on bus—luggage abandoned—no standing

Defendant lacked standing to assert a constitutional violation rising from the search of luggage which he had abandoned on a bus where officers boarded a bus during a rest stop, questioned passengers about the origin and destination of their journeys and about which luggage belonged to whom, one suitcase remained unclaimed, and defendant and all other passengers denied ownership of the suitcase.

Am Jur 2d, Searches and Seizures §§ 9, 21.

4. Constitutional Law § 28 (NCI3d); Searches and Seizures § 1 (NCI3d)— trafficking in cocaine—search of luggage found on bus—Fourth Amendment law and reasoning—determinative of rights under North Carolina Constitution

The law and reasoning applicable to the Fourth Amendment of the U.S. Constitution in a search of luggage on a bus was also determinative of defendant's rights under the North Carolina Constitution.

Am Jur 2d, Searches and Seizures §§ 9, 21.

Judge ORR concurring.

APPEAL by defendant from judgment entered 15 December 1988 by *Judge Giles R. Clark* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 16 November 1989.

Defendant was arrested and charged with trafficking in cocaine by possession and trafficking in cocaine by transportation. Defendant's pretrial motion to suppress cocaine discovered during a search of luggage found on a Greyhound bus was denied. Defendant pled guilty to trafficking in cocaine by possession and the State dismissed the trafficking by transportation charge. Pursuant to G.S. 15A-979 defendant appeals the denial of his motion to suppress.

At the suppression hearing the State's evidence tended to show that defendant was a passenger on a New York bound bus that arrived in Fayetteville from Florida. Two State Bureau of Investigation (SBI) officers entered the bus while it was stopped for a 30 minute rest stop and began asking the passengers questions regarding their travel destinations and where they had begun their journeys. The officers also asked which bags belonged to whom.

The officers began at the back of the bus and worked their way forward. After the officers had spoken with all of the passengers on the bus, one bag located in the front of the bus had not been claimed. The officers asked each passenger including the defendant whether the bag belonged to them; no one claimed the bag. The officers then removed the bag from the bus and searched it. Inside the bag they found approximately eight (8) ounces of cocaine and a traffic citation issued in Tampa, Florida. The name on the citation was illegible. The officers then reboarded the bus and asked the passengers to produce identification. Defendant was the only passenger with a Tampa address on his driver's license. Additionally, although the name on the traffic citation was illegible, the date of birth on defendant's driver's license was the same birthday and month as shown on the traffic citation (although the year was different). The officers requested that defendant get off of the bus. When he did, the officers again asked him if the luggage belonged to him. Defendant denied ownership of the bag. The officers looked through the bag again and found a pair of jeans with the initials "BJ" on the inside. The officers then arrested defendant Bernard Anthony Johnson.

Defendant's testimony was dissimilar from the State's evidence. Defendant testified that the officers boarded the bus and began shouting at the passengers, demanding who owned which bags. Defendant also testified that other passengers' bags were searched without the owners' permission.

The trial court made the following findings of fact:

> 1. On November 3, 1987, the Defendant was a passenger on a Greyhound Bus bound from Florida to New York. . . . The Greyhound Corporation has given police officers permission to board the buses on these stop over occasions, and the officers had permission to do so on this occasion. . . . Ronald Steenestre was an operator from Fayetteville to Richmond, Virginia. Mr. Steenestre was standing outside the bus when the officers entered, but he has no independent rememberance [sic] of what happened on November 23, 1987. . . . The Greyhound Corporation has also given officers permission to search any bag not accompanied by an individual.

* * *

3. Officers Turbeville and Campbell entered the bus. Officer Campbell had on regular street clothes. Office[r] Turbeville asked those present, which was a majority of the passengers on the bus, if they would mind talking to him, and where they were coming from or going. He asked if he could speak to them for a moment, and if they have [sic] bags and which ones are [sic] theirs. Officer Turbeville did not shout or talk in a loud manner. He was the only Officer talking. The officers were not acting in a hostile manner. The officers did not grab bags and start searching. . . .

4. There was one remaining black bag on the front of the bus that no one claimed after being asked by the officers. The officers searched this bag and it contained white powder cocaine. Also, inside the bag as [sic] a traffic ticket issued in Tampa to the Defendant. A pair of pants inside the bag had B.J. stamped on the inside of them. Everyone on the bus was asked for identification and all complied. The traffic citation and Defendant's identification contained a one (1) year difference as to the date of birth.

5. . . . No one, including the Defendant claimed the black bag before it was seized and searched. Officer Turbeville had asked, "Does this bag belong to anyone?" No one replied. . . .

* * *

7. From the time that the officer entered the bus until the find in the black bag took only about ten (10) minutes. The bus left within a total of fifteen (15) minutes of this find, and its departure was not delayed on this occasion. At all times the bus door was open.

* * *

9. That at no time did any of the officers prevent anyone from entering or leaving the bus, and that under under [sic] all the circumstances surrounding the incident a reasonable person would have believed he was free to leave the bus and refuse to allow their [sic] baggage to be searched.

Attorney General Thornburg, by Associate Attorney General Jane R. Garvey, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Assistant Appellate Defender Gordon Widenhouse, for defendant-appellant.

EAGLES, Judge.

Defendant asserts that the trial court erred in denying his motion to suppress. Defendant argues that the court erred in concluding there was no seizure of the bus, its occupants or defendant by the SBI officers when they boarded the bus with the driver's permission. Defendant also argues that the evidence did not support the conclusion that the luggage was abandoned. Finally, defendant argues that once the luggage was in the custody of the law enforcement officers they needed a search warrant to have authority to search the luggage.

Our scope of review of an order denying a motion to suppress evidence is "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We conclude that the trial court's findings of fact were amply supported by the evidence and that these findings of fact support the conclusion that the luggage was abandoned. Because the luggage was abandoned, defendant had no legitimate expectation of privacy in the luggage and the contraband found in it could properly be admitted into evidence.

[1] Not every contact between a police officer and a citizen rises to the level of a "seizure" or is one which requires objective justification. *Terry v. Ohio*, 392 U.S. 1, 19, n. 16, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889, 905 (1968). There is no seizure of a person until an officer demonstrably restricts that person's liberty. *Id.*

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, 509-10, *reh'g denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980) (citation omitted).

Defendant argues that the evidence shows that a reasonable person in his position would not feel free to leave. Defendant points to the testimony of various bus drivers. None of the drivers remembered this specific incident. Nevertheless they testified that normally an officer stood at the front of the bus, the bus doors were shut, and the departure of the bus was delayed by the officers. Defendant relies on *United States v. Hammock*, 860 F.2d 390 (11th Cir. 1988), to argue that the circumstances surrounding bus searches are confining and lead reasonable people to believe they are not free to leave. Defendant places particular reliance on the following passage from *Hammock*:

> We recognize that actions by law enforcement officers that would not constitute an arrest in, for example, an airport environment, might constitute an arrest when used to interdict drug couriers traveling by bus because of the inherent limitations on a bus passenger's freedom of movement.

Id. at 393 (citation omitted). However, on facts substantially similar to this case, the *Hammock* court held that defendant was not seized or arrested by officers. Therefore, the *Hammock* court held that the trial court did not err in denying defendant's motion to suppress. Here, the trial court found that the officer who spoke with the passengers did not shout or talk in a loud manner, the officers were not acting in a hostile manner, at all times the bus door was open, and that the officers did not block passenger ingress and egress. Based on these facts the trial court concluded that neither the bus nor defendant were seized by the officers during the period of time they spoke to the passengers. The evidence of record supports these findings.

We note two recent decisions from this court where similar circumstances were not considered a seizure of the passengers or the bus. *See State v. Christie*, 96 N.C. App. 178, 385 S.E.2d 181 (1989) (defendant passenger on bus was not seized when officers boarded the bus and officers did not display weapons, did not use threatening language or a compelling tone of voice, and did not block or inhibit defendant in any way); *State v. Turner*, 94 N.C. App. 584, 380 S.E.2d 619, *appeal dismissed and disc. rev. denied*, 325 N.C. 549, 385 S.E.2d 508 (1989) (defendant, who officer

asked to stand after person sitting near him on bus and who had departed from same city as defendant had been arrested for possession of narcotics, was free to leave until he was placed under arrest).

[2] The trial court also found that defendant did not have a reasonable expectation of privacy in the bag and therefore concluded that defendant did not have standing to contest the search and seizure. This finding was the basis for the court's conclusion that the bag was abandoned property. Defendant relies on *State v. Cooke*, 54 N.C. App. 33, 282 S.E.2d 800 (1981), *aff'd*, 306 N.C. 132, 291 S.E.2d 618 (1982), in which the court stated that a defendant's "disclaimer of ownership does not necessarily constitute an abandonment signifying the relinquishment of his privacy interest in the contents of the suitcase." *Id.* at 43, 282 S.E.2d at 807. Defendant argues that his denial of ownership was the result of unlawful police conduct and therefore not a voluntary relinquishment of an expectation of privacy. We disagree. The officer's actions while asking the passengers questions were lawful. It was during this lawful police conduct that defendant and all other passengers denied ownership of the luggage. Nothing else appearing, abandonment of personal property in the face of lawful police inquiry does not render the abandonment involuntary. *See State v. Cromartie*, 55 N.C. App. 221, 284 S.E.2d 728 (1981). Here defendant lost any legitimate expectation of privacy he may have had in the luggage when he denied he owned or controlled the luggage.

[3] Defendant's final argument is that the search of the luggage, once the police had it in their exclusive control and possession, was unconstitutional because the officers did not have a warrant. Defendant relies on *State v. Thomas,* 81 N.C. App. 200, 343 S.E.2d 588, *disc. rev. denied*, 318 N.C. 287, 347 S.E.2d 469 (1986), in which the court stated that once officers had a suitcase in their exclusive control and no exigent circumstances existed the agents could not lawfully search the luggage without first obtaining a warrant. Defendant's reliance is misplaced. In *Thomas* the suspect was asked questions by SBI officers while he waited for luggage at an airport baggage claim. After the suspect retrieved his luggage the officers requested that he accompany them to another room. While in the room the officers obtained information amounting to probable cause to arrest the suspect; after he was arrested they searched the luggage. The State attempted to argue that the search was a valid search incident to arrest. This court disagreed.

The facts here are neither similar nor analogous to those in *Thomas*. Here, no one on the bus claimed an interest in the luggage. It had been abandoned for purposes of fourth amendment inquiry.

> [W]here one abandons property, he is said to bring his right of privacy therein to an end, and may not later complain about its subsequent seizure and use in evidence against him. In short, the theory of abandonment is that no issue of search is presented in such a situation, and the property so abandoned may be seized without probable cause.

Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 Buffalo L. Rev. 399, 400-401 (1970-1971). *See, e.g., Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668, 687 (1960) ("There can be nothing unlawful in the Government's appropriation of [] abandoned property."). Defendant has no "standing" to assert a constitutional violation arising from the search of luggage that he had abandoned.

[4] Finally, defendant argues that the North Carolina Constitution provides an independent basis for suppression of the evidence found in the luggage. On this record we are not persuaded. We conclude that the law and reasoning applicable to the fourth amendment in this case is also determinative of defendant's rights under the North Carolina Constitution. *See State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987).

Accordingly, we affirm the denial of defendant's motion to suppress.

Affirmed.

Judges PARKER and ORR concur.

Judge ORR concurring.

I concur with the majority opinion that defendant was not unconstitutionally seized when the bus on which he was a passenger was subjected to an investigatory stop by law enforcement officials. *See State v. Christie*, 96 N.C. App. 178, 385 S.E.2d 181 (1989); *State v. Turner*, 94 N.C. App. 584, 380 S.E.2d 619, *appeal dismissed and disc. review denied*, 325 N.C. 549, 385 S.E.2d 508 (1989).

I further concur in the result with the majority opinion that defendant did not have a reasonable expectation of privacy in the suitcase searched by law enforcement officers. I find that defendant waived any reasonable expectation of privacy he had in the suitcase when he verbally denied ownership or control of the suitcase when specifically asked by the law enforcement officers. *See, generally, California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988); *United States v. Tolbert*, 692 F.2d 1041 (6th Cir. 1982).

The line of cases addressing this issue and cited by defendant and the State indicate, however, that there must be some *affirmative statement or action* by a defendant to disclaim a piece of property before it may be considered abandoned property and, therefore, opened and searched for contraband. For example, I do not believe that the search in the case before us would have been constitutionally permissible if the police officer had held the suitcase up before all of the passengers and asked if anyone on the bus owned it. If no one affirmatively denied ownership of the suitcase, it would not become immediately abandoned for search and seizure purposes. To hold otherwise would mean that any piece of luggage not claimed *immediately* becomes "abandoned" and subject to search and seizure.

The law is clear on this issue. When a person does not clearly disclaim ownership of property, or if a person maintains possession of a suitcase while denying ownership, the officer should not consider the suitcase or other property abandoned. *United States v. Sanders*, 719 F.2d 882 (6th Cir. 1983); *State v. Casey*, 59 N.C. App. 99, 296 S.E.2d 473 (1982).

The key element in the case *sub judice* that made the search constitutionally permissible was defendant's affirmative statement that the suitcase was not his. At that point, defendant no longer had a reasonable expectation of privacy in the suitcase, and cannot now assert an expectation of privacy after the fact.

ROXIE CARRIE MAY S. TOMPKINS, PLAINTIFF v. LEROY T. TOMPKINS, DEFENDANT

No. 8917DC1082

(Filed 1 May 1990)

1. Appeal and Error § 157 (NCI4th)— erroneous finding in trial court—error not assigned—finding not binding on Court of Appeals

An erroneous portion of a finding of fact was not binding on the Court of Appeals even though error was not assigned to that finding of fact by either party where the trial court in an alimony action found that the parties lived in North Carolina during a portion of the marriage and were living in North Carolina at the time of the separation, the pleadings plainly assert no allegations whatsoever that the parties lived in North Carolina during a portion of the marriage or that they were living in this State at the time of separation, and the erroneous finding, if allowed to stand, would when coupled with other allegations clearly warrant reversal of the order dismissing plaintiff's action on grounds of lack of personal jurisdiction over defendant. Where error is manifest on the face of the record, even though it is not the subject of an exception, it is the duty of the Court to correct it and the Court may do so of its own motion; such error will not be grounds for disturbing a judgment or order unless the failure to take corrective action amounts to the denial of a substantive right and such a remedy is strictly limited to those rare circumstances where the error is so pronounced upon the face of the record that sound principles of jurisprudence will not permit it to be ignored.

Am Jur 2d, Appeal and Error §§ 654-656, 674.

2. Process § 9.1 (NCI3d)— alimony action—minimum contacts—pleadings insufficient

The trial court did not err in an alimony action in allowing defendant's motion under N.C.G.S. § 1A-1, Rule 12(b)(2) to dismiss the action based on defendant's lack of contact with North Carolina where the pleadings or other materials before the trial court did not indicate where the parties were married, that they shared a marital domicile in the State, that defendant has conducted activities here, owns property here, or other-

wise has invoked the protection of North Carolina laws. Plaintiff's allegations of defendant's marital misconduct, absent any allegations going to a nexus between such misconduct and this State, are insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired; moreover, the mere fact that the marriage is still in existence at the time an action for alimony is initiated cannot of itself constitute sufficient contacts to establish personal jurisdiction over a foreign defendant.

Am Jur 2d, Divorce and Separation § 552.

Judge EAGLES dissenting.

APPEAL by plaintiff from order entered 8 August 1989 in SURRY County District Court by *Judge Clarence W. Carter*. Heard in the Court of Appeals 10 April 1990.

On 26 April 1989, plaintiff, a North Carolina resident, filed her complaint seeking permanent alimony from defendant, based on allegations that defendant, residing in South Carolina, had abandoned plaintiff and committed adultery. By her amended complaint filed on 7 June 1989, plaintiff added a claim for equitable distribution.

Defendant, without making a general appearance, interposed a motion to dismiss under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure for lack of personal jurisdiction. By his affidavit in support of the motion, defendant stated, *inter alia*, that he had left the State of North Carolina more than three and one-half years prior to the commencement of this action, had resided in South Carolina since that time, owned no property in North Carolina, conducted no business in this State, and had not invoked the protection of North Carolina law for any purpose or reason since leaving this State.

The trial court found that it would have jurisdiction under G.S. § 1-75.4(12) in that this action arose out of the marital relationship. The trial court, however, further found and concluded that the assumption of personal jurisdiction over defendant would violate the dictates of *International Shoe* and its progeny because defendant did not have sufficient contacts with North Carolina.

From the order allowing defendant's Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, plaintiff appeals.

Sarah S. Stevens for plaintiff-appellant.

W. David White, P.A., by W. David White, for defendant-appellee.

WELLS, Judge.

The settled law of this State requires the application of a two-pronged test to determine whether personal jurisdiction may be exercised over a foreign defendant. First, there must exist a statutory basis for exercising personal jurisdiction under the provisions of G.S. § 1-75.4, our long-arm statute. Second, the exercise of personal jurisdiction must comport with the due process requirements of the Fourteenth Amendment, as articulated by the United States Supreme Court in *International Shoe v. Washington*, 326 U.S. 310 (1945), and its progeny. *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986); *see also Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988) (and cases cited therein). The question presented by this appeal pertains solely to the second prong of this test, namely, whether the trial court erred in concluding that defendant does not have sufficient contacts with this State to satisfy the requirements of due process. The resolution of this question, however, turns on the disposition of an underlying issue peculiar to the posture of this appeal, which we raise *ex mero motu*: whether we are bound by findings of fact that are manifestly erroneous on the face of the record, but to which error was not assigned.

To place this underlying issue in the appropriate context, we note that finding of fact number six in the trial court's order provides:

> [N]one of the pleadings allege where the marriage of the parties took place, *only that during a portion of the marriage that the parties lived in North Carolina, and were living in North Carolina at the time of the separation.* (Emphasis added.)

Plaintiff's complaint seeking permanent alimony states in pertinent part:

> 1. That the Plaintiff is a resident of Surry County, North Carolina, and has been a resident of North Carolina for more than six (6) months next preceding the institution of this action.
>
> 2. That the Defendant is a resident of McCormick County, South Carolina.

3. That the Plaintiff and Defendant were married to each other on June 23, 1984.

4. That the Plaintiff and Defendant were separated from each other in July, 1986, and have since such time lived continuously separate and apart from each other.

. . .

6. That the Defendant has abandoned the Plaintiff in that he brought their cohabitation to an end without justification, without the intent of renewing it, and without the consent of the Plaintiff.

That the Defendant has committed adultery[.]

Plaintiff's amended complaint, adding a second cause of action for equitable distribution, merely restates as a basis for jurisdiction paragraphs 1-4 above.

[1] The pleadings plainly assert no allegations whatsoever that the parties lived in North Carolina during a portion of the marriage or that they were living in this State at the time of separation. Thus, to the extent that it states otherwise, the trial court's finding of fact number six is manifestly erroneous on the face of the record. Error was not, however, assigned to this finding of fact by either party.

Ordinarily, where no exception is taken to the trial court's findings of fact, those findings will be binding on appeal. *Williams v. Williams*, 97 N.C. App. 118, 387 S.E.2d 217 (1990) (*citing Anderson v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982)). Additionally, the scope of appellate review is generally confined only to a consideration of those assignments of error set out in the record on appeal. N.C. R. App. P., Rule 10. But "where error is manifest on the face of the record, even though it be not the subject of an exception, it is the duty of the Court to correct it, and it may do so of its own motion, that is, *ex mero motu.*" *Gibson v. Insurance Co.*, 232 N.C. 712, 62 S.E.2d 320 (1950); *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969), *aff'd*, 403 U.S. 528 (1971); *see also* N.C. R. App. P., Rule 2 (court may suspend rules of appellate procedure "[t]o prevent manifest injustice to a party"). Nevertheless, such error will not be grounds for disturbing a judgment or order unless the failure to take corrective action amounts to the denial of a substantial right. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P., Rule

61 (1983). And we hasten to add the further caution that such a remedy is strictly limited to those rare circumstances where the error is so pronounced upon the face of the record that sound principles of jurisprudence will not permit it to be ignored.

Applying these standards to this case, we conclude that we are not bound by the manifestly erroneous finding of fact. Coupled with plaintiff's allegations of defendant's marital misconduct in abandoning her and committing adultery, the erroneous finding, if allowed to stand, would clearly warrant reversal of the order dismissing plaintiff's action on grounds of lack of personal jurisdiction over defendant. *See Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976) (allegations of marital residence and misconduct occurring in this State are sufficient to satisfy minimum contacts inquiry). Hence, failure to take corrective action would amount to the denial of a substantial right of defendant, namely, the constitutional right not to be compelled to defend an action in a foreign forum absent a demonstration that the requirements of due process have been satisfied. Because of the import of the error in this case, sound principles of jurisprudence will not permit it to be ignored. Accordingly, we must treat the erroneous portion of finding of fact number six as not binding on this Court.

[2] We now turn to the question of whether the trial court erred in concluding that defendant did not possess sufficient contacts with this State to satisfy the requirements of due process.

In *Buck v. Heavner*, 93 N.C. App. 142, 377 S.E.2d 75 (1989), this Court extensively reviewed the decisional precedents pertaining to the due process inquiry for exercising personal jurisdiction over a foreign defendant. We thus need not recite those precedents here. It suffices to add that "[t]here is no clear formula to determine whether the exercise of personal jurisdiction is justified; all decisions evolve ultimately into a test of reasonableness, fairness and justice in light of all circumstances surrounding the action." *Schofield, supra (citing Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979)).

In *Schofield*, we held that minimum contacts did not exist where:

> There is nothing in the record to indicate where the parties were married . . . . There is no indication that the parties shared a matrimonial domicile in this State. The complaint was filed almost a year after defendant moved to New Jersey. There is nothing in the record to indicate that defendant has

> conducted business or other activities in the State since she left, that she owns property here or that she has in any other way invoked the protection of the laws of North Carolina.

Similarly, the pleadings or other materials before the trial court in this case do not indicate where the parties were married, that they shared a marital domicile in this State, that defendant has conducted activities here, owns property here, or otherwise has invoked the protection of North Carolina laws.

Plaintiff, however, contends that defendant has sufficient contacts with North Carolina in that he abandoned plaintiff within this State and the marital relationship was still in existence at the time this action was brought. We disagree.

As we noted in our discussion above, the pleadings are devoid of any allegations that the parties resided here during a portion of the marriage or at the time of the separation. It is true that the failure to plead the particulars of personal jurisdiction is not necessarily fatal, so long as the facts alleged permit the reasonable inference that jurisdiction may be acquired. *See Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 355 S.E.2d 177 (1987). However, plaintiff's allegations of defendant's marital misconduct, absent any allegations going to a nexus between such misconduct and this State, are simply insufficient to permit the reasonable inference that personal jurisdiction over defendant could properly be acquired in this case.

Finally, the mere fact that the marriage is still in existence at the time an action for alimony is initiated cannot of itself constitute sufficient contacts to establish personal jurisdiction over a foreign defendant. Were it otherwise, this State could exercise personal jurisdiction over a foreign defendant solely by virtue of a plaintiff's unilateral act of moving to North Carolina prior to the termination of the marriage. This is plainly impermissible. *See Buck v. Heavner, supra* (and cases cited therein); *see also Carroll v. Carroll*, 88 N.C. App. 453, 363 S.E.2d 872 (1988) (*citing Burger King v. Rudzewicz*, 471 U.S. 462 (1985)).

For these reasons, we conclude that the trial court did not err in allowing defendant's Rule 12(b)(2) motion and dismissing this action based on defendant's lack of contacts with this State sufficient to permit the exercise of personal jurisdiction.

Affirmed.

Judge GREENE concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent.

We have often stated the rule that in the absence of a proper objection and exception, we are bound by the trial court's findings of fact. *See Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989); *Matter of Moore*, 306 N.C. 394, 293 S.E.2d 127 (1982); *Dealers Specialties, Inc. v. Neighborhood Housing Serv., Inc.*, 305 N.C. 633, 291 S.E.2d 137 (1982); *Couch v. North Carolina Employment Sec. Comm'n*, 89 N.C. App. 405, 366 S.E.2d 574, *aff'd per curiam*, 323 N.C. 472, 373 S.E.2d 440 (1988); *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E.2d 755, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986); *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982). By our appellate rules we confine the scope of an appeal to matters previously made the subject of a proper exception and assignment of error. App. R. 10(a).

Here, there was *no objection or exception* to the trial court's finding of fact, no assignment of error, no cross-assignment of error by appellee, and no argument in either brief as to the validity of any of the findings of fact.

The majority has examined the record on appeal (which was prepared by the parties with its focus on the assignments of error) and has determined that the trial court's finding of fact number 6 is not supported by the record and must be declared invalid.

I disagree because I believe we err when we depart from the orderly appellate review procedures we have utilized over the years and when we begin, for the first time at the appellate level, to challenge and strike down findings of fact to which neither of the adversary parties chose to question or take exception. Because there is no objection, exception, assignment of error or cross-assignment of error challenging finding of fact number 6, I believe we are bound by finding of fact number 6.

I agree with the majority that finding of fact number 6, coupled with plaintiff's other allegations of abandonment and adultery, would "clearly warrant reversal" of the order dismissing the action for lack of personal jurisdiction over the defendant. Accordingly, I would vote to reverse.

L.R.C. TRUCK LINE, INC. AND CNA INSURANCE COMPANIES v. RIELEY JANE BERRYHILL, WALTER JACKSON, MAGGIE JACKSON, FRANKLIN McLEAN, D.T.S. COTTON COMPANY AND THE CONTINENTAL INSURANCE COMPANY

No. 8919SC239

(Filed 1 May 1990)

Insurance § 93 (NCI3d)— rented truck—primary and excess insurance—ICC endorsement

The trial court in a declaratory judgment action to determine which of two insurance companies was liable for payment of damages resulting from a collision between a rented truck and a car correctly concluded that defendant Continental provides primary coverage and plaintiff CNA provides excess coverage where plaintiff L.R.C. leased a truck from D.T.S.; the driver was to be furnished by D.T.S.; the lease agreement called for D.T.S. to carry and pay for bobtail and deadhead insurance coverage; the accident occurred while the truck was being operated bobtail; L.R.C. maintained insurance with CNA which included an Interstate Commerce Commission endorsement and defendant Continental contended that the ICC endorsement preempted all other insurance, making the coverage provided by CNA primary as a matter of law. The analysis of *Carolina Casualty Insurance Company v. Underwriters Insurance Company*, 569 F.2d 304 (5th Cir. 1978), is correct and applicable: ICC policy factors are frequently determinative where protection of a member of the public or a shipper is at stake, but those factors cannot be invoked by another insurance company which has contracted to insure a specific risk and which needs no equivalent protection.

Am Jur 2d, Automobile Insurance §§ 227, 433, 435.

APPEAL by defendants D.T.S. Cotton Company and Continental Insurance Company from judgment of *Judge Julius A. Rousseau* entered 8 August 1988 in CABARRUS County Superior Court. Heard in the Court of Appeals 10 October 1989.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for plaintiff appellees.

Waggoner, Hamrick, Hasty, Monteith, Kratt, Cobb & McDonnell, by S. Dean Hamrick, for defendant appellants, D.T.S. Cotton Company and Continental Insurance Company.

COZORT, Judge.

This declaratory judgment action was brought to determine whether CNA Insurance Companies (CNA) or Continental Insurance Company (Continental) is liable for the payment of damages resulting from a collision between a D.T.S. Cotton truck, operated by Franklin McLean, and a car, driven by Walter Jackson. After a bench trial, Judge Rousseau concluded that Continental provides primary coverage and CNA provides excess coverage for the accident. We affirm.

On 14 January 1985, L.R.C. Truck Line, Inc. (LRC), and D.T.S. Cotton Co. (DTS) executed a lease entitled "Independent Contractor Agreement" (the Agreement). Under the Agreement, LRC, designated as the "Carrier," leased a tractor-type truck from DTS designated as the "Owner." Pertinent provisions of the Agreement, including the purpose of the parties, were as follows:

> The AUTHORIZED CARRIER is an interstate For-Hire Motor Carrier, operating under authority granted by the Interstate Commerce Commission . . . and by this agreement it undertakes to augment and supplement its fleet of equipment through special arrangement with independent contractors, who have motor truck equipment. The OWNER is and desires to be engaged in the business of transporting freight by motor vehicle pursuant to contract with private . . . carriers or shippers.
>
> * * * *
>
> 4. In addition to the equipment herein referred to, the OWNER as an independent contractor *agrees to furnish AUTHORIZED CARRIER during the entire life of this agreement all drivers* and all other necessary labor to perform all of the work necessary

for the transportation and the loading and unloading of such commodities as may be provided or directed to be hauled by the AUTHORIZED CARRIER.

* * * *

20. *All drivers*, drivers' helpers, and laborers engaged in the operation and loading and unloading of said equipment under this contract *are the employees of the OWNER and the OWNER is responsible for the payment of all such drivers*, drivers' helpers, and laborers, and the OWNER shall make such earnings deductions, as may be necessary under governmental law, rule, or regulation . . . . *The OWNER has and shall continue to have full and exclusive responsibility for the direction and control of agents, servants, and employees of the OWNER including* selecting, hiring, firing, *supervising, directing and training them* . . . .

* * * *

22. Any other provision herein notwithstanding, the AUTHORIZED CARRIER shall maintain insurance coverage for the protection of the public pursuant to Interstate Commerce Commission regulations as set forth in 49 USC 10927. *The OWNER agrees to carry and pay for bobtail and deadhead insurance coverage with respect to public liability and property damage* with minimum limits of $100,000.00/$300,000.00/$50,000.00 covering all equipment used hereunder and agrees to furnish evidence of such coverage to the AUTHORIZED CARRIER and shall cause the company or companies issuing such coverage to designate the AUTHORIZED CARRIER as a named additional insured and to furnish AUTHORIZED CARRIER an undertaking to notify AUTHORIZED CARRIER in writing of any termination or reduction of such coverage at least ten (10) days prior to the effective date of such termination or reduction. . . .

If OWNER fails to furnish AUTHORIZED CARRIER with evidence of bobtail, deadhead and worker's compensation insurance or request AUTHORIZED CARRIER to secure any or all of those coverages on its behalf, AUTHORIZED CARRIER shall obtain those coverages and deduct the costs thereof from its settlements with OWNER. . . .

The OWNER shall hold the AUTHORIZED CARRIER harmless and shall be responsible for any loss or damage to any third

person or to the property of any third person up to and including the sum of Five Hundred Dollars ($500.00) *for any accident for which OWNER or OWNER'S agents, servants, employees are responsible that is caused or contributed to by the negligence of the OWNER or any agents, servants or employees* of the OWNER. [Emphasis added.]

To operate a tractor "bobtail" means to drive it without pulling a trailer. The parties to the case below stipulated that DTS paid the wages of Franklin McLean based on a mileage formula. The mileage LRC paid DTS for the use of its tractor "did not begin until McLean reported to the LRC terminal . . . ." The parties stipulated further that

> D.T.S. furnished a tractor to McLean and told him that he would be dispatched on trips from time to time by L.R.C. McLean kept the tractor in his possession and would report to terminals as directed by L.R.C. and would then deliver goods and merchandise loaded on trailers of L.R.C. to the destinations as directed by L.R.C. At the time of the accident referred to in the complaint, McLean had received a call from the L.R.C. dispatcher to go from his home [in North Carolina] to the L.R.C. terminal in South Carolina for the purpose of securing a trailer . . . .

Thus, at the time of the accident, McLean was operating the tractor bobtail.

DTS failed to have its insurer (Continental) designate LRC a "named additional insured" as required by term twenty-two of the Agreement. However, when the accident occurred, DTS's insurance contract with Continental provided coverage as follows:

> **Part IV—LIABILITY INSURANCE**
>
> * * * *
>
> **D. WHO IS INSURED**
>
> * * * *
>
> 2. Anyone else is an **insured** while using with **your** permission a covered **auto you** own, hire or borrow . . . .
>
> * * * *

Part VI—CONDITIONS

* * * *

B. OTHER INSURANCE.

1. For any covered **auto you** own this policy provides primary insurance. For any covered **auto you** don't own, the insurance provided by this policy is excess over any other collectible insurance.

As required by term twenty-two of the lease agreement, LRC maintained insurance pursuant to "Interstate Commerce Commission regulations as set forth in 49 USC 10927." In compliance with those regulations, LRC's insurance contract with CNA included an ICC endorsement reading in part as follows:

> In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay, within the limits of liability prescribed herein, any final judgment recovered against the insured for bodily injury to or death of any person, or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and property transported by the insured, designated as cargo), resulting from negligence in the operation, maintenance, or use of motor vehicles regardless of whether or not such motor vehicles are specifically prescribed in the policy and whether or not such negligence occurs on any route or in any territory authorized by the Interstate Commerce Commission to be served by the insured or elsewhere.
>
> It is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, or any other endorsement thereon or violation thereof, or of this endorsement, by the insured, shall relieve the Company from liability or from the payment of any final judgment, irrespective of the financial responsibility or lack thereof or insolvency or bankruptcy of the insured. *However, all terms, conditions, and limitations in the policy to which this endorsement is attached are to remain in full force and effect as binding between the insured and the company*, and the insured agrees to reimburse the Company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would

> not have been obligated to make under the provisions of the policy except for the agreement contained in this endorsement. [Emphasis added.]

LRC's insurance policy also provided that with "respect to a hired automobile or a non-owned automobile, this insurance shall be excess over any other valid and collectible insurance available to the Insured."

In entering judgment the trial court relied upon *Carolina Casualty Insurance Co. v. Underwriters Insurance Co.*, 569 F.2d 304 (5th Cir. 1978), whose essential facts are parallel to those in the case below. In *Carolina Casualty*, J.R.J. Trucking, Inc. (JRJ), leased a tractor to International Transportation Services, Inc. (ITS). JRJ agreed, among other items in its lease with ITS,

> [2] to assume responsibility for and pay wages to the drivers; [3] to assume full responsibility for drivers as JRJ's employees, and to hold ITS-lessee harmless from driver's claims against ITS; [4] (a) to provide and keep in force property damage and public liability insurance, (b) to furnish a certificate of insurance showing ITS as the named insured and providing for notice of cancellation, and (c) to assume the expense in the event JRJ was unable to furnish evidence of insurance and ITS procured insurance on behalf of JRJ.

Carolina Casualty, 569 F.2d at 307 (footnotes omitted). While operating the tractor, one of JRJ's drivers was involved in an accident. At the time of the accident JRJ was insured by Carolina Casualty.

In a declaratory judgment action, Carolina Casualty contended that ITS's insurance policy was subject to the ICC endorsement required by 49 USC 10927 (quoted, in part, above) and that the ICC endorsement pre-empted all other insurance, making the coverage provided by ITS's insurer primary as a matter of law.

In rejecting Carolina Casualty's argument, the United States Court of Appeals for the Fifth Circuit held that the

> purpose of § 215 of the Interstate Commerce Act and regulations is to assure to members of the public and shippers that a certificated carrier has independent financial responsibility, with the dollar limits prescribed, to pay for losses created by its carrier operations. On the face of the endorsement this

> is accomplished by reading out "other insurance," "excess," or similar clauses insofar as the amount available to a third party victim would be reduced. But there is no need for or purpose to be served by this supposed automatic extinguishment of the clause insofar as it affects the insured or other insurers who clamor for part or all of the coverage. Indeed . . . the endorsement . . . prescribes that as between insurer and insured all terms of the policy are to remain in effect.

Carolina Casualty, 569 F.2d at 312.

We agree with the trial court that this analysis is correct and that it applies to the case below. The defendants' attempts to distinguish the facts in *Carolina Casualty* are wholly unpersuasive.

At the time of the accident, Continental "provided insurance for the defendant D.T.S. Cotton Company pursuant to a contract of insurance entitled 'Business Auto Policy' bearing policy number LBA3403812." Finding of Fact No. 13. DTS owned the tractor, employed the driver, and retained the "full and exclusive responsibility for the direction and control of [its] . . . employees . . . including selecting, hiring, firing, supervising, directing and training them." The accident occurred "at a time when no equipment belonging to LRC was being pulled by the tractor." Finding of Fact No. 16. Under these circumstances the trial court correctly concluded that the

> ICC endorsement did not make CNA Insurance Companies, the liability carrier of the lessee, L.R.C. Truck Line, Inc., the primary insurer as a matter of law. The Continental Insurance Company cannot disavow its primary insurer status on the theory that public policy demands that this be pushed off onto CNA. ["]ICC policy factors are frequently determinative where protection of a member of the public or a shipper is at stake, but those factors cannot be invoked by another insurance company which has contracted to insure a specific risk and which needs no equivalent protection.["]

Conclusion of Law No. 2 (quoting *Carolina Casualty*, 569 F.2d at 313).

The trial court's judgment is

Affirmed.

Judges PHILLIPS and LEWIS concur.

JOHN L. NICHOLS, JR., AND SUSAN BREEDLOVE, D/B/A MOUNTAIN VENTURES, AND BREEDLOVE AND NICHOLS RESORT AND TOXAWAY PROPERTIES, INC., PLAINTIFFS v. LAKE TOXAWAY COMPANY, INC. (A NORTH CAROLINA CORPORATION), DEFENDANT

No. 8929SC857

(Filed 1 May 1990)

1. **Declaratory Judgment Act § 3 (NCI3d)— option to purchase clauses in deeds—partial summary judgment—subject matter jurisdiction**

The trial court lacked subject matter jurisdiction to enter partial summary judgment in a declaratory judgment action brought by the owners of four tracts of land whose deeds included rights of first refusal where defendant had sought to exercise his right of first refusal as to only one deed. Although defendants had mailed to Lake Toxaway property owners a letter discussing the first refusal, the letter was targeted at no one in particular and did not allude to any legal recourse that would be taken if the residents did not comply with the terms of their deeds. There was no actual controversy as to the deeds other than lot 9, the property to which defendant was asserting its right of first refusal, and the trial court lacked subject matter jurisdiction to enter an order as to those deeds; the trial court did have subjective matter jurisdiction as to lot 9.

Am Jur 2d, Declaratory Judgments § 163.

2. **Deeds § 21 (NCI3d)— right of first refusal—no violation of Rule Against Perpetuities**

The trial court incorrectly entered partial summary judgment for plaintiff as to lot 9 in a declaratory judgment action seeking to have certain Option to Purchase clauses in deeds declared void and unenforceable as violating the Rule Against Perpetuities where the Option to Purchase was a preemptive right and the use of the language "grantee" in the option clause specifically limits the Option to Purchase to the life of the grantee.

Am Jur 2d, Perpetuities and Restraints on Alienation § 65.

APPEAL by defendant from an Order entered by *Judge Claude S. Sitton* on 31 May 1989 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 6 March 1990.

On 3 April 1987, plaintiffs brought a declaratory judgment action seeking to have certain "option to purchase" clauses contained in their chains of title declared void and unenforceable as violating the Rule Against Perpetuities. Upon hearing, Judge Sitton entered an order of partial summary judgment in favor of plaintiffs and found that the right of first refusal contained in their chains of title did in fact violate the Rule Against Perpetuities. From this order defendants appeal.

Plaintiffs are the owners of four tracts of land in Hogback Township near Lake Toxaway, North Carolina. Plaintiff Nichols and wife acquired title to property on 31 October 1969 delineated as Lot No. 10, Block "D" on a plat of Lake Toxaway Company, recorded in Book 2, page 160 and pursuant to the same deed, title to Lot No. 9DA, Block "D" of Plat Book 3, page 69, Transylvania County Registry. On 7 November 1983, plaintiff Mountain Ventures acquired property described as Lot 7, Block EE, as shown on a plat of Lake Toxaway Company recorded in Book 2, page 174, Transylvania County Registry. On 24 February 1987, Craig Runge and wife Sharandee Runge conveyed property described as Lot 9, Block L on a plat of Lake Toxaway Company recorded in Plat Book 4, page 28, Transylvania County Registry to plaintiff Mountain Ventures.

Contained in all of these deeds were certain clauses entitled "Options to Purchase." Specifically, these clauses stated as follows:

> ARTICLE XVII. OPTION TO PURCHASE. In consideration of the agreement on the part of the grantor, its successors, or assigns, to restrict other lots sold by it in the same subdivision, the grantee agrees that if he or she should desire to sell the said lots or any interest therein, and receives a bona fide satisfactory offer therefor, he or she shall, before accepting said satisfactory offer, submit to Lake Toxaway Property Owners Association, Inc., in writing by certified mail, return receipt requested, the terms of said offer, the name(s) and address(es) of offer(s) and an offer to convey the lot to said Association at the same price and terms. Said Association shall have a period of thirty (30) days . . . within which . . . to complete the said transaction. . . .

Article XV of the deeds states that this provision, among others, is to run in perpetuity.

On 20 March 1987 and 1 April 1987 defendant Lake Toxaway Company attempted to inform Mr. and Mrs. Craig Runge that it was exercising its option to purchase Lot 9 of Block L at the same price and upon the same terms and conditions as they understood was contained in the Offer to Purchase from Mountain Ventures. Lake Toxaway Property Company held this right of first refusal pursuant to an assignment from the Lake Toxaway Property Owners Association to Lake Toxaway Company. On 3 April plaintiffs brought their declaratory judgment action. From an order granting partial summary judgment in favor of plaintiffs, defendant appeals.

Long, Parker, Hunt, Payne & Warren, P.A., by Jeffrey P. Hunt, for plaintiffs-appellees.

Roberts Stevens and Cogburn, P.A., by Isaac N. Northup, Jr. and Vincent D. Childress, Jr., for defendant-appellant.

LEWIS, Judge.

[1] Defendant first contends that the trial court lacked subject matter jurisdiction to enter partial summary judgment. The Superior Court has no jurisdiction to render a declaratory judgment when the pleadings and evidence do not disclose the existence of a genuine controversy between the parties. *Trust Co. v. Barnes*, 257 N.C. 274, 276, 125 S.E.2d 437, 439 (1962); *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958); *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949). Defendant argues that as to all deeds except Lot 9, Block L, Deed Book 244 at page 909 ("Lot 9"), the only deed under which the defendant has sought to exercise its right of first refusal, there is no adverse claim. We agree. There is no indication that the defendant seeks to assert a right of first refusal as to the other remaining deeds. The only evidence the plaintiffs have shown on this point is a general letter from the Lake Toxaway Company, mailed to Lake Toxaway property owners at large, stating in part:

> As you may recall, the Lake Toxaway Company has the right of first refusal on virtually all property within Lake Toxaway Estates, whether a lot or home. This is a very important provision which most quality developments enjoy. With this provi-

> sion we know the details of all real estate transactions in our community. . . . It is also very important that you or your broker, if not handled by the Lake Toxaway Company, notify us immediately after your contract is executed so that we will have adequate time to process the right of first refusal.

This general letter, targeted at no one in particular and not alluding to any legal recourse that would be taken if the residents did not comply with the terms of their deeds, is not the makings of an "actual controversy" ripe for declaratory judgment. "A mere difference of opinion between the parties . . . without any practical bearing on any contemplated action—does not constitute a controversy. . . ." *Newman Machine Co. v. Newman*, 2 N.C. App. 491, 493-94, 163 S.E.2d 279, 281 (1968), *reversed on other grounds*, 275 N.C. 189, 166 S.E.2d 63 (1969), *quoting*, *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942). A mere fear or apprehension that a claim may be asserted in the future is not grounds for issuing a declaratory judgment. *Id.*

We distinguish this case from *York v. Newman*, 2 N.C. App. 484, 163 S.E.2d 282 (1968). In that case, the defendant had mailed the plaintiff a letter which stated in pertinent part:

> In view of the facts and circumstances attendant upon and inherent in the transaction, including the financial and other information in documentary form and the facts as related to us by Mr. Newman, we have further concluded that, in our opinion, Mr. Newman, individually and as Trustee for his minor children, has the legal right to either disaffirm and rescind the transaction or to sue for damages. . . . [W]e are of the opinion that Mr. Newman, in his capacity as Trustee for his minor children, is legally obligated by reason of his duty as a fiduciary to assert his claim as Trustee and that his failure to do so would amount to a breach of his obligations as a fiduciary, for which he could later be held personally liable. . . . Mr. Newman, individually and as Trustee, has requested that we take appropriate and prompt action to enforce his rights arising out of the transactions mentioned above. . . .

Id. at 486, 163 S.E.2d at 284. The court also noted that the defendant continued to make demands upon the plaintiffs and to threaten legal action against them. *Id.* There is nothing in the record before us that indicates that any of the above actions were taken by this defendant. We find that no actual controversy exists as to

the deeds in question other than Lot 9. Therefore, the trial court lacked subject matter jurisdiction to enter an order as to those deeds.

Defendant did, however, make an attempt to assert its right to first refusal on Lot 9. As to this Lot, the trial court did have subject matter jurisdiction and appropriately considered the parties' claims. The court below found that the right of first refusal contained in the plaintiffs' deed violated the Rule Against Perpetuities and was therefore void and unenforceable. Defendant argues that the court erred in this ruling and asserts that its option to purchase is authorized by law because it is the exercise of a reasonable preemptive right.

[2] A "preemptive right" is a right requiring that "before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980). A preemptive right is a right of first refusal. *Id.* North Carolina authorizes the use of preemptive rights so long as they are reasonable and do not impose impermissible restraints on alienation. The two primary considerations which determine the reasonableness or unreasonableness of a preemptive right are (1) the duration of the right and (2) the provisions it makes for determining the price of exercising the right. *Hardy v. Galloway*, 111 N.C. 519, 15 S.E. 890 (1892); *Smith v. Mitchell, supra*, at 65, 269 S.E.2d 613 (1980). A preemptive right is unreasonable if it violates the Rule Against Perpetuities. *Id.*

In the present case, defendant argues that its Option to Purchase does not violate the Rule Against Perpetuities because it states that the Option only bind "the grantees" and not "the grantees, their heirs, and assigns." Defendants argue that by limiting the language only to "the grantees," the Options to Purchase are personal in nature and only bind the original grantees, here the Runges. However, Article XIV in the Runges' deed (Lot 9) states "All of the restrictions, conditions, covenants, charges, easements, and agreements contained herein shall run with the land and be binding on all parties and all persons claiming under them in perpetuity. . . ." This same clause makes exceptions to the general statement quoted above; the clause containing defendant's Option to Purchase is not one of those excepted.

A basic rule of construction is that the specific controls the general. *Smith v. Mitchell*, 301 N.C. at 67, 269 S.E.2d at 614. Fur-

thermore, where there are two possible interpretations of an instrument, one which would render the instrument invalid and one which would render it valid, preference must be given to the interpretation which will render the instrument valid. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 377, 128 S.E.2d 867, 872 (1963). Because the instrument here specifically limits the Option to Purchase only to the grantee, we agree with the appellant and find that the right to exercise this option is personal to the grantee. The use of the language "grantee" in the Option clause specifically limits the Option to Purchase to the life of the grantee. This very specific language automatically limits the Option to the life of the grantee. The trial court incorrectly entered partial summary judgment for the plaintiff as to Lot 9.

Accordingly, we

Reverse.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. BILLY GENE JERRELLS

No. 8914SC483

(Filed 1 May 1990)

1. **Criminal Law § 89.4 (NCI3d) — impeachment of own witness — prior inconsistent statement — collateral matter — extrinsic evidence inadmissible**

Where a State's witness denied making a prior inconsistent statement which was damaging to defendant, the trial court erred in permitting the State to present testimony by a detective recounting the inconsistent statement, since a party may not introduce evidence to impeach its witness's testimony regarding a collateral matter.

Am Jur 2d, Witnesses §§ 521, 612.

2. Criminal Law § 904 (NCI4th); Rape and Allied Offenses § 19 (NCI3d)— indecent liberties—instructions—use of disjunctive for purpose

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that defendant could be found guilty of taking an indecent liberty if it found that he "willfully took an indecent liberty with a child for the purpose of arousing *or* gratifying sexual desire" since the court merely allowed the jury to choose between alternate purposes for which a single act may have been committed.

Am Jur 2d, Infants § 17.5; Trial § 721.

3. Constitutional Law § 80 (NCI3d); Rape and Allied Offenses § 7 (NCI3d)— first degree sexual offense—life imprisonment—constitutionality

The mandatory life sentence for first degree sexual offense does not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law § 627.

4. Criminal Law § 270 (NCI4th)— denial of continuance to obtain witness

Defendant's constitutional right to present a defense was not denied by the trial court's refusal to continue a sexual offense case to permit defendant to secure a witness to testify regarding a medical report.

Am Jur 2d, Criminal Law § 717.

APPEAL by defendant from judgments entered 8 December 1988 by *Judge Henry W. Hight, Jr.*, in DURHAM County Superior Court. Heard in the Court of Appeals 9 January 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Norma S. Harrell, for the State.

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

ORR, Judge.

Defendant, Billy Gene Jerrells, was convicted of one count of first degree sexual offense and one count of taking indecent liberties with a minor. He was sentenced to a mandatory term

of life imprisonment for the sexual offense and a consecutive term of three years for the indecent liberties charge.

At trial, the State's evidence tended to show that defendant, the prosecutrix, and a third man were in a motel room along with several other persons. At some point during this time, the group went out for food and to run errands but these three remained in the room. After some conversation, the two men undressed the prosecutrix. They thereafter engaged in illicit acts of sexual intercourse with her against her will.

Defendant presented evidence which tended to show that he and the prosecutrix were prior acquaintances and that he had asked for the police to be called after the prosecutrix began to accuse him of raping her in the presence of the group. Other facts which are pertinent to this opinion will be addressed herein. Defendant now appeals his convictions before this Court.

[1] The first issue which we shall address is whether the trial court erred in allowing the State to introduce extrinsic evidence to impeach its witness's testimony regarding collateral matters. We find that the court did err and accordingly grant defendant a new trial.

The laws of our State make it clear that "[t]he credibility of a witness may be attacked by any party, including the party calling him." N.C. Gen. Stat. § 8C-1, Rule 607 (1988). Moreover,

> [a] witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony.

State v. Williams, 322 N.C. 452, 455, 368 S.E.2d 624, 626 (1988) (citation omitted). In *Williams*, the defendant, who was charged with rape, had his brother-in-law testify on his behalf. *Id.* at 453, 368 S.E.2d at 625. His testimony tended to exculpate defendant. *Id.* When the witness was asked whether he had told his probation officer that defendant had admitted having sex with the prosecutrix to him, the witness said "no." *Id.* The witness's probation officer was then called by the State to testify. His testimony detailed the statement which was allegedly made about the defendant by his brother-in-law. There the court said, "testimony concerning what

[the brother-in-law] did or did not tell his probation officer was collateral to the issues in the case; therefore, it was improper to impeach him on this point by offering [extrinsic evidence] . . . ." *Id.* at 456, 368 S.E.2d at 626. The court ordered a new trial.

In the case at bar, David Noell was called as a witness by the State. He essentially testified that he and several others, including the defendant, were in a motel room on the day in question. Defendant had two relatively brief telephone conversations with someone whom Noell assumes was the prosecutrix. Later, Noell and several others picked the prosecutrix up at her home and took her back to the motel. Shortly thereafter, Noell and several others left to run errands. The prosecutrix, defendant, and another man chose to stay behind.

When Noell returned, he was unable to enter the room with his key because the chain guard was on the door. However, he saw the defendant standing nude in the room. When defendant let Noell and the others into the room, the prosecutrix and the other man were in the bathroom presumably taking a shower. Another woman, a friend of the prosecutrix who had stayed with the group, took the prosecutrix' clothes to her in the bathroom. When the prosecutrix re-entered the room where the others were, she began to cry and accused defendant and the other man of raping her. The two men denied her accusations.

The State thereafter questioned Noell about certain other statements which he allegedly made which were damaging to defendant. Noell denied making any such statements. Over defendant's objections, the court permitted the State to cross-examine Noell about a prior statement which was allegedly inconsistent with his courtroom testimony. The State later called Detective Early who was permitted to testify and recount the inconsistent statement which Noell allegedly made at an earlier time.

We are bound to follow the rule in *Williams* and conclude that it was prejudicial error to allow the State to use extrinsic evidence from Detective Early to impeach David Noell. As we previously noted, when a witness is cross-examined on a collateral matter, the party who draws out unfavorable answers will not be permitted to contradict them using other testimony. *Williams*, 322 N.C. at 455, 368 S.E.2d at 326. Our Supreme Court has said that whether or not a witness has given prior inconsistent statements is a collateral matter. *See State v. Hunt*, 324 N.C. 343, 348, 378

S.E.2d 754, 757 (1989). Although the court instructed the jury that Detective Early's testimony was only to be considered as corroborative evidence, it was improper to permit this testimony for any purpose. First of all, " 'impeachment by prior inconsistent statement[s] may not be permitted where employed as a *mere subterfuge* to get before the jury evidence not otherwise admissible.' " *Id.* at 349, 378 S.E.2d at 757 (citation omitted). Secondly, since Noell had admitted giving a statement but he denied the specifics of what the State claimed he said, the proper use of his prior statement for corroborative purposes was to have Detective Early attest to the fact that a prior statement was indeed made and not to prove the facts to which those statements purportedly relate. *Id.* at 352, 378 S.E.2d at 759.

[2] Although we have ordered a new trial for defendant, it is still necessary for us to address two of the other issues raised here. Defendant has asserted that the trial court erred in instructing the jury that he could be found guilty of taking an indecent liberty if it found that he "willfully took an indecent liberty with a child for the purpose of arousing *or* gratifying sexual desire." He argues that this violated his right to have a unanimous verdict.

> The court's charge to the jury stated:
>
> [F]or you to find the defendant guilty of taking an indecent liberty with a child, the State must prove three things beyond a reasonable doubt.
>
> First, that the defendant willfully took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an immoral, improper or indecent touching by the defendant upon the child.
>
> Second, that the child had not reached her sixteenth birthday at the time in question.
>
> And third, that the defendant was at least five years older than the child and had reached his sixteenth birthday at that time.

Defendant relies on the case of *State v. Callahan*, 86 N.C. App. 88, 356 S.E.2d 403 (1987), *disc. review denied*, 325 N.C. 274, 384 S.E.2d 521 (1989). In *Callahan*, the court charged the jury that the defendant could be convicted if "it found that he forced the victim to perform *either* 'fellatio *or* anal intercourse.' " *Id.* at 90,

356 S.E.2d at 405 (emphasis added). There, the court found that the charge to the jury made it impossible to determine whether the defendant was unanimously convicted of having engaged in fellatio or anal intercourse, or whether some thought him guilty of engaging in one and others thought him guilty of engaging in the other. *Id.* at 91, 356 S.E.2d at 405. A new trial was therefore ordered.

The rule in *Callahan* is inapplicable to this case because there the court's charge allowed the jury to choose between two distinct acts in order to convict defendant of a sexual offense. Here, the court charged the jury on a single act, "willfully [taking] an indecent liberty with a child . . . ." The court merely allowed the jury to choose between two alternative purposes for which this single act may have been committed. Furthermore, because the court's charge is almost identical to that which is contained in the North Carolina Pattern Instructions at section 226.85, we find no error in the court's instructions. This assignment of error is overruled.

[3] The next issue which we shall consider is whether the mandatory life sentence for defendant's conviction of first degree sexual offense is cruel and unusual punishment.

Our Supreme Court examined this question in *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985), and determined that such a sentence was not violative of the Constitution. Without re-examining the matter, the court reaffirmed its conclusion that such a punishment is permissible. *See State v. Cooke*, 318 N.C. 674, 679, 351 S.E.2d 290, 293 (1987). Because defendant has raised no new questions for our review, we likewise decline to re-examine this question.

[4] Defendant's final issue regarding the denial of his motion to continue is meritless. Motions to continue are within the discretion of the trial court. *State v. Gardner*, 322 N.C. 591, 369 S.E.2d 593 (1988). Although defendant has argued that his constitutional right to a defense was violated by the court's refusal to continue this case in order for him to secure a witness to testify regarding a medical report, we are not compelled by that argument. Nor has defendant shown resulting prejudice based upon the court's ruling. This assignment of error is likewise overruled.

Based upon our conclusion that defendant was prejudiced by the court's admission of certain extrinsic evidence, a new trial is ordered.

New trial.

Judges PHILLIPS and EAGLES concur.

BOBELLA BLALOCK GLATZ v. FRANK ROBERT GLATZ, JR.

No. 8917DC835

(Filed 1 May 1990)

1. **Divorce and Alimony § 16.11 (NCI3d)— alimony—income withholding—attorney's fees**

The trial court correctly denied plaintiff's motion for attorney's fees and expenses pursuant to N.C.G.S. § 110-136.6(b) and N.C.G.S. § 50-13.6 because plaintiff first asserted her claim for attorney's fees in a motion filed three months after entry of the income withholding order. Language in N.C.G.S. § 110-136.6(a) allowing court costs and attorney's fees to be included in the amount withheld clearly contemplates that such claims should be asserted prior to the entry of the withholding order.

Am Jur 2d, Divorce and Separation §§ 613, 614.

2. **Appeal and Error § 28.1 (NCI3d)— alimony—findings as to disposable income—no exceptions**

Although plaintiff questioned the trial judge's findings with regard to defendant's disposable income in her motion to amend judgment and motion for a new trial, no exceptions were noted in the record on appeal to any of the trial judge's findings on this issue and the assignment of error has no merit.

Am Jur 2d, Appeal and Error § 558.

3. **Divorce and Alimony § 28 (NCI3d)— child support—Illinois judgment—full faith and credit**

The trial judge erred by not extending full faith and credit to an Illinois judgment by refusing to enforce automatic adjustment provisions, allowing defendant a credit against his child support obligation, and refusing to award prejudgment interest to plaintiff where the trial judge concluded that those provisions would be unenforceable under North Carolina law. The

Illinois judgment was never registered in North Carolina and remained a valid and fully enforceable judgment of another state entitled to enforcement according to its terms in this state under the full faith and credit clause in the United States Constitution. U.S. Constitution Art. IV, Sec. 1.

Am Jur 2d, Divorce and Separation §§ 1102, 1103, 1130, 1131.

APPEAL by plaintiff from *Martin (Jerry Cash), Judge*. Orders entered 4 May 1989 in District Court, STOKES County. Heard in the Court of Appeals 14 February 1990.

This is a civil action wherein plaintiff seeks to have the court enter an order enforcing an Illinois judgment in which defendant agreed to pay child support to plaintiff by requiring the withholding of child support payments from defendant's income pursuant to G.S. 110-136.5.

Plaintiff and defendant were married on 24 August 1968 in Springfield, Illinois. Two children were born of the marriage: Frank Robert Glatz, III, born 2 December 1970, and Kristen Lynn Glatz, born 25 February 1975.

Plaintiff and defendant were granted an absolute divorce on 29 January 1979 in Sangamon County, Springfield, Illinois. In entering the divorce judgment, the Illinois court found that:

> J. The parties have entered into an agreement concerning the question of custody, visitation and support of the minor children . . . which agreement has been presented to this Court . . . it is not unconscionable and ought to receive the approval of this Court; that the separation agreement between the Petitioner and the Respondent referred to hereinabove is made a part of this Judgment of Dissolution of Marriage as set forth hereinafter.

Pursuant to the parties' separation agreement as incorporated into the Illinois divorce decree, defendant consented to pay child support to plaintiff in the amount of $300.00 per month per child for 36 months from the date of entry of the judgment, and then beginning with the 37th calendar month, to pay a base amount of $500.00 per month per child to be adjusted in relation to deviations in the average Wholesale Price Index (now called the Producer Price Index).

On 28 August 1987, plaintiff filed a complaint in the District Court, Forsyth County, alleging defendant to be in arrears for payment of child support and medical expenses in the amount of $116,366.65 and seeking to have the court order that $1,500.00 per month be withheld from defendant's income to pay current child support, and an additional $3,000.00 per month to be withheld and applied toward the liquidation of the arrearages. On 9 November 1988 "nunc pro tunc for 18 October 1988," Judge Martin entered an order in the District Court, Stokes County, finding that "the plaintiff is entitled to an order of income withholding in the amount of . . . ($1,733.20) per month from the defendant, through his employer, F.R. Glatz, M.D., P.A."

Plaintiff then filed a "Motion to Amend Judgment and Motion For a New Trial" pursuant to Rules 55(b) and 59 of the North Carolina Rules of Civil Procedure on 27 October 1988, contending in part that:

> 1. . . . The Court failed to consider the total earnings of the defendant's professional association, F.R. Glatz, Jr., M.D.P.A., notwithstanding the fact that the defendant is the sole shareholder of said association and enjoys the full benefit of its earnings. . . .
>
> 2. The Court's finding that the automatic adjustment provisions contained in the Illinois Judgment were unenforceable in North Carolina is contrary to applicable law.
>
> 3. The Court's ruling that the plaintiff is not entitled to interest on each child support payment as it became due is contrary to applicable law.

Plaintiff filed a second motion on 31 January 1989, asking the court to enter an order requiring defendant to pay her reasonable attorney's fees and expenses pursuant to G.S. 110-136.6(b) and 50-13.6.

A hearing was conducted on 25 April 1989 to consider both motions. The court heard arguments from counsel representing both parties, but plaintiff presented no additional evidence at the hearing. Based upon the evidence presented, Judge Martin made the following pertinent findings of fact:

> (3) The evidence presented at the hearing as to the defendant's earnings and disposable income was consistent with and convincing to the Court as to the earnings and disposable

income of the defendant as found by the Court in its order of November 9, 1988.

(4) The Court's rulings and findings of fact concerning the "automatic adjustment" provisions and "interest" were made by the Court after extensive research by the Court and counsel for the parties and arguments by counsel as to the applicable law in the instant case; that after further argument, the Court is still convinced that its conclusions of laws applied in the order of November 9, 1988, are the appropriate laws to be applied in the instant case.

Judge Martin also concluded as a matter of law that G.S. 110-136.6 does not grant plaintiff a substantive right to attorney's fees incurred at the hearing to obtain a "withholding order."

Based upon these findings of fact and conclusions of law, Judge Martin entered orders denying both plaintiff's "Motion to Amend Judgment and Motion For a New Trial" under Rules 55(b) and 59 and her motion for an award of attorney's fees. Plaintiff appealed.

Elliot & Pishko, P.A., by David C. Pishko, for plaintiff, appellant.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Clifton R. Long, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

[1] In her fourth assignment of error, plaintiff contends "[t]he trial court committed error in denying the plaintiff's motion for attorney's fees." We disagree. Plaintiff argues that G.S. 110-136.6(a) "clearly authorizes the award of [attorney's] fees in income withholding cases." G.S. 110-136.6(a) provides in pertinent part:

The *amount withheld* may also include court costs and attorneys fees as may be awarded by the Court in non-IV-D cases . . . (emphasis added).

In denying plaintiff's motion for an award of attorney's fees, the trial judge found that "[t]he plaintiff's claim for relief did not allege any arrearages under the order of [the] Illinois court for attorney's fees and/or court costs." The record on appeal supports Judge Martin's finding and further demonstrates that plaintiff first asserted a claim for attorney's fees in her motion filed on 31 January 1989; this motion being filed three months after the entry of the income withholding order on 18 October 1988.

We find the language in G.S. 110-136.6(a) allowing court costs and attorney's fees to be included in the amount withheld by the court clearly contemplates that such claims should be asserted prior to the entry of the withholding order. Therefore, we hold the trial judge had no authority to allow plaintiff's motion for an award of attorney's fees in the present case, and his order denying plaintiff's motion will be affirmed.

[2] Plaintiff's fifth assignment of error states "[t]he District Court committed error by refusing to consider the income of the defendant's professional association when calculating the defendant's disposable income." In granting the income withholding order on 18 October 1988, Judge Martin made the following finding with respect to defendant's disposable income:

> 32. The Court finds that the defendant has a disposable income of Fifty Two Thousand Dollars ($52,000.00) annually, or Four Thousand Three Hundred Thirty Three Dollars ($4,333.00) per month.

Although plaintiff questions the trial judge's findings with respect to defendant's disposable income in her "Motion to Amend Judgment and Motion For a New Trial," no exceptions are noted in the record on appeal to any of the trial judge's findings on this issue. "When findings of fact are not challenged by exceptions in the record, they are presumed to be supported by competent evidence and are binding on appeal." *Tinkham v. Hall*, 47 N.C. App. 651, 652-653, 267 S.E.2d 588, 590 (1980). Thus, this assignment of error has no merit.

[3] Finally, in assignments of error Nos. 1, 2, and 3, plaintiff contends the trial court erred by (1) refusing to enforce the automatic adjustment provisions contained in the Illinois child support judgment, (2) allowing defendant a credit against his child support obligation for items purchased for the minor children, and (3) refusing to award prejudgment interest on defendant's child support arrearage. In support of each of these contentions, plaintiff argues the trial court erred in failing to fully enforce the child support provisions included in the Illinois divorce judgment because such provisions would be unenforceable under North Carolina law. We agree.

In the present case, plaintiff and defendant entered into a separation agreement which, among other things, provided for the

support of the minor children and contained the provisions cited above. This agreement was made part of the Illinois divorce decree with both parties' knowledge and consent. In making the agreement part of the divorce judgment, the Illinois court found: "[the agreement] is not unconscionable and ought to receive the approval of this Court. . . ."

"The full faith and credit clause in the United States Constitution, Article IV, Sec. 1, requires that the judgment of the court of one state must be given the same effect in a sister state that it has in the state where it was rendered." *Fleming v. Fleming*, 49 N.C. App. 345, 349, 271 S.E.2d 584, 587 (1980). In the case *sub judice*, the Illinois judgment incorporating the parties' separation agreement was never registered in North Carolina and remained a valid and fully enforceable judgment of another state entitled to enforcement according to its terms in this state. Therefore, the trial judge erred in not extending full faith and credit to the Illinois judgment by (1) refusing to enforce the automatic adjustment provisions, (2) allowing defendant a credit against his child support obligation, and (3) refusing to award prejudgment interest to plaintiff.

Thus, this cause must be remanded to the District Court, Stokes County, for an entry of an order awarding plaintiff interest on the judgment and adjusting the payments on the judgment in accordance with the Wholesale Price Index, and deleting any credits for defendant for items purchased for the minor children.

Affirmed in part; reversed and remanded in part.

Judges PHILLIPS and DUNCAN concur.

MARK D. SEVERANCE, ADMINISTRATOR OF THE ESTATE OF KYLE DAVID SEVERANCE, PLAINTIFF v. FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, AND DICK PARKER FORD, INC., DEFENDANTS

No. 893SC681

(Filed 1 May 1990)

Torts § 6.1 (NCI3d) — automobile accident — negligence action — prior consent judgment — satisfaction

Summary judgment was properly entered for defendants, the car manufacturer and dealer, in a negligence action arising from the death of plaintiff administrator's son in an automobile accident where a consent judgment had been entered in a prior action brought by plaintiff as administrator against his wife, the driver of the car. The consent judgment in the prior action constituted a satisfaction of judgment under N.C.G.S. § 1B-3(e); the one exception to N.C.G.S. § 1B-3(e) does not apply because the consent judgment did not specify that it was a release, a covenant not to sue under N.C.G.S. § 1B-4, or anything other than a judgment. Furthermore, plaintiff is the administrator of the estate of the minor decedent, so that there was no minor plaintiff or injured minor as required by the exception to N.C.G.S. § 1B-3(e).

Am Jur 2d, Judgments §§ 1088, 1094.

APPEAL by plaintiff from order entered 27 February 1989 by *Judge Herbert O. Phillips, III*, in CRAVEN County Superior Court. Heard in the Court of Appeals 9 January 1990.

Plaintiff appeals from the order of 27 February 1989 granting summary judgment to all defendants. Plaintiff's claim for relief arose from an automobile accident on 21 March 1988, in which plaintiff's wife, Denise D. Severance, lost control of the 1982 Ford Bronco which she was driving. The Bronco rolled several times into a ditch. Plaintiff's 21-month-old son, Kyle David Severance, was a passenger in the Bronco, and was properly strapped and secured in a child restraint seat safely secured in the backseat of the Bronco. As a result of the accident, a portion of the fiberglass roof of the Bronco shattered, killing Kyle David Severance.

On 26 May 1988, plaintiff, in his capacity as administrator of his son's estate, filed a cause of action for wrongful death against

his wife, Denise Severance, alleging, *inter alia*, that her negligence was the "sole and proximate cause" of their son's death. On 9 September 1988, a consent judgment was entered ordering Mrs. Severance to pay plaintiff $25,000.00, which was satisfied by the insurer. In the consent judgment, the trial court found that Mrs. Severance denied all liability for the death of her minor son.

Plaintiff filed the present cause of action on 15 August 1988, alleging that defendants negligently designed, produced, manufactured, advertised and distributed the Bronco; that defendant Ford Motor Company (hereinafter Ford) breached its express and implied warranties of merchantability; strict liability; and seeking actual and punitive damages. Plaintiff filed amended complaints on 26 August 1988 and 13 September 1988.

Defendant Dick Parker Ford, Inc. (hereinafter Parker Ford) filed its answer, motion to dismiss and third-party complaint on 19 September 1988. Defendants Ford and Ford Motor Credit Company (hereinafter Ford Credit) filed their answer on 17 October 1988. The third-party defendants, Mark D. And Denise Severance, filed a motion to dismiss the third-party complaint on 17 October 1988.

On 15 December 1988, defendants Ford and Ford Credit filed a motion for summary judgment under Rule 56(c) of the N.C. Rules of Civil Procedure. On 27 February 1989, the trial court granted summary judgment as to all defendants on the grounds that the judgment entered in the wrongful death case (*Severance v. Severance*, No. 88 CVS 852) was fully satisfied by Denise Severance's insurance company on her behalf. The trial court also found that the family purpose doctrine barred the present action.

From this order, plaintiff appeals.

Barker, Dunn & Mills, by Donald J. Dunn, for plaintiff-appellant.

Yates, Fleishman, McLamb & Weyher, by Joseph W. Yates, III, for defendant-appellees Ford Motor Company and Ford Motor Credit Company.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by C. R. Wheatly, Jr. and Stevenson L. Weeks, for defendant-appellee Dick Parker Ford, Inc.

ORR, Judge.

The dispositive issue on appeal is whether the trial court erred in granting summary judgment to defendants. For the reasons set forth below, we affirm the trial court's order.

Under N.C. Gen. Stat. § 1A-1, Rule 56(c), a motion for summary judgment "shall be rendered . . . if the pleadings, depositions, . . . 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." This remedy permits the trial court to decide whether a genuine issue of material fact exists; it does not allow the court to decide an issue of fact. *Sauls v. Charlotte Liberty Mut. Ins. Co.*, 62 N.C. App. 533, 535, 303 S.E.2d 358, 360 (1983) (citations omitted). In a summary judgment proceeding, the trial court must view all evidence in the light most favorable to the nonmoving party. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 258, 335 S.E.2d 79, 83 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). Summary judgment is generally inappropriate in negligence cases, unless it appears that plaintiff cannot recover even if the facts plaintiff alleged are true. *Stoltz v. Burton*, 69 N.C. App. 231, 233, 316 S.E.2d 646, 647 (1984) (citations omitted).

In the case before us, the trial court granted summary judgment to defendants on the ground that the consent judgment in the prior civil action of *Severance v. Severance* constituted a satisfaction of judgment under N.C. Gen. Stat. § 1B-3(e) (1983). We agree.

Under § 1B-3(e):

> The recovery of judgment against one tort-feasor for the injury or wrongful death does not of itself discharge the other tort-feasors from liability to the claimant. The satisfaction of the judgment discharges the other tort-feasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution. Provided, however, that a consent judgment in a civil action brought on behalf of a minor, or other person under disability, for the sole purpose of obtaining court approval of a settlement between the injured minor or other person under disability and one of two or more tort-feasors, shall not be deemed to be a judgment as that term is used herein, but shall be treated as a release or cove-

nant not to sue as those terms are used in G.S. 1B-4 unless the judgment shall specifically provide otherwise.

This statute permits a claimant to obtain judgments against any and all joint tort-feasors for a single injury or wrongful death, but the claimant may have only one satisfaction. *Ipock v. Gilmore*, 73 N.C. App. 182, 186, 326 S.E.2d 271, 275, *disc. review denied*, 314 N.C. 116, 332 S.E.2d 481 (1985) (citation omitted).

N.C. Gen. Stat. § 1B-3(e) allows one exception to the above rule. "[A] consent judgment in a civil action brought on behalf of a minor or other [disabled person] for the sole purpose of gaining court approval of a settlement between the injured minor . . . and one of two or more tort-feasors, . . ." is not a judgment under N.C. Gen. Stat. § 1B-3(e), but is instead a release or covenant not to sue under § 1B-4, unless it otherwise specifically provides.

In the case *sub judice*, the consent judgment in the case of *Severance v. Severance* did not specify that it was a release or covenant not to sue under § 1B-4, or that it was anything other than a consent judgment "in full settlement, satisfaction, release, and discharge of all matters in this action, ..."

Moreover, there was no minor plaintiff or injured minor as required by the exception to § 1B-3(e). The plaintiff in the case of *Severance v. Severance* and the case *sub judice* is the *administrator* of the estate of the minor decedent. As the administrator of his son's estate, he brings the action for wrongful death on behalf of the *beneficiaries* of his son's estate, not on behalf of his deceased son.

An administrator has the right to negotiate and compromise a cause of action for wrongful death. N.C. Gen. Stat. § 28A-13-3(a)(23) (1984). *See Bowling v. Combs*, 60 N.C. App. 234, 298 S.E.2d 754, *disc. review denied*, 307 N.C. 696, 301 S.E.2d 389 (1983). As a result of a successful wrongful death action, any proceeds pass to the beneficiaries of the estate, except for funeral, burial, hospital and medical expenses. § 28A-13-3(a)(23).

Because plaintiff did not bring the previous wrongful death action of *Severance v. Severance* on behalf of an injured minor or minor plaintiff as required by § 1B-3(e), and the consent judgment did not specify that it was anything other than a judgment, § 1B-4 does not apply to the case before us. Therefore, we hold that under § 1B-3(e), the judgment entered in the case of *Severance*

v. Severance has been fully satisfied by the insurance company of Denise D. Severance, discharging the defendants in the present case from liability for the same injury or wrongful death.

Because we hold that plaintiff is barred from recovery as a matter of law by § 1B-3(e), we do not reach the remaining issues on appeal.

Affirmed.

Judges PHILLIPS and EAGLES concur.

FIN JOHNSON v. NATURAL RESOURCES AND COMMUNITY DEVELOPMENT

No. 8810SC880

(Filed 1 May 1990)

Administrative Law § 44 (NCI4th) — discharge of state employee — exempt policymaking position — administrative procedure

The appeal of a state employee who was discharged from an exempt policymaking position with the Department of Natural Resources and Community Development was remanded to the Office of Administrative Hearings where petitioner was employed as the Section Chief of the Air Quality Section of the Division of Environmental Management of the Department of Natural Resources and Community Development; that position was designated as an exempt policymaking position in 1985; petitioner was discharged with the stated reason for dismissal being deficient job performance in failing to exercise leadership in presenting feasible proposals for effecting required budget and staff reductions; petitioner contested by petitioning the Office of Administrative Hearings; the Administrative Law Judge recommended that the State Personnel Commission reassign petitioner to a job in the same grade and with full back pay and benefits; the recommended decision was sent to the State Personnel Commission; the State Personnel Commission adopted the Administrative Law Judge's findings but dismissed the appeal for lack of jurisdiction because petitioner was in an exempt position; and the Superior Court of Wake County ruled that the Personnel Commission had

erred, that the Administrative Law Judge had been correct, and directed the State Personnel Commission to make proper conclusions. N.C.G.S. §§ 150B-36 and 150B-37 direct that the recommended decision or order made by the Administrative Law Judge be forwarded to the employer administrative agency for a review and final decision and no statutory authority authorizes the State Personnel Commission to review the Administrative Law Judge's recommended decision in a case involving an exempt employee, nor does any statute provide that an exempt employee in a case such as this is entitled to the protections and safeguards of Art. 8 of N.C.G.S. Ch. 126, as the superior court ruled. The matter was thus returned to the Office of Administrative Hearings with the directive that its recommended decision be forwarded to the Department of Natural Resources and Community Development for a final administrative determination.

Am Jur 2d, Public Officers and Employees §§ 256, 257, 263-265.

APPEAL by respondent from judgment entered 22 April 1988 by *Stephens, Judge,* in WAKE County Superior Court. Heard in the Court of Appeals 15 March 1989.

Anderson, Schiller & Rutherford, by Marvin Schiller, for petitioner appellee.

Attorney General Thornburg, by Assistant Attorney General Francis W. Crawley, for respondent appellant.

PHILLIPS, Judge.

This case concerns the discharge of a state employee who had an exempt policymaking position under the provisions of G.S. 126-5(c)(3) and (d)(5). Since administrative agencies may validly do only those things the Legislature authorizes them to do, *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau,* 300 N.C. 381, 269 S.E.2d 547, *reh'g denied,* 301 N.C. 107, 273 S.E.2d 300 (1980), the decisive question presented is whether the administrative course that was followed in processing petitioner's case was authorized by statute.

The facts pertinent to this question follow: Before being discharged on 10 September 1986, petitioner had been employed by

the North Carolina Department of Natural Resources and Community Development for approximately sixteen years. When discharged he was Section Chief of the Air Quality Section of the Division of Environmental Management, a position he had held since 1982 and that was designated as an exempt policymaking position pursuant to G.S. 126-5(c)(3) and (d)(5) on 1 May 1985. The stated reason for the dismissal was a deficient job performance in that he failed to exercise leadership in presenting feasible proposals for effecting required budget and staff reductions. Johnson contested the dismissal by petitioning the Office of Administrative Hearings to review the circumstances under the provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act. The issues raised by the petition were initially heard by Administrative Law Judge Genie Rogers, who in a Recommended Decision sent to the State Personnel Commission for review (1) found, in addition to the facts above stated, that prior to his dismissal petitioner had not been notified that his job performance was considered to be unsatisfactory; (2) concluded that petitioner was not afforded the procedural safeguards required for a "just cause" dismissal under the provisions of G.S. 126-5(e)(2) and G.S. 126-35; and (3) recommended that the State Personnel Commission reassign him to a job of the same grade as the position was before it was exempted from the Act with full back pay and benefits from the date of his dismissal. In reviewing the Recommended Decision the State Personnel Commission adopted the Administrative Law Judge's findings of fact as its own, but ruled that all her conclusions of law were erroneous and substituted the following conclusion in their place:

> Mr. Johnson occupied a position exempted from certain portions of the State Personnel Act and certain policies of this Commission. Persons who occupy positions exempted as making policy under G.S. 126-5(c)(3) are not subject to Article 8 of Chapter 126, neither are they subject to this Commission's policies on discipline and dismissal. For those reasons, this Commission concludes that it has no jurisdiction over this matter and orders that Petitioner's appeal be dismissed for lack of jurisdiction.

Petitioner appealed this decision to the Superior Court of Wake County, which ruled that the conclusion of the State Personnel Commission was erroneous, all conclusions of the Administrative Law Judge were correct, the Personnel Commission did have jurisdic-

tion over the case, and directed the Commission upon remand to make proper conclusions of law upon the facts found, which it also approved.

That the case was properly started before the Office of Administrative Hearings is clear and not disputed. The dispute concerns the review of the Recommended Decision of the Administrative Law Judge by the State Personnel Commission. As the appellant maintains, and the State Personnel Commission ruled, the Legislature has not authorized the Commission to review cases involving the discharge of an exempt policymaking employee and thus the Commission was without jurisdiction.

Under the State Personnel Act, Chapter 126 of the General Statutes, there are two specific classes of employees—exempt and nonexempt; the two classes have different employment and dismissal rights and their cases are processed differently. The *exempt* employees are the relatively few who hold policymaking positions subject to political appointment and are generally exempt from the protections and safeguards of the Act; the *nonexempt* employees comprise the vast rank and file and are fully protected by the Chapter. As to the dismissal of employees, Article 8 of Chapter 126 of the General Statutes by G.S. 126-35, *et seq.*, provides that *nonexempt* permanent employees subject to the Act can be dismissed only for "just cause" after written specifications, an opportunity to appeal to the department head, and other formalities have been complied with. On the other hand G.S. 126-5, which exempts policymaking positions from the protection of the Act except for certain purposes irrelevant to this case, by its subsection (5)(e) authorizes department heads to transfer, demote, or separate exempt employees without restriction, subject only to the employee's rights, if he meets the accumulated service requirements of the statute and is removed from the exempt position for "reasons other than just cause." G.S. 126-5(h) provides that in case of dispute as to whether an employee is subject to the provisions of the Chapter—and such a dispute exists here—"the dispute shall be resolved as provided in Article 3 of Chapter 150B." That Article in pertinent part provides as follows: G.S. 150B-23(a) provides that a contested case is commenced by filing a petition with the Office of Administrative Hearings, which assigns a judge to hear the case; G.S. 150B-34(a) directs the Administrative Law Judge assigned to the case to make a recommended decision or enter an order containing findings of fact and conclusions of law; G.S. 150B-36

and G.S. 150B-37 direct that the recommended decision or order be forwarded to the employer administrative agency for a review and final decision; G.S. 150B-43 and G.S. 150B-45 permits that decision to be judicially reviewed by the Superior Court of Wake County at the request of any aggrieved person who has exhausted all administrative remedies and complies with the statutory provisions; and G.S. 150B-52 permits the final judgment of the Superior Court to be appealed here. But no statute in either Chapter authorizes the State Personnel Commission to review the Administrative Law Judge's recommended decision in a case involving an exempt employee; nor does any statute provide that an exempt employee in a case such as this is entitled to the protections and safeguards of Article 8 of Chapter 126, as the Superior Court ruled.

In arriving at this decision it was not necessary to resort to the nice refinements of statutory interpretation that the parties argue in the briefs. For the statutes referred to make plain that for the purposes of dismissal and discipline nonexempt permanent employees are fully protected by the Act and exempt employees generally are not; and that the administrative review route for cases involving the dismissal of exempt employees is through the employer agency, rather than the State Personnel Commission. Thus, we return the matter to the Office of Administrative Hearings with the directive that its recommended decision be forwarded to the Natural Resources and Community Development Department for a final administrative determination as to whether the petitioner, as an exempt employee, was properly dismissed for just cause, G.S. 126-5(e)(2); and if not, whether he is entitled to the reassignment rights that the Administrative Law Judge recommended.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 APRIL 1990

ASSA'AD v. THOMAS No. 8915SC593	Orange (88CVS900)	Affirmed
BOWMAN v. SPEARS No. 8921SC536	Forsyth (87CVS3015)	Affirmed
CARY JOINT VENTURE v. KOH No. 8910SC526	Wake (87CVS6765)	Affirmed
GARVIN v. MALONE & HYDE, INC. No. 8912SC321	Cumberland (87CVS4874)	Reversed
GEORGE v. GEORGE No. 8914DC824	Durham (88CVD3603)	Vacated & Remanded
HALL v. PARKER No. 894DC913	Onslow (88CVD674)	Affirmed
IN RE GRIFFIN No. 8923DC853	Wilkes (88J90)	Dismissed
IN RE JACKSON PAPER MFG. CO. No. 8910PTC455	Prop. Tax Comm. (87PTC245)	Affirmed
KAY v. KINDLEY No. 8922SC997	Iredell (87CVS1619)	Vacated
PENDERGRASS v. TOWN OF CARRBORO No. 8915SC972	Orange (88CVS496)	Affirmed
PFAFF v. COHEN No. 8821SC1385	Forsyth (87CVS3396)	Appeal Dismissed
RORRER v. McCAIN No. 8917SC251	Rockingham (87CVS1277)	Affirmed
SALEM PROPERTIES, LTD. v. SLIGH No. 8921DC780	Forsyth (86CVD6102)	Appeal Dismissed
SHAHIN CO. v. CAROLINA BEAUTY SYSTEMS No. 8921DC646	Forsyth (88CVD185)	Reversed
SIMMONS v. DENNY No. 8915SC866	Alamance (87CVS1795)	Affirmed in part; Reversed in part
SISK v. JONES No. 8929SC636	Rutherford (87CVS556)	Affirmed

STATE v. DAVIS No. 8918SC393	Guilford (88CRS20724) (88CRS32805) (88CRS32806) (88CRS32807) (88CRS32808) (88CRS32809) (88CRS32972) (88CRS32973) (88CRS32974)	Affirmed
STATE v. ERNST No. 8927SC330	Cleveland (87CRS8473)	No Error
SWAIN v. JONES No. 8910SC950	Wake (88SP528)	Affirmed
TURNER v. SERVICE MDSE. CO. OF CHARLOTTE No. 8927SC334	Gaston (88CVS1273)	Affirmed

FILED 1 MAY 1990

BEAVER v. AJS TRUCKING CO. No. 8910IC955	Ind. Comm. (64686)	Affirmed
BIVINS DIESEL SERVICE v. SULLENS & LOACES TRUCKING No. 8927DC452	Cleveland (88CVD118)	Vacated
BLACK v. DAVIS No. 8910SC612	Wake (87CVS10448)	No Error
ECKERT v. WILLHOIT No. 8915SC751	Orange (87CVS1179)	Affirmed
FARLOW v. FARLOW No. 8918DC994	Guilford (87CVD8894)	No Error
HILL v. ROBERTS No. 898SC591	Lenoir (87CVS1069)	Reversed
HINTON v. BULLOCK No. 8910DC963	Wake (87CVD10873)	No Error
L. P. COX CO. v. WRIGHT ELECTRIC CO. No. 8918SC960	Guilford (87CVS9371)	No Error
LEE v. DUKE POWER CO. No. 8926SC995	Mecklenburg (88CVS7598)	Affirmed

MARTIN v. JORDAN CONSTR. CO. No. 8926SC625	Mecklenburg (88CVS6573)	Appeal Dismissed
MEDLIN v. ARCADIAN SHORES, INC. No. 8918SC542	Guilford (87CVS7108)	Affirmed
ROB-ROY, INC. v. CRAFT No. 8918SC1055	Guilford (88CVS8723)	Reversed
SOUTHERN RAILWAY CO. v. CSX TRANSPORTATION, INC. No. 8910SC1006	Wake (88CVS3606)	Dismissed
STATE v. SUGGS No. 893SC703	Pitt (88CRS15089) (88CRS15090) (88CRS15091) (88CRS15093) (88CRS15094) (88CRS17851) (88CRS17852) (88CRS17853)	No Error
STATE v. WHITAKER No. 8920SC416	Union (88CRS3321)	Vacated & Remanded
THOMPSON v. BRADLEN CORP. No. 8928SC520	Buncombe (88CVS1437)	Affirmed
WEBSTER CONSTR. CO. v. GREENSBORO CITY BD. OF ED. No. 8918SC669	Guilford (88CVS5630)	Affirmed

STATE OF NORTH CAROLINA v. SAM EDWARD JONES

No. 898SC750

(Filed 1 May 1990)

1. **Constitutional Law § 51 (NCI3d)— delayed arrest—undercover investigation pending—seven-month delay not unreasonable**

The trial court did not err in denying defendant's motion to dismiss based on a pre-arrest delay of seven months and three days where no arrest was made at the time of defendant's sale of cocaine to an undercover SBI agent in order to avoid exposing the agent and the confidential informant who accompanied him and in order to allow the undercover operation to continue for several more months, and the pre-arrest delay therefore was not unreasonable or for improper purposes but was rather a legitimate delay justified by the need to protect an ongoing undercover investigation.

Am Jur 2d, Arrest § 3.

2. **Criminal Law § 66.16 (NCI3d)— suggestive photographic procedure—in-court identification of independent origin**

The showing of only one photograph some seven months after the alleged crime occurred, after the witness had been notified that he would be receiving a photograph of the defendant and with the defendant's name written on the back, was impermissibly suggestive; however, evidence was sufficient to support the trial court's conclusions that the pretrial identification procedure did not create a substantial likelihood of irreparable misidentification and that the in-court identification was of independent origin based solely on the witness's observations at the time of the incident.

Am Jur 2d, Evidence § 371.

3. **Criminal Law § 66.19 (NCI3d)— admissibility of identification testimony—voir dire conducted after testimony admitted—no error**

Any error in conducting a voir dire hearing immediately after identification testimony was admitted rather than before was harmless in light of the trial court's determination that the in-court identification was admissible.

Am Jur 2d, Jury §§ 196, 212.

4. Criminal Law § 73.1 (NCI3d)— hearsay statement—admission not prejudicial error

Because there was a sufficient independent basis for the identification of defendant other than erroneously admitted hearsay, defendant was not prejudiced by admission of the hearsay.

Am Jur 2d, Evidence § 493.

5. Criminal Law § 73.2 (NCI3d)— testimony not hearsay

An officer's testimony that an informant knew where defendant lived did not constitute hearsay since the witness and other local officers coordinated an undercover operation including the use of the informant, and it could therefore be inferred that the witness had personal knowledge concerning the informant's awareness of where defendant lived.

Am Jur 2d, Evidence § 493.

APPEAL by defendant from judgment entered 17 March 1989 in WAYNE County Superior Court by *Judge I. Beverly Lake, Jr.* Heard in the Court of Appeals 8 February 1990.

On 28 January 1988 an undercover SBI agent, accompanied by a confidential informant, went to a house in Goldsboro in order to attempt to purchase illegal drugs. This attempt to buy drugs was part of an ongoing undercover operation in Goldsboro and Wayne County. At the house, the undercover agent bought what was later positively identified as cocaine from defendant.

Defendant was charged with two felonies: (1) possession with intent to sell and deliver a controlled substance and (2) sale of a controlled substance. He was also charged with a misdemeanor of keeping and maintaining a dwelling for the use and sale of a controlled substance. A jury found him guilty on all counts. Defendant was sentenced to a ten-year term on the first count and concurrent three- and two-year terms to begin at the expiration of the ten-year sentence. Defendant appeals.

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

Duke and Brown, by John E. Duke, for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss based on a pre-arrest delay of seven months and three days.

The law regarding a defendant's rights with respect to events occurring prior to indictment is set forth in *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). In *Lovasco*, the United States Supreme Court reiterated its holding in *U.S. v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), that the Sixth Amendment right to speedy trial applies only after one is formally accused of a crime; however, the due process clause plays a limited role in protecting against oppressive delay with regard to events occurring prior to indictment or arrest. When making a due process inquiry into pre-indictment or pre-arrest delay, the court must consider the reasons for the delay as well as any prejudice to the accused. *Id.* These principles were recently applied by our Supreme Court in *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

In order to prevail on allegations of a constitutional due process violation of the right to a speedy trial, a defendant must show actual prejudice in the conduct of his defense and that the delay was unreasonable, unjustified, and engaged in for the impermissible purpose of gaining a tactical advantage over the defendant. *See Goldman, supra*, and *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981). In this case an undercover SBI agent bought cocaine from defendant in January 1988. In order to avoid exposing the agent and the confidential informant who accompanied him, and because the undercover operation was to last for several more months, no arrest was made at the time. On these facts the pre-arrest delay was not unreasonable or for improper purposes but was rather a legitimate delay justified by the need to protect an ongoing undercover investigation. Defendant's only allegation of prejudice concerns the ability of the undercover agent to identify defendant after a seven-month delay. The test for prejudice is whether significant evidence or testimony that would have been helpful to the defense was lost due to delay; therefore, we fail to see how this alleged weakness in the State's case prejudiced defendant. *See, e.g., State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976) (A defendant must show that lost evidence or testimony would have been helpful to his defense). This assignment is overruled.

Defendant's next two assignments of error concern the in-court identification of defendant by SBI Agent Ransome. Defendant assigns as error the trial court's failure to conduct a *voir dire* prior to the in-court identification of defendant by Agent Ransome. Defendant also assigns as error the trial court's denial of his motion to suppress the in-court identification of defendant by SBI Agent Ransome. We first address the assignment of error concerning the suppression motion.

Defendant contends that the in-court identification should have been suppressed because it was tainted by the mailing of a photograph of defendant to Agent Ransome after defendant's arrest in September 1988. Defendant argues that showing Agent Ransome only one photograph with defendant's name written on the back was impermissibly suggestive.

Identification evidence must be excluded as violating due process where a pretrial identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968); *see also State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987). If the facts of a given situation do not give rise to a substantial likelihood of irreparable misidentification then, despite the presence of impermissible suggestiveness in the photographic identification procedure, reversal is not required. *Simmons, supra; see also State v. Knight*, 282 N.C. 220, 192 S.E.2d 283 (1972). Factors the court must consider in evaluating the likelihood of irreparable misidentification include:

(1) the opportunity of the witness to view the criminal at the time of the crime;

(2) the witness' degree of attention;

(3) the accuracy of the witness' prior description;

(4) the level of certainty demonstrated at the confrontation; and

(5) the time between the crime and the confrontation.

Pigott, supra. Even in cases where the confrontation procedure may have been suggestive, the court must still determine whether under the "totality of the circumstances" the identification was reliable. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985).

On *voir dire* Agent Ransome testified that on 28 January 1988 at approximately 7:00 in the evening he was taken to a house

in Goldsboro by a confidential informant. Agent Ransome had instructions to purchase cocaine from a man named Sam Jones. Agent Ransome had never seen Jones before, nor had he seen a picture of Jones prior to being taken to the house in Goldsboro. There were four black males present at the house. Agent Ransome was introduced to one of the men by the informant who said, "This is Sam Jones." Agent Ransome testified that he spent at most five minutes with the man introduced as Jones, but that the room where they met was only a "little dimmer" than the courtroom; he could see clearly; and, at one point, was less than a foot away from Jones. The agent further testified that he purposely focused his attention on defendant in order to describe him later. Approximately five minutes after the undercover cocaine purchase was completed, Agent Ransome was interviewed by his supervisor, John Rea. Agent Ransome told Rea what had happened and described the appearance of Jones. Agent Ransome then reviewed the notes taken by Rea for accuracy. The notes were subsequently transcribed and a report containing his account of the incident was provided to Agent Ransome. He used this report to refresh his memory while testifying at trial.

Shortly after defendant was arrested in September 1988, Rea mailed a single color photograph of defendant and a note saying "let me know" to Agent Ransome. Rea had contacted Agent Ransome in advance telling him to expect a photograph of Sam Jones. The name "Sam Jones" was written on the back of the photograph. Upon receipt of the photograph, Agent Ransome notified Rea that the photograph was that of the same person from whom he had made the undercover purchase of cocaine.

Agent Ransome also testified on *voir dire* that he recognized the person in the photograph because of the mental picture he had of him from 28 January 1988 and that he was "very sure" that defendant was the same person from whom he had purchased cocaine on that date. On *voir dire* Agent Ransome also testified as follows:

> Q. What is your identification of the defendant based upon?
>
> A. My seeing him on January 28, 1988, at his residence, the photograph and seeing him Tuesday morning in Court.

Q. State whether or not at the time you saw the photograph you had a clear mental image of the defendant and could have recognized him without benefit of the photograph?

MR. DUKE: Objection.

THE COURT: Overruled.

A. Yes, sir.

At the conclusion of the *voir dire* hearing the trial court made findings of fact and conclusions of law. The trial court essentially concluded that the in-court identification was of independent origin based on what the witness saw at the time of the alleged "buy" and was not tainted by Agent Ransome's seeing the photograph. The trial court specifically concluded that no pretrial identification procedure impermissibly suggestive or conducive to irreparably mistaken identification had occurred. At the request of defendant, the trial court made an additional finding of fact to the effect that although "the witness testified that his identification was based on seeing the defendant on January 28, 1988, [and] that [while] his identification was influenced by the photograph, . . . that he had an independent recollection of the defendant over and beyond the photograph."

[2] The evidence and findings do not support the conclusion that the pretrial photographic identification procedure was not impermissibly suggestive. The showing of only one picture some seven months after the incident occurred, after the witness had been notified that he would be receiving a photograph of the defendant and with the defendant's name written on the back, was impermissibly suggestive.

Having determined that the pretrial photographic identification was impermissibly suggestive, we must next review whether, considering all of the circumstances, the impermissibly suggestive procedure gave rise to a "very substantial likelihood of irreparable misrepresentation." *See State v. Grimes*, 309 N.C. 606, 308 S.E.2d 293 (1983). Applying the necessary factors to the facts of this case, we conclude that the trial court's findings and conclusions that the pretrial identification procedure did not create a substantial likelihood of irreparable misidentification and that the in-court identification was of independent origin based solely upon Agent Ransome's observations at the time of the incident are adequately supported. The factors used to determine the likelihood of misiden-

tification from a suggestive identification procedure are the same factors used to determine whether an in-court identification was of "independent origin." *Wilson, supra.* Although Agent Ransome testified at one point that his identification was partially based on the photograph, in addition to seeing the defendant on 28 January 1988 and again in court in March 1989, he also stated that he was able to recognize the person in the photograph as defendant because of the mental picture he had formed on 28 January 1988. Based on the totality of the circumstances present in this case, the trial court properly concluded that Agent Ransome's in-court identification was of independent origin. Any discrepancies or contradictions in Agent Ransome's testimony go to its weight and were properly resolved by the trial court. *See, e.g., State v. Weimer,* 300 N.C. 642, 268 S.E.2d 216 (1980). This assignment is overruled.

[3] Defendant also contends that the trial court erred by allowing the in-court identification prior to holding a *voir dire* hearing. A *voir dire* examination to determine the admissibility of identification testimony should be conducted prior to the admission of the testimony. *State v. Stepney,* 280 N.C. 306, 185 S.E.2d 844 (1972). However, a defendant is not automatically prejudiced by a court's initial failure to conduct a timely *voir dire. See, e.g., State v. Edwards,* 49 N.C. App. 547, 272 S.E.2d 384 (1980). In this case a *voir dire* hearing was conducted immediately after the identification testimony was admitted and the trial court determined that the in-court identification was admissible. Under the circumstances, we find that any error with regard to the timing of the *voir dire* must be deemed harmless.

[4] In his next two assignments of error defendant contends that the trial court erred by allowing the State to introduce hearsay testimony on two occasions. In the first instance, defendant argues that the trial court erred in allowing the State to introduce hearsay testimony concerning the identity of defendant. On direct examination Agent Ransome was allowed to testify that the confidential informant introduced him to the defendant by saying "This is Sam Jones." The State admits in its brief that the elicited testimony is hearsay, therefore we must assume that this testimony was offered for the truth of the matter asserted. However, the admission of hearsay does not always require a new trial. *State v. Hickey,* 317 N.C. 457, 346 S.E.2d 646 (1986). The defendant must also show that there is a reasonable possibility that a different

result would have been reached at trial if the testimony had not been admitted. *Id.*

In this case the defendant has not met that burden. Agent Ransome identified defendant as the man from whom he bought drugs based upon defendant's physical characteristics, not upon his name. Because there was a sufficient independent basis for the identification of defendant other than the erroneously admitted hearsay, defendant was not prejudiced by its admission. This assignment is overruled.

[5] The second instance in which defendant contends hearsay was erroneously admitted occurred during direct examination of Sgt. Bell of the Goldsboro Police Department. In response to a series of questions explaining how Agent Ransome found defendant's house, Sgt. Bell testified that the informant "knew where he [defendant] lived." Defendant contends that allowing Sgt. Bell to testify as to what the informant knew constituted hearsay. We disagree. The statement to which defendant objects could perhaps be challenged as a matter outside Sgt. Bell's personal knowledge and therefore speculative. However, defendant does not make this argument. Even if defendant challenged the testimony on this basis, his argument would be without merit. Rule 602 of the North Carolina Rules of Evidence states that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. N.C. Gen. Stat. § 8C-1, Rule 602 of the N.C. Rules of Evidence (1988). The commentary to Rule 602 provides that personal knowledge need not be explicit but may be implied from the witness's testimony. The record shows that Sgt. Bell and other local officers coordinated this undercover operation, including the use of this informant. It can therefore be implied that Sgt. Bell had personal knowledge concerning the informant's awareness of where defendant lived. This assignment of error is overruled.

Defendant also contends that the trial court erred by allowing the district attorney to question Agent Ransome with regard to how intently he had observed defendant during the undercover "buy." He contends this testimony was unnecessary and prejudicial. We disagree. A witness's opportunity to view the perpetrator and his degree of attention at the time of the crime are legitimate areas of examination. This assignment is also overruled.

Defendant next assigns error to Agent Ransome's testimony concerning the content of a note he received from John Rea along with the photograph of defendant. Defendant contends that this testimony violated the so-called "best evidence" or original document rule by placing into evidence the content of a writing without the admission of the writing itself. N.C. Gen. Stat. § 8C-1, Rule 1002 of the N.C. Rules of Evidence (1988). Agent Ransome was allowed to testify that the note said "Dwight, let me know." We agree that the note itself was the best evidence of its content; however, the testimony elicited did not prejudice defendant. This assignment is overruled.

In his final assignment of error defendant asserts that the trial court erred by limiting his right to cross-examine Sgt. Bell regarding his use of confidential informants and regarding information contained in a prior affidavit made by Sgt. Bell.

Cross-examination of an adverse witness is a matter of right; however, its scope is subject to appropriate control by the trial court. N.C. Gen. Stat. § 8C-1, Rule 611(a) of the N.C. Rules of Evidence (1988); *State v. Hosey*, 318 N.C. 330, 348 S.E.2d 805 (1986). In this case the trial court refused to allow counsel for the defense to ask Sgt. Bell about how frequently he used confidential informants who were also drug users. The State objected to the question on the basis of relevancy and the trial court sustained the objection. At defense counsel's request, Sgt. Bell was allowed to whisper his answer to the court reporter for the record. This conduct on the part of the trial court was proper and did not prejudice defendant.

Defendant also was not prejudiced by the trial court's ruling with regard to the affidavit. After hearing arguments from both sides outside the presence of the jury, the trial court also ruled that the affidavit in question was the best evidence of what it contained. Because defense counsel was attempting to establish the contents of the affidavit, the trial court did not err in requiring the document itself to be submitted. This assignment is overruled.

No error.

Judges COZORT and LEWIS concur.

MOLLIE JACKSON DUNN AND HUSBAND, CECIL DUNN; DAISY JACKSON TROGDON AND HUSBAND, JAMES H. TROGDON, JR.; PATRICIA JACKSON DAVIS AND HUSBAND, WILLIAM R. DAVIS; FAIRLYN JACKSON MONTELLA AND HUSBAND, MICHAEL MONTELLA, PLAINTIFFS APPELLANTS v. WILLARD J. PATE; BOBBIE LOU JACKSON GRIMES; FAIRLEY JAMES GRIMES AND WIFE, JENNIFER B. GRIMES; DAVID E. GRIMES, JR.; ELIZABETH GRIMES FISHER AND HUSBAND, WILSON DAVID FISHER; LABON CHARLES GRIMES AND WIFE, LIBBY GRIMES, DEFENDANTS APPELLEES

No. 8912SC555

(Filed 1 May 1990)

1. **Husband and Wife § 4.2 (NCI3d)— deed between husband and wife—no private exam of wife—no certificate that deed was not injurious to wife—errors not cured by statute**

The trial court erred in granting summary judgment in favor of defendants based on a finding that N.C.G.S. § 39-13.1 or N.C.G.S. § 52-8 cured the failure of the certifying officer to find and certify that the deed in question was not unreasonable or injurious to the subscribing wife, since N.C.G.S. § 39-13.1(a) purported to cure only an instrument which was "in all other respects regular except for the failure to take the private examination"; the deed in question was not "in all other respects regular" due to the lack of a certificate stating that the deed was not unreasonable or injurious to the wife; and N.C.G.S. § 52-8 could not cure the void 1962 deed because plaintiffs' rights vested in the property with the wife's death on 17 August 1980, and the amendment to that statute was not enacted until 1981.

Am Jur 2d, Deeds §§ 26, 191.

2. **Appeal and Error § 456 (NCI4th)— constitutional issue—appeal disposed of on other grounds**

The Court of Appeals declines to rule upon a constitutional issue, though defendants alleged violation of their constitutional rights in their answer, trial brief, and during oral arguments, since there were other grounds for the trial court's decision, and the record did not make it clear that the trial court based its decision on the constitutional issue asserted.

Am Jur 2d, Appeal and Error § 702.

APPEAL by plaintiffs from order entered 16 March 1989 by *Judge Wiley F. Bowen* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 9 November 1989.

This is a dispute involving title and ownership of land. Mary A. Jackson conveyed property to F. J. Jackson and wife, Mary E. Jackson, as tenants by the entirety. On 23 July 1962, F. J. Jackson and Mary E. Jackson later executed a deed conveying the property to F. J. Jackson only. The deed in question did not contain a certification by the clerk of court that the conveyance was not unreasonable or injurious to the wife as was then required by G.S. 52-12 and G.S. 47-39. F. J. Jackson died testate on 12 May 1976 and devised a life estate to his wife, Mary E. Jackson, and the remainder to his living children and sister-in-law, Willard J. Pate, in equal shares. Mary E. Jackson then died intestate on 17 August 1980. Mary E. Jackson's heirs were her five daughters, Mollie Jackson Dunn, Daisy Jackson Trogdon, Patricia Jackson Davis, Fairlyn Jackson Montella, who along with their husbands are the plaintiffs in this action, and Bobbie Lou Jackson Grimes who is a defendant. The defendant, Willard J. Pate, is the half sister of Mary E. Jackson. The defendants Fairley James Grimes, David E. Grimes, Jr., Elizabeth Grimes Fisher and Labon Charles Grimes are the children of the defendant Bobbie Lou Jackson Grimes and the grandchildren of F. J. and Mary E. Jackson. After her mother's death, Bobbie Lou Jackson Grimes conveyed the interest she acquired by and through her mother to her children. The plaintiff Fairlyn Jackson Montella conveyed portions of her interest to plaintiffs Mollie Jackson Dunn and husband, Cecil S. Dunn.

In their complaint, plaintiffs allege that title vested in them with one-fifth interest each as heirs at law of Mary E. Jackson by intestate succession because the deed from F. J. and Mary E. Jackson to F. J. Jackson only was void since the clerk failed to make the appropriate certification. Defendants answered claiming superior title under the will of Fairley Jackson because G.S. 39-13.1(a) cured the defect resulting from the failure of the clerk to certify that the conveyance was not unreasonable or injurious to the wife. In the alternative defendants asserted that G.S. 52-12 and G.S. 47-39 violated the 14th Amendment to the United States Constitution since it represented a form of gender-based discrimination. All parties moved for summary judgment and the trial court granted defendants' motion. Plaintiffs appeal.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Richard M. Wiggins, for plaintiff-appellants.

Faircloth, Taylor and Yarborough, by Garris Neil Yarborough, for defendant-appellees.

EAGLES, Judge.

[1] Plaintiffs' sole assignment of error is whether the trial court committed reversible error by granting summary judgment in favor of defendants based on a finding that G.S. 39-13.1 or G.S. 52-8 cured the failure of the certifying officer to find and certify that the deed was not unreasonable or injurious to a subscribing wife. Plaintiffs agree that summary judgment is appropriate but argue that the evidence and stipulated facts would require entry of summary judgment in their favor. First, plaintiffs argue that G.S. 39-13.1 (a) purports to cure only an instrument " 'which is in all other respects regular except for the failure to take the private examination' " and that the 1962 deed was not "in all other respects regular" due to the lack of a certificate stating that the deed was not unreasonable or injurious to the wife. Plaintiffs argue that the requirement of a private examination and the finding that the deed was not unreasonable or injurious to the wife are two separate requirements and G.S. 39-13.1(a) does not cure a deed where there is a failure to find that the deed was not unreasonable or injurious to the wife. Secondly, plaintiffs argue that G.S. 52-8 could not cure the void 1962 deed because the plaintiffs' rights vested in the property on 17 August 1980 and the amendment to G.S. 52-8 was not enacted until 1981.

Initially we note that "[s]ummary judgment is a drastic measure." *Barber v. Woodmen of the World Life Ins. Society*, 88 N.C. App. 666, 671, 364 S.E.2d 715, 718 (1988) (citations omitted). "It should be granted only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there in no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.*

In July 1962, when F. J. and Mary E. Jackson conveyed the realty to F. J. Jackson only, G.S. 52-12, which was later renumbered as G.S. 52-6, provided that no contract made between husband and wife during coverture could be valid unless a certifying officer made a private examination of the wife and incorporated in his

certificate a statement that the contract was not unreasonable or injurious to the wife. We note parenthetically that G.S. 52-6 was repealed by Session Laws 1977, c. 375, s. 1, effective 1 January 1978. "Our Supreme Court has uniformly held that unless the requirements of that statute [G.S. 52-6] are complied with, such a deed is void." *Boone v. Brown*, 11 N.C. App. 355, 357, 181 S.E.2d 157, 158 (1971), and cases cited therein. The certificate must be attached or annexed to the deed. *See Caldwell v. Blount*, 193 N.C. 560, 137 S.E. 578 (1927). " 'Where, however, there has been a substantial compliance with statutory requirements, [the] deed may be enforced, but there must be a substantial compliance with every requisite of the statute.' " *Kanoy v. Kanoy*, 17 N.C. App. 344, 347, 194 S.E.2d 201, 203, *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973), quoting *Trammell v. Trammell*, 2 N.C. App. 166, 169, 162 S.E.2d 605, 607 (1968).

In *Boone, supra*, the acknowledgment of the deed in question did not comply with G.S. 52-6 which provided that a certifying officer must conduct a private examination of the wife and incorporate in its certificate a statement that the deed was not unreasonable or injurious to the wife. The *Boone* court stated that neither requirement of G.S. 52-6 was complied with. The court also stated that the person who took the wife's acknowledgment was a notary public who was not authorized by G.S. 52-6(c) to certify the acknowledgment. The court held that since the statute was not complied with, the deed was void. The court also addressed the applicability of G.S. 52-8, which is a curative statute, to the deed in question. The court held that since none of the requirements of G.S. 52-6 had been met, G.S. 52-8 would not operate to cure the void deed since the statute by its own terms applied to contracts which were " 'in all other respects regular.' " *Id.* at 357, 181 S.E.2d at 159; *see also Mansour v. Rabil*, 277 N.C. 364, 177 S.E.2d 849 (1970).

On its facts *Boone* is very similar to this case. Mary E. Jackson conveyed property to F. J. Jackson when G.S. 52-12 required both a private examination by a certifying officer and a statement in the certificate that the deed was not unreasonable or injurious to the wife. After careful review of the record here we find no evidence that a private examination of the grantor Mary E. Jackson was ever conducted by a certifying officer. The parties stipulated that the deed appearing in the record is not in controversy. There are no attachments or annexations to the deed indicating that a

private examination had been conducted. In their complaint, plaintiffs admit that the acknowledgment is defective because the certification failed to comply with G.S. 52-12 and G.S. 47-39 in that there was no finding that the conveyance was not unreasonable or injurious to wife. We find the acknowledgment also defective because it contains no evidence that a private examination was conducted by a certifying officer. Accordingly, the deed was void. We must now determine whether G.S. 52-8 or G.S. 39-13.1(a) would cure the otherwise invalid deed.

West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986), addressed whether G.S. 52-8 could cure defects in a deed between a husband and wife which was in all other respects regular except for the absence of a required private examination or the absence of a finding that the contract was not unreasonable or injurious to the wife after the rights of the parties have already vested. In *West*, defendants' rights in the property vested in 1978 and G.S. 52-8 was not amended until 1981. The *West* court stated that our Supreme Court in *Mansour v. Rabil*, 277 N.C. 364, 376, 177 S.E.2d 849, 857 (1970), held that " '[a] void contract cannot be validated by a subsequent act, and the Legislature has no power to pass acts affecting vested rights.' " *Id.* at 578, 346 S.E.2d at 692. Accordingly, the *West* court held that "[t]o apply G.S. 52-8 to cure the void deed in the present case would violate this rule of law." *Id.*

Here, the void deed was not in all other respects regular because of its failure to meet any of the requirements of G.S. 52-12 and the rights of the parties vested upon the death of Mary E. Jackson on 17 August 1980. Since the amendment to G.S. 52-8 did not occur until 1981, under the rule of *West* this statute could not be retroactively applied to cure the void deed. Accordingly, we find that the trial court erred in concluding that G.S. 52-8 operated to cure the void deed in question.

Secondly, we note that G.S. 39-13.1(a) which provides that "[n]o deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November 1944, shall be declared invalid because of the failure to take the private examination of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument" does not validate the deed also. Even if this statute would operate to validate the deed for failure of the certifying officer to conduct a private examination, the deed would still be invalid because the certifying officer failed to find

whether or not the deed was unreasonable or injurious to the wife since there were two statutory requirements.

Defendants rely on *Johnson v. Burrow*, 42 N.C. App 273, 256 S.E.2d 811 (1979), to support their position that G.S. 39-13.1(a) cured the purported deed. In *Johnson*, the certifying officer conducted a private examination but failed to find that the deed was not unreasonable or injurious to the wife. There the court held that G.S. 39-13.1(b) would operate to validate the deed. In support of its holding the court distinguished the facts in *Johnson* from those in *Boone*. The *Johnson* court noted that in *Boone* there had been no attempt to comply with any section of G.S. 52-6 whereas in *Johnson* the certifying officer did in fact conduct a private examination and the officer's only omission was the failure to find that the deed was not unreasonable or injurious to the wife. The court held that the deed in *Johnson* was in all other respects regular.

We note that *Johnson* addressed the applicability of G.S. 39-13.1(b) while here we are addressing the applicability of G.S. 39-13.1(a). G.S. 39-13.1(a) operates to cure void deeds executed after November 1944 and G.S. 39-13.1(b) cures deeds executed prior to 7 February 1945 and are in all other respects regular except for failure to take the private examination. Since the deed here failed to comply with any of the requirements of G.S. 52-12, we find the facts of *Johnson* clearly distinguishable and accordingly conclude G.S. 39-13.1(a) would not validate the deed.

In *West* our court discussed the separate nature of the private examination and the requirement of a finding that the conveyance was not unreasonable or injurious to the wife. The deed in *West* was executed on 2 September 1947. The *West* court noted that when the deed was executed, G.S. 52-12 and G.S. 47-39 did not require a private examination of the wife. Accordingly, the court held that G.S. 39-13.1(a) could not cure a deed void for failure of the certifying officer to find that the conveyance was not unreasonable or injurious to the wife. G.S. 39-13.1(a)'s efficacy was limited to curing deeds where the certifying officer failed to make a private examination. We note that the theory of substantial compliance that was applied in *Johnson* could not apply in *West*. In *West* the only statutory requirement in effect was that there be a finding that the conveyance was not unreasonable or injurious to the wife and at that time there was no requirement of a private examination.

[2] Finally, in their brief defendants have argued in the alternative that summary judgment should be affirmed because G.S. 52-12 and G.S. 47-39 violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution. Defendants contend that since they asserted this equal protection argument in their answer and argued it in their trial brief and oral arguments, the trial court must have adopted their position when it allowed summary judgment for defendants.

While we note from the record that defendants did raise the constitutional issues before the trial court, from the record it appears that the trial court did not rule on the constitutional issues. Our conclusion is bolstered by the fact that the trial court ruled in defendants' favor with no statement of reasons. In *State v. Jones*, 242 N.C. 563, 89 S.E.2d 129 (1955), defendant asserted alternative grounds for quashing a bill of indictment which charged him with violating a city ordinance prohibiting him from building or installing a septic tank and nitrification or tile bed for the septic tank without prior inspection by the Pamlico County Health Department. Defendant moved to quash the indictment on the grounds that the ordinance was unconstitutional and therefore void or in the alternative quash the indictment because the offense charged was alleged in the alternative. In its ruling the trial court stated that " '[a]fter hearing the argument of the solicitor and counsel for defendant, and after considering the matter, the court is of the opinion that the motion to quash the Bill of Indictment should be allowed, and thereupon, it is ORDERED THAT THE INDICTMENT BE QUASHED.' " *Id.* at 564, 89 S.E.2d at 130. The State appealed.

In *Jones*, our Supreme Court stated that it was "unable to ascertain whether the court sustained the motion to quash on the ground that the ordinance of the Board of Health of Pamlico County is unconstitutional, or upon the ground that the offense charged in the respective counts in the bill of indictment is alleged in the alternative." *Id.* The court stated that "[t]herefore, in conformity with the well established rule of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." *Id.* After determining that the bill of indictment was sufficient, the Supreme Court overruled the motion to quash the indictment.

Here defendants state in their brief that they alleged violation of their constitutional rights in their answer, trial brief, and during oral arguments. In its order granting defendants' motion, the trial court did not mention the constitutional claim. Because there were other grounds for the trial court's decision and the record does not make it clear that the trial court based its decision on the constitutional basis asserted, we decline to rule upon the constitutional issue.

In summary, since no private examination was conducted by the certifying officer and there was no finding that the deed was unreasonable or injurious to the wife, there was no compliance with the statute justifying summary judgment in favor of the defendants. The trial court erroneously granted summary judgment in favor of defendants after applying G.S. 39-13.1(a) and G.S. 52-8 to cure an invalid deed. Accordingly, we reverse the entry of summary judgment in favor of defendants and remand this cause.

Reversed and remanded.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. HERMAN LEE AYTCHE

No. 898SC945

(Filed 1 May 1990)

1. Criminal Law § 179 (NCI4th) — pain affecting capacity to stand trial — motion for continuance denied after competency hearing

The trial court did not err in denying defendant's motion for a continuance based on his assertion that pain interfered with his ability to stand trial where the trial court conducted a competency hearing prior to trial; defense counsel offered his personal observations of the extent of defendant's pain and his inability to assist in his defense; the trial court then personally questioned defendant as to his ability to understand the proceedings, observed the physical appearance of defendant, and reviewed samples of defendant's handwriting; the court also heard testimony from defendant's jailer, to which defendant did not object, and reviewed the report of a physi-

cian who had seen defendant on the evening prior to trial; the court received information regarding a similar occurrence five months earlier at defendant's trial on an unrelated offense, and defendant did not object; and failure of the court to make specific findings and conclusions was not error because the evidence compelled the ruling made.

Am Jur 2d, Continuance § 39.

2. **Criminal Law § 66.12 (NCI3d)— identification testimony—defendant seated at defense table—no improper confrontation**

The trial court did not abuse its discretion in denying defendant's motion to be seated away from the defense table during identification testimony by the assault victim since the victim testified at both voir dire and at trial that he had seen defendant several times prior to the incident and that on the night of the incident, he spent some thirty minutes with the defendant before the assault occurred; several days after the assault the victim positively identified defendant in a photographic lineup; the victim again identified defendant as his attacker during voir dire and at trial; and there was no equivocation or hesitancy associated with the victim's identification at any time.

Am Jur 2d, Evidence § 367.

3. **Constitutional Law § 46 (NCI3d)— request for substitute counsel—denial proper**

The trial court did not err in denying defendant's request to have substitute counsel appointed prior to trial where the only reason offered by defendant for his request was that he didn't understand what his attorney was doing, didn't like the jury selected by the attorney, and wasn't able to assist his attorney in the jury selection process, but defendant expressed no desire to represent himself and offered no substantive reason for the appointment of replacement counsel.

Am Jur 2d, Criminal Law § 982.

4. **Jury § 7.14 (NCI3d)— jury selection—no racial discrimination shown**

Where only one peremptory challenge was exercised for a person of the same race as defendant, and that person was excused because she had been convicted of a felony, defendant

failed to make a prima facie showing of racial discrimination in the prosecutor's use of peremptory challenges.

Am Jur 2d, Jury § 235.

5. **Assault and Battery § 23 (NCI4th); Mayhem § 1 (NCI3d)—assault with deadly weapon inflicting serious injury—maiming—two distinct offenses**

Defendant could properly be convicted of both assault with a deadly weapon inflicting serious injury and maiming, since each offense contained distinct elements not found in the other.

Am Jur 2d, Assault and Battery § 57; Mayhem and Related Offenses §§ 1-5.

APPEAL by defendant from judgment entered 3 May 1989 in LENOIR County Superior Court by *Judge Cy Anthony Grant, Sr.* Heard in the Court of Appeals 15 February 1990.

At trial, the evidence for the State tended to show the following: On the evening of 6 October 1988 Hildred Perry, age 64, was at home watching television with Joette Aytche. At some point they were joined by a woman known only as Pam. Approximately ten minutes later Joette left. Shortly thereafter Pam and Perry were joined by the defendant. After talking and watching television together for approximately thirty minutes, defendant and Pam prepared to leave. At that point defendant hit Perry with a 16-ounce soft drink bottle, injuring his eye. Defendant continued beating Perry with a bottle or some other object while demanding money from him. Pam also removed Perry's trousers, which they took with them. Before leaving Perry's house, defendant took $1.40 and threatened to kill Perry and his family if they came after him. Due to the extent of the injury, Perry's eye had to be surgically removed and he now wears a false eye.

Defendant did not offer any evidence. The jury found him guilty of robbery with a dangerous weapon, assault with a deadly weapon inflicting serious injury, and malicious maiming. Judgments were entered sentencing him to prison terms of twenty-five years, fourteen years, and ten years, the fourteen and ten-year sentences to run concurrently at the conclusion of the twenty-five-year term. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

T. Dewey Mooring, Jr. for defendant-appellant.

WELLS, Judge.

[1] Defendant first contends the court erred in denying his motion for a continuance based on defendant's assertion that pain interfered with his ability to stand trial. This assignment in effect challenges the trial court's ruling that defendant was competent to stand trial. Defendant contends pain from a previous back injury rendered him incapable to proceed, pursuant to the provisions of N.C. Gen. Stat. § 15A-1001 (1988).

Prior to trial defense counsel filed a written motion for "evaluation of defendant." In this motion, counsel requested that defendant be examined and treated for back injuries and pain in order to determine if defendant's capacity to stand trial was affected by this condition or, in the alternative, if this condition could not be confirmed, that defendant be committed to a state mental health facility for observation and treatment in order to determine his capacity to proceed. In response to defendant's motion the court held a pre-trial hearing pursuant to N.C. Gen. Stat. § 15A-1002 (1988 & Supp. 1989) to determine defendant's capacity to proceed. After hearing evidence, the trial court determined that defendant was competent to stand trial and that his pain would not interfere with his ability to assist his counsel. Accordingly, the trial court denied the motion for evaluation.

The determination of a defendant's capacity to proceed in North Carolina is governed by G.S. §§ 15A-1001-1002. The objective of the statute is to ensure that a defendant will not be tried or punished while mentally incapacitated. G.S. § 15A-1002(b)(1) authorizes a court to appoint medical experts to examine the state of defendant's mental health; however, it does not authorize the court to appoint a medical examiner for a general physical exam or to see if certain physical problems exist. G.S. § 15A-1002 in pertinent part provides:

> (b) When the capacity of the defendant to proceed is questioned, the court:
>
> (1) *May* appoint one or more impartial medical experts to examine the defendant and return a written report describ-

ing the present state of the defendant's *mental health.* . . . (Emphasis supplied.)

(2) *May* commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. . . . (Emphasis supplied.)

(3) *Must* hold a hearing to determine the defendant's capacity to proceed. . . . (Emphasis supplied.)[1]

It is well settled that the decision whether to grant a motion for appointment of medical experts to determine the state of a defendant's mental health or for commitment to a state mental health facility for psychiatric examination to determine competency of a defendant to stand trial is discretionary with the trial court. *State v. Woods*, 293 N.C. 58, 235 S.E.2d 47 (1977); *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983). However, a competency hearing is mandatory whenever a motion questioning defendant's capacity to stand trial is made. *State v. Silvers*, 323 N.C. 646, 374 S.E.2d 858 (1989).

In this case the mandatory competency hearing was held prior to trial on 2 May 1989. In support of the motion for evaluation, defense counsel offered his personal observations of the extent of defendant's pain and defendant's inability to assist in his defense. After hearing from defense counsel, the court personally questioned defendant as to his ability to understand the proceedings; observed the physical appearance of defendant; and reviewed samples of defendant's handwriting. The court also heard testimony from defendant's jailer and reviewed the report of a physician who had seen defendant on the evening prior to trial. After considering this information, the court concluded that defendant was competent to stand trial and denied the motion for evaluation.

The defendant also contends that the trial court committed error during the competency hearing by considering testimony from

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1. G.S. § 15A-1002(b) was amended effective 1 October 1989. While we rely on the statute as it was written at the time this cause of action arose, we note for the record that the amendment rewriting subsection (b) did not change the discretionary role of the court in deciding whether to appoint medical experts to examine defendant or to commit defendant to a state mental health facility for observation, treatment and diagnosis. Furthermore, a competency hearing remains mandatory whenever the issue of defendant's capacity to stand trial is raised.

defendant's jailer; by receiving information regarding a similar occurrence five months earlier at defendant's trial on an unrelated offense; and for failing to make "formal findings of fact and conclusions of law." The record reveals that after summarizing the evidence presented at the competency hearing, the trial court made the following statement: "Based upon the foregoing the Court finds that the Defendant is competent to stand trial; that the Defendant's pain will not interfere with him assisting his counsel in trying his case. As a result the court will deny the defendant's motion." This "finding" was more precisely a conclusion of law which was adequately, if implicitly, supported by the facts. While the better practice is for the trial court to make specific findings and conclusions when ruling on a motion under G.S. § 15A-1002(b), failure to do so is not error where the evidence compels the ruling made. *State v. Gates, supra.* Finally, defendant did not object to either the comments by the jailer or to the information concerning the similar occurrence; therefore, they are not preserved for appellate review.

The court's conclusion regarding defendant's capacity is binding on appeal if supported by the evidence. *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981). Despite the fact that defendant may have been experiencing some back pain, the record contains sufficient evidence to support the trial court's conclusion that he was competent to stand trial. This assignment is overruled.

[2] Defendant next assigns error to the trial court's denial of his motion to be seated elsewhere in the courtroom during identification testimony by the victim. Defendant contends that any doubts as to the identity of the person to be identified are erased when a witness sees a defendant seated at the defense table.

The conduct of a trial has historically been the exclusive province of the trial court. Unless there is a controlling statutory provision or an established rule which governs the situation, all matters relating to the orderly conduct of the trial, or which involve the proper administration of justice in the court, are within the trial court's discretion. *See, e.g., State v. Rhodes*, 290 N.C. 16, 224 S.E.2d 631 (1976).

While defendant's argument raises a provocative aspect of some in-court identifications, based on the record in this case we cannot say that the trial court in any way abused its discretion in denying defendant's motion to be seated away from the defense table. The

victim testified at both *voir dire* and at trial that he had seen the defendant several times prior to the incident and that on the night of the incident he spent some thirty minutes with the defendant before the assault occurred. Several days after the assault the victim positively identified defendant in a photographic line-up. The victim again identified defendant as his attacker during *voir dire* and at trial. There was no equivocation or hesitancy associated with the victim's identification at any time. This assignment of error is overruled.

Defendant also contends that the victim's in-court identification was "inherently incredible" and therefore should have been suppressed. For the reasons stated above this assignment of error is also overruled.

[3] Defendant's fourth assignment of error concerns the trial court's denial of his request to have substitute counsel appointed prior to trial. The only reason offered by defendant in support of this request is his statement to the court after the jury was selected. At that time defendant told the court he was dissatisfied with his attorney because "[he didn't] understand what [his] attorney [was] doing . . . and he's selected a jury that I wasn't satisfied with because I was not able to give him assistance in selecting this jury." In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), and cases cited therein. Defendant does not have the right to insist new counsel be appointed simply because he has become dissatisfied with his services. *Id.* Defendant expressed no desire to represent himself nor did he offer any substantive reason for the appointment of replacement counsel. This assignment is overruled.

[4] Defendant's next assignment of error concerns whether the prosecutor used peremptory jury challenges in a racially discriminatory manner. Following jury selection, defendant requested that the State make a showing on the challenge of the jurors. In his brief, defendant, who is black, directs his argument to one black female potential juror who was ultimately excused by the State. The record does not disclose the final make-up of the jury with regard to race.

A defendant may establish a *prima facie* case of purposeful racial discrimination in the selection of the petit jury by the prose-

cutor's use of peremptory challenges by making three showings: (1) that defendant is a member of a cognizable racial group; (2) that the prosecutor used the challenges to exclude members of defendant's race; and (3) that these and other relevant facts and circumstances as they appear in the record raise an inference of racially discriminatory intent on the part of the State. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). *See also State v. Attmore*, 92 N.C. App. 385, 374 S.E.2d 649 (1988), *disc. rev. denied*, 324 N.C. 248, 377 S.E.2d 757 (1989); *citing State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279 (1987), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987). Only if this *prima facie* showing is made does the burden shift to the State to make a showing of nondiscriminatory intent. *Batson, supra.*

When requested by defendant to explain the reasons for the State's peremptory challenges, the prosecutor did so. The State excused three jurors, two white males and a black female. The black female was actually selected to serve on the jury; however, prior to the jury being impaneled, she advised the court that she had not responded to a question posed by the State. *Voir dire* was reopened pursuant to N.C. Gen. Stat. § 15A-1214 (1988) and the juror admitted she had been convicted of involuntary manslaughter. In light of that information, the State excused her. Only one peremptory challenge was exercised for a person of the same race as defendant, and that person was excused because she had been convicted of a felony. On these facts defendant has failed to make a *prima facie* showing of racial discrimination. Accordingly, this assignment of error is overruled.

[5] In his remaining assignment of error defendant ostensibly argues that the trial court erred in denying his motion to dismiss at the close of all the evidence. While initially contending that all three charges against him should have been dismissed at the close of the evidence, defendant offers no reason, argument or authority for his exception to the charge of armed robbery. His exception as to that charge is therefore deemed abandoned pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure. Defendant's actual argument on appeal is that the evidence presented could not support both the offense of assault with a deadly weapon and the offense of malicious maiming. In effect, defendant makes a double jeopardy argument rather than a sufficiency of the evidence argument. He maintains that the elements of maiming are included in the crime of assault with a deadly weapon with intent to kill

and inflicting serious injury and that the facts in this case can support only one charge.

For the record we note that defendant was charged with assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(b) (1986) and not with assault with a deadly weapon with intent to kill and inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32(a) (1986). The elements of a charge under G.S. § 14-32(b) are (1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death. The elements of malicious maiming relevant in this case are (1) with malice aforethought (2) to unlawfully put out an eye of another person (3) with intent to murder, maim or disfigure. N.C. Gen. Stat. § 14-30 (1986). Clearly, these are separate crimes. The elements of malice aforethought and intent to murder, maim or disfigure, necessary elements of G.S. § 14-30, are not elements of G.S. § 14-32(b). Additionally, use of a deadly weapon is required for a violation of G.S. § 14-32(b) but not for G.S. § 14-30. Because each offense contains distinct elements not found in the other, defendant was properly convicted of and punished for each offense. This assignment is overruled.

We hold that defendant received a fair trial, free from prejudicial error.

No error.

Judges COZORT and LEWIS concur.

CARLTON RAY TURNER, EMPLOYEE-PLAINTIFF v. CECO CORPORATION, EMPLOYER-DEFENDANT, AND COMMERCIAL UNION INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8910IC1073

(Filed 1 May 1990)

Master and Servant § 89.4 (NCI3d)— workers' compensation— recovery from third party tortfeasor—lifetime monthly benefits not future benefits

Lifetime monthly payments from a third party tortfeasor pursuant to the settlement of a third party action were proceeds of the settlement and not future benefits; therefore,

defendants were not entitled to a lien in the monthly payments since they had agreed to waive "any lien which they had as to the proceeds from this settlement and recovery." N.C.G.S. § 97-10.2.

Am Jur 2d, Workmen's Compensation § 437.

APPEAL by defendants from opinion and award entered 8 June 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 April 1990.

The parties have stipulated to the following pertinent facts. Plaintiff was injured on 16 August 1984, while on the job and employed by defendant CECO Corporation. As a result of the accident, plaintiff is permanently paralyzed and permanently totally disabled. The parties are bound by the provisions of the North Carolina Workers' Compensation Act, and defendants have agreed to pay compensation, provide medical treatment, and are further obligated under G.S. § 97-25 to pay plaintiff's medical expenses incurred after 25 July 1988.

Pursuant to G.S. § 97-10.2, plaintiff and his wife brought an action against a third party, Louisville Ladder Division of Emerson Electric Company ("Emerson Electric"), seeking recovery for the injuries sustained in the 16 August 1984 accident. That action was filed in the United States District Court for the Western District of Kentucky. Defendants duly asserted their lien in the third party action in accordance with G.S. § 97-10.2. Although not parties to the third party action, defendants' lien interests in that action were presented by counsel.

Prior to trial of the third party action, plaintiff, his wife, and Emerson Electric entered into a settlement agreement in which plaintiff agreed, *inter alia*, to release Emerson Electric from all actions arising out of the 16 August 1984 accident. As consideration for plaintiff's release, Emerson Electric agreed, *inter alia*, to pay plaintiff and his attorneys the lump sum of $100,000.00 and further agreed to pay plaintiff, individually, the sum of $1,542.00 per month for the rest of plaintiff's life. Defendants consented to this settlement.

The settlement agreement was submitted to the federal district court for its approval. Following those proceedings, at which defendants were represented by counsel, Judge Thomas A. Ballan-

tine, Jr. entered an "Order Dismissing Settled" on 11 October 1988 which states in pertinent part:

> The parties further agree and the Court finds that at the time the settlement agreement was announced to the Court the plaintiff's employer and worker's compensation carrier agreed to waive any lien which they had as to the proceeds from this settlement and recovery. In consideration of said waiver by the employer and worker's compensation carrier, the plaintiffs agreed to waive their rights to pursue two disputed claims against the employer and the worker's compensation carrier. The first claim being an order by the North Carolina Industrial Commission requiring the employer and the worker's compensation carrier to furnish a house for the plaintiffs. The second claim being medical bills incurred to date by plaintiff Carlton Turner at the Medical College of Virginia in Richmond, Virginia, in an amount of approximately $90,000.
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> . . .
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> As a part of the agreement stated to the Court, Carlton Turner has not released in any way any claims against the employer and worker's compensation carrier for future compensation benefits and medical expenses . . . and the employer and worker's compensation carrier waived no rights concerning said benefits and expenses.

Following the settlement of the third party action, defendants filed their petition in the Industrial Commission seeking the Commission's approval of the third party compromise settlement and a determination that they were entitled to a lien in, or credit against, the $1,542.00 lifetime monthly payments payable to plaintiff by Emerson Electric on the grounds that such payments were future benefits. By order of 27 January 1989, the deputy commissioner approved the third party settlement, but denied defendants' petition for a lien or credit as to the monthly payments, concluding that defendants had waived all rights of liens against proceeds and recovery from the settlement and that the monthly payments were proceeds and recovery from the settlement and not future benefit payments. Defendants were also ordered to pay costs.

Defendants appealed to the full Commission. By its opinion and award entered 8 June 1989 affirming the order of the deputy commissioner, the Commission concluded that defendants inten-

tionally, and for adequate consideration, waived their lien pursuant to G.S. § 97-10.2 as to all proceeds of the settlement with Emerson Electric, whenever payable. The Commission again ordered defendants to pay costs.

Defendants appeal.

Fields & Cooper, by Roy A. Cooper, III, for plaintiff-appellee.

Smith, Helms, Mullis & Moore, by Vance Barron, Jr. and Jeanne Rehberg, for defendant-appellants.

WELLS, Judge.

An appeal from a decision of the Industrial Commission presents but two questions for review: (1) whether the evidence before the Commission supports its findings of fact and (2) whether the facts found sustain the Commission's conclusions of law. *McBride v. Peony Corp.*, 84 N.C. App. 221, 352 S.E.2d 236 (1987) (and cases cited therein). The parties stipulated to the facts in the proceedings held in the Commission, hence those facts are binding on appeal. *See Long v. Morganton Dyeing & Finishing Co.*, 321 N.C. 82, 361 S.E.2d 575 (1987). Thus, the sole issue before us is whether the stipulated facts support the Commission's conclusions of law.

Defendants bring forward five of their six assignments of error in a single argument challenging the denial of their petition for a lien in the monthly payments of $1,542.00 to be paid to plaintiff by Emerson Electric, the third party tortfeasor, pursuant to the settlement of that third party action. Defendants do not question the validity of either the settlement agreement resolving the third party action in Kentucky or their collateral agreement of waiver with plaintiff as reflected in the "Order Dismissing Settled." Rather, they contend that the terms of the agreements drew a dividing line through their lien such that defendants waived any lien which they had prior to the date of the settlement, but expressly reserved any lien which might arise in future benefits received by plaintiff after the date of the settlement. Defendants argue that because plaintiff is to receive the monthly payments after the date of the settlement agreement, such payments are "future benefits," and therefore they are entitled either to a lien therein equal to the amount of the monthly payments or to suspend or reduce their payment of compensation to plaintiff until the settlement proceeds are exhausted.

Plaintiff concedes that defendants did not waive any rights as to their statutory lien in future benefits. Plaintiff, however, vigorously contends that the lifetime monthly payments are proceeds of the third party settlement and that defendants therefore expressly waived their rights to assert any lien therein. We agree.

G.S. § 97-10.2 governs the respective rights and interests of an employee-beneficiary under the Workers' Compensation Act, the employer, and the employer's insurance carrier in cases where a common law action against a third party is brought. N.C. Gen. Stat. § 97-10.2(a) (1985). That statute provides in pertinent part:

> (h) In any proceeding against or settlement with the third party, every party to the claim for [workers'] compensation shall have a lien to the extent of his [statutory] interest . . . upon any payment made by the third party by reason of such injury or death, whether paid in settlement, in satisfaction of judgment, as consideration for covenant not to sue, or otherwise and such lien may be enforced against any person receiving such funds.
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> . . .
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> (j) . . . in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the . . . presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tort-feasor. If the matter is pending in the federal district court such determination may be made by the federal district court judge of that division.

An agreement, approved by the Commission and otherwise valid, between the parties to a workers' compensation claim as to the distribution between them of proceeds recovered from a third party action is binding. *See Swaney v. Construction Co.*, 5 N.C. App. 520, 169 S.E.2d 90 (1969); N.C. Gen. Stat. § 97-17.

The recital of consideration set forth in the settlement agreement between plaintiff and Emerson Electric states in pertinent part:

(a) The sum of $1,542.00 . . . shall be payable to Carlton Turner on the first day of each and every month, commencing October 1, 1988, and continuing for the life of Carlton Ray Turner.

The settlement agreement further states:

4. The Releasors agree and acknowledge payment of the sums specified in this . . . Agreement are accepted as a *full and complete compromise* of matters involving disputed issues[.] (Emphasis added.)

By the explicit terms of the agreement between plaintiff and Emerson Electric—to the making of which defendants have stipulated their consent—the lifetime monthly payments from Emerson Electric to plaintiff are plainly proceeds of the structured settlement reached in that third party action. The federal district court, after reviewing the settlement agreement and hearing extensive argument from all parties, including counsel for defendants, found that defendants had "agreed to waive any lien which they had *as to the proceeds from this settlement and recovery.*" (Emphasis added.) Defendants' attempt to recharacterize the monthly payments as "future benefits" solely because these payments are to be received by plaintiff after the date of the settlement directly contradicts the express terms of both the settlement agreement and the "Order Dismissing Settled."

We conclude that the facts fully support the Commission's determination that defendants, by virtue of their waiver, are not entitled to a lien in the lifetime monthly payments due plaintiff from the third party action. The assignments of error subsumed under this issue are therefore overruled.

By their remaining assignment of error, defendants challenge that portion of the Commission's order requiring them to pay the costs associated with the hearing of this petition. We have carefully reviewed the record, discern no basis therein to sustain this assignment of error, and therefore we determine it to be without merit.

For the reasons stated, the opinion and award entered by the Commission is

Affirmed.

Judges EAGLES and GREENE concur.

INGLES MARKETS, INC., A NORTH CAROLINA CORPORATION, PETITIONER-APPELLANT v. TOWN OF BLACK MOUNTAIN, A MUNICIPAL CORPORATION, W. MICHAEL BEGLEY, MAYOR OF THE TOWN OF BLACK MOUNTAIN, BILL WHITE, JR., MARTHA GALLION, TOM MARETT, J. RICHARD HUDSON, LARRY B. HARRIS, MEMBERS OF THE BOARD OF ALDERMEN OF THE TOWN OF BLACK MOUNTAIN, RESPONDENTS-APPELLEES

No. 8928SC873

(Filed 1 May 1990)

Municipal Corporations § 2.4 (NCI3d) — annexation ordinance changed after judicial review — new petition required for further judicial review

In order to obtain further review of an annexation ordinance after infirmities have been corrected by the municipality pursuant to an order of remand, whether such order of remand addresses all or merely some of the issues raised in the initial petition, appellate jurisdiction in the superior court must be perfected anew by filing a separate petition in accordance with the provisions of N.C.G.S. § 160A-38(a).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 64, 79.

APPEAL by petitioner from orders entered 3 May and 8 May 1989 in BUNCOMBE County Superior Court by *Judge Charles C. Lamm*. Heard in the Court of Appeals 6 March 1990.

On 26 January 1988 respondent Town of Black Mountain, having a population of less than 5,000, passed an ordinance of annexation ("1988 ordinance") affecting, in pertinent part, property owned by petitioner. Pursuant to G.S. § 160A-38, petitioner duly appealed from this action of the Town to the Buncombe County Superior Court, alleging that the 1988 ordinance was invalid due to the presence of numerous defects under G.S. § 160A-33, *et seq.* Thereafter, petitioner moved for summary judgment grounded on the failure of respondent to make specific findings that the area to be annexed satisfied the requirements of G.S. § 160A-37(e)(1), and therefore the 1988 ordinance was facially insufficient to show substantial compliance with the annexation provisions of chapter 160A. The court granted petitioner's motion and remanded the 1988 ordinance to respondent Town to amend the ordinance to include the requisite findings. The court also ordered the effective

date of the 1988 ordinance stayed until the date of the final judgment in this matter.

Pursuant to the order of remand, the Town approved an amended annexation report and, on 28 February 1989, adopted an ordinance ("1989 ordinance") amending the 1988 ordinance. Petitioner did not appeal from this action of the Town. Thereafter, the Town moved in the superior court that the stay of the operation of the 1988 ordinance be lifted and the court file in that case be closed. By order of 3 May 1989, the court granted the Town's motion, concluding that since no appeal was taken from the 28 February action of the Town, the 1989 ordinance became effective as of that date, and the superior court lacked jurisdiction to consider any further question regarding the validity of either the 1988 or 1989 ordinances. By order of 8 May 1989, the court, for the same reasons, denied petitioner's motion for stay pending appeal.

From these orders, petitioner appeals.

Law firm of William C. Frue, Jr., by Michael C. Frue, John C. Frue and William C. Frue, Jr., for petitioner-appellant.

Adams, Hendon, Carson, Crow & Saenger, P.A., by Martin K. Reidinger and S. J. Crow; and Ronald E. Sneed, for respondent-appellees.

WELLS, Judge.

By its first assignment of error, petitioner challenges the court's granting of respondent's motion to lift the stay and close the court file in this case. Petitioner's argument in support of this assignment of error, reduced to its essentials, is that no appeal was required to be taken from the action adopting the 1989 ordinance because the 1988 ordinance was remanded for the limited purpose of including specific findings of fact that the area to be annexed is developed for urban purposes as required by G.S. § 160A-37(e)(1), and therefore the order of remand did not constitute a determination of the merits of the petition regarding the validity of the 1988 ordinance.

The Town contends that the order of remand disposed of the appeal from the 1988 ordinance in its entirety and that petitioner was therefore required to appeal the adoption of the 1989 ordinance in order to obtain review thereof. The Town vigorously argues that the effect of petitioner's position is to subvert the requirements

of the annexation statute by allowing piecemeal review of limited issues and thereby prolonging challenges to annexation.

Thus, the dispositive question presented is whether the superior court's entry of its order of remand divested that court of appellate jurisdiction to conduct further review of those aspects of the petition brought forward, but not addressed by the order, such that petitioner was required to appeal anew from the action of the Town taken pursuant to remand in order to obtain the right to a review of the 1989 ordinance in the superior court. We answer this question in the affirmative.

An appeal from the passage of an annexation ordinance by a municipality having a population of less than 5,000 must be taken within 30 days following such passage by filing a petition in the superior court of the county in which the municipality is located. N.C. Gen. Stat. § 160A-38(a) (1987). Compliance with this provision is a condition precedent to perfecting appellate jurisdiction in the superior court for the review of an annexation ordinance. *See Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967). Once appellate jurisdiction in the superior court is perfected, review "shall be expeditious and without unnecessary delays." N.C. Gen. Stat. § 160A-38(f).

The action which the superior court may take pursuant to its review of an annexation ordinance is limited. Under G.S. § 160A-38(g), the court must either affirm the action of the municipal governing board without change, or remand for one or more of the following:

> (1) . . . for further proceedings if procedural irregularities are found to have materially prejudiced the substantive rights of any of the petitioners.
>
> (2) . . . for amendment of the boundaries to conform to the provisions of G.S. 160A-36 if it finds that the provisions of G.S. 160A-36 have not been met[.]
>
> (3) . . . for amendment of the plans for providing services to the end that the provisions of G.S. 160A-35 are satisfied.

In the event of remand, a municipality must take action in accordance with the court's instructions within three months from receipt thereof or the annexation proceeding "shall be deemed null and void." *Id.*

G.S. § 160A-38(i)[1] further provides:

> If part or all of the area annexed under the terms of an annexation ordinance is the subject of an appeal to the superior court, Court of Appeals or Supreme Court on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the [appropriate court], *or the date the municipal governing board completes action to make the ordinance conform to the court's instructions in the event of remand.* (Emphasis added.)

In construing the identical provisions of G.S. § 160A-50(i) (applying to appeals from the passage of an ordinance of annexation by municipalities having a population of greater than 5,000), our Supreme Court has held that the effective date of an ordinance adopted pursuant to an order of remand as set forth in the statute is "subject to *further* appeal to the superior court." *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E.2d 265 (1980). (Emphasis added.)

G.S. § 160A-38(i) and our Supreme Court's holding in *Moody* make it clear that the effective date of an ordinance adopted pursuant to the superior court's order of remand is neither postponed nor amended absent *further appeal*, which must be taken within the required 30 days; *i.e.*, the ordinance becomes an accomplished fact, subject only to further appeal. Obviously, such can be the case only if the superior court's entry of the order of remand fully concludes its review of the petition, thereby divesting it of jurisdiction to entertain further proceedings on the merits thereof. This remains true whether the order of remand is based on one or all of the alternative grounds set forth in G.S. § 160A-38(g). This result is consonant with the well established rule that a decision on appeal should be limited to ruling upon only those issues necessary to a proper disposition of the case. *See Todd v. White*, 246 N.C. 59, 97 S.E.2d 439 (1957); 5 Am. Jur. 2d, Appeal and Error § 760.

Most importantly, to hold that the superior court retains jurisdiction of the cause under G.S. § 160A-38 whenever it enters an order of remand that addresses less than all of the issues brought

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1. We note that the amendments to G.S. § 160A-38(i), effective 1 January 1990, are neither applicable to the present case nor germane to the rationale upon which our holding is based.

forward by a petitioner would create a significant danger of fragmentation and delay by allowing limited issues to be excised from the case, passed upon, and remanded for further municipal action, leaving the remainder of the case in appellate limbo in the superior court. This would plainly conflict with the requirement of G.S. § 160A-38(f) that review of annexation ordinances "shall be expeditious and without unnecessary delays."

We therefore hold that in order to obtain further review of an annexation ordinance after infirmities have been corrected by the municipality pursuant to an order of remand, whether such order of remand addresses all or merely some of the issues raised in the initial petition, appellate jurisdiction in the superior court must be perfected anew by filing a separate petition in accordance with the provisions of G.S. § 160A-38(a).

In the present case, we hold that the superior court's order of remand fully disposed of petitioner's appeal from the 1988 ordinance. Additionally, it is plain that the portion of that order staying the ordinance until the date of final judgment in this matter is subject to the provisions of G.S. § 160A-38(i) and cannot alter the jurisdictional perimeters established by that statute. Consequently, by failing to take further appeal from the 1989 ordinance adopted pursuant to the order of remand, the ordinance of annexation became an accomplished fact, effective 28 February 1989. The superior court thus correctly concluded that it lacked jurisdiction to entertain further proceedings on the merits of the petition.

By its remaining assignment of error, petitioner challenges the court's order denying its motion to stay operation of the ordinance pending appeal. Because of our disposition of petitioner's first assignment of error, this question has become moot and we decline to consider it. *Wells v. French Broad Elec. Mem. Corp.*, 68 N.C. App. 410, 315 S.E.2d 316, *disc. rev. denied*, 312 N.C. 498, 322 S.E.2d 565 (1984) (*citing Rice v. Rigsby*, 259 N.C. 506, 131 S.E.2d 469 (1963)).

For the reasons stated, the orders entered below are

Affirmed.

Judges COZORT and LEWIS concur.

THEO BROWN, PLAINTIFF v. HOWARD T. GREENE AND WIFE, THELMA BRADSHAW GREENE, DEFENDANTS

No. 8925SC583

(Filed 1 May 1990)

Rules of Civil Procedure § 56.1 (NCI3d)— summary judgment motion—plaintiff given insufficient time to prepare response

Where defendant filed his motion for summary judgment two days after he filed his answer, the trial court erred in granting defendant's motion for summary judgment two weeks later despite plaintiff's request for a continuance in order to conduct discovery, since adequate opportunity for discovery was thwarted by the entry of the judgment.

Am Jur 2d, Summary Judgment §§ 20, 21.

APPEAL by plaintiff from judgment entered 27 March 1989 by *Judge Marvin K. Gray* in CALDWELL County Superior Court. Heard in the Court of Appeals 22 December 1989.

Ted S. Douglas for plaintiff-appellant.

Patton, Starnes, Thompson, Aycock & Teele, P.A., by Robert L. Thompson, for defendant-appellees.

ORR, Judge.

On 20 January 1989, plaintiff filed this civil action against defendants seeking money damages for injuries which resulted when she was struck by an automobile driven by defendant Thelma Bradshaw Greene. Plaintiff alleges that defendant failed to keep a proper lookout within the area, and failed to maintain proper control of the vehicle. Plaintiff further alleges that defendant negligently allowed the vehicle to leave the public vehicular way and strike her.

The complaint also alleges that the automobile which struck her was owned by Thelma Greene and her husband and maintained for the general use of their family, and thus she is entitled to recover from both defendants for their joint and several liability. Additionally, the complaint alleges that Thelma Greene was on an errand for her husband at the time of the accident; therefore, liability may be imposed jointly and severally on that basis as well.

On 13 February 1989, defendant Howard T. Greene filed a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Attached to that motion was an affidavit from his wife, along with a copy of the sales contract on her automobile and a copy of her vehicle registration card. Plaintiff filed a reply to defendant's motion. After defendant Thelma Greene filed an answer to plaintiff's complaint, the court heard defendant Howard Greene's motion to dismiss. At that time, the court deferred judgment on it and subsequently converted the motion into one for summary judgment.

Thereafter, defendant Howard Greene filed an answer on 14 March 1989. He then filed a motion for summary judgment on 16 March 1989. This motion also had an affidavit by defendant's wife and her vehicle registration card attached to it. Plaintiff likewise filed a reply to defendant Howard Greene's motion for summary judgment. In her reply, plaintiff stated that adequate discovery had not been conducted. Plaintiff moved the court for a continuance and at least 120 days to complete discovery.

On 27 March 1989, the court heard defendant's motion for summary judgment and granted the same and denied plaintiff's motion to continue. From that order, plaintiff now appeals.

The single issue which plaintiff has raised is whether the trial court erred in granting defendant Howard Greene's motion for summary judgment.

Plaintiff argues that the pleadings and the evidence raise a genuine question of material fact regarding whether Thelma Greene was operating an automobile for her and her husband's mutual benefit when she struck plaintiff while allegedly on an errand for her husband. Therefore, summary judgment should not have been entered. Furthermore, because summary judgment was entered before she had an opportunity to conduct discovery, plaintiff argues that judgment was, at the very least, entered prematurely.

Defendant Howard Greene makes several arguments. First, he contends that the answers that he and his wife filed, his wife's affidavit, and the automobile registration card are sufficient proof that he is not the owner of the vehicle which struck plaintiff. Therefore, plaintiff's theory based upon co-ownership of the automobile was properly dismissed. Second, he contends that this same evidence, and the absence of an allegation that he was operating the vehicle when it struck plaintiff, is sufficient evidence to negate

plaintiff's claim under the family purpose doctrine. Defendant argues that under that doctrine only the owner of the vehicle or the person with ultimate possession and control of the vehicle can be held liable for its negligent operation by another person.

Defendant next contends that plaintiff's pleadings and evidence did not support a claim under a joint benefit theory; therefore, that claim was properly dismissed. Finally, defendant contends that the mailbox to which defendant Thelma Greene had gone existed solely for her benefit and he received no mail at that address. Consequently, his wife could not have been at the post office picking up mail at his direction.

The often stated rule with regard to summary judgment is that when the pleadings, interrogatory answers, affidavits or other materials do not contain a genuine question of material fact for the court, and at least one party is entitled to a favorable judgment, the summary judgment motion should be granted. *Warren v. Rosso and Mastracco, Inc.*, 78 N.C. App. 163, 336 S.E.2d 699 (1985). N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983).

Here, no interrogatories or other discovery materials were ever served; therefore, none were introduced in support of or in opposition to this motion. Defendant Howard Greene filed his answer on 14 March 1989. Two days later, he filed a motion for summary judgment. That motion was heard and granted by the court less than two full weeks later despite plaintiff's request for a continuance and at least 120 days in order to conduct discovery.

The general purpose of discovery is to assist in the disclosure, prior to trial, of any unprivileged information or materials which are relevant to the lawsuit. *Willoughby v. Wilkins*, 65 N.C. App. 626, 310 S.E.2d 90 (1983), *disc. review denied*, 310 N.C. 631, 315 S.E.2d 698 (1984). Such exchanges are to help the parties narrow and sharpen the basic issues and facts prior to trial. On the other hand, summary judgment is designed to eliminate formal trials where only questions of law are involved, as the facts have not been disputed. *Highlands Township Taxpayers Assoc. v. Highlands Township Taxpayers Assoc., Inc.*, 62 N.C. App. 537, 303 S.E.2d 234 (1983). However, this is a drastic remedy which should be used cautiously, and never as a tool to deprive any party of a trial for genuinely disputed issues. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

In the case of *Florida National Bank v. Satterfield*, 90 N.C. App. 105, 367 S.E.2d 359 (1988), the appellant argued that after the trial court allowed him to amend his answer, the court should not have granted the appellee's motion for summary judgment. Rather, the court should have either denied the motion for summary judgment or it should have ordered a continuance to allow him time to investigate the facts. *Id.* at 109, 367 S.E.2d at 361.

There we stated that:

> Rule 56(f) allows the trial court to deny a motion for summary judgment or order a continuance to permit additional discovery, if the party opposing the motion cannot present facts essential to justify his opposition . . . . Although the Rule should be liberally applied to allow sufficient time to complete discovery, . . . the decision to grant a continuance rests in the trial court's discretion.

Id. (citations omitted).

In that case we concluded that the trial court had not abused its discretion in failing to order a continuance or granting appellee's motion for summary judgment because appellee had waited almost 14 months after the complaint was filed before filing the summary judgment motion and the trial court had waited nearly two months before ruling on that motion. *Id.* We noted that defendant had no outstanding discovery proceedings which had not been concluded. *Id.* at 110, 367 S.E.2d at 361. The court found that the appellant had ample time to conduct discovery.

In the case *sub judice*, adequate opportunity for discovery was thwarted by the entry of judgment and the trial court's refusal to allow plaintiff's motion for a continuance and time to conduct discovery. Defendant Howard Greene filed his motion for summary judgment immediately after he filed his answer and judgment was entered less than two weeks after the filing of that answer. Considering the theories under which plaintiff was proceeding, we hold that the trial court abused its discretion in granting defendant's motion for summary judgment without giving plaintiff ample time to conduct discovery and present facts essential to justify her opposition to that motion. *Florida National Bank* at 109, 367 S.E.2d at 361.

Accordingly, we reverse the trial court's entry of summary judgment and remand this matter for further proceedings consistent with our decision herein.

Reversed and remanded.

Judges PHILLIPS and EAGLES concur.

HELEN BARNES AND WILLIAM G. BARNES, JR., PLAINTIFFS-APPELLANTS v. NORMAN L. HARDY, JR., ELLA FLEMING HARDY, AND UNITED STATES FIDELITY AND GUARANTY COMPANY, DEFENDANTS-APPELLEES

No. 893SC678

(Filed 1 May 1990)

Insurance § 110.1 (NCI3d); Interest § 2 (NCI3d)— prejudgment interest—award resulting in amount exceeding policy limits—insurer not liable for prejudgment interest

An automobile liability insurer was not liable for prejudgment interest when such payment would result in a total amount which exceeded the stated policy limits, and N.C.G.S. § 24-5(b) did not apply, since it provides for recovery of interest in instances where there has been both a judgment as to liability and a determination of appropriate compensatory damages, but this matter was settled and not tried.

Am Jur 2d, Automobile Insurance § 428; Insurance § 1555.

Judge COZORT dissenting.

APPEAL by plaintiffs from judgment entered 30 January 1989 by *Judge Herbert O. Phillips, III* in PITT County Superior Court. Heard in the Court of Appeals 6 December 1989.

In January of 1987, plaintiff Helen Barnes was badly injured as a result of an automobile collision she had with a vehicle owned and operated by defendants Norman and Ella Hardy. At the time of the collision, Mr. and Mrs. Hardy were insured by United States Fidelity & Guaranty Company ("USF&G"). Pursuant to the terms of their automobile liability insurance policy, personal liability was limited to $50,000 per person and $100,000 per occurrence.

In an attempt to settle the matter, defendants offered plaintiffs $49,900. This offer, however, excluded prejudgment interest. The matter was subsequently settled in accordance with the terms of the insurance policy. Despite continued efforts to reach an agreement which would dispense with questions concerning USF&G's obligation to pay prejudgment interest to plaintiffs, the parties agreed to allow a court, sitting without a jury, to interpret the provisions of the insurance policy and to issue a declaratory judgment determining whether prejudgment interest and costs are encompassed within the policy. After determining that the policy did not obligate USF&G to pay any amount that exceeds the stated policy limits, the trial court issued a declaratory judgment in favor of USF&G. Plaintiffs gave notice of appeal to this Court in apt time.

Taft, Taft & Haigler, by Thomas F. Taft and Mark R. Morano, for plaintiff-appellants.

Gaylord, Singleton, McNally, Strickland & Snyder, by Danny D. McNally, for defendant-appellees.

JOHNSON, Judge.

This appeal raises the single question of whether an insurer is liable for prejudgment interest when such payment would result in a total amount that exceeds the stated policy limits. Plaintiffs argue that USF&G's liability is not limited to the policy limits since the policy conflicts with G.S. § 24-5. We disagree.

Initially, we recognize that an offer of judgment was made by defendants and that a settlement for the full $50,000 policy limit was reached by the parties. We also recognize that this settlement amounted to a release of claims, not a judgment. The issue of USF&G's liability for prejudgment interest, however, was left open for judicial determination. Upon review at a declaratory judgment proceeding, the trial court determined that USF&G was not obligated under the terms of the policy to pay prejudgment interest. A declaratory judgment was therefore issued in favor of defendant USF&G.

G.S. § 1-254 makes a declaratory judgment proceeding available where there is a dispute concerning contracts of any kind, namely liability insurance policies. *See Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964). This proceeding is designed to provide an expeditious method of procuring a judicial interpreta-

tion of written instruments. *Penley v. Penley*, 65 N.C. App. 711, 310 S.E.2d 360 (1984), *rev'd on other grounds*, 314 N.C. 1, 332 S.E.2d 51 (1985). Its purpose is to settle and afford relief from uncertainty and insecurity with regard to rights, status and other legal relations. *Hobson Const. Co. Inc. v. Great American Ins. Co.*, 71 N.C. App. 586, 322 S.E.2d 632 (1984).

The parties in the case *sub judice*, undisputedly asked the trial court to make a judicial interpretation of the insurance policy issued by USF&G, particularly the following provisions:

> PART A—LIABILITY COVERAGE
>
> *Insuring Agreement*
>
> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.
>
> . . . .
>
> *Supplementary Payments*
>
> In addition to our limit of liability, we will pay on behalf of a covered person:
>
> . . .
>
> (3) Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for this coverage.
>
> . . .
>
> (6) Other reasonable expenses incurred at our request.

Following review, the trial court interpreted the provisions, made a determination and entered a declaratory judgment adverse to plaintiffs on the issue of prejudgment interest. A judgment as to USF&G's liability for damages resulting from plaintiff's accident was never made.

In determining whether the trial court erred in concluding that an insurer is not liable for prejudgment interest when such payment would result in a total amount that exceeds the stated policy limits, we turn to the General Statutes. G.S. § 24-5(b) provides in pertinent part that:

> [i]n an action other than contract, *the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied.* Interest on an award in an action other than contract shall be at the legal rate.

(Emphasis added.) Our interpretation of this statute suggests that where there is no question of liability and no judgment entered as to this issue, G.S. § 24-5(b) does not apply and we must therefore look to the contract itself for guidance.

In the instant case, the only issue raised by the parties is whether the terms of the policy obligated USF&G to pay prejudgment interest on the $50,000 settlement. Plaintiffs argue in their brief that USF&G is obligated and cites G.S. § 24-5(b) as the applicable statute for their recovery. Plaintiffs' reliance on this statute, however, is misplaced since G.S. § 24-5(b) provides for the recovery of interest in instances where there has been both a judgment as to liability and a determination of appropriate compensatory damages. We do not equate the release of claims to the entry of a judgment as to liability, nor do we find prejudgment interest to be equal to "defense costs" to be paid over and beyond the limits of the policy already paid in a settlement. G.S. § 24-5(b) therefore does not apply.

Looking to the applicable provisions of the insurance policy for guidance, we conclude that the trial court properly granted a declaratory judgment in favor of defendant since the policy expressly provides for the payment of interest where such payment does not exceed the limit of liability.

For all the foregoing reasons the decision of the trial court is

Affirmed.

Judge LEWIS concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I disagree with the majority's conclusion that N.C. Gen. Stat. § 24-5(b) (1989) does not apply. I read the $50,000 settlement agreement entered into by the parties as having the effect of a judgment for the purposes of triggering the application of that statute. I then follow the Supreme Court's holding in *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), to find that interest must be paid by the insurer from the date of the institution of the action, in accordance with N.C. Gen. Stat. § 24-5(b). To hold otherwise would not encourage settlement by the parties; in fact, it may have the opposite effect. I vote to reverse the trial court.

AMERICAN MOTORISTS INSURANCE COMPANY, PLAINTIFF v. AVNET, INC., CHANNEL MASTER SATELLITE SYSTEMS, INC., AETNA CASUALTY AND SURETY COMPANY, ALLIANZ UNDERWRITERS INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY (AS SUCCESSOR TO NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY), CENTAUR INSURANCE COMPANY, EMPLOYERS MUTUAL CASUALTY COMPANY, EXCESS INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, HARTFORD ACCIDENT & INDEMNITY COMPANY, HIGHLANDS INSURANCE COMPANY, HOME INSURANCE COMPANY, INTERNATIONAL INSURANCE COMPANY, LONDON MARKET (UNDERWRITERS AT LLOYD'S AND INSURANCE COMPANIES), MOTOR VEHICLE CASUALTY COMPANY, NATIONAL SURETY CORPORATION, NEW ENGLAND INSURANCE COMPANY, NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY (AS PREDECESSOR TO ALLSTATE INSURANCE COMPANY), ROYAL INDEMNITY COMPANY AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, DEFENDANTS

No. 8910SC942

(Filed 1 May 1990)

Abatement, Survival, and Revival of Actions § 3 (NCI4th) — action in foreign jurisdiction — North Carolina claims dismissed — declaratory judgment action brought in North Carolina — stay improper

Plaintiff's declaratory judgment action to determine whether it was required by policies of insurance which it had issued to pay the costs of investigating and defending environmental actions was improperly stayed where a separate action had been brought in New York, but claims in that action

arising from a waste site in North Carolina had been dismissed, and there was therefore no prior action pending; furthermore, the second requirement of N.C.G.S. § 1-75.12, that the party moving for a stay must stipulate consent to suit in another jurisdiction which would provide a convenient, reasonable, and fair place of trial, was not met, since defendant did not consent to some other jurisdiction.

Am Jur 2d, Abatement, Survival, and Revival §§ 3, 10, 13; Declaratory Judgments §§ 127, 128.

APPEAL by plaintiff from order entered 26 May 1989 in WAKE County Superior Court by *Judge James H. Pou Bailey*. Heard in the Court of Appeals 13 March 1990.

Petree Stockton & Robinson, by J. Anthony Penry, and Drinker Biddle & Reath, by Timothy C. Russell and Alan C. Nessman, for plaintiff-appellant.

Smith Helms Mulliss & Moore, by Gary R. Govert, for defendant-appellees.

DUNCAN, Judge.

In this appeal, plaintiff, American Motorists Insurance Company ("AMICO"), seeks to overturn the order staying its action for declaratory relief granted to defendants Avnet, Inc. ("Avnet"), Channel Master Satellite Systems, Inc. ("Channel Master"), and nineteen insurance companies ("the insurance companies"). For the reasons which follow, we reverse the decision of the trial judge.

I

Channel Master, a New York corporation whose principal place of business as alleged in the complaint is Johnson (sic) County, North Carolina, is a wholly owned subsidiary of Avnet, Inc. Avnet is a New York corporation whose principal place of business is New York State. Channel Master purchased a waste site located in Oxford from JFD, a North Carolina corporation, in 1980. Channel Master also owns a manufacturing facility in Ellenville, New York. AMICO and the insurance companies entered into liability insurance contracts with Avnet for primary and excess liability. Channel Master is a named insured under some or all of the policies.

Channel Master was subsequently notified that it was a potentially responsible party for pollution at the site in Oxford and the site in New York. Avnet and Channel Master are arguing that the insurance companies from which they purchased primary and excess insurance should pay the costs of investigating and defending the environmental actions. AMICO contends that it is not obligated to Avnet under the policies because there is no "suit" against Avnet and that the environmental actions do not fall within the language of the policies which provide for insurance where a claim for damages is based on property damage or bodily injury. AMICO further contends that the environmental claims are not an "occurrence" within the meaning of the policies, that the "pollution exclusion" excludes claims arising from environmental hazards and that it was not notified of the environmental contamination at the site "as soon as practicable." The other insurance companies have also disputed that they are obligated to provide any such coverage.

Avnet brought an action for declaratory judgment in New York. The Supreme Court of the State of New York dismissed Avnet's and Channel Master's claims with regard to the Oxford site. AMICO then sought relief under the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. Art. 26, Sec. 1253 (1983). The action was stayed under N.C. Gen. Stat. Sec. 1-75.12 (1983) pending the final resolution of the New York action through all allowable appeals. AMICO appeals that determination.

II

N.C. Gen. Stat. Sec. 1-75.12 provides,

> (a) When Stay May be Granted.—If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

In this case, the trial judge granted the stay based upon the doctrine of prior action pending: ". . . the pending of a prior action between the same parties for the same cause of action in a court of competent jurisdiction works an abatement of a subsequent ac-

tion either in the same court or another court of the same state having jurisdiction." *Shore v. Brown*, 324 N.C. 427, 429, 378 S.E.2d 778, 779 (1989). This case does not involve an action in another court in this state but involves a separate action in another state from which claims arising from the site in this state have been dismissed. The claims involving the Oxford site had been dismissed by the New York court. As there is no prior action pending, the stay of AMICO's request for declaratory relief was improperly granted.

Furthermore, assuming *arguendo* that the New York court had not dismissed the North Carolina claims, the second requirement of Section 1-75.12 is that the party moving for a stay must stipulate consent to suit in another jurisdiction which will "provide a convenient, reasonable and fair place of trial." We first note that North Carolina courts cannot force New York courts to accept the North Carolina claims and Avnet did not consent to some other jurisdiction. Thus, the stay was improperly entered.

Second, the question of interpretation of the contracts between Avnet, Channel Master and the insurance companies, involves questions of fact concerning the Oxford site and whether the facts which gave rise to the environmental agency actions are of a nature contemplated by the contracts for insurance. There is nothing in the record to suggest that North Carolina is an inconvenient forum for the adjudication of these claims. We therefore find that the stay of AMICO's action for declaratory relief was improperly granted and that it should be reversed.

III

For the foregoing reasons, the order of the trial judge granting a stay of AMICO's action is

Reversed and this cause is

Remanded for further proceedings.

Judges ARNOLD and LEWIS concur.

PHILLIP ALSUP AND GERARD CARON, PLAINTIFFS-APPELLANTS v. THOMAS PITMAN AND HIRAM BELL, DEFENDANTS-APPELLEES

No. 894SC596

(Filed 1 May 1990)

Costs § 4 (NCI3d)— deposition expenses—taxing as costs—discretion of court

The trial court had full authority to tax, in its discretion, deposition expenses as costs pursuant to N.C.G.S. §§ 1A-1, Rule 41(d), and 6-20.

Am Jur 2d, Costs § 56.

APPEAL by plaintiffs from Order of *Judge James R. Strickland*, entered 13 March 1989 in ONSLOW County Superior Court. Heard in the Court of Appeals 14 November 1989.

Beaver, Thompson, Holt & Richardson, P.A., by Mark A. Sternlicht and Richard B. Glazier, for plaintiff appellants.

Womble Carlyle Sandridge & Rice, by William E. Moore, Jr., for defendant appellees.

COZORT, Judge.

On 8 October 1988, the plaintiffs filed a notice of voluntary dismissal of the case below (a malpractice action). On the same day, they filed a new complaint based on the original claims. On 16 November 1988, the defendants filed a motion pursuant to Rule 41(d) of the North Carolina Rules of Civil Procedure to tax the plaintiffs with costs, including expenses for taking depositions. On 6 January 1988, the clerk of superior court ordered that the plaintiff be taxed with deposition expenses in the amount of $4,620.74. On 13 March, the trial court, after considering memoranda and arguments of counsel, affirmed the clerk's order.

On appeal, the plaintiffs contend that the trial court erred in taxing expenses for depositions as costs. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 41(d) provides that

> A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff

> who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

The North Carolina Rules of Civil Procedure are modeled on the federal rules, and our Rule 41(d) is substantially the same as the federal rule. *Sutton v. Duke*, 277 N.C. 94, 99, 176 S.E.2d 161, 163 (1970); Fed. R. Civ. P. 41(d). Its purpose, "aside from securing the payment of costs, is to prevent vexatious suits made possible by the ease with which a plaintiff may dismiss . . . ." 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice § 41.16 (2d ed. 1985); *see also* 9 C. Wright and A. Miller, Federal Practice and Procedure § 2375 (1971).

N.C. Gen. Stat. § 6-20 provides that in those civil actions not enumerated in § 6-18, "costs may be allowed or not, *in the discretion of the court*, unless otherwise provided by law." (Emphasis added.) The malpractice action voluntarily dismissed by the plaintiff falls within the scope of § 6-20, and this Court has held that § 6-20 authorizes trial courts to tax deposition expenses as costs. *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E.2d 512, 516 (1982). "As a general rule, recoverable costs may include deposition expenses unless it appears that the depositions were unnecessary. Even though deposition expenses do not appear expressly in the statutes they may be considered as part of 'costs' and taxed in the trial court's discretion." *Id.* (citation omitted).

Based on the language of N.C. Gen. Stat. § 7A-320, enacted in 1983, the plaintiffs maintain that *Dixon* has been overruled legislatively. Section 7A-320 of Article 28 dealing with costs and fees in the trial divisions, states: "The costs set forth in this Article are complete and exclusive, and in lieu of any other costs and fees." The plaintiffs contend alternatively that *Dixon* has been limited by the subsequent case of *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d

616 (1985). We do not adopt either the plaintiffs' interpretation of § 7A-320 or their characterization of *Wade*.

The plaintiffs observe, correctly, that statutes on the same subject are to be construed together. We note that § 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, also provides in subsection (e) that "[n]othing in this section shall affect the liability of the respective parties for costs as provided by law." Consequently, we find that the authority of trial courts to tax deposition expenses as costs, pursuant to § 6-20, remains undisturbed.

Moreover, since the enactment of § 7A-320, this Court has twice recognized that the taxing of deposition expenses lies within the trial court's discretion. The issue before the Court in *Williams v. Boylan-Pearce, Inc.*, was "whether deposition fees and expert witness fees are costs within the purview of" § 6-18. 69 N.C. App. 315, 321, 317 S.E.2d 17, 21, *disc. review denied*, 312 N.C. 65, 323 S.E.2d 927 (1984), *decision aff'd*, 313 N.C. 321, 327 S.E.2d 870 (1985). The Court held:

> In *Dixon, Odom & Co. v. Sledge*, this court said a trial court in its discretion may tax deposition costs as part of the 'costs' of an action. In this action the court in its discretion refused to award deposition expense. We are unable to find any abuse of discretion and therefore affirm the court's order.

Id. (citation omitted). In *Wade v. Wade*, the Court addressed the question of "reimbursement for appraisal fees as cost[s]," and the Court held: "We are aware that we have approved an award of deposition fees not expressly allowed by statute, following the general definition of 'costs' in other jurisdictions. Unless an expert witness is subpoenaed, however, the witness' fees are not generally recognized as costs." 72 N.C. App. 372, 384, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) (citations omitted). Although the issue in *Wade* was not deposition expenses, the holding in that case acknowledges the authority of trial courts to tax those expenses as costs.

The trial court in the case below had full authority to tax, in its discretion, deposition expenses as costs pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 41(d), and 6-20. We find no abuse of the court's discretion. Accordingly, the trial court's order of 13 March 1989 is

Affirmed.

Judges JOHNSON and LEWIS concur.

CLAES C. HONIG, PLAINTIFF v. VINSON REALTY CO., INC., DEFENDANT

No. 8926SC527

(Filed 1 May 1990)

Accord and Satisfaction § 1 (NCI4th)— written property management contract—acceptance of check tendered in full payment—defendant as agent with fiduciary duty—accord and satisfaction not available defense

In an action to recover for an alleged breach of a written property management contract, the trial court erred in concluding that plaintiff's acceptance of defendant's check tendered in full payment of the disputed claim constituted an accord and satisfaction, since defendant was an agent with a fiduciary duty to account for money belonging to his principal, plaintiff; defendant therefore had no right to impose a condition on the payment of the amount represented by the check; and the accord and satisfaction defense was not available to defendant.

Am Jur 2d, Accord and Satisfaction § 8.

APPEAL by plaintiff from judgment entered 30 January 1989 by *Judge Frank W. Snepp* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 22 November 1989.

This is a civil action in which plaintiff sought compensatory and treble damages for defendant's alleged breach of a written property management contract. Defendant denied the material allegations and instituted a counterclaim. After a nonjury trial, the trial court concluded as a matter of law that plaintiff's acceptance of defendant's check tendered on 7 January 1987 as full payment constituted an accord and satisfaction and thereby barred plaintiff's claim and defendant's counterclaim. Plaintiff gave notice of appeal in open court. Defendant, however, did not appeal the trial court's decision as to his counterclaim.

Kennedy Covington Lobdell & Hickman, by Wayne Huckel, for plaintiff-appellant.

Ruff, Bond, Cobb, Wade & McNair, by Robert S. Adden, Jr. and Thomas C. Ruff, for defendant-appellee.

JOHNSON, Judge.

Plaintiff purchased commercial property located in Charlotte and executed a written management contract with defendant. The contract, dated 28 April 1983, provided that (1) defendant was to receive a monthly management fee of 6% of the gross rentals collected from lessees Pelton & Crane Company ("P&C") and Inmont Corporation ("Inmont") and (2) in the event plaintiff relieved defendant of managing the property, defendant would receive a buyout of 5% of the gross rentals for the remainder of the leases then in effect.

A dispute arose between the parties as to whether there was an oral modification of the management contract. Plaintiff argued that the management contract was orally modified and that such modifications were to commence in September, 1986. Plaintiff further argued that the parties agreed to reduce both the monthly commission due to defendant from 6% to 4% of the gross rentals and the amount due to defendant under the buyout provision from 5% to 1% of the gross rentals remaining under the leases then in effect. Defendant, however, maintained that an agreement with respect to a reduction of the monthly commission was never agreed upon. The management contract was subsequently terminated.

In an attempt to settle the dispute between the parties, a letter sent from defendant to plaintiff and dated 29 December 1986 suggested new buyout terms. Defendant proposed that he would accept a buyout of 4% of the remaining rents on the P&C and Inmont leases instead of the original 5% provided for in the management contract. No verbal or written agreement was reached.

On 7 January 1987, defendant withheld 4% or $12,409.00 of rents it had collected from P&C and Inmont. Defendant thereafter sent a check in the amount of $43,613.33 to plaintiff along with a letter indicating that the check represented "payment in full through December, 1986 on all accounts." Plaintiff accepted and negotiated the check despite the controversy over the exact amount owed.

By letter addressed to defendant and dated 13 January 1987, plaintiff protested the removal of $12,409.00 as a buyout. Plaintiff instituted this breach of contract action as a result of the parties being unable to reach an amicable resolution.

Before reaching the questions raised by plaintiff on appeal, we note that an accord and satisfaction is compounded of two elements:

> [a]n "accord", [which] is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute . . . something other than or different from what he is or considered himself entitled to; and a "satisfaction" [,] [which] is the execution or performance, of such agreement.

Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 565, 302 S.E.2d 893, 894 (1983), *quoting Allgood v. Trust Co.*, 242 N.C. 506, 515, 88 S.E.2d 825, 830-31 (1955). An accord and satisfaction is established where a creditor cashes a check tendered by a debtor in full payment of a disputed claim. *Barber v. White*, 46 N.C. App. 110, 264 S.E.2d 385 (1980). However, where an agent, having money belonging to his principal, pays part of it conceded to be due, but retains the balance, claiming a right to do so, the principal's acceptance, retention or negotiation of the amount paid does not constitute an accord and satisfaction. The principal is therefore not estopped from claiming the balance. *Thomas v. Gwyn*, 131 N.C. 460, 42 S.E. 904 (1902). *See also* 1 C.J.S. *Accord and Satisfaction* § 37; *Hudson v. Yonkers Fruit Co., Inc.*, 258 N.Y. 168, 179 N.E. 373 (1932).

The first issue raised on appeal is whether the trial court erred in concluding that plaintiff's acceptance of defendant's check tendered in full payment of the disputed claim constituted an accord and satisfaction. Plaintiff contends that the parties shared a fiduciary relationship and as such, the accord and satisfaction defense is not available to defendant. We agree and therefore vacate the trial court's decision.

We note that in the instant case, defendant was more than a mere debtor paying money in which he could freely retain or disburse. He was an agent with a fiduciary duty to account for money belonging to his principal, Honig. Therefore, defendant had no right to impose a condition on the payment of the amount

represented by the check. To hold that plaintiff's negotiation of defendant's check constituted an accord and satisfaction would be contrary to the law and could result in a flagrant and widespread abuse of the opportunities and powers that accompany a fiduciary position. We therefore hold that the trial court's order barring plaintiff's claim must be vacated.

In light of our holding above, we deem it unnecessary to discuss plaintiff's second Assignment of Error.

Accordingly, the order barring plaintiff's claim is vacated, and the case is remanded for a new trial for disposition on the merits.

Vacated and remanded.

Judges PARKER and GREENE concur.

NANCY P. FIELDS, APPELLEE v. IRVIN H. WHITEHOUSE AND SONS COMPANY, AND JOHN FORBES, INDIVIDUALLY, APPELLANT

No. 8921SC657

(Filed 1 May 1990)

Costs § 1.2 (NCI3d); Rules of Civil Procedure § 41.1 (NCI3d)— voluntary dismissal—taxing of costs proper—deadline improper

The trial court in plaintiff's first action had the authority only to order that costs be paid by plaintiff after she took a voluntary dismissal, not to order that the costs be paid within 30 days of the refiling of the action; therefore, that portion of the trial court's order taxing costs within 30 days of the filing of the second action was void and could be treated as a nullity by the trial court in the second action, and that court had the authority to deny defendant's motion to dismiss and enter its own order without offending the general rule which precludes one superior court judge from reviewing the decision of another, as that rule simply does not apply when the first superior court judge had no legal authority to issue the incorrect order.

Am Jur 2d, Costs § 18; Dismissal, Discontinuance, and Nonsuit § 39.

APPEAL by defendant Irvin H. Whitehouse and Sons Company from judgment entered 5 April 1989 by *Judge F. Fetzer Mills* in FORSYTH County Superior Court. Heard in the Court of Appeals 22 December 1989.

This case arises out of an action filed by plaintiff on 30 December 1986, against both defendants, alleging intentional infliction of emotional distress. At trial on 26 January 1988, plaintiff took a voluntary dismissal under N.C. Gen. Stat. § 1A-1, Rule 41(a) (1983). On the same day, defendant Whitehouse (hereinafter defendant) filed a motion to tax costs under Rule 41(d), and the trial court, by Honorable Thomas W. Seay, Jr., granted the motion on 28 January 1988. Judge Seay's order directed plaintiff to pay defendant's costs within 30 days of refiling a new action. Plaintiff was duly served with the order and did not appeal.

Plaintiff filed a new complaint on 23 January 1989. Plaintiff did not pay the costs within 30 days as directed by Judge Seay's order, and defendant filed a motion to dismiss on 23 February 1989 under Rule 41(d) of the N.C. Rules of Civil Procedure.

On 20 March 1989, plaintiff filed a motion in the alternative, requesting an extension of time to pay the costs of the first action. On 23 March 1989, plaintiff filed an affidavit in support of its motion.

Oral argument was heard before the Honorable F. Fetzer Mills, Judge, on 27 March 1989. Judge Mills denied defendant's motion to dismiss.

On 29 March 1989, defendant filed a motion for reconsideration and supporting affidavits. On 6 April 1989, the trial court entered its order and judgment denying defendant's motion to dismiss "on the grounds that Rule 41(d) does not authorize dismissal and that the Order Taxing Costs entered January 28, 1988 . . . was improper in requiring that those costs be paid within thirty days of the refiling of Plaintiff's action pursuant to Rule 41(d)."

The trial court further ordered that the "Order affects a substantial right, subjects the Defendant to the jurisdiction of the courts where Defendant contends it is not so subject and that there is no just reason for delay such that the order of this Court shall be deemed the final judgment from which appeal may be taken."

Defendant appealed and petitioned for a writ of certiorari on 20 April 1989. This Court granted defendant's petition on 12 May 1989.

From the order of 6 April 1989 denying its motion to dismiss, defendant appeals.

Greeson & Grace, P.A., by Michael R. Greeson, Jr.; and Bell, Davis & Pitt, P.A., by Stephen M. Russell, for plaintiff-appellee.

Petree Stockton & Robinson, by W. R. Loftis, Jr., Kenneth S. Broun and Robin E. Shea, for defendant-appellant.

ORR, Judge.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 41(d) (1983). For the reasons set forth below, we affirm the trial court's order.

Under Rule 41(d),

> A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action. . . . If a plaintiff who once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of costs of the action previously dismissed, . . . , the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

In the case *sub judice*, plaintiff contends that a notice of voluntary dismissal under Rule 41(a) terminates the case and prevents the trial court in the initial action from issuing any further orders in the case except an order to pay costs under Rule 41(d). In *Ward v. Taylor*, 68 N.C. App. 74, 79, 314 S.E.2d 814, 819, *disc. review denied*, 311 N.C. 769, 321 S.E.2d 157 (1984), this Court stated that the superior and district courts have the authority to enforce Rule 41(d).

> G.S. 1A-1, Rule 41(d) provides that plaintiffs '. . . *shall* be taxed with the costs . . . .' (emphasis supplied) [footnote omitted]. If, as plaintiffs here contend, notice of voluntary

> dismissal completely terminates the case and prevents issuance of any further orders in the case, the superior and district courts would lack authority to enforce the mandate of Rule 41(d). Only where the parties chose to reinstitute the suit *and* the reinstituted suit was still pending would the courts then be able to order payment of costs. We do not believe the General Assembly intended to give *parties* this degree of control over the power of the trial courts to tax costs. (emphasis in the original).
>
> In construing Rule 41(d), we must give effect to the legislative intent, and avoid constructions which operate to defeat or impair that intent. *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975) [footnote omitted]. The object of this statutory rule is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in which voluntary dismissals are taken. We therefore hold that the filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs.

Id.

We believe that the holding in *Ward* and the language of Rule 41(d) are clear. The trial court or the clerk of the court in the first action shall tax the costs of the action to the plaintiff taking a voluntary dismissal under Rule 41(d). Then, if the plaintiff commences an action against the same defendant based upon or including the same claim before the costs of the previous action have been paid, the trial court in the second action shall, upon motion of the defendant, order the plaintiff to pay the costs of the first action within 30 days. If the plaintiff does not comply with the order, the court shall dismiss the action.

In the case before us, the trial court in the first action had the authority only to order that costs be paid by plaintiff. Under *Ward* and Rule 41(d), the trial court did not have the authority to order that the costs be paid within 30 days of the filing of a second action. Therefore, we hold that the portion of the trial court's order taxing costs within 30 days of the filing of the second action is void and may be treated as a nullity. *See Veazy v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (a court may treat a void order as a nullity).

Because that portion of the trial court's order in the first action was void, the trial court in the second action had the authority to deny defendant's motion to dismiss and enter its own order accordingly. This order did not offend the general rule which precludes one superior court judge from reviewing the decision of the first superior court judge on the ground that the decision is incorrect. The rule simply does not apply when the first superior court judge had no legal authority to issue the incorrect order. *Veazy v. Durham*, 231 N.C. 357, 366, 57 S.E.2d 377, 384, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

We have considered defendant's remaining assignments of error and find them to be without merit. For the reasons set forth above, we affirm the trial court's decision.

Affirmed.

Judges PHILLIPS and EAGLES concur.

BRUCE SCHAFFNER, GUARDIAN AD LITEM FOR EUGENIA L. SCHAFFNER, MINOR
v. DR. C. G. PANTELAKOS

No. 8912SC683

(Filed 1 May 1990)

Costs § 1.2 (NCI3d); Rules of Civil Procedure § 41.1 (NCI3d)— action dismissed—costs not paid determination made by judge in second action

N.C.G.S. § 1A-1, Rule 41(d) requires the judge in a second action following a voluntary dismissal to make his own determination as to costs of the first action not being paid and to allow the plaintiff 30 days within which to pay them; it does not authorize actions to be dismissed because of failure to meet deadlines improperly set in the first action.

Am Jur 2d, Costs § 18; Dismissal, Discontinuance, and Nonsuit § 39.

APPEAL by plaintiff from order entered 10 April 1989, *nunc pro tunc* 3 April 1989, by *Britt, Joe Freeman, Judge*, in

CUMBERLAND County Superior Court. Heard in the Court of Appeals 9 January 1990.

Lester G. Carter, Jr. and Stephen R. Melvin for plaintiff appellant.

Walker, Young & Barwick, by Robert D. Walker, Jr. and Don E. Clark, Jr., for defendant appellee.

PHILLIPS, Judge.

Plaintiff's appeal is from an order dismissing her action with prejudice under Rule 41(d), N.C. Rules of Civil Procedure, which reads as follows:

> (d) *Costs.* A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.

The circumstances pertinent to the validity of the order follow: By this action, filed on 30 November 1988, the minor plaintiff seeks damages from defendant surgeon because of a burn she allegedly sustained during the removal of her adenoids in August, 1977. An earlier action for the same injury had been brought against defendant surgeon and the Cumberland County Hospital System, Inc. in 1982. That action, which plaintiff brought as a pauper, was voluntarily dismissed as to defendant surgeon without prejudice on 8 December 1987 following a judgment settling plaintiff's claim against the hospital corporation for $11,000. Ten days after the voluntary dismissal defendant surgeon moved for an order taxing the costs of that action against plaintiff. On 23 December 1987 plaintiff responded to the motion, alleging that the costs that defendant outlined in his motion were not allowable "under the Rules or Statutes of the State of North Carolina"; but plaintiff did not

allege that she sued as a pauper and if that fact was called to the court's attention, the record does not show it. Following a hearing on 19 January 1988, Judge E. Lynn Johnson entered an order taxing costs in the amount of $650.37 against plaintiff. The order also provided:

> IT IS FURTHER ORDERED that the payment of such costs by the plaintiff to the defendant shall be made within thirty (30) days after entry of this Order, and that any proceedings presently pending in this action are stayed until the plaintiff has so complied.

That order was not appealed. On 16 January 1989, in answering the complaint in *this action* defendant showed that the costs of the prior action had not been paid and moved that the action be dismissed under the provisions of Rule 41(d). On 10 April 1989 when defendant's motion was heard, Judge Britt dismissed this action following only a review of the pleadings in both actions and the arguments of counsel for both parties.

The order dismissing this action is not authorized by Rule 41(d) and we reverse it. The circumstances stated above give rise to the following conclusions of law: (1) Contrary to plaintiff's argument, the order of Judge Johnson in the prior action taxing costs against plaintiff is not void in its entirety because plaintiff sued in that action as a pauper. Under the provisions of Chapter 6 and Article 28 of Chapter 7A of the North Carolina General Statutes, trial judges are authorized to tax court costs, and if the court misused its authority in taxing costs against the pauper plaintiff, that error was waived by her failure to appeal therefrom. 1 Strong's N.C. Index 3d *Appeal and Error* Sec. 14 (1976); *Redevelopment Commission of Winston-Salem v. Weatherman*, 23 N.C. App. 136, 208 S.E.2d 412 (1974). (2) The provision in the cost taxing order directing plaintiff to pay the costs within 30 days and staying any pending undertaking, of which there was none, was not authorized by Rule 41(d) or any other rule or statute and its effect, if any, is limited to that action. It cannot control this action, as Rule 41(d) expressly vests that authority in the judge presiding over the second case. And it is immaterial that plaintiff did not appeal from the directive; for the action that it undertook to control did not come into existence until several months later and an appeal was not authorized under any theory known to us. (3) Upon the court in this action hearing defendant's motion to dismiss and cor-

rectly determining from the record of the two cases that the costs of the first action had been taxed against plaintiff and she had not paid them it was required by Rule 41(d), before dismissing the action, to "make an order" for the payment of the costs within 30 days, and since no such order was made, the dismissal is invalid. In short, in situations like this Rule 41(d) requires the judge in the second action to make his own determination as to costs not being paid and to allow the plaintiff 30 days within which to pay them; it does not authorize actions to be dismissed because of deadlines improperly set in the first action.

Reversed.

Judges EAGLES and ORR concur.

SHARON YATES FOR WILLIAM McCOMBS v. N.C. DEPT. OF HUMAN RESOURCES

No. 8919SC781

(Filed 1 May 1990)

Social Security and Public Welfare § 1 (NCI3d)— denial of Medicaid benefits to father—no standing of daughter to obtain judicial review

Petitioner who was not an applicant or recipient of Medicaid benefits had no standing to obtain judicial review of respondent's eligibility decision concerning petitioner's father.

Am Jur 2d, Welfare Laws § 40.

APPEAL by petitioner from order entered 9 June 1989 by *Judge D. Marsh McLelland* in ROWAN County Superior Court. Heard in the Court of Appeals 7 February 1990.

This is a proceeding to judicially review a final order by the respondent, Department of Human Resources (DHR), denying an application for medical assistance benefits (Medicaid). Sharon Yates applied for benefits on behalf of her father (William McCombs), now deceased, on 15 August 1988, retroactive to May, 1988. On 10 October 1988 DHR denied the application based on its de-

termination that Mr. McCombs had "excess reserves." Medicaid eligibility requirements set an asset ceiling of $2,250 for a two-person unit. Deceased and his wife had approximately $7,178 in non-exempt assets on the date of application. Mr. McCombs paid some of his accumulated medical bills, converted his stocks to a pre-need burial plan and reapplied for benefits. His application for Medicaid was approved as of 4 November 1988.

Between May and 4 November 1988 Mr. McCombs had incurred $51,578 in medical bills, $45,728 of which were not covered by insurance. Ms. Yates requested that her father be allowed to "spend down" resources (i.e., subtract his accumulated medical bills from his resources) retroactive to May so that on some date before 4 November his assets would be below the $2,250 ceiling. This request was denied and Ms. Yates appealed. After unsuccessful administrative appeals within DHR, Ms. Yates petitioned for judicial review in superior court. The superior court affirmed the decision of DHR and Ms. Yates appeals.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, and N.C. Legal Services Resource Center, Inc., by Pam Silberman, for petitioner-appellant.

Attorney General Thornburg, by Assistant Attorney General Jane T. Friedensen, for the North Carolina Department of Human Resources.

EAGLES, Judge.

Our initial inquiry is whether this appeal must be dismissed for lack of subject matter jurisdiction. The State asserts that only an "applicant or recipient" of Medicaid funds may petition for judicial review of the DHR's eligibility decision and Ms. Yates does not have "standing" to bring a proceeding for judicial review to contest the denial of benefits to her father. Ms. Yates argues that lack of capacity is in issue and that lack of capacity does not affect subject matter jurisdiction. Therefore, the State cannot raise this issue for the first time on appeal. We agree with the State's contention that this is a question of subject matter jurisdiction. The superior court lacked jurisdiction to hear Ms. Yates' petition for judicial review. Therefore, we dismiss Ms. Yates' purported appeal to this court.

"Whether one has standing to obtain judicial review of administrative decisions is a question of subject matter jurisdiction." *Petition of Wheeler*, 85 N.C. App. 150, 152, 354 S.E.2d 374, 376 (1987). Questions of subject matter jurisdiction may properly be raised at any time. *See Forsyth County Bd. of Social Services v. Division of Social Services by Everhart*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986).

"Where a cause of action is created by statute and the statute also provides who is to bring the action, the person or persons so designated, and, ordinarily, only such persons, may sue." *State ex rel. Lanier v. Vines*, 274 N.C. 486, 492, 164 S.E.2d 161, 164 (1968) (citation omitted). No party has the right to appeal from an administrative agency's decision "unless the right is granted by statute." *In re Halifax Paper Co.*, 259 N.C. 589, 592, 131 S.E.2d 441, 444 (1963). *See also Appeal of Moravian Home, Inc.*, 95 N.C. App. 324, 382 S.E.2d 772, *rev. denied and appeal dismissed*, 325 N.C. 707, 388 S.E.2d 457 (1989); *Malloy v. Durham County Dep't of Social Services*, 58 N.C. App. 61, 293 S.E.2d 285 (1982).

The statutory provision for judicial review of DHR's decisions regarding Medicaid eligibility states that "[a]ny *applicant or recipient* who is dissatisfied with the final decision of the Department may file . . . a petition for judicial review in superior court of the county from which the case arose." G.S. 108A-79(k) (emphasis ours). An "applicant" is "any person who requests assistance or on whose behalf assistance is requested." G.S. 108A-24(1). A "recipient" is "a person to whom, or on whose behalf, assistance is granted under this Article." G.S. 108A-24(5). Because Ms. Yates is neither an applicant or a recipient she has no right to appeal from the DHR's decision. Additionally, nothing in the record shows that Ms. Yates is the legal representative of her father's estate. Therefore, this appeal must be dismissed for lack of subject matter jurisdiction.

We do not address the difficult question of whether the actions of persons in Ms. Yates' position are adequate to preserve the rights of Medicaid applicants, recipients or their legal representatives to judicial review of DHR's eligibility decisions.

For the reasons stated, this appeal is dismissed.

Dismissed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. LINWOOD WILLIAMS

No. 896SC422

(Filed 1 May 1990)

1. **Searches and Seizures § 13 (NCI3d)— warrantless seizure of matchbox—no expectation of privacy by defendant—consent given by defendant**

The trial court properly denied defendant's motion to suppress a matchbox seized during a warrantless search outside defendant's house where defendant did not have a reasonable expectation of privacy in the area searched, but, even if he did, no search warrant would have been necessary, since officers were at defendant's house for a lawful purpose; defendant consented to one officer walking over to the area where the matchbox was found; and the officer discovered the matchbox in plain view.

Am Jur 2d, Searches and Seizures §§ 20, 100.

2. **Narcotics § 5 (NCI3d)— felonious possession of cocaine—possession with intent to sell or deliver same cocaine—punishment for both—double jeopardy**

Principles of double jeopardy barred defendant's sentencing both to five years for felonious possession of cocaine and to ten years for possession with intent to sell or deliver the same cocaine.

Am Jur 2d, Criminal Law § 277; Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from judgments entered 16 November 1988 by *Judge Samuel T. Currin* in HALIFAX County Superior Court. Heard in the Court of Appeals 8 January 1990.

Defendant was indicted on one count of misdemeanor possession of drug paraphernalia, one count of felonious possession of

cocaine, and one count of possession of cocaine with intent to sell or deliver. The evidence supporting these indictments had been seized during two searches. The first search was a warrantless search of an area outside defendant's house which resulted in the seizure of a matchbox containing 0.6 grams of crack cocaine. As a result of this search, the law enforcement officers obtained a search warrant for defendant and his house. This second search resulted in the seizure of the following items: $585 in cash, 25.7 grams of the cutting agent Inositol, which tested at under one percent cocaine, an empty bottle labelled Inositol, a folding spoon, a bottle cap containing a white residue, small pieces of tinfoil, a razor blade, a pipe cleaner, fifty-four plastic bags, and rolling papers.

Before trial, defendant moved to suppress the matchbox seized during the warrantless search. The State argued that defendant had failed to follow the procedural requirements of N.C. Gen. Stat. § 15A-975 regarding timely filing of suppression motions and therefore had waived any right to a hearing on his motion. The trial court denied defendant's suppression motion based on failure to meet the filing requirements of N.C. Gen. Stat. § 15A-975.

The judge submitted all three charges to the jury and defendant was convicted and sentenced on all charges. From these judgments, defendant appeals.

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

Robin E. Hudson for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends the trial court erred in denying his motion to suppress based on a failure to timely file that motion. He argues that his motion was filed before trial, as required by N.C. Gen. Stat. § 15A-975 and, furthermore, that his motion could have been filed during trial because the requirements of N.C. Gen. Stat. § 15A-975(b) were satisfied.

N.C. Gen. Stat. § 15A-977 provides in pertinent part:

> (c) The judge may summarily deny the motion to suppress evidence if:
>
> (1) The motion does not allege a legal basis for the motion; or

(2) The affidavit does not as a matter of law support the ground alleged.

Defendant's motion alleged, as a basis for suppressing the matchbox and its contents, that the law enforcement officers had, without his consent, made a warrantless search of an area outside defendant's house. Defendant's affidavit does not, however, support the alleged ground for suppression. In the affidavit, defendant states that he did not exercise dominion over the area in which the matchbox was found. Defendant did not, therefore, have a reasonable expectation of privacy in the area searched. *See State v. Thompson*, 73 N.C. App. 60, 63-5, 325 S.E.2d 646, 649-50, *disc. rev. denied and appeal dismissed*, 313 N.C. 610, 332 S.E.2d 183 (1985). Furthermore, even if defendant did have a reasonable expectation of privacy in the area where the matchbox was found, no search warrant would have been necessary. Evidence at trial showed that the officers were at defendant's house for a lawful purpose, that defendant consented to one officer walking over to the area where the matchbox was found, and that the officer discovered the matchbox in plain view. *See State v. Mettrick*, 54 N.C. App. 1, 15, 283 S.E.2d 139, 148 (1981), *aff'd*, 305 N.C. 383, 289 S.E.2d 354 (1982). The trial court did not err in summarily denying defendant's motion to suppress.

[2] Defendant next contends the trial court erred in sentencing him both to five years for felonious possession of cocaine and to ten years for possession with intent to sell or deliver the same cocaine. We agree. Principles of double jeopardy bar defendant's punishment for both offenses based on possession of the same contraband. *State v. McGill*, 296 N.C. 564, 568, 251 S.E.2d 616, 619 (1979); *State v. Oliver*, 73 N.C. App. 118, 122, 325 S.E.2d 682, 686, *cert. denied*, 313 N.C. 513, 329 S.E.2d 401 (1985). We therefore arrest judgment on the lesser charge and sustain the conviction and sentence on the greater.

As to the charges of felonious possession of cocaine with intent to sell or deliver and misdemeanor possession of drug paraphernalia, no error.

As to the charge of felonious possession of cocaine, judgment arrested.

Chief Judge HEDRICK and Judge WELLS concur.

IN THE MATTER OF: THE APPEAL OF ARNOLD HENSLEY FROM THE ORDER OF: THE CRAMERTON BOARD OF ADJUSTMENT DATED SEPTEMBER 1, 1988

No. 8927SC1022

(Filed 1 May 1990)

Municipal Corporations § 30.19 (NCI3d)— mobile home park— trailer moved—attempt to replace nonconforming use—town required to issue permit

Where petitioner leased a tract of land which contained seven mobile homes, one of the homes was moved by its owners, and petitioner attempted to place another mobile home on the property in the area vacated, defendant board of adjustment was bound to issue a permit for the nonconforming use, since petitioner attempted to replace the nonconforming use within 180 days, as allowed by the town's zoning ordinance.

Am Jur 2d, Zoning and Planning §§ 208, 213, 220; Mobile Homes, Trailer Parks, and Tourist Camps §§ 13, 14.

APPEAL by petitioner Arnold Hensley from *Griffin (Kenneth A.), Judge*. Judgment entered 30 June 1989 in Superior Court, GASTON County. Heard in the Court of Appeals 4 April 1990.

The record establishes the following facts: Petitioner leased a tract of land that contained upon it seven mobile homes. This property subsequently became subject to the Town of Lowell Zoning Ordinance. Petitioner's use of the property was a non-conforming use under the Zoning Ordinance, but the Lowell Town Council permitted petitioner to retain seven mobile homes on the property with an eighth space being used for picnic and recreation. In April 1988, petitioner's property became subject to the Town of Cramerton extraterritorial zoning jurisdiction, and mobile homes were not permitted in the designated zone containing petitioner's property. In June 1988, one of the mobile homes on petitioner's property was moved by its tenants, leaving only six mobile homes on petitioner's land. Petitioner attempted to place another mobile home on the property in the area vacated; however, the Town of Cramerton refused to grant the permit stating that the non-conforming use had been converted to a conforming use and could not be used subsequently for a non-conforming purpose. Petitioner appealed the ruling, and a hearing was held before the Cramerton Board of Adjustment on 1 September 1988. The Board of Adjust-

ment found that the Town of Cramerton does not have a mobile home park classification and that the complete removal of one mobile home converts that portion of the property to a conforming use.

Judge Griffin concluded that "the decision of the Cramerton Board of Adjustment was supported by competent material and substantial evidence in the record and that the decision of the Board was not arbitrary and capricious." From a judgment affirming the decision of the Cramerton Board of Adjustment, petitioner appealed.

Whitesides, Robinson, Blue & Wilson, by Terry A. Kenny, for petitioner, appellant.

Charles D. Gray, III, for respondent, appellee.

HEDRICK, Chief Judge.

Cramerton Zoning Ordinance, Article VII, Section 70.2 provides:

> When a non-conforming use has been changed to a conforming use it shall not thereafter be used for any non-conforming use.

Article VII, Section 70.4 further provides:

> A non-conforming use may not be re-established after discontinuance for a period of one hundred and eighty (180) days.

While Judge Griffin did not find as a fact that petitioner attempted to replace the non-conforming use within 180 days, the record clearly establishes that petitioner sought a permit in July 1988, and the cause came on for hearing before the Cramerton Board of Adjustment on 1 September 1988.

The Town of Cramerton is bound by its own ordinances, and since the record establishes that petitioner sought to replace the mobile home within 180 days, the town was bound to issue the permit. The Superior Court erred in affirming the decision of the Cramerton Board of Adjustment, and the judgment dated 30 June 1989 must be vacated, and the cause will be remanded to the Superior Court for further remand to the Cramerton Board of Adjustment with instructions that it issue the permit.

Vacated and remanded.

Judges PARKER and COZORT concur.

CLIFFORD DANIEL LOCKWOOD v. BEN ALEXANDER PORTER, JR., CHARLES JONES AND TRYON MANOR CORPORATION

No. 8926DC219

(Filed 1 May 1990)

Insurance § 101 (NCI3d)— automobile insurance—insurer's right to have plaintiff examined by doctor—plaintiff's refusal to cooperate—action for medical payments barred

An automobile insurer's right to have plaintiff examined by its physician was a material part of the insurance contract, and plaintiff's unjustified refusal to be examined violated the cooperation clause of the policy and barred plaintiff's action for medical payments as a matter of law.

Am Jur 2d, Automobile Insurance §§ 405, 406.

APPEAL by plaintiff from judgment entered 21 October 1988 by *Cantrell, Judge*, in MECKLENBURG County District Court. Heard in the Court of Appeals 10 October 1989.

Price, Smith and Bednarik, by Daniel J. Clifton and Michael J. Bednarik, for plaintiff appellant.

Underwood Kinsey & Warren, by Richard L. Farley and Kenneth S. Cannaday, for appellee Aetna Casualty & Surety Company.

PHILLIPS, Judge.

Plaintiff, driving a vehicle owned by Janice G. McGlen and insured by Aetna Casualty & Surety Company, suffered injuries as a consequence of a three-car collision caused by defendant Porter, an uninsured motorist. His suit as an unnamed insured under McGlen's policy against the alleged uninsured motorist for medical payments was answered by Aetna in its own name as G.S. 20-279.21(b)(3)a permits. In answering Aetna also moved for sum-

mary judgment based upon plaintiff's failure to comply with policy provisions mandating that:

> A person seeking any coverage must:
>
> 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
>
> . . . .
>
> 3. Submit, as often as we reasonably require, to physical exams by physicians we select. We will pay for these exams.

Following a hearing on appellee's motion plaintiff's action was dismissed by summary judgment because the materials of both parties indicated without contradiction that plaintiff refused to appear for a doctor's appointment that Aetna scheduled under the foregoing policy provisions. In his affidavit plaintiff stated in substance that: Aetna made an appointment for him to be examined at 9:30 a.m. on 25 April 1984 by Dr. John Roper, an orthopedic physician; he failed to keep the appointment because he did not want to waste his time with a doctor who was not going to do anything for him and would report to Aetna that nothing was wrong with him when that was not so; and he thought the whole situation was a rip-off.

The foregoing facts give rise to the following legal conclusions: The cooperation clause was binding upon plaintiff as an additional insured operating an automobile with the permission of the insured. 8 J. Appleman, Insurance Law and Practice Sec. 4775 (1981). Aetna's right to have plaintiff examined by its physician is a material part of the insurance contract, and plaintiff's unjustified refusal to be so examined violated the cooperation clause of the policy and bars his action as a matter of law. *Orozco v. State Farm Mutual Insurance Co.*, 360 F.Supp. 223 (S.D. Fla. 1972), *aff'd*, 480 F.2d 923 (5th Cir. 1973). Though failure to cooperate under an insurance policy is an affirmative defense upon which Aetna has the burden of proof, *MacClure v. Accident & Casualty Insurance Co. of Winterthur, Switzerland*, 229 N.C. 305, 49 S.E.2d 742 (1948), the dismissal was nevertheless correct, since plaintiff's own sworn admission established the defense as a matter of law. *Hedgecock v. Jefferson Standard Life Insurance Co.*, 212 N.C. 638, 194 S.E. 86 (1937).

Affirmed.

Judges COZORT and LEWIS concur.

IN THE MATTER OF: THE CONSOLIDATED APPEALS OF CERTAIN TIMBER COMPANIES FROM THE DENIAL OF USE VALUE ASSESSMENT AND TAXATION BY CERTAIN COUNTIES

No. 8910PTC875

(Filed 15 May 1990)

1. **Constitutional Law § 20 (NCI3d)— ad valorem taxation of forestland—distinctions between corporations—classification not unconstitutional**

The ownership distinctions for ad valorem taxation purposes in N.C.G.S. § 105-277.2 *et seq.* between forestland owned by corporations whose shareholders are all natural persons actively engaged in the business of the corporation or related to someone who is, and forestland owned by corporations which do not meet that and other requirements, does not violate article V, section 2(2) of the North Carolina Constitution. The definition of "individually owned" contained in N.C.G.S. § 105-277.2(4)b and N.C.G.S. § 105-277.2(5a) is neither arbitrary nor capricious; rather, after three legislative revisions, this statute has been carefully tailored to provide a tax incentive to the family forester while avoiding a windfall to those foresters less likely to need such an incentive.

Am Jur 2d, State and Local Taxation § 185.

2. **Constitutional Law § 20 (NCI3d)— taxation of forestland—classification by corporate type—no violation of equal protection**

The distinctions in N.C.G.S. § 105-277.2 *et seq.* between forestland owned by corporations whose shareholders are engaged in the business or related to someone who is engaged in the business and forestland owned by corporations who do not meet that and other requirements does not violate the equal protection requirements of the state and federal constitutions. The statute is an economic regulation which must be reviewed under the second tier rational basis standard and the United States Supreme Court has always emphasized

that states have broad powers to impose and collect taxes. While N.C.G.S. § 105-277.2 *et seq.* is not perfect, it is clear that the ownership requirements of the statute are rationally related to the ends the General Assembly sought to accomplish; as long as it is arguable that the statutory scheme designed by the legislature *could* work, then the challenged statute must be upheld.

Am Jur 2d, State and Local Taxation § 185.

APPEAL by petitioners from an order entered on 30 March 1989 by the Property Tax Commission. Heard in the Court of Appeals on 6 March 1990.

Petitioners applied with various county tax boards in North Carolina for present use valuation of their forestland for *ad valorem* tax purposes. All applications were denied by the county boards because the timber companies did not "individually own" their property as defined by N.C. Gen. Stat. §§ 105-277.2(4)b and -277.2(5a). Petitioners appealed to the Property Tax Commission where all appeals were consolidated in a single proceeding. The Commission upheld the denial of petitioners' applications and refused to reverse the counties' grant of present use treatment to so-called family corporations. The Commission also refused to rule on petitioners' constitutional challenge to the statute because such power rested only in the province of the judicial branch. Petitioners appealed.

Appellants are Boise Cascade Corporation ("Boise Cascade"), Champion International Corporation ("Champion"), Georgia-Pacific Corporation ("Georgia-Pacific"), and Weyerhaeuser Company ("Weyerhaeuser"). These public corporations own and operate substantial timber operations in North Carolina. In 1986 each company filed applications in several counties seeking present use value assessment and taxation of specific tracts of forestland they own in the respective counties. Boise Cascade filed in Anson, Bladen and Chatham counties. Champion filed in Burke, Franklin and Rutherford counties. Georgia-Pacific filed in Bertie, Brunswick, Hertford and Martin counties. Weyerhaeuser filed in Bertie, Currituck, Martin, Onslow, Pamlico and Washington counties. (These fourteen counties are hereinafter referred to as "the Counties.") These applications were denied by the Counties and by their respective county boards of equalization and review.

The *ad valorem* tax statute involved, N.C. Gen. Stat. § 105-277.2 *et seq.*, provides that forestland owned by certain corporations whose shareholders meet specific descriptions is assessed and taxed on the basis of "present use value." Present use value is based on the capability of the property to produce income in its present use, in this case as forestland, regardless of other available uses for the property that would produce greater income and higher value. Corporations such as appellants, which do not qualify under the statute, are assessed and taxed at the "market value" rate, meaning that the land is valued and then taxed at the highest and best use for which the property is capable of being used, whether that be residential, commercial, industrial or otherwise, without regard for the current use of the property. The record is clear that taxing the property at the market value rather than at the present use value has resulted in higher property taxes for appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and Jim W. Phillips, Jr., for appellants.

Simpson, Aycock, Beyer & Simpson, by Samuel E. Aycock and Michael Doran; and McMurray, McMurray & Alexander, by John W. Alexander, for appellees.

ARNOLD, Judge.

Appellants' property qualifies under all but one criteria of the statute in question for the present use taxation classification. To qualify, forestland owned by corporations must be "part of a forest unit that is actively engaged in the commercial growing of trees under a sound management program." N.C. Gen. Stat. § 105-277.2(2). The forestland must be comprised of tracts twenty acres in size or larger. N.C. Gen. Stat. § 105-277.3(a)(3). The property must be owned for at least four years by a taxpayer whose principal business is that of a timber company. N.C. Gen. Stat. §§ 105-277.2(4)b and -277.3(b)(2). The only requirement appellants do not satisfy is one related to the description of the shareholders of the corporation owning the property. The shareholders must all be "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)b. " 'Relative' means:

a. Spouse;

b. A lineal ancestor;

c. A lineal descendant;

d. A brother or sister, including a stepbrother or stepsister;

e. An adopted or adoptive child, parent, grandchild, or grandparent; or

f. A spouse of a person listed in paragraphs b. through e." N.C. Gen. Stat. § 105-277.2(5a).

The ownership requirement excludes publicly owned corporations. Although in many instances corporations eligible under this statute are "family" corporations, they need not be "family" corporations in the strict sense. Eligible corporations can have numerous shareholders so long as the shareholders qualify by engagement in the business or by relationship to someone who is. Eligible corporations can be large, both in financial size and in the number of shareholders, while excluded corporations can be small both in net worth and in number of shareholders.

Appellants have failed to carry forward in their briefs any argument that the ruling of the Property Tax Commission was erroneous other than the constitutional attack on the controlling statute forming the basis of the decision. As a result, any objection to the ruling of the Commission based on their application of the statute to the taxpayers has been abandoned. N.C.R. App. P. 28(a). Thus, the only question before us is the constitutionality of the statute.

The Property Tax Commission is without authority to rule on the constitutionality of N.C. Gen. Stat. § 105-277.2 *et seq. Johnston v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *cert. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). Instead, such authority is vested in this Court. *Id.; see also* N.C. Gen. Stat. § 105-345.2(b)(1).

[1] Appellants first argue that the classification of property in N.C. Gen. Stat. § 105-277.2 *et seq.* violates the powers of the General Assembly as granted under article V, section 2 of the North Carolina Constitution and therefore is not in compliance with article I, section 19 of the state constitution. Appellants' main attack on the classification system of the statute focuses on alleged violations of their equal protection rights under article I, section 19 of the

state constitution and the fourteenth amendment of the United States Constitution. In the second portion of this opinion, those questions will be examined more thoroughly. First, however, we will analyze appellants' closely related argument concerning article V, section 2 of the state constitution, which states:

> (2) *Classification.* Only the General Assembly shall have the power to classify property for taxation, which power shall be exercised only on a State-wide basis and shall not be delegated. No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government.

While this constitutional grant of authority establishes the general rule that taxes must be applied uniformly, it "does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation." *In re Appeal of Martin*, 286 N.C. 66, 75, 209 S.E.2d 766, 773 (1974). "[A] classification does not violate this provision if it is founded upon a reasonable distinction and bears a substantial relation to the object of the legislation . . . . It is only those classifications which are arbitrary or capricious which violate Article V, Section 2." *In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. 211, 223-24, 322 S.E.2d 155, 163 (1984), *appeal dism., sub nom.*, 472 U.S. 1001, 86 L.Ed.2d 710 (1985).

To find that N.C. Gen. Stat. § 105-277 *et seq.* is unconstitutional under article V, section 2 of our state constitution, appellants must show that the definition of "individually owned" contained in the statute is either arbitrary or capricious. As noted above, the General Assembly has constitutional authority to designate special classes of property for taxation purposes. N.C. Gen. Stat. § 105-277.2 *et seq.* designates two main criteria to qualify for the special taxation classification: (1) the land must be used as agricultural, horticultural or forest land, and (2) it must be individually owned. Property with only one of these characteristics is not within the special class designated by the General Assembly. Appellants use the property for the right purpose but do not individually own it. *See* N.C. Gen. Stat. §§ 105-277.2(4)b and (5a).

In their brief, appellants make the following argument on this point:

> The result (of the individual ownership requirement) is to draw an arbitrary line between corporations engaged in *exactly* the same kind of business, owning *exactly* the same kind of land, and making *exactly* the same use of the property involved, granting some of these corporations preferential tax treatment for their property and denying such tax treatment to other similarly situated corporations . . . . This blatantly violates the rule that for taxing purposes "all persons similarly circumstanced shall be treated alike," (citation omitted); and that classification must rest on "a genuine distinction." (citation omitted). The distinction attempted here, based not on genuine differences between corporations—there are none—but on an arbitrary description of the individuals who happen to own the stock in the taxpayer corporation and beyond that on their family relationships, is plainly not a genuine distinction between the corporate taxpayers for *ad valorem* tax purposes.

To determine if the ownership requirement of the statute is constitutional, it is necessary to examine the purpose for including this distinction in the statute. As originally written in 1973, the preferential tax treatment provided by the present use valuation statute was limited to "individually owned land," that is, property owned only by natural persons. Property owned by any corporate entity was entirely excluded. N.C. Gen. Stat. § 105-277.2(4) (Supp. 1973). The purpose of the statute was to ease the tax burden on family farmers or foresters and encourage their continued use of the property rather than succumbing to development pressures. Furthermore, "[t]he law as written in 1973 appears to be an attempt to deprive agribusiness and development corporations of the benefits of present use valuation." *W.R. Company v. Property Tax Comm.*, 48 N.C. App. 245, 258, 269 S.E.2d 636, 643 (1980), *disc. rev. denied*, 301 N.C. 727, 276 S.E.2d 287 (1981).

In 1975, the General Assembly amended the statute and broadened the definition of "[i]ndividually owned" to include some corporate entities, namely "family corporations." N.C. Gen. Stat. § 105-277.2(4)b (1975 Supp.) "The amendment was enacted at a time when farm families were advised to incorporate for estate planning purposes." *W.R. Company*, at 259, 269 S.E.2d at 644; *see also* Institute of Government Property Tax Bulletin #44 (20 August 1975).

On at least three other occasions, the General Assembly has had opportunities to broaden the qualified ownership class to include public corporation but has chosen not to. For example, a 1979 bill designed to accomplish this purpose was allowed to die in the House Finance Committee. *W.R. Company*, at 259, 269 S.E.2d at 644. Again in 1983, the House defeated a bill that specifically sought to extend use-value appraisal eligibility to publicly held corporations. This defeat for publicly held timber corporations came despite a specific recommendation to change the law made by the 1983 Property Tax System Study Committee. Instead, the 1985 session of the General Assembly chose to add subsection (5a) to N.C. Gen. Stat. § 105-277.2, which changed the ownership requirement by expanding the class of relatives who could be shareholders in the family corporations. This was the latest change made in the statute.

At least thirty-five other states have similar statutes according special tax treatment to property used in this manner. Appellants contend that North Carolina is the only state that restricts the special tax treatment of the statute based upon the identity of the property owner. However, our research indicates that other states, such as Georgia, South Carolina, Texas and Minnesota, have to varying degrees excluded certain corporate taxpayers from the preferential tax treatment laws. Nonetheless, it is true that North Carolina's statute is more restrictive in excluding public corporations than most other ones. Yet, we believe this is because the North Carolina General Assembly has accomplished what the majority of other states have failed to do. In *W.R. Company*, Judge Vaughn noted the following major criticism of these types of tax statutes:

> [T]he programs are for the most part applicable to all people and all lands statewide resulting in a tax windfall for those not financially pressed by taxes and tax reduction for land which is not the object of development pressures. It is an unfair subsidization of farmers and land speculators who are not in need of a tax shelter.

Id. at 256, 269 S.E.2d at 642. Judge Vaughn then reviewed the specifics of the North Carolina statute and the amendments concerning the ownership requirements made by the General Assembly during the 1970s. After even more legislative refinement during the 1980s, we find his comment concerning the ownership require-

ment of the statute even more pertinent today: "The intent of the legislature seems quite clear. Its intent has been to be very restrictive with regard to what corporate entities can receive the benefit of present use valuation. The law is generally restrictive and answers much of the criticism leveled at such tax statutes in other jurisdictions." *Id.* at 259, 269 S.E.2d at 644.

The definition of individually owned contained in N.C. Gen. Stat. §§ 105-277.2(4)b and -277.2(5a) is neither arbitrary nor capricious. Rather, after three legislative revisions this statute has been carefully tailored to provide a tax incentive to the family forester while avoiding a tax windfall to those foresters less likely to need such an incentive. The ownership distinction in the statute is reasonable and does not violate art. V, section 2(2) of the North Carolina Constitution.

[2] In conjunction with their first argument, appellants claim that the ownership requirement violates the Equal Protection Clause grounded in art. I, § 19 of the North Carolina Constitution. Appellants also contend that the statute violates their equal protection rights under the fourteenth amendment of the United States Constitution. In regard to these constitutional guarantees, the North Carolina Supreme Court has held that the principle of equal protection, made explicit in the fourteenth amendment to the federal constitution, has been expressly incorporated in art. I, § 19 of our state constitution, and for all practical purposes is the same under both constitutions. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E.2d 382 (1971); *Hajoca Corp. v. Clayton*, 277 N.C. 560, 568, 178 S.E.2d 481, 486 (1971). Therefore, we will examine the two equal protection questions simultaneously.

When addressing a claim that the Equal Protection Clause has been violated, the courts employ a two-tiered analysis. *Regan v. Taxation With Representation*, 461 U.S. 540, 76 L.Ed.2d 129 (1983). The highest level of review, or "strict scrutiny," applies "only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L.Ed.2d 520, 524 (1976). When strict scrutiny applies, the government must show that the classification created by the statute is "necessary to promote a compelling government interest." *In Re Assessment of Taxes Against Village*

Publishing Corp., 312 N.C. 211, 221, 322 S.E.2d 155, 162, *appeal dism., sub nom.*, 472 U.S. 1001, 86 L.Ed.2d 710.

A lower level of review applies when there is no fundamental right or suspect class involved. "A statutory classification survives this analysis if it bears 'some rational relationship to a conceivable legitimate interest of government.' . . . . Statutes subjected to this level of scrutiny come before the Court with a presumption of validity." *Id.* In the case before us, the statute is an economic regulation. In determining whether a purely economic regulation violates the Equal Protection Clause, the rational basis test is applied. *Id.*

Moreover, in cases challenging the constitutionality of tax statutes on equal protection grounds, the United States Supreme Court has always emphasized that States have broad powers to impose and collect taxes. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 35 L.Ed.2d 351, *reh'r. den.*, 411 U.S. 910, 36 L.Ed.2d 200 (1973). (The Court held that a state constitutional provision exempting individuals from *ad valorem* personal property taxes and imposing such taxes only on corporations and other "non-individuals" does not violate the Equal Protection Clause of the fourteenth amendment.) "Where taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Id.* at 359, 35 L.Ed.2d at 354-55. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88, 84 L.Ed. 590, 593 (1940).

Furthermore, under the lower tier, rational basis test, the party challenging the legislation has a tremendous burden in showing that the questioned legislation is unconstitutional. In *Lehnhausen*, Justice Douglas wrote:

> There is a presumption of constitutionality which can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." . . . The burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it. (citations omitted).

Lehnhausen, 410 U.S. at 364, 35 L.Ed.2d at 358 (emphasis added). Distinctions of degree between classes of taxpayers made by a

legislature are presumed to rest on a rational basis "if there is any conceivable state of facts" which would support the legislative decision. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509, 81 L.Ed. 1245, 1253 (1937).

Appellants have not demonstrated that the statute here is unconstitutional because they have failed to "negative every conceivable basis" that could exist to support this legislation. On the contrary, while N.C. Gen. Stat. § 105-277.2 *et seq.* is not perfect, it is clear that the ownership requirements of the statute are rationally related to the ends the General Assembly sought to accomplish. This statute has three primary goals: (1) to provide a tax incentive to family foresters; (2) to preserve the present use of forest land; and (3) to avoid a tax windfall for those not in need of such an incentive. *See W.R. Company*, at 256-57, 269 S.E.2d at 642. In our view, the narrowly drafted language of N.C. Gen. Stat. §§ 105-277.2(4)b and -277.2(5a) comes closer to reaching these goals than other legislation of a similar nature in the country.

Appellants claim that the distinction the statute draws between public and private ownership does not in reality help protect undeveloped forestland. They argue:

> It is fundamentally inconsistent with these purposes to exclude public corporations which own a substantial amount of timberland in the greenbelts around the cities and towns . . . . Indeed, because of the substantial amount of land in an undeveloped state and "open and green spaces" owned by Appellant timber companies in North Carolina, and the need to provide a "deterrent to such development," the exclusion of such companies from the statute defeats rather than serves the purposes of the statute.

Even if appellants' argument here is valid, the proper forum for its assertion is in the legislative chambers of the General Assembly, not in this Court. It is unimportant whether or not the General Assembly's use of a "public-private ownership" distinction to delineate between landowners who are "in need" of a tax incentive and ones who are not in fact frustrates one of the goals of the legislation. For the purposes of this proceeding, as long as it is arguable that the statutory scheme designed by our legislators *could* work, then we must uphold the challenged statute. The United States Supreme Court has consistently rejected attacks such as the one launched here under the guise of the Equal Protection

Clause. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 66 L.Ed.2d 659, *reh. denied*, 450 U.S. 1027, 68 L.Ed.2d 222 (1981).

In *Clover Leaf Creamery*, several dairies and milk container manufacturers challenged a state statute that banned the retail sale of milk in plastic nonreturnable, nonrefillable containers but permitted such sale in other nonreturnable, nonrefillable containers. The Court held the ban was not violative of the Equal Protection Clause. *Id.* "Whether *in fact* the Act will promote more environmentally desirable milk packaging is not the question: the Equal Protection Clause is satisfied by our conclusion that the Minnesota Legislature *could rationally have decided* that its ban on plastic nonreturnable milk jugs might foster greater use of environmentally desirable alternatives." *Id.* at 466, 66 L.Ed.2d at 670 (emphasis in original). Where the evidence before the legislature is "at least debatable," courts should not substitute their judgments for those of the lawmakers. *Id.* at 469, 66 L.Ed.2d at 672. Clearly, the ownership distinction drawn by the General Assembly in this statute arguably is related to the legitimate goals of helping foresters preserve undeveloped land, while spreading the tax burden in a fair manner. We hold that the ownership distinctions of N.C. Gen. Stat. §§ 105-277.2(4)b and -277.2(5a) satisfy the equal protection requirements of the state and federal constitutions.

Appellants' final assignment of error pertains to the proper remedy to impose were we to find that the statute here was unconstitutional. Because we uphold the statute against the constitutional attack, we will not examine the arguments related to the remedy.

Affirmed.

Judges JOHNSON and ORR concur.

CHICOPEE, INC., PLAINTIFF-APPELLANT v. SIMS METAL WORKS, INC., AMERICAN TOOL AND MACHINE COMPANY AND COMMERCIAL UNION INSURANCE COMPANY, DEFENDANTS-APPELLEES

No. 8911SC745

(Filed 15 May 1990)

1. **Limitation of Actions § 4.1 (NCI3d); Sales § 22 (NCI3d)— product liability—statute of repose—time of initial purchase for use**

Where plaintiff textile manufacturer contracted for defendant machine company to manufacture and install two drying ranges containing forty pressure vessels each, and defendant machine company subcontracted with defendant metal working company to manufacture the eighty vessels, the "initial purchase for use" of the pressure vessels within the meaning of the six-year statute of repose of N.C.G.S. § 1-50(6) occurred when plaintiff purchased the drying ranges for the purpose of manufacturing textiles, not when defendant machine company purchased the vessels from the subcontractor for assembly into the drying ranges.

Am Jur 2d, Products Liability § 921.

2. **Limitation of Actions § 4.1 (NCI3d); Sales § 22 (NCI3d)— product liability—statute of repose—proof by plaintiff**

Plaintiff met its burden of proving that its action for negligent manufacture and inspection of pressure vessels was brought no more than "six years after the date of initial purchase for use" within the meaning of N.C.G.S. § 1-50(6) where plaintiff filed its complaint on 19 September 1986, and plaintiff's evidence showed that on 19 September 1980 component parts of two drying ranges, including the pressure vessels, were still being shipped to plaintiff's plant for assembly and installation.

Am Jur 2d, Products Liability § 921.

3. **Rules of Civil Procedure § 15 (NCI3d)— denial of motion to amend complaint—inconsistent and incomplete reasons—apparent reasons—remand for reconsideration**

Where the trial court stated inconsistent and incomplete reasons for the denial of plaintiff's motion to amend its complaint, the Court of Appeals could have examined any apparent

reasons for such denial. However, since the Court of Appeals reversed a directed verdict for defendants and remanded the case for trial on plaintiff's negligence claim, the trial court was directed on remand to reconsider plaintiff's motion to amend.

Am Jur 2d, Pleadings §§ 306, 314.

4. **Rules of Civil Procedure § 60 (NCI3d)— Rule 60 motion for relief from judgment—no substitute for appeal**

Erroneous judgments may be corrected only by appeal and not by a motion under N.C.G.S. § 1A-1, Rule 60.

Am Jur 2d, Judgments §§ 671-674.

5. **Damages § 6 (NCI3d); Sales § 22 (NCI3d)— product liability negligence action—damages—economic losses**

Purely economic losses cannot be recovered in a product liability negligence action. Therefore, in an action to recover for negligent manufacture and inspection of a pressure vessel which exploded, the trial court properly ruled that plaintiff's recoverable damages did not include economic or pecuniary losses such as the cost to replace other allegedly defective pressure vessels not damaged by the explosion.

Am Jur 2d, Products Liability § 970.

APPEAL by plaintiff Chicopee, Inc. from judgment and order entered 8 February 1989 by *Judge Howard E. Manning, Jr.* in JOHNSTON County Superior Court, and from orders entered 19 May 1988 by *Judge Coy E. Brewer, Jr.* in JOHNSTON County Superior Court. Heard in the Court of Appeals 17 January 1990.

Plaintiff's evidence presented at trial tended to show the following: Plaintiff Chicopee, Inc. (Chicopee), is a textile manufacturer with a plant in Benson, North Carolina. In March 1980, plaintiff contracted with defendant American Tool and Machine Company (American Tool) to manufacture two drying ranges, each containing forty pressure vessels, and to install those drying ranges in Chicopee's Benson plant. The drying ranges are used in the manufacture of fiber products. Engineers employed by Chicopee prepared the specifications for the drying ranges, including specifications for the pressure vessels. Chicopee specified that the pressure vessels should be designed and manufactured to withstand working pressure

at 150 pounds per square inch and should comply with standards set by the American Society of Mechanical Engineers (ASME) Boiler and Pressure Vessel Code.

American Tool subcontracted with defendant Sims Metal Works, Inc. (Sims) for the manufacture of the eighty vessels. Sims contracted with Commercial Union Insurance Company (Commercial Union) to inspect the pressure vessels for compliance with the ASME Code.

By 22 August 1980, Sims and Commercial Union had completed manufacture and inspection of the pressure vessels. The pressure vessels and other component parts of the two drying ranges arrived at Chicopee's plant in several shipments between August and November 1980. In accordance with the contract, American Tool assembled and installed the drying ranges at Chicopee's plant.

On 15 October 1983, one of the pressure vessels exploded, damaging fabric and chemicals used in the manufacturing process. Chicopee hired two engineering firms to examine the welds on the remaining pressure vessels. The engineers determined that approximately three-quarters of the pressure vessels had not been manufactured in accordance with the ASME Code. Chicopee replaced all the defective cans.

On 19 September 1986, Chicopee filed its complaint against defendants American Tool, Sims and Commercial Union alleging negligence in the design, manufacture and inspection of the pressure vessels and seeking damages for the equipment and materials damaged in the explosion as well as for the cost of inspecting and replacing the defective pressure vessels. On 1 February 1988, Chicopee filed a motion to amend its complaint to add additional claims and additional defendants. On that same date, defendants Sims and Commercial Union filed motions for partial summary judgment on the issue of damages, arguing that plaintiff's damages should be limited to actual property damage. On 19 May 1988, Judge Brewer denied plaintiff's motion to amend its complaint and granted defendants' motions for partial summary judgment. On 27 September 1988, plaintiff brought a motion under N.C. Gen. Stat. § 1A-1, Rule 60 seeking an order setting aside Judge Brewer's 19 May 1988 orders. Additional facts regarding these pre-trial motions and orders are set out in the opinion.

The case came on for trial on 30 January 1989. During plaintiff's case, Chicopee reached a settlement with defendant American Tool and voluntarily dismissed its claim against that defendant. At the close of plaintiff's evidence, defendants Sims and Commercial Union moved for and Judge Manning granted a directed verdict against Chicopee. Chicopee appeals from this judgment, as well as from Judge Manning's order on plaintiff's Rule 60 motion and Judge Brewer's orders denying plaintiff's motion to amend and granting defendants' motions for partial summary judgment on the issue of damages.

Harlow, Reilly, Derr & Stark, by Jay R. Sloane and William L. London, for plaintiff appellant.

Young, Moore, Henderson & Alvis, by Thomas J. White, III and Theodore S. Danchi, for defendant appellee Sims Metal Works, Inc.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Mark A. Ash and Stuart B. Dorsett, for defendant appellee Commercial Union Insurance Company.

ARNOLD, Judge.

The first issue on appeal is whether the trial court properly granted a directed verdict against plaintiff on the ground that the products liability statute of repose, N.C. Gen. Stat. § 1-50(6), barred plaintiff's action. Plaintiff has the burden of proving the condition precedent that its cause of action is brought no "more than six years after the date of initial purchase for use or consumption." *Bolick v. American Barmag Corp.*, 306 N.C. 364, 370, 293 S.E.2d 415, 420 (1982). Whether a statute of repose has expired is a question of law, *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871-2 (1983). If plaintiff fails to prove that its cause of action is brought before the repose period has expired, a directed verdict for defendant is appropriate, since plaintiff's case is insufficient as a matter of law.

The controlling statute on the question before us is N.C. Gen. Stat. § 1-50(6), which provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall

be brought more than six years after the date of initial purchase for use or consumption.

[1] Plaintiff contends that the products "purchase[d] for use" were the two drying ranges and that the "initial purchase for use" of those ranges was made by plaintiff. Defendants, on the other hand, argue that the product "purchase[d] for use" was the pressure vessel that exploded and that the "initial purchase for use" was made by American Tool, when it purchased the pressure vessels from Sims to assemble them into drying ranges.

Neither N.C. Gen. Stat. § 1-50(6) nor Chapter 99B defines "initial purchase for use." Plaintiff relies on *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985), which upheld N.C. Gen. Stat. § 1-50(6) against several challenges to its constitutionality. In *Tetterton*, defendant Long Manufacturing Company, Inc. (Long) manufactured a tobacco harvester, sold the harvester to a dealer and distributor, who subsequently sold it to Jimmy Ray Casey, a farmer. *Id.* at 46, 332 S.E.2d at 68. The farmer used the equipment on his farm until he sold it to defendant Revels Tractor Company, Inc. (Revels). *Id.* Revels subsequently sold the harvester to plaintiff appellant's husband, also a farmer. *Id.* Plaintiff's husband was killed while operating the harvester on his farm. *Id.* Plaintiff's products liability claims against manufacturer Long were dismissed on Long's summary judgment motion on the ground that plaintiff's action against Long was barred by N.C. Gen. Stat. § 1-50(6). *Id.* On appeal, plaintiff challenged the language "initial purchase for use or consumption" as unconstitutionally vague. *Id.* at 54, 332 S.E.2d at 73. Plaintiff argued that the language in question could reasonably refer to any of three different dates: (1) the date the manufacturer Long sold the harvester to the dealer-distributor; (2) the date the dealer-distributor sold the harvester to the farmer Casey; (3) the date Revels Tractor Company sold the harvester to plaintiff's intestate Tetterton. *Id.* at 54-5, 332 S.E.2d at 73. The Supreme Court rejected plaintiff's vagueness challenge and found that "[t]he first purchase in this case 'for use or consumption' was by farmer Casey" (date (2) above). *Id.* at 56, 332 S.E.2d at 74. A dealer-distributor's purchase of a product for the purpose of resale is not the "initial purchase for use" within the meaning of N.C. Gen. Stat. § 1-50(6). *See id. Accord Whittaker v. Federal Cartridge Corp.*, 466 N.E.2d 480 (Ind. App. 1984).

In this case, American Tool's "use" of the eighty pressure vessels was to assemble those and other component parts into the two drying ranges and install those ranges in plaintiff's plant in accordance with their contract with plaintiff. We hold that American Tool's purchase of the component parts for the purpose of assembly into a drying range, like a dealer-distributor's purchase of a product for the purpose of resale, is not the "initial purchase for use" within the meaning of N.C. Gen. Stat. § 1-50(6). Chicopee's purchase of the drying ranges for the purpose of manufacturing textiles was the "initial purchase for use" because manufacturing textiles was the ultimate or intended use of this product. *Accord Wilson v. Studebaker-Worthington, Inc.*, 699 F. Supp. 711 (1987) (Under Indiana statute of repose, company which ordered assembled product was "user or consumer," not subcontractor which, by assembling product, functioned as a go-between.); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985) (Under Nebraska statute of repose, plumbing pipe was first sold for use when homeowner took possession of house of which pipe was a part, not when plumbing subcontractor purchased pipe from pipe manufacturer.); *see* Am. Law of Prod. Liab. 3d § 47.46 at 60.

This construction of the statutory language "initial purchase for use" does not offend the policy behind the statute of repose. As our Supreme Court stated in *Tetterton*, the intent of the legislature in enacting the statute of repose was "to limit the manufacturer's liability at some *definite point in time*." *Tetterton* at 56, 332 S.E.2d at 74 (emphasis added). The legislature wanted to avoid subjecting manufacturers to " 'open-ended' liability created by allowing claims for an *indefinite* period of time after the product was first sold and distributed." *Id.* at 54, 332 S.E.2d at 73 (emphasis added). The issue in this case is determining that definite point in time, six years after which manufacturers will no longer be subject to products liability actions. As we have construed the statutory language, defendants' liability would end six years from the date their pressure vessels, as assembled into drying ranges, were purchased by Chicopee, the initial user.

Defendants argue under this statutory construction, that if American Tool kept defendants' component parts in inventory for a time, defendants' liability would extend more than six years from the date of their sale to American Tool. While this is a possibility, it is not a consequence that offends the purpose behind the statute of repose. Defendants will still be shielded from liability

after six years from the date American Tool sells the completed product to its ultimate user. Defendants' position is no different from that of the tobacco harvester manufacturer in *Tetterton*, whose liability will not end until after six years from the date the equipment is sold by a dealer-distributor to an ultimate user. Neither defendants here, nor the defendant manufacturer in *Tetterton*, can control when the "initial purchase for use" occurs, and they will nevertheless be shielded from liability at a *definite point in time. See id.* at 56, 332 S.E.2d at 74. Other state statutes of repose begin their limitations period as of "the date of first sale, lease or delivery" of the product, Ill. Rev. Stat. ch. 110, para. 13-213(b), or "the date that the party last parted with possession or control of the product," Conn. Gen. Stat. § 52-577a, giving manufacturers control over when the limitations period begins. Our legislature, however, chose to begin the limitations period at the date of "initial purchase *for use*," not landmarks such as those chosen by the Illinois or Connecticut legislatures.

Having determined that Chicopee, not American Tool, was the "initial purchaser for use," we next decide if Chicopee's products liability action against defendants was brought no more than "six years after the date of initial purchase for use." Plaintiff argues that the date all component parts of the drying ranges, which were to be assembled on plaintiff's premises, were received at plaintiff's plant determines the date of purchase. Defendants contend that, because "purchase" is not defined in N.C. Gen. Stat. § 1-50(6) or in Chapter 99B, we should look to the Uniform Commercial Code (UCC) to determine the date of purchase. We disagree. Plaintiff's claims against defendants for negligent manufacture and inspection do not arise under the UCC. Under these circumstances, the UCC is not authoritative on the question of when plaintiff purchased the drying ranges.

[2] Plaintiff filed its complaint on 19 September 1986. Therefore, for its products liability action to be timely under N.C. Gen. Stat. § 1-50(6), plaintiff must show that the drying ranges were initially purchased for use after 19 September 1980. Plaintiff's evidence showed that on 19 September 1980, component parts of the drying ranges were still being shipped to plaintiff's plant for assembly and installation. Therefore, without determining precisely when plaintiff's purchase of the drying ranges was complete, we find that plaintiff discharged its burden of proving that its action was

brought no more than six years after the initial purchase for use or consumption.

Plaintiff next assigns error to the denial of its motion to amend its complaint. Plaintiff's original complaint, alleging negligent manufacture and inspection of the pressure vessels by defendants Sims and Commercial Union, was filed on 19 September 1986. On 1 February 1988, plaintiff moved to amend its complaint 1) to allege fraud and unfair trade practices in the inspection of the pressure vessels against defendants Sims and Commercial Union as well as against three new defendants, William C. Sims, Jr., McCoy-Ellison, Inc., and Daniel W. McCoy, the former and current principals of Sims and its successor corporation, and 2) to add as new defendants Mary T. Sims, William Curtis Sims, Jr., and Joe N. Sims pursuant to a provision in the Articles of Dissolution filed by Sims on 17 June 1987 that guaranteed that they had made adequate provision for the satisfaction of any judgment rendered against Sims. Judge Brewer signed three orders: one order stated that "the substantive law of Alabama applies to the plaintiff's proposed amended causes of action, and that said motion should be denied." The second order stated that North Carolina law applied and denied plaintiff's motion, while the third order denied plaintiff's motion without further elaboration.

Amendment of pleadings after a response has been served is only by "leave of court . . . and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a). A motion for leave to amend is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of abuse of discretion. *Martin v. Hare*, 78 N.C. App. 358, 360-1, 337 S.E.2d 632, 634 (1985). Although a trial court is not required to state specific reasons for denial of a motion to amend, *see id.* at 361, 337 S.E.2d at 634, reasons that would justify a denial 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.*

From the orders appealed from, it appears that the trial court chose to state specific reasons for denying plaintiff's motion to amend, and stated those "reasons" as conclusions according to what substantive law governed plaintiff's proposed additional causes of action. The "reasons" stated in the orders, however, are inconsistent, since one order concludes that Alabama law governs while

another order concludes that North Carolina law governs. The "reasons" stated are also incomplete. The fact that a particular state's law governs does not specifically explain why the plaintiff's motion to amend should be denied.

[3] When the trial court fails to state specific reasons for denial of a motion to amend or when the trial court states inconsistent and incomplete reasons, this Court *may* nonetheless examine any apparent reasons for such denial. *See id.* (emphasis added). However, since we are reversing the directed verdict for defendants and remanding the case for trial on plaintiff's negligence claim, we direct the trial court on remand to reconsider plaintiff's motion to amend, *see Murphy v. Murphy*, 295 N.C. 390, 398, 245 S.E.2d 693, 698-99 (1978); Shuford, N.C. Civil Practice and Procedure § 15-5 (3d ed. 1988).

[4] We note that plaintiff brought a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 requesting that the trial court "correct the clerical mistake in plaintiff's submitting three orders, and the Court's signing all three. This Court should further clarify whether . . . Alabama law or North Carolina applies to plaintiff's claims against Sims and Commercial Union." The questions presented by plaintiff's Rule 60 motion were questions of law: whether the trial court abused its discretion in denying plaintiff's motion to amend and whether Alabama or North Carolina law applied to plaintiff's claims. Erroneous judgments may be corrected only by appeal, and a motion under this rule cannot be used as a substitute for appellate review. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *appeal dismissed and cert. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). Since Rule 60 was not an appropriate vehicle by which to seek review of Judge Brewer's orders on plaintiff's motion to amend, as well as our decision to direct a reconsideration of that motion, we will not consider Judge Manning's disposition of this aspect of plaintiff's Rule 60 motion.

[5] The question presented by plaintiff's last assignment of error is whether Judge Brewer erred in granting partial summary judgment to defendants Sims and Commercial Union on the issue of damages. Judge Brewer's order of 19 May 1988 stated:

> [A]s a matter of law, the plaintiff's recoverable damages must be limited to actual damage to property resulting from the alleged negligence of the defendants and cannot include economic

or pecuniary losses such as the costs to replace property not damaged by the explosion described in the complaint.

Our state courts have not decided whether, in the context of a products liability suit, purely economic losses can be recovered in an action for negligence. The majority of courts which have considered this question have held that purely economic losses are not ordinarily recoverable under tort law. *2000 Watermark Ass'n, Inc. v. Celotex Corp.*, 784 F.2d 1183, 1185 (1986), and cases cited therein. We adopt this rule and find no error in Judge Brewer's order.

We note that plaintiff's Rule 60 motion sought relief from Judge Brewer's order at issue here. As with the portion of plaintiff's Rule 60 motion challenging Judge Brewer's order denying plaintiff's motion to amend, the portion of the Rule 60 motion challenging Judge Brewer's summary judgment order raises a question of law. Since erroneous judgments may be corrected only by appeal, not by a Rule 60 motion, *Town of Sylva*, this portion of plaintiff's Rule 60 motion was also improperly brought.

In sum, we reverse the directed verdict in favor of defendants and remand for trial. On remand, the trial court should reconsider plaintiff's 1 February 1988 motion to amend. We affirm the grant of partial summary judgment on the damages issue.

Affirmed in part; and reversed and remanded in part.

Chief Judge HEDRICK and Judge WELLS concur.

RICHARD SHERWOOD WEBSTER AND BENNY MITCHELL CHURCH, PLAINTIFFS v. HARRELL POWELL, JR., DEFENDANT

No. 8921SC499

(Filed 15 May 1990)

1. Attorneys at Law § 42 (NCI4th)— attorney malpractice—release from bankruptcy—partial summary judgment for defendant proper

There was no error in granting partial summary judgment for defendant on claims of breach of fiduciary duty, fraud,

unjust enrichment, return of fee, restitution, and imposition of a constructive resulting trust where defendant attorney filed a bankruptcy petition in 1986 which was granted in 1987, discharging all dischargeable debts, including plaintiffs'; the bankruptcy court later granted plaintiffs' motion for release from the stay and gave them express authority to continue their action to the extent of the limits of coverage of any malpractice liability insurance policies; plaintiffs' claims for punitive damages based upon fraud and for the imposition of a trust due to fraud and oppressive tactics are claims expressly excluded by the terms of the policy; with respect to the claim of breach of fiduciary duties, the contract referred to the law firm and there was no language in the contract which specifically made defendant personally liable for retention and payment of fees to others, so that the contract does not evidence the fact that defendant attorney agreed to act as a fiduciary for plaintiffs as their complaint alleges; and, even if defendant had agreed to act as a fiduciary, defendant attorney's insurance policy indicates that coverage will be provided for fiduciary agreements which require court approval, so that an informal fiduciary arrangement of this nature would be outside the scope of the insurance policy.

Am Jur 2d, Attorneys at Law §§ 217, 226; Bankruptcy §§ 71, 72, 785, 786, 799, 800.

2. Attorneys at Law § 44 (NCI4th)— malpractice—motion in limine granted—no abuse of discretion

The trial court did not err in an action for damages against an attorney by granting defendant attorney's motion *in limine* to preclude introduction of evidence related to defendant's failure to return plaintiffs' money, unethical solicitation, commingling, excessive fees, and unauthorized use of a deed of trust. Plaintiffs' counsel failed to articulate a reason for the court to allow the excluded evidence to be admitted; summary judgment had already been properly granted on claims for return of fee and constructive or resulting trust; and breach of a provision of the Code of Professional Responsibility is not in and of itself a basis for civil liability.

Am Jur 2d, Attorneys at Law §§ 223, 225.

3. Limitation of Actions § 4.2 (NCI3d)— attorney malpractice— accrual of claim—statute of limitations

The trial court correctly granted defendant attorney's motion for a directed verdict as to plaintiffs' professional negligence and breach of contract claims where defendant's alleged wrongful conduct was readily apparent as early as 6 October 1981 and plaintiffs were at liberty to sue at that time; the statute of limitations began to run from that date and plaintiffs were required to bring their action by 7 October 1984; and the claims were not filed until 29 April 1985.

Am Jur 2d, Attorneys at Law § 221.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by plaintiffs from judgment entered 14 October 1988 by *Judge Melzer A. Morgan* in FORSYTH County Superior Court. Heard in the Court of Appeals 20 December 1989.

Robert R. Schoch for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, by William C. Raper and G. Michael Barnhill, for defendant-appellee.

ORR, Judge.

On 26 April 1985, plaintiffs filed this complaint which alleges that they contracted with defendant, a licensed attorney, to represent them in several legal matters. When, according to plaintiffs, defendant failed to perform pursuant to the terms of their agreement, this action was brought against him for damages.

In their complaint, plaintiffs allege that they were approached by defendant in February 1981, and that after several meetings with him the parties entered into a contract whereby defendant agreed to act as attorney for them and they agreed to pay him $150,000.00 for his services. According to plaintiffs, defendant agreed to represent them concerning anticipated audits by the Internal Revenue Service (the IRS), and concerning any criminal charges resulting from their prior tax activities. Defendant also allegedly agreed to represent them on any charges which might be filed against them relating to violations of banking laws or regulations. Defendant allegedly contracted to hire an outside Certified Public Accounting (CPA) firm to assist in preparation of the matters for the IRS. Defendant was to pay the CPA firm out of the $150,000.00

which plaintiffs were to pay him. Defendant also agreed to hire additional counsel if criminal indictments were returned against plaintiffs. Said counsel was to be paid out of the same $150,000.00 fund referred to above.

Plaintiffs further allege that defendant's representation of them was inadequate in that he failed to advise them and incorrectly advised them on several occasions. They allege that they ultimately hired replacement counsel to conduct the various negotiations which defendant had agreed to conduct for them. Furthermore, plaintiffs allege that defendant made himself unavailable to them and often absented himself from important meetings. Most importantly, plaintiffs allege that defendant failed to pay the invoices which he had agreed to pay. When defendant failed to respond to plaintiffs' numerous requests for him to make these payments and/or to return the unearned portions of their advancements, plaintiffs filed this complaint seeking compensatory and punitive damages for: (1) breach of contract, (2) breach of fiduciary duty, (3) professional negligence, and (4) fraud. In the alternative, plaintiffs were also seeking to have a constructive or resulting trust imposed due to the invalidity of the contract which was allegedly procured by fraud and duress.

Defendant filed an answer to this complaint on 11 August 1986. Therein he admitted discussing plaintiffs' cases with them and contracting with them for his services. He also stated that he negotiated certain advantageous plea bargain and immunity agreements for them. However, he denied all material allegations made against him by plaintiffs.

By way of affirmative defenses, defendant avers that plaintiffs' claims are barred by the statutes of limitation contained in N.C. Gen. Stat. §§ 1-15(c) and 1-52. He further avers that plaintiffs' requests for equitable relief in the form of a constructive or resulting trust are barred by the unclean hands doctrine. According to defendant's answer, he substantially performed by rendering valuable services; however, plaintiffs refused to make payments as required by their contract. He avers that any actual negligence by him was offset by plaintiffs' own contributory negligence in failing to fully disclose all facts and circumstances related to their criminal activity. Defendant also raised the defense of satisfaction and accord.

Thereafter, on 2 September 1986, defendant filed a petition for bankruptcy under Chapter 7 of the United States Code, Title 11. A stay was ordered in that action, and on 5 November 1986,

plaintiffs filed a motion for relief from that stay. They asked the court to modify its stay and allow them to prosecute their claims against defendant to the extent of his coverage under a malpractice liability insurance policy. On 18 May 1987, plaintiffs were authorized to continue their suit and the stay was "modified to the extent of the limits of coverage of any malpractice liability insurance policies issued to the [defendant] which may be applicable to the [plaintiffs' claims]. . . ."

On 29 May 1987, defendant filed a motion for a judgment on the pleadings requesting a judgment with respect to plaintiffs' professional negligence and malpractice claims. His motion was denied on 28 September 1987. Defendant then filed a summary judgment motion on or about 11 April 1988. Attached to this motion was his own affidavit and a copy of his insurance policy with Lawyers Mutual Liability Insurance Company which was in effect during the time period in which the subject of this suit arose. Plaintiffs filed several affidavits in opposition to defendant's motion.

On 29 April 1988, the court granted defendant's summary judgment motion with regard to the following claims: "(a) imposition of a constructive or resulting trust; (b) breach of fiduciary duty; (c) fraud, including double damages and punitive damages; (d) restitution, unjust enrichment and 'money had and received'; (e) return of fee; and (f) recovery of fee because the fees were allegedly unreasonable, oppressive and excessive."

Defendant's motion was denied as to plaintiffs' claims for professional negligence and breach of contract as that claim relates to their cause of action for professional negligence.

On or about 4 October 1988, defendant filed a motion *in limine* with the trial court to exclude testimony or argument about claims which had already been summarily dismissed in his favor. Defendant sought to exclude any reference to and evidence of his alleged violations of certain professional rules of conduct, his alleged use of illegal drugs, and the existence of a professional malpractice liability insurance policy.

The court granted defendant's motion *in limine*, and plaintiffs thereafter filed a motion to correct an alleged clerical error in the court's order granting defendant partial summary judgment. The court denied plaintiffs' motion.

Thereafter, the court entered a directed verdict in favor of defendant on plaintiffs' claims for malpractice and contractual breach arising from that malpractice. Plaintiffs now appeal the adverse judgments and decisions which were entered below.

I.

[1] Plaintiffs have raised numerous issues some of which we have consolidated for our discussions herein. We will first address the question of whether the trial court erred in granting partial summary judgment in favor of defendant thereby dismissing plaintiffs' claims for breach of fiduciary duty, fraud, unjust enrichment, return of fee, recovery of fee, restitution, and for the imposition of a constructive or resulting trust.

Summary judgment is appropriate when the pleadings, depositions, and other relevant discovery materials show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983). In the case at bar, defendant filed a petition in bankruptcy court in 1986. On 17 April 1987, the bankruptcy court granted that petition and entered an order discharging all of defendant's dischargeable debts. Plaintiffs' claims against defendant were therefore discharged by this order. However, the bankruptcy court later granted plaintiffs' motion for relief from its stay and gave them express authority to continue their action against defendant for damages:

> to the extent of the limits of coverage of any malpractice liability insurance policies issued to the debtor which may be applicable to [plaintiffs' claims], . . . the stay . . . shall remain in full force and effect as to any portion of those claim [sic] for relief not covered by the debtor's malpractice liability insurance policy.

The language of defendant's malpractice liability insurance policy indicates that defendant was insured for all sums which he should become legally obligated to pay as "money damages" for any claims arising out of the insured's rendering or failing to render his professional services. Under the exclusions section, the policy makes it clear that it does not apply to any claim arising out of any active or deliberate dishonest or fraudulent acts or omissions, and to any punitive, exemplary, double or treble or other damages which are in excess of actual damages. The policy further states that

it covers the attorney when acting as "administrator, conservator, executor, guardian, trustee or in any similar fiduciary capacity."

Plaintiffs' claims for punitive damages based upon fraud and for the imposition of a trust due to fraud and oppressive tactics are claims expressly excluded by the terms of the policy. Therefore, the trial court correctly granted defendant's summary judgment motion as to those matters.

With respect to plaintiffs' claim for breach of fiduciary duties, plaintiffs' contract states that it was "made and entered into . . . between POWELL, YEAGER & FISCHER, hereinafter referred to as 'Law Firm' . . . and [plaintiffs]." It further states that the "Law Firm" would retain the additional counsel and CPA firm and the "Law Firm" would "be responsible for the payment of the fees" to those other entities. There is no language in plaintiffs' contract which specifically makes defendant Powell personally liable for retention and payment of fees to others; the firm contracted to perform such services. Plaintiffs unfortunately voluntarily dismissed their complaint against the firm under N.C. Gen. Stat. § 1A-1, Rule 41(a) on 6 September 1985. Therefore, the trial court properly dismissed this matter as to Powell because plaintiffs' contract does not evidence the fact that Powell agreed to act as a fiduciary for plaintiffs as their complaint alleges.

Furthermore, even if defendant had agreed to act as a fiduciary in this matter, the language in defendant's insurance policy indicates that the policy covers attorneys when acting as "administrator[s], conservator[s], executor[s], guardian[s], trustee[s] or in any similar fiduciary capacit[ies]." We do not believe that their agreement would be covered under this policy because this risk is different from the type of risk described in the policy. Powell's policy indicates that coverage will be provided for fiduciary agreements which require court approval. Therefore, an informal fiduciary arrangement of this nature would be outside of the scope of defendant's policy. As such, the court would have been compelled to dismiss this claim as it would not have been compensable under defendant's policy. We find no error and overrule this assignment.

II.

[2] The next issue raised by this appeal is whether the trial court erred in granting defendant's motion *in limine* which precluded the introduction of evidence related to defendant's failure to return

plaintiffs' money, unethical solicitation, comingling, excessive fees and his unauthorized use of plaintiff Church's deed of trust as constituting evidence of malpractice.

A motion *in limine* is "made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial. . . ." *State v. Tate*, 300 N.C. 180, 182, 265 S.E.2d 223, 225 (1980). "The judge has a wide discretion to make or refuse to make advance rulings. . . ." McCormick on Evidence, Section 52 (3rd ed. 1984). The ground for reversing a court's decision on such a motion is an abuse of discretion. *Duke Power v. Ham House, Inc.*, 43 N.C. App. 308, 258 S.E.2d 815 (1979).

The trial transcript which contains the parties' argument to the court demonstrates that plaintiffs' counsel failed to articulate a reason for the court to allow the excluded evidence to be admitted. Indeed, their attorney stated several times that he *would* be offering the evidence to show that defendant's conduct was unethical and violative of certain rules of professional conduct. Evidence introduced for those reasons was correctly excluded for two reasons.

First, the summary judgment order had already properly dismissed the return of fees claim and the claim for a constructive or resulting trust. Therefore, any evidence which related to those claims, and for which plaintiffs failed to articulate another valid reason for admission was correctly excluded.

Secondly, we have previously stated that a breach of a provision of the Code of Professional Responsibility is not "in and of itself . . . a basis for civil liability. . . ." *McGee v. Eubanks*, 77 N.C. App. 369, 374, 335 S.E.2d 178, 181 (1985), *disc. review denied*, 315 N.C. 589, 341 S.E.2d 27 (1986). Inasmuch as this evidence may have supported an allegation regarding violations of disciplinary rules, the court correctly excluded it because plaintiffs' attorney failed to present any evidence to the trial court which would show that the excluded material was relevant in determining whether defendant was liable for malpractice for his failure to perform his duties under the contract. More importantly, plaintiffs have failed to demonstrate to this Court that the trial court abused its discretion in granting defendant's motion *in limine*. Therefore, we shall not disturb the trial court's ruling on this issue.

III.

[3] Next, we shall address the question of whether the trial court erred in granting defendant's motion for a directed verdict as to plaintiffs' professional negligence and breach of contract claims.

> Upon a motion for a directed verdict pursuant to N.C.G.S. 1A-1, Rule 50, the court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. . . . It is only where the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor that the motion for directed verdict should be granted. . . .
>
> A directed verdict is proper only if it appears that the nonmovant failed to show a right to recover upon *any* view of the facts which the evidence reasonably tends to establish . . . . [T]he court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion for a directed verdict only if *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff.

West v. Slick, 313 N.C. 33, 40-41, 326 S.E.2d 601, 605-06 (1985) (emphasis in original) (citations omitted).

In the case at bar, plaintiffs were limited to a professional negligence claim based upon alleged acts of legal malpractice and a claim for a breach of contract arising from that professional negligence. A professional negligence claim against an attorney is, in essence, a legal malpractice claim. Defendant argues that plaintiffs' claims based on these two theories are barred by the applicable statutes of limitations.

In general, our Supreme Court has said that causes of action accrue to injured persons so as to start the statute of limitations, when those persons are at liberty to sue. *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E.2d 570 (1966). Likewise, we recently considered an issue relating to the statute of limitations for legal malpractice claims in *Nationwide Mutual Ins. Co. v. Winslow*, 95 N.C. App. 413, 382 S.E.2d 872 (1989). There, we said civil actions can only be commenced after the cause of action has accrued. *Id.* at 415, 382 S.E.2d at 873. But, when the damage is not readily apparent to the claimant, the action accrues at the time of the happening of the last wrongful act of the defendant and suit must

be brought within three years of that accrual. *Id. See* N.C. Gen. Stat. §§ 1-15(c) and 1-52.

Here, plaintiffs allege that defendant's failure to negotiate a favorable plea and to coordinate effective defensive strategies for them was malpractice. They further allege that his failure to perform certain services and pay various expenses was a breach of his contract. Plaintiffs allege that they were given advice which did not result from defendant's exercise of his reasonable and ordinary care and diligence, and that he breached his contract with them by withholding his services and failing to pay bills. According to plaintiffs, this behavior "became evident as early as 6 October 1981." Plaintiffs allege that they were harmed by defendant on or about 15 July 1981 when he advised them to give certain inculpatory statements to Federal Bureau of Investigation officers regarding charges which had not yet been proved and for which they had not been given any assurances. Thereafter, plaintiffs allege that by the end of April 1982 it became necessary for them to hire replacement counsel to represent them.

In the case at bar, defendant's alleged wrongful conduct was readily apparent to plaintiffs as early as 6 October 1981. Certainly, by 15 July of that same year plaintiffs had been harmed by this alleged conduct. We find that the damage was readily apparent to plaintiffs as of 6 October 1981, and they were at liberty to sue at that time. Therefore, the statute of limitations began to run from that date. Consequently, they were required to bring this action by 7 October 1984. Because this action was not filed until 29 April 1985, more than three years after their accrual, these claims were barred by the statute of limitations. The trial court properly directed the verdict in defendant's favor.

We have reviewed the remaining issues raised by plaintiffs and we find that many of them were abandoned due to a lack of supporting authority and that all of them were meritless. Accordingly, for the reasons stated above, the judgment reached in the trial court is affirmed.

Affirmed.

Judge EAGLES concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

Except as stated below, I concur in the foregoing opinion. (1) In my opinion (a) the insurance policy issued to defendant's firm covers his liability as a fiduciary and trustee because of his agreement to receive, hold and disburse money received from plaintiffs to the CPA and the additional attorney, Mr. Jennings; (b) the materials raise an issue of fact as to defendant's breach of those duties; and (c) that the policy was issued in the firm's name is no bar to defendant's liability, as the evidence indicates that Powell was a partner and under the law partners are generally liable for the firm's obligations. (2) In my opinion it does not affirmatively appear that plaintiffs' cause of action for professional negligence is barred by the statute of limitations, because under one view of the evidence defendant was still obligated to perform various services for plaintiffs and negligently failed to perform them within the three-year period before the suit was filed. That the evidence indicates that plaintiffs may have known that defendant was derelict in performing his earlier obligations did not, under the conflicting circumstances that existed, necessarily cause the action to accrue and deprive them of the right to rely upon defendant performing his later obligations.

STATE OF NORTH CAROLINA v. RAY TURNER

No. 897SC680

(Filed 15 May 1990)

1. **Conspiracy § 5.1 (NCI3d) — prima facie showing of conspiracy — admissibility of co-conspirator's statements against defendant**

The State's evidence was sufficient to make a prima facie showing of a conspiracy to traffic in cocaine so that hearsay statements made by an alleged co-conspirator regarding "getting up with his man" were admissible against defendant where it tended to show that an undercover officer asked the co-conspirator to sell him two ounces of cocaine; when the officer went to the co-conspirator's home at the arranged time, the co-conspirator told him that he did not yet have the drugs but to return in thirty minutes; defendant subsequently arrived at the co-conspirator's home and gave him a bag contain-

ing 60.1 grams of cocaine without receiving payment therefor; and when the officer returned to the home, the co-conspirator retrieved the same bag of cocaine which defendant had given him and sold it to the officer.

Am Jur 2d, Conspiracy § 46.

2. **Narcotics § 4.5 (NCI3d)— conspiracy to traffic in cocaine— instruction not supported by indictment**

Where defendant was indicted for conspiracy "with Ernie Lucas to commit the felony of trafficking to deliver to Ernie Lucas 28 or more but less than 200 grams of cocaine," the trial court committed plain error in instructing the jury on an agreement by defendant with Ernie Lucas to deliver 28 grams or more of cocaine "to another."

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 41, 42.

3. **Narcotics § 4.2 (NCI3d)— conspiracy to traffic in cocaine— sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of conspiracy to traffic in cocaine where it tended to show that an undercover officer arranged to buy cocaine from a co-conspirator; when the officer went to the co-conspirator's home at the appointed time, the co-conspirator told him that "his man was running late and he didn't have the stuff at that time" but that he should return in thirty minutes; defendant subsequently arrived at the co-conspirator's home and gave him a bag containing 60.1 grams of cocaine without receiving payment therefor; and the co-conspirator later retrieved this bag and sold it to the officer.

Am Jur 2d, Conspiracy § 40; Drugs, Narcotics, and Poisons § 47.

4. **Narcotics § 5 (NCI3d)— trafficking by transportation and by delivery— separate convictions**

Defendant's right against double jeopardy was not violated by his conviction and sentencing for both trafficking in cocaine by transportation and trafficking in cocaine by delivery where the evidence showed that defendant moved the cocaine from one place to another and then transferred the cocaine to another person.

Am Jur 2d, Criminal Law § 277; Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from judgments entered 1 February 1989 by *Judge Frank R. Brown* in WILSON County Superior Court. Heard in the Court of Appeals 6 February 1990.

Defendant was convicted of conspiracy to traffic in cocaine, trafficking in cocaine by delivery and trafficking in cocaine by transporting it. He was sentenced to three separate terms of seven years' imprisonment to be served consecutively. He was also ordered to pay a $50,000.00 fine for the trafficking in cocaine by transporting conviction.

Defendant is challenging his convictions on several grounds. He contends that the admission of certain statements into evidence, the court's denial of his motions for nonsuit and acquittal, the court's violation of his right not to be placed in double jeopardy and to be protected from cruel and unusual punishment all constitute reversible error.

We have reviewed this case and conclude that the court's erroneous instruction to the jury on the conspiracy charge entitles defendant to a new trial. We find no error as to the remaining portions of the judgments and sentences imposed.

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

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, for defendant-appellant.

ORR, Judge.

The State's evidence tended to show that in mid-April 1988 Officer Timothy Bell was working undercover in the Wilson, North Carolina area. On 26 April 1988, Officer Bell contacted Ernie Lucas about purchasing two ounces of cocaine and a meeting was set up for the following day.

On 27 April 1988, Officer Bell went to Ernie Lucas' home to make the cocaine purchase. Lucas told the officer that he was unable to sell him the drugs at that time, but he instructed the officer to return in 30 minutes.

During this 30-minute interim period, two surveillance officers observed defendant, Ray Turner, drive up to Lucas' home, hold a brief conversation with Lucas and give him a bag. Lucas was thereafter observed placing this bag in his pants.

When the officer returned to buy the narcotics, Lucas gave the officer the bag which he had placed in his pants in exchange for money which the officer paid him. The bag contained 60.1 grams of cocaine according to a subsequent chemical analysis.

I.

[1] Defendant first contends that the trial court erred in admitting into evidence certain statements made by Ernie Lucas. He argues that these statements are hearsay and do not come under any exception which would permit their usage. According to defendant, the State failed to establish a *prima facie* case for conspiracy without the use of the statements; therefore, the exception which permits the use of extrajudicial statements made between co-conspirators in furtherance of the conspiracy is inapplicable.

Generally, an out-of-court statement which is offered to prove the truth of the matter asserted therein is inadmissible because it is hearsay. N.C. Gen. Stat. § 8C-1, Rule 801(c) (1988). *See, generally, Hall v. Coplon*, 85 N.C. App. 505, 355 S.E.2d 195 (1987). Although a statement made during the furtherance of a conspiracy may be hearsay, it is nevertheless admissible under specific circumstances. Our Supreme Court has previously stated that:

> [t]he rule governing the admission of co-conspirators' statements is that once the State has made a *prima facie* showing of the existence of a conspiracy, 'the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members . . . .' Prior to considering the acts or declarations of one co-conspirator as evidence against another, there must be a showing that:
>
> (1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended . . . .

State v. Polk, 309 N.C. 559, 564, 308 S.E.2d 296, 298-99 (1983) (citations omitted). The judge, however, may in his discretion admit the statements subject to a later showing of a conspiracy because our courts recognize the "difficulty in proving the formation and activities of the criminal plan and [they] have allowed wide latitude in the order in which pertinent facts are offered in evidence." *State v. Tilley*, 292 N.C. 132, 139, 232 S.E.2d 433, 438-39 (1977).

A conspiracy is an unlawful agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Collins*, 81 N.C. App. 346, 350, 344 S.E.2d 310, 313 (1986). It may be shown by circumstantial evidence. *Id.*

In the instant case, the State's evidence tended to demonstrate that on 26 April 1988, an undercover officer asked Ernie Lucas to sell him two ounces of cocaine. Later that evening, Lucas called the officer back to arrange a meeting place and time. On 27 April 1988, the next evening, the undercover officer went to Lucas' home at which time Lucas told him that he did not have the drugs but to return in 30 minutes. Two surveillance officers watched defendant who subsequently arrived at Lucas' home. At that time, defendant spoke with Lucas briefly and gave him a bag. Lucas did not exchange any money with defendant; defendant simply gave Lucas the bag and left. When the undercover officer returned to Lucas' home, Lucas retrieved the same bag which defendant had just given him and he sold it to the officer. The contents of the bag were later determined to be 60.1 grams of cocaine.

Based on the foregoing, we find that this evidence of the officer arriving at Lucas' home to make the purchase, being told to return in 30 minutes, and defendant *giving* Lucas 60.1 grams of cocaine without receiving payment in return is evidence sufficient to make a *prima facie* showing of a conspiracy. Indeed, this testimony alone tends to show that some previous agreement existed regarding defendant's furnishing and delivery of the cocaine to Lucas for him to sell to the officer. Lucas' statements that "[h]e would have to get up with his man [,and that] he could not get up with his man but that he knew that his man had it and it wouldn't be no problem [,and that] his man was running late and he didn't have the stuff at that time" are merely evidence which further support the showing of this conspiracy. The State's burden of proof here was only to procure evidence sufficient to permit, but not compel, the jury to find a conspiracy. *See State v. Bell*, 311 N.C. 131, 316 S.E.2d 611 (1984). This assignment of error is overruled.

II.

[2] The next issue raised by defendant is whether the court erred in denying his motion for nonsuit and for an acquittal on the charge of conspiracy to deliver 28 grams or more of cocaine. In the first part of defendant's argument, he contends that there was a stark

variance between what he was charged with in the indictment and what he was charged with in the court's instructions to the jury. This variance, in defendant's opinion, is prejudicial and "mandates" a new trial. Defendant further contends that the evidence against him is insufficient to support a conviction for conspiracy "with Ernie Lucas to commit the felony of trafficking to deliver to Ernie Lucas 28 or more but less than 200 grams of cocaine[,]" as alleged in the indictment.

At the outset, we note that although defendant now argues that the court's charge to the jury on the conspiracy offense was error, he did not object to that charge at trial. Therefore, in order for defendant to be entitled to a new trial based upon the court's error, if any, such error must rise to the level of plain error. *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

Our Supreme Court has addressed this type of question in the case of *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). In that case, the defendant was indicted for kidnapping and several other offenses. The kidnapping indictment stated that "the defendant . . . unlawfully, willfully and feloniously . . . kidnap[ped] [the victim], . . . by unlawfully *removing her from one place to another*, without her consent . . . ." *Id.* at 537, 346 S.E.2d at 420. (Emphasis in original.) The trial judge instructed the jurors that "they could find defendant guilty of first degree kidnapping if they found *inter alia*, 'that the defendant *unlawfully restrained* [the victim], that is, restricted [her] freedom of movement by force and threat of force.' " (Emphasis added.) *Id.* In *Tucker*, the Court first noted that defendant had not objected to the instruction at trial. The Court then noted that the State's evidence amply supported the judge's instructions to the jury, though the indictment did not. However, the Court deferred to the "well established rule" that it is prejudicial error for the " 'trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.' " *Id.* at 537-38, 346 S.E.2d at 420 (citations omitted).

After careful consideration, we find that the facts of *Tucker* are analogous to those in the case at bar and that its rule of law is applicable here. In our case, defendant was indicted for "conspir[ing] with Ernie Lucas to commit the felony of trafficking to deliver to *Ernie Lucas* 28 grams or more . . . of cocaine." However, the trial court instructed the jury "that . . . the defendant agreed with Ernie Lucas to deliver 28 grams or more of cocaine to another,

and that the defendant,—and that Ernie Lucas intended at the time the agreement was made, that the cocaine would be delivered . . . ." Just as in *Tucker*, we believe that the State's evidence does support the trial court's instruction; however, the indictment does not. Consequently, we must award defendant a new trial on the conspiracy charge. Furthermore, we are not persuaded by the State's argument that there was only a "slight difference" between the indictment and the instruction, and that defendant has waived this objection. As we have previously pointed out, our Supreme Court has concluded that such a "slight difference" is prejudicial and amounts to plain error. *See also Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

[3] Turning to the remaining portion of this issue in which defendant asserts that the court erred in denying his motion for nonsuit because the evidence was insufficient as a matter of law, we find this argument to be without merit.

On review of a motion for nonsuit, we must consider the evidence "in the light most favorable to the State, giving it the benefit of all reasonable inferences and resolving all doubts in its favor . . . [and determine] whether the State's evidence was sufficient to overcome the defendant's motions for nonsuit. . . ." *State v. Shufford*, 34 N.C. App. 115, 117, 237 S.E.2d 481, 482, *disc. review denied*, 293 N.C. 592, 239 S.E.2d 265 (1977). When such a motion is made, the trial court must determine:

> whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied . . . .
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed . . . .
>
> [A]nd all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion . . . .
>
> The trial court . . . is concerned only with the sufficiency of the evidence to carry the case to the jury and not with its weight. . . .

> [T]he question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty.

State v. Powell, 299 N.C. 95, 98-99, 261 S.E.2d 114, 117 (1980).

With regard to this question, we have already concluded that the evidence regarding Ernie Lucas' interaction with the undercover agent and defendant's delivery of the drugs to Ernie Lucas was sufficient to establish a *prima facie* case for conspiracy. We also said that based upon this conclusion, it was not error for the trial court to admit Ernie Lucas' extrajudicial statements regarding "getting up with [his] man. . . ." We find that the cumulative effect of this evidence is that it raises a "*reasonable inference* of the defendant's guilt." *Powell* at 99, 261 S.E.2d at 117 (emphasis in original). Likewise, we find no reason to reverse this conclusion on the basis of the federal case to which defendant has directed our attention. This assignment of error is overruled.

III.

[4] The next issue which we shall discuss is whether the trial court violated defendant's right against double jeopardy by sentencing him separately on the trafficking in cocaine by delivery and trafficking in cocaine by transportation convictions. Defendant argues that the same facts comprise the evidence of both of these offenses; therefore, conviction and sentencing on both is duplicitous by virtue of the "same evidence test."

N.C. Gen. Stat. § 90-95(h)(3) under which defendant was charged, states that a person who "sells, manufactures, delivers, transports *or* possesses 28 grams or more" of cocaine shall be guilty of trafficking in cocaine. (Emphasis added.) The literal language of this statute implies that punishment may be imposed for both trafficking in cocaine by delivery and by transporting it. In fact, our Supreme Court so held in the case of *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), *cert. denied*, 322 N.C. 327, 368 S.E.2d 870 (1988). There the defendant was convicted of several acts of trafficking in marijuana under a statute which is similarly worded. *Id.* at 546, 346 S.E.2d at 490. However, defendant argues to this Court that our decision in *State v. Moore*, 95 N.C. App. 718, 384 S.E.2d 67 (1989),

disc. review allowed, 326 N.C. 53, 389 S.E.2d 102 (1990), requires us to vacate one of his sentences.

In *Moore*, the defendant was given separate sentences for both the sale of a controlled substance to another and the delivery of that substance to the same person. There, we stated that " '[a] sale is a *transfer* of property for a specified price payable in money,' " and a delivery under these circumstances means the " 'actual, constructive, or attempted transfer from one person to another of a controlled substance.' " *Id.* at 720-21, 384 S.E.2d at 68. We vacated Moore's sentences and ordered a new sentencing hearing because the two offenses involved the same transaction. *Id.* at 722, 384 S.E.2d at 69.

Here, we find that transporting a controlled substance from one place to another and delivering that substance to another person is quite distinguishable from the sale and delivery with which Moore was charged. Once defendant moved the cocaine from one place to another, he had trafficked in cocaine by transporting it. Turner then added the additional offense of trafficking by delivery when he transferred the narcotics from his person to Lucas. Unlike in *Moore*, where both of the criminal offenses involved the same facts of transferring narcotics to another party, here the offense of trafficking by transporting cocaine only involved defendant. The offense of trafficking by delivery occurred when the transfer to Lucas was made. Consequently, those two charges involved different facts and different persons. On this basis, we find *Moore's* holding inapplicable to the case at bar.

Relying on the statute under which defendant was convicted and on *Diaz*, we conclude that the court did not err in sentencing defendant on the trafficking by transporting and trafficking by delivery convictions.

We have reviewed defendant's final challenge regarding his sentence being cruel and unusual punishment. We find the same to be wholly without merit.

For the reasons stated above, defendant is entitled to a new trial on his conspiracy conviction. The remaining assignments of error are overruled.

New trial.

Judges ARNOLD and JOHNSON concur.

HERNDON HAYES, PLAINTIFF v. LOIS TURNER, DEFENDANT; AND MARCIA MICKENS, INTERVENOR PLAINTIFF v. HERNDON HAYES, INTERVENOR DEFENDANT

No. 8918SC650

(Filed 15 May 1990)

1. **Ejectment § 2 (NCI3d) — summary ejectment — lack of subject matter jurisdiction**

The trial court lacked subject matter jurisdiction to hear a summary ejectment action where the complaint alleged that there was no rent and that no lease existed, the record contained neither allegations nor evidence of a landlord-tenant relationship, and plaintiff did not allege any of the statutory violations required for summary ejectment. A court derives its jurisdiction in conducting summary ejectment proceedings solely from N.C.G.S. § 42-26, and it may exercise such jurisdiction only where a landlord-tenant relationship exists and where one of three statutory violations occurs.

Am Jur 2d, Landlord and Tenant § 1232.

2. **Executors and Administrators § 6 (NCI3d) — action to invalidate deed to property — undue influence or incapacity of grantor — proper parties to contest**

The heirs under a will were the proper parties to contest title to real estate and the court had subject matter jurisdiction in an action in which the heirs counterclaimed and brought an intervening claim alleging that the original plaintiff had acquired a deed to the disputed property through undue influence or the incapacity of the grantor.

Am Jur 2d, Landlord and Tenant § 1233.

3. **Deeds § 4 (NCI3d); Wills § 21.4 (NCI3d) — action to invalidate deed — undue influence or incapacity of grantor — summary judgment improper**

Summary judgment was improvidently granted as to claims for undue influence or mental incapacity of the grantor in an action by the heirs under a will to invalidate a deed. All of the factors tending to show undue influence and mental incapacity were supported by the evidence and, while the grantee under the deed produced substantial contrary evidence,

his showing did not eliminate the dispute as to genuine issues of material fact.

Am Jur 2d, Deeds § 203.

4. Deeds § 9 (NCI3d)— deed of gift—registration requirement

The issue of whether a gift deed was void *ab initio* because it was not acknowledged and registered in due form was not properly before the court because the two-year registration period did not expire until ten days after the trial court entered its order.

Am Jur 2d, Deeds § 106; Records and Recording § 173.

APPEAL by defendant and intervenor plaintiff from judgment entered 10 February 1989 by *Judge Henry V. Barnette, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 6 December 1989.

Ivey, Ivey & Donahue, by Robert L. McClellan, for plaintiff- and intervenor defendant-appellee.

Clark & Wharton, by John R. Erwin and Stanley Hammer, for defendant- and intervenor plaintiff-appellants.

GREENE, Judge.

Lois Turner and Marcia Mickens appeal from summary judgment entered by the trial court for Herndon Hayes (Hayes) pursuant to Hayes' motion.

The evidence presented in support of and in opposition to the motion for summary judgment, viewed in the light most favorable to the nonmovants, tends to show that in 1943 Turner began living with and caring for Virgie Hayes (Virgie), who was Hayes' and Mickens' mother. In return for Turner's services Virgie promised to grant Turner, by will, a life estate in her home, located at 2200 South Benbow Road. On 13 September 1985 Virgie executed a Last Will and Testament devising to her son Hayes and her daughter Mickens the home located at 2200 South Benbow Road, subject to Turner's life estate. Virgie never revoked this will.

In February 1987, at the age of 76 years, Virgie was hospitalized for nearly a month because of complications of diabetes which required amputation of a leg. Prior to her discharge, Virgie, who

was blind, signed a deed conveying her Benbow Road home to Hayes in fee simple.

The deed was signed without the presence of a notary. The grantee, Hayes, assisted in the execution of the deed by presenting and identifying it for his blind mother to sign. He also paid an attorney to draw the deed. Present at the deed's execution in addition to Hayes and Virgie were Hayes' wife and a friend of Hayes who was called to witness the signing.

The record contains evidence tending to show that acquaintances, observing Virgie in 1987, reported that she often appeared confused and that her mental clarity would "come and go." Virgie would from time to time imagine that people stood around her bed. Turner also introduced the nurses' hospital notes of 27 February 1987, the date of the deed's execution, indicating that Virgie was depressed and believed that Turner no longer planned to care for her. Turner's evidence showed that upon discharge Virgie returned to the Benbow Road residence and remained there with Turner until Virgie's death on 13 April 1988. The day after Virgie's discharge from the hospital she was still disoriented, and her doctor recommended that she see a psychiatrist. After Virgie died, Turner remained on the premises. Only after Virgie's death did Hayes assert a right of ownership in the property.

Hayes sought summary ejectment of Turner from the Benbow Road property to which both claimed title. He later amended the complaint seeking damages. Turner defended asserting that Hayes lacked title since the deed by which he purportedly gained title was executed under undue influence or the incapacity of the grantor, Virgie. In a counterclaim Turner alleges she holds a life estate in the property per Virgie's will. Mickens entered the action as intervenor-plaintiff against Hayes alleging that Hayes' deed was void and that she has an undivided fifty percent remainder interest in the property as set forth in Virgie's will. The trial court granted summary judgment for Herndon both on his complaint and on Turner's counterclaim and Mickens' intervening claim.

The issues presented are: I) whether plaintiff's action must be dismissed for lack of subject matter jurisdiction; II) whether the trial court improvidently granted summary judgment against defendant and intervenor-plaintiff on their claims against the plain-

tiff; and III) whether the issue of the deed's proper form and registration is properly before this court on appeal.

I

[1] While the issue of subject matter jurisdiction has not been raised by any of the parties, "it is [this court's] duty to take proper notice of the defect, and stay, quash or dismiss the suit" when the court is without such jurisdiction. *Jackson v. Bobbitt*, 253 N.C. 670, 673, 117 S.E.2d 806, 808 (1961). The action which gave rise to this appeal was for summary ejectment under N.C.G.S. § 42-26. A court, in conducting summary ejectment proceedings, derives its jurisdiction solely from this statute, and it may exercise such jurisdiction only where a relationship of landlord and tenant exists and where one of three statutory violations occurs. *See Howell v. Branson*, 226 N.C. 264, 37 S.E.2d 687 (1946). The statute provides:

> Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> (1) When a tenant in possession of real estate holds over after his term has expired.
>
> (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
>
> (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

N.C.G.S. § 42-26 (1984).

Hayes' complaint in summary ejectment alleges that there was no rent and that no lease existed. The record contains neither allegations nor evidence of a landlord-tenant relationship, and Hayes also failed to allege any of the statutory violations. Hayes' amended

complaint also fails to assert the required allegations for summary ejectment or for any other cause of action. We therefore, *sua sponte*, conclude that the trial court lacked subject matter jurisdiction to hear the summary ejectment action. We therefore vacate the trial court's grant of summary judgment for plaintiff on plaintiff's cause of action and remand for dismissal of that action. *See Jones v. Swain*, 89 N.C. App. 663, 367 S.E.2d 136 (1988).

II

[2] Lack of jurisdiction over the original claim does not compel dismissal of Turner's counterclaim or Mickens' intervening claim, provided that jurisdiction for those actions lies. *See Jeanette Fruit & Produce Co., Inc. v. Seafare Corp.*, 75 N.C. App. 478, 483, 331 S.E.2d 305, 308 (1985) (defendant's cross-claim not dismissed upon dismissal of plaintiff's claim); *see also Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) ("counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principle claim . . .").

The counterclaim and intervening claims sought to invalidate Hayes' deed to the Benbow Road property because of his alleged undue influence on or the incapacity of the grantor. In addition, they sought a judgment or declaration of their rights to the Benbow Road property under Virgie's will. We first determine that Turner and Mickens were proper parties to contest the title to the real estate in question. The court had subject matter jurisdiction over these claims.

> As a general rule, heirs or devisees are the proper parties to sue to recover real estate belonging to decedent, or to protect their rights in such property, and the executor or administrator is not a proper or necessary party to such a suit . . . .

34 C.J.S. *Executors and Administrators* § 741(a) at 768 (1942) (footnotes omitted).

> *Conveyances made under undue influence.* A bill to set aside a deed on the ground of undue influence cannot be filed by the deceased grantor's personal representative, but can be maintained only by his heirs; and in a suit of such nature instituted by the heirs the executor or administrator is neither a necessary nor a proper party.

Id. at 775 (footnotes omitted); *see Kearns v. Primm*, 263 N.C. 423, 427-28, 139 S.E.2d 697, 700 (1965) (administrator not a necessary or proper party in heir's action relating to loss of certain realty since, upon the death of the former owner, title vests in his heirs).

[3] As the counterclaim and intervening claim are thus properly before the court, we next determine whether the record shows a dispute as to a material fact regarding these claims such that summary judgment against Turner and Mickens was error. They argue that summary judgment was improvidently granted as to their claims since issues of material fact existed as to whether Hayes signed the deed as a result of undue influence or while legally incapacitated.

> Summary judgment is a drastic remedy. The purpose is to save time and money for litigants in those instances where there is no dispute as to any material fact. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E.2d 214 (1975). Upon appeal, the standard of review is whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). The movant has the burden of showing that summary judgment is appropriate. *Development Corp. v. James*, 300 N.C. 631, 268 S.E.2d 205 (1980). Furthermore, in considering summary judgment motions, we review the record in the light most favorable to the nonmovant. *Calswell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

Leake v. Sunbelt Ltd. of Raleigh, 93 N.C. App. 199, 201, 377 S.E.2d 285, 287, *rev. denied*, 324 N.C. 578, 381 S.E.2d 774 (1989).

We first address the undue influence claim. Undue influence is defined as "the exercise of an improper influence over the mind and will of another to such an extent that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result." *Lee v. Ledbetter*, 229 N.C. 330, 332, 49 S.E.2d 634, 636 (1948). "Whether there was undue influence is to be determined by the jury from all the evidence including circumstantial evidence." *Hayes v. Cable*, 52 N.C. App. 617, 619, 279 S.E.2d 80, 81 (1981). Evidence which may tend to prove undue influence occurred may include a showing that the grantor had planned to divide the property otherwise and that the grantor was in failing health and in a weakened mental capacity. *Id.* Also, the fact that the grantor retained the deeded property for the

remainder of her life may be considered. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951). In addition, the fact that a deed disinherits someone who had been promised the property may tend to prove undue influence. *See Flythe v. Lassiter*, 199 N.C. 804, 153 S.E. 844 (1930). In general:

> weakness of mind, whether natural or induced by the excessive use of drugs or any other cause, when accompanied by such circumstances as tend to show what advantage was taken of it by the party who procured the deed, or when it appears that there is not only a weakness of mind, but inadequacy of consideration, especially when it is gross, and the situation of the parties is so unequal, by reason of the weakness of the one and the mental superiority of the other, or for other reason, the jury may infer fraud, or undue influence, which in law is the same thing.

Gillikin v. Norcom, 197 N.C. 8, 9, 147 S.E. 433 (1929).

All of these factors were supported by evidence in the case before us. The record contains evidence tending to prove that the grantor was ill, aged and infirm, and witnesses brought into question Virgie's mental state. Furthermore, Virgie had intended and promised to leave Turner a life estate in the Benbow house and in fact had devised that property right to Turner in her will. Also Hayes did not attempt to assert his purported ownership to the property during his mother's lifetime, and the general circumstances of the drawing and execution of the deed are some evidence indicating undue influence. Furthermore, the record contains evidence of Virgie's unexplained and apparently erroneous belief that Turner would no longer care for her. From this fact, taken in conjunction with the totality of the circumstances, a jury might infer that someone, perhaps Hayes, had encouraged Virgie to believe Turner unworthy of the planned inheritance.

Hayes produced substantial evidence contradicting Turner's evidence, but his showing did not eliminate the dispute as to genuine issues of material fact. Since a dispute as to material fact exists and since Hayes was not due summary judgment as a matter of law, the undue influence issue should have been placed before a jury.

Regarding the claim of mental incapacity, we find the evidence heretofore mentioned also sufficient to place the issue before the

jury. That evidence could tend to prove that Virgie lacked the ability to understand the nature of the deed and its scope and effect at the time of its execution. *See, e.g., Hendricks v. Hendricks*, 272 N.C. 340, 158 S.E.2d 496, *vacated on other grounds*, 273 N.C. 733, 161 S.E.2d 97 (1968).

III

[4] The defendants next argue, in essence, that they are entitled to judgment on their claims because the deed, undisputedly a gift deed, to the plaintiff was not acknowledged and registered in due form. A deed of gift is void *ab initio* if not properly registered within two years. N.C.G.S. § 47-26 (1984). Since two years did not expire until ten days after the trial court entered its order, that issue is not properly before this court and will not be addressed.

Vacated and remanded.

Judges WELLS and PHILLIPS concur.

JOSEPH D. VANDIFORD, III, EMPLOYEE, PLAINTIFF v. STEWART EQUIPMENT COMPANY, EMPLOYER; UTICA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8910IC930

(Filed 15 May 1990)

1. Master and Servant § 65.2 (NCI3d) — workers' compensation — back injury — arising out of employment

The evidence supports the Industrial Commission's findings that plaintiff suffered additional injuries to his back in October 1984 as a result of an accident suffered at work in February of 1984, despite defendants' assertion that plaintiff's injury could have stemmed from back problems treated in 1980 and 1982, where plaintiff's doctor's medical notes regarding the October 1984 injuries indicated that plaintiff had aggravated his preexisting back condition. There is a distinction between the proximate cause doctrine in workers' compensation cases and that applied in cases of tort; while there must be some causal connection between the employment and the

injury, it is not necessary that the original injury be the sole cause of the second injury.

Am Jur 2d, Workmen's Compensation §§ 289, 340, 341, 344.

2. **Master and Servant § 65.2 (NCI3d)— workers' compensation— back injury—scheduled injuries—total disability**

Although plaintiff's back and leg injuries are scheduled injuries under N.C.G.S. § 97-31 and were suffered in 1984, plaintiff's workers' compensation hearing was held in 1988 and *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89 (1986), clearly controls so that plaintiff may recover total permanent disability benefits.

Am Jur 2d, Workmen's Compensation §§ 289, 340, 341, 344.

3. **Master and Servant § 65.2 (NCI3d)— workers' compensation— permanent and total disability—conflicting evidence**

The Industrial Commission did not err by finding that plaintiff was entitled to permanent and total disability benefits despite testimony that plaintiff was able to earn some wages, though less than he was receiving at the time of his injury. There was ample support in the record to uphold the Commission's findings and, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal.

Am Jur 2d, Workmen's Compensation §§ 289, 340, 341, 344.

4. **Master and Servant § 65.2 (NCI3d)— workers' compensation— back injury—preexisting disability—no credit**

Defendants in a workers' compensation action were not entitled to a credit for a preexisting five percent disability to plaintiff's back where plaintiff's injuries were clearly intensified by the October 1984 accident. Employers take their employees as they find them and, so long as an individual is capable of doing that for which he was hired, then the employer's liability for injury due to industrial accident ought not to be reduced due to the existence of a nonincapacitating infirmity.

Am Jur 2d, Workmen's Compensation §§ 289, 340, 341, 344.

5. Master and Servant § 65.2 (NCI3d) — workers' compensation — back injury — stipulation as to dates for temporary total disability

Defendants in a workers' compensation action were entitled to a credit for the time the parties stipulated plaintiff was paid temporary total disability benefits where the Commission's finding had used different dates.

Am Jur 2d, Workmen's Compensation §§ 289, 340, 341, 344.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendants from an opinion and award by the Full Commission, filed 9 May 1989. Heard in the Court of Appeals 3 April 1990.

Plaintiff was born on 11 December 1960. In 1983, plaintiff was employed as a mechanic for defendant-employer, servicing heavy industrial equipment.

On 6 February 1984, plaintiff was "squatted" down under a five-ton army truck removing a flywheel. As the flywheel came out, plaintiff wrenched his back. Plaintiff left work and saw Dr. Gerald Pelletier, an orthopedic surgeon in New Bern, North Carolina, who diagnosed plaintiff's condition as a disc injury and prescribed bed rest and medications.

Later that same day, plaintiff developed severe chest pains, began spitting up blood and was rushed to the emergency room where he was treated for a pulmonary embolism.

After being treated, he was discharged. Plaintiff was able to return to work on light duty on 14 March 1984 and had a course of gradual improvement with restrictions on his lifting and other back motions.

On 17 October 1984, plaintiff re-injured his back while in his mother's yard. Plaintiff was hospitalized and underwent surgery. He was released 15 November 1984. On 3 January 1985, plaintiff was again hospitalized and diagnosed as having thrombophlebitis.

On 24 July 1985, Dr. Pelletier formed an opinion that Mr. Vandiford had sustained a twenty percent permanent impairment of his spine. The carrier paid Mr. Vandiford for the twenty percent permanent partial disability rating. On 28 January 1987, a CT scan was performed on the plaintiff. The scan revealed a large calcified

disc at the same level in the back where the plaintiff's other injuries were located. On 2 March 1987, Dr. Pelletier increased the permanent partial disability rating of the employee's back to forty percent permanent impairment. Thereafter, defendants gave plaintiff a ten percent permanent partial disability rating to the back, without any prejudice to their defenses.

After trying various other jobs, plaintiff stopped working altogether because of the continuous back and leg pain.

Dr. Pelletier, in his deposition, expressed the opinion that plaintiff was not able to work. Defendants produced testimony of Dr. Paul Alston, an expert in the field of vocational rehabilitation, that there were certain occupations which the employee could perform consistent with his limitations, although the employment would be on a part-time basis, of three to four hours per day at an average of $3.75 per hour.

Deputy Commissioner Denson, by Opinion and Award filed 12 August 1988, held that the employee was permanently and totally incapacitated from gainful employment, and concluded as a matter of law that plaintiff was entitled to a compensation rate of $146.67 per week. The defendants gave Notice of Appeal to the Full Commission which affirmed plaintiff's recovery of permanent and total lifetime benefits. From the 9 May 1989 Opinion and Award, defendants appeal.

Barker, Dunn & Mills, by James C. Mills, for plaintiff-appellee.

Wallace, Morris, Barwick & Rochelle, P.A., by David R. Duke, for defendants-appellants.

LEWIS, Judge.

[1] The issue before this Court is whether plaintiff's injury and disability from his October 1984 accident arose out of or was in the course of his employment. For these injuries to be compensable, they must result from an injury by accident arising out of and in the course of employment. *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678 *reh'ing denied*, 300 N.C. 562, 270 S.E.2d 105 (1980). A subsequent injury to an employee, whether an aggravation of the original injury or a new and distinct injury, is compensable only if it is the direct and natural result of a prior compensable injury. *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 610, 175 S.E.2d 342, 347 (1970). The plaintiff must therefore

establish a causal relationship between the February 1984 back injury and the October 1984 injury.

Our inquiry is limited solely to whether there was competent evidence before the Commission to support its findings of fact. *Henry v. A.C. Lawrence Leather Co.*, 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950). Moreover, if the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commissioner is conclusive on appeal. *Dolbow v. Holland Industries., Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *cert. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). The duty of this Court in reviewing the validity of the award on appeal is to ascertain whether there is *any* competent evidence in the record to support such a finding. *Id.* at 696, 308 S.E.2d 336.

Defendant argues that because plaintiff's doctor testified that plaintiff was treated for back pain in 1980 and again in 1982, his thrombophlebitic condition was not necessarily a natural and direct result of the February 1984 accident. Dr. Overby, plaintiff's treating physician for the thrombophlebitis, testified that in his opinion this condition was related to the plaintiff being at bed rest following his back injury of October 1984. Defendant asserts that because plaintiff suffered from some back problems which were treated in 1980 and 1982, his October 1984 injury could have stemmed from the 1980 and 1982 back problems and therefore the thrombophlebitis does not arise out of his employment. We disagree.

There is a distinction between the proximate cause doctrine in workers' compensation cases and that applied in cases of tort. *Starr v. Charlotte Paper Co., Inc., supra* at 610, 175 S.E.2d 347. While there must be some causal connection between the employment and the injury, it is not necessary that the original injury be the sole cause of the second injury. *Id.*

> The hazards of employment do not have to set in motion the sole causative force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury.

Id. (*quoting, Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951)). Dr. Pelletier's medical notes regarding the October 1984 injuries indicated that plaintiff had "*aggravated* his pre-existing back condition." In *Mayo v. City of Washington*, the Court affirmed the award of the Commission based upon evidence of the treating physician's notes which indicated that plaintiff had been injured on the job and "was reinjured today." The *Mayo* court held that "[t]his was sufficient medical evidence to establish a causal connection between the [first compensable] . . . accident and the subsequent injuries." *Mayo v. City of Washington*, 51 N.C. App. 402, 407, 276 S.E.2d 747, 750 (1981). According to Dr. Pelletier's deposition testimony, all of the workers' compensation forms filed by his office, including those filed after the October 1984 incident, indicate the date of injury as February 1984.

The evidence supports the Commission's findings that as a result of the February 1984 accident, plaintiff suffered additional injuries in October 1984 and we affirm those findings.

[2] Defendants also argue that because the plaintiff was injured in 1984, he is not entitled to recover permanent disability compensation. Both plaintiff's back and leg injuries are "scheduled injuries." G.S. § 97-31. Prior to 1986 the Supreme Court had interpreted the Workers' Compensation Act to limit recovery to an employee only to those benefits enumerated in G.S. § 97-31, if all the injuries were "scheduled injuries." Plaintiff, under this interpretation of the law, would not be allowed to recover total permanent disability benefits. However, in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986), our Supreme Court interpreted the Workers' Compensation Act to allow total permanent disability benefits to an employee who only sustained "scheduled injuries." Plaintiff's workers' compensation hearing was held in 1988. Clearly, the *Whitley* decision controls this case. *See also Niple v. Seawell Realty and Ins. Co.*, 88 N.C. App. 136, 362 S.E.2d 572, *disc. rev. denied*, 321 N.C. 744, 365 S.E.2d 903 (1988); *Harrington v. Pait Logging Co.*, 86 N.C. App. 77, 356 S.E.2d 365 (1987).

[3] Defendants further assert that the Industrial Commission erred in finding that the employee was entitled to permanent and total disability benefits. Defendants argue that the plaintiff is able to earn some wages, though less than what he was receiving at the time of his injury, and therefore is not totally disabled. G.S. § 97-29. Defendants primarily rely upon the testimony of Dr. Paul

Alston, a vocational rehabilitation expert, who testified that plaintiff could perform certain types of jobs on a part-time basis, three to four hours per day. However, we find ample support in the record to uphold the Commission's findings.

Dr. Pelletier testified that because of plaintiff's present physical condition, he is unable to sit or stand for a period of more than fifteen to twenty minutes at a time. The plaintiff cannot lift or bend, and he must frequently lie down and rest because of the pain in his back and legs. Furthermore, Dr. Alston conceded on cross-examination that he assumed that the plaintiff would be able to go three to four hours at a time on a regularly scheduled basis without needing to lie down and rest. This testimony is contrary to the testimony of Dr. Pelletier. If the evidence before the Commission is capable of supporting two contrary findings, the determination of the Commission is conclusive on appeal. *Dolbow v. Holland Indus., Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *cert. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984).

[4] Defendants next argue that they should be credited for a five percent disability assigned by Dr. Pelletier to the 1980 and 1982 back injuries. Dr. Pelletier, in his deposition speculated that he "would have rated [the plaintiff] at five percent." However, simply because plaintiff is predisposed to sustain injuries while engaged in labor, he is still permitted to recover compensation if the physical aspects of his employment intensifies the pre-existing condition. *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 610, 175 S.E.2d 342, 346 (1970). Here, although plaintiff did suffer from some minor disability due to his pre-existing back injuries, they were clearly intensified by the October 1984 flywheel accident. Employers take their employees as they find them. *Pruitt v. Knight Pub. Co.*, 27 N.C. App. 254, 258, 218 S.E.2d 876, 880 (1975), *rev'd on other grounds*, 289 N.C. 254, 221 S.E.2d 355 (1976). "So long as an individual is capable of doing that for which he was hired, then the employer's liability for injury due to industrial accident ought not to be reduced due to the existence of a nonincapacitating infirmity." *Id.* Defendants are not entitled to a credit.

[5] Finally, defendants contend that the Commission erred in its stipulation number two, which states:

> 2. Plaintiff's average weekly wage was $220.00 and his weekly compensation rate was $146.67. Compensation was paid for temporary total disability from February 7 to March 14, 1984,

from April 10 to April 26, 1984, and from October 17, 1984 to September 1985.

Defendants assert that the Commission erred in the dates it listed that plaintiff was paid for temporary total disability. The parties themselves, at the request of the Deputy Commissioner, entered into a stipulation as to the relevant dates; they stipulated disability payments from February 7, 1984 through April 26, 1984, and then from October 17, 1984 through October 21, 1985. We agree with the defendants. Defendants are entitled to a credit for the time the parties stipulated plaintiff was paid temporary total disability benefits.

We therefore reverse the Industrial Commission on the issue above and remand for entry of an Order which credits the defendants for payments made to plaintiff from February 7, 1984 through April 26, 1984, and then from October 17, 1984 through October 21, 1985.

Affirmed in part, reversed in part and remanded.

Judge DUNCAN concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I disagree with the majority on the issue of whether the defendant should be given a credit to reflect the five percent disability the claimant possessed prior to the compensable injury. In *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 253-54, 354 S.E.2d 477, 484 (1987), our Supreme Court clearly held that awards must be apportioned "to reflect the extent to which claimant's permanent total disability was caused by the compensable" injury. In fact, compensation under the Workers' Compensation Act of North Carolina is appropriate only in those situations where the disability is "caused, accelerated, or aggravated" by the compensable injury. *See Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 215, 360 S.E.2d 696, 700 (1987), *rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). As the Commission in this case failed to determine what portion if any of the claimant's disability was a result of the five percent disability the claimant possessed prior to the compensable injury, I would remand to the Commission for a determina-

tion of whether the disability claimant suffers was indeed entirely caused by the compensable injury or whether any portion of the disability was a consequence of disabilities to the claimant's back that existed prior to the claimant's compensable injury. *Pitman*, 87 N.C. App. at 216, 360 S.E.2d at 700.

SARA ENGLISH, EMPLOYEE v. J. P. STEVENS & CO., EMPLOYER, LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 8910IC421

(Filed 15 May 1990)

Master and Servant § 68.4 (NCI3d)— workers' compensation— compensable injury— subsequent pregnancy— cesarean section because of original injury— compensation for scar and additional expenses

Where plaintiff became pregnant after suffering a compensable back injury, the child was delivered by cesarean surgery rather than natural childbirth solely because of her compensable back injury, and plaintiff became pregnant because of a defect in her method of birth control, plaintiff was entitled to compensation for the increased medical expenses and scar caused by the cesarean surgery since (1) the surgery and any accompanying injuries or damages were the direct and natural result of the original compensable injury, and (2) plaintiff's pregnancy was not an independent intervening cause attributable to plaintiff's own intentional conduct.

Am Jur 2d, Workmen's Compensation § 229.

APPEAL by plaintiff from order of North Carolina Industrial Commission filed 16 December 1988. Heard in the Court of Appeals 13 October 1989.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson, Jr., Jonathan R. Harkavy and Leto Copeley, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by C. D. Taylor Pace, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals the opinion and award of the North Carolina Industrial Commission ("Commission"), denying plaintiff's workers' compensation claim.

The undisputed evidence shows that plaintiff was an employee dye machine operator of defendant J. P. Stevens & Company ("Company") when she suffered a lower back strain at work on 7 January 1986. Plaintiff continued to work from 7 January 1986, through 9 March 1986, and was evaluated as temporarily totally disabled on 10 March 1986. Company, through its insurance carrier, defendant Liberty Mutual Insurance Company, paid plaintiff temporary total disability benefits from 7 March 1986 until 4 January 1987, pursuant to an Agreement for Compensation for Disability, executed between the parties and approved by the Commission.

At the time of her injury, plaintiff was thirty years old and had a six-year-old child which had been delivered vaginally by natural childbirth. Plaintiff submitted evidence showing that prior to her injury, in December 1985, plaintiff had consulted her doctor for a possible pregnancy, despite plaintiff's use of an intrauterine device (IUD) as birth control. Plaintiff's doctor removed the IUD, determined that plaintiff was not pregnant, and recommended that plaintiff use another form of birth control, such as condoms. Subsequent to her injury and before plaintiff's disability was determined, plaintiff's physician did not restrict her in any physical activities. In approximately February 1986, plaintiff became pregnant while her partner was using condoms for birth control. Plaintiff introduced into evidence her statement: "The pregnancy resulted from the failure of the condom and was not intentional on my part."

In July 1986, an orthopedic surgeon evaluated plaintiff and determined that plaintiff had a herniated nucleus pulposus (disc, in lay terminology), but could not confirm the diagnosis because radiographic (x-ray) diagnostic procedures might affect plaintiff's pregnancy adversely. Additionally, the orthopedic surgeon recommended cesarean section surgery because plaintiff risked further damage to the disc if she attempted labor and natural childbirth. The surgeon recommended childbirth surgery solely to protect plaintiff's injured back. Plaintiff was delivered of a child by cesarean section surgery on 29 October 1986. Plaintiff introduced evidence to show that the costs of childbirth surgery were higher than

the costs for natural childbirth because of two additional days of hospital stay, the surgery, anesthesia and medications.

After the birth of her child, plaintiff underwent diagnostic evaluation of her back, and the surgeon assessed plaintiff as having a five percent total disability in her lower back. Pursuant to a Supplemental Memorandum of Agreement, which the parties executed on 4 February 1987, the parties agreed that the five percent disability of the plaintiff's back occurred on 7 January 1986, and Company paid plaintiff additional compensation. Later in 1987, plaintiff applied for workers' compensation benefits for expenses arising out of her childbirth surgery which exceeded the natural childbirth expenses, alleging that the increased expenses were entirely due to her back injury. Plaintiff also requested compensation for permanent weakness in her abdominal muscles, caused by the scar arising from the surgery which would necessitate surgical deliveries of all future pregnancies.

Plaintiff's claim came on for hearing before a Deputy Commissioner. Plaintiff offered the physician's expert testimony to show that the scar resulting from the surgery offered plaintiff and her unborn child "a very high risk" if she were to become pregnant in the future "because as the muscles of the womb [stretch] the scar [which] is the weakest point in the muscle and there is the danger that it could rupture and the baby would be in the abdomen . . ." Plaintiff requested benefits or compensation for the scar produced by the surgery. Plaintiff also testified that her physicians did not counsel her to refrain from intercourse or from getting pregnant prior to her pregnancy. Defendants introduced no evidence. The Deputy Commissioner entered the following:

Findings of Fact

. . . .

> 3. The plaintiff could not go through the trial of labor in a natural delivery due to the herniated nucleus pulposus since the labor may push out the disc material even more thereby causing a drop foot or a cauda equina syndrome. Based on the recommendation of Dr. Seidel that the child be delivered by cesarean section[,] Dr. M. I. Ammar, an obstetrician, delivered the child by said surgery on October 29, 1986. The child would have been delivered by natural birth if the plaintiff had not sustained the back injury.

. . . .

8. The plaintiff's pregnancy which occurred subsequent to the compensable back injury on January 7, 1986[,] and the resulting consequence thereof was not a direct and natural consequence of the compensable back injury. The pregnancy was an independent intervening cause attributable to the plaintiff's own intentional conduct.

Conclusions of Law

The plaintiff's pregnancy, which occurred subsequent to the compensable back injury on January 7, 1986, and the resulting consequence thereof was not a direct and natural consequence of the compensable back injury. The pregnancy was an independent intervening cause attributable to the plaintiff's own intentional conduct. The plaintiff is not entitled to the benefits under the Workers' Compensation Act for the cesarean section and the resulting consequences. G.S. 97-2(6), Larson's Work[men's] Compensation Law, Section 13.

The Deputy Commissioner denied plaintiff's claim.

Plaintiff appealed to the Commission, stating as grounds that neither the evidence nor the law supported the Deputy Commissioner's findings of fact and conclusions of law that plaintiff's pregnancy was an "independent intervening cause" attributable to her own intentional conduct which rendered noncompensable her scar and increased medical bills. Plaintiff asserted that the scar and costs of the surgery were direct and natural consequences of her back injury.

As an alternative request for relief, plaintiff filed a motion to remand the claim for taking of additional evidence on the issue of whether plaintiff's "intentional conduct" caused plaintiff's pregnancy, if the Commission determined that the Deputy Commissioner's Opinion and Award should stand. Plaintiff offered her affidavit to show that she became pregnant because of a defect in her method of birth control and not by her "intentional conduct."

The Commission adopted the findings of fact and conclusions of law by the Deputy Commissioner, determining that the facts were supported by the evidence and the conclusions were without prejudicial error. The Commission denied plaintiff's motion to remand for additional evidence.

The dispositive issue is whether plaintiff's injuries resulting from cesarean surgery, necessitated by an injury compensable under the Workers' Compensation Act, are compensable, when plaintiff's pregnancy occurred after the initial compensable injury.

The general rule is:

> [w]hen the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause, attributable to claimant's own intentional conduct.

1 *Larson's Workmen's Compensation Law* § 13, at 3-502 (1989); cited by *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 611, 175 S.E.2d 342, 347 (1970); *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379-80, 323 S.E.2d 29, 30, *review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985).

I

Natural Consequence

All the evidence before the Commission supports the conclusion that the cesarean surgery was performed on plaintiff solely because of the initial compensable injury to plaintiff's back. The testimony of plaintiff's treating physician was that natural childbirth would further damage plaintiff's back. Because the parties do not dispute evidence that plaintiff's back injury was work-related and therefore compensable, we determine that the cesarean surgery and any accompanying injuries or damages are the direct and natural result of the original compensable injury.

We find this case similar to *Heatherly*. In *Heatherly*, the claimant injured his right middle tibia (leg bone) in a work-related event for which he was compensated. Several months later, claimant reinjured the same tibia under circumstances which the Court determined were compensable only if the second injury was the direct and natural result of the initial work-related injury. This Court held that the second injury was a "direct and natural result" of the first injury, since the first injury left the tibia in a weakened condition, and the second injury would not have occurred absent the first injury. *Heatherly*, at 381, 323 S.E.2d at 31. *See also Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E.2d 747 (1981) (reinjury of claimant's knee was a direct and natural result of

earlier compensable injury); *Starr*, at 609, 175 S.E.2d at 347 (second- and third-degree burns on plaintiff's body were direct and natural results of the initial compensable injury because the first injury caused a weakened body condition, the "loss of feeling and sensitivity," rendering him unable to feel the burning); *see also* 1 *Larson's Workmen's Compensation Law* § 13.12(a) at 3-546—3-553 (the necessary causal connection is established when the compensable injury causes a weakened condition which results in subsequent injuries).

In this case, plaintiff's back was in a weakened condition as a result of the initial compensable injury, and the cesarean surgery was necessary solely because of plaintiff's weakened back. Therefore, the cesarean surgery was a direct and natural result of the compensable injury.

II

Intervening Cause

The Commission found as a fact that plaintiff's pregnancy was an intervening cause "attributable to [her] own intentional conduct." We disagree.

We are not bound by the findings of the Commission when they are not supported by competent evidence in the record. *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 246, 354 S.E.2d 477, 479 (1987). This finding of the Commission is not supported by the evidence. In fact, all the evidence supports a contrary finding. The record testimony is that plaintiff desired to prevent pregnancy, was advised by her doctor to use condoms, and that the pregnancy "resulted from the failure of the condom." In light of this evidence, we determine that plaintiff's voluntary act of intercourse was not an independent intervening cause attributable to claimant's 'own intentional conduct.' Our determination is consistent with this Court's holding in *Starr*. In *Starr*, plaintiff was paralyzed as a result of a compensable injury and was subsequently burned in a fire caused by plaintiff's arguably negligent act of smoking in bed. *Id.*, at 605, 175 S.E.2d at 346. This Court held that plaintiff's "smoking in bed was not such an independent intervening cause attributable to plaintiff's 'intentional conduct' as to defeat recovery." *Id.*, at 612, 175 S.E.2d at 347. In *Starr*, as here, plaintiff did not intend to cause the subsequent injury. To

to hold otherwise would limit the range of compensable damages for all working women of childbearing age in a manner inconsistent with established law.

III

In summary, the Commission's finding that plaintiff's "pregnancy was an independent intervening cause attributable to the plaintiff's own intentional conduct" is not supported by the evidence and is vacated. All of the evidence supports a contrary finding and this case is remanded with instructions that an order be entered by the Commission consistent with this opinion.

Vacated and remanded.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. LARRY MULLEN

No. 891SC603

(Filed 15 May 1990)

1. **Appeal and Error § 155 (NCI4th)— possession of cocaine— defendant's statements as to how drugs could be hidden—no objection at trial**

Defendant in a cocaine prosecution did not object at trial and did not properly preserve for appeal his objection to testimony by an undercover agent regarding defendant's description of how drugs could be hidden to prevent detection by law enforcement officers.

Am Jur 2d, Appeal and Error § 553.

2. **Criminal Law § 169.3 (NCI3d)— cocaine—testimony regarding defendant's statements of amounts sold—same testimony admitted elsewhere without objection**

An assignment of error by defendant in a cocaine prosecution to testimony from an undercover agent about the amount of drugs defendant sold on a weekly basis was overruled where the same testimony from two other witnesses was admitted without objection.

Am Jur 2d, Appeal and Error § 553.

3. Criminal Law § 67 (NCI3d) — cocaine — identification of defendant's voice over radio transmitter

The trial court in a cocaine prosecution did not err by admitting testimony concerning the identity of defendant's voice as the voice heard on a radio transmitter where a voir dire had been held and the witness had testified that he had personally known defendant for several years, had had conversations with defendant on several occasions prior to the transactions leading to defendant's arrest, and described distinctive characteristics in defendant's tone, timbre, and speech patterns. The fact that the prior circumstances described by the witness did not involve the same means of monitoring defendant used here only goes to the weight of the evidence.

Am Jur 2d, Evidence §§ 368, 383, 1143.

APPEAL by defendant from judgments entered 26 January 1989 by *Judge Thomas S. Watts* in PASQUOTANK County Superior Court. Heard in the Court of Appeals 17 January 1990.

This is an appeal from a conviction on three indictments each charging felonious possession of a Schedule II narcotic with intent to sell and deliver, felonious sale of a Schedule II narcotic, felonious delivery of a Schedule II narcotic and keeping a place for controlled substances. A jury convicted defendant of all charges except those related to maintaining a dwelling house for the purpose of unlawfully selling cocaine. Defendant received consecutive sentences totalling thirty years.

On 1 September 1988 Kent O'Neal Felton, an undercover agent, went to defendant's residence to purchase cocaine. At this time Agent Felton was wearing a concealed voice transmitter so that other agents (not on the scene) could hear his conversation with defendant. After purchasing the drugs, Agent Felton turned the drugs over to his supervising officers. On 2 September 1988, Agent Felton returned to defendant's residence still wearing the voice transmitter, purchased an additional amount of cocaine and discussed with defendant the future purchase of larger amounts of cocaine. During this conversation, defendant also talked to Agent Felton about how to conceal drugs to avoid detection by law enforcement officers. Agent Felton returned to defendant's residence on 5 September 1988 to confirm with him the purchase of the larger quantity of cocaine. At that time, he was still wearing the

voice transmitter. On 6 September 1988, Agent Felton went to defendant's residence to purchase the cocaine. He gave defendant the money needed for the purchase but did not receive any cocaine. Finally, on 7 September 1988, Agent Felton still wearing the voice transmitter returned to pick up the larger quantity of cocaine and defendant demonstrated how the cocaine could be divided into smaller quantities to sell. The narcotics purchased on each occasion were turned over to supervising officers.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

Twiford, O'Neal and Vincent, by Russell E. Twiford and Edward A. O'Neal, for defendant-appellant.

EAGLES, Judge.

[1] Defendant first assigns as error the admission of testimony by Agent Felton concerning defendant's statements to him describing how drugs could be hidden to prevent detection by law enforcement officers. Defendant argues that this testimony was "unfairly prejudicial and irrelevant in that it implied to the jury that the defendant was a person of bad character because of his extensive criminal knowledge in how to allude (sic) apprehension or arrest in dealing in or handling drugs." Defendant contends that evidence offered in the proffered testimony constituted other wrongs or criminal acts and was inadmissible character evidence. Defendant argues that even if Agent Felton's statement was admissible under Rule 404(b), the evidence should have been excluded under the Rule 403 balancing test since it was unfairly prejudicial. Defendant contends that he was denied a fair trial "as his presumption of innocence was removed as a result of his past dealings in drugs and [this] impermissibly placed a burden on him having to prove his innocence." We disagree.

Initially, we note that "[a]n assignment of error must be based on an exception duly noted and may not present by amplification a question not embraced in the exception." *Hennis Freight Lines, Inc. v. Burlington Mills Corp.*, 246 N.C. 143, 148, 97 S.E.2d 850, 854 (1957). Here, defendant in his discussion of assignment of error No. 1 relies on the following testimony during trial:

Q Now, did you have any other discussions with Mr. Mullen concerning controlled substances and the—

A Yes, I did. We were discussing also—I was discussing, asking him where would be a good place to hide the substance in my car, or whichever vehicle I was driving.

Q What did Mr. Mullen say when you asked him about hiding these substances?

A Well, he went into full detail about where to hide it, such as behind your license plates, under the foam up in your car, in the different places.

Q Did Mr. Mullen physically show you any places, sir?

A Yes, sir. Yes, he did.

Q Would you describe what Mr. Mullen did concerning showing you some places?

A Well, we went out into the yard and we approached my car. And being that my license plates didn't come down, he indicated, you know, that it would be impossible to hide it there. So he showed me underneath my hood this—some foam, and about putting it behind foam, taping it behind form (sic).

THE COURT: Behind—you are saying behind the what?

A Up in the hood of your car there's a foam.

THE COURT: Insulation?

A Yes, I guess that's what it is.

Q (By Mr. Carter) You are saying foam, f-o-a-m?

A Foam, yes.

THE COURT: Mr. Tade, don't you be coaching the witness[.] I am not going to tolerate that.

Q (By Mr. Carter) He was showing you the location under the hood of your car?

A Yes, sir.

Q What else, if anything, did Mr. Mullen point out to you at that time?

A He also pointed out about using black pepper, that it would eliminate the dog, the canine dog, from smelling the substance.

Q Did Mr. Mullen indicate how one used that black pepper to you, sir?

A Yes. He explained to put the substance in one bag, and put that bag into the bag with the pepper in it.

Q When you say put the substance into a bag, what did Mr. Mullen refer to, what was he referring to?

A Cocaine.

Mr. Busby: Objection. EXCEPTION NO. 1

THE COURT: Overruled.

It is clear from the record that defendant failed to object to testimony concerning the statements he made to Agent Felton on how to hide controlled substances to avoid detection by law enforcement officers. Defendant has not properly preserved his objection to the above-mentioned testimony for appeal. Accordingly, this assignment of error must fail.

[2] Next, defendant assigns as error the trial court's admission of testimony from Agent Felton concerning the amount of drugs which the defendant sold on a weekly basis "because this testimony was unfairly prejudicial and irrelevant in that it implied to the jury that the defendant was a person of bad character because of the amount of drugs he alleged he sold while bragging to an undercover agent."

Initially, we note that the record indicates that the same testimony was admitted without objection from two other witnesses. During trial, Sergeant Joe Tade testified that "[t]hen they engaged in some conversation concerning controlled substances, this being that Mr. Mullen made the statement that he usually sold an ounce and a half on weekends and a half ounce during the week." Defendant did not object to this testimony. Captain W. P. Leary testified on direct examination that "[t]hey engaged in a little conversation concerning the drug business, and the subject advised him he would sell approximately a half an ounce during the week days and on weekends that he had sold approximately an ounce." Defendant did not object to this testimony. "Where evidence is admitted over

objection, and the same evidence is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984). Accordingly, this assignment of error is overruled.

[3] Finally, defendant assigns as error the trial court's admission of testimony from Sergeant Tade concerning the identity of defendant's voice as the voice heard on a voice transmitter. Defendant argues that the "identification of the defendant's voice over the radio transmitter by Sgt. Tade without ever having heard defendant's voice on a radio transmission previously is an identification which does not meet the requirements of Rule 901(b)(5)." We disagree.

Initially, we note that G.S. § 8C-1, Rule 901(b)(5) provides for the authentication or identification of a voice where there is "[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." "Radio communications, by analogy to telephone conversations, are governed by the rules of evidence regulating the admission of oral statements made during a face-to-face transaction once the identity of the speakers is ascertained." *State v. Connley*, 295 N.C. 327, 341, 245 S.E.2d 663, 671 (1978), *remanded for other reasons*, 441 U.S. 929, 99 S.Ct. 2046, 60 L.Ed.2d 657 (1979); *see also State v. Love*, 296 N.C. 194, 250 S.E.2d 220 (1978). "As in the case of telephone conversations, a foundation must be laid for the admission of testimony concerning the content of the transmitted message. The identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence." 296 N.C. at 199, 250 S.E.2d at 224. *Love*, *supra*, involved communication through radio dispatch.

In *Ingle v. Allen*, 69 N.C. App. 192, 317 S.E.2d 1, *disc. rev. denied*, 311 N.C. 757, 321 S.E.2d 135 (1984), this court addressed whether a telephone call allegedly made by the defendant was properly authenticated. In *Ingle*, plaintiff testified that she could recognize defendant's voice over the telephone and that she had spoken to defendant " 'quite a bit,' 'a lot,' and 'many times.' " Defendant argued that this testimony was insufficient to establish that plaintiff had properly identified defendant as the speaker. This court held that "[p]laintiff's testimony is admissible if the 'identity of the person be shown directly or by circumstances somewhere in the development of the case, either then or later.' "

Id. at 198, 317 S.E. 2d at 4. "Any lack of assurance or uncertainty on the part of plaintiff identifying defendant by voice recognition affects only the weight and credibility, and not the admissibility of her testimony. 'As a general rule, the weight of voice recognition is a question of fact for the jury.' " *Id.*

Here, defendant erroneously contends that Rule 901(b)(5) should be interpreted to mean that the authentication of a voice over wire transmission can only be properly identified by testimony of one who heard the voice on prior occasions under the same circumstances. Rule 901(b)(5) merely provides that the identification need only be under circumstances connecting it with the alleged speaker. Prior to the admission of Sergeant Tade's testimony, the trial court allowed a voir dire examination of the witness concerning his ability to recognize the voices that he heard over the transmitter or wire. Sergeant Tade testified both during voir dire examination and direct examination that he had personally known defendant for several years and had conversations with defendant on several occasions prior to the transactions leading to defendant's arrest. Sergeant Tade also testified about distinctive characteristics in the defendant's tone, timbre and speech pattern. Sergeant Tade stated that defendant stuttered a little and had a tendency to say, " 'Yeah, uh-huh' a lot." After making detailed findings of fact and conclusions of law, the trial court concluded that Sergeant Tade could testify as to the identity of those persons he overheard over the transmitter. This evidence was sufficient to establish Sergeant Tade's familiarity with defendant's voice. The fact that these prior circumstances did not involve the same mechanical means as used in the monitoring of defendant only goes to the weight of the evidence. Accordingly, the trial court properly admitted the testimony of Sergeant Tade. This assignment of error must also fail.

Accordingly, we find no error.

No error.

Judges PHILLIPS and ORR concur.

JEFFERSON-PILOT LIFE INSURANCE COMPANY v. JEAN M. THOMPSON, LAURA A. THOMPSON, SHERRILL A. THOMPSON, JOHN B. THOMPSON, TRACY J. THOMPSON, MARK S. THOMPSON, PATRICIA A. THOMPSON, AND BRANCH BANKING AND TRUST COMPANY

No. 894SC676

(Filed 15 May 1990)

Bankruptcy § 7 (NCI3d)— life insurance policy—policy proceeds as security—not listed—discharged

The trial court improperly granted summary judgment for BB&T and should have granted summary judgment for appellant Mrs. Thompson where plaintiff Jefferson-Pilot filed an interpleader action requesting that the court determine which of the defendant claimants was entitled to the proceeds of four life insurance policies issued on the life of Dr. John Thompson; the trial court granted partial summary judgment in favor of BB&T as to the proceeds of one of the policies; Dr. and Mrs. Thompson had signed an assignment in favor of BB&T providing that the policy was to be held as collateral security; Dr. and Mrs. Thompson had subsequently filed a Chapter 11 bankruptcy petition; and the Chapter 11 plan contains no specific references to the assignment in favor of BB&T. Although BB&T filed a proof of claim and was listed as a secured creditor, it failed to list as part of its security the potential proceeds of the life insurance policy on Dr. Thompson, the plan did not provide for continuing the lien on that policy, and the lien was therefore extinguished.

Am Jur 2d, Bankruptcy §§ 22, 60, 241.

APPEAL by defendant Jean M. Thompson from judgment entered 11 May 1989 by *Judge J. Milton Read, Jr.* in JONES County Superior Court. Heard in the Court of Appeals 9 January 1990.

Plaintiff filed this interpleader action requesting that the trial court determine which of the defendant claimants is entitled to the proceeds of four life insurance policies issued by plaintiff on the life of Dr. John Hargett Thompson. Dr. Thompson died on 8 July 1988. The trial court granted partial summary judgment in favor of Branch Banking and Trust Company (BB&T) and held that BB&T was entitled to the proceeds of one of the four policies. This policy, #2-541-561, was a $50,000 policy issued on 23 November

1975 which named as beneficiary Jean Monette Thompson, appellant here. The net proceeds from this policy are $41,369.43. An assignment in favor of BB&T, signed by Dr. and Mrs. Thompson and dated 11 November 1975, provides that "the Policy is to be held as collateral security for any and all liabilities of the undersigned, or any of them, to the Assignee, either now existing or that may hereafter arise between any of the undersigned and the Assignee." In June of 1985 Dr. and Mrs. Thompson filed a Chapter 11 bankruptcy petition. However, the Chapter 11 plan contains no specific reference to the assignment in favor of BB&T. Dr. and Mrs. Thompson's Chapter 11 plan was confirmed by the bankruptcy court on 22 August 1986. The order states that the debtors, Dr. and Mrs. Thompson, were released "from all dischargeable debts" except those provided for in the bankruptcy court's order, the debtors' plan or 11 U.S.C. § 1141(d).

Appellant and the living children of the deceased have competing claims on the proceeds of the three other policies, none of which are involved in this appeal. BB&T makes no claim against the proceeds of those policies.

The trial court granted summary judgment in favor of BB&T on its claim for the proceeds of the $50,000 insurance policy in spite of appellant's argument that BB&T's claim was extinguished by the bankruptcy proceeding. Appellant Jean M. Thompson appeals the entry of partial summary judgment for BB&T.

Stubbs, Perdue, Chesnutt, Wheeler & Clemmons, by Gary H. Clemmons, for defendant-appellant Jean M. Thompson.

Ward and Smith, by William F. Hill and Mario E. Perez, for defendant-appellee Branch Banking and Trust Company.

EAGLES, Judge.

The sole issue presented here is whether partial summary judgment in favor of BB&T was appropriate. Appellant argues that the order confirming the Thompson's bankruptcy plan is entitled to full faith and credit, and that confirmation of the plan destroyed any security or lien rights BB&T had in the insurance proceeds. Appellant points out that in Chapter 11 bankruptcy cases (as opposed to Chapter 7) confirmation of the plan of reorganization by the court extinguishes all pre-existing debts not explicitly provided for in the plan. 11 U.S.C. § 1141(d). BB&T argues that because

neither the policy nor the assignment were brought to the attention of the bankruptcy court, the policy and assignment were not affected by the Chapter 11 proceedings. Additionally, BB&T argues that since it was the owner of the policy pursuant to the assignment, the policy was not property of the debtors at the time of the petition and was not affected by the bankruptcy court's confirmation of the plan. BB&T also argues that as a general rule a pre-existing lien survives a bankruptcy case; only the debtor's personal liability is extinguished. For the reasons stated below, we reverse and remand this case to the trial court for entry of judgment in favor of Mrs. Thompson.

In a Chapter 11 case, "[s]ubject to compliance with the requirements of due process under the Fifth Amendment, a confirmed plan of reorganization is binding upon every entity that holds a claim or interest even though a holder of a claim or interest is not scheduled, has not filed a claim, does not receive a distribution under the plan, or is not entitled to retain an interest under such plan." 5 L.P. King *Collier on Bankruptcy* ¶ 1141.01[1] at 1141-6 (15th ed. 1989). Here it is undisputed that BB&T had notice of the debtors' Chapter 11 proceeding.

Section 1141(a) of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (1978) (hereinafter the Code), states in pertinent part that "the provisions of a confirmed plan bind the debtor, . . . and any creditor, . . . whether or not the claim or interest of such creditor, . . . is impaired under the plan and whether or not such creditor, . . . has accepted the plan." The order of confirmation adopting the terms of the plan is a final judgment for purposes of *res judicata* on all matters relevant to the confirmation and is therefore binding on BB&T.

The binding effect of a confirmed Chapter 11 plan on liens has been the subject of extensive, though somewhat unsettled, case law. In *Minstar, Inc. v. Plastech Research, Inc. (In re Artic Enterprises, Inc.)*, 68 Bankr. 71 (D. Minn. 1986), although the creditor had a consensual lien on the debtor's property, its claim was treated as unsecured under the provisions of the confirmed Chapter 11 plan. Noting a split of authority, the district court held that the creditor's lien was dissolved because of the effect given to a confirmed plan by virtue of Code § 1141(c). The court stated that "[a]fter confirmation of a Chapter 11 plan, a creditor's lien rights are only those granted in the confirmed plan. A creditor no longer

can enforce its preconfirmation lien rights . . . ." *Id.* at 79, *quoting Board of County Comm'rs v. Coleman Am. Properties, Inc. (In re American Properties, Inc.)*, 30 Bankr. 239, 246 (Bankr. D. Kan. 1983). In addressing the binding effect of a confirmed plan, the court observed that "[i]n a Chapter 11 case, . . . the debtor and creditors naturally look to the plan of reorganization as the final decree of the rights of the parties." *Id.* at 80.

Similarly, in *Martin Marietta Corp. v. County of Madison (In re Penn-Dixie Indus., Inc.)*, 32 Bankr. 173 (Bankr. S.D. N.Y. 1983), the court confirmed a debtor's amended Chapter 11 plan, which incorporated the terms of an earlier tax order providing for payment of pre-petition real property tax claims over six years. The claims were originally secured by liens and held by Iowa counties. In spite of the tax order and the order confirming the amended plan, to which the counties neither objected nor appealed from, the counties sought to sell debtor's real property post-confirmation. When enjoined in an adversary proceeding, the counties moved to reform the order confirming the plan, claiming status as lien creditors. The *Penn-Dixie* court noted that only one of the counties had filed a proof of claim and that it had been untimely and identified as "priority" with the word "secured" stricken. The court held that the counties were "now estopped from seeking to revise the payment scheme." *Id.* at 179. The court noted that the counties had not objected to the order confirming the plan and that "[t]o allow the counties to go forward with their motion now . . . would defeat the time-honored doctrine of *res judicata.*" *Id.* at 177.

In *Pennsylvania Iron and Coal Co. v. Good (In re Pennsylvania Iron and Coal Co.)*, 56 Bankr. 492 (Bankr. S.D. Ohio 1985), the defendant claimed he had a lien on the debtor's trailer. Under the debtor's confirmed plan, however, the defendant, who received notice of the petition and a copy of the disclosure statement, neither filed a proof of claim nor lodged an objection to the confirmation. Accordingly, defendant was treated as an unsecured creditor without priority. The court held that the claimed lien was relinquished under the plan, stating that "11 U.S.C. § 1141 precludes defendant from presently altering his treatment under the plan and from maintaining or enforcing any pre-confirmation lien." *Id.* at 494-95. The *Pennsylvania Iron* court also observed that "[i]nherent in any bankruptcy reorganization . . . is the fact that the original contractual expectations of creditors will not be fulfilled." *Id.* at 496. Upon confirmation, therefore, the "defendant became bound by the provi-

sions of that plan." *Id.* at 495. *See also In re American Properties, Inc.*, 30 Bankr. at 246; *In re Fischer*, 91 Bankr. 55 (Bankr. D. Minn. 1988); Hopper, *Confirmation of a Plan Under Chapter 11 of the Bankruptcy Code and the Effect of Confirmation on Creditors' Rights*, 15 Ind. L.Rev. 501, 514-15 (1982).

We believe that a confirmed Chapter 11 plan defines the creditors' claims and any pre-confirmation rights of the creditors survive only to the extent that they are accounted for in the confirmed plan.

We acknowledge authority to the contrary holding that a lien creditor's status cannot be affected by a bankruptcy proceeding, but a close reading of the seminal case, *In re Tarnow*, 749 F. 2d 464 (7th Cir. 1984), leads us to conclude that it does not conflict with our decision here. In *Tarnow*, the Seventh Circuit Court of Appeals concluded that the bankruptcy and district courts erred when they permitted a Chapter 11 debtor to extinguish the lien of a pre-petition secured creditor. The Circuit Court examined Code § 506(d)(1) and reasoned that the statute "make[s] clear that the failure of the secured creditor to file a proof of claim is not a basis for avoiding the lien of the secured creditor." *Id.* at 467, *quoting* S. Rep. No. 65, 98th Cong., 1st Sess. 79 (1983). The court concluded that

> [t]he basis for disallowing the Corporation's claim was not that the Corporation was not a genuine secured creditor of the bankrupt but that its claim against the bankrupt estate—that is, its claim to be an unsecured creditor for so much of Tarnow's debt as could not be realized from the sale of the crops and equipment on which the Corporation had a lien—had been filed too late. . . . The validity of the lien was not determined in this case.

Id. at 466. The rationale of *Tarnow*, that a secured creditor cannot be deprived of its lien status where the debtor merely moves successfully to expunge the creditor's claim for late filing, is grounded upon due process requirements and is supported by Code § 506(d)(2), which simply provides that a creditor's failure to file a claim does not affect its lien status. We do not take issue with this logic, flowing as it does from a lien's status as a property right to which due process attaches. *See United States v. Security Indus. Bank*, 459 U.S. 70, 75-78 & n. 6, 103 S.Ct. 407, 410-12 & n. 6, 74 L.Ed.2d 235, 240-43 & n. 6 (1982). However, we observe that *Tarnow* arose

solely in the context of proof of claim litigation and had nothing to do with the effect of the confirmation of a Chapter 11 plan. On this record, *Tarnow* is not persuasive.

Artic Enterprises, supra, is more closely analogous on its facts and circumstances. Here, BB&T filed a proof of claim and was listed as a secured creditor. However, BB&T failed to list as part of its security the potential proceeds of the life insurance policy on one of the debtors, Dr. Thompson. The plan did not provide for continuing the lien on that policy and it was therefore extinguished under Code § 1141.

For the reasons stated, we reverse and remand the case for entry of judgment in favor of the appellant, Mrs. Thompson.

Reversed and remanded.

Judges PHILLIPS and ORR concur.

STEFEN CRAIG GILLIKIN v. WALTER HANNON PIERCE, JR.

No. 893SC122

(Filed 15 May 1990)

1. **Appeal and Error § 111 (NCI4th)— prior action pending—denial of dismissal—immediate appeal**

Although appeal of the trial court's denial of a motion to dismiss on the ground of a prior action pending is interlocutory because it is not a final adjudication, a denial of such a motion is immediately appealable.

Am Jur 2d, Appeal and Error §§ 50, 105.

2. **Rules of Civil Procedure § 41.2 (NCI3d)— voluntary dismissal by plaintiff—simultaneous voluntary dismissal of counterclaim—defendant's consent to plaintiff's dismissal not required**

A plaintiff may voluntarily dismiss his claim without defendant's consent when defendant's attorney simultaneously voluntarily dismisses defendant's counterclaim arising out of the same transaction alleged in the complaint, since the

simultaneous actions of the parties constitute a conclusion of action with respect to each claim, and defendant thus has no counterclaim pending against plaintiff which would enable him to prevent plaintiff from dismissing his claim without defendant's consent.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 66, 67.

3. **Rules of Civil Procedure § 41.2 (NCI3d)— voluntary dismissal by plaintiff—simultaneous dismissal of counterclaim—implied consent to plaintiff's dismissal**

Assuming arguendo that defendant's counterclaim arising out of the same transaction as the complaint was still pending when plaintiff voluntarily dismissed his complaint, defendant's filing of a voluntary dismissal of his counterclaim at the same instant that plaintiff dismissed his complaint was in effect a stipulation of dismissal of plaintiff's claim.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit §§ 66, 67.

4. **Attorneys at Law § 30 (NCI4th); Rules of Civil Procedure § 41.2 (NCI3d)— notice of dismissal—signature of attorney—presumption of authority**

A notice of voluntary dismissal of defendant's counterclaim was not ineffective because it was signed only by defendant's attorney, since an attorney may properly sign a written dismissal without the client's signature, and it is presumed that the attorney had authority to act for the client.

Am Jur 2d, Attorneys at Law § 155.

APPEAL by defendant from order entered 27 December 1988 by *Judge David E. Reid, Jr.* in CARTERET County Superior Court. Heard in the Court of Appeals 13 September 1989. Defendant's petition for rehearing allowed for the purpose of modifying the earlier opinion.

Wheatly, Wheatly, Nobles, Weeks & Wainwright, P.A., by Stevenson L. Weeks, for plaintiff-appellee.

Stith and Stith, P.A., by F. Blackwell Stith and Susan H. McIntyre, for defendant-appellant.

GREENE, Judge.

Defendant appeals the trial court's denial of defendant's motion to dismiss plaintiff's personal injury complaint.

Defendant Pierce ("Pierce") was the driver of a car which collided with a car that plaintiff Gillikin ("Gillikin") was driving. Originally, Pierce instituted a lawsuit for personal injury against Gillikin, alleging Gillikin's negligence. Gillikin answered Pierce's complaint, denied negligence and counterclaimed against Pierce for Pierce's negligence in causing the accident. Each alleged that the other had negligently crossed the center line of the road, causing the collision. Pierce answered Gillikin's counterclaim, denying liability and asserting Gillikin's contributory negligence as a defense. Before the lawsuit was tried, Pierce voluntarily dismissed his complaint with prejudice on 12 January 1987, at 10:37 a.m., pursuant to N.C.G.S. § 1A-1, Rule 41(a) (Cum. Supp. 1989). The voluntary dismissal was signed by Pierce and by Pierce's attorney. Pierce also executed a release and discharge of all claims against Gillikin resulting from the collision in exchange for $3,000.00. The same day, hour and minute, Gillikin voluntarily dismissed his counterclaim against Pierce without prejudice. The voluntary dismissal was signed by Gillikin's attorney and was not signed by Gillikin. Approximately, ten months later, Gillikin filed a complaint against Pierce which contained the same allegations as those in his former counterclaim against Pierce. Pierce filed a motion to dismiss Gillikin's complaint, asserting that abatement of Gillikin's cause of action was necessary because Pierce's own complaint had not been properly dismissed, and remained as a prior pending action between the parties on the same issues of negligence. In its order denying Pierce's motion, the trial court found that the prior action had been properly dismissed.

The dispositive issue is whether plaintiff may voluntarily dismiss his complaint when defendant asserts a counterclaim arising out of the same transaction alleged in the complaint, and defendant's attorney simultaneously voluntarily dismisses the counterclaim.

[1] Although appeal of the trial court's denial of a motion to dismiss on the ground of a prior action pending is interlocutory because it is not a final adjudication, a denial of such a motion is immediately appealable. *Atkins v. Nash*, 61 N.C. App. 488, 489, 300 S.E.2d 880, 881 (1983). Accordingly, we address the merits.

[2] When " 'defendant sets up a counterclaim arising out of the same transaction alleged in the plaintiff's complaint, the plaintiff cannot take a [voluntary dismissal] without the consent of the defendant. . . .' " *McCarley v. McCarley*, 289 N.C. 109, 112, 221 S.E.2d 490, 492 (1976) (citation omitted); *see* N.C.G.S. § 1A-1, Rule 41(a)(1) (voluntary dismissal by plaintiff or by stipulation). The basis for this rule is that any party making such a claim has "the right to have [adjudicated] all the matters put in issue by the pleadings . . ." *Whedbee v. Leggett*, 92 N.C. 465, 470 (1884). However, if no counterclaim is pending, or if the counterclaim is independent and does not arise of the same transaction as the complaint, a party may voluntarily dismiss his suit without the opposing party's consent by filing a notice of dismissal. N.C.G.S. § 1A-1, Rule 41(a)(1)(i); *Ward v. Taylor*, 68 N.C. App. 74, 78, 314 S.E.2d 814, 819, *cert. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984) (after a party files a voluntary dismissal, no suit is pending). "Pending" means "[b]egun, not yet completed . . . awaiting an occurrence or conclusion of action." Black's Law Dictionary 1021 (5th ed. 1979).

In this case, Pierce and Gillikin each filed a notice of dismissal during the same minute on the same day, and their simultaneous action constituted a 'conclusion of action' with respect to each claim. Since Gillikin's counterclaim was concluded at the time Pierce filed his complaint dismissal, Gillikin has no counterclaim pending against Pierce which would enable Gillikin to prevent Pierce from dismissing his complaint without Gillikin's consent. Each party's concurrent right to have his claim issues adjudicated, and concurrent right to hold the other into court, ceased simultaneously, and neither may assert improper dismissal of his own or the other's pleadings.

[3] Assuming, *arguendo*, that Gillikin's counterclaim was pending when Pierce dismissed his complaint, we determine that Gillikin's counterclaim dismissal constituted implied consent to Pierce's complaint dismissal.

Generally, consent is evidenced "by filing a stipulation of dismissal signed by all parties who have appeared in the action. . . ." N.C.G.S. § 1A-1, Rule 41(a)(1)(ii). However, our courts disfavor a strict statutory construction of Rule 41, and allow other actions to substitute for the procedure of filing of a "paper writing" in compliance with the procedural mandates. *See Danielson v. Cummings*, 300 N.C. 175, 179, 265 S.E.2d 161, 163 (1980) (North Carolina tradition equates oral notice in open court with a filed written

notice of voluntary dismissal). "In construing Rule 41 . . . we must give effect to the legislative intent, and avoid constructions which operate to defeat or impair that intent." *Ward*, at 79, 314 S.E.2d at 819. The legislative intent underlying enactment of Rule 41 was to protect defendants from abusive use of the voluntary dismissal procedure when "there has been a heavy expenditure of time and effort by the court and other parties." N.C.G.S. § 1A-1, Rule 41, Comment.

In this case, Gillikin's filing of a signed voluntary dismissal of his claim against Pierce at the same instant that Pierce dismissed his complaint was in effect a stipulation of dismissal to Pierce's claim. Gillikin's dismissal of his counterclaim showed Gillikin's willingness to abandon the time and effort he had expended on his claim, and to forego his right to have his claim adjudicated. Such action speaks "consent" as clearly as oral notice or written stipulation.

[4] Pierce also contends that Gillikin's notice of voluntary dismissal of Gillikin's counterclaim is ineffective because only Gillikin's attorney signed the notice. We disagree, because the lack of Gillikin's signature was immaterial.

An attorney may properly sign a written dismissal without his or her client's signature. *See Department of Transportation v. Combs*, 71 N.C. App. 372, 322 S.E.2d 602 (1984). While Rule 41(a) requires the consent of the *parties* to the litigation, there is a presumption that an attorney has authority to act for his client and one challenging the attorney's actions as being unauthorized has the burden of rebutting the presumption. N.C.G.S. § 1A-1, Rule 41(a); *J.I.C. Electric, Inc. v. Murphy*, 81 N.C. App. 658, 660, 344 S.E.2d 835, 837 (1986). Here, Pierce has offered no evidence to rebut the presumption.

We determine that the earlier action was concluded, is no longer pending, and does not abate this action. Therefore, the trial court was correct in denying defendant's motion to dismiss the present action. *Layell v. Baker*, 46 N.C. App. 1, 4, 264 S.E.2d 406, 409 (1980) (abatement is proper only when another action stating the same claim is pending in another court).

Affirmed.

Judges JOHNSON and EAGLES concur.

DOUGLAS P. RICH, PLAINTIFF v. DOUGLAS G. SHAW AND DAVID SHAW D/B/A TAYLOR RENTALS, AND THE CHARLES MACHINE WORKS, INC., DEFENDANTS

No. 8926SC1107

(Filed 15 May 1990)

Sales § 22 (NCI3d)— product liability—belt guard removed from machine—proximate cause of injury—manufacturer not liable

N.C.G.S. § 99B-3 bars recovery from the manufacturer in a product liability action where the forecast of evidence shows that a proximate cause of plaintiff's injury was the modification or alteration of a machine by a party other than the manufacturer after it left the manufacturer's control and that the alteration was contrary to the manufacturer's instructions and done without its express consent. Therefore, in an action to recover for injuries received when plaintiff's hand was pulled into the belts and pulleys of a rented trenching machine manufactured by defendant while plaintiff was working on the machine, summary judgment was properly entered for defendant manufacturer where plaintiff's forecast of evidence showed that a belt guard which would have prevented his injury was missing from the trencher when he rented it from a third party; defendant manufacturer's forecast of evidence showed that the belt guard was in place when the trencher left the manufacturer's control and that the operator's manual furnished by the manufacturer warned against operation of the trencher without the belt guard and cautioned that the belt guard should be replaced after removal for maintenance; and plaintiff failed to present evidence that the belt guard was not in place when the trencher left the manufacturer's control.

Am Jur 2d, Products Liability §§ 354, 367.

APPEAL by plaintiff from order entered 21 July 1989 in MECKLENBURG County Superior Court by *Judge Frank W. Snepp*. Heard in the Court of Appeals 11 April 1990.

In this product liability action plaintiff seeks damages for an injury he received while operating a Ditch Witch C99 trenching machine. The trencher, manufactured by defendant The Charles

Machine Works, Inc., was rented by plaintiff from defendants Douglas and David Shaw d/b/a Taylor Rentals.

When plaintiff rented the trencher from Taylor Rentals he noticed that the belt guard, also referred to as a safety guard, was missing. The purpose of the belt guard is to protect the operator of the trencher by preventing the operator from inserting hands or other body parts into the belts, chains, or gears of the machine. When plaintiff started to use the machine, he noticed that the rear wheels of the trencher were not pulling and that the digging chain was not engaged. In an attempt to fix the trencher plaintiff knelt down and, without turning off the motor, tried to adjust two levers located in the trencher. While plaintiff was working on the trencher with his left hand, his right hand was somehow pulled into the belts and over the pulleys. As a result his hand was seriously injured.

Summary judgment was granted in favor of defendant manufacturer based on N.C. Gen. Stat. § 99B-3. Plaintiff appeals.

Smith and Feerick, by Richard T. Feerick, for plaintiff-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by John G. Golding, for defendant-appellee The Charles Machine Works, Inc.

WELLS, Judge.

Summary judgment should be granted when the pleadings, affidavits, and other documents on file show that there is no genuine issue of material fact for trial and that any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A, Rule 56(c) (1983 & Supp. 1989); *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982). An issue is genuine if it may be maintained by substantial evidence and a fact is material if it would irrevocably establish any material element of a claim or defense. *Id.* Defendant may meet this burden in one of three ways: (1) proving that an essential element of the plaintiff's claim is nonexistent, (2) showing that plaintiff cannot produce evidence to support an essential element of his claim, or (3) showing that plaintiff cannot overcome an affirmative defense which bars the claim. *Bernick, supra, citing Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). If defendant satisfies its burden of proof, then the burden shifts to the plaintiff to show that there is a genuine issue for trial. *Id.*

In his complaint plaintiff asserted various theories of negligence against defendant manufacturer including negligent design based on failure to equip the belt guard with an electrical interlock which would prevent the engine of the machine from operating when the guard was removed. In response to plaintiff's complaint, defendant manufacturer denied all allegations of negligence and specifically raised the provisions of N.C. Gen. Stat. § 99B-3 (1989) as a defense to this action. In this case, summary judgment was proper if the provisions of G.S. § 99B-3 barred recovery by plaintiff as to defendant manufacturer.

Chapter 99B of the North Carolina General Statutes governs product liability actions. G.S. § 99B-3 specifically addresses circumstances under which a manufacturer of a product will not be held liable in the event a product is altered or modified after leaving the manufacturer's control. The statute provides:

> (a) No manufacturer . . . of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death or damage to property was either an alteration or modification of the product by a party other than the manufacturer . . ., which alteration or modification occurred after the product left the control of such manufacturer . . . unless:
>
> (1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer . . .; or
>
> (2) The alteration or modification was made with the express consent of such manufacturer. . . .
>
> (b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear.

G.S. § 99B-3.

Defendant manufacturer submitted an affidavit stating that all of its C99 trenching machines were manufactured and assembled with a belt guard and that these trenching machines have always been sold and shipped to a distributor with belt guards firmly bolted in place. Defendant manufacturer's affidavit also stated that

the operator's manual furnished to dealers contains safety warnings against removing the belt guard while a trencher is running and cautioning that the belt guard be replaced after removal for any maintenance. A copy of this manual was exhibited with the affidavit.

The president of Ditch Witch of Charlotte, Inc. also submitted an affidavit on defendant's behalf. According to the affidavit, two trenchers were sold by Ditch Witch of Charlotte, Inc. to Taylor Rental Center. The affidavit states that the belt guard was in place and bolted to each machine when they were sold. This forecast of evidence shows that the belt guard was in place when it left the manufacturer's control. Failure to replace the belt guard after removing it for maintenance or any other reason was not in accordance with defendant manufacturer's instructions. In fact, defendant manufacturer warned against such operating practices.

In order to overcome this forecast of evidence, plaintiff must demonstrate that there was a genuine issue for trial with regard to whether the removal of the belt guard occurred before the trenching machine left the manufacturer. Plaintiff did not present any evidence to show that the belt guard was not in place when it left the manufacturer's control. His evidence tended to show only that when he picked up the trencher at Taylor Rentals the belt guard was not attached to the machine. By his own deposition testimony plaintiff admits that had the belt guard not been removed, his hand would not have been pulled into the machine.

When, as here, the forecast of evidence demonstrates that a proximate cause of plaintiff's injury was the modification or alteration of the machine by a party other than the manufacturer after it left the control of the manufacturer; and that the alteration of the machine was contrary to the instructions of the manufacturer and done without its express consent, then G.S. § 99B-3 bars recovery from the manufacturer. The trial court's grant of summary judgment was therefore proper in this case.

Affirmed.

Judges EAGLES and GREENE concur.

IN RE BHATTI

[98 N.C. App. 493 (1990)]

IN THE MATTER OF THE CUSTODY OF HABIB ARSHAD BHATTI, SAFFIYAH ARSHAD BHATTI, AHMAD ARSHAD BHATTI, AND MAHBOOB ARSHAD BHATTI; ARSHAD BHATTI, PETITIONER-APPELLANT v. KOKAB ARSHAD BHATTI A/K/A KOKAB SAID CHOUDHERY BHATTI, RESPONDENT-APPELLEE

No. 8917DC990

(Filed 15 May 1990)

1. **Divorce and Alimony § 23.6 (NCI3d)— child custody—jurisdiction—simultaneous proceeding in Georgia**

The trial court properly dismissed petitioner's North Carolina custody action on the grounds that Georgia had previously assumed jurisdiction in the case where Georgia was the home state of the children at the time the child custody proceedings were begun by respondent and Georgia met the requirements of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act. Petitioner failed to establish any of the four bases for jurisdiction set forth in N.C.G.S. § 50A-3, failed to appear at the custody hearing, and the vague assertions in his complaint and affidavit do not qualify as "information" anticipated and required by N.C.G.S. § 50A-9.

Am Jur 2d, Abduction and Kidnapping § 19; Divorce and Separation § 1145.

2. **Divorce and Alimony § 25 (NCI3d)— child custody—simultaneous Georgia action—law enforcement officers authorized to take children into protective custody—erroneous**

The trial court erred in a child custody action by authorizing law enforcement officers to pick up the children and deliver them to respondent in an effort to assist the Georgia court in enforcing its order. While the trial court could resort to traditional contempt proceedings, there is no statutory basis for invoking the participation of law enforcement officers in producing the children.

Am Jur 2d, Abduction and Kidnapping § 19; Divorce and Separation § 1145.

APPEAL by petitioner from order entered 30 May 1989 in CASWELL County District Court by *Judge Peter M. McHugh*. Heard in the Court of Appeals 15 March 1990.

Petitioner filed for custody of his four minor children in Caswell County. Respondent moved to dismiss the North Carolina custody action on the grounds that Georgia had previously assumed jurisdiction in this matter and that petitioner had abruptly removed the children from the marital residence in Georgia and that such conduct barred North Carolina from exercising jurisdiction. From the order dismissing petitioner's claim for relief and authorizing North Carolina law enforcement officers to take the children into protective custody for delivery to respondent, petitioner appeals.

Latham, Wood, Eagles & Hawkins, by William A. Eagles, for petitioner-appellant.

Moseley & Whited, P.A., by W. Phillip Moseley, for respondent-appellee.

WELLS, Judge.

[1] North Carolina's Uniform Child Custody Jurisdiction Act (UCCJA), N.C. Gen. Stat. § 50A *et seq.* (1989), and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C.A. § 1738A (West Supp. 1989), govern the issue of jurisdiction in child custody matters. *See Gasser v. Sperry*, 93 N.C. App. 72, 376 S.E.2d 478 (1989). When there are simultaneous proceedings in other states G.S. § 50A-6 provides with regard to jurisdiction:

> (a) If at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Chapter, a court of this State shall not exercise its jurisdiction under this Chapter, unless the proceeding is stayed by the court of the other state because this State is a more appropriate forum or for other reasons.

Similarly, the PKPA provides in part:

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

28 U.S.C.A. § 1738A(g). Obviously, the prerequisites for exercising jurisdiction in substantial conformity with Chapter 50A and for

exercising jurisdiction consistently with the provisions of the PKPA are essentially the same. *Compare* G.S. § 50A-3, subsections 1-4 and 28 U.S.C.A. § 1738A(c); *see also Schrock v. Schrock*, 89 N.C. App. 308, 365 S.E.2d 657 (1988). Unlike the UCCJA, the PKPA extends full faith and credit to child custody determinations, including temporary orders, made according to its jurisdictional guidelines. In addition, the PKPA's jurisdictional standards are designed to prohibit the concurrent exercise of jurisdiction by more than one state that sometimes occurs under the UCCJA's more flexible guidelines. *See, generally, Comment, The Parental Kidnapping Prevention Act: Is There An Enforcement Role for the Federal Courts?*, 62 Wash. L. Rev. 841, 842-846 (1987).

If the Georgia court's exercise of jurisdiction meets the jurisdictional guidelines of the above Acts, then the trial court's order dismissing petitioner's action and enforcing the Georgia custody award was proper.

In this case the trial court found that the State of Georgia had assumed jurisdiction of the custody of the children and that a custody action was pending prior to the action in Caswell County. The trial court also found that a Georgia court had issued a temporary custody order which awarded custody to respondent. These findings are supported by the record. Based on these findings as well as other evidence before it, the trial court concluded that Georgia was the home state of the children and that Georgia had assumed jurisdiction.

For the purpose of jurisdiction in custody matters "home state" means the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months. G.S. § 50A-2(5); *see also* 28 U.S.C.A. § 1738A(b)(4) (adding that periods of temporary absence of any such persons are counted as a part of the six-month period). A state properly assumes jurisdiction as the home state if it (i) is the home state at the commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State. G.S. § 50A-3(a)(1); *see also* 28 U.S.C.A. § 1738A(c).

In our opinion the trial court properly declined to assert jurisdiction based on its conclusion that Georgia is the home state of these children. The materials before the trial court consisted of the verified complaints, the case file from Georgia, a conversation with the Georgia judge who issued the temporary custody order, the testimony of respondent and a Dr. Khawaja, brother-in-law of petitioner, and the arguments of counsel. The materials showed that petitioner moved to North Carolina in 1971 and began his medical studies at North Carolina Baptist Hospital in Winston-Salem. In November 1980 the parties were married in Pakistan. Respondent immediately joined petitioner in North Carolina where the two oldest children were born. The actual date is disputed, but at some point between December 1984 and February 1985, the family, then consisting of the two oldest children and Dr. and Mrs. Bhatti, moved from North Carolina to Georgia so that petitioner could practice medicine with his brother-in-law and sister. During a visit to North Carolina the Bhatti's third child was born. The Bhatti's fourth child was born during a visit to Pakistan. These temporary absences do not interrupt the period of time spent in Georgia for purposes of applying the home state rule. Except for visits with respondent to Pakistan and North Carolina, the children remained in Georgia until December 1987. At that time petitioner, without respondent's knowledge or consent, removed himself and the children from their home in Georgia.

On 18 December 1987 petitioner filed a complaint against respondent in Alamance County, North Carolina which was later dismissed by order of the court. On 28 December 1987 respondent filed suit in Georgia for divorce, temporary and permanent alimony, and temporary and permanent custody of the children. This action is still pending and respondent continues to live in Georgia. Based on this evidence it is clear that the the trial court properly refused jurisdiction in this case. Georgia's exercise of jurisdiction meets the requirements of the UCCJA and the PKPA in that at the time child custody proceedings were begun by respondent, Georgia was the home state of the children. The trial court's order dismissing petitioner's action and enforcing the Georgia custody award was therefore proper.

Petitioner's contention that North Carolina had jurisdiction pursuant to N.C. Gen. Stat. § 50A-3 is without merit. In order for a court of this State to exercise jurisdiction in child custody determinations, at least one of the four alternative bases for jurisdic-

tion set forth in G.S. § 50A-3 must be established. Petitioner failed to establish any of the four bases for jurisdiction at this hearing. Additionally, G.S. § 50A-9 requires that every party in a custody pleading must give information under oath regarding the children's present address, the places where they have lived within the last five years, and the names and present addresses of the persons with whom the children have lived during that period. Petitioner did not appear at the hearing and the vague assertions he makes in his complaint and affidavit do not qualify as "information" anticipated and required by G.S. § 50A-9. Since their removal from Georgia in December 1987, information regarding the location of the children, any connections they might have with this State, or reasons why North Carolina should be considered their home state were indefinite and unsubstantiated. The sole witness for the petitioner, his brother-in-law Dr. Khawaja, testified that he had not seen petitioner or the children since he drove them from Georgia to North Carolina in December 1987. The trial court had no grounds for assuming jurisdiction in this case; therefore, refusal to exercise jurisdiction was proper.

[2] Petitioner also asserts that the trial court erred in authorizing law enforcement officers to pick up the children and deliver them to respondent in an effort to assist the Georgia court in enforcing its order. We agree. While the UCCJA provides for assistance to courts of other states, it only does so in the manner provided for in G.S. § 50A-20. In pertinent part it provides:

> (a) Upon request of the court of another state the courts of this State which are authorized to hear custody matters may order a person in this State to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this State. . . .
>
> . . .
>
> (c) Upon request of the court of another state a competent court of this State may order a person in this State to appear alone or with the child in a custody proceeding in another state. . . .

G.S. § 50A-20. While the trial court could resort to traditional contempt proceedings, we are unaware of any statutory basis for invoking the participation of law enforcement officers in producing

the children. Accordingly, this portion of the trial court's order is vacated.

Affirmed in part; vacated in part.

Judges COZORT and GREENE concur.

ALLEN D. COWAN v. N.C. PRIVATE PROTECTIVE SERVICES BOARD

No. 8926SC443

(Filed 15 May 1990)

Professions and Occupations § 1 (NCI3d)— private investigator's license—experience as investigative reporter

Petitioner's activities as an investigative reporter for a newspaper qualified as "experience" in private investigative work required by former N.C.G.S. § 74C-8(d)(3) (1981) for a private investigator's license where his investigations encompassed several of the subjects listed in N.C.G.S. § 74C-3(8)(a), and the Private Protective Services Board erred in refusing to consider such experience on the ground that it was outside traditional investigative work because its purpose was to sell newspapers.

Am Jur 2d, Licenses and Permits § 6.

APPEAL by respondent from order entered 7 February 1989 by *Judge Frank W. Snepp, Jr.*, in MECKLENBURG County Superior Court. Heard in the Court of Appeals 21 November 1989.

George Daly for petitioner-appellee.

Lacy H. Thornburg, Attorney General, by Teresa L. White, Assistant Attorney General, for the State.

GREENE, Judge.

Respondent North Carolina Private Protective Services Board ("Board") appeals the superior court's order and judgment reversing its decision denying petitioner a license as a private investigator.

Petitioner Cowan ("Cowan") applied to the Board for a private investigator's license, pursuant to N.C.G.S. § 74C-2 (1981) (amended 1989). The Board denied Cowan's application, citing his "failure to meet the experience requirements as outlined in [N.C.G.S. §] 74C-8(d)(3) [repealed in 1989]." The Board made these findings:

FINDINGS OF FACT

1. Petitioner's [Cowan's] education is as follows:

   A. Graduation from the University of Florida in 1968 with a degree in journalism.

   B. One year at the University of Michigan School of Law.

   C. Seminar on Investigative Reporting, American Press Institute, Reston, Virginia.

   D. Political Procedures Course, St. Petersburg Community College.

   E. Course of study and Florida Certification in law enforcement, Pinallis County, Florida.

   F. Course of Study and North Carolina Certification in law enforcement, Charlotte Police Academy.

   G. 1977—Professional Journalism Fellowship from the National Endowment for the Humanities, University of Michigan.

2. Petitioner's experience is as follows:

   A. Three years with the Orlando Sentinel.

   B. Three years with the St. Petersburg Times.

   C. Nine and one-half years as an Investigative Reporter with the Charlotte Observer.

   D. Three years as an Investigative Reporter with the Stars and Stripes, Wiesbadden, West Germany.

   E. Fourteen months as an Investigative Reporter with the Business Journal of Charlotte.

   F. 1988—Three months as investigator for duly-licensed North Carolina attorney.

G. Witness in cruelty to animals trial generated by Petitioner's article on the training of greyhound racing dogs.

H. 1973—Article on cruelty to animals submitted for Pulitzer Prize and received honorable mention.

I. 1973—Florida Society of Managing Editors voted Petitioner Best Investigative Reporter of the Year.

J. 1986—American Board of Realtors voted article on fraudulent land sales as Best Consumer Article of the Year.

K. Excellence in Journalism Award, Atlanta Chapter of the Society of Professional Journalists, Sigma Delta Chi, for Investigative Reporting.

3. Petitioner's assignments included the following:

A. 1973—Use of live rabbits in the training of greyhound racing dogs. National Humane Society began a national campaign against the practice and the State of Florida rewrote its cruelty to animals law. Gordon Oldom, then the District Attorney of Marion County, Florida, prosecuted the man accused of this practice and called the Petitioner to testify at the trial. The man was convicted and received a prison term.

B. 1979—Petitioner was voted by the editors of the Charlotte Observer to be the only reporter on that staff to cover the financial abuses in the PTL Ministry. From 1979-1983, this was Petitioner's sole duty assignment. Lawrence Bernstein, who was a Federal Communication (FCC) lawyer in 1979, stated, "It was through his (Petitioner's) diligence and investigative skill that serious allegations of misconduct involving the PTL Television Network were first uncovered. The FCC took these reports of Mr. Cowan very seriously. They were in fact a direct cause of the FCC ordering its own investigation of PTL."

C. Lincoln County. Improprieties in the Magistrate's and District Attorney's offices. Petitioner reported that DUI cases were being improperly dismissed. Chief Judge John Friday ordered 249 DUI cases to be reopened. The N.C. Department of Justice sent a special prosecutor to Lincoln County to prosecute the Magistrate.

D. 1983—Fraudulent land sales to American servicemen. Article reprinted and distributed to all incoming servicemen.

E. 1978—Abuses by a Charlotte businessman.

F. 1986—Fraudulent mail order sales of synthetic diamonds.

G. Mail order sale of overvalued coins.

H. Crash of Eastern Airline plane at Douglas Municipal Airport in Charlotte.

4. Don Hardister was the PTL Chief of Security at Heritage USA for 12 years. He testified that during his tenure with PTL, he was aware of Petitioner's articles concerning PTL and launched an internal investigation to determine how the Petitioner was obtaining his information.

5. Peter S. Gilchrist, the District Attorney for the 26th Judicial District, testified that he knew Petitioner through a Mecklenburg County Study Commission and through Petitioner's efforts at having a potentially incorrect conviction investigated. Based on Petitioner's information, the District Attorney's Office reopened their investigation.

6. Ron Guerrette, a licensed private investigator, testified that Guerrette was employed by Attorney Eddie Knox[,] who represented the PTL ministry. As a result of the Petitioner's articles, Guerrette was directed to determine where the Petitioner obtained his information.

7. The Charlotte Observer recently won a Pulitzer prize for its coverage of the PTL Ministry financial abuses.

8. The following hours of reporting have been documented:

A. Stars and Stripes, 3½ years, 1,750 hours.

B. Charlotte Business Journal, 560 hours.

C. Charlotte Observer, 350 hours.

The Board concluded that Cowan's 3,000 hours experience as a newspaper reporter did not qualify as "experience" required by N.C.G.S. § 74C-8(d)(3) (1981) (repealed 1989). Cowan then petitioned the superior court for review of the Board's denial pursuant to N.C.G.S. § 150B-51(a-b). The superior court judge reversed the Board's

decision, and entered an order and judgment directing the Board to grant Cowan a private investigator's license.

The dispositive issue is whether the Board's findings and conclusions were supported by substantial evidence.

I

Our review of an administrative agency's decision is governed by the Administrative Procedure Act, and we may reverse or modify the Board's decision only if it violates one of five statutory grounds. *Walls & Marshall Fuel Co., Inc. v. N.C. Dept. of Revenue*, 95 N.C. App. 151, 153, 381 S.E.2d 815, 817 (1989) (citations omitted); N.C.G.S. § 150B-51 (Cum. Supp. 1989). More particularly, if "the substantial rights of the [petitioner] may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are . . . (5) [u]nsupported by substantial evidence . . . in view of the entire record[,]" we may reverse the Board's decision. N.C.G.S. § 150B-51(b). We determine that the Board must be reversed for lack of substantial evidence and the statute's disjunctive "or" language renders unnecessary our review of other bases for reversal or modification of error.

In determining whether the Board's findings and conclusions are supported by substantial evidence, we apply the "whole record" test. N.C.G.S. § 150B-51(b)(5); *Watson v. North Carolina Real Estate Com'n*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296, *cert. denied, temp. stay denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). In the whole record test, the reviewing court takes into account " 'both the evidence justifying the agency's decision and the contradictory evidence from which a different result could be reached. . . . "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." . . . .' " *Id.* (citation omitted).

Until 1989, an applicant was required to meet statutory prerequisites for obtaining a private investigator's license, including an experience requirement of "at least three years experience within the past five years in private investigative work . . ." N.C.G.S. § 74C-8(d)(3) (repealed 1989). Also until 1989, an applicant could satisfy this experience requirement if he had

engage[d] in the business of or accept[ed] employment to furnish, agree[ed] to make, or [made] an investigation for the purpose of obtaining information with reference to:

a. Crime or wrongs done or threatened against the United States or any state or territory of the United States;

b. The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;

c. The location, disposition, or recovery of lost or stolen property;

d. The cause or responsibility for fires, libels, losses, accidents, damages, or injuries to persons or to properties, provided that scientific research laboratories and consultants shall not be included in this definition;

e. Securing evidence to be used before any court, board, officer, or investigation committee, or

f. Protection of individuals from serious bodily harm or death.

N.C.G.S. § 74C-3(8)(a) (amended 1989).

The Board must "consider all evidence of experience that is investigative in nature to determine if the applicant had the necessary experience." *Boston v. N.C. Private Protective Services Board*, 96 N.C. App. 204, 207, 385 S.E.2d 148, 151 (1989).

The Board does not dispute that Cowan's investigations encompassed several of the subjects listed in the statute. Instead, the Board contends that it can reject Cowan's newspaper research as being outside "traditional investigative work" because Cowan's 'purpose' was to sell newspapers and not to obtain information. We disagree.

Reviewing the whole record, we determine that a reasonable person would conclude that Cowan's research activities were investigative, for the 'purpose of obtaining information,' and the Board's findings and conclusions were not supported by substantial evidence. The Board did not attempt to define 'traditional investigative work,' but whatever the definition, news gathering and research has been part of an investigative tradition that predates the American Revolu-

tion. It is an applicant's 'purpose to obtain information' that determines whether he is acting as a 'private investigator' and not how he uses the information after obtaining it. That the information ultimately generates business or income is irrelevant. *See Boston*, at 207, 285 S.E.2d at 150 (a bail bondsman runner who investigates a defendant's whereabouts in furtherance of the bail bondsman's business does investigative work).

The superior court properly reversed the Board's decision denying Cowan's application based on the lack of substantial evidence.

Affirmed.

Judges JOHNSON and PARKER concur.

NATIONAL SERVICE INDUSTRIES, INC., PLAINTIFF v. HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, DEFENDANT

No. 8921SC572

(Filed 15 May 1990)

1. **Taxation § 23 (NCI3d)— administrative interpretation of taxing statutes—prima facie correct rule inapplicable**

The "prima facie correct" standard of N.C.G.S. § 105-264 applies only to decisions by the Secretary of Revenue to initiate or propose regulations that modify, change, alter or repeal existing regulations and not to administrative interpretations of taxing statutes.

Am Jur 2d, State and Local Taxation § 8.

2. **Taxation § 29 (NCI3d)— corporate income—business or nonbusiness—jury question**

Whether corporate income is business or nonbusiness for income tax purposes is a question of fact, and the trial court properly submitted this issue to the jury.

Am Jur 2d, State and Local Taxation §§ 256-258.

3. Taxation § 30 (NCI3d)— income taxation—foreign multistate corporation—safe harbor lease in Georgia—apportionment of losses

Losses sustained by a foreign multistate corporation under a "safe harbor" lease of electric generating equipment in Georgia are business losses that should be apportioned among all the states in which it does business rather than allocated exclusively to Georgia where the return on plaintiff's investment in the generating equipment is an integral part of plaintiff's business in that 15 percent to 20 percent of plaintiff's net worth was invested in the equipment, and the lease arrangement and its federal tax benefits constitute a means of gaining working capital and increasing cash flow for all of plaintiff's business operations.

Am Jur 2d, State and Local Taxation §§ 294-298.

APPEAL by defendant from judgment entered 6 December 1988 by *Judge James A. Beaty, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 22 December 1989.

This is a corporate tax case. Plaintiff is a foreign corporation doing business in North Carolina. In April of 1982 plaintiff entered into a "safe harbor lease" outside of the state of North Carolina. Pursuant to this arrangement plaintiff bought electric generating equipment located in Georgia and leased the equipment back to the company from which it was purchased. Under the federal Internal Revenue Code plaintiff has the benefit of energy tax credits, investment tax credits, and depreciation on the equipment that is being leased. The evidence tended to show that plaintiff used 15-20% of its net worth to obtain these tax benefits. These tax benefits increase plaintiff's cash flow "in the neighborhood of 80 to 90 million dollars" over the first four years of the lease. Due to plaintiff's centralized financial management this increased cash flow benefitted plaintiff's North Carolina operations. Plaintiff is not in the business of generating or selling electric power in North Carolina and does not manage the power equipment that is leased.

Plaintiff filed a North Carolina corporate income tax return for the fiscal year ending 31 August 1982 and apportioned as business income a net loss from this "safe harbor" lease. The Department of Revenue reclassified plaintiff's loss on the lease as nonbusiness income, reallocated the loss outside of North Carolina and eliminated

the property owned under the lease from the property factor of the apportionment formula. Consequently, an additional corporate income tax of $143,648.08, plus interest, was assessed. Plaintiff paid the additional tax (which, including interest, totaled $201,466.94) under protest. Thereafter, pursuant to G.S. 105-267, plaintiff claimed a refund. When its administrative efforts were unsuccessful, plaintiff brought suit for the return of the disputed tax paid. The jury found for the plaintiff. The trial court denied defendant's motion for judgment notwithstanding the verdict or, in the alternative, a new trial. Defendant appeals.

Petree Stockton & Robinson, by G. Gray Wilson, James M. Iseman, Jr., and Timothy J. Ehlinger, for plaintiff-appellee.

Attorney General Thornburg, by Assistant Attorney General Newton G. Pritchett, Jr., for defendant-appellant.

EAGLES, Judge.

Defendant makes two arguments on appeal. First, defendant asserts that the trial court erred in failing to instruct the jury on the "presumption of correctness of the defendant's interpretation of a taxing statute." Additionally, defendant argues that the trial court erred in denying the motion for judgment notwithstanding the verdict where defendant's motion for directed verdict should have been granted. Defendant asserts that the evidence was insufficient as a matter of law to justify a verdict for plaintiff. Plaintiff asserts a cross-assignment of error and argues that the trial court should have denied defendant's motion for judgment notwithstanding the verdict on the ground that defendant failed to state the basis for the motion. We disagree with defendant's arguments and affirm the judgment below. Therefore, we do not reach plaintiff's cross-assignment of error.

North Carolina's Corporate Income Tax Act (the Act), G.S. 150-130 to 150-132, is based on the Uniform Division of Income for Tax Purposes Act (UDITPA). The Act contains rules for determining the portion of a corporation's total income from a unitary multistate business which is attributable to this state and therefore subject to North Carolina's income tax. In general, the Act divides a multistate corporation's income into two groups: business and nonbusiness income. Business income is apportioned among the states in which the corporation does business according to a three-factor formula, G.S. 105-130.4(i), while nonbusiness income is allo-

cated to a specific jurisdiction. G.S. 105-130.4(h). Plaintiff argues that the losses it sustained under the safe harbor lease should be apportioned among the states in which it does business since the lease provides essential working capital for all of plaintiff's business operations. Defendant argues that these losses are non-business income and therefore should be allocated exclusively to Georgia, the location of the leased property.

I. Jury Instruction.

[1] Defendant's first argument is that the trial court erred by refusing to instruct the jury on the "presumption of correctness" which should be accorded to defendant's interpretation of the taxing statute. Defendant argues that G.S. 105-264 provides that decisions of the Secretary, with regard to construction of the Act, are "prima facie correct." Defendant asserts that there was evidence that the assessment here was consistent with department policy, memorialized in an interoffice memo, for treatment of income from "safe harbor" leases. We are not persuaded and accordingly this assignment of error fails.

"When a party tenders a written request for a specific instruction which is correct and supported by evidence, the failure of the court to give the instruction in substance is error." *Property Shop Inc. v. Mountain City Inv. Co.*, 56 N.C. App. 644, 649, 290 S.E.2d 222, 225 (1982). Defendant relies on G.S. 105-264 which provides that "[s]uch decisions by the Secretary of Revenue shall be prima facie correct, and a protection to the officers and taxpayers affected thereby." Defendant's reliance is misplaced. A reading of the entire statute indicates that only the Secretary's decisions to initiate or propose regulations that modify, change, alter or repeal existing regulations are "prima facie correct." This "prima facie correct" standard does not apply to administrative interpretations. Since defendant has not proposed or promulgated a regulation regarding the treatment of these federal tax benefits in the context of state corporate income taxation, G.S. 105-264 does not apply. Accordingly, defendant's request for the instruction was properly denied.

II. Judgment Notwithstanding the Verdict.

Defendant also argues that the trial court erred in denying her motion for judgment notwithstanding the verdict because the evidence was insufficient as a matter of law to support a verdict

in favor of plaintiff. Additionally, defendant argues that the determination of whether corporate income is business or nonbusiness income is a conclusion of law rather than a finding of fact and the trial court erred in submitting the issue to the jury. We disagree and overrule this assignment of error.

[2] Initially, defendant argues that since the determination of whether income is business or nonbusiness is a question of law, the issue was improperly submitted to the jury. Defendant failed to assert this basis in support of the motions for directed verdict and judgment notwithstanding the verdict and cannot properly raise this issue here. However, we hold that whether certain income is business income for tax purposes is a question of fact and that the trial court properly submitted the issue to the jury.

A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, will be granted only if the evidence, considered in the light most favorable to the plaintiff, is insufficient as a matter of law to justify a verdict for the plaintiff. *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 395, 331 S.E.2d 148, 154, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). In determining whether a directed verdict was properly denied, the movant is entitled to the benefit of every reasonable inference which may be drawn, and all evidentiary conflicts must be resolved in her favor. *See Penley v. Penley*, 314 N.C. 1, 10-11, 332 S.E.2d 51, 57 (1985).

G.S. 105-130.4(a)(1) provides that business income is "income arising from transactions and activity in the regular course of the corporation's trade or business and includes income from tangible and intangible property if the acquisition, management, and/or disposition of the property constitute integral parts of the corporation's regular trade or business operations." Defendant emphasizes that the evidence failed to show that plaintiff was regularly engaged in the business of leasing electric generating equipment, or that the acquisition, management, and/or disposition of electric power generating equipment constitute integral parts of plaintiff's regular trade or business operations. Defendant's emphasis is misplaced. The determinative question here is not whether plaintiff is in the business of generating electricity but whether the return on plaintiff's investment is an integral part of the plaintiff's trade or business. Here, the lease arrangement was a means of gaining working capital and increasing cash flow for all of plaintiff's business operations. This is certainly an "integral part" of plaintiff's busi-

ness. *See Champion Int'l Corp. v. Bureau of Revenue*, 88 N.M. 411, 540 P.2d 1300 (1975) (interest income earned on short-term investments is business income even though taxpayer was not in the investment business; usual and customary for taxpayer to invest excess capital in short-term investments); *Sperry & Hutchinson Co. v. Department of Revenue*, 270 Or. 329, 333, 527 P.2d 729, 731 (1974) (interest earned on short-term securities held to satisfy the needs for liquid capital in the trading stamp business are apportionable; interest on these securities qualifies as income "arising from transactions and activity in the regular course of the taxpayer's trade or business"). Although we recognize that not all investments made by corporations produce business income, under the facts of this case the benefits derived from the lease arrangement were properly determined to be business income. We especially note the amount of net worth originally invested (15 to 20 percent of plaintiff's net worth) to acquire the property and the substantial amount of cash flow ("80 to 90 million dollars") generated by the safe harbor lease arrangement.

[3] Defendant also argues that if plaintiff were to realize a profit on the "safe harbor" lease North Carolina could not constitutionally tax a portion of the profit because there is not a sufficient nexus between the lease activity and this state. Defendant's point is that plaintiff should not be able to take a deduction for losses incurred by an activity that this state could not tax if a gain were realized. While plaintiff's argument is correct in the abstract, it does not apply here. Plaintiff concedes that any gain realized on the lease arrangement would be apportioned among the states in which plaintiff does business, including North Carolina. The parties have stipulated that the several operating arms of plaintiff's business are joined by a "highly centralized" cash management and business operations system. From this record we conclude that plaintiff's conglomerate corporation is a unitary business for tax purposes. As the United States Supreme Court has stated, a prerequisite to finding a "unitary business is a flow of *value*, not a flow of goods." *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 178, 103 S.Ct. 2933, 2947, 77 L.Ed.2d 545, 561 (1983) (emphasis in original). Therefore, if a gain is realized it will be taxable (after apportionment) in North Carolina.

III. Cross-assignment of Error.

Plaintiff cross-assigns as error that the trial court should have denied defendant's post-trial motions on grounds that the defendant

failed to state the basis for the motions. We need not address this cross-assignment of error because of our determination of defendant's assignments of error.

For the reasons stated, the decision of the trial court is affirmed.

Affirmed.

Judges PHILLIPS and ORR concur.

SPENCER HAMMOCK v. ROBERT BENCINI AND FRANKLIN FREEMAN

No. 8918SC667

(Filed 15 May 1990)

1. **Declaratory Judgment Act § 3 (NCI3d)— declaratory judgment action to require appointment of counsel—plaintiff no longer incarcerated—no actual controversy**

The trial court correctly granted defendant's motion to dismiss a declaratory judgment action seeking a declaration that district court judges must appoint counsel for indigent defendants at criminal contempt, nonsupport hearings in which they are likely to be jailed where the plaintiff in this case was no longer incarcerated at the time of the filing and hearing of the action in superior court. The possibility that plaintiff may again be subject to criminal contempt should he again fail to pay child support presents only the mere threat of an action and is insufficient to create an actual controversy. Moreover, a request for injunctive relief against the now deceased Judge Bencini is moot. N.C.G.S. § 1-253.

Am Jur 2d, Declaratory Judgments §§ 33, 37.

2. **Contempt of Court § 6 (NCI3d)— criminal contempt for failure to pay child support—appointment of counsel**

It was noted that N.C.G.S. § 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment is likely to be adjudged, and that includes citations for criminal contempt for failure to comply with civil child support orders.

Am Jur 2d, Contempt § 92.

APPEAL by plaintiff from judgment entered 10 May 1989 by *Judge Joseph R. John, Sr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 6 December 1989.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by L. Darlene Graham, Assistant Attorney General, for the State.

GREENE, Judge.

This appeal arises from an action seeking declaratory judgment and injunctive relief. The trial court denied the plaintiff's motion for summary judgment, and granted defendants' motion to dismiss. The plaintiff appeals both orders.

On January 5, 1989 the plaintiff, Spencer Hammock, appeared before District Court Judge Robert Bencini at a criminal contempt hearing for nonsupport. The plaintiff was unrepresented by counsel, and Judge Bencini refused to appoint counsel at plaintiff's request even though the plaintiff indisputably was indigent. Judge Bencini found the plaintiff in criminal contempt for nonsupport and ordered him jailed for twenty-nine days.

On January 10, 1989 the plaintiff filed a notice of appeal for a de novo criminal contempt hearing in superior court pursuant to N.C.G.S. § 5A-17 (1986). At that time Judge Bencini refused to sign a stay releasing the plaintiff from jail, but a superior court judge did so on January 12, 1989.

On February 3, 1989 the plaintiff filed a complaint in superior court seeking a declaration that, under N.C.G.S. § 7A-451(a) (1989), district court judges must appoint counsel for indigent defendants at criminal contempt, nonsupport hearings in which they are likely to be jailed. The plaintiff also sought an injunction requiring Judge Bencini to comply with the statute.

On March 7, 1989, the date of the plaintiff's de novo criminal contempt hearing, the Assistant County Attorney voluntarily dismissed the case. The plaintiff remains under an order to pay child support. Judge Bencini died while this appeal was pending.

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[1] The issue is whether this action presents a justiciable controversy.

For a court to entertain jurisdiction under the Declaratory Judgment Act, N.C.G.S. § 1-253 (1983), an actual controversy must exist at the time the pleadings were filed and at the time of hearing. *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986).

> Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. Mere apprehension or the mere threat of an action or a suit is not enough.

Gaston Bd. of Realtors v. Harrison, 311 N.C. 230, 234, 316 S.E.2d 59, 61-62 (1984) (citations omitted).

At the time of filing and hearing of this action in the superior court, the plaintiff was no longer incarcerated. Without addressing the issue of the propriety of Bencini and Freeman being parties, we conclude no actual controversy existed or exists. The plaintiff argues that an actual controversy exists because he remains subject to criminal contempt should he again fail to pay child support as required by an outstanding court order. This possibility does not present a situation where litigation appears unavoidable but only presents the "mere threat of an action," and as such it is insufficient to create an actual controversy.

Therefore, we conclude that the trial court correctly granted defendants' motion to dismiss the declaratory judgment. Regarding the plaintiff's request for injunctive relief against the now deceased Judge Bencini, we also affirm the trial court. The untimely demise of Judge Bencini renders the injunctive issue moot, and thus we need not discuss its merits.

[2] Nonetheless we note that N.C.G.S. § 7A-451(a)(1) does require appointment of counsel in "any case in which imprisonment . . . is likely to be adjudged," and that includes citations for criminal contempt for failure to comply with civil child support orders. *See State v. Wall*, 49 N.C. App. 678, 272 S.E.2d 152 (1980) (§ 7A-451(a)(1) applies for criminal contemnor accused of making a threatening telephone call to a prospective witness in a civil matter); *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) (criminal contempts are crimes); *see also ex parte Goodman*, 742 S.W.2d 536, 540 (Tex. Ct. App. 1987) (contemnor in nonsupport case allowed

counsel under criminal statute requiring appointed counsel for indigents).

Affirmed.

Judges ARNOLD and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 MAY 1990

BYERLY v. LOMAX No. 8922DC634	Davidson (87CVD1812)	No Error
CRAVEN COUNTY v. HALL No. 893SC1126	Craven (85CVS1421)	No Error
GRIFFIN v. GRIFFIN No. 8915DC964	Orange (85CVD75)	Reversed & remanded for further proceedings consistent with this opinion.
HENDERSONVILLE ORTHOPAEDIC ASSOC. v. CONNELL INDUSTRIES, INC. No. 8929SC734	Henderson (87CVS851)	No Error
HOOVER v. WILSON No. 894SC842	Duplin (89CVS81)	Affirmed
IN RE HUTCHENS No. 8923DC1291	Yadkin (88J3)	Affirmed
IN RE TULECKI No. 8915DC1173	Alamance (89J89)	Affirmed
IN RE WHITE No. 8930DC932	Cherokee (88J42)	Affirmed
JOHNSON v. A & B CARTAGE No. 8910IC1157	Ind. Comm. (I-018132)	Affirmed
McNAIR v. McNAIR No. 8911DC1175	Harnett (87CVD883)	Affirmed
MASSEY v. MORRIS No. 897SC1149	Nash (88CVS169)	Affirmed
MITCHELL v. ARTHUR No. 8928SC1110	Buncombe (88CVS2321)	Dismissed
MOSER v. RANDOLPH DRUGS No. 8919SC975	Randolph (88CVS241)	Affirmed
N.C. CHIROPRACTIC ASSN. INC. v. AETNA CASUALTY & SURETY CO. No. 8910IC868	Ind. Comm. (PH-0027)	Affirmed

NORTHWESTERN FINANCIAL GROUP v. COUNTY OF GASTON No. 8927SC402	Gaston (88CVS2513)	Reversed & Remanded
PRUITT v. PITT COUNTY SCHOOLS No. 8910IC1099	Ind. Comm. (656859)	Affirmed
SHERMAN v. DAMERON No. 8927SC912	Gaston (88CVS415)	Affirmed & remanded for modification
SOUTHERN QUILTERS-CAROLINA COMFORTERS, INC. v. TEX-NOLOGY SYSTEMS, INC. No. 899SC1040	Vance (88CVS350)	Affirmed
STATE v. BREVARD No. 8918SC1213	Guilford (89CRS19123)	No Error
STATE v. COX No. 8911SC1240	Harnett (88CRS7615)	No Error
STATE v. DAVIS No. 8914SC1156	Durham (89CRS14909)	No Error
STATE v. DAY No. 8910SC1138	Wake (89CRS5564) (89CRS6524)	No Error
STATE v. DORSEY No. 8926SC1236	Mecklenburg (88CRS66294)	No Error
STATE v. HAMILTON No. 8926SC1289	Mecklenburg (88CRS89712) (88CRS89713)	No Error
STATE v. HAYWARD No. 8922SC1121	Davidson (88CRS17060) (89CRS043)	No Error
STATE v. HOLMES No. 8921SC525	Forsyth (88CRS20626) (88CRS2504)	New trial for defendant Penn, but find no error in the trial of defendant Holmes
STATE v. JOHNSON No. 8926SC1206	Mecklenburg (89CRS24778)	No Error

STATE v. LITTLEJOHN No. 8929SC658	Polk (88CRS647) (88CRS650)	No Error
STATE v. LOCKLEAR No. 8922SC1195	Davidson (88CRS15190)	No Error
STATE v. McCAIN No. 8926SC1132	Mecklenburg (89CRS10329) (88CRS80986) (88CRS80987)	No Error
STATE v. McCURRY No. 8929SC1398	Rutherford (88CRS3755)	No error in trial; remanded for resentencing
STATE v. MOSS No. 899SC1197	Person (88CRS4113)	No Error
STATE v. OWENS No. 8912SC1227	Cumberland (88CRS3803)	No Error
STATE v. RAMBO No. 8919SC1203	Rowan (88CRS3133)	No Error
STATE v. SEMPLE No. 893SC1223	Pitt (88CRS11620)	No Error
STATE v. SIGMON No. 8927SC1058	Gaston (87CRS19529)	No Error
STATE v. SMITH No. 8926SC1226	Mecklenburg (89CRS10683)	No Error
STATE v. STUART No. 897SC1247	Wilson (88CRS6304) (89CRS741) (89CRS742) (89CRS744)	No Error
STATE v. WILLIAMS No. 8911SC1298	Johnston (89CRS5000)	Appeal Dismissed
STATE ex rel. UTILITIES COMM. v. NORTH TOPSAIL WATER & SEWER, INC. No. 8910UC760	Util. Comm. (W-754, Sub 8)	Affirmed
TRIAD METRONET, INC. v. MACKO No. 8921DC1150	Forsyth (88CVD3284)	Affirmed
TRIPLETT v. COOK No. 8921DC1243	Forsyth (86CVD5235)	No Error

TROTTIER v. CAMPBELL No. 8918SC1094	Guilford (88CVS2960)	Affirmed

STATE OF NORTH CAROLINA v. DONNA JONES ARNOLD

No. 894SC344

(Filed 5 June 1990)

1. **Homicide § 30 (NCI3d)— first degree murder—accessory before the fact—erroneous submission of second degree murder**

In a prosecution of defendant for first degree murder of her husband as an accessory before the fact, the trial court erred in submitting second degree murder as a possible jury verdict because all of the evidence tended to show a first degree murder based on premeditation and deliberation where it showed that the perpetrator lay in wait and attacked the victim in a church parking lot as the victim returned to the church to retrieve defendant's pocketbook; the victim was stabbed with a scuba diving knife in the chest and his throat was cut; the perpetrator made various statements showing that he had intended for some time to kill the victim; and a controversy existed between the perpetrator and the victim regarding their relationships with each other and with defendant.

Am Jur 2d, Homicide §§ 485, 527, 528.

2. **Homicide § 8 (NCI3d)— use of marijuana—premeditation and deliberation not negated**

Evidence of the perpetrator's use of marijuana prior to a killing did not negate premeditation and deliberation where there was no evidence as to the effect of the use of marijuana on him at the time of the killing.

Am Jur 2d, Homicide §§ 263, 439.

3. **Appeal and Error § 503 (NCI4th)— error affecting constitutional right—presumption of prejudice—other errors—burden of proving prejudice**

A defendant is presumed prejudiced by an error affecting a right under the U. S. Constitution, and the burden is on the State to show that the error was harmless beyond a reasonable doubt. If the right affected does not arise under the U. S. Constitution, defendant has the burden of showing that there is a reasonable possibility that, had the error not been committed, a different result would have been reached

at the trial out of which the appeal arises. N.C.G.S. § 15A-1443(a) and (b).

Am Jur 2d, Appeal and Error § 574; Homicide § 559.

4. **Homicide § 30 (NCI3d)— first degree murder trial—unsupported submission of second degree murder—violation of due process**

The submission to the jury of second degree murder as a possible verdict when the evidence tends to support only first degree murder violates defendant's federal due process rights.

Am Jur 2d, Homicide §§ 485, 527, 528.

5. **Homicide § 30 (NCI3d)— unsupported submission of second degree murder—State's failure to show harmless error**

In a prosecution of defendant for first degree murder of her husband as an accessory before the fact, the State failed to meet its burden under N.C.G.S. § 15A-1443(b) of showing that error by the trial court in submitting second degree murder as a possible verdict was harmless beyond a reasonable doubt where contradictory evidence was presented as to whether defendant procured, counseled or commanded the perpetrator to commit the crime, and it thus cannot be said that the evidence of defendant's guilt of first degree murder was so overwhelming that the jury most certainly would have found defendant guilty of first degree murder had the unsupported offense of second degree murder not been submitted to the jury.

Am Jur 2d, Homicide §§ 485, 527, 528.

6. **Criminal Law § 26.9 (NCI3d)— first degree murder trial—unsupported submission of second degree murder—conviction of second degree murder set aside—retrial for first or second degree murder prohibited**

Where defendant was tried for first degree murder and convicted of second degree murder, and the appellate court held that the evidence did not support submission of second degree murder as a possible verdict, the retrial of defendant for first degree murder would place defendant in double jeopardy since a conviction of second degree murder acts as an acquittal of first degree murder; furthermore, defendant may not be retried for second degree murder or any lesser included

offense since it has been determined that no evidence of second degree murder exists.

Am Jur 2d, Criminal Law § 270.

7. **Homicide § 31 (NCI3d)— second degree murder as an accessory before the fact—conspiracy to murder—verdicts not inconsistent**

The jury did not render inconsistent verdicts in finding defendant guilty of second degree murder as an accessory before the fact and of conspiracy to commit murder.

Am Jur 2d, Homicide §§ 28, 34-40.

8. **Criminal Law § 45 (NCI3d)— lay witness—exclusion of demonstration—harmless error**

In a prosecution of defendant for the first degree murder of her husband as an accessory before the fact wherein the State introduced photocopies of purported love letters from defendant to the perpetrator, the trial court erred in refusing to permit a lay witness to testify and submit documents demonstrating how words and phrases from legitimate letters sent by defendant to the perpetrator could have been pieced together and photocopied to produce what would appear to be copies of authentic love letters. However, defendant was not prejudiced by this error since she had already presented evidence to support this theory.

Am Jur 2d, Evidence §§ 771, 785.

9. **Criminal Law § 1177 (NCI4th)— conspiracy to murder husband—position of trust or confidence aggravating factor**

The evidence supported the trial court's finding as an aggravating factor for conspiracy by defendant to murder her husband that defendant took advantage of a position of trust or confidence to commit the offense. N.C.G.S. § 15A-1340.4(a)(1)n.

Am Jur 2d, Criminal Law §§ 598, 599.

10. **Criminal Law § 1081 (NCI4th)— one aggravating factor outweighing five mitigating factors—no abuse of discretion**

The trial court did not abuse its discretion in finding that one aggravating factor outweighed five mitigating factors in imposing a sentence upon defendant for conspiracy to murder her husband.

Am Jur 2d, Criminal Law §§ 598, 599.

11. Criminal Law § 884 (NCI4th)— instructions—waiver of appellate review

An assignment of error to the court's failure to limit its conspiracy instructions to conspiracy to commit first degree murder will not be considered on appeal where defendant failed to request an instruction, failed to object to that portion of the charge, and failed to argue plain error. Appellate Rules 10(b)(2) (1988) and 10(c)(4) (1989).

Am Jur 2d, Appeal and Error §§ 545, 623.

Judge EAGLES dissenting.

APPEAL by defendant from judgment entered 16 March 1988 by *Judge Henry L. Stevens, III* in SAMPSON County Superior Court. Heard in the Court of Appeals 13 October 1989.

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

Gerald L. Bass for defendant-appellant.

GREENE, Judge.

The defendant, Donna Jones Arnold, appeals her convictions of second degree murder and conspiracy to commit murder of her husband Robert Daniel Arnold. The defendant's indictment for murder reads in pertinent part that she "unlawfully, willfully and feloniously and of malice aforethought did kill and murder Robert Daniel Arnold." Her indictment for conspiracy reads in pertinent part that she "unlawfully, willfully and feloniously did combine and conspire with Carl Edward Stuffel to commit the felony of First Degree Murder, G.S. 14-17, against Robert Daniel Arnold." On the murder charge the State prosecuted the defendant on a theory of accessory before the fact of murder.

The principal perpetrator of the murder, Carl Stuffel, pled guilty to second degree murder. Stuffel testified that he was a drug addict and habitual criminal. He began taking drugs when he was ten years old. He has engaged in numerous larcenies and has been convicted of conspiracy to break and enter and felonious possession of a handgun. The deceased, Robert Daniel Arnold (Dan), first met Stuffel on Valentine's Day 1984 at the Valley Style Shop in Raleigh where Stuffel worked as a barber. Stuffel had learned his trade in prison from which he recently had been released.

Stuffel cut Dan's hair and later joined him for dinner. Upon Dan's invitation, Stuffel joined him for that night at a cheap motel where they engaged in a homosexual relationship. In the following weeks, Dan stopped by the shop from time to time to talk to Stuffel, but Stuffel testified that he and Dan did not engage in further homosexual acts. At this time, Stuffel was twenty-two years old and Dan was in his early thirties.

Dan later brought his wife (the defendant) and their two children from their home in Clinton, North Carolina to meet Stuffel in Raleigh. In April 1984, Dan invited Stuffel to Easter Services at Emmanuel Baptist Church in Clinton where Dan acted as Minister of Music. Shortly thereafter, at the end of April, Stuffel moved into the Arnold's house which was close to the church. The defendant testified that she opposed this move because Stuffel was a criminal and a drug addict, and she did not want him in the house with her two little girls. However, at Dan's insistence, she acquiesced in his purported desire to help Stuffel overcome drugs.

A few days before Stuffel joined them, Dan also expressed his desire that the defendant allow herself to be impregnated by Stuffel. Although her initial refusal brought forth Dan's anger and tears, he later agreed to drop the idea. Stuffel testified that the defendant agreed to have a child by him, but that Dan later changed his mind.

On the day that Stuffel moved in with the Arnolds, the defendant confronted Dan with the canceled check with which Dan had paid for the motel room earlier shared with Stuffel. At that time Dan lied to his wife about it, but the next day he gave her a letter in which he not only divulged the details of his relationship with Stuffel, but he also informed her that he had been a homosexual since childhood. He finally admitted to having male lovers wherever they had lived, including Clinton. The defendant testified that she was stunned by these revelations, but she eventually decided that her relationship with Dan was worth working on.

The next day Stuffel began a sexual relationship with the defendant. Stuffel testified that it was voluntary and that they engaged in sexual intercourse about every other day for the next few weeks. The defendant testified that he coerced her to have sexual intercourse three times by threatening to tell the community about Dan's bisexuality and by insinuating threats against her children. The defendant's statements to the police about the nature

of her relationship with Stuffel lend themselves to varying interpretations.

The Arnold household deteriorated such that by May 22, 1984 Dan threw Stuffel out, resulting in an angry confrontation. Stuffel went to Raleigh, but by early June he returned to the Arnolds seeking assistance since he was ill from drug abuse. They took him into their house again briefly, and then at his request committed him to Dorothea Dix Hospital for a month to detoxify. The Arnolds visited Stuffel at Dix together several times a week. Stuffel's therapist at Dix observed that both the Arnolds were frequently engaged with Stuffel in physical contact which he described as a "sexual feeling type of thing." Since their behavior was so inappropriate as to be distracting to other patients, Stuffel's therapist asked them to cease their displays of affection.

The Arnolds planned to entertain Stuffel at their home on a weekend pass from Dix, but on the preceding Thursday Dan called Stuffel's therapist to cancel the plans. Dan told the therapist that the defendant had told him of the sexual relationship between her and Stuffel. Although Dan had been "hysterical, shouting, [and] crying" when calling that night, he called back the next day to say he had changed his mind. Stuffel's therapist, having learned that Stuffel had homicidal ideations about Dan, had encouraged Dan to terminate the Arnolds' relationship with Stuffel. Dan had replied that in spite of the fact that his church told him he would lose his position if he did not give up Stuffel, he did not care. He would work elsewhere rather than terminate the relationship. However, Dan soon changed his mind again, and he brought Stuffel's belongings and car to Dix, telling Stuffel never to return to Clinton. Stuffel was discharged from Dix around July 12, 1984.

Stuffel testified that before his discharge from Dix, he had, at the defendant's request, asked his friend Jerald Junius Tart (Tart) to murder Dan on July 4, 1984. Although Tart purportedly agreed to do so, he did not carry it through because a police officer had noticed him loitering near the Arnold home.

After his discharge Stuffel resided with Tart. Tart and Stuffel had been friends since their teen years. Together they had engaged in various criminal acts. Stuffel testified that a few days after moving in with Tart, they broke into a scuba diving shop, stealing an assortment of equipment including knives and spear guns. According to Stuffel they intended to murder Dan with spear guns,

but after target practice in Tart's yard they deemed the weapons unsuited to the task. Tart swore that he did not participate in Stuffel's burglary of the scuba shop, and that he never had any spear guns at his house. However, Tart's former girl friend testified that Tart and Stuffel visited the scuba shop the day before the burglary, and she saw a spear gun in Tart's closet.

Stuffel testified that he, Tart, and the defendant plotted to kill Dan both before and after Stuffel's release from Dorothea Dix Hospital. By at least July 17, 1984, Dan apparently also plotted to kill Stuffel. On that day he sent a letter to his friend Bill Poole stating that he would kill Stuffel if he thought he could get away with it. Dan asked his friend to contact various drug dealers on a list drawn up by Stuffel in anticipation of Stuffel's assistance to the police. Stuffel intended to aid in the prosecution of these drug dealers to gain a more favorable sentence in a pending firearms prosecution against him. Dan hoped the drug dealers would kill Stuffel. Dan concluded: "I want him [Stuffel] dead and I will not rest until he is." On July 18, while in his church, Dan asked his friend Daniel Staten (Staten) to kill Stuffel. Upon Staten's refusal, Dan informed him that he intended to contact the drug dealers on Stuffel's list so that they would kill Stuffel. Staten discouraged Dan from this pursuit telling Dan that he would more likely end up dead himself.

On the evening of July 18, 1984, Dan and the defendant participated in a service at Emmanuel Baptist Church, after which they returned to their home nearby. Michelle Honeycutt (Honeycutt) joined them to receive a piano lesson from the defendant. Honeycutt testified that during the lesson the defendant sought her contact lens materials to soothe her irritated eyes. Upon discovering that she had left her pocketbook, containing the desired materials, at the church, she informed Dan. According to Honeycutt:

> Dan said he would go back to the church and get her pocketbook, and Donna, she offered first, she said she would go with him, and he said, "no, you say [sic] here and you and Michelle practice," and then she said, "well, I don't have to have it tonight, I have some stuff in the bathroom."

Dan then went to the church by himself anyway. About forty-five minutes later, after making some phone calls trying to locate Dan, the defendant and Honeycutt, with the defendant's children drove to the church. There they noticed on the ground what ap-

peared to be the crumpled figure of a man. The defendant began screaming and wanted to get out of the car, but Honeycutt, who was driving, immediately put the car in reverse and pulled away not allowing the defendant to exit. They went to a nearby gas station, called the police and then returned to the scene. The police arrived and found Robert Daniel Arnold dead from numerous knife wounds including a slashed throat.

Stuffel testified that he and Tart killed Dan. He stated that he and the defendant were in love and that she asked him to kill Dan because she feared that a divorce would be too hard on the children. He agreed to kill Dan only because he loved the defendant.

Stuffel further testified that he and the defendant agreed that she would leave her pocketbook at her church on the evening of July 18 and then send Dan for it, giving Stuffel an opportunity to attack. On that evening Stuffel and Tart lay in wait in the woods near the church until Dan appeared. Tart first hit Dan with a slapjack, and then Stuffel stabbed Dan in the chest. Tart then finished Dan off by cutting his throat.

Tart testified that prior to July 4, 1984 Stuffel and the defendant asked him to kill Dan, but he decided not to do so. Regarding the July 18 incident, he admitted bringing Stuffel to a shopping center near the Emmanuel Baptist Church, but he remained in the parking lot until Stuffel's return. Although he claimed not to have known of Stuffel's murderous intent, he admitted to helping Stuffel dispose of a bloody knife and clothing. Tart testified under a limited grant of immunity which required that he testify in the trial of any other defendants of the Arnold murder.

Stuffel admitted that he first implicated the defendant in the murder only on the morning before his plea bargaining. Stuffel's plea bargain required that he testify against the defendant. His sentencing was scheduled for after her trial. In addition, Stuffel testified that he hoped his assistance to the State would gain him the privileges of an "honor" prisoner. Furthermore, he stated that while in custody he came to believe that the defendant only used him to kill her husband since he now believes that she was having an affair with someone else at the time. At the defendant's trial, Stuffel swore that he was finally telling the "whole truth" in spite of the fact that he had lied to the police repeatedly in the preceding months.

The State also produced three xerox copies of love letters purportedly from the defendant to Stuffel. Although none directly implicated the defendant in the murder, they tended to support Stuffel's story of romance. Tart's mother purportedly made these copies from originals she found in Stuffel's belongings. Stuffel later burned the originals. Although no evidence linked Tart's mother to the murder, she had engaged in various criminal acts with Stuffel and Tart, including chauffeuring them around to burglarize houses.

The defendant produced evidence showing that the Arnold home was visible from the shopping center parking lot from which Stuffel had launched his foray against Dan Arnold, thus giving Stuffel an independent opportunity to discern Dan's travels from his house to the church. The defendant also testified that she was not forthcoming to the police about the relationships or incidents between Stuffel, Dan and herself because she wished to protect her deceased husband's reputation in the community. Regarding the xerox copies of the purported love letters, the defendant stated that while the handwriting looked like hers, she had never written letters of that content. A State Bureau of Investigation handwriting analyst concluded that the handwriting could be hers, but could not establish that fact with certainty without viewing the originals. Furthermore, the defendant testified that she had no way of knowing whether Ms. Tart had photocopied original letters or had taken many originals, cut them up and then pasted them together before xeroxing the new compositions. Lastly, the defendant produced numerous character witnesses, including Dan's parents, who testified as to her honesty, generosity, caring and loving nature, her gentleness and peacefulness.

Regarding the murder charge, the trial court instructed the jury that it could (1) acquit the defendant; or (2) find her guilty of first degree murder on an accessory before the fact theory; or (3) find her guilty of second degree murder on an accessory before the fact theory. The second degree murder instruction was made over the defendant's objection. The trial judge stated that he was submitting the second degree murder charge to the jury to be fair to the defendant since Stuffel had an opportunity to plead guilty to that offense. The defendant did not object to the trial court's instruction on conspiracy to commit murder.

Upon the defendant's conviction of second degree murder and conspiracy to commit murder, the trial court found one aggravating

and five mitigating factors for each offense. On the murder charge he sentenced the defendant to fifteen years, and he added ten more years for the conspiracy charge.

The issues presented are: I) whether the trial court erred in submitting second degree murder as a possible jury verdict; II) if so, whether the error was prejudicial; III) if so, whether the defendant can be retried for first degree murder or second degree murder; IV) whether the jury rendered inconsistent verdicts by finding the defendant guilty of second degree murder and conspiracy to commit murder; V) whether the trial court erred prejudicially by failing to receive proffered testimony; VI) whether the trial court erred prejudicially by failing to allow the defendant to present demonstrative evidence explaining the source of the xeroxed love letters; VII) whether the trial court erred prejudicially by finding that Stuffel had not waived his Fifth Amendment right to decline to testify; VIII) whether the evidence supported the trial court's finding of mitigating and aggravating factors and the weighing thereof; and IX) whether the defendant's last assignment of error is deemed abandoned for failure to object to the trial court's instructions at trial.

I

[1] The defendant argues that the trial court erred in submitting second degree murder as a possible jury verdict since on the evidence presented the jury rationally could have only either convicted or acquitted her of first degree murder. We agree. The general rule is that:

> [W]here no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of "guilty of murder in the first degree," if they are satisfied beyond a reasonable doubt, or of "not guilty."

State v. Smith, 294 N.C. 365, 380, 241 S.E.2d 674, 683 (1978) (quoting *State v. Spivey*, 151 N.C. 676, 685-86, 65 S.E. 995, 999 (1909)). "It is clear then that it is error for the trial court to submit as an alternative verdict a lesser included offense which is not actually supported by any evidence in the case." *State v. Ray*, 299 N.C. 151, 163, 261 S.E.2d 789, 797 (1980).

This same rule applies when the State seeks to prove murder by use of the "accessory before the fact" theory. N.C.G.S. § 14-5.2 (1986) (acting as the "accessory before the fact" is not an independent substantive crime). In using this theory, the State admits it presented no evidence that defendant actually committed the offense, but it seeks to show that another person (the principal) was "counseled, procured or commanded [by the defendant] to commit the offense." *State v. Woods*, 307 N.C. 213, 218, 297 S.E.2d 574, 577 (1982). Under the "accessory before the fact" theory, the degree of defendant's guilt is identical to that of the principal. N.C.G.S. § 14-5.2. In this context, it is error to allow the jury to find the defendant guilty of second degree murder when no inference can fairly be deduced from the evidence tending to prove that the principal committed murder in the second degree. *See Smith*, 294 N.C. at 380, 241 S.E.2d at 683.

Our inquiry therefore is whether there was evidence from which a jury could reasonably have found the principal, Stuffel, guilty of second degree murder. Since the trial court did not instruct the jury on "lying in wait," as a basis for first degree murder, *see State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986) (premeditation and deliberation are not elements of murder in the first degree where the murder is committed by "lying in wait"), it would not have been error to submit second degree murder to the jury if there was evidence, reasonably construed, tending to negate Stuffel's premeditation and deliberation. *See State v. Strickland*, 307 N.C. 274, 287, 298 S.E.2d 645, 654 (1983).

In determining whether a killing was committed with premeditation and deliberation, some of the relevant factors are:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased had been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

State v. Barts, 316 N.C. 666, 687-88, 343 S.E.2d 828, 842 (1986). "[T]he nature and number of the victim's wounds is [also] a circumstance from which premeditation and deliberation can be inferred." 316 N.C. at 688, 343 S.E.2d at 842.

We conclude that the evidence reasonably construed indicates a coldly calculated killing planned well in advance, and it belies anything other than a premeditated and deliberate killing. All the evidence shows that Stuffel lay in wait in the woods near the church and attacked him in the parking lot as the decedent was returning to the church to retrieve his wife's pocketbook. Decedent was stabbed with a scuba diving knife in the chest and his throat was cut. The record is full of statements made by Stuffel that he had for some time intended to kill the decedent. Stuffel had even acquired spear guns specifically to accomplish the crime although he decided not to use them. Likewise the record is replete with evidence of controversies existing between Stuffel and the decedent, regarding not only their relationship with each other but also their relationship with the defendant. Noticeably absent from the record is any evidence of bruises, cuts or scrapes incurred by Stuffel as would be characteristic of an unpremeditated fight. Finally, Stuffel's disposal of the knife after the killing indicates "prior careful thought in planning to hide the killing." *See State v. Cummings*, 326 N.C. 298, 317, 389 S.E.2d 66, 77 (1990).

[2] The State argues the fact that Stuffel smoked marijuana prior to killing is evidence negating premeditation and deliberation. We disagree. A defendant's use of drugs or alcohol negates deliberation and premeditation only when there is evidence that the "defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978). As there is no evidence in the record relating to the effect of the use of marijuana on Stuffel at the time of the killing, the evidence of the use of marijuana does not negate premeditation and deliberation.

Accordingly, we determine that the State adequately established all the elements of first degree murder based on premeditation and deliberation and that there is no evidence in the record sufficient to cause a "rational trier of fact to doubt" the State's proof of these elements. *See State v. Clark*, 324 N.C. 146, 165, 377 S.E.2d 54, 65 (1989). "The mere possibility that the jury could return with a negative finding does not, without more, require the submission of a lesser included offense—murder in the second degree." *Cummings*, 326 N.C. at 317, 389 S.E.2d at 77. Furthermore the " 'mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient

to require the Court to submit to the jury the issue of defendant's guilt or innocence of a lesser offense than that which the prosecuting witness testified was committed.' " *State v. Shaw*, 305 N.C. 327, 343, 289 S.E.2d 325, 334 (1982) (quoting *State v. Lampkins*, 286 N.C. 497, 504, 212 S.E.2d 106, 110 (1975)). Therefore, it was error for the trial court to submit second degree murder as an alternative verdict in this case.

II

Generally, the submission of a lesser included offense in the absence of substantial evidence to support the lesser verdict, invites jurors to disregard their oaths and to reach verdicts by compromise. *See State v. Lampkins*, 286 N.C. 497, 504, 212 S.E.2d 106, 110 (1975), *cert. denied*, 428 U.S. 909, 49 L.Ed.2d 1216 (1976) (submission of instructions in absence of evidence of lesser included offense invites "a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit"); *State v. Bullock*, 326 N.C. 253, 258, 388 S.E.2d 81, 83 (1990) ("one of the purposes of [instructing on second degree murder only when there is evidence to sustain such a verdict] . . . is to eliminate compromise verdicts"); *see also People v. Knieling*, 443 N.E.2d 207, 212 (Ill. App. Ct. 1982); *People v. Vail*, 227 N.W.2d 535, 536 (Mich. 1975); *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986); *State v. Gross*, 351 N.W.2d 428, 431 (N.D. 1984).

Nonetheless, our courts have frequently held that an erroneous charge on a lesser included offense is error favorable to the defendant when all the evidence tends to support a greater offense. *State v. Vestal*, 283 N.C. 249, 252, 195 S.E.2d 297, 299, *cert. denied*, 414 U.S. 874, 38 L.Ed.2d 114 (1973). However, "the finding of prejudice or lack of it must always turn upon the facts and circumstances of the individual case." *Ray*, 299 N.C. at 166, 261 S.E.2d at 798.

[3] The resolution of the issue of prejudice requires an analysis of whether the error is one relating to rights arising under the Constitution of the United States. N.C.G.S. § 15A-1443 (1988). If the right affected arises under the Constitution of the United States, the defendant is presumed prejudiced "unless the appellate court finds that it was harmless beyond a reasonable doubt," the burden of proof being on the State. N.C.G.S. § 15A-1443(b); *State v. Autry*, 321 N.C. 392, 399-400, 364 S.E.2d 341, 346 (1988). If the right affected does not arise under the Constitution of the United States, the defendant is prejudiced "when there is a reasonable possibility

that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises," the burden being on the defendant. N.C.G.S. § 15A-1443(a). Aside from the placement of the burden of proof, each standard is substantially equivalent to the other. *See Chapman v. California*, 386 U.S. 18, 23-24, 17 L.Ed.2d 705, 710-11, *reh. denied*, 386 U.S. 987, 18 L.Ed.2d 241 (1967). In addition, "some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error. . . ." 386 U.S. at 23, 17 L.Ed.2d at 710.

[4] As a general proposition, where there is insufficient evidence of all the elements of the offense for which the defendant is convicted, a defendant's federal due process rights are violated. *Thompson v. City of Louisville*, 362 U.S. 199, 206, 4 L.Ed.2d 654, 659 (1960); *see also* Annotation, *Lack of Evidence Supporting State Conviction of Criminal Offense as Violation of Federal Due Process*, 15 L.Ed.2d 889 (1966); Annotation, *Due Process—Conviction Without Proof*, 80 A.L.R.2d 1362 (1961). More specifically, the United States Supreme Court has held that "due process requires that a lesser included offense instruction be given *only* when the evidence warrants such instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence." *Hopper v. Evans*, 456 U.S. 605, 611, 72 L.Ed.2d 367, 373 (1982) (emphasis in original). The *Evans* Court discussed *Roberts v. Louisiana*, 428 U.S. 325, 49 L.Ed.2d 974 (1976), in which it had invalidated a Louisiana statute which required instruction on lesser included offenses of murder "even if there is not a scintilla of evidence to support the lesser verdicts." 428 U.S. at 334, 49 L.Ed.2d at 982. In *Evans* the Court reiterated that:

> Such a practice was impermissible . . . because it invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first degree murder, inevitably leading to arbitrary results.

456 U.S. at 611, 72 L.Ed.2d at 373. Regarding the constitutional propriety of giving a lesser included offense instruction where, as in *Evans*, no evidence of that offense existed, the Court there stated that "instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense." *Id.* The North Carolina Supreme Court, citing *Evans*, also held that it would be impermissible to instruct on a lesser offense in the absence of evidence supporting that offense. *Strickland*,

307 N.C. at 289, 298 S.E.2d at 655. We conclude that the submission to the jury of the possible verdict of second degree murder, where the evidence tended to support only first degree murder, was an error of federal constitutional dimensions thereby violating defendant's federal due process rights.

We note that the Court in *Ray* applied the "reasonable possibility" standard of N.C.G.S. § 15A-1443(a) for determining prejudice. *See also State v. Mercado*, 72 N.C. App. 521, 325 S.E.2d 313, *rev. denied*, 314 N.C. 659, 336 S.E.2d 87 (1985). However, in those cases the courts did not address the constitutional implications of the erroneous instructions since the defendants there apparently failed to raise the issue. Here the constitutional implications are argued by the defendant. *See State v. Ross*, 322 N.C. 261, 367 S.E.2d 889 (1988).

[5] The question next presented is whether the State has met its burden under § 15A-1443(b) of demonstrating beyond a reasonable doubt that the instructions to the jury on second degree murder constituted harmless error. If this court can conclude that "had the jury not been given the unsupported lesser offense [here second degree murder] as an alternative, it most certainly would have returned a verdict of guilty of a higher offense [here first degree murder] . . . [then the] defendant has no cause for complaint." *Ray*, 299 N.C. at 163, 261 S.E.2d at 797; *Autry*, 321 N.C. at 400, 364 S.E.2d at 346 ("presence of *overwhelming* evidence of guilt may render error of constitutional dimensions harmless beyond a reasonable doubt") (emphasis added). Our inquiry therefore is whether the State presented overwhelming evidence of first degree murder such that all the jurors certainly would have been convinced beyond a reasonable doubt of the defendant's guilt of first degree murder.

To prove first degree murder in this case, it was necessary for the State to prove: (1) that the principal committed first degree murder; (2) that defendant was not present when the murder occurred; and (3) that defendant procured, counseled or commanded the principal to commit the crime. *See Woods*, 307 N.C. at 218, 297 S.E.2d at 577. On the first two elements, the State's evidence was uncontradicted. However, on the third element the evidence was contradicted. Because of the strength of defendant's evidence, we are not prepared to say that, absent the erroneous submission of second degree murder, the jury would have returned a

verdict of guilty of first degree murder. While Stuffel testified that the defendant did procure and counsel him to commit the murder of her husband, the defendant denied doing so. The record shows that both Stuffel and Tart lacked credibility. Jurors could have disregarded their testimony. Furthermore, Michelle Honeycutt's testimony, if believed by the jury, tends to show the defendant did not manipulate her husband into retrieving her pocketbook. Jurors could rationally believe that Stuffel merely waited for an opportunity to arise to attack Dan. In addition, a juror could believe that the defendant's failure to immediately tell the police about Stuffel's relationship to her and her husband arose from her wish to protect her husband's reputation. While the defendant's evidence is not without ambiguity and inconsistencies, a rational juror could find that it raises considerable doubt as to her alleged participation in the crime. Accordingly, the evidence of defendant's guilt of first degree murder is not overwhelming, and therefore the State has not met its burden of rebutting the presumption that the violation of defendant's constitutional rights was prejudicial.

III

[6] The defendant may not now be retried for first degree murder. Conviction of second degree murder acts as acquittal of first degree murder, and thus retrial would place the defendant in double jeopardy in violation of her rights under the Fifth and Fourteenth Amendments to the Federal Constitution. *Price v. Georgia*, 398 U.S. 323, 26 L.Ed.2d 300 (1970); *see also State v. Cousin*, 292 N.C. 461, 233 S.E.2d 554 (1977); *see generally* 21 Am.Jur.2d *Criminal Law* §§ 270, 319 (1981). Furthermore, the defendant may not be retried for second degree murder or for any lesser included or related offense since we have determined that, as a matter of law, no evidence exists as to that offense. *See Greene v. Massey*, 437 U.S. 19, 57 L.Ed.2d 15 (1978) (double jeopardy clause bars retrial of defendant where conviction was reversed for lack of evidence); *see generally* 21 Am.Jur.2d *Criminal Law* § 309, at 539-40 (1981).

IV

[7] The defendant next asserts that the trial court erred in failing to grant her motions to dismiss the charge of conspiracy to commit murder. The defendant argues that, as matter of law, a jury cannot convict her of both second degree murder and of conspiracy to commit murder since it is legally impossible to conspire to commit second degree murder.

Conspiracy has been defined as follows:

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Littlejohn*, 264 N.C. 571, 142 S.E.2d 132 (1965). To constitute a conspiracy it is not necessary that the parties should have come together and agreed in *express* terms to unite for a common object: " 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " *State v. Smith*, 237 N.C. 1, 16, 74 S.E.2d 291, 301 (1953) quoting *State v. Connor*, 179 N.C. 752, 103 S.E.2d 79 (1920). The conspiracy is the crime and not its execution. *State v. Lea*, 203 N.C. 13, 164 S.E. 737 (1932).

State v. Bindyke, 288 N.C. 608, 615-16, 220 S.E.2d 521, 526 (1975).

Since conspiracy occurs when the agreement is made, a conviction for conspiracy is not affected by the degree of the substantive crime, or even by the nonoccurrence of the crime. *See State v. Guthrie*, 265 N.C. 659, 144 S.E.2d 891 (1965). The evidence tends to show and a jury found that the defendant conspired with Carl Stuffel to commit murder. The defendant's conviction for second degree murder as an accessory before the fact has no bearing on her conviction for conspiracy to commit murder. The conspiracy conviction was based on defendant's agreement with Stuffel to have her husband killed. The second degree murder conviction was based on the defendant's alleged acts of leaving her purse at the church and sending her husband back to get it after having procured Stuffel to kill her husband. Therefore the jury did not render inconsistent verdicts.

V

The defendant next assigns as error the trial court's failure to receive proffered testimony which the defendant claims concerns Stuffel's interest in the outcome of the case. Error, if any, in the trial court's failure to take the proffered testimony, was nonprejudicial since Stuffel did in fact testify and was extensively cross-examined by the defendant.

VI

[8] The defendant next assigns as error the trial court's refusal to allow a layperson to testify and submit documents showing how

he had taken some letters, cut them up and pasted the various words and phrases together to form new letters of a different message and then xeroxed the result. The defendant wished to submit this evidence to demonstrate her theory to the jury that someone, such as Stuffel who had access to her writings, could have created these xerox love letters entered in evidence by the State by cutting and pasting her writings.

The trial court characterized the proffered evidence as an experiment which did not meet the criteria of admissibility for experiments. The trial court also found the jury would be confused by the evidence and that the evidence was unfairly prejudicial to the State.

We find the trial court erred. The proffered evidence was not an experiment. Rather it was a demonstration. A demonstration has been defined as "an illustration or explanation, as of a theory or product, by exemplification or practical application." *State v. Hunt*, 80 N.C. App. 190, 193, 341 S.E.2d 350, 353 (1986).

> [T]he admissibility of demonstrative or experimental evidence depends as much, as for any other piece of evidence, upon whether its probative value is outweighed by the potential undue prejudicial effect it may have on defendant's case. *See* Rule 403, N. C. Rules Evid. In the case of a courtroom demonstration, the demonstrator may not need to be qualified as an expert in the same way as an experimentor, but a proper foundation still must be laid as to the person's familiarity with the thing he or she is demonstrating.

Id.

The State had already entered into evidence three xeroxed papers which appeared to have been made from love letters purportedly from the defendant to Stuffel. In response to the State's repeated demands that she explain how her handwriting found its way onto the xerox documents, she sought to demonstrate to the jury that anyone could paste together a letter from collected sentence fragments which would appear, after photocopying, to be a true letter.

The State argued that the defendant had no basis on which to present this theory since she had not presented evidence of how Stuffel had access to each and every word used in the xeroxed documents. We think the State attempts to place too heavy a burden

on the defendant. She did present evidence showing that she had written various legitimate letters to Stuffel and that Stuffel had lived with the defendant and her husband for some time. It was within the province of the jury to determine, given Stuffel's access to the defendant's writings, the likelihood of her theory.

Here, the fact that a layperson sought to discuss the theory and present real evidence demonstrating its feasibility does not make the layperson's testimony inadmissible. The defendant's proffer revealed that his witness had successfully cut up letters, pasted the words and phrases together and xeroxed them to produce photocopies of what appeared to be authentic letters.

The record contains no indication the jury would have been confused by the evidence or that the State's case would have been *unfairly* prejudiced. We hold the trial court abused its discretion in disallowing this evidence.

However, we find the trial court's error did not prejudice the defendant since a reasonable possibility does not exist that the outcome of the trial would have been different had the error not occurred. *See* N.C.G.S. § 15A-1443(a). The defendant was not prejudiced because she had already entered in evidence the essential theory which she sought to further elucidate upon through the laywitness. On redirect examination the following colloquy occurred:

> Q. Ms. Arnold, were you present when Barbara Tart supposedly Xeroxed these letters and the post marked envelopes?
>
> A. No.
>
> Q. So you don't know whether she Xeroxed them all off of the same original, or whether she took a bunch of originals, cut them up, and pasted them together and Xeroxed them as her work product, do you?
>
> A. No sir.
>
> Q. Have you ever done anything like that, trying to compose a forgery by using a Xerox machine?
>
> A. No sir.

From this testimony the jury was exposed to the theory through which the defendant sought to explain the presence of what appeared to be her handwriting on the xeroxed letters. Since the

defendant had no direct evidence that Ms. Tart in fact produced the photocopies in this manner, an additional witness could have done no more than verify the possibility of composing letters by cutting and pasting. Since such a possibility is hardly beyond the ken of the average juror, we find that the refusal to allow additional testimony was not prejudicial.

VII

The defendant next assigns as error the trial court's decision to allow Stuffel to assert his Fifth Amendment right to decline to testify. Although Stuffel declined to testify when first called by the defendant, he did later testify and was cross-examined by the defendant. Therefore, we find that if the trial court erred, it could not have prejudiced the defendant.

VIII

[9] The defendant next asserts that the trial court erred in finding an aggravating factor unsupported by evidence or in improperly weighing this factor against several mitigating factors. The trial court found as a statutory aggravating factor that: "The defendant took advantage of a position of trust or confidence to commit the offense." N.C.G.S. § 15A-1340.4(a)(1)(n) (1988). The trial court also found five mitigating factors. Those factors were:

1. The defendant has no record of criminal convictions.
2. The defendant was a passive participant in the commission of the offense.
3. The defendant acted under strong provocation.
4. The relationship between the defendant and the victim was an extenuating circumstance.
5. The defendant has been a person of good character and has had a good reputation in the community in which she lives.

A finding of an aggravating factor under N.C.G.S. § 15A-1340.4(a)(1)(n) is appropriate where there exists "a relationship between the defendant and the victim generally conducive to reliance of one upon the other." *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987). A position of trust or confidence may arise within the context of a familial relationship so long as the familial relationship is not an element of the offense of which the defendant was convicted. *See State v. Goforth*, 67

N.C. App. 537, 538, 313 S.E.2d 595, 596, *rev. denied*, 311 N.C. 765, 321 S.E.2d 149 (1984) (position of trust aggravating factor in sentencing for attempted rape of stepdaughter); *see also State v. Caldwell*, 85 N.C. App. 713, 355 S.E.2d 813 (1987) (position of trust aggravating factor in sentencing for taking indecent liberties with a minor, here stepson). Furthermore, since this court has found a position of trust or confidence between best friends, *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), *rev. denied*, 311 N.C. 406, 319 S.E.2d 278 (1984), we hesitate to find that a man and wife do not occupy a position of trust. While it is conceivable that some husband and wife relationships may not be "generally conducive to reliance of one upon the other," here the evidence could support the trial court's conclusion that a position of trust was present and violated.

[10] In addition, we hold the trial court did not abuse its discretion in finding one aggravating factor outweighed five mitigating factors. "The weight to be given mitigating and aggravating factors is a matter solely within the trial court's discretion, and the balance struck by the trial court will not be disturbed if supported by the record." *State v. Penley*, 318 N.C. 30, 52, 347 S.E.2d 783, 796 (1986) (one aggravating factor outweighed seven mitigating factors); *see also State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). We find that a record which can support a conclusion that the defendant conspired to murder her husband supports the balance struck by the trial court even in light of the five mitigating factors.

IX

[11] In her last assignment of error the defendant contends the trial court erred by not clearly limiting its conspiracy instructions to conspiracy to commit first degree murder. The defendant failed to request an instruction of the trial court or to object to that portion of the charge as required by Appellate Rule 10(b)(2) (1988), and has failed to argue plain error. *See State v. Reilly*, 71 N.C. App. 1, 3, 321 S.E.2d 564, 566 (1984), *aff'd*, 313 N.C. 499, 329 S.E.2d 381 (1985) ("the brief must specifically, and not obliquely, raise the issue"). Accordingly, she is barred from raising this assignment of error on appeal. This result would also follow under the new Rule of Appellate Procedure 10(c)(4) (1989).

Second degree murder—reversed.

Conspiracy—no error.

Judge PARKER concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent.

I agree with the rule of law that the submission to the jury of second degree murder as a possible verdict, where the evidence tends to support only first degree murder, violates defendant's federal due process rights. Contrary to the majority's view, however, I believe that in this record there is evidence justifying the submission to the jury of the lesser included offense of second degree murder.

The majority states that evidence that the principal committed first degree murder and that the defendant was not present when the murder occurred was uncontradicted. I agree that there is ample evidence to support the principal's conviction for first degree murder. However, I suggest that while this evidence is characterized by the majority as "uncontradicted," the evidence is not unequivocal and could also have supported a verdict of second degree murder as to the principal.

Parenthetically, I have carefully reviewed the record and conclude that the evidence is equivocal as to whether the homicide here was committed by "lying in wait." The significance of that factor, i.e., whether the murder was committed by "lying in wait," lies in the Supreme Court's holding that where a homicide is committed by poison, lying in wait, imprisonment, starvation or torture, "premeditation and deliberation is not an element of the crime of first degree murder." *State v. Johnson*, 317 N.C. 193, 203, 344 S.E.2d 775, 781 (1986). Here, to support a theory that the murder occurred other than by lying in wait, I rely on Tart's testimony that Stuffel told him that he (Stuffel) and the victim "had gotten into a fight" and that he (Stuffel) "wished it hadn't happened." Defendant testified that based on her revelation to the victim that Stuffel had forced her to have sex with him, the victim had become "very angry and . . . visibly upset" at Stuffel and said that he

(the victim) "just wished there were some way he could get even with Carl [Stuffel]." Accordingly, there is some evidence to support a theory of prosecution other than first degree murder perpetrated by "lying in wait," i.e., first degree murder by premeditation and deliberation or second degree murder. I note that the trial court did not charge the jury on the lying in wait theory but charged them on first degree murder by premeditation and deliberation and second degree murder.

The Supreme Court has observed that:

> [A]lthough it is for the jury to determine, from the evidence, whether a killing was done with premeditation and deliberation, the mere possibility of a negative finding does not, in every case, assume that defendant could be guilty of a lesser offense. Where the evidence belies anything other than a premeditated and deliberate killing, a jury's failure to find all the elements to support a verdict of guilty of first degree murder must inevitably lead to the conclusion that the jury disbelieved the State's evidence and that defendant is not guilty. The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

State v. Strickland, 307 N.C. 274, 293, 298 S.E.2d 645, 657-58 (1983) (emphasis in original).

From this record, I further conclude that because this case was submitted as a premeditation and deliberation case and there is some evidence, in addition to defendant's denial, to negate the element of premeditation and deliberation, the trial court properly submitted second degree murder to the jury.

First, at trial co-conspirator Stuffel testified that he was "under the influence of drugs" at the time Dan Arnold was murdered. In response to the State's question regarding what he did while waiting in the parking lot, Stuffel even admitted that he "smoked mariguana [sic]." Evidence of drug use near the time of a murder has been held to call into question the specific intent needed to

commit first degree murder. *See State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968).

Secondly, the other co-conspirator Tart even testified that he did not know what had happened in Clinton while he was waiting for Stuffel in the car. He stated that he noticed that Stuffel's T-shirt was off and that there was blood on his forearms and hands. Tart further testified that when he asked Stuffel what had happened, Stuffel said he and Dan had gotten "into a fight." Stuffel did not elaborate on any details of the fight. Tart also testified that Stuffel said he "wished it hadn't happened" but did not elaborate. Defendant testified that when she told her husband Dan (the victim) on or about July 6th that Stuffel had forced her to have sex, he (Dan) was "very angry and . . . visibly upset." Defendant testified that Dan had said "that he just wished there was some way he could get even with Carl." This evidence tends to negate premeditation by Stuffel and Tart. While this testimony tends to support the theory that the victim's death was an unplanned happening (as opposed to a premeditated event), this testimony is also relevant in determining whether Stuffel had the requisite specific intent to kill after premeditation and deliberation.

Thirdly, there was testimony from friends of defendant stating that defendant did not think Stuffel was the kind of person who could kill her husband and that she did not think that Stuffel had in fact murdered her husband. Inconsistent with the State's theory of a preplanned, premeditated murder, Michelle Honeycutt, defendant's friend, testified that before Dan, the victim, left that night to go back to the church, defendant offered to go with him to retrieve her pocketbook. Defendant also told Dan, in Ms. Honeycutt's presence, that "I don't have to have [the pocketbook] tonight." Ms. Honeycutt testified that the victim insisted on retrieving the pocketbook from the church that night. This testimony tends to negate the evidence supporting the State's original theory of a preplanned killing that had been the subject of premeditation and deliberation.

Finally, I note that Stuffel's guilty plea to second degree murder was apparently accepted by the court. Under G.S. 15A-1022(c) a trial court "may not accept a plea of guilty . . . without first determining that there is a factual basis for the plea." The majority's conclusion that the evidence "indicates a coldly calculated killing planned well in advance and belies anything other than a

premeditated and deliberate killing" flies in the face of the court's acceptance of Stuffel's guilty plea to second degree murder.

While there was undoubtedly ample evidence to support a conviction for first degree murder on either basis (lying in wait or premeditation and deliberation), there was also more than a scintilla of evidence to support a verdict of homicide less than first degree. *See State v. Smith*, 294 N.C. 365, 380, 241 S.E.2d 674, 683 (1978). The weight and credibility of the evidence is an issue for the jury, not for the court. *See State v. Alston*, 294 N.C. 577, 591, 243 S.E.2d 354, 364 (1978). Reconciliation of conflicts in testimony is a matter for the trier of fact. *State v. Hargrove*, 216 N.C. 570, 571, 5 S.E.2d 852, 852-53 (1939).

We note that the trial court stated on the record that it submitted second degree murder as a possible verdict in part because our Supreme Court had "no trouble with the submission of the second degree possibility" in an accessory before the fact case, citing *State v. Davis*, 319 N.C. 620, 356 S.E.2d 340 (1987). In *Davis*, the Supreme Court reversed and remanded the case based on incomplete jury instructions. The trial court here stated that it submitted second degree murder as a possible verdict because it wanted to be "fair" and Stuffel had been allowed to plead guilty to second degree murder for this homicide. The court also stated that it thought the possible second degree verdict was permitted by the evidence. Submission of second degree murder as a possible verdict would have been error if done without regard for whether there was evidence to support the verdict but solely on the basis of the trial court's notion of "fairness," based on Stuffel's being allowed to plead "guilty" to second degree murder. Here "fairness" was just one of the court's reasons for submitting the lesser offense. The trial court stated unequivocally that he thought the evidence supported the submission of second degree murder.

Considering my conclusions regarding the propriety of submitting the issue of second degree murder to the jury, it is unnecessary to consider the issue of whether the alleged error was prejudicial. I agree with the majority in its disposition of the other assignments of error. However, because there was evidence justifying the submission of the lesser offense to the jury, I find no error with respect to this particular assignment of error. Accordingly, I would vote that there was no prejudicial error in the trial.

STIMPSON HOSIERY MILLS, INC. v. PAM TRADING CORPORATION AND OFFICINE SAVIO MATEC, S.P.A.

No. 8922SC561

(Filed 5 June 1990)

1. **Contracts § 26.1 (NCI3d)— parol testimony—precontract agreement—motion to strike untimely**

Defendants in a warranty action arising from the sale of hosiery manufacturing equipment waived objection to parol testimony concerning a precontract agreement where their motion to strike the testimony was untimely in that it occurred at least 100 questions and answers after plaintiff adduced the testimony and defendants neither offered nor argued a specific reason for postponing their objection past the time in which the court or plaintiff could have remedied the effect of the error. Furthermore, defendants made no showing that the trial court abused its discretion in denying the motion to strike. N.C.G.S. § 8C-1, Rule 103.

Am Jur 2d, Evidence § 1022.

2. **Damages § 9 (NCI3d)— mitigation—instruction**

The trial court erred in a warranty action arising from the sale of hosiery equipment by refusing to instruct the jury on plaintiff's duty to mitigate damages where defendants' proposed instruction was a correct statement of the applicable law, the record evidence supported the request for instruction on mitigation of damages, and the instruction the court gave did not give the substance of the requested instruction. The court gave the instruction within the proximate cause portion of the charge and invited the jury to use an all or nothing analysis, so that plaintiff's failure to mitigate would bar its remedy rather than lessen its recovery.

Am Jur 2d, Damages §§ 495, 496.

3. **Appeal and Error § 203 (NCI4th)— oral notice of appeal—post-verdict motions—judge's chambers**

Plaintiff properly perfected notice of appeal in a breach of warranty action arising from the sale of hosiery manufacturing equipment where the jury found for the plaintiff on breach of warranty issues but for defendants for the unpaid purchase

price; defendants filed post-verdict motions for judgment notwithstanding the verdict, for a new trial, or for remittitur of damages; the trial court heard the parties on those motions by consent in chambers and out of session on 1 December 1988; the court signed an order denying the motions on 27 December 1988 and plaintiff gave oral notice of appeal on the issue of the unpaid purchase price on 27 December 1988. Appellate Rule 3 was amended to include oral notice at post-verdict motion hearings to extend an aggrieved party's opportunity to give oral notice beyond the traditional trial setting; subject to the requirement that some part of the judgment aggrieve the party appealing, this extension of setting for giving oral notice encompasses the entire judgment rendered in session regardless of whether that same part of the judgment is the subject of the post-verdict motions.

Am Jur 2d, Appeal and Error § 319.

4. Appeal and Error § 203 (NCI4th)— notice of appeal—open court

Plaintiff properly gave oral notice of appeal during a post-verdict motions hearing in judge's chambers. Because of the assurance that interested parties will receive notice of a party's intent to appeal expressed orally at a post-verdict motion hearing, Appellate Rule 3 contains no explicit or implicit requirement that a post-verdict hearing be held in open court or that appellants give oral notice in open court for such notice of appeal to have effect.

Am Jur 2d, Appeal and Error § 319.

5. Sales § 13.1 (NCI3d)— breach of warranty action—counterclaim for purchase price—instruction on recovery of purchase price—no error

The trial court did not err in a warranty action arising from the sale of hosiery manufacturing equipment by instructing the jury that defendants could recover the balance of the purchase price if the jury awarded plaintiff actual or general damages for breach of express or implied warranty. The record shows that plaintiff accepted the machines and did not reject or revoke acceptance; plaintiff was therefore obliged to pay for the machines although it could and did recover damages for breach of warranty. N.C.G.S. §§ 25-2-607(1), 25-2-709(1)(a).

Am Jur 2d, Sales §§ 661, 663.

6. Appeal and Error § 203 (NCI4th)— notice of appeal—issues appealed from—no appellate jurisdiction

An assignment of error was not properly before the appellate court where plaintiff's oral notice of appeal specifically included only the jury's verdict on defendants' counterclaim; a counterclaim is an independent proceeding not automatically determined by a ruling in the principal claim; plaintiff gave no actual notice from the five remaining jury issues; and the court could not infer notice because of the independent nature of the counterclaim.

Am Jur 2d, Appeal and Error §§ 319, 658.

7. Appeal and Error § 520 (NCI4th)— error in damages—partial new trial

A breach of warranty action arising from the sale of hosiery manufacturing equipment was remanded for a partial new trial on the issue of plaintiff's damages where the error was confined to the issue of damages and there was no danger of it complicating other issues.

Am Jur 2d, Appeal and Error § 953.

APPEAL by plaintiff and defendants from judgment entered 27 December 1988 by *Judge Ralph A. Walker, Jr.* in IREDELL County Superior Court. Heard in the Court of Appeals 22 November 1989.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellant/plaintiff-appellee Stimpson Hosiery Mills, Inc.

Petree Stockton & Robinson, by Leon E. Porter, Jr. and J. David Mayberry, for defendant-appellants/defendant-appellees PAM Trading Corporation and Officine Savio Matec, S.p.A.

GREENE, Judge.

Plaintiff Stimpson Hosiery Mills, Inc. ("plaintiff"), appeals a jury's counterclaim verdict for defendants PAM Trading Corporation and Officine Savio Matec, S.p.A. ("defendants"). Defendants appeal the jury verdict for plaintiff and denial of defendants' motions for new trial, judgment notwithstanding the verdict, and remittitur.

Plaintiff is a corporation that manufactures women's hosiery. Defendants PAM and Matec are corporations which respectively manufacture and sell a brand of hosiery knitting machine, Veloce. Defendants placed a Veloce knitting machine in plaintiff's plant in 1985, for plaintiff's trial-use evaluation of the machine's capabilities. Plaintiff used the machine for approximately six months, after which plaintiff and defendants contracted for plaintiff to purchase 24 Veloce machines for the price of $172,000.00.

The machines were installed and operational by March, 1986. Plaintiff claimed that the machines began malfunctioning shortly after their installation, but kept the machines. Plaintiff refurbished its previously-owned knitting machines to produce more hosiery, and on 1 April 1987, plaintiff purchased 10 new knitting machines manufactured by defendants' competitor.

Plaintiff filed a complaint against defendants, alleging breach of express warranty and implied warranty of fitness for a particular purpose, along with other bases for relief. Defendants answered, denying the allegations and counterclaiming for the unpaid purchase price plus interest. Plaintiff replied to defendants' counterclaim, denying defendants' right to the balance of the purchase price. The case came on for trial and both parties offered evidence.

At trial, plaintiff offered the testimony of one of plaintiff's corporate officers, Mr. Stimpson. Mr. Stimpson testified:

> . . . I made the statement that if we decided to purchase his machine, I would like for Mr. Arnie McKinney to be the one to set the machine up. . . . [Defendants' sales representative] told me that I would get that wish to get Mr. McKinney to set up the machines.

At the jury instructions charge conference, defendants requested in writing that the trial court submit an issue and instruct the jury on plaintiff's obligation to mitigate damages, according to the North Carolina Pattern Jury Instructions:

> This issue reads:
>
> "What amount, if any, of the damages sustained by [plaintiff] could have been avoided?"
>
> The burden of proof on this issue is on [defendant] to satisfy you by the greater weight of the evidence that some

or all of the damages claimed by [plaintiff] could have been avoided.

A party injured by a breach of contract is required to protect [itself] from loss if [it] can do so with reasonable exertion or minimal expense. Ordinarily an injured party will not be allowed to recover from the delinquent party any damages which the injured party could have avoided with reasonable effort or minimal expense.

And so I finally instruct you that if you find, by the greater weight of the evidence, that some or all of the damages claimed by [plaintiff] could have been avoided with reasonable exertion or minimal expense on [its] part then you will answer this issue by writing that amount in the blank space provided. On the other hand, if you fail to so find, then you would answer this issue by writing the word "None" in the blank space provided.

N.C. Pattern Jury Instruction 571.20 (March 1974). The trial court instead submitted to the jury issue 5, set out below in pertinent part, noting that "I believe what I have included is included in the essence of mitigation of damages required by the plaintiff."

The court submitted six issues to the jury, which answered them as follows:

1. Did the Defendants expressly warrant to the Plaintiff that the knitting machines were capable of running at 1200 RPM's and that these knitting machines would be set up and would operate as the trial machine had been set up and operated?

ANSWER: Yes

2. If so, was the expressed warranty breached by the failure of the knitting machines to conform to the Defendants['] affirmation of fact or promise about these machines?

ANSWER: Yes

3. Did the Defendants impliedly warrant to the Plaintiff that the knitting machines were fit for the particular purpose of making different styles and sizes of hose efficiently while running at a speed of at least 1000 RPM's?

ANSWER: Yes

4. If so, was the implied warranty of fitness for a particular purpose breached by the Defendants?

ANSWER: Yes

5. What amount of damages is the Plaintiff entitled to recover?

(1) For parts, labor and needles to refurbish and operate old machines

$16,900.00

(2) For goods returned, credit memos, down-sized goods and goods discarded before shipment

$1.00

(3) For new Lonati machines purchased in 1987

$0

(4) For lost profits

$534,988.80

6. What amount [are] the Defendants entitled to recover?

$143,672[.]10

The court instructed the jury that if it "answered either implied or [express] . . . warranty issues [2 or 4] in favor of the plaintiff . . . go on to the damage issue [5]." The court instructed the jury on issue 5 using this language:

> [T]he burden of proof is . . . on the plaintiff to prove to you that [it] has suffered damages by reason of breach of expressed or implied warranty on the part of defendants . . . the plaintiff has the burden of proving to you by the greater weight of the evidence that a breach of warranty was made by the defendants and that this was [a] proximate cause of [its] damages or loss . . . [h]owever, if damages or loss would have occurred whether or not the warranty was breached then these damages do not proximately result from a breach of warranty. *If the plaintiff's own neglect of the machines or failure to maintain or properly operate the knitting machines as a reasonable careful, prudent person in the hosiery industry would do was a proximate cause of the plaintiff's difficulties with the machines,*

then its damages or loss would not be proximately caused by a breach of warranty. (Emphasis added.)

The jury returned its verdict on 1 November 1988, and on 10 November 1988, defendants filed post-verdict Rules 50 and 59 motions for judgment notwithstanding the verdict (j.n.o.v.) or alternately for new trial, or for remittitur of damages as to issues 1-5. On 1 December 1988, the trial court heard the parties on these motions in chambers, out of session, and the parties consented to the court's ruling on the motions out of session. The court signed an order denying the motions out of session on 27 December 1988. The Iredell County Clerk of Court filed the order and appeal entries on 4 January 1989. Defendants signed and served written notice of appeal as to the jury verdict on issues 1-5 and from the court's denial of defendants' motions for directed verdict and for j.n.o.v., new trial, and remittitur, filed on 5 January 1989. Plaintiff gave oral notice of appeal from issue 6 on 27 December 1988, but did not give written notice of appeal. Subsequent to filing of the record on appeal, defendants moved to dismiss plaintiff's appeal.

Defendants' appeal presents these dispositive issues: (I) whether the trial court erred in admitting parol evidence of the contract, which prejudiced defendants on the issue of express warranty; and (II) whether the trial court erred in refusing to instruct the jury on plaintiff's duty to mitigate damages. These issues arise concerning plaintiff's appeal: (III) whether plaintiff properly perfected its appeal of defendants' counterclaim award when it gave oral notice of appeal at the post-verdict motions hearing; (IV) whether the trial court erred in instructing the jury that defendants were entitled to recover the balance of the purchase price if it found that defendants breached a warranty; and (V) whether it properly appealed the trial court's instructions concerning its own damages.

DEFENDANTS' APPEAL

I

Express Warranty

[1] Defendants contend that the trial court erred in admitting Mr. Stimpson's parol testimony of a pre-contract agreement that defendants would provide McKinney as the sole start-up technician for the machines, prejudicially creating an erroneous basis for express warranty. We disagree.

> Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a *timely* objection or motion to strike appears of record. . . .

N.C.G.S. § 8C-1, Rule 103 (Cum. Supp. 1989) (emphasis added). "An objection is timely only when made as soon as the potential objector has the opportunity to learn that the evidence is objectionable, unless there is some specific reason for a postponement. Unless prompt objection is made, the opponent will be held to have waived it." 1 Brandis on North Carolina Evidence § 27 (Cum. Supp. 1987). "[E]xcept in certain circumstances not applicable here, failure to object to the admission of evidence at the time it is offered waives the objection." *Spencer v. Spencer*, 70 N.C. App. 159, 165, 319 S.E.2d 636, 642 (1984) (citing *Brandis*, at § 27, naming three exceptional circumstances constituting reversible error without objection: evidence forbidden by statute or public policy, inadmissible confessions in criminal cases, and statutorily prohibited questions from judges or jurors), *see also State v. Lewis*, 281 N.C. 564, 569, 189 S.E.2d 216, 219, *cert. denied*, 409 U.S. 1046, 34 L.Ed.2d 498 (1972) (when an opposing party does not object to a question eliciting offending testimony, the witness answers the question, a further question is propounded to the witness and the opposing party then moves to strike testimony relating to the first question, the motion to strike is untimely); *Invesco Fin. Serv., Inc. v. C.D. Elks, et al.*, 29 N.C. App. 512, 513, 224 S.E.2d 660, 661 (1976) (when testimony is first admitted without objection, denial or grant of a subsequent motion to strike the testimony is in the court's sound discretion, which will not be disturbed absent a showing of abuse).

We determine that defendants' motion to strike Mr. Stimpson's testimony was untimely, occurring at least one hundred questions and answers after plaintiff adduced the testimony. Defendants neither offer nor argue a 'specific reason' for postponing their objection until well past the time in which the court or plaintiff could have remedied the effect of the alleged error. Therefore, defendants waived objection to the testimony. Furthermore, defendants made no showing that the trial court abused its discretion in denying defendants' motion to strike.

II

[2] Defendants submit that the trial court erred in refusing to instruct the jury on plaintiff's duty to mitigate damages because

the instructions given did not supply the substance of the mitigation instruction to the jury. We agree.

When a judge fails to submit to the jury any issue of fact raised by the pleadings or evidence, to preserve its right to a trial by jury on the omitted instruction a party must demand that the trial court submit the issue before the jury retires. N.C.G.S. § 1A-1, Rule 49(c) (Cum. Supp. 1989). "When a party appropriately tenders a written request for a special instruction which is correct in itself and supported by the evidence, the failure of the trial judge to give the instruction, at least in substance, constitutes reversible error." *Millis Construction Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 509-10, 358 S.E.2d 566, 568 (1987); *see* N.C.G.S. § 1A-1, Rule 51(b) (Cum. Supp. 1989).

The doctrine of avoidable consequences or the duty to minimize damages requires that "an injured plaintiff, whether [its] case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the *consequences* of the defendant[s'] wrong." *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 74 (1968) (emphasis added); *see also Radford v. Norris*, 63 N.C. App. 501, 502, 305 S.E.2d 64, 65 (1983) (doctrine precludes "recovery for those consequences of the tort-feasor's act which could have been avoided by acting as a reasonably prudent man . . ."). The Uniform Commercial Code ("UCC") applies to contracts for sale of goods that include warranties. N.C.G.S. § 25-2-106(2) (Cum. Supp. 1989). The UCC specifically incorporates this doctrine and provides that an aggrieved buyer may recover "[c]onsequential damages resulting from the seller's breach . . . *which could not reasonably be prevented by cover or otherwise* . . ." N.C.G.S. § 25-2-715(2)(a) (Cum. Supp. 1989) (emphasis added).

> Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable . . . [i]t has its source in the same motives of conservation of human and economic resources as the doctrine of contributory negligence, but 'comes into play at a later stage.' . . . [g]enerally they occur—if at all—at different times. Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant.

Miller, at 239, 160 S.E.2d at 74 (citations omitted). Plaintiff's "duty to mitigate damages arises only after the negligent act of defend-

ant." *Hagwood v. Odom*, 88 N.C. App. 513, 516, 364 S.E.2d 190, 192 (1988), citing *Miller*, at 239, 160 S.E.2d at 74.

We determine that the trial court erred in failing to submit an issue on mitigation and in its instructions to the jury, requiring new trial. Defendants tendered a written request to the trial judge for an issue and instruction on mitigation of damages. The proposed instruction was a correct statement of the applicable law. We also determine that record evidence supported defendants' request for an instruction on mitigation of damages: approximately one year passed after the new Veloce machines developed problems before plaintiff bought other new machines to increase production, for which plaintiff claimed damages of $100,000.00, plaintiff employed only one employee to maintain and operate old machines for one of three working shifts each day, plaintiff did not maintain a sufficient spare parts inventory, plaintiff should have increased its routine inspection and maintenance schedule, and plaintiff did not properly exhaust heat and prevent drafts that snarled knitting materials.

We next determine that the given instruction did not give the substance of the requested mitigation of damages instruction for two reasons. First, the instruction given by the trial court invited the jury to use an 'all or nothing' analysis regarding plaintiff's damage: if the jury concluded that defendants breached the warranties and that plaintiff acted unreasonably after receiving the machines, the instruction required the jury to either award plaintiff all of its damages, ignoring plaintiff's unreasonable behavior, or to award plaintiff nothing because plaintiff acted unreasonably, disregarding defendants' breach. The given instruction does not instruct the jury that it could assess defendants in breach and also deduct a portion of damages that plaintiff unreasonably incurred, as it is required to do in the requested mitigation-of-damages instruction. Second, the instruction was not a proper statement of the law concerning damages. The doctrine of mitigation affects the *consequences* of defendants' breach, but the trial court gave the instruction within the proximate cause portion of the charge and improperly invited the jury to view the damage issue somewhat as a contributory negligence issue. As phrased, plaintiff's failure to mitigate would bar its remedy, rather than lessen its recovery.

PLAINTIFF'S APPEAL

III

Defendants move to dismiss plaintiff's appeal for failure to properly perfect notice of appeal. Defendants contend that plaintiff could not appeal issue 6 of the jury verdict according to Appellate Rule 3 because (A) plaintiff was nonmovant in relation to the post-verdict motions and because issue 6 was not the subject of defendants' post-verdict motions, and (B) oral notice of appeal could only be taken in "open court," which does not include judges' chambers. We disagree.

A

[3] If a judgment or order is *rendered* in session, *"[a]ny party entitled by law to appeal* from a judgment . . . may take appeal by . . . giving oral notice of appeal at trial, or at any hearing of a timely motion under Rule 59 . . . or under Rule 50 . . ." N.C.R. App. P. 3(a)(1) (1976) (amended 1989) (emphases added). *See also* N.C.G.S. § 1-279(a) (1983) (repealed 1989) (containing essentially the same language). Oral notice is proper only for judgments rendered in session. N.C.R. App. P. 3(a)(1).

A 'party entitled by law to appeal' is any aggrieved party. N.C.G.S. § 1-271 (Cum. Supp. 1989). "A party aggrieved is one whose rights are substantially affected by judicial order. . . . An appeal must also be prosecuted by the aggrieved real party in interest. . . . A real party in interest is one who is benefited or injured by the judgment in the case." *Carawan v. Tate*, 304 N.C. 696, 700, 286 S.E.2d 99, 101 (1982) (citations omitted).

A judgment is 'rendered' when it is announced or declared in open court. *Provident Finance Co. v. Locklear*, 89 N.C. App. 535, 537, 366 S.E.2d 599, 600 (1988), citing N.C.G.S. § 1A-1, Rule 58 (1987).

Here, when the jury announced its verdict in open court, it 'rendered judgment' according to Rule 3(a) and N.C.G.S. § 1A-1, Rule 58, and oral notice of appeal was a proper procedure. As a party against whom the jury rendered the verdict, plaintiff was an 'aggrieved party' who was entitled by law to orally appeal from the judgment. It is plaintiff's status as an aggrieved party which qualifies it to give oral notice of appeal, and its nonmovant status is irrelevant.

Furthermore, whether the part of the judgment from which an aggrieved party appeals is the basis for post-verdict motions is irrelevant, so long as an aggrieved party is giving notice of appeal. Appellate Rule 3 was amended to include oral notice at post-verdict motion hearings simply to extend an aggrieved party's opportunity to give oral notice beyond the traditional trial setting to another setting, post-verdict motion hearings. N.C.R. App. P. 3, Commentary (1982). Subject to the requirement that some part of the judgment grieve the party appealing, this extension of setting for giving oral notice encompasses the entire judgment rendered in session, regardless of whether that same part of the judgment is the subject of the post-verdict motions.

B

[4] Defendants next contend that plaintiff could only give oral notice of appeal in "open court" and the post-verdict motions hearing in judge's chambers are not "open court." We disagree.

Oral notice of appeal from judgments rendered in session was originally allowed "at trial." N.C.R. App. P. 3, Commentary. The "bench and bar . . . equated 'at trial' with 'in open court' . . ." *Id.* Oral notice of appeal was based on the principle that such action gave sufficient notice to the parties. *Id.* The Drafting Committee recognized this principle in amending Appellate Rule 3 to extend the opportunity to give oral notice of appeal at post-verdict motion hearings: "it seems fair to charge [all parties] with notice, since [the] parties must have been given notice of the hearings themselves. . . ." *Id.*

Because of the assurance that interested parties will receive notice of a party's intent to appeal, expressed orally at a post-verdict motion hearing, we determine that Appellate Rule 3 contains no explicit or implicit requirement that a post-verdict motion hearing be held in 'open court,' or that appellants give oral notice in 'open court,' for such notice of appeal to have effect.

IV

[5] Plaintiff contends that the trial court improperly instructed the jury that defendants could recover the balance of the purchase price if the jury awarded plaintiff actual or general damages for defendants' breach of express or implied warranty. We disagree.

"The buyer must pay at the contract rate for any goods accepted." N.C.G.S. § 25-2-607(1) (Cum. Supp. 1989). "When the buyer fails to pay the price as it becomes due[,] the seller may recover, together with any incidental damages . . . the price . . . of goods accepted." N.C.G.S. § 25-2-709(1)(a) (Cum. Supp. 1989). A buyer who accepts goods must pay the seller the contract price, but can sue the seller for breach of warranty. *Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 561, 253 S.E.2d 277, 280 (1979).

We determine that the record shows that plaintiff accepted the Veloce machines and did not reject or revoke acceptance. Therefore, plaintiff was obliged to pay for the machines, although it could and did recover damages for breach of warranty.

V

[6] Plaintiff next purports to assign error to jury instructions for its claim of breach of warranty damages.

A reviewing court is vested with appellate jurisdiction only as to the part of the judgment or order from which appellant appeals. *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 272, 258 S.E.2d 864, 866 (1979). This rule is construed liberally only with regard to written notices of appeal. *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 351 (1984) (citing *Smith*). Appellant's assignment of error is not properly before the reviewing court if the assignment relates to a part of the judgment from which appellant has not given notice of appeal. N.C.R. App. P. 3; *Chaparral Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985).

Our review of the record reveals that plaintiff's oral notice of appeal specifically included only the jury's verdict on defendants' counterclaim. "[A] counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim." *Brooks*, at 707, 318 S.E.2d at 351 (citation omitted). We determine that plaintiff gave no actual notice from the remaining five jury issues, and we cannot infer notice because of the independent nature of the counterclaim. Therefore, since plaintiff did not give notice of appeal from the five issues relating to its own claim, it cannot subsequently vest this court with jurisdiction by assigning error to those matters. Furthermore, new trial on the issue of plaintiff's damages renders unnecessary our review of assignments of error relating to the issue.

[7] A reviewing court may grant a partial new trial in its discretion, " '"generally . . . when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." ' " *Brown v. Neal*, 283 N.C. 604, 616, 197 S.E.2d 505, 513 (1973).

Here, we determine that the error is confined to the issue of damages, and we perceive no danger of it complicating other issues. Accordingly, we remand the case only for new trial on the issue of plaintiff's damages, and it is unnecessary that we review defendants' or plaintiff's additional assignments of error relating to the issue of plaintiff's damages. Because the jury verdict correctly determined plaintiff's recovery based on breach of express warranty, and this determination alone provides plaintiff's basis for recovery, we do not address defendants' assignments of error relating to breach of implied warranty.

In summary:

Defendants' appeal: on liability—no error; on damages—new trial.

Plaintiff's appeal: no error.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. GEORGE ALAN GARVICK

No. 893SC296

(Filed 5 June 1990)

1. Automobiles and Other Vehicles § 126.3 (NCI3d)—breathalyzer—second test—steps not required to be repeated—constitutional

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress the results of a breathalyzer test because the testing regulations adopted by the Commission of Health Services did not satisfy the requirement in N.C.G.S. § 20-139.1(b3) for duplicate sequential tests. That statute does not require two chemical analyses

but merely the testing of at least duplicate samples. The purpose of sequential testing is to assure the accuracy of the readings and to assure that factors outside the control of the state and the defendant do not affect the result; shutting down the instrument, adding a new ampul, and restarting from the beginning would not accomplish either of those purposes.

Am Jur 2d, Automobiles and Highway Traffic §§ 305-307, 375-377, 380.

2. Automobiles and Other Vehicles § 126.3 (NCI3d)—breathalyzer—subsequent tests—time period

The trial court did not err in a prosecution for driving while impaired by denying defendant's motion to suppress breathalyzer results because the use of the words "as soon as feasible" in the Commission Regulations is not time specific as required by N.C.G.S. § 20-139.1(b3)(1). Regulation .0336 provides a checklist of procedures that must be followed to insure accurate test results. By using the words "as soon as feasible," the regulation requires the operator to obtain a breath sample as soon as he can follow the checklist and, at the same time, this standard provides the operator with the flexibility needed to assure that the checklist is carefully followed.

Am Jur 2d, Automobiles and Highway Traffic §§ 305-307, 375-377, 380.

3. Automobiles and Other Vehicles § 126.3 (NCI3d)—breathalyzer—second test—distinctions based on first test results—not unconstitutional

The trial court did not err in prosecution for driving while impaired by denying defendant's motion to suppress breathalyzer results on the ground that the Commission's Regulations unconstitutionally create three classes of people: those whose first test reading is .20 or more and who receive a duplicate test, those whose first test reading is .19 or less and who receive another test which is not a duplicate, and those whose reading is between .19 and .20 who are not mentioned. No gap regarding test results between .19 and .20 exists because the final result is rounded to the lower reading. Even though those who test .19 or less receive a second test without a new verification of the calibration of the instrument and a new test of the ampul, there is no unconstitutional

classification between different groups because all individuals arrested for driving while impaired who are tested under the model 900 breathalyzer are given the same initial test; the regulations merely treat the same group of people in a different way depending on the results of this first test. Moreover, even if the different procedures followed when the initial test results differ did create classifications subject to the equal protection clause, Regulation .0336 is not unconstitutional because the distinction between the two groups is based on the scientific theory of the breathalyzer and is not capricious, arbitrary or unjust.

Am Jur 2d, Automobiles and Highway Traffic §§ 305-307, 375-377, 380.

4. **Evidence § 48.1 (NCI3d)— DWI—witness on biochemistry and spectrophotometry—not qualified as expert**

The trial court did not err in a DWI prosecution by failing to certify defendant's chemistry professor as an expert where the witness admitted on voir dire that he had never run a breathalyzer test, had not conducted and was not aware of any scientific experimentation with the breathalyzer to substantiate that a smudge would affect the accuracy of the reading, as he intended to testify; there was no evidence in the record that the breathalyzer was administered improperly; and all parties stipulated that the chemical analysis of defendant's breath was conducted in accordance with the regulations.

Am Jur 2d, Automobiles and Highway Traffic §§ 305-307, 375-377, 380.

5. **Evidence § 18 (NCI3d)— DWI—demonstration of breathalyzer—defendant required to state in open court reasons for demonstration**

The trial court did not err in a DWI prosecution by requiring defendant to state his reasons for a demonstration of how a chemical analyst inserted an ampul into the breathalyzer machine. Although the purpose of the demonstration was to show that the analyst had to touch the ampul in such a way that he left smudge marks and fingerprints on the ampul and the breathalyzer operator subsequently stated that he needed to get a paper towel before attempting the demonstration, there was no evidence presented or offer of proof that a smudge would affect a breathalyzer reading.

Am Jur 2d, Automobiles and Highway Traffic §§ 305-307, 375-377, 380.

6. Criminal Law § 903 (NCI4th)— DWI—submission of two-pronged verdict denied—unanimity not denied

The trial court did not err in a prosecution for driving while impaired in its instructions to the jury on the offense of DWI and in failing to provide the jury with defendant's requested two-pronged verdict. The unanimity requirement was not violated because driving while under the influence of an intoxicating substance and driving with an alcohol concentration of .10 or more are separate ways by which one can commit the single offense of driving while impaired.

Am Jur 2d, Trial §§ 592, 713, 716.

7. Automobiles and Other Vehicles § 129.3 (NCI3d)— DWI—request for instructions—given in substance

The trial court did not err in a prosecution for DWI by denying defendant's requested jury instructions since those instructions were given in substance.

Am Jur 2d, Trial §§ 592, 713, 716.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendant from judgment entered 19 October 1988 by *Judge James R. Strickland* in CRAVEN County Superior Court. Heard in the Court of Appeals 11 October 1989.

On 20 February 1988 defendant was arrested and charged with driving while impaired in violation of G.S. 20-138.1. At the police station, defendant submitted to a chemical analysis of his breath at the request of the charging officer. The first sample of defendant's breath was collected at 1:21 a.m. and yielded a test result of 0.11. The second sample of defendant's breath was collected at 1:27 a.m. and yielded a test result of 0.12.

At trial, all parties stipulated that the chemical analysis of defendant's breath was conducted according to all the rules and regulations of the North Carolina Department of Human Resources, Division of Health Services, by a certified chemical analyst. The Smith and Wesson breathalyzer model 900 was used to perform the test. Defendant moved to suppress the results of the breathalyzer test on the basis that the regulations governing operational pro-

cedures for breathalyzer machines promulgated by the Commission for Health Services (herein "the Commission") found in Regulation 07B.0336 of Title 10 of the North Carolina Administrative Code fail to comply with the legislative mandate of G.S. 20-139.1(b3) and G.S. 20-139.1(b3)(1).

Defendant's motion to suppress the results of the breathalyzer test was denied at trial both in the District Court and on appeal to the Superior Court. From judgment entered on the verdict, defendant appealed to this Court.

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

Kennedy W. Ward, P.A., by Kennedy W. Ward, for defendant-appellant.

PARKER, Judge.

Defendant brings forward five assignments of error. In his first assignment of error, defendant contends that the trial court erred by denying his motion to suppress the results of the breathalyzer test. Defendant's second assignment of error is that the trial court erred in denying expert status to defendant's witness, Jonathan Pharr. Defendant's third assignment of error is that the trial court erred by requiring defendant's counsel to reveal the purpose of his cross-examination in the presence of the State's witness. In his fourth assignment of error, defendant argues that the trial court erred by instructing the jury on the offense of driving while impaired and in failing to provide the jury with defendant's requested two-pronged verdict. Defendant's fifth assignment of error is that the trial court erred in denying his requested jury instructions.

[1] Defendant first argues that his motion to suppress the results of the breathalyzer test should have been granted because the testing regulations adopted by the Commission are both invalid and unconstitutional. In support of this argument, defendant contends that the requirement for duplicate sequential breath samples in G.S. 20-139.1(b3) and the time requirement for the second and subsequent samples in G.S. 20-139.1(b3)(1) have not been satisfied in the regulations.

General Statutes Chapter 20, Article 3, provides as follows:

> Sequential Breath Tests Required.—By January 1, 1985, the regulations of the Commission for Health Services governing the administration of chemical analyses of the breath must require the testing of at least duplicate sequential breath samples. Those regulations must provide:
>
> > (1) A specification as to the minimum observation period before collection of the first breath sample and the time requirements as to collection of second and subsequent samples.

G.S. 20-139.1(b3)(1). With regard to duplicate sequential breath samples, the Commission adopted ten requirements "to be followed in using the Breathalyzer, Models 900 and 900A." N.C. Admin. Code tit. 10, r. 7B.0336 (herein "Regulation .0336"). Requirement (1), steps (a) through (k), provides for the verification of instrumental calibration and the replacement and testing of the ampul used in the breathalyzer. Requirements (2) through (10) set out the procedure for the remainder of the test. The guidelines for determining when to perform each requirement read as follows: "If the alcohol concentration is 0.19 or less, repeat steps (2) through (10) as soon as feasible. If the alcohol concentration is 0.20 or more, repeat steps (1) through (10) as soon as feasible."

Defendant argues that the tests required by the regulations do not give a person in his position with a test result of 0.19 or less the benefit of a duplicate test because under Regulation .0336, the first test is a complete test, requiring the breathalyzer operator to follow requirements (1) through (10), whereas the second test requires only requirements (2) through (10), and is, therefore, not a complete test.

Defendant contends that requirement (1), which provides for verifying the calibration of the instrument and testing the ampul, is the primary safeguard to insure that the instrument is working properly and that the legislature intended this dual protection to guard against human or mechanical error. Defendant argues that if the operator makes a mistake in performing requirement (1) on the first test, and is not required to repeat requirement (1) on the second test, the mistake would affect both tests; and neither the operator nor the person taking the test would be aware of the error. Therefore, the practical result of removing requirement (1) from the second test is a less than thorough testing procedure,

and one that removes the protection afforded the defendant by the legislature.

This argument that the testing regulations do not provide for duplicate sequential tests as required by G.S. 20-139.1(b3)(1) is without merit. General Statute 20-139.1(b3) does not require two chemical analyses but merely requires the testing of at least duplicate sequential breath samples. The purpose of the sequential testing is to insure the accuracy of readings. "Sequential tests are required to minimize the time between tests." *State v. White*, 84 N.C. App. 111, 114, 351 S.E.2d 828, 830, *disc. rev. denied*, 319 N.C. 409, 354 S.E.2d 887 (1987). The sequential testing is also designed to assure that factors outside the control of both the State and the defendant do not affect the result. *Id.* Shutting down the instrument, adding a new ampul, and restarting from the beginning would not accomplish either of these purposes.

[2] Defendant next argues that use of the words "as soon as feasible" in Regulation .0336 is not time specific as required by G.S. 20-139.1(b3)(1). This argument is also without merit.

This Court has considered the question of specific time requirements with regard to breathalyzer model 2000 which is controlled by Regulation .0346. *State v. Lockwood*, 78 N.C. App. 205, 336 S.E.2d 678 (1985). In *Lockwood*, the Court held that Regulation .0346 "designates a specific time, which is at the reappearance of the words 'blow sample,' for the collection of the second breath sample." *Id.* at 207-08, 336 S.E.2d at 679. Even though the words "as soon as feasible" were not directly at issue in *Lockwood, supra*, this Court noted with approval that those words were utilized for third and subsequent samples using the 2000 model as well. *Id.* at 207, 336 S.E.2d at 679. In our view, the same principle is appropriate in the instant case.

Regulation .0336 provides a check list of procedures that must be followed to insure accuracy of test results. At trial, the expert on breathalyzer theory and operation testified that if a check list is followed, the test result will be accurate. The chemical analyst who administered the test to defendant testified that he followed the check list. By using the words "as soon as feasible," the Regulation requires the operator to obtain a breath sample as soon as he can follow the check list. At the same time, this standard provides the operator with the flexibility needed to assure that the check list is carefully followed. The use of the words "as soon

as feasible" in substance meets the requirements of G.S. 20-139.1(b3)(1).

[3] Defendant next argues that by adopting the regulations, the Commission has created three different classes of persons:

> (1) those individuals whose first test result is .20 or more who do receive a duplicate test as required by statute because the breathalyzer operator is required to perform procedures (1) through (10) in the first as well as the second test;
>
> (2) those individuals whose first test result is .19 or less who do not receive a duplicate test in that Regulation .0336 only requires that procedures (2) through (10) be repeated on the second test, which does not allow the full or complete procedure to be followed as in the administering of the first breathalyzer test; and
>
> (3) those individuals whose first test result is between .19 and .20, who are not mentioned by the regulation.

Defendant contends that the Commission has altered and added to G.S. 20-139.1(b3) by creating these three different classes of persons under the regulations. These classifications, according to defendant, are invalid, as they are contrary to the meaning and language of G.S. 20-139.1(b3).

As a preliminary matter, defendant's contention that the regulations provide no procedures for those persons whose first test result is between 0.19 and 0.20 is without merit. The trial judge found, based on competent evidence, that there was no gap regarding test results between 0.19 and 0.20, since the final result is rounded off to the lower reading measured in one hundredths. Therefore, there can be no final test result between 0.19 and 0.20. *See* N.C. Admin. Code tit. 10, r. 51B.0354 (1987).

Defendant also contends that the different classifications within the regulations are unconstitutional because they deny equal protection of the law in that under Regulation .0336, defendants charged with the same offense of driving while impaired, although facing the same outcome if convicted, receive different treatment regarding the test procedures. Defendant argues that because his initial test result was less than 0.19, he had two breath samples run through one ampul, and then measured, whereas a defendant with

a breathalyzer reading of 0.20 or more on the first test gets a fresh ampul for each test.

"A statute is not subject to the equal protection clause of the fourteenth amendment of the United States Constitution or article 1 § 19 of the North Carolina Constitution unless it creates a classification between different groups of people." *State v. Howren*, 312 N.C. 454, 457, 323 S.E.2d 335, 337 (1984).

In this case no classification between different groups has been created. All individuals arrested for driving while impaired who are tested under the model 900 breathalyzer are given the same initial test to determine blood-alcohol content. The regulations merely treat the same group of people in a different way depending on the results of this first test. This classification is not of the type that can be considered a denial of equal protection.

Moreover, even if the different procedures followed when initial test results differ did create classifications subject to the equal protection clause, Regulation .0336 is not unconstitutional. The legislature may make classifications and distinctions in the application of laws provided they are reasonable, just and not arbitrary. *Motley v. Board of Barber Examiners*, 228 N.C. 337, 342-43, 45 S.E.2d 550, 553 (1947). Legislative bodies may distinguish, select, and classify objects of legislation and they may make different regulations for different classes. Equal protection will not be offended if the basis for classification is practicality. *Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 667, 174 S.E.2d 542, 547 (1970).

In the instant case, the distinction between the two groups is not arbitrary. The distinctions are based on the scientific theory of the breathalyzer, and as such are not capricious, arbitrary or unjust. On account of chemical changes which occur during the testing of a breath sample, the ampul must be changed when the first reading is 0.20 or more in order to assure reliability of the test results. *See* Watts, *Some Observations on Police-Administered Tests for Intoxication*, 45 N.C.L. Rev. 34, 62, 64-66 n.92 (1966-67). Therefore, the regulations do not amount to a denial of equal protection.

[4] In his second assignment of error defendant argues that the trial court erred in failing to certify the defendant's witness, Jonathan Pharr, as an expert. Mr. Pharr, a chemistry professor at Craven Community College, was tendered by defendant as an expert in

biochemistry and spectrophotometry. After voir dire, the court denied the tender of the witness as an expert.

The North Carolina Rules of Evidence provide, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." G.S. 8C-1, Rule 702. Whether a witness is qualified as an expert is considered "a question of fact, the determination of which is ordinarily within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987).

On voir dire Mr. Pharr admitted he had never run a breathalyzer test. Mr. Pharr knew in general about spectrophotometry, the study of light absorption through a special light meter. Since the breathalyzer is a type of light measuring device, Mr. Pharr intended to testify regarding inaccuracies that could result from an improperly given breathalyzer examination. Specifically, the witness intended to testify concerning the effect of a smudge on the vial. However, Mr. Pharr had not conducted, nor was he aware of, any scientific experimentation with the breathalyzer to substantiate that a smudge on the vial would affect the accuracy of the reading. Moreover, there was no evidence in the record that the breathalyzer test was administered improperly, and all parties stipulated that the chemical analysis of defendant's breath was conducted in accordance with the regulations. Therefore, the decision of the trial judge to deny expert status to Mr. Pharr was not reversible error.

[5] Defendant's third assignment of error is that the trial court erred by requiring the defendant to state his reasons for a demonstration in court. Defendant argues that this deprived him of the right to confront the witnesses against him and forewarned the witness of his defense strategy. Defendant requested that the chemical analyst be allowed to demonstrate for the jury how he inserted an ampul into the breathalyzer. The purpose of the demonstration was to show that the analyst had to touch the ampul in such a way that he left smudge marks and fingerprints on the ampul. Shortly after defendant gave his reasons for the demonstration, the breathalyzer operator stated that he needed to get a paper towel before attempting the demonstration.

Defendant contends that the operator's response suggests that he was forewarned and that the trial judge's ruling is analogous

to a judicial admonition to the witness wherein the witness changes his testimony to comply with the judge's interpretation of the facts. In the instant case, there was no evidence presented or offer of proof that a smudge would affect a breathalyzer reading. In fact, the State's expert testified that a properly balanced breathalyzer would not be affected by a smudge. This assignment of error is without merit and is, therefore, overruled.

[6] Defendant's fourth assignment of error is that the trial judge committed error by instructing the jury on the offense of driving while impaired and in failing to provide the jury with defendant's requested two-pronged verdict. Defendant contends that this failure by the trial court violated defendant's right to a trial by jury and a unanimous jury verdict. We disagree.

Defendant tendered possible verdicts to the court which would have allowed the jury to find him guilty of impaired driving by (i) driving while under the influence of an impairing substance; and/or (ii) by driving with an alcohol concentration of 0.10 or more; or (iii) not guilty of either statutory charge. The trial court rejected defendant's requested verdicts, and submitted two possible verdicts to the jury of guilty or not guilty. The trial court instructed the jury as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a highway within this state and that when he did so he was under the influence of an impairing substance or had consumed sufficient alcohol that at any time relevant after the driving the defendant had an alcohol concentration of 0.10 or more, it would be your duty to return a verdict of guilty of impaired driving.

The trial court also instructed the jury that the State had the burden of proving the defendant guilty beyond a reasonable doubt and defined "reasonable doubt" for them.

General Statute 20-138.1(a) provides that a person commits the offense of impaired driving if he drives (i) under the influence of an impairing substance or (ii) with an alcohol concentration of 0.10 or more at any relevant time after the driving. In *State v. Coker*, 312 N.C. 432, 323 S.E.2d 343 (1984), our Supreme Court discussed the two prongs as follows:

> This arrangement supports our conclusion that the acts of driving while under the influence of an impairing substance and driving with an alcohol concentration of .10 are two separate, independent and distinct ways by which one can commit the single *offense* of driving while impaired. Since we must presume that the legislature did not act in vain but instead acted with care, deliberation and the full knowledge of prior and existing law, we interpret N.C.G.S. 20-138.1 as creating one offense which may be proved by either or both theories detailed in N.C.G.S. 20-138.1(a)(1) & (2).

Id. at 440, 323 S.E.2d at 349 (emphasis in original).

Defendant relies on *State v. Britt*, 93 N.C. App. 126, 377 S.E.2d 79 (1989), in support of his argument that the instruction violated the unanimity requirement. *Britt* was overruled, however, in the Supreme Court's recent decision in *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), on the basis that under the statute, "the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts." *Id.* at 567, 391 S.E.2d at 180. Applying the *Hartness* analysis to the single offense of DWI proscribed in G.S. 20-138.1(a), we hold that the trial court did not err in instructing the jury.

[7] Defendant's fifth and final assignment of error is that the trial court committed reversible error in denying defendant's requested jury instructions.

With regard to requested jury instructions, the law is clear:

> The trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence in the case, the court must give the instructions in substance. . . .

State v. Puckett, 54 N.C. App. 576, 581, 284 S.E.2d 326, 329 (1981) (citations omitted).

In the instant case, three of the defendant's requested jury instructions were denied. The first related to the defendant's 0.11 breathalyzer result. It provided that "no legal presumption attaches to the results of a breathalyzer test. You, members of the jury, are still at liberty to acquit the defendant if you find that his alcohol concentration was not proven to be .10 or more . . . beyond a reasonable doubt." The second denied instruction was that "our

courts recognize the defendant's right to offer . . . witnesses as to his condition after his arrest . . . in his defense." The third and final denied instruction was "that it is not unlawful in North Carolina for an individual to drive a vehicle with the odor of alcohol on his breath."

In order for the defendant to show error, he must show that the requested instructions were not given in substance and that substantial evidence supported the omitted instructions. *State v. White*, 77 N.C. App. 45, 52, 334 S.E.2d 786, 792, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985). Here, the court instructed the jury, in accordance with the Pattern Jury Instructions, that they must be convinced beyond a reasonable doubt that the defendant had an alcohol concentration of 0.10 or more. This is the substance of the first and third request. The second request, that the courts recognize defendant's right to offer evidence, was unnecessary since the court instructed the jury on the burden of proof and that they were to consider all of the evidence. Thus, the trial court did not commit reversible error by failing to give defendant's specific instructions in form since they were given in substance.

No error.

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 much in the majority opinion, I believe the defendant is entitled to a new trial on the grounds that the jury's verdict of guilty is ambiguous and therefore fatally defective.

The jury rendered their verdict on the following verdict form:

> We the jury unanimously find the defendant, George Alan Garvick:
>
> Check (X) either:
>
> 1. __X__ Guilty of impaired driving; or
>
> 2. _____ Not guilty

At trial the defendant objected to the verdict form used by the trial court and requested the trial court submit the following verdict form:

> We, the twelve members of the jury, unanimously find the defendant to be:
>
> ____ 1. Guilty of impaired driving
>
> ____ (a) by driving while under the influence of an impairing substance
>
> and/or
>
> ____ (b) by having consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of 0.10 or more.
>
> or
>
> ____ Not guilty.

This court has approved a verdict form similar to that submitted by the defendant since it avoids the risk of a nonunanimous verdict. *See State v. Harrell*, 96 N.C. App. 426, 433. 386 S.E.2d 103, 106 (1989).

It is impossible to determine from the jury's verdict whether the jurors unanimously thought the defendant guilty of impaired driving because of N.C.G.S. § 20-138.1(a)(1), because they unanimously thought the defendant guilty of N.C.G.S. § 20-138.1(a)(2), or because some jurors thought the defendant guilty because of § 20-138.1(a)(1) and some because of § 20-138.1(a)(2). Unless twelve jurors agree to one set of facts, unanimity has not occurred. Accordingly, I believe the defendant has been deprived of his constitutional right to be convicted by an unanimous jury. N.C. Const. art. I, § 24.

RICHARD M. BOOHER AND NANCY ANN BROWN, PLAINTIFFS v. WILLIAM C. FRUE, RONALD K. PAYNE AND MICHAEL Y. SAUNDERS, DEFENDANTS

No. 8928SC1116

(Filed 5 June 1990)

1. **Attorneys at Law § 57 (NCI4th)— fee splitting—action for constructive fraud and constructive trust—directed verdict and j.n.o.v. denied**

The trial court did not err in denying defendant's motions for a directed verdict and judgment n.o.v. in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney despite plaintiffs' testimony in which they denied the existence of an attorney-client relationship with defendant. Plaintiffs' testimony was not sufficiently fact specific to be binding but was in response to questions regarding legal conclusions; additionally, defendant himself testified that he felt he was representing plaintiff Booher. There was also no prejudicial error in denying a directed verdict for defendant for any amount of the excess of the money he received because the jury returned a verdict for less than that amount.

Am Jur 2d, Attorneys at Law §§ 215, 302, 303, 309; Fraud and Deceit §§ 4, 260, 441.

2. **Attorneys at Law § 57 (NCI4th)— fee splitting—action for constructive trust and constructive fraud—instruction on burden of proof**

The trial court did not err in an action for constructive trust and constructive fraud arising from a fee-splitting arrangement with a Texas attorney by giving a peremptory instruction on whether a relationship of trust and confidence existed between plaintiffs and defendant Frue because the evidence in the case, if believed by the jury, proves the existence of an attorney-client relationship. The instruction given was a proper peremptory instruction and not a directed verdict because the court stated that "if you believe the evidence" the answer to the first issue would be yes. The court had also properly instructed the jury on the burden of proof and the credibility of witnesses.

Am Jur 2d, Attorneys at Law §§ 215, 302, 303, 309; Fraud and Deceit §§ 4, 260, 441.

3. Attorneys at Law § 51 (NCI4th)— fee splitting—fraud—issue submitted to jury

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney in its submission of an issue relating to fraudulent practice. Although defendant's argument was that there is no way to determine whether the jury awarded damages based on constructive trust, unjust enrichment, or because defendant received an excessive fee, N.C.G.S. § 84-13 provides for double damages when a plaintiff is injured by the fraudulent practice of an attorney and the jury clearly found that defendant committed a fraudulent practice. There was a sufficient definition of fraudulent practice in that the court instructed the jury that constructive fraud would have occurred if they found a fiduciary relationship and the transaction was not open, fair and honest. The legality of contingent fees is irrelevant to this issue.

Am Jur 2d, Attorneys at Law §§ 215, 302, 303, 309; Fraud and Deceit §§ 4, 260, 441.

4. Fiduciaries § 1 (NCI3d)— fee-splitting arrangement between attorneys—breach of fiduciary duty—instructions on damages

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting agreement between a North Carolina attorney and a Texas attorney by instructing the jury on alternative bases for plaintiffs' recovery of damages or restitution. It is clear that plaintiffs' recovery was based on defendant's breach of fiduciary duty; imposition of a constructive trust is one possible remedy and damages is an alternate remedy. Defendant does not argue that the jury improperly allowed plaintiffs double recovery.

Am Jur 2d, Attorneys at Law §§ 215, 302, 303, 309; Fraud and Deceit §§ 4, 260, 441.

5. Estoppel § 4.6 (NCI3d)— fee splitting between attorneys—constructive fraud and constructive trust—estoppel not applicable

Estoppel was not applicable to a claim for constructive fraud and constructive trust arising from a fee-splitting agree-

ment between attorneys where plaintiffs accepted the proceeds from various claims of their son's estate with full knowledge of the fee-splitting agreement because defendant Frue at the time of the disbursement of funds knew of plaintiffs' dissatisfaction with the referral fee arrangement and did not rely on plaintiffs' actions or change his own position to his prejudice based on their actions.

Am Jur 2d, Attorneys at Law §§ 215, 302, 303, 309; Fraud and Deceit §§ 4, 260, 441.

6. **Attorneys at Law § 57 (NCI4th)— fee splitting—testimony regarding contacts and conversations with other attorneys —admissible**

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement between attorneys in admitting testimony regarding contacts and conversations of plaintiffs with other attorneys. The testimony was offered to show plaintiffs' state of mind, not the truth of the matters asserted, and was relevant to show the plaintiffs' understanding of their need to hire Texas legal counsel.

Am Jur 2d, Attorneys at Law §§ 215, 302, 303, 309; Fraud and Deceit §§ 4, 260, 441.

7. **Attorneys at Law § 57 (NCI4th); Evidence § 15 (NCI3d)— fee splitting between attorneys—constructive fraud and constructive trust—Rules of Professional Conduct—admissible**

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting agreement between a North Carolina attorney and a Texas attorney by allowing the introduction into evidence of North Carolina Disciplinary Rules 2-106 and 2-107. Although a violation of a Rule of Professional Conduct does not constitute civil liability per se, the Rules are some evidence of an attorney's duty to his client. Moreover, the North Carolina Rules of Professional Conduct apply rather than Texas law even though the contract to split the fee was entered in Texas because the attorney-client relationship between plaintiffs and a North Carolina lawyer was entered into in North Carolina.

Am Jur 2d, Attorneys at Law §§ 48, 54, 55.

8. Evidence § 46.1 (NCI3d)— fee splitting between attorneys— Texas attorney's deposition—admissible

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney by allowing plaintiffs' counsel to read to the jury portions of the Texas attorney's deposition concerning hypothetical situations in which the Texas attorney would have taken less than one-third of any recovery. These questions were asked to rebut defendant's argument that plaintiffs were not damaged by the fee-splitting arrangement and, additionally, there was some evidence presented by defendant that plaintiff Booher was present when the fee-splitting arrangement was discussed, so that there was some basis in the evidence for the hypothetical question. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Depositions and Discovery §§ 176, 177, 192.

9. Evidence § 23 (NCI3d)— fee splitting—constructive fraud and constructive trust—pleadings—excluded

There was no prejudicial error in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney where the trial court denied defendant's request to admit a particular paragraph of plaintiffs' complaint and a corresponding answer from the Texas attorney. Although plaintiff asserted that the pleadings showed the Texas attorney's bias and that its introduction was to impeach the credibility of his deposition testimony, defendant had the opportunity to question the Texas attorney on this matter in his deposition and apparently failed to take advantage of that opportunity.

Am Jur 2d, Depositions and Discovery §§ 176, 177, 192.

10. Evidence § 20 (NCI3d)— fee splitting—constructive fraud and constructive trust—rebuttal evidence

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement by allowing rebuttal evidence from plaintiff about payments made to the Texas attorney where defendant failed to assert at trial that the rebuttal evidence was outside the scope of previously admitted evidence and therefore could not argue that basis for objection on appeal. Moreover, the evidence

was offered to rebut defendant's evidence that certain fees had been paid out of the North Carolina attorney's portion of their fees rather than to prove the truth of the statements made and was therefore not inadmissible hearsay.

Am Jur 2d, Evidence § 269.

11. Attorneys at Law § 51 (NCI4th)— fee splitting—fraud—statutory damages

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting agreement by determining that N.C.G.S. § 84-13 applied to the facts of this case even though this case involved constructive fraud by breach of fiduciary duty. When an attorney breaches the duty owed to his client, there is a presumption of fraud and N.C.G.S. § 84-13 does not limit its availability to cases of actual fraud. Although defendant also asserted that it was impossible to tell whether damages were awarded on the basis of constructive fraud, unjust enrichment, or excessive fee, the jury found that defendant had engaged in a fraudulent practice and that was sufficient to invoke the provisions of the statute.

Am Jur 2d, Attorneys at Law § 215.

APPEAL by defendant William C. Frue from judgment entered 2 March 1989 by *Judge Hollis M. Owens, Jr.* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 5 April 1990.

Plaintiffs brought suit against defendants William C. Frue (Frue) and Ronald K. Payne (Payne), licensed North Carolina attorneys, and Michael Y. Saunders (Saunders), a Texas attorney, seeking compensation for claims of constructive fraud and constructive trust. In summary, plaintiffs sued defendants Frue and Payne to recover money paid to them by Saunders under a referral fee arrangement. Saunders was named a defendant pursuant to Rule 19(a) of the North Carolina Rules of Civil Procedure. In an earlier appeal we reversed the trial court's dismissal of plaintiffs' action for failure to state a claim and remanded for trial. *Booher v. Frue*, 86 N.C. App. 390, 358 S.E.2d 127 (1987), *aff'd*, 321 N.C. 590, 364 S.E.2d 141 (1988). The trial court allowed summary judgment for defendant Payne. That judgment is reversed in a companion case, 98 N.C. App. 585 (1990).

Plaintiffs' son was injured in an accident in Texas and later died from his injuries. Plaintiff Booher planned a trip to Texas to secure legal counsel to handle the claims arising from his son's death. Booher testified that his employer suggested that Frue, an Asheville attorney, should accompany Booher to Texas. On the morning Booher and Frue arranged to leave for Texas, Payne was at the airport with Frue. Booher mistakenly assumed that Payne was Frue's partner. Defendants Frue and Payne accompanied Booher and one of his sons to Texas in a plane Booher had borrowed from a friend; Booher is a pilot. Booher, Frue and Payne initially conferred with the Houston firm of Hutcheson & Grundy (H&G) and that firm handled the probate matters for plaintiffs' son's estate. H&G also arranged for the three to meet with Saunders regarding all other claims arising from the son's death. A fee arrangement was agreed upon whereby Saunders was to receive 1/3 of any recovery on the life insurance and wrongful death claims and 1/4 of any recovery for the workers' compensation claim. Frue and Payne, unknown to plaintiffs, negotiated a referral fee with Saunders for 1/3 of Saunders' total fees. The fees received by Frue in relation to the workers' compensation and wrongful death claims are the subject of plaintiffs' claims here.

As to plaintiffs' claim that defendants' agreement with Saunders was in breach of their fiduciary duty to plaintiffs, the trial court granted Payne's motion for summary judgment. The trial court submitted the case against Frue to the jury. From judgment on the verdict defendant Frue appeals.

Kennedy Covington Lobdell & Hickman, by James E. Walker and James P. Cooney, III, for plaintiff-appellees.

Morris, Bell and Morris, by William C. Morris, Jr., for defendant-appellant.

EAGLES, Judge.

We have narrowed defendant's twenty-five assignments of error and eleven arguments to four categories. First, defendant argues that the trial court erred in denying his motions for directed verdict and judgment notwithstanding the verdict. Second, defendant argues that the trial court made various errors in its instructions to the jury. Third, defendant argues that the trial court made several evidentiary errors. Finally, defendant asserts that the trial court erred in determining that G.S. 84-13 applies to this case. Because

defendant's brief failed to argue four of his assignments of error, they are deemed abandoned. App. R. 28(a). After careful review of the proceedings and defendant's arguments, we find no error.

I. Directed Verdict and
Judgment Notwithstanding the Verdict.

[1] Defendant's first argument is that the trial court erred in denying his directed verdict and judgment notwithstanding the verdict motions. Defendant argues that plaintiffs are bound by their testimony in which they denied the existence of an attorney-client relationship. Defendant also argues that the plaintiffs waived their right to sue since they knew of the fee-splitting arrangement at least one year in advance of the disbursement but accepted their portion of the proceeds. Defendant also argues that the trial court should have directed a verdict in his favor as to any sum in excess of $73,973.16, the amount he received. We disagree and overrule defendant's assignments of error.

The question presented by the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to plaintiffs, is sufficient for submission to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). A motion for a directed verdict may properly be granted "only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law." *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979). The standards for granting a motion for judgment notwithstanding the verdict are the same as those for granting a directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 584, 201 S.E.2d 897, 903 (1974).

Defendant initially asserts that the plaintiffs continually and unequivocally testified that they never hired defendant to be their attorney and plaintiffs are bound by their testimony. *See Woods v. Smith*, 297 N.C. 363, 255 S.E.2d 174 (1979); *Cogdill v. Scates*, 290 N.C. 31, 224 S.E.2d 604 (1976). Defendant's reliance on the cited cases is misplaced.

In *Woods* the court stated the general rule that "when a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him. . . ." *Woods*, 297 N.C. at 374, 255 S.E.2d at 181. The court stated that there are two exceptions to this general rule: first, when a party gives unequivocal factual testimony, as in *Cogdill*, the

statements should be treated as binding judicial admissions, *id.*, and second, when there is insufficient evidence to support the plaintiff's allegations, summary judgment or a directed verdict "would in most instances be properly granted against him." *Id.* This case presents neither of those exceptions. Here, the plaintiffs' testimony was not sufficiently fact-specific but was in response to questions regarding legal conclusions. Additionally, Frue himself testified that when he left with Booher to travel to Texas, he (Frue) felt he was representing Booher. This evidence was sufficient to withstand defendant's motions.

Defendant also argues that plaintiffs waived their right to sue for fraud when they accepted their portion of the Texas litigation proceeds with knowledge of the fee-splitting arrangement between Saunders and Frue. Defendant's argument is without merit and is discussed more thoroughly in Section II.D. below.

Defendant also argues that the trial court erred in denying a directed verdict in his favor for any amount in excess of the $73,973.16 he received. Assuming *arguendo* that defendant could be liable to plaintiffs for no more than the amount he actually received, defendant was not prejudiced by the trial court's failure to grant his requested directed verdict; the jury returned a verdict of $61,500.

II. Instructions.

A. First issue: Attorney-client relationship.

[2] Defendant argues that the trial court erred in failing to give his proposed instruction on the first issue. The proposed instruction placed on plaintiffs the burden of proof on the issue of whether a relationship of trust and confidence existed between plaintiffs and Frue. The trial court gave a peremptory instruction on this issue. Defendant also argues that even if a peremptory instruction had been proper, the one given was improper since it did not allow the jury to determine the credibility of the witnesses. Defendant's arguments are without merit.

When only one inference can be drawn from the evidence, a peremptory instruction may be given in favor of the party with the burden of proof. *Cutts v. Casey*, 278 N.C. 390, 418, 180 S.E.2d 297, 312 (1971); *Chisholm v. Hall*, 255 N.C. 374, 376-77, 121 S.E.2d 726, 728 (1961). A correct peremptory instruction informs the jury that they should answer the issue as specified if they find from

the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also inform the jury that if they do not so find they should answer the issue in the opposite manner. The court must leave to the jury the decision on the issue. The evidence in this case, if believed by the jury, proves the existence of an attorney-client relationship between plaintiffs and Frue. On this record the trial court correctly gave a peremptory instruction on the first issue.

Defendant also argues that the instruction given was incorrect. The trial court instructed the jury that:

> [T]he first issue reads as follows: "At the time of the transactions relating to the death of the plaintiffs' son, did a relationship of trust and confidence exist between the plaintiffs and the defendant Frue?" Now, on this issue the burden of proof is on the plaintiffs. Now, when a relationship—when the relationship between two people is such that one is entitled to place special trust and confidence in the other, if there is a transaction between them, even in the absence of intentional fraud or deception, there is a presumption that the transaction was induced by fraud or undue influence on the part of the person in whom the trust and confidence was placed. A client is entitled to place such trust and confidence in his attorney as to any transaction in respect to a matter within the client/attorney relationship.
>
> Now, the plaintiffs in this case have offered evidence which tends to show that the defendant Frue, a member of the North Carolina State Bar Association [sic], accompanied the Plaintiff Booher to Houston, Texas to retain a Texas lawyer for the purpose of bringing claims or lawsuits for damages arising from the death of the plaintiffs' son. Now, the defendant Frue has offered evidence that he was retained to represent the plaintiff Booher in connection with the transaction, and that the matter was in his hands. Now, in connection with the first issue, members of the jury, since all the evidence tends to show a relationship of trust and confidence, the Court instructs you that if you believe the evidence, your answer to Issue No. 1 should be "yes."
>
> Now, the second issue reads as follows—and by the way, members of the jury, if you answer Issue No. 1 "yes," you

should then proceed to answer the second issue. If you answer Issue No. 1 "no," you would return to the courtroom.

Defendant argues that the trial court's instruction was not a proper peremptory instruction but was a directed verdict. We disagree. The trial court stated in his instruction that "if you believe the evidence" the answer to the first issue would be "yes." Additionally, the court had properly instructed the jury on the burden of proof and credibility of witnesses.

B. Second issue: Fraudulent practice.

[3] Defendant argues that the trial court erred in submitting the second issue relating to fraudulent practice to the jury. Defendant argues that both the wording on the issue sheet and the instructions given were improper. We disagree with defendant's arguments and overrule his assignments of error.

The second issue submitted to the jury was as follows: "Did defendant, Frue, commit a fraudulent practice by a breach of that relationship of trust and confidence?" Defendant asserts that the wording of the second issue was "an obvious attempt to place Plaintiffs in a position to use the provisions of NCGS 84-13. . . ." However, defendant makes no argument regarding any impropriety in plaintiffs attempting to take advantage of this statutory provision. Instead, defendant's argument is that there is no way to determine whether the jury awarded damages based on constructive trust, unjust enrichment or because defendant received an excessive fee for the work performed. Defendant's argument is misplaced. The statute provides for double damages when a plaintiff is injured by a fraudulent practice of an attorney. The jury clearly found that defendant committed a fraudulent practice.

Defendant's second argument relating to the second issue is that there was no instruction defining a "fraudulent practice" and the court erred in failing to instruct the jury that contingent fee arrangements are legal. The trial court instructed the jury that if they found: (1) a fiduciary relationship; and (2) the transaction was not open, fair and honest, then constructive fraud would have occurred. This was a sufficient definition of a "fraudulent practice." Additionally, the legality of contingent fees is irrelevant to the second issue. Plaintiffs' cause of action was not based on the illegality of contingent fees but the plaintiffs' lack of knowledge of and consent to Frue's agreement with Saunders.

C. Third issue: Theories of recovery.

[4] Defendant asserts that the instructions given on the third issue improperly submitted alternative bases for plaintiffs' recovery: "damages recovery" (compensation for plaintiffs' loss) or "restitution recovery" (unjust enrichment). We find no error in the court's instruction. It is clear that plaintiffs' recovery was based on defendant's breach of fiduciary duty. Imposition of a constructive trust (i.e., recovery in restitution or for unjust enrichment) is one possible remedy available to plaintiffs for defendant's breach of fiduciary duty. Damages is an alternative remedy. *See Speight v. Branch Banking and Trust Co.*, 209 N.C. 563, 566, 183 S.E. 734, 736 (1936). Defendant does not argue that the jury improperly allowed plaintiffs a double recovery, one for "damages" and one for "restitution."

D. Estoppel.

[5] Defendant's final argument regarding the trial court's instructions involves the issue of estoppel. Defendant asserts that there was evidence from which the jury could find that plaintiffs waived their right to sue. Specifically, defendant asserts that plaintiffs' acceptance of the proceeds from the various claims of their son's estate, with full knowledge of the fee-splitting agreement between the attorneys, raises an issue of estoppel. The principles of estoppel do not apply here.

> As related to the party claiming the [equitable] estoppel, the essential elements are (i) lack of knowledge and the means of knowledge of the truth of the facts in question; (ii) reliance upon the conduct of the party to be estopped; and (iii) action based on this conduct which changes his position prejudicially.

Five Oaks Homeowners Assoc., Inc. v. Efirds Pest Control Co., 75 N.C. App. 635, 636, 331 S.E.2d 296, 297-98 (1985). "Equity does not estop one from asserting his legal rights to enable another to make a profit which he could not otherwise obtain." *Herring v. Volume Merchandise, Inc.*, 252 N.C. 450, 453, 113 S.E.2d 814, 816 (1960). At the time of disbursement of funds, defendant Frue knew of plaintiffs' dissatisfaction with the referral fee arrangement. Frue did not rely on plaintiffs' actions and did not change his own position to his prejudice based on their actions. Accordingly, defendant's assignment of error is overruled.

III. Admission of Evidence.

A. Contacts with other attorneys.

[6] Defendant argues that testimony regarding contacts and conversations of plaintiffs with other attorneys was irrelevant and served only to prejudice defendant, creating the impression that defendant was "ambulance chasing." Defendant also argues that the statements were inadmissible hearsay. This testimony was offered to show plaintiffs' state of mind, not the truth of the matters asserted and is therefore not hearsay. Additionally, the testimony was relevant to show the plaintiffs' understanding of their need to hire Texas legal counsel. Defendant's argument is without merit.

B. Disciplinary Rules 2-106 and 2-107.

[7] Defendant asserts that the introduction into evidence of North Carolina Disciplinary Rules 2-106 and 2-107 was error. Defendant argues that the Rules were irrelevant to this proceeding since the Rules do not define the standards for civil liability. Although we agree with defendant's argument that a violation of a Rule of Professional Conduct does not constitute civil liability *per se*, we disagree that the substance of those Rules was irrelevant here. The Rules are some evidence of an attorney's duty to his client. *See Klassette v. Mecklenburg County Area Mental Health, Mental Retardation and Substance Abuse Authority*, 88 N.C. App. 495, 364 S.E.2d 179 (1988) (voluntary policies and procedures adopted by health care facility are some evidence of standard of care); *Slade v. New Hanover County Bd. of Educ.*, 10 N.C. App. 287, 178 S.E.2d 316, *cert. denied*, 278 N.C. 104, 179 S.E.2d 453 (1971) (voluntarily adopted safety standards to protect the public are some evidence that a reasonably prudent person would adhere to their requirements).

Defendant also asserts that Texas law governs here since the contract to split the fee was entered in Texas, not North Carolina. In Texas, subject to certain restrictions and contrary to the North Carolina Rules, referral fee agreements between attorneys are not unethical. Defendant's argument is without merit. It is uncontradicted that the attorney-client relationship between plaintiffs and Frue, a North Carolina lawyer, was entered into in North Carolina. Accordingly, the North Carolina Rules of Professional Conduct apply.

C. Hypothetical questions.

[8] Defendant argues that the trial court erred by allowing plaintiffs' counsel to read to the jury portions of Saunders' deposition. The portions of the transcript on which defendant bases this argument read as follows:

> Q "Well, had the subject [the referral fee] been brought up in Mr. Booher's presence, you said you would have been willing to discuss it, right?
>
> A Right.
>
> Q Had it been brought up"—
>
> * * *
>
> Q "Had it been brought up in his presence and had he objected to Mr. Frue and Payne receiving one-third of your fee, but instead, suggested that since you were willing to do it for two-thirds of the fee, would you do it for that amount and let him get satisfied with Mr. Frue and Mr. Payne?"
>
> * * *
>
> A "I would have looked over at the lawyers and asked them if they were going to be able to work that out with Mr. Boo (sic) that way—Booher that way so that they got paid satisfactorily, and I would have considered doing that since I would be giving up the same third as I otherwise would. So long as the lawyers that brought me the case were satisfied they were being paid what they should be paid, I would have discussed that."
>
> * * *
>
> Q "Of course, Mr. Frue didn't ask you to do that, did he?
>
> A No.
>
> Q Mr. Payne didn't ask you to do that, did he?
>
> A No."
>
> * * *
>
> Q "And when you're talking about being—your stock answer being 'no' to the question of whether you would reduce the contingent fee basis, of course, in that 'no' answer you already

realize that you're only getting two-thirds of a-third at that time, since there is a referring attorney there; isn't that correct?"

A "Yes. When I was talking about one-third, the one-third I say is my stock contract, and my stock answer presumes that there may come out of that a referral fee in my normal dealings . . . in the community. Some cases I don't pay a referral fee because I get them direct from the client, but that, obviously, my one-third, if there's a referral involved, there's money coming out of that one-third.

* * *

Q But had there been no referral fee in this situation, you certainly may have considered very favorably taking it for less than a-third, since you didn't have to pay a referral fee; isn't that true?"

* * *

A "Well, under the circumstances you've previously described where they're all sitting there and the lawyers actually know or are satisfied that they're being taken care of with whatever arrangement they make with the client, separate and apart from me, if they're satisfied with that, then I would not be losing anything by taking it for the same two-thirds of one-third that I was already willing to contract for."

At trial, defendant asserted that the questions asked were too hypothetical and speculative to be admissible. Here, defendant asserts that the answers are inadmissible lay opinion under G.S. 8C-1, Rule 701. Defendant argues that Rule 701 "is generally stated to stand for the proposition that a lay witness may not testify in answer to hypothetical questions, especially those based on circumstances which are not in evidence." These questions were asked to rebut defendant's argument that plaintiffs were not damaged by the fee-splitting arrangement since Saunders' "stock contract" was to receive one-third. Additionally, there was some evidence presented by defendant that Booher was present when the fee-splitting arrangement was discussed. Therefore, there is some basis in the evidence for the hypothetical question. We find no merit in defendant's argument and overrule this assignment of error.

D. Pleadings.

[9] Defendant also argues that the trial court erred in denying his request to admit a particular paragraph of plaintiffs' complaint and a corresponding answer of Saunders. Defendant asserts that the pleadings in question show Saunders' bias and its introduction was to impeach the credibility of his deposition testimony. In Saunders' answer he asserts he is entitled to the amounts paid to Payne and Frue if plaintiffs prevail in their action. Assuming *arguendo* that the trial court erred in sustaining plaintiffs' objection, defendant has failed to show how he was prejudiced by the court's ruling. Defendant had the opportunity to question Saunders on this matter in his deposition and apparently failed to take advantage of that opportunity. On this record we see no prejudice to defendants from the trial court's refusal to admit a portion of the complaint and Saunders' answer.

E. Rebuttal.

[10] Defendant's final argument regarding the introduction of evidence is that the trial court erred in allowing rebuttal evidence from plaintiff Brown about payments made to Saunders. Defendant asserts that the rebuttal testimony was outside the scope of previously admitted evidence. Defendant failed to assert this basis when objecting at trial and therefore cannot argue that basis on appeal. Additionally, defendant argues that the testimony was hearsay. Defendant's argument is without merit. The evidence was offered to rebut defendant's evidence that certain fees had been paid by Frue and Payne out of their portion of the fees, not to prove the truth of the statements made to Mrs. Brown. Therefore, the evidence was not inadmissible hearsay.

IV. Applicability of G.S. 84-13.

[11] Defendant's final argument is that the trial court erred in determining that G.S. 84-13 is applicable to the facts of this case. Defendant asserts that G.S. 84-13 is in derogation of the common law and, since it is a statute that imposes penalties, it must be strictly construed. Therefore, defendant argues that the statute applies only to cases of actual fraud, not constructive fraud by breach of a fiduciary duty. Defendant's argument is without merit. When an attorney breaches the duty owed to his client, there is a presumption of fraud. The statute does not limit its applicability to cases of actual fraud. We note that G.S. 84-13 has been held

to apply in a case of constructive fraud in a bankruptcy proceeding. *See Ehlenbeck v. Patton (In re Patton)*, 58 Bankr. 149, 150 (W.D. N.C. 1986) (where attorney allegedly embezzled a client's funds and thereafter filed a petition in bankruptcy, court determined that "when an attorney mishandles client funds, there is a presumption of fraud as a matter of law. N.C.G.S. § 84-13 applies.").

Defendant also asserts that it is impossible to tell whether damages were awarded on the basis of constructive fraud, unjust enrichment or that the fee received was excessive. The jury found that Frue had engaged in a fraudulent practice. This is sufficient to invoke the provisions of G.S. 84-13.

For the reasons stated, we find no error in the trial court.

No error.

Judges WELLS and GREENE concur.

RICHARD M. BOOHER AND NANCY ANN BROWN v. WILLIAM C. FRUE, RONALD K. PAYNE AND MICHAEL Y. SAUNDERS

No. 8928SC1042

(Filed 5 June 1990)

Attorneys at Law § 57 (NCI4th)— fee splitting—summary judgment for defendant—improperly entered

The trial court erred by entering summary judgment in favor of defendant Payne in an action arising from a fee-splitting agreement between North Carolina attorneys and a Texas attorney where there were statements which raised a genuine issue as to whether defendant Payne was working as an attorney for plaintiffs on the trip to Texas. Although defendant Payne argued that plaintiffs' depositions reveal a total disavowal of any confidential or fiduciary relationship between plaintiffs and defendant Payne and that plaintiffs are bound by their testimony, plaintiffs' testimony here was not on concrete facts but was in response to conclusory questions regarding legal issues.

Am Jur 2d, Attorneys at Law §§ 244.8, 247, 302, 303.

APPEAL by plaintiffs from judgment entered 5 October 1988 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 5 April 1990.

Plaintiffs appeal from the entry of summary judgment in favor of defendant Ronald K. Payne (Payne). This case and case number 8928SC1116 arose from the same series of transactions. In an earlier appeal in this case we reversed the trial court's dismissal of plaintiffs' action for failure to state a claim and remanded for trial. *See Booher v. Frue*, 86 N.C. App. 390, 358 S.E.2d 127 (1987), *aff'd*, 321 N.C. 590, 364 S.E.2d 141 (1988). This appeal is from a summary judgment order in favor of defendant Payne. In this case, plaintiffs sued defendant attorneys to recover money paid to them by a Texas lawyer under an attorney's fee referral arrangement allegedly entered into among the lawyers without plaintiffs' knowledge.

Plaintiffs' son was killed in an accident in Texas. Plaintiff Booher planned to fly to Texas to secure legal counsel to handle the claims arising from his son's death. William C. Frue (Frue), an Asheville attorney, agreed with Booher to accompany him to Texas and to assist in hiring Texas counsel. At Frue's invitation, Payne, another Asheville attorney, arrived with Frue at the Asheville airport on the morning Booher and Frue had arranged to leave for Texas. Booher mistakenly assumed Payne was Frue's partner. Booher, Frue, Payne and one of Booher's sons traveled together in a plane Booher had borrowed (Booher is a pilot) and initially conferred with the Houston firm of Hutcheson & Grundy (H&G) which handled the probate matters for plaintiffs' son's estate. H&G also arranged for Booher, Frue and Payne to meet with Houston attorney Michael K. Saunders (Saunders) regarding all other claims arising from the son's death. Frue and Payne negotiated a fee arrangement between Booher and Saunders whereby Saunders was to receive 1/3 of any recovery on the life insurance and wrongful death claims and 1/4 of any recovery for the workers' compensation claim. Frue and Payne, allegedly unknown to plaintiffs, negotiated a referral fee with Saunders whereby they would receive 1/3 of Saunders' total fees.

Plaintiffs brought this action to recover the referral fees paid to Frue and Payne, alleging that defendants' agreement with Saunders was in breach of their fiduciary duty to plaintiffs. Saunders was made a party defendant under Rule 19(a) of the North Carolina Rules of Civil Procedure. The trial court granted Payne's motion

for summary judgment. (The case against Frue went to the jury which returned a verdict in plaintiffs' favor. Defendant Frue's appeal from that judgment is case number 8928SC1116.) Plaintiffs appeal the entry of summary judgment in favor of Payne.

Kennedy Covington Lobdell & Hickman, by James E. Walker and Alice Carmichael Richey, for plaintiff-appellants.

Ronald W. Howell for defendant-appellee.

EAGLES, Judge.

The sole question here is whether the court erred in granting defendant Payne's motion for summary judgment. Under G.S. 1A-1, Rule 56(c), defendant is entitled to summary judgment if the record shows "that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986). After careful review of the record we reverse the entry of summary judgment in favor of Payne and remand for trial.

The relationship between attorney and client is a fiduciary relationship. The existence of a fiduciary relationship and its breach are the bases for plaintiffs' claims of constructive fraud (recovery of actual damages) and constructive trust (recovery for unjust enrichment or restitution). The question here is whether there is a genuine issue of fact regarding the existence of an attorney-client relationship between plaintiffs and Payne at the time the referral fee arrangement was made. Defendant Payne contends there is no attorney-client relationship with Booher or Brown and points to plaintiffs' depositions for support.

"[T]he relation of attorney and client may be implied from the conduct of the parties, and is not dependent on the payment of a fee, nor upon the execution of a formal contract. . . . The dispositive question . . . [is] whether defendant[ ] [attorney's] conduct was such that an attorney-client relationship could reasonably be inferred." *North Carolina State Bar v. Sheffield*, 73 N.C. App. 349, 358, 326 S.E.2d 320, 325, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482 (1985) (citations omitted). Payne argues that the plaintiffs' depositions reveal a total disavowal of any confidential or fiduciary relationship between plaintiffs and Payne and that plaintiffs are bound

by their testimony. *See Woods v. Smith*, 297 N.C. 363, 255 S.E.2d 174 (1979); *Cogdill v. Scates*, 290 N.C. 31, 224 S.E.2d 604 (1976). Payne's reliance on the cited cases is misplaced.

In *Woods*, the Supreme Court stated that "a party's statements, given in a deposition or at trial of the case, are to be treated as evidential admissions rather than as judicial admissions." *Woods*, 297 N.C. at 373-74, 255 S.E.2d at 181. The Court went on to state that

> when a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Two exceptions to this general rule should be noted, however. First, when a party gives unequivocal, adverse testimony under factual circumstances such as were present in *Cogdill*, his statements should be treated as binding judicial admissions rather than as evidential admissions. Second, when a party gives adverse testimony, *and there is insufficient evidence to the contrary presented to support the allegations of his complaint*, summary judgment or a directed verdict would in most instances be properly granted against him.

Id. at 374, 255 S.E.2d at 181 (emphasis in original). On the record before us, because neither of the two exceptions apply, we conclude that summary judgment in favor of Payne was improperly entered.

First, the testimony here is unlike that in *Cogdill*. In *Cogdill* the plaintiff brought suit against her husband and a third party, alleging that defendants were concurrently negligent in their operation of motor vehicles. Plaintiff alleged that her husband failed to keep a proper lookout, drove at excessive speed, suddenly made a left turn across a highway without signaling and that he drove while under the influence of alcohol. At trial plaintiff testified that at the time of the collision her husband's car was in the correct lane, that he was waiting to turn left and that he had signaled his intention to turn left. Plaintiff also recanted her allegations about failing to keep a proper lookout, driving while intoxicated and driving at an excessive speed. The Supreme Court stated that plaintiff's testimony on "concrete facts" was "deliberate, unequivocal and repeated." *Cogdill*, 290 N.C. at 43, 224 S.E.2d at 611. When "a plaintiff's own testimony has equivocally repudiated the material allegations of his complaint," the trial court should grant defendant's motion for directed verdict. *Id.* at 44, 224 S.E.2d at 611.

Unlike the testimony in *Cogdill*, plaintiffs' testimony here was not on "concrete facts" but was in response to conclusory questions regarding legal issues. Although plaintiff Brown stated that she had "never been told anything about Mr. Payne's role" and thought that Frue was just a friend of Booher's, Frue's deposition reveals that he was aware of Ms. Brown's interest and her reliance on Booher to protect their concurrent interests in their son's estate.

Second, there is sufficient evidence, contrary to plaintiffs' depositions, to support the plaintiffs' allegations. The depositions of Frue and Payne tend to show that they traveled to Texas with Booher to help him retain Texas legal counsel and that they had done some work on the case prior to leaving Asheville. Additionally, Booher's deposition contains statements regarding his expectations arising from the defendants' activities while in Texas. Booher testified that he thought Frue and Payne were negotiating with Saunders for the lowest possible fee for him and that he had no knowledge of the arrangement to split the fee between the attorneys. These statements raise a genuine issue whether Payne was working as an attorney for plaintiffs on the trip to Texas.

For the reasons stated, the entry of summary judgment in favor of Payne is reversed and the cause is remanded for trial.

Reversed and remanded.

Judges WELLS and GREENE concur.

CLIFTON LENINS, PLAINTIFF v. K-MART CORPORATION AND DANIEL MEETZE, DEFENDANTS

ELSA COBBE LENINS, PLAINTIFF v. K-MART CORPORATION AND DANIEL MEETZE, DEFENDANTS

No. 8918SC1015

(Filed 5 June 1990)

1. **Trial § 10.1 (NCI3d)— court's comment during jury selection—no expression of opinion**

The trial court did not express an opinion on the evidence when he stated during jury selection that the case involved an incident at the K-Mart during which plaintiff was stopped and asked whether she had engaged in shoplifting and that "she denies that she had engaged in shoplifting, and of course, for that reason she was stopped," where the court had asked whether any prospective jurors had ever been stopped for an alleged offense of shoplifting and was preparing the jurors for further questions concerning their ability to be objective in such a case. N.C.G.S. § 1A-1, Rule 51(a).

Am Jur 2d, Trial §§ 92, 95, 103, 105.

2. **Trial § 10.1 (NCI3d)— judge's comments upon opening of court—no expression of opinion**

The trial court's remarks upon the opening of court for the second and third days of the trial that the jury should "sit back, relax and stay tuned for the next portion of the trial" did not equate plaintiffs' cases to staged, fictional entertainment and did not constitute an expression of opinion on the evidence.

Am Jur 2d, Trial §§ 92, 95, 103, 105.

3. **Malicious Prosecution § 11.2 (NCI3d)— prior criminal trial—testimony relevant to malicious prosecution**

Testimony about a prior criminal trial in which plaintiff was found not guilty of concealing merchandise and shoplifting, including testimony that the judge's verdict of not guilty was rendered on a day subsequent to the day testimony was heard and that certain witnesses for the defense at the civil hearing

did not testify at that criminal trial, was relevant to prove the elements of malicious prosecution.

Am Jur 2d, Malicious Prosecution §§ 149-151.

4. **False Imprisonment § 2 (NCI3d); Malicious Prosecution § 14 (NCI3d)— shoplifting—probable cause for detainment—suspicional by rational and prudent man**

The trial court in an action for malicious prosecution and false imprisonment did not err in instructing the jury that a person may be detained if a rational and prudent man should "suspect" that a concealment or larceny of merchandise has taken place.

Am Jur 2d, False Imprisonment §§ 91, 99, 132; Malicious Prosecution §§ 186, 194.

5. **False Imprisonment § 2 (NCI3d); Malicious Prosecution § 14 (NCI3d)— lack of probable cause—acquittal not evidence**

The trial court in an action for malicious prosecution and false imprisonment did not err in instructing the jury that evidence of plaintiff's acquittal of concealment of merchandise and shoplifting could not be considered as evidence of lack of probable cause by defendant.

Am Jur 2d, False Imprisonment §§ 91, 99, 132; Malicious Prosecution §§ 186, 194.

6. **Malicious Prosecution § 14 (NCI3d)— instruction on legal malice—belief in success of action**

The trial court in a malicious prosecution action did not err in instructing the jury that legal malice "occurs when a person institutes a legal proceeding, although he does not believe there's any possibility for success of the action."

Am Jur 2d, False Imprisonment §§ 91, 99, 132; Malicious Prosecution §§ 186, 194.

7. **False Imprisonment § 2 (NCI3d)— detainment for concealing merchandise—civil liability—instructions**

The trial court's instructions, when considered contextually as a whole, sufficiently apprised the jury as to when a merchant or his agent or employee who detains or causes the arrest of any person for concealing merchandise will not be held civilly liable for false imprisonment.

Am Jur 2d, False Imprisonment §§ 91, 99, 132; Malicious Prosecution §§ 186, 194.

8. **Rules of Civil Procedure § 32 (NCI3d)— admission of portions of depositions—no right to admission of entire depositions**

N.C.G.S. § 1A-1, Rule 32(a)(5) did not give plaintiffs a right to have entire depositions admitted into evidence once portions of those depositions were admitted.

Am Jur 2d, Depositions and Discovery § 188.

9. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—insufficient evidence**

Plaintiff's evidence that he was cursed, abused, and struck by defendant store's employees when he went to his wife's rescue upon seeing her being forcibly detained at the store was insufficient to support plaintiff's claim for intentional infliction of emotional distress.

Am Jur 2d, False Imprisonment § 138; Torts §§ 18-22, 32; Trespass § 8.

APPEAL by plaintiffs from judgment entered 17 April 1989 by *Judge W. Steven Allen, Sr.* in GUILFORD County Superior Court for these two civil actions which were duly consolidated for trial. Heard in the Court of Appeals 4 April 1990.

Plaintiffs' evidence tended to show that Mrs. Lenins was verbally and physically assaulted just after leaving the corporate defendant's store, dragged back in, held against her will and put to great emotional distress. Mr. Lenins' evidence tended to show that he saw his wife being attacked and, when he attempted to rescue her, he too was attacked by the defendant store's employees.

The evidence for the defendant tended to prove that Mrs. Lenins was observed shoplifting and was properly confronted with the accusation. Mrs. Lenins was arrested, charged and tried in the District Court for concealing merchandise and shoplifting. She was found not guilty.

Mrs. Lenins sued for (1) assault and battery, (2) false imprisonment, (3) malicious prosecution, (4) intentional infliction of emotional and mental suffering and distress, and (5) slander. The jury found in favor of the defendants on all issues.

Mr. Lenins alleged (1) intentional infliction of mental and emotional suffering and distress, and (2) assault and battery. The court dismissed the first cause of action at the close of the plaintiffs' evidence and the jury found for the defense on the second cause of action.

Plaintiffs appeal.

Robert S. Cahoon for plaintiffs-appellants.

Adams Kleemeier Hagan Hannah & Fouts, by Clinton Eudy, Jr. and Trudy A. Ennis, for defendants-appellees.

LEWIS, Judge.

Plaintiffs bring forward twenty-two assignments of error. Those assignments of error have been combined below into major topical areas.

I: ALLEGED PREJUDICIAL EXPRESSIONS OF OPINION BY THE TRIAL JUDGE.

Plaintiffs allege that the trial judge made certain statements to the jury which were prejudicial expressions of opinion and were therefore grounds for a new trial.

A. *A statement to the jury during jury selection.*

[1] During jury selection, the trial judge stated to the prospective jurors:

> Now, this case involves an incident at K-Mart, where Mrs. Lenins was a shopper. . . and at which time she was stopped and inquired as to whether or not she had engaged in shoplifting. Of course, she denies that she had engaged in shoplifting, and of course, for that reason she was stopped.

Plaintiff Elsa Lenins contends that this statement "contradicts plaintiff's allegations and testimony concerning the incident and constitutes a charge and a statement of opinion by the court that plaintiff's version of the incident was incorrect, and that plaintiff was in fact stopped because she was in fact guilty of shoplifting." Rule 51(a) of the North Carolina Rules of Civil Procedure states that "no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury. . . ." In this instance, the statements in question were made by the judge in the context of jury selection during which the

judge inquired: "Now, is there anybody that's ever been stopped in a store like K-Mart for the alleged offense of shoplifting?"

Since no evidence had yet been presented for the purpose of proving or disproving plaintiff's alleged shoplifting, the judge was not commenting on "whether a fact is fully or sufficiently proved." He was evidently preparing the prospective jurors for the next question concerning their ability to be objective in such a case. We find no prejudicial error in this statement.

B. *A statement to the jury on the opening of court for the second and third days of the trial.*

[2] Plaintiffs allege that the court's remarks to the jury on the opening of court for the second and third days of trial constituted grounds for a new trial. On the second day of trial, the trial judge stated to the jury:

> Good morning, ladies and gentlemen. We're ready to continue with the trial of this matter. We hope that you had a good evening last evening, that you sit back, relax and stay tuned for the next portion of the trial.

On the third day of trial, the trial judge opened court with this greeting to the jury:

> Good morning, ladies and gentlemen. We're glad to see that you all made it back. Sit back, relax and stay tuned for the next portion of the trial.

Plaintiffs contend that these "remarks equated each plaintiff's cases and evidence to staged, fictional entertainment such as a television program for which jurors should relax and tune in to be entertained . . . and that the plaintiff's case and evidence were not to be taken as real, substantive or serious matters." Citing Rule 51 quoted above, plaintiffs object to such "expressions of opinion." Rule 51, however, clearly refers to the judge who gives an opinion about a "fact" and whether or not that fact has been "fully or sufficiently proved." The trial judge in this case was commenting neither on the evidence nor on the credibility of witnesses. His manner of greeting the jury and his description of the trial process may have been informal and even jocular; however, his statements do not constitute reversible error.

> It does not follow . . . that every ill-advised comment by the trial judge . . . is of such harmful effect as to constitute reversible error. The comment made . . . should be considered in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.

Andrews v. Andrews, 243 N.C. 779, 781, 92 S.E.2d 180, 181 (1956), *quoting State v. Perry*, 231 N.C. 467, 57 S.E.2d 774 (1950).

II: RULINGS BY THE TRIAL JUDGE TO ALLOW DESCRIPTIVE INFORMATION ABOUT THE PRIOR CRIMINAL ACTION.

[3] The trial judge in this case allowed testimony about the prior criminal trial in which Mrs. Lenins was found not guilty of concealing merchandise and shoplifting. Plaintiff Mrs. Lenins objects on appeal to the admission of (1) testimony that "the judge's verdict of not guilty was rendered on a day subsequent to the day testimony was heard," and (2) testimony that certain witnesses for the defense at the civil hearing did not testify at that criminal trial. Plaintiff contends that admission of this evidence over defendants' objections was "serious, prejudicial" error. Appellants have the burden to show not only "error but to show that if the error had not occurred there is a reasonable probability that the result of the trial would have been favorable to [them]." *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967), *quoting Mayberry v. Charlotte City Coach Lines, Inc.*, 260 N.C. 126, 131 S.E.2d 671 (1963). Appellants in this case have made no such showing. Moreover, the evidence to which plaintiff objects is relevant in this case since plaintiff included in the civil action a charge of malicious prosecution. The definition of malicious prosecution includes the following elements: "[P]laintiff must prove . . . that the defendant instituted . . . the criminal proceeding against [plaintiff] . . . without probable cause; . . . with malice; . . . and that [the proceeding] terminated in [plaintiff's] favor." *Carson v. Doggett*, 231 N.C. 629, 632, 58 S.E.2d 609, 611 (1950). We find no error.

III: THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY ON PLAINTIFF MRS. LENINS' CLAIMS FOR (1) MALICIOUS PROSECUTION AND FOR (2) FALSE IMPRISONMENT OR UNLAWFUL RESTRAINT.

Plaintiffs object to five portions of the trial judge's instructions to the jury. The standard for analyzing jury instructions was

described in *Hanks v. Nationwide Mut. Fire Ins. Co.*, 47 N.C. App. 393, 267 S.E.2d 409 (1980).

> It is well settled in this State that the court's charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such a manner as to leave no reasonable cause to believe the jury was misled or misinformed, this Court will not sustain an exception on the grounds that the instruction might have been better.

Id. at 404, 267 S.E.2d at 415.

[4] (1) Plaintiff alleges that the trial court erred in charging the jury that a person may be detained if "a rational and prudent man . . . [should] *suspect* that the concealment or larceny had taken place." (Emphasis added.) This instruction is very similar to the pattern jury instructions on malicious prosecution and false imprisonment. N.C.P.I.—Civil 801.00 (Malicious Prosecution) and N.C.P.I.—Civil 802.00 (False Imprisonment). North Carolina courts have also upheld the definition of "probable cause" which allows "a reasonable man to commence a prosecution" when the "facts and circumstances, known to him at the time" would "induce" him to believe that the person charged is guilty of the offense. *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978), *quoting Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E.2d 149, 151 (1907). The trial court's definition of "probable cause" was without error.

[5] (2) Plaintiff Mrs. Lenins objects to the trial court's instruction to the jury that "the failure of the Court . . . to convict Mrs. Lenins or to find her not guilty is no evidence of lack of probable cause, and you may not consider that fact in determining whether [defendant] Mr. Meetze acted upon probable cause. . . ." Plaintiff contends that this jury instruction is "not . . . a correct statement of the law" and that it is "misleading to the jury because the jury must consider and determine whether plaintiff was acquitted." In fact, according to the North Carolina Supreme Court, it would have been reversible error if the judge had allowed the jury to consider that Mrs. Lenins' acquittal was *conclusive* evidence of lack of probable cause. (Emphasis added.) *Abbitt v. Bartlett*, 252 N.C. 40, 44, 112 S.E.2d 751, 754 (1960). It was not error for the trial court to instruct the jury that evidence of acquittal could not be considered as evidence of lack of probable cause by defendant Meetze.

[6] (3) The trial court instructed the jury with the definition of "legal malice" and stated, in part: "Legal malice occurs when a person institutes a legal proceeding, although he does not believe there's any possibility for success of the action. . . ." Plaintiff Mrs. Lenins objects to this charge to the jury, stating that it is "misleading to the jury" since it is "not . . . a correct statement of the law because good faith and probable cause (not belief in success) are the only proper basis for prosecution." The trial court's instruction was taken from the pattern jury definition of malice. N.C.P.I.—Civil 801.00 (Malicious Prosecution). Plaintiff contends: "If such language has crept into our decisions it should now be repudiated," but she supports her argument only by appealing to "common experience and knowledge." The trial court properly instructed the jury on the issue of malice for the purpose of a malicious prosecution cause of action.

[7] (4) Plaintiff also objects to the following charge to the jury:

> The law further provides this: that a merchant or his agent or employee or peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention or false imprisonment.

According to plaintiff, this charge "is not a correct statement of the law in that it fails to point out that a merchant or his agent *could* be held civilly liable for such acts done in bad faith, wrongfully, or without probable cause. . . ." Plaintiff's statement of the law is correct; however, plaintiff incorrectly states that the trial judge "fail[ed] to point out" a complete statement of the applicable law in his jury instructions. The very next sentence begins with a statement by the judge that he will later be giving instructions on "malicious prosecution." The trial judge continues with his statement of the law concerning a charge of false imprisonment by a merchant.

> A merchant or his agent or employee who detains or causes the arrest of any person shall not be held civilly liable for malicious prosecution, where such detaining or causing the arrest of such person by the merchant or its agent or employee is based upon—has reasonable grounds at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section.

Considering the court's charge "contextually as a whole" as indicated in *Hanks v. Nationwide Mut. Fire Ins. Co.* quoted above, 47 N.C. App. 393, 404, 267 S.E.2d 409, 415 (1980), the trial judge presented the law of this case in such a manner that the jury was not misled. The statement of the applicable law in this instance is not reversible error.

(5) Plaintiff Mrs. Lenins alleges that a specific jury instruction "makes even a wrongful arrest . . . immune from suit . . . if done 'politely' or 'reasonably.'" In this assignment of error, plaintiff refers only to the *proposed* instruction and makes no reference to specific objectionable jury instructions on this issue which the trial judge made in the presence of the jury. The trial judge did not make any such erroneous instruction to the jury.

IV: THE ADMISSION OF PORTIONS OF DEPOSITIONS INSTEAD OF ENTIRE DEPOSITIONS.

[8] Plaintiffs state that the trial court erred in allowing in evidence selected portions of each of the two plaintiff's depositions and in overruling plaintiffs' motions that the entire depositions be admitted. Plaintiff relies on Rule 32(a)(5) of the North Carolina Rules of Civil Procedure.

> If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce any other parts.

This reliance is misplaced since plaintiffs here allege a right to have the *entire* depositions admitted once a portion has been offered into evidence. The statute allows the admission of "any other *part which is relevant* to the part introduced." (Emphasis added.) We find no error here.

V: INSUFFICIENCY OF THE EVIDENCE TO WITHSTAND A MOTION FOR A DIRECTED VERDICT FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

[9] The elements which a plaintiff must establish in order to recover for intentional infliction of emotional and mental distress in North Carolina are (1) "extreme and outrageous conduct," (2) which "intentionally or recklessly causes" (3) "severe emotional distress to another." *Dickens v. Puryear*, 302 N.C. 437, 447, 276 S.E.2d 325, 332 (1981), *quoting* Restatement (Second) of Torts (1965), § 46. Mr.

Lenins' evidence was that he went to his wife's rescue when he saw her accosted by Mr. Meetze and was himself "cursed, abused, assaulted and struck." Defendants state that Mr. Lenins came from behind the security officer and started choking him. The officer hit Mr. Lenins without first seeing him since Mr. Lenins had approached the officer from behind. The determination of whether the conduct alleged was intentional and was extreme and outrageous enough to support such an action is a question of law for the trial judge. *Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381 (1987). The trial judge concluded that the evidence presented was insufficient as a matter of law to withstand defendants' motion for a directed verdict. We agree.

VI: SUBMISSION TO THE JURY THAT DEFENDANTS USED "REASONABLE FORCE," ACTED "JUSTIFIABLY IN SELF DEFENSE," AND ENGAGED IN AN "AFFRAY" WITH PLAINTIFF.

Plaintiff Mr. Lenins cites error in submitting these issues: (1) whether in assaulting the plaintiff the defendants used "only reasonable force to defend or protect its property from harm," (2) whether the defendant Meetze acted "justifiably in self defense" when he assaulted plaintiff, and (3) whether plaintiff Mr. Lenins engaged in an "affray" with defendant Meetze. Plaintiff relies on Rule 49(b) of the North Carolina Rules of Civil Procedure:

> Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues.

Rule 49(b) has been interpreted as follows: "[T]he form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed." *Link v. Link*, 278 N.C. 181, 190, 179 S.E.2d 697, 702-03 (1971). The pleadings raised the issues submitted and the trial court did not err in submitting these three issues to the jury.

VII: PLAINTIFFS' MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

Pursuant to G.S. § 1A-1, Rule 50(b), plaintiffs moved for a judgment notwithstanding the verdict, "on account of errors assigned and to be assigned and on account of [the verdict] being contrary to the evidence and contrary to the law." We hold that the trial court did not err in denying this motion because, as discussed above, there was no prejudicial error committed at trial, and

because ample evidence was presented at trial to support the jury's verdict on all issues. "A presumption exists that the judgment is correct." *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967), *quoting Key v. Woodlief*, 258 N.C. 291, 128 S.E.2d 567 (1962).

We find no reversible error in this trial.

Judges ARNOLD and DUNCAN concur.

STATE OF NORTH CAROLINA v. BARRY DEAN LINER, DEFENDANT

No. 8915SC888

(Filed 5 June 1990)

1. **Homicide § 21.7 (NCI3d)— second degree murder—furnishing inherently dangerous drugs—evidence of malice—sufficient**

The trial court did not err in a murder prosecution based on defendant's furnishing drugs to the victim by denying defendant's motion to dismiss based on the contention that the state did not produce sufficient evidence of malice or intent. The malice necessary to support a conviction for second degree murder does not necessarily mean an actual intent to take human life, and the evidence in this case tends to show that defendant supplied the drugs to the victim with the knowledge that the drugs were inherently dangerous due to the fact that two others had both become violently ill after using the drugs in defendant's presence.

Am Jur 2d, Homicide §§ 229, 425.

2. **Criminal Law § 687 (NCI4th)— murder—requested instructions refused—substance given**

There was no prejudicial error in a murder prosecution arising from the furnishing of drugs where the trial court refused to charge the jury in accordance with defendant's written requests for instructions as to the definition of intent and proximate cause but the instructions given were clearly sufficient and adequately reflected the substance of the defendant's requested instructions.

Am Jur 2d, Homicide §§ 496, 497.

3. Witnesses § 1 (NCI3d)— murder—witness with mental and drug problems—competent

The trial court did not err in a murder prosecution arising from the furnishing of drugs by finding a state's witness competent despite defendant's contention that the witness was suffering from paranoid schizophrenia, was manic depressive, had been under a mental health clinic doctor's care for five or six years, and was a walking drug store. The witness testified on voir dire that his medical condition did not affect his ability to remember events, testified that he was currently taking medication for his mental illness, and provided a detailed account of a prior incident in which defendant had furnished the same drugs to another person who had then become violently ill.

Am Jur 2d, Homicide § 537; Witnesses §§ 80, 83.

4. Criminal Law § 34.6 (NCI3d)— murder—furnishing drugs—prior incident—admissible

The trial court did not abuse its discretion in a prosecution for murder arising from the furnishing of dangerous drugs by allowing the jury to consider testimony about another incident in which defendant supplied the same drugs to another party who suffered a near fatal overdose. The testimony at issue here clearly established that defendant knew the drugs he gave to the victim were extremely dangerous because he had given the same drugs to another person just eight days earlier and had observed that person overdose on the drugs at that time.

Am Jur 2d, Evidence § 323.

5. Homicide § 28.8 (NCI3d)— murder—furnishing of drugs—accident or misadventure

The trial court did not err in a murder prosecution arising from the furnishing of drugs by not instructing the jury on accident and misadventure where defendant intentionally provided the drugs to the victim and defendant was with the victim when the drugs were consumed.

Am Jur 2d, Homicide §§ 112, 514.

6. Homicide § 30.3 (NCI3d)— murder—involuntary manslaughter not submitted—waiver by defendant

The trial court did not err in a murder prosecution arising from the furnishing of drugs by not submitting involuntary manslaughter as a possible verdict where the record affirmatively discloses that defendant knowingly, intelligently, and voluntarily waived any right he had to have the judge submit to the jury the possible verdict of involuntary manslaughter. A defendant who knowingly, intelligently, and voluntarily waives his right to have the trial judge submit possible verdicts of lesser included offenses and instructions thereon may not thereafter assign as error on appeal the judge's failure to submit such possible verdicts of lesser included offenses even though the evidence at trial gave rise to possible verdicts of the lesser included offenses.

Am Jur 2d, Homicide §§ 530, 531.

APPEAL by defendant from *Hight (Henry W., Jr.), Judge.* Judgment entered 10 February 1989 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 9 May 1990.

Defendant was charged in a proper bill of indictment with the murder of John Thomas Jordan, Jr. in violation of G.S. 14-17.

The evidence presented at trial tends to show the following: On 30 September 1988, defendant assisted Mr. W. S. Gardner, pharmacist and operator of the Medical Village Apothecary in Burlington, N.C., in cleaning out the basement of a house on Beaumont Avenue where Gardner had stored old and out of date drugs including some Class II controlled substances—cocaine, Dilaudid, and morphine. On this date, Gardner, defendant, and defendant's girlfriend went to the house on Beaumont Avenue, and Gardner unlocked the building and told defendant to start moving out boxes of drugs from the basement while he and defendant's girlfriend went to get a truck to take the drugs to the dump where they would be destroyed. Gardner and defendant's girlfriend returned with the truck approximately thirty minutes later and found defendant in the basement of the house putting merchandise outdoors to be loaded onto the truck. At this time, Gardner pointed out a box of Schedule II drugs to defendant and stated, "We're not going to put these on the truck. We're going to handle this differently." Gardner then put the box of Class II drugs into his

van and locked it intending to return them to the drug store and destroy them there. After taking the remaining drugs to the dump, Gardner and defendant got into the van and went to the drug store. At the store, they proceeded to pour the Class II drugs into an empty box. Some of the drugs had crystallized, however, and Gardner realized that he would have to do something else with them. Since it was getting late, Gardner decided to destroy the drugs the next day and proceeded to take defendant home. Gardner then placed the drugs in his storage building. Gardner did not give any of the drugs to defendant, nor did he observe defendant take any of the drugs. Following defendant's arrest, however, defendant admitted to Gardner that he had taken three bottles containing Dilaudid and cocaine.

The next day, Paul David Barbee went to defendant's apartment, and defendant told him "he had got ahold of some drugs and that we was going to do a little bit of them." Defendant then showed Barbee a small suitcase containing several vials labeled Dilaudid hydrochloride, morphine sulphate, cocaine hydrochloride and Demerol. Defendant told Barbee that he had been helping Gardner throw away some drugs "and he thought he would get some so that we could turn trips to get high."

Later that evening, Steve Dixon came to defendant's apartment. Dixon saw the drugs setting on the table and produced a hypodermic needle. Defendant then took a bottle of Dilaudid hydrochloride from the suitcase, and Dixon filled the syringe with Dilaudid powder hydrochloride and added some water. While defendant was sitting beside him, Dixon proceeded to use the needle to inject the mixture into the vein of his arm. Dixon then passed out, turned deathly white, and stopped breathing. Dixon's heart had stopped beating, and defendant hit him on the chest to get his heart started. Barbee administered mouth-to-mouth resuscitation, and the rescue squad was called. Defendant and Barbee hid the drugs and the syringe outside defendant's apartment before the rescue squad arrived. Dixon later recovered from the overdose.

One week later, Barbee returned to defendant's apartment. On this occasion, defendant gave Barbee some of the Dilaudid which he ingested. Barbee became very ill after taking the Dilaudid, and told defendant that he "wasn't going to do anymore, that it was bad."

The following day, on 9 October 1988, defendant and Barbee went to the home of the victim, John Thomas Jordan, Jr. (hereinafter

"Tommy Jordan"). Jordan told defendant that he wanted to do some cocaine, and defendant produced a pharmaceutical bottle from his pocket which contained some cocaine. Jordan and defendant snorted all the cocaine which was in the bottle, and when the bottle was empty, Jordan filled the bottle with water and drank from it. Defendant then produced a bottle of Dilaudid hydrochloride, and defendant and Jordan began snorting the Dilaudid hydrochloride up their noses. Jordan snorted the drug up his nose at least five times. Defendant told Jordan that this was the same drug that Steve Dixon had "ODed" on and that it was very potent. Jordan, however, continued snorting the drug.

Shortly after midnight that same day, Todd Jordan, the victim's brother and an Air Force flight surgeon medical technician, arrived at Tommy's house. Upon his arrival, Todd found his brother, Tommy, passed out in the bedroom. At the request of his brother's girlfriend, Todd went into the bedroom to check on his brother. Todd found that Tommy was breathing abnormally so he picked his brother up and carried him to the couch where he stabilized his brother's breathing. Todd continued to monitor his brother, but fell asleep. He awoke at approximately 5:30 the next morning to find that Tommy had stopped breathing and had no pulse. Todd called the paramedics and administered CPR but failed to get any response.

Tommy Jordan was pronounced dead at the emergency room at 6:14 a.m. on 10 October 1988. The physician concluded that Tommy had been dead for at least thirty minutes. An autopsy was performed on the victim's body later that same day, and the cause of death was determined to be a combination of cocaine and hydromorphone poisoning.

The jury found defendant guilty of second degree murder. From a judgment imposing a prison sentence of fifteen years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Daniel H. Monroe for defendant, appellant.

HEDRICK, Chief Judge.

[1] In his first assignment of error, defendant contends "[t]he trial court erred prejudicially in denying defendant's motions to dis-

miss . . . ." In support of his contention, defendant argues "[t]he State produced not a scintilla of evidence of malice by Defendant towards Tommy Jordan, nor did it show the 'generalized', as opposed to 'specific' intent to kill required for a conviction of second degree murder to stand." We disagree.

Our Courts have long held that the malice necessary to support a conviction for second degree murder "does not necessarily mean an actual intent to take human life." *State v. Trott*, 190 N.C. 674, 679, 130 S.E. 627, 629 (1925). However, "[w]hile an intent to kill is not a necessary element of second degree murder, the crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death." *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 917 (1978). Recently, this Court held that malice "denotes a wrongful act intentionally done without just cause or excuse [which demonstrates] . . . a willful disregard of the rights of others." *State v. Vance*, 98 N.C. App. 105, 390 S.E.2d 165 (1990), *quoting State v. Wilkerson* at 578, 247 S.E.2d at 916. Furthermore, malice "may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Trott* at 679, 130 S.E.2d at 629.

In the present case, the evidence tends to show that defendant supplied the drugs to the victim, Tommy Jordan, with the knowledge that the drugs were inherently dangerous due to the fact that Steve Dixon and Paul David Barbee had both become violently ill after using the drugs in defendant's presence. Clearly, this was sufficient to establish "a wrongful act intentionally done without just cause or excuse" demonstrating "a willful disregard of the rights of others." Thus, considering the evidence in the light most favorable to the State, the jury could have reasonably inferred that defendant acted with malice in supplying the drugs to the victim. Therefore, we hold the trial judge did not err in denying defendant's motions to dismiss.

[2] Defendant next contends "[t]he trial court erred prejudicially in failing to charge the jury in accordance with defendant's written requests for instructions, specifically as to the court's definition of 'intent' and 'proximate cause.' " This argument is without merit.

Where the judge's charge fully instructs the jury on all the substantive areas of the case, and defines and applies the law

thereto, it is sufficient. *State v. McNeil*, 47 N.C. App. 30, 266 S.E.2d 824, *disc. rev. denied and appeal dismissed*, 301 N.C. 102, 273 S.E.2d 306 (1980). "[T]he court is not required to read the requested instruction verbatim." *State v. Greene*, 324 N.C. 1, 17, 376 S.E.2d 430, 440 (1989). Although a trial judge is not required to give requested instructions verbatim, he is required to give the requested instruction at least in substance if it is a correct statement of the law and supported by the evidence. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982).

We have reviewed Judge Hight's instructions to the jury and find them to have been clearly sufficient and to have adequately reflected the substance of defendant's requested instructions. Thus, we hold the trial judge did not err prejudicially in refusing to give defendant's requested instructions verbatim.

[3] In his third and fourth contentions, defendant asserts that the trial court erred in finding the State's witness Paul David Barbee to be competent and in allowing his testimony concerning a previous occasion upon which defendant provided drugs to a third person to be considered by the jury.

With respect to the competency of a particular person to be a witness, G.S. 8C-1, Rule 601 provides in pertinent part:

> (a) Every person is competent to be a witness except as otherwise provided in these rules.
>
> (b) A person is disqualified to testify as a witness when the court determines that he is (1) incapable of expressing himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him, or (2) incapable of understanding the duty of a witness to tell the truth.

Our Supreme Court set forth the standard for review on this issue stating:

> The issue of the competency of a witness to testify rests in the sound discretion of the trial court based upon its observation of the witness (citation omitted). Absent a showing that a trial court's ruling as to competency could not have been the result of a reasoned decision, it will not be disturbed on appeal.

State v. Rael, 321 N.C. 528, 532, 364 S.E.2d 125, 128 (1988).

In the present case, defendant asserts that the trial judge should not have found Barbee competent to be a witness because (1) "[h]e was suffering from 'paranoiod [sic] schizophrenia, manic depressive', and had been under a Mental Health Clinic doctor's care for five or six years," and (2) [he] was a walking drug store." During *voir dire*, however, Barbee testified that his medical condition did not affect his ability to remember events and that he was currently taking medication for his mental illness. Barbee also provided a detailed account of the events which transpired on 1 October 1988. Based upon the evidence presented during *voir dire* and his "opportunity to view the witness and listen to his answers to the questions," Judge Hight found Barbee competent to testify. On appeal, defendant has failed to show that Judge Hight's ruling "could not have been the result of a reasoned decision," and therefore, we will not disturb it on appeal.

[4] Likewise, we will not disturb the trial judge's ruling allowing the jury to consider Barbee's testimony about the events of 1 October 1988 when defendant supplied the same drugs which caused the victim's death to Steve Dixon resulting in his near fatal overdose.

Rule 404(b) of the North Carolina Rules of Evidence provides:

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

Furthermore, the decision to admit evidence under this rule rests in the discretion of the court upon consideration of the facts supporting relevancy. *State v. Wortham*, 80 N.C. App. 54, 341 S.E.2d 76 (1986).

The testimony at issue here clearly established that defendant knew the drugs he gave to the victim were extremely dangerous because he had given the same drugs to another person just eight days earlier, and defendant had observed that person overdose on the drugs at that time. In allowing Barbee's testimony to be admitted, Judge Hight stated:

> The Court is going to find that the evidence is offered not for the purpose of proving that he acted in conformity with conduct on October 9, 1988, with the conduct of October

1 of 1988, but, however, is admissible to show knowledge as set forth in Rule 404(b).

The Court has then taken the balancing test as required by Rule 403 and finds that the evidence is more probative on the point to be shown than any other evidence and that it is quite relevant to the trial of this particular matter and it's [sic] relevance outweighs any prejudice to the defendant.

The record clearly discloses that Judge Hight did not abuse his discretion in admitting Barbee's testimony concerning the prior acts of defendant in supplying drugs to a third person. Therefore, we find no prejudicial error in the trial judge's findings with respect to the competency of the witness to testify, or in his decision to allow the jury to consider his testimony. These assignments of error are overruled.

[5] Next, defendant argues the trial court erred in not instructing the jury on accident and misadventure. Assuming *arguendo* that this issue is properly raised on appeal, we find the trial court did not err in not instructing the jury on accident. Defendant intentionally provided the drugs to the victim, and defendant was with the victim when the drugs were consumed. This contention is without merit.

[6] Finally, defendant contends the trial court erred in not submitting involuntary manslaughter as a possible verdict and in not instructing the jury thereon. Defendant argues G.S. 15A-1232 requires the trial judge to "explain the law arising on the evidence" of each case, and he cites numerous cases in support of this argument.

With respect to this issue the record discloses the following:

MR. HUNT: . . . If I might ask the Court to inquire—I don't know if this is proper, but I discussed lesser included offenses also with my client, as to whether or not he wanted me to request that, and he has indicated, and I have a signed statement to that effect, that he is aware of the circumstances and has elected only to request that the Court submit it on second degree murder or not guilty, and I just wanted the record to reflect that, and if the Court wanted to inquire, I have no objection.

COURT: Mr. Liner, if you would stand, please, sir.

Mr. Liner, you have conferred with your attorney, Mr. Hunt, as to your election not to request this Court submit to the jury the lesser included offenses of voluntary manslaughter and involuntary manslaughter, is that correct?

MR. LINER: Yes, your Honor.

COURT: Has he explained to you those charges?

MR. LINER: Yes.

COURT: . . . and you have asked him any questions you desired?

MR. LINER: Yes, sir.

COURT: And is it your decision after conferring with your attorney not to request this Court to instruct on involuntary manslaughter and voluntary manslaughter?

MR. LINER: Yes, your Honor.

The cases cited by defendant in support of his argument, *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974), *State v. Ferrell*, 300 N.C. 157, 265 S.E.2d 210 (1980), *State v. Little*, 51 N.C. App. 64, 275 S.E.2d 249 (1981), and *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983), simply stand for the proposition that the trial judge is required to submit possible lesser included offenses as verdicts when the evidence gives rise to such an offense. These cases, however, do not stand for the proposition that defendant cannot waive his right to have verdicts of lesser included offenses submitted to the jury even though the evidence might give rise to such verdicts. The State cites *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969), and *State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988), in support of its contention that defendant can waive certain constitutional rights. These cases cited by the State are not applicable.

We hold that a defendant who knowingly, intelligently, and voluntarily waives his right to have the trial judge submit to the jury possible verdicts of lesser included offenses and instructions thereon may not thereafter assign as error on appeal the judge's failure to submit such possible verdicts of lesser included offenses even though the evidence at trial gave rise to possible verdicts of lesser included offenses. In the present case, the record affirmatively discloses that defendant knowingly, intelligently, and volun-

tarily waived any right he had to have the judge submit to the jury the possible verdict of involuntary manslaughter. Defendant advised the judge that he knew the consequences of his request not to have the possible verdicts of lesser included offenses submitted to the jury. He also told the judge that he had conferred with his counsel who had explained the charges to him and answered any questions that he had. This assignment of error has no merit.

Defendant received a fair trial free from prejudicial error.

No error.

Judges JOHNSON and EAGLES concur.

JEAN L. SIKES v. JAMES M. SIKES

No. 8910DC758

(Filed 5 June 1990)

1. **Divorce and Alimony § 24.5 (NCI3d)— child support—interim order—no error**

Defendant's contention in a child custody and support action that the court erred by ordering retroactive and prospective child support even though he was in compliance with a previous support order was without merit where the court had entered an interim order clearly and unequivocally intended to facilitate the transfer of custody to plaintiff pending an agreement between the parties or a determination by the court of the appropriate level of support. The order in question was the first time a determination on the merits of child support had been made, no findings relating to a change of circumstances were required, and the order did not constitute a modification of a previous order.

Am Jur 2d, Divorce and Separation §§ 1039-1042, 1045, 1056.

2. **Divorce and Alimony § 24.9 (NCI3d)— child support—findings—no error**

There were sufficient findings and conclusions to support payment of child support where the court made specific find-

ings concerning the actual sums expended by plaintiff since custody of the sons was transferred to her, the reasonableness of those sums, and defendant's ability to contribute to the payment of those past expenditures. Although the trial court erred in denominating the amount due for retroactive child support as "arrears," that error was not prejudicial. N.C.G.S. § 50-13.4(c).

Am Jur 2d, Divorce and Separation §§ 1039-1042, 1045, 1056.

3. **Divorce and Alimony § 24.9 (NCI3d)— child support—no finding as to net income—no abuse of discretion**

The trial court did not abuse its discretion in an action for child custody and support by finding that both parties had the ability to contribute to the support of the children and that the sums ordered were reasonable where the court failed to make a finding as to defendant's net income but found that defendant's gross income was $53,540.00, as compared to plaintiff's gross income of $13,100.00, and made findings about the parties' expenses, plaintiff's net income, and the children's expenses.

Am Jur 2d, Divorce and Separation §§ 1039-1042, 1045, 1056.

4. **Divorce and Alimony § 24.1 (NCI3d)— child support—child with learning disability—private schooling**

The trial court did not err in an action for child custody and support by ordering defendant to pay a portion of the expenses incurred for private schooling for a child with a learning disability. Although defendant contended that the State of North Carolina is required by law to provide an adequate education for the child and that it was error to hold him responsible for paying a portion of expenses for private education without his consent, there was ample evidence to support the trial court's findings that the child's progress while attending public schools was grossly inadequate and that the educational expenses incurred by plaintiff for her son's attendance at the private school were reasonable. The trial court did not order defendant to contribute to future costs of private schooling but found that the parties should make further attempts to find an appropriate educational program in the public system.

Am Jur 2d, Divorce and Separation §§ 1039-1042, 1045, 1056.

5. Divorce and Alimony § 27 (NCI3d)— child support—attorney fees—no error

The trial court did not abuse its discretion by ordering defendant to pay a portion of plaintiff's attorney fees in an action for child custody and child support. N.C.G.S. § 50-13.6.

Am Jur 2d, Divorce and Separation §§ 597, 1061.

Judge LEWIS dissenting in part and concurring in part.

APPEAL by defendant from Order of *Judge Jerry W. Leonard* entered 2 March 1989 in WAKE County District Court. Heard in the Court of Appeals 6 February 1990.

Donald H. Solomon, P.A., for plaintiff appellee.

Ragsdale, Kirschbaum, Nanney & Sokol, P.A., by William L. Ragsdale, for defendant appellant.

COZORT, Judge.

Defendant appeals from an order of the trial court ordering defendant to pay back child support, prospective child support, a portion of expenses incurred for special education for one child, and a portion of plaintiff's attorney's fees. We affirm.

The parties were formerly husband and wife, having married on 24 June 1968. Four children were born of the marriage, two daughters, born 29 March 1970 and 6 November 1971, and two sons, born 15 April 1976 and 24 June 1977. The parties are now divorced. Pursuant to an amended separation agreement, all four children had resided with defendant since 5 February 1986.

On 21 August 1986, plaintiff filed an action for custody and child support. Defendant filed Answer, and the matter came on for hearing in October of 1986 in Wake County District Court before Judge L. W. Payne. The record does not disclose the contents of that hearing. In January of 1987, Judge Payne sent notice to the parties' attorneys that an order was due and should be presented to the court by 20 February 1987. On 23 February 1987 Judge Payne ordered counsel to appear in court to report the status of the case and the reason for the order not having been

drafted. Thereafter, counsel met in chambers with Judge Payne, who signed an Interim Order on 10 March 1987 as follows:

> Upon a conference in Chambers with Counsel for the Plaintiff and the Defendant, on March 6, 1987, and upon representations that the custody of the two minor children Derick Brendon Sikes and Warren James Sikes will be transferred to the Plaintiff, the undersigned Judge of the District Court of Wake County, North Carolina, is of the opinion that an Interim Order regarding custody and support of the two minor sons of the parties, Derick Brendon Sikes and Warren James Sikes, should be entered, pending further negotiations and possible agreement between the parties on certain matters.
>
> NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:
>
> 1. That upon entry of this order, the Defendant shall physically transfer custody of the two minor sons to the Plaintiff.
>
> 2. The Defendant, by consent, shall pay to the Plaintiff for the support and maintenance of the two minor children, the sum of $200 per month per child, commencing with the entry of this Order for March, 1987, and a like sum on or before the 10th day of each and every month thereafter until an agreement between the parties with respect to an appropriate level of child support can be reached, or absent such agreement, until further Orders of this Court. The said monthly amount specified herein shall be without preference or prejudice as to a subsequent determination of an appropriate level of child support.
>
> 3. The parties and their respective Counsel are instructed to immediately negotiate and diligently attempt to reach an agreement with respect to an appropriate level of monthly child support, an apportionment of unreimbursed hospital, medical and dental expenses, and an apportionment of the expenses of psychological counseling currently being provided by Ms. Rosie Zeigler.
>
> 4. In the absence of such agreement, and upon motion of either party, this Court will make such determination of child support and apportionment of hospital, medical, dental, and psychological expenses on March 20, 1987, based upon the financial circumstances at that time and enter an Order.

Again, however, the parties failed to come to an agreement on the issue of child support. Defendant procured new counsel. A hearing was held on 22 October 1987 before Judge Jerry W. Leonard, but at the close of the second day of testimony the matter had not concluded and was continued. Hearing of the case was not resumed until 5 January 1988, when the hearing was concluded. The trial court received evidence concerning the parties' respective present incomes and expenses, actual past and present expenses of the children, the youngest son's educational needs, and other evidence. On 2 March 1989, Judge Leonard entered an order making findings and conclusions and ordering defendant (1) to pay child support in the amount of $300.00 per month per child, (2) to pay $4,600.00 in back child support dating from March 1987, (3) to provide insurance coverage for the parties' children and be responsible for all costs of medical and dental care not covered by insurance, (4) to contribute to the private school expenses incurred for the youngest son from March 1987 through completion of the school year in 1988, and (5) to pay a portion of plaintiff's attorney's fees. Defendant appealed.

[1] By his first three assignments of error, defendant assigns error to the order of retroactive and prospective child support on the grounds that defendant was in compliance with a previous order of child support, the trial court failed to find a change in circumstances justifying a modification of that previous order, and the court was without authority to modify that order retroactively. We find no merit to this argument. The Interim Order clearly and unequivocally was intended to facilitate the transfer of custody to plaintiff pending an agreement between the parties or a determination by the trial court as to an appropriate level of support. The order entered by Judge Leonard in March of 1989 was "manifestly the first time a determination on the merits of the issue of child support was made," and thus no findings relating to a change in circumstances were required. *Little v. Little*, 74 N.C. App. 12, 19, 327 S.E.2d 283, 289 (1985). The March 1989 order did not constitute a modification of a previous order for support, much less a retroactive one.

[2] Defendant also contends that the trial court made insufficient findings and conclusions to support the payment for retroactive child support. We do not agree. Under N.C. Gen. Stat. § 50-13.4(c), a trial court may order a defendant to pay retroactive child support representing his or her fair share of the amount actually expended

by the plaintiff which represented the defendant's share of support, taking into consideration the reasonable needs of the children and the ability of the defendant to pay during the time for which reimbursement is sought. *Warner v. Latimer*, 68 N.C. App. 170, 175, 314 S.E.2d 789, 792 (1984). In the March 1989 Order, the trial court made specific findings concerning the actual sums expended by plaintiff since custody of the sons was transferred to her pursuant to the Interim Order, the reasonableness of those sums, and defendant's ability to contribute to the payment of those past expenditures. Defendant correctly notes the trial court's error in denominating the amount due for retroactive child support as "arrears." We do not, however, find prejudicial error in the trial court's misnomer.

[3] Defendant further contends that the trial court erred in finding that both parties had the ability to contribute to the support of the minor children and that the sums ordered as support were reasonable, because the trial court failed to make a finding as to his net income. The court found that defendant's gross income was $53,540.00, as compared to plaintiff's gross income of $13,100.00, and made findings about the parties' expenses, plaintiff's net income, and the children's expenses. We hold that these findings are sufficient under N.C. Gen. Stat. § 50-13.4(c) to satisfy the requirement that the court give "due regard" to the parties' estates, earnings, conditions, and accustomed standard of living. Defendant has not argued to this Court nor does the record disclose any evidence that he does not have the ability to contribute to the support of his minor sons in the amount determined by the trial court. The amount of child support is a matter for determination by the trial court in its discretion and will not be disturbed on appeal absent an abuse of that discretion. *Warner v. Latimer*, 68 N.C. App. at 174, 314 S.E.2d at 792. We discern no abuse of that discretion here.

We have reviewed defendant's remaining challenges to several of the court's findings and conclusions which he contends are either irrelevant or unsupported by the evidence. We find that the errors, if any, are minor discrepancies, nonprejudicial, and not grounds for reversing the court's order. For the foregoing reasons, the errors assigned to the trial court's order regarding past and prospective child support are overruled.

[4] By his next assignment of error, defendant contends that the trial court erred in ordering him to pay a portion of the expenses incurred by plaintiff for private schooling for the parties' youngest child, who has a learning disability. Although he takes issue with several findings of fact which he contends are unsupported by the evidence, the crux of his argument is that, pursuant to Article 9 of Chapter 115C of the General Statutes, the State of North Carolina is required by law to provide an adequate education for the parties' child and, therefore, it was patent error for the court to find that the sums expended by plaintiff for private education were reasonable and to hold defendant responsible for paying for a portion of those expenses without his consent. We do not agree.

The trial court heard testimony from plaintiff and Dr. Silber at the Achievement School about the child's lack of progress in the public school system and his significant improvement since enrolling in the Achievement School in March of 1987. Plaintiff testified about the problems experienced in the public schools the child previously attended. She testified that she enrolled her son in the Achievement School because she felt that her son had not been given an adequate opportunity to learn even the most basic academic skills and because he was falling farther behind and needed immediate help. On cross-examination, plaintiff admitted that she had not pursued the procedure whereby public funds for private schooling might be obtained. Dr. Silber, found by the trial court to be an expert in learning disabilities and educational development, testified that, when the child enrolled in Achievement School, his skills were at a preschool level or were so low that the child was "nontestable," but that, after five or six months, his scores "ranged from first grade up to first grade seven months."

We find that there is ample evidence to support the trial court's findings that the child's progress while attending public schools was "grossly inadequate" and that the educational expenses incurred by plaintiff for her son's attendance at the Achievement School in 1987 and 1988 were reasonable for the child's care, maintenance, and educational needs. Unlike the court in *Evans v. Craddock*, 61 N.C. App. 438, 300 S.E.2d 908 (1983), relied upon by defendant, the trial court here gave due regard to the factors set forth in N.C. Gen. Stat. § 50-13.4(c) and made appropriate findings and conclusions. We do not agree with defendant that the availability of a publicly funded educational program precludes such a finding. The trial court did not order defendant to contribute

to future costs of private schooling for his son but found that the parties should make further attempts to find an appropriate educational program in the public system. Given the court's findings regarding the income and expenses of the parties and the needs of their children, we also find no error in requiring the parties to pay the costs of the child's educational expenses in proportion to their gross incomes.

[5] By his next assignment of error, defendant contends that the trial court erred in ordering defendant to pay a portion of plaintiff's attorney's fees. N.C. Gen. Stat. § 50-13.6 allows the trial court, in its discretion, to award payment of reasonable attorney's fees in an action for custody and support to an interested party who has acted in good faith and who has insufficient means to defray the expense of the suit. In an action for support, attorney's fees may be awarded if 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. N.C. Gen. Stat. § 5-13.6 (1989). For the reasons stated earlier in this opinion, we reject defendant's argument that an award of attorney's fees was improper because defendant was in compliance with a previous order for support and because there was no substantial change in circumstances. Therefore, assuming that it was necessary for the court to make such a finding, we hold that the court did not err in finding that defendant had refused to provide support which was adequate under the circumstances existing at the time of the institution of the action. This assignment of error is overruled.

Defendant last assigns error to entry of the order almost fourteen months after the hearing on 5 January 1988. We find no prejudice resulted from the delay, and we decline to invalidate the judgment for that reason.

Affirmed.

Judge WELLS concurs.

Judge LEWIS concurs in part and dissents in part.

Judge LEWIS dissenting in part and concurring in part.

I respectfully dissent. The trial court found that "the defendant has complied with the payments of [the interim Order]" and yet

ordered defendant to pay "arrearages for the children in the care of the Plaintiff from March, 1987 through the date of the entry of this Order [March, 1989]" at the rate of "$100.00 per month per child." The interim Order stated that defendant would pay the specified amount "until further Orders of this Court," at which time there would be "a *subsequent determination* of an appropriate level of child support." (Emphasis added.) The majority contends: "Defendant correctly notes the trial court's error in denominating the amount due for retroactive child support as 'arrears.' We do not, however, find prejudicial error in the trial court's misnomer." I disagree. The trial court, in referring to "arrearages," apparently confused "arrearages" with retroactive child support. "Arrearages" refers to amounts that are overdue and unpaid. Since defendant had complied with the payments of the interim Order, there can be no "arrearages" under the terms of the existing Order.

Defendant is also under no obligation to make retroactive payments for child support. The North Carolina Supreme Court in *Fuchs v. Fuchs* held that the retrospective increase in child support previously allowed by the trial court was not supported either in law or in equity without evidence of an "emergency situation" providing justification for the increase. 260 N.C. 635, 641, 133 S.E.2d 487, 492 (1963). No such "emergency situation" has been shown in this case. Although *Warner v. Latimer* does allow "a claim for retroactive child support" which may be brought under N.C. General Statute § 50-13.4, 68 N.C. App. 170, 174, 314 S.E.2d 789, 792 (1984), plaintiff must demonstrate a change in circumstances in order to allow modification of the prior Order. The majority alleges that "no findings relating to a change in circumstances were required" because the Interim Order was made solely "to facilitate the transfer of custody." It was, however, a Court Order, and even a temporary order requires a showing of a change in circumstances for that Order to be modified. *Ellenberger v. Ellenberger*, 63 N.C. App. 721, 306 S.E.2d 190, *disc. rev. allowed*, 309 N.C. 631, 308 S.E.2d 714 (1983). The court did not have the authority to order "arrearages" or retroactive child support when there was an Order in force with which defendant complied and there was no showing of substantial change in circumstances.

Likewise, the trial court may not order defendant to pay private school expenses for the minor child Warren for the time period prior to the March 1989 order. For the reasons stated above, a retroactive modification of the preexisting court order is improper

in the case at bar. Defendant fully complied with the March 1987 order which had no provision for payment for private school educational expenses. The trial court made proper findings of fact and conclusions of law based on competent evidence concerning defendant's *subsequent* obligation to pay his proportionate share of the necessary educational expenses for the minor child. The trial court erred in ordering the payment of "arrearages for money spent" for Warren's private school expenses.

The majority's award of attorney's fees was based partially on its conclusion that defendant "refused to provide support which [was] adequate under the circumstances existing at the time of the institution of this action." I disagree with that conclusion based on the reasoning stated above. However, I concur with the decision to award attorney's fees because, as the majority states, plaintiff in this action for child support "acted in good faith" and had "insufficient means to defray the expense of the suit." I therefore concur as to the award of attorney's fees.

With respect to the majority's decision on the remaining assignments of error, I concur.

G. WALLACE NEWTON AND NEWTON INSTRUMENT COMPANY, INC. v. UNITED STATES FIRE INSURANCE COMPANY, A CORPORATION AND NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION

No. 8914SC959

(Filed 5 June 1990)

1. **Insurance § 149 (NCI3d) — liability insurance — primary insurer bankrupt — Insurance Guaranty Association — umbrella insurer not primary insurer**

Where plaintiffs' primary liability insurer in an amount of $500,000.00 was declared bankrupt after an injury to a third party, the N.C. Insurance Guaranty Association became plaintiffs' insurer in the amount of $300,000.00, and plaintiffs also had an umbrella policy with a second insurer at the time of the injury, the umbrella policy did not "drop down" and become the primary liability coverage for a $185,000.00 claim by the injured third party because, under the terms of the umbrella policy, the second insurer was not obligated to cover any claim

against plaintiffs unless the claim was greater than $500,000.00 regardless of whether that $500,000.00 was "collectible."

Am Jur 2d, Insurance § 103.

2. **Master and Servant § 89.1 (NCI3d)— injury to worker—willful negligence by co-employee—common law liability—genuine issue of fact**

A genuine issue of material fact existed as to whether alleged actions by an injured worker's co-employee amounted to willful, wanton and reckless negligence so as to subject the co-employee to common law liability to the injured worker.

Am Jur 2d, Master and Servant §§ 398, 399; Workmen's Compensation §§ 67, 330, 331.

3. **Insurance § 149 (NCI3d)— employee's claim against co-employee—employer's liability insurance—policy exclusions**

An injured worker's claim against a co-employee individually was not excluded from coverage under the employer's liability policy by a provision excluding coverage for an obligation for which the insured may be held liable under the workers' compensation law since the co-employee was not individually liable to the injured worker under the Workers' Compensation Act. However, there was an issue of fact as to whether the employer assumed liability for the employee's injuries in a contract with a temporary employment service so that a policy exclusion for bodily injury to an employee arising out of and in the course of the employment would not apply.

Am Jur 2d, Master and Servant §§ 398, 399; Workmen's Compensation §§ 67, 330, 331.

4. **Master and Servant § 89.1 (NCI3d)— willful negligence by co-employee—vicarious liability of employer—Workers' Compensation Act as exclusive remedy**

The Workers' Compensation Act was an employee's exclusive remedy against the employer based on vicarious liability for the willful, wanton and reckless negligence of a co-employee.

Am Jur 2d, Master and Servant §§ 398, 399; Workmen's Compensation §§ 67, 330, 331.

APPEAL by plaintiffs and defendant United States Fire Insurance Company from order entered 14 April 1989 and by plaintiffs from order entered 7 July 1989 by *Judge Howard E. Manning, Jr.* in DURHAM County Superior Court. Heard in the Court of Appeals 13 March 1990.

This is a declaratory judgment action. At issue is which of the defendants, if either, is liable for a previously settled claim against plaintiffs. The previously settled claim arose out of litigation between plaintiffs here and David Riley. Riley sued plaintiffs, alleging that he was injured on 2 May 1984 while working with a press brake on the premises of plaintiff Newton Instrument Company, Inc. (NIC). Riley alleged that his injuries were caused by the negligence of NIC and G. Wallace Newton (Newton). Riley's employment with NIC was arranged through Manpower Temporary Services.

On the date of the injury plaintiffs were insured against liability for bodily injury by Iowa National Insurance Company (Iowa National) in the amount of $500,000. Iowa National was declared bankrupt on 10 October 1985. Upon Iowa National's insolvency, under G.S. 58-48-35(a) (formerly G.S. 58-155.48) the North Carolina Insurance Guaranty Association (NCIGA) became plaintiffs' insurer in the amount of $300,000. NCIGA undertook the defense in the Riley litigation under a reservation of rights. On the date of the injury plaintiffs also had an "umbrella" policy with defendant United States Fire Insurance Company (U.S. Fire).

Plaintiffs demanded that NCIGA and U.S. Fire settle the Riley litigation. Defendants refused to settle on plaintiffs' behalf, each asserting that it did not provide liability insurance coverage to plaintiffs for the allegations contained in the Riley litigation. Additionally, NCIGA and U.S. Fire asserted that workers' compensation benefits were Riley's exclusive remedy. Notwithstanding the workers' compensation argument, plaintiffs, without the consent of NCIGA or U.S. Fire, settled the Riley litigation for $185,000.

Plaintiffs brought this suit to collect its settlement expenses and to determine the relative liabilities of the two insurance carriers. NCIGA answered and cross-claimed against U.S. Fire. NCIGA denied that the Riley litigation was a "covered claim" under the Insurance Guaranty Association Act, G.S. 58-48-1, *et seq.* (formerly G.S. 58-155.41, *et seq.*). Additionally, NCIGA cross-claimed against U.S. Fire, alleging that U.S. Fire had primary liability and that

NCIGA was entitled to reimbursement of defense costs incurred in the Riley litigation. U.S. Fire answered and denied liability. All parties moved for summary judgment on all claims.

In an order filed 14 April 1989 the trial court denied plaintiffs' motions; granted both defendants' motions as to NIC, finding that Riley was an employee of NIC at the time of his injury and therefore his injuries were covered by workers' compensation and expressly excluded from coverage by defendants' policies; denied U.S. Fire's motion as to Newton, finding that there was a genuine issue whether the claims in the Riley litigation were covered by U.S. Fire's policy; granted NCIGA's motion as to Newton; and, regarding the cross-claim, found that U.S. Fire's coverage "dropped down" when Iowa National became insolvent and U.S. Fire became the primary insurer. Therefore, the trial court held that if at trial U.S. Fire is deemed liable for Riley's claim against Newton, U.S. Fire must also reimburse NCIGA for defense costs incurred in the Riley litigation.

U.S. Fire appeals the disposition of the cross-claim summary judgment motions and the denial of its motion for summary judgment on the claims of Newton. Plaintiffs moved for alteration or amendment of the judgment under Rule 59(e), asking the court to strike the paragraph in the judgment that stated there was "no just reason for delay." Plaintiffs' motion was denied in an order entered 7 July 1989. Plaintiffs appeal the denial of their Rule 59(e) motion and the entries of summary judgment against them.

Yates, Fleishman, McLamb & Weyher, by Joseph W. Yates, III and Bruce W. Berger, for plaintiff-appellants.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks, for defendant-appellee/appellant United States Fire Insurance Company.

Moore & Van Allen, by Joseph W. Eason, Christopher J. Blake and Kelley Dixon Moye, for defendant-appellee North Carolina Insurance Guaranty Association.

EAGLES, Judge.

This case involves appeals by three different parties. For the reasons stated below, we reverse the entry of summary judgment against U.S. Fire on NCIGA's cross-claim and remand for entry of summary judgment in favor of U.S. Fire. Therefore, NCIGA is the primary insurer for Riley's claims against NIC and Newton.

Regarding plaintiffs' appeals, we affirm the entry of summary judgment in favor of NCIGA on the claims of NIC based on the exclusivity of the workers' compensation remedy but reverse the entry of summary judgment in favor of NCIGA on the claims of Newton.

U.S. Fire Insurance Company's Appeal

[1] The question raised by U.S. Fire's appeal is whether the trial court erred in granting summary judgment in favor of NCIGA on its cross-claim against U.S. Fire. The trial court determined that the provisions of the U.S. Fire policy were ambiguous and that the contract must be construed in favor of the insured. Therefore, the trial court concluded that the U.S. Fire policy "dropped down" to become the primary insurer and, as between U.S Fire and NCIGA, U.S. Fire was the carrier primarily liable for the claims in the Riley litigation. Our review of the U.S. Fire policy leads us to the conclusion that U.S. Fire's coverage does not "drop down" and become primary coverage. Therefore, summary judgment in favor of NCIGA on the cross-claim was improper.

In North Carolina, it is well settled that when construing an insurance policy a court must enforce the policy as written, "without rewriting the contract or disregarding the express language used." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). The U.S. Fire insurance policy provides that:

> The Company agrees to pay on behalf of the insured the ultimate net loss in excess of the retained limit hereinafter stated, which the insured may sustain by reason of the liability imposed upon the insured by law, or assumed by the insured under contract, for:
>
> (a) Bodily Injury Liability,
>
> * * *
>
> arising out of an occurrence.

The policy also provides that the "retained limit" is the greater of:

> (a) the total of the applicable limits of the underlying policies listed in Schedule A hereof, and the applicable limits of any other insurance collectible by the insured; or
>
> (b) the self-insured retention stated in Item 4(c) of the declarations as the result of all occurrences not covered by said underly-

> ing insurance, and which shall be borne by the insured, separately as respects each annual period of this policy.

The policy provisions recited above are almost identical to the provisions involved in *Molina v. United States Fire Ins. Co.*, 574 F.2d 1176 (4th Cir. 1978). In *Molina* the court stated that

> [u]nder its policies U. S. Fire agreed to pay on [the insured's] behalf "the ultimate net loss in excess of the retained limit which the insured shall become legally obligated to pay," and the "retained limit" is defined as "the total of the applicable limits of the underlying policies listed in Schedule A." . . . . Clearly the obligation of U. S. Fire was to pay only the ultimate net loss in excess of the policy limits of the primary coverage of [the insolvent underlying carrier's] policies.

Id. at 1178.

NCIGA argues that because the word "collectible" is used in the definition of "retained limit," U.S. Fire's coverage should drop down to become primary coverage. We disagree. The word "collectible," as used in this policy, clearly modifies only the second part of subsection (a) in the definition of retained limit and applies only to insurance policies that are not listed in Schedule A of the policy. Plaintiffs' policy with Iowa National was listed in Schedule A and the applicable limit of that policy was $500,000. Under the terms of the contract, U.S. Fire was not obligated to cover any claim against plaintiffs unless the claim was greater than $500,000 regardless of whether that $500,000 was "collectible." We note the possibility of a "gap" in coverage that may occur when a primary carrier becomes insolvent since the statutory cap on NCIGA's liability here is $300,000. However, there is no "gap" here since Riley's claims amounted to $185,000.

NCIGA also argues there is significance in an amendatory endorsement in U.S. Fire's policy with plaintiffs. The endorsement replaced a provision that expressly addressed the liability of U.S. Fire in the event of the insolvency of an underlying insurer. The deleted provision stated that "[i]n the event there is no recovery available to the insured as a result of the bankruptcy or insolvency of the underlying Insurer, the coverage hereunder shall apply in excess of the applicable limit of liability specified in Schedule A." This particular provision was *not* a part of U.S. Fire's policy with plaintiffs. The provision was replaced with language that does not

expressly address U.S. Fire's obligations when an underlying insurer becomes insolvent. NCIGA argues that the change in this provision renders the the policy ambiguous on the "drop down" issue. We disagree. The record discloses that when the policy here was originally issued, it already included the amendatory endorsement. Therefore, the "original provision" that expressly addressed the liability of U.S. Fire on the insolvency of an underlying insurer was never part of plaintiffs' contract with U.S. Fire. Since there was no "change" in plaintiffs' policy with U.S. Fire, there is no ambiguity.

Based on the clear language of the contract U.S. Fire is not liable for claims against plaintiffs that are less than $500,000. The claim involved in this case was for $185,000. If either carrier is liable for the claims arising out of the Riley litigation, the carrier liable is NCIGA. Therefore, the trial court erred in granting summary judgment in favor of NCIGA on its cross-claim against U.S. Fire; U.S. Fire was entitled to summary judgment.

Plaintiffs' Appeal

Because of our determination of the "drop down" issue, the remaining issue is whether the Riley litigation claims are covered by plaintiffs' policy with Iowa National and by the Insurance Guaranty Association Act. We find that the claims against NIC were not covered since Riley's exclusive remedy against NIC was under the Workers' Compensation Act. We also agree with the trial court that there are outstanding issues regarding Newton's personal liability. Newton would be personally liable to Riley only if Newton's conduct is found to be willful, wanton and reckless negligence. Additionally, we find there is an issue of fact whether the potential claims are excluded from coverage by the Iowa National policy. Therefore, we conclude that summary judgment in favor of NCIGA on Newton's claims was improperly granted.

(A) Claims against Newton.

[2] The issues involved here are whether the actions alleged in the Riley litigation subject Newton to common law liability and, if so, is that liability covered by the Iowa National policy and the Insurance Guaranty Association Act. The trial court concluded that "a disputed issue of material fact exists with respect to whether the claims against Newton were excluded from the coverages of the policies issued to [NIC]." We agree.

"[T]he Workers' Compensation Act does not shield a co-employee from common law liability for willful, wanton and reckless negligence." *Pleasant v. Johnson*, 312 N.C. 710, 716, 325 S.E.2d 244, 249 (1985). However, the Act is the exclusive remedy for an employee who is injured by the ordinary negligence of a co-employee. *Id.* at 713, 325 S.E.2d at 247. G.S. 97-2(2) defines "employee" as "every person engaged in an employment under any appointment or contract of hire . . . . [and e]very executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article." Riley and Newton were co-employees under the Act.

There is an issue of fact whether the allegations contained in the Riley litigation amount to willful, wanton and reckless negligence. Additionally, whether the Iowa National policy and the Insurance Guaranty Association Act cover Riley's claims against Newton is in issue.

[3] NCIGA argues that because two exclusions from the policy apply, Riley's claims are not covered. The policy provides that:

> This insurance does not apply:
>
> * * *
>
> (i) to any obligation for which the insured or any carrier as his insurer may be held liable under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law;
>
> (j) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured or to any obligation of the insured to indemnify another because of damages arising out of such injury; but this exclusion does not apply to liability assumed by the insured under an incidental contract[.]

NCIGA argues that paragraph (i) excludes Riley's claims against Newton from the policy's coverage. We disagree. Because they were co-employees Newton was not individually liable to Riley under the Workers' Compensation Act for the injuries Riley sustained.

NCIGA also asserts that paragraph (j) excludes Riley's claims against Newton from the policy's coverage. Newton argues that

NIC assumed liability for Riley's injuries in its contract with Manpower. After careful review of the record, we have determined there is an issue whether NIC assumed liability for Riley's injury in its contract with Manpower. Although the parties have asserted different arguments in regard to this contract, the contract is not in the record before us. Therefore, we cannot determine whether Newton's individual liability is insured by the Iowa National policy.

(B) Claims against NIC.

[4] Riley's claim against NIC was based solely on vicarious liability. NIC argues that this cause of action was recently suggested by our Supreme Court in *Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987). We disagree and affirm the entry of summary judgment in favor of defendants on the claims of NIC.

Plaintiff relies on language from *Abernathy* where the Court stated that "we find it unnecessary to decide, or even consider, whether an employer may be held vicariously liable in a civil action by one of its employees for the willful, wanton or reckless conduct of its other employees, arising out of and in the course of their employment." *Id.* at 241, 362 S.E.2d at 562. NIC asserts that the Supreme Court's use of this language suggests that the Court will consider an additional exception to the exclusivity of the Workers' Compensation Act with respect to vicarious liability of employers for the willful, wanton and reckless negligence of their employees. We disagree.

Our reading of *Abernathy* draws us to the conclusion that when the Supreme Court employed the language quoted above, the Court was simply disposing of all of the parties' arguments. The Court had determined that the employee's actions were merely negligent, as a matter of law, and that there was no basis for finding the employee had acted in a willful, wanton or recklessly negligent manner. Therefore, the Court was merely stating that since there was no basis for liability of the co-employee there was no reason to discuss the possibility of the employer's vicarious liability. We find no merit in NIC's argument and decline further to extend the established exceptions to the exclusivity of workers' compensation benefits.

For the reasons stated, we reverse the entry of summary judgment in favor of NCIGA on its cross-claim and remand for

entry of summary judgment in favor of U.S. Fire. Additionally, we affirm the entry of summary judgment in favor of NCIGA against NIC. We reverse summary judgment in favor of NCIGA against Newton and remand for trial.

Affirmed in part, reversed in part and remanded.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA v. CINEMA BLUE OF CHARLOTTE, INC., A NORTH CAROLINA CORPORATION, AKA CINEMA BLUE ADULT ENTERTAINMENT CENTER, AKA CINEMA BLUE OF CHARLOTTE, AKA CINEMA BLUE; JIM ST. JOHN; AND CURTIS RENE PETERSON

No. 8926SC765

(Filed 5 June 1990)

1. **Obscenity § 3 (NCI3d) — disseminating obscenity — exclusion of expert testimony**

The trial court in an obscenity prosecution did not abuse its discretion in excluding expert testimony as to the proper community standard for obscenity in Mecklenburg County and the community acceptance of sexually explicit materials comparable to those allegedly disseminated by defendants.

Am Jur 2d, Lewdness, Indecency, and Obscenity § 34.

2. **Obscenity § 3 (NCI3d) — conspiracy to disseminate obscenity — prior sales of sexually explicit materials**

Testimony indicating that a store sold sexually explicit materials for several years prior to 1988 was admissible to show that the corporate and individual defendants were aware that the store was selling sexually explicit materials at the time of an alleged conspiracy to disseminate obscenity in 1988.

Am Jur 2d, Evidence § 323; Lewdness, Indecency, and Obscenity §§ 15, 38.

3. Criminal Law § 79.1 (NCI3d)— guilty pleas of codefendants— admissibility to strengthen credibility

Testimony by two codefendants concerning their guilty pleas to the obscenity charges for which defendants were being tried was admissible to strengthen their credibility as witnesses.

Am Jur 2d, Evidence §§ 323-326, 666, 667; Lewdness, Indecency, and Obscenity §§ 15, 38.

4. Criminal Law § 79 (NCI3d)— obscenity case—past arrests and plea bargains of store employees—admissibility to show intent and plan

Testimony by two former employees of defendant adult entertainment center concerning their past arrests and plea arrangements in obscenity cases was admissible to show intent and plan on the part of defendant to engage in a conspiracy to disseminate obscenity. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 323-326, 666, 667; Lewdness, Indecency, and Obscenity §§ 15, 38.

5. Criminal Law § 322 (NCI4th)— joinder of all defendants and charges for trial

The trial court did not abuse its discretion in granting the State's motion to join all defendants and charges for trial in a prosecution for conspiracy to disseminate obscenity and dissemination of obscenity and in denying one defendant's motion for a severance where all three defendants were charged as members of a single conspiracy and the dissemination charges arose out of this conspiracy. N.C.G.S. § 15A-926(a).

Am Jur 2d, Conspiracy § 39.

6. Criminal Law § 1133 (NCI4th)— conspiracy—accessory before the fact—inducement of others aggravating factor

The trial court's finding as an aggravating factor for conspiracy to disseminate obscenity and dissemination of obscenity as an accessory before the fact that defendants induced others to participate in each offense was not improperly based on evidence necessary to prove an element of each offense in violation of N.C.G.S. § 15A-1340.4(a)(1).

Am Jur 2d, Criminal Law §§ 598, 599.

7. **Obscenity § 3 (NCI3d) — conspiracy to disseminate obscenity — accessory before the fact to dissemination of obscenity — sufficient evidence of scienter**

The State presented sufficient evidence of scienter to support convictions of the individual defendants on charges of conspiracy to disseminate obscenity and dissemination of obscenity as accessories before the fact where the State's evidence tended to show that defendants were supervisors of an adult entertainment store and had visited the store on a number of occasions for business purposes, that the store sold only sexually explicit materials, and that many of those materials were in plain view of anyone who entered the store.

Am Jur 2d, Lewdness, Indecency, and Obscenity § 15.

8. **Obscenity § 1 (NCI3d) — obscenity statute — constitutionality**

The statute proscribing the dissemination of obscenity, N.C.G.S. § 14-190.1, is not unconstitutionally vague and overbroad.

Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 3-8.

APPEAL by defendants from *Gray (Marvin K.), Judge.* Judgments entered 24 February 1989 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 May 1990.

Defendants were charged in proper bills of indictment with multiple counts of dissemination of obscenity in violation of G.S. 14-190.1 and with common law conspiracy to disseminate obscenity. Each defendant was convicted by a jury on two counts of dissemination of obscenity and one count of common law conspiracy to disseminate. At the sentencing hearing, the trial court found factors in aggravation and mitigation with respect to each offense and concluded in each case that the aggravating factors outweighed the mitigating factors. From judgments imposing prison sentences totaling six years on each individual defendant and fining defendant Cinema Blue $150,000, defendants appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Harold M. White, Jr., and Assistant Attorney General Thomas J. Ziko, for the State.

Lee J. Klein for defendants, appellants.

Nelson Casstevens, Jr., for defendant, appellant Cinema Blue of Charlotte, Inc.

George Daly for defendant, appellant Jim St. John.

Calvin Murphy for defendant, appellant Curtis Rene Peterson.

HEDRICK, Chief Judge.

[1] In their first two arguments on appeal, defendants contend the trial court erred in excluding expert testimony by Dr. Joseph Scott. Defendants sought to have Dr. Scott testify as to 1) the proper community standard for obscenity in Mecklenburg County and 2) the community acceptance of other sexually explicit materials "comparable" to those which defendants were convicted of disseminating. Defendants correctly point out that "appropriate expert testimony" may be offered "to explain to juries what they otherwise would not understand" in an obscenity case. *State v. Anderson*, 322 N.C. 22, 26-28, 366 S.E.2d 459, 463, *cert. denied*, --- U.S. ---, 109 S.Ct. 513 (1988). However, the trial court has wide discretion in determining whether to admit expert testimony in such cases. *Id.* We have reviewed the record on appeal and find no abuse of discretion by the trial judge in excluding this testimony. Defendants' argument has no merit.

[2] Defendants next argue that the trial court should have sustained their objection to "evidence of events at Cinema Blue in 1985." They claim that because the trial court decided to "dismiss charges [against defendants] for conduct that occurred in 1985," testimony by Captain Thomas Barnes of the Charlotte Police Department regarding observations and purchases he made in 1985 at Cinema Blue was more prejudicial than probative. Thus, according to defendants, such testimony should have been excluded under G.S. 8C-1, Rule 703. We disagree.

To support a charge of conspiracy to disseminate obscenity, the State is required to prove scienter on the part of the particular defendant. To satisfy this element of the offense, each defendant must have at least a general familiarity with the sexually explicit nature of the materials in question. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887 (1974). Circumstantial evidence which suggests such familiarity is therefore admissible. In the instant case, testimony indicating that Cinema Blue had sold sexually explicit materials for several years prior to 1988 tends to show that

the corporate defendant and the individual defendants, both of whom began working for Cinema Blue before 1988, were aware that the store was selling sexually explicit materials at the time of the alleged conspiracy. Consequently, the trial court properly allowed Captain Barnes' testimony.

[3, 4] In defendants' fourth argument, based on assignment of error number nine, they complain that "[t]he trial court erred in admitting testimony of arrests, plea bargains and prior convictions of Cinema Blue's clerks." Defendants claim this testimony violated the rule which bars convictions and guilty pleas by a codefendant from being admitted as evidence of a defendant's guilt. *State v. Campbell*, 296 N.C. 394, 205 S.E.2d 228 (1979). Nevertheless, our Supreme Court has held that a guilty plea by a codefendant is admissible to show that the codefendant was not being treated too leniently in exchange for testifying against the defendant. *State v. Rothwell*, 308 N.C. 782, 303 S.E.2d 798 (1983). Furthermore, testimony concerning prior arrests, plea bargains, and convictions by employees of Cinema Blue is admissible under G.S. 8C-1, Rule 404(b) if it tends to show motive, opportunity, intent, preparation, plan, or knowledge on the part of a defendant. In the case at bar, testimony by Grady Burr and David Schoch, two codefendants, was properly admitted under the rule in *Rothwell* to strengthen their credibility. Testimony by Mr. Schoch and former employee Ernest Smith regarding their past arrests and plea arrangements was properly allowed because it tends to show the intent and plan on the part of defendant Cinema Blue to engage in a conspiracy to disseminate obscenity.

Defendants also contend the trial court erred "in allowing testimony of hearsay declarations of a codefendant." They argue that David Schoch was improperly allowed to repeat "incriminating statements about Defendant St. John purportedly made to him by Defendant Peterson." The essence of these alleged statements was that defendant St. John was Schoch's new boss. Nevertheless, we find no conceivable prejudice to defendants resulting from their admission. Mr. Schoch's testimony, even absent the statements in question, clearly portrays his relationship with St. John as one between employee and boss. Defendants' assignment of error is therefore overruled.

[5] Defendants next complain the trial court acted improperly by dismissing defendant St. John's motion to sever and by allowing

the State to join all defendants and charges for one trial. Defendants point out that Mr. St. John was not alleged to have participated in a conspiracy to disseminate until after April 1987, and they argue that denial of his motion to sever, in view of evidence admitted at trial regarding events in 1985, prejudiced his defense.

G.S. 15A-926(a) allows consolidation of separate offenses for trial when the offenses charged are "based on the same act or transaction or on a series of transactions connected together or constituting parts of a single scheme or plan." Subsection (b) similarly permits joinder of separate defendants for trial when the several offenses charged are transactionally related. This requirement is satisfied when the offenses in question all arose out of a single conspiracy. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981).

In addition to the transactional requirement, the trial court must determine that none of the defendants would be deprived of a fair trial by being tried together or by facing more than one charge at the same trial. *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985). However, when the offenses are transactionally related, the trial court's ruling on a motion for joinder or severance is discretionary and, absent a showing of abuse, will not be disturbed on appeal. *State v. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, *cert. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982); *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982).

In the present case, all three defendants were charged as members of a single conspiracy to disseminate obscenity. The remaining charges were all for disseminating obscenity in some capacity and clearly arose out of this conspiracy. Thus, the proper standard for review by this Court is abuse of discretion. We have reviewed the record and find no such abuse by the trial judge in granting the State's motion for joinder or in dismissing defendant St. John's motion to sever. Defendant's argument has no merit.

Defendants next contend the trial court erred in its instructions to the jury. They complain that the court should have given several instructions proposed by defendants which address the scope of First Amendment protection and elements of the standard for obscenity. We have examined the instructions given by the trial judge and find them to be sufficient. The instructions proposed by defendants but refused by the trial court were not necessary to a proper determination on the issue of obscenity. Consequently, this assignment of error is overruled.

[6] In assignment of error number seventeen, based on exceptions eleven through nineteen in the record, defendants claim the trial judge erred at sentencing by finding as a factor in aggravation that defendants "induced others to participate in the commission of" each offense of conspiracy to disseminate and dissemination as an accessory before the fact. Such findings, according to defendants, violated G.S. 15A-1340.4(a)(1) which provides that "[e]vidence necessary to prove an element of the offense [charged] may not be used to prove any factor in aggravation. . . ." We disagree.

While G.S. 15A-1340.4(a)(1) indeed prohibits basing an aggravating factor on circumstances essential to establishment of a defendant's guilt for a particular crime, our Supreme Court has indicated that many of the factors listed in the statute "contemplate a duplication in proof without violating [that] proscription. . . ." *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983). In the case of a criminal conspiracy, the State must show, by competent evidence, only that the defendant entered into an agreement with one or more other persons to do an unlawful act or to do a lawful act by unlawful means or in an unlawful manner. *State v. Massey*, 76 N.C. App. 660, 334 S.E.2d 71 (1985). Although essential evidence of the agreement may also suggest that the accused induced others to participate in the conspiracy, the fact that he did so is not required to establish his guilt as a conspirator. With respect to a conviction for being an accessory before the fact, the State must show that defendant either gave advice or counsel to the principal or did some act which aided the principal in the commission of the offense. Once again, however, it does not matter that certain evidence essential to establish the giving of aid or advice by defendant also tends to show he persuaded the principal to commit the offense in question. Such duplication in proof does not prohibit the trial judge from using the evidence to find a factor in aggravation. We therefore conclude that the trial judge did not err at sentencing.

[7] Defendants next argue that the trial court erred by denying their motions to dismiss because "[i]nsufficient evidence [was] presented to support conspiracy or accessory before the fact charges." They contend that the State failed to produce any evidence of "scienter" to support defendants' convictions.

In ruling on a motion to dismiss pursuant to G.S. 15A-1227, the trial court must consider the evidence presented in the light

most favorable to the State, and the State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). If there is evidence, direct or circumstantial, from which a jury could reasonably find that defendant had committed the offense charged, the motion to dismiss must be denied. *State v. Simmons*, 57 N.C. App. 548, 291 S.E.2d 815 (1982). In the present case, the record tends to show that the Cinema Blue store sold only sexually explicit materials and that much of these materials were in plain view of anyone who entered the store. The record also indicates that the individual defendants were supervisors of the store and had visited the store on a number of occasions for business purposes. We believe that this evidence constituted sufficient proof of scienter to withstand a motion to dismiss. Defendants' argument has no merit.

[8] Finally, defendants assign as error the trial court's denial of several pretrial motions to dismiss the charges against them arguing that G.S. 14-190.1 is unconstitutionally overbroad and vague. Nevertheless, this Court has held G.S. 14-190.1 to be neither vague nor overbroad because of the specificity with which it defines which types of "sexual conduct" are considered obscene. *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). This argument has no merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges JOHNSON and EAGLES concur.

EUNICE HARMON RAGAN AND TERRY WALL, FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, JANET BUTLER, FOR HERSELF AND ALL OTHERS SIMILARLY SITUATED, AND DONNELL S. KELLY, FOR HIMSELF AND ALL OTHERS SIMILARLY SITUATED v. THE COUNTY OF ALAMANCE, THE BOARD OF COMMISSIONERS FOR THE COUNTY OF ALAMANCE, AND W. B. TEAGUE, JR., JOSEPH P. BARBOUR, T. FRANK BENNETT, CARY D. ALLRED, AND LARRY W. SHARPE, ALL DULY ELECTED AND ACTING COMMISSIONERS OF AND FOR ALAMANCE COUNTY

No. 8915SC974

(Filed 5 June 1990)

1. **Counties § 9 (NCI3d)— mandamus to compel courthouse improvements—sovereign immunity**

The Court of Appeals declined the county's invitation to expand the doctrine of sovereign immunity in a case in which plaintiffs sought a writ of mandamus to compel improvements in the Alamance County Courthouse. There is no precedent in which a county in North Carolina has sought to use the sovereign immunity doctrine as a shield from mandamus, and the modern tendency is to restrict rather than to extend the perimeters of governmental immunity.

Am Jur 2d, Mandamus §§ 129, 220, 228.

2. **Mandamus § 2 (NCI3d)— action to compel courthouse improvements—discretionary function—mandamus not appropriate**

A petition for a writ of mandamus to compel improvements to the Alamance County Courthouse was remanded with instructions that the complaint be dismissed because mandamus lies only to compel the performance of a specific act required by statute. N.C.G.S. § 7A-302 directs only that a county provide courtrooms, but the kind of courthouse needed is a discretionary matter vested in the Commissioners. Although plaintiffs contended that the inadequate courthouse deprived them of constitutionally-protected guarantees and statutory rights, none of the constitutional provisions or statutes asserted by plaintiffs specify the specific way nor the prescribed extent by which those provisions might be satisfied. There are no ministerial functions at issue here that the trial judge could order the Commissioners to fulfill.

Am Jur 2d, Mandamus §§ 129, 220, 228.

APPEAL by defendants from order entered 20 July 1989 in ALAMANCE County Superior Court by *Judge J. Milton Read, Jr.* Heard in the Court of Appeals 14 March 1990.

Latham, Wood, Eagles, and Hawkins, by James F. Latham, B.F. Wood, and William A. Eagles, for plaintiff-appellees.

Alamance County Attorney S.C. Kitchen, and Human Resources Attorney Carol Vincent Miller, for defendant-appellants.

DUNCAN, Judge.

Plaintiffs seek a writ of mandamus ordering defendants to make certain improvements to the Alamance County Courthouse. Defendants appealed after the trial judge denied their motion to dismiss this action. Because we hold that mandamus may not issue in this case, we vacate and remand with instructions that the judge enter an order dismissing the Complaint.

I

Plaintiffs, representing a class of people similarly situated, allege that the Courthouse in Alamance County is, in multiple respects, inadequate. Plaintiffs Eunice Ragan and Terry Wall are paraplegics who rely upon wheelchair transportation; they charge that the absence of ramps and elevators in the Courthouse deprives them of access to the Office of the Clerk of Superior Court, to the Small Claims Court, and to the Superior Court. Plaintiff Janet Butler has served as a foreperson of the grand jury; among other things, she alleges that the grand jury must deliberate in a converted coal bin in the basement of the Courthouse and that the jury's deliberations can be heard in the public hallways. Plaintiff Donnell S. Kelly is a practicing attorney who appears regularly in the civil and criminal courts; he alleges, in part, that there are no areas in the Courthouse nor in the Courthouse Annex that allow for confidential communications between lawyers and their clients. Each of these plaintiffs, moreover, is a taxpayer in Alamance County.

Plaintiffs petitioned the trial judge for a writ of mandamus to issue against defendants, the County of Alamance, its Board of Commissioners, and the Board's members. Defendants moved to dismiss the Complaint on jurisdictional grounds. The judge's denial of defendants' motion is the subject of this appeal.

II

Defendants argue that the trial court cannot exercise personal jurisdiction in this action because 1) the Board of Commissioners and its members are not the real parties in interest because N.C. Gen. Stat. § 153A-11 (1987) requires that suits be brought against a county in the county's name only, and 2) because Alamance County enjoys immunity from suit. Plaintiffs contend that defendants' appeal from a denial of a motion to dismiss is interlocutory and that defendants have attempted to " 'boot-strap' their way into this Court by denominating this argument as one of 'personal jurisdiction.' "

[1] We do not address, in its substance, the real-party-in-interest argument brought forward by the Board and the individual Commissioners. In our view, both arguments defendants make on appeal are, in essence, directed at whether the County may assert sovereign immunity. The Commissioners, named here in their representative capacities, would be protected by the County's immunity were the latter able to invoke it. *See Baucom's Nursery Co. v. Mecklenburg County*, 89 N.C. App. 542, 544, 366 S.E.2d 558, 560, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). Alternatively, if mandamus may ultimately issue in this case, defendants concede that the writ would be directed to the Commissioners, their status as real parties in interest during the trial phase of this case notwithstanding. We focus our discussion, then, on the sovereign-immunity ground advanced by the County.

These plaintiffs are not the first to seek mandamus to compel a county to improve its court facilities. In *Ward v. Comm'rs*, our Supreme Court said that the writ "will not lie to compel . . . county commissioners to repair or build a courthouse." 146 N.C. 534, 535, 60 S.E. 418, 418 (1908). *Ward* was preceded by *Vaughn v. Comm'rs*, in which the Court said it had "no authority vested in the commissioners of determining what kind of a courthouse is needed or what would be a reasonable limit to the cost." 117 N.C. 432, 434, 23 S.E. 354, 355 (1895). *Vaughn* and *Ward* have been followed in subsequent cases in this State. *See State v. Leeper*, 146 N.C. 655, 61 S.E. 585 (1908); *Burgin v. Smith*, 151 N.C. 561, 66 S.E. 607 (1909). However, we find no case turning on the jurisdictional arguments defendants advance here. Rather, as the *Ward* Court explained, our courts will not issue the writ when the relief sought is directed at a discretionary function: "[B]uilding a new

courthouse or repairing an old one is not a mere ministerial matter, admitting of no debate, but is one of discretion, committed to the county commissioners, in regard to which their judgment and discretion must prevail, and not the opinion of a judge." 146 N.C. at 536, 60 S.E. at 418.

The County's novel resort to the sovereign-immunity doctrine is, perhaps, as plaintiffs assert, calculated to permit an immediate appeal from the denial of defendants' motion to dismiss. *See Zimmer v. N.C. Dept. of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 116-17 (1987) (in which Court of Appeals adhered to cases holding that sovereign immunity presents question of personal jurisdiction). However, we decline the County's invitation to follow its line of analysis because its reasoning is broader than the case law supports.

Following defendants' arguments, § 153A-11 requires that only a county be named when mandamus is sought in a county matter. The county, in turn, may then defeat jurisdiction by invoking the sovereign-immunity doctrine. Defendants' analysis would leave our courts powerless to compel government officials to perform their ministerial duties, as we discuss next. Such a result is clearly not correct. We need not construe § 153A-11 nor the concept of sovereign immunity in the manner defendants assert, as our traditional refusal to act when mandamus is sought in discretionary matters rests on a firmer ground.

Mandamus, like the mandatory injunction, uses the *in personam* contempt power of the court to coerce an individual public officer to perform a plain duty. *Orange County v. N.C. Dept. of Transp.*, 46 N.C. App. 350, 384-85, 265 S.E.2d 890, 912, *disc. review denied*, 301 N.C. 94 (1980). The power of our courts to issue such orders is bestowed by Article IV, § 1 of the North Carolina Constitution. *Id.* at 385, 265 S.E.2d at 913. A county is required by statute to provide "courtrooms and related judicial facilities" for its citizens, N.C. Gen. Stat. § 7A-302 (1989), and it is within the province of the courts to determine what are necessary public buildings. *Hightower v. City of Raleigh*, 150 N.C. 569, 571, 65 S.E. 279, 281 (1909). It is within the authority of our courts, therefore, to command a county's officials to fulfill the ministerial, nondiscretionary public duty mandated by § 7A-302. *See Orange County*, 46 N.C. App. at 385, 265 S.E.2d at 913; *Burgin*, 151 N.C. at 566, 66 S.E. at 610.

We find, moreover, no precedent in which a county in this State has sought to use the sovereign-immunity doctrine as a shield from mandamus. Typically, a county asserts immunity in the tort context, the context, indeed, in which the doctrine first entered our jurisprudence. *See Moffit v. City of Asheville*, 103 N.C. 237, 9 S.E. 695 (1889). In addition, the "modern tendency" is to restrict rather than to extend the perimeters of governmental immunity, *see Koontz v. City of Winston-Salem*, 280 N.C. 513, 529, 186 S.E.2d 897, 908, *reh'g denied*, 281 N.C. 516 (1972), and we decline the County's invitation to so expand the doctrine in this case.

Although we are not convinced by the jurisdictional arguments presented by defendants, the authority they cite offers clear authority governing the ultimate resolution of this case. In the interest of judicial economy—because, in our view, defendants must inevitably prevail in this case—we will treat this appeal as a petition for certiorari to determine whether mandamus may issue. N.C. Gen. Stat. § 7A-32(c) (1989); *see Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 288-89, 266 S.E.2d 812, 814 (1980).

III

[2] As we noted above, a county is required by statute to furnish courtrooms and related judicial facilities for its citizens, § 7A-302, and our courts have the authority to determine what are necessary public buildings and what classes of expenditures by a county are necessary ones. *See Vaughn*, 117 N.C. at 434, 23 S.E. at 355. The judicial power, however, does not extend towards determining such matters as the kind of courthouse that is needed nor the reasonable limits of its cost. *Id.; see also Burgin*, 151 N.C. at 567-68, 66 S.E. at 610. Rather, mandamus lies only to compel the performance of a specific act required by statute. *Ward*, 146 N.C. at 538, 60 S.E. at 419. Mandamus would lie, therefore, to command a county to provide court facilities as directed by § 7A-302. "[W]hat kind of a courthouse is needed," however, is a discretionary matter vested in the commissioners. *Vaughn*, 117 N.C. at 434, 23 S.E. at 355.

As the Court said in *Ward*, courts cannot compel officials "to do any specific act *not required by statute to be done in a specific way or to a prescribed extent*." 146 N.C. at 536, 60 S.E. at 418-19 (emphasis added). Although *Vaughn*, *Ward*, and *Burgin* did not address themselves to the statute at issue here, § 7A-302 directs only that a county "provide" courtrooms; we think the type of court facilities provided remains a matter of discretion with the

county officials. The reasoning of the prior courthouse decisions is thus applicable here. *See* Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 18-20 (1974).

Plaintiffs assert that the prior decisions of our Supreme Court are inapposite because plaintiffs allege that the inadequate Courthouse has deprived them of constitutionally-protected guarantees and statutory rights. They make these contentions: 1) that N.C. Const. Art. I, §§ 18, 19, 24 and 25 of the North Carolina Constitution command that every person have access to the courts, equal protection of the laws, and the right to jury trials in civil and criminal matters; 2) that N.C. Gen. Stat. § 168-2 (1987) provides handicapped persons with the same right of access and use of public places as the law provides the able-bodied, and N.C. Gen. Stat. § 168A-7 (1987) states that it is discriminatory for a department of State "to refuse to provide reasonable aids and adaptations necessary for a known qualified handicapped person to use or benefit from existing public services operated by such entity . . ."; 3) and that N.C. Gen. Stat. § 15A-623(e) (1988) requires that all grand jury proceedings be in secret, except as the law otherwise provides.

As sympathetic as plaintiffs' allegations may be, a mandamus in this case would necessarily intrude upon the discretionary powers of the Commissioners. Would the trial judge, for example, command that the grand jury room be soundproofed, or would he order that a guard be posted in the hallway whenever the jury met? None of the constitutional provisions nor statutes asserted by plaintiffs specify the "specific way" nor the "prescribed extent" by which those provisions might be satisfied. There are not, in short, mere ministerial functions at issue here that the trial judge could order the Commissioners to fulfill. Plaintiffs, rather, ask the courts to enter into an area in which we have historically declined to intervene. We adhere, therefore, to our precedents and hold that mandamus may not issue in this case. In so holding, we express no opinion as to whether other avenues might be available for these plaintiffs to pursue.

IV

Holding that mandamus is not available as a remedy for plaintiffs, the order of the trial judge is vacated, and the case is remanded with instructions that the Complaint be dismissed.

Vacated and remanded.

Judges ARNOLD and LEWIS concur.

STATE OF NORTH CAROLINA v. WILLIAM ARTHUR MORENO

No. 8910SC846

(Filed 5 June 1990)

1. **Criminal Law § 813 (NCI4th)— character trait as substantive evidence—instruction**

State v. Bogle, 324 N.C. 190, stands for the principle that a criminal defendant will be entitled to an instruction on a good character trait as substantive evidence of innocence when defendant satisfies a four-part test; first, the evidence must be of a trait of character and not merely evidence of fact; second, the evidence of the trait must be competent; third, the trait must be pertinent; and fourth, the instruction must be requested by defendant.

Am Jur 2d, Trial §§ 793, 794, 797-801, 803-805.

2. **Criminal Law § 815 (NCI4th)— instruction on character testimony as substantive evidence—erroneously denied—no prejudice**

The trial court in a prosecution for trafficking in cocaine correctly refused to instruct the jury on character traits including honesty, loyalty, and generosity as substantive evidence of innocence where those traits were not pertinent to the criminal charges against defendant. The court also correctly refused to instruct the jury on good character as it pertained to defendant's not dealing in drugs because that was plainly evidence of a fact; however, the trial court erred by refusing to instruct on law-abidingness as a character trait and on evidence of his not using drugs as a character trait. The error was not prejudicial because defendant admitted on cross-examination that he had been convicted of giving false information to a police officer and because there was very strong evidence of defendant's guilt.

Am Jur 2d, Trial §§ 793, 794, 797-801, 803-805.

APPEAL by defendant from judgments entered 17 March 1989 in WAKE County Superior Court by *Judge Samuel T. Currin*. Heard in the Court of Appeals 8 May 1990.

Defendant was charged by proper indictments with trafficking in cocaine by possession, trafficking in cocaine by transporting, and conspiracy to possess cocaine, all in violation of G.S. § 90-95. The State's evidence at trial tended to establish that at approximately 4:00 p.m. on 7 October 1988, Agent Terry Turbeville of the State Bureau of Investigation received a telephone call from Sergeant Blois of the St. Louis Airport Drug Task Force informing him that defendant, en route to Raleigh-Durham Airport from Los Angeles via TWA and travelling under the name of "Arthur Manzano," had missed his connecting flight and was acting suspiciously, creating a disturbance over his bag being sent ahead of him.

After the flight arrived at Raleigh-Durham at 4:24 p.m., Agent Turbeville observed an unclaimed blue suitcase in the TWA baggage claim area. He put the suitcase in a row of other bags and had the row examined by a narcotics detection dog from the Johnston County Sheriff's Department. The dog "alerted" on the blue suitcase. A second narcotics detection dog, assigned to the State Highway Patrol, then arrived. It, too, alerted on the blue suitcase.

Agent Turbeville then obtained a search warrant and searched the suitcase, retrieving a plastic bag containing a quantity of cocaine. The suitcase was reclosed and held in custody until the next TWA flight from St. Louis arrived at approximately 12:00 midnight. At that time, Agent Turbeville returned the suitcase to the TWA baggage office. Shortly thereafter, defendant arrived and took the blue suitcase from the TWA baggage clerk. Defendant was then stopped, questioned, and arrested. Defendant was further instructed to remove the contents of his pockets. Among the items in defendant's pockets was a piece of paper with a number to a digital pager belonging to codefendant Arthur Whitley (not a party to this appeal). Whitley had hired defendant to transport the suitcase from Los Angeles to Raleigh.

The State's evidence further tended to establish that the cocaine retrieved from defendant's suitcase consisted of 237 grams of 85% pure uncut and undiluted cocaine. A fingerprint, determined to belong to defendant, was found on the plastic bag containing the cocaine.

The jury returned verdicts of guilty on all charges. Following the sentencing hearing, the trial court found as a statutory aggravating factor that defendant has a prior conviction or convictions punishable by more than 60 days' confinement. The trial court further found as an additional, nonstatutory aggravating factor that defendant gave false information to a law enforcement officer. Defendant was sentenced to the maximum term of twenty years' imprisonment on each of the two trafficking convictions, such terms to run consecutively. Defendant was also sentenced to twenty years' imprisonment for the conviction of conspiracy to possess cocaine, such sentence being suspended and defendant being placed on five years' probation.

From the judgments entered on the jury's verdicts of guilty, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Alan S. Hirsch, for the State.

J. Randolph Riley for defendant-appellant.

WELLS, Judge.

[1] Defendant's seventh assignment of error challenges the trial court's refusal to instruct the jury that it could consider certain evidence of his good character as substantive evidence of his innocence. The record reveals that defendant requested instructions on his law-abidingness, honesty, generosity, loyalty, religious devoutness, being church-going, not using or dealing in drugs, being hard working, being a good provider, not being extravagant, and being naive. Proof on these character traits was made through defendant's witness Tina Shelton, his girlfriend, in the form of both reputational and opinion testimony. The trial court, however, declined to give the requested instructions.

The decisional precedents governing the circumstances in which a criminal defendant is entitled to a jury instruction on a good character trait as substantive evidence of innocence were extensively reviewed by our Supreme Court in *State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989). We thus need not recite those precedents here. Careful reading of *Bogle* and the authorities on which it relies convinces us that our Supreme Court in *Bogle* sought to synthesize the line of cases construing Rules 404 and 405 of the Rules of Evidence, in light of the well-established duty of the trial

court to instruct the jury on the substantial and essential features of the case arising on the evidence, and thereby articulate a clear standard which must be satisfied before a criminal defendant will be entitled to an instruction on a good character trait as substantive evidence of his innocence.

Although not stated there in precisely this form, we perceive *Bogle* to stand for the principle that a criminal defendant will be entitled to such an instruction when he satisfies the following four-part test. First, the evidence must be of a "trait of character" and not merely evidence of a fact (*e.g.*, "being 'law-abiding' addresses one's *trait of character* of abiding by all laws, a lack of convictions addresses only the *fact* that one has not been convicted of a crime"). *Bogle* at 200, 376 S.E.2d at 751 (emphasis original). Second, the evidence of the trait must be competent (*i.e.*, in addition to satisfying all other applicable standards, the evidence must be in the proper form as required by Rule 405). *Id.* at 198-202, 376 S.E.2d at 749-52. Third, the trait must be pertinent (*i.e.*, relevant in the context of the crime charged in that it bears a special relationship to or is involved in such crime). *Id.* at 198, 201, 376 S.E.2d at 749, 751. And fourth, the instruction must be requested by the defendant. *Id.* at 199, 376 S.E.2d at 750 (*citing State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988)). In determining whether this test is satisfied, the trial court must view the facts of the case in the light most favorable to the defendant. *Id.* (*citing State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985)).

[2] Setting aside for the moment defendant's request as it pertains to evidence of his "law-abidingness" and "not using or dealing in drugs," it is plain that the remainder of the traits on which defendant sought an instruction, *e.g.*, "honesty," "loyalty," "generosity," and the like, are not pertinent to the criminal charges against defendant. *See Bogle, supra* at 202, 376 S.E.2d at 752 (honesty and truthfulness not pertinent to charge of trafficking in marijuana). Thus, the third prong of the test is clearly not satisfied, and the trial court therefore did not err in refusing to instruct the jury that it could consider evidence of such character traits as substantive evidence of defendant's innocence.

Defendant's requested instructions on "law-abidingness" and "not using or dealing in drugs," however, present different questions. Turning to the first of these, we note that our Supreme Court has stated that law-abidingness is a character trait that

is pertinent in virtually all criminal cases. *Bogle, supra* at 198, 376 S.E.2d at 749 (*citing State v. Squire*, 321 N.C. 541, 364 S.E.2d 354 (1988)). Thus, the sole remaining question is whether the evidence of defendant's law-abidingness is competent. As we noted above, proof of this character trait was made through defendant's girlfriend, Tina Shelton, in the form of opinion and reputational testimony. This testimony was based on the witness' having known defendant for approximately four and one-half years prior to the 13 March 1989 date of the trial, *i.e.*, since approximately September 1984. Ms. Shelton's testimony is clearly competent under the requirements stated in *Bogle.* Having satisfied the four-part test, defendant was entitled to an instruction on law-abidingness, and the trial court therefore erred in refusing to instruct the jury that it could consider the evidence of defendant's law-abidingness as substantive evidence of defendant's innocence.

Turning to defendant's requested instruction on his good character as it pertains to his "not using or dealing in drugs," we note that this in fact presents two distinct but related questions: (1) whether "not using drugs" and (2) whether "not dealing in drugs" satisfy the requirements of *Bogle.* As to the second of these, evidence of not dealing in drugs is plainly evidence of a fact, indeed, a fact at issue in this case. It thus fails the first prong of the test, and defendant was therefore not entitled to an instruction that his "good character" for not dealing in drugs could be considered by the jury as substantive evidence of his innocence. "Not using drugs," however, is clearly a character trait, akin to sobriety. Hence the first prong of the test is satisfied. The remaining prongs of the test are also satisfied in that defendant's evidence of this trait is competent, the trait is plainly pertinent to this prosecution for trafficking and conspiracy to traffic in cocaine, and defendant requested the instruction. Consequently, defendant was also entitled to an instruction that evidence of his not using drugs could be considered as substantive evidence of his innocence.

Having determined that the trial court erred in refusing to instruct the jury on defendant's law-abidingness and not using drugs, we are next required by G.S. §§ 15A-1442(4)d and -1443(a) to determine whether such error redounds to the prejudice of defendant. In making this determination, we note that neither *Bogle*, nor the precedents upon which it relies, hold that such error is prejudicial *per se* or as a matter of law. Accordingly, our inquiry is directed to the question of whether there is a reasonable possibility that

a different result would have been reached at trial had these errors not been committed. N.C. Gen. Stat. § 15A-1443(a). *See also State v. Carson*, 80 N.C. App. 620, 343 S.E.2d 275 (1986); *State v. Miller*, 69 N.C. App. 392, 317 S.E.2d 84 (1984). Defendant bears the burden of demonstrating prejudice under this standard. *Id.*

Defendant has not surmounted his burden. First, with respect to the trial court's refusal to instruct on law-abidingness the record shows that defendant himself later admitted, on cross-examination, that he had been convicted in Los Angeles County Court on 14 January 1986 of giving false information to a police officer. Defendant's own testimony thus flatly contradicts the prior testimony of Ms. Shelton that defendant is law-abiding. Second, we note generally that there was very strong evidence of defendant's guilt. There was no question as to defendant's ownership or control of the suitcase which contained the bag of cocaine. Moreover, defendant's fingerprint on the cocaine bag points directly to his knowledge that the cocaine was in his suitcase. Consequently, we cannot conclude that there is a reasonable possibility that the jury in this case would have returned verdicts of not guilty had the trial court given these instructions. We therefore conclude that the trial court's failure to instruct the jury on defendant's law-abidingness and not using drugs was not prejudicial to defendant.

Defendant's remaining assignments of error have been carefully considered, are determined to be without merit, and are therefore overruled.

For the reasons stated, we conclude that defendant had a fair and impartial trial, free from prejudicial error.

No error.

Judges PARKER and DUNCAN concur.

R. L. COLEMAN & COMPANY, PLAINTIFF v. CITY OF ASHEVILLE, DEFENDANT

No. 8928SC1209

(Filed 5 June 1990)

1. **Municipal Corporations § 33.4 (NCI3d)— expansion of mall— driveway intersection—city council minutes not ambiguous**

The trial court erred in a declaratory judgment action seeking a judgment that plaintiff was entitled to construct an intersection with the driveway angle less than ninety degrees as part of a mall expansion by concluding that city council minutes requiring the ninety degree angle were ambiguous. It is uncontroverted that at the time plaintiff's proposed mall expansion project was under consideration, the private road within the mall had been in existence since 1973, had been used throughout that time by the public to enter and exit the mall, and intersected a public road at a driveway angle of approximately sixty-five to seventy degrees; the city council minutes plainly reflect that the question of changing the driveway angle was before the city council, the city's director of planning and zoning recommended that the driveway angle of the intersection be modified to create a T, public comment was received on the recommendation, and the minutes are devoid of any hint that the T intersection under consideration was other than perpendicular. Additional language in the minutes referring to city standards does not create an ambiguity even though there is a section of the Asheville Zoning Ordinance allowing a minimum driveway angle of sixty degrees because that is but one of many design specifications governing driveway entrance construction. The additional language in the minutes plainly refers not to driveway angle but to the remainder of the specifications governing such driveway entrance construction.

Am Jur 2d, Zoning and Planning §§ 143, 294.

2. **Municipal Corporations § 34 (NCI3d)— mall expansion—parking area—city requirements reasonably met**

The trial court did not err in an action arising from a mall expansion by finding and concluding that the parking area as actually constructed reasonably met the requirements established by the city where the evidence shows that the

actual construction of the parking area deviated from the plans approved by the city council only in its realignment of the directional orientation of the individual parking spaces, there was no change in the total area set aside for parking in the west parking area, and the effect of the realignment was to cause a mere nine parking spaces in that area to be redistributed among the approximately four thousand total parking spaces available at the mall.

Am Jur 2d, Zoning and Planning §§ 143, 294.

APPEAL by defendant from judgment entered 30 August 1989 in BUNCOMBE County Superior Court by *Judge Forrest A. Ferrell.* Heard in the Court of Appeals 8 May 1990.

On 13 December 1988, plaintiff-developer filed its complaint seeking a declaratory judgment that it was entitled to construct, as part of its expansion of the Asheville Mall Shopping Center, an intersection connecting Brackettown Road, a private road within the mall, to White Pine Drive, a public road adjacent to the mall, by a driveway angle of less than ninety degrees. Plaintiff also sought injunctive relief instructing the City not to withhold a certificate of occupancy, or driveway and curb cut permits, upon completion of the intersection to incorporate a driveway angle of less than ninety degrees.

The City answered and counterclaimed, alleging that plaintiff was required, as a condition for the City's approval of the expansion project, to construct the intersection at a driveway angle of ninety degrees. The City further alleged that plaintiff had redesigned the west parking area of the mall in violation of the intent of the site plan approval.

The evidence at the trial before Judge Ferrell, sitting without a jury, tended to establish that on 22 December 1987, the Asheville City Council held a public meeting for the purpose, *inter alia,* of considering whether to approve plaintiff's plans for the expansion project. After hearing recommendations from its director of planning and zoning, as well as public comment on the expansion project, the city council approved the plan contingent upon the following pertinent requirement stated in the minutes: "[T]hat the Mall construct a 'T' intersection from Bracket[t]own Road onto White Pine Drive according to city standards and approved by city staff."

Following further conversations with city staff, plaintiff constructed the intersection at a driveway angle of sixty degrees. The City thereafter advised plaintiff that it would not issue a certificate of occupancy for the mall expansion project or issue driveway and curb cut permits, on the grounds that the city council, in providing that plaintiff construct a "T" intersection, required that such intersection be constructed at a driveway angle of ninety degrees.

Judge Ferrell found that the minutes of 22 December 1987 were ambiguous in the requirement that plaintiff construct a "T" intersection according to city standards, and concluded and declared that plaintiff was entitled to construct the intersection at sixty degrees, subject to conditions not pertinent to this appeal. Judge Ferrell also found and concluded that plaintiff's construction of the west parking area reasonably met the requirements of the City and declared that plaintiff was entitled to construct and maintain this parking area as constructed. The City was ordered not to withhold a certificate of occupancy or driveway and curb cut permits.

From the judgment entered granting the relief sought by plaintiff, the City appeals.

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

Nesbitt & Slawter, by William F. Slawter; and Sarah Patterson Brison, Assistant City Attorney, for defendant-appellant.

WELLS, Judge.

[1] By its first argument, the City challenges the trial court's finding that the minutes of the 22 December 1987 proceedings in the city council were ambiguous regarding the requirement that plaintiff construct a "T" intersection as part of the mall expansion and the trial court's concluding and declaring plaintiff to be entitled to construct and maintain the intersection of Brackettown Road and White Pine Drive at a driveway angle of sixty degrees. In addressing this issue, we note that the question of whether the City is authorized to regulate the manner of constructing driveway connections between private and public roads is not before us. We are here concerned only with the question of whether the City, in requiring plaintiff to construct a "T" intersection at the

junction of Brackettown Road and White Pine Drive as a condition for its approval of plaintiff's mall expansion, unambiguously indicated that such intersection be constructed at a driveway angle of ninety degrees. We hold that it did.

It is well settled that when the trial judge sits as factfinder, his findings of fact are binding if they are supported by any competent evidence in the record, but his conclusions of law are reviewable. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985). "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties [and] . . . must be based on the facts found by the court[.]" *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

The trial court's finding of fact number nine provides, in pertinent part:

> The Minutes of December 22, 1987, of Defendant's City Council . . . are ambiguous in their requirement that the Mall construct a "T" intersection from Brackettown Road onto White Pine Drive according to "city standards."

This is plainly not a finding of fact but a conclusion of law. Hence, it is reviewable by this Court.

In support of the trial court's determination, plaintiff contends that the minutes of the 22 December 1987 city council meeting make no provision for a "ninety-degree angle" and that there was no discussion or mention in the meeting referring to a "T" intersection or the angle in which Brackettown Road would meet White Pine Drive. We disagree.

It is uncontroverted that at the time plaintiff's proposed mall expansion project was under consideration by the City Brackettown Road had been in existence since 1973, had been used throughout that time by the motoring public to enter and exit the mall, and intersected White Pine Drive at a driveway angle of approximately sixty-five to seventy degrees. Moreover, the minutes for 22 December 1987, contrary to plaintiff's assertion, plainly reflect that the question of changing the driveway angle of this intersection was before the city council, that the City's director of planning and zoning recommended that the driveway angle of the intersection be modified to create a "T" in order to give a greater sight distance and allow more time for motorists to decide which traffic lane to enter, and that public comment was received on this recommendation. The

minutes are devoid of any hint that the "T" intersection under consideration was other than perpendicular, *i.e.*, ninety degrees.

Plaintiff, however, asserts that the additional language in the minutes, "according to city standards," creates an ambiguity in that city standards, as set forth in section 30-3-15 of the Asheville Zoning Ordinance, permit construction of intersections with a driveway angle of between sixty and ninety degrees. We reject this argument as well.

"Ordinances must receive a reasonable construction and application, and the primary rule for their interpretation and construction is that the intention of the municipal legislative body is to be ascertained and given effect." *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E.2d 200 (1973). It is true that section 30-3-15D.4 of the Asheville Zoning Ordinance allows a minimum driveway angle of sixty degrees. This, however, is but one of many design specifications—including grade, setback, curbing, and the like—that are detailed in section 30-3-15 governing driveway entrance construction generally. Additionally, we note by way of analogy that section 30-2-1 of the ordinance provides that "[e]xcept where specifically defined below, all words in this ordinance shall carry the standard dictionary meanings." Webster's Third New International Dictionary (1976) defines "T," in pertinent part, as "something having the shape of the letter T."

We are persuaded that the City's requirement that plaintiff construct a "T" intersection unambiguously indicated the City's intent that the previously existing, acute driveway angle of sixty-five to seventy degrees be changed to a perpendicular, "T" intersection, having a driveway angle of ninety degrees. This requirement thus disposed of that specification in the ordinance pertaining to driveway angle. The additional language in the minutes "according to city standards" plainly refers, not to driveway angle, but to the remainder of the specifications governing such driveway entrance construction. In the context of this case, the City's approval of plaintiff's mall expansion project contingent upon plaintiff's constructing a "T" intersection from Brackettown Road to White Pine Drive can have but one meaning: that plaintiff was required to change the driveway angle of this intersection to ninety degrees. Plaintiff, however, did not satisfy this requirement but instead constructed the intersection with a driveway angle that, at sixty degrees, is even more acute than the previously existing driveway

angle. The trial court therefore erred in concluding that the 22 December 1987 minutes were ambiguous and that plaintiff was entitled to construct the intersection of Brackettown Road and White Pine Drive with a driveway angle of sixty degrees.

[2] By its second argument, defendant contends that the trial court erred in finding and concluding that parking spaces constructed in the west parking area of the mall reasonably met the requirements of the site plan approval. The evidence, however, tends to show that the actual construction of the parking area deviated from the plans approved by the city council only in its realignment of the directional orientation of the individual parking spaces. There was no change in the total area set aside for parking in the west parking area, and the effect of the realignment was to cause a mere nine parking spaces in that area to be redistributed among the approximately four thousand total parking spaces available at the mall. Accordingly, the trial court did not err in finding and concluding that the parking area as actually constructed reasonably met the requirements established by the City.

In summary, we reverse the portions of the judgment ordering that plaintiff is lawfully entitled to construct the Brackettown Road-White Pine Drive intersection at an angle of sixty degrees and that the City may not withhold a certificate of occupancy, driveway permit, or curb cut permit because of such construction. In all other respects the trial court's judgment is affirmed.

Affirmed in part, reversed in part.

Judges PARKER and DUNCAN concur.

FRANK S. J. McINTOSH, PLAINTIFF v. CAREFREE CAROLINA COMMUNITIES, INC., DEFENDANT v. R. P. THOMAS, THIRD PARTY DEFENDANT

No. 8929SC210

(Filed 5 June 1990)

Negligence § 59.1 (NCI3d)— retirement community—political rally in clubhouse—attendee as licensee

Plaintiff was a licensee rather than an invitee while he was on the premises of defendant's retirement community where

he went to the retirement community clubhouse for a political rally in response to a paid political advertisement, notwithstanding defendant had signs, literature and salespeople at the rally promoting the sale of available units in the retirement community and plaintiff was of retirement age. Therefore, defendant had the duty only to refrain from willfully or wantonly injuring plaintiff and from increasing the hazard to him while he was on the premises, and defendant was not liable for injuries received by plaintiff in a fall on a flagstone walkway allegedly caused by broken flagstones.

Am Jur 2d, Premises Liability §§ 87-113.

Judge GREENE dissenting.

APPEAL by plaintiff from judgment entered 6 October 1988 by *Judge Robert D. Lewis* in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 20 September 1989.

Adams, Hendon, Carson, Crow & Saenger, P.A., by Martin K. Reidinger and Lori M. Glenn, for plaintiff-appellant.

Harrell & Leake, by Larry Leake, for defendant-appellee.

Prince, Youngblood, Massagee & Jackson, by Sharon B. Ellis and Boyd B. Massagee, Jr., for third-party defendant-appellee.

PARKER, Judge.

The sole issue on appeal in this action in which plaintiff seeks to recover for personal injuries arising out of a fall on defendant's premises is whether the trial court erred in entering summary judgment for defendant. Summary judgment should be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *McCurry v. Wilson*, 90 N.C. App. 642, 643, 369 S.E.2d 389, 391 (1988). The moving party may meet this burden by showing that an essential element of the non-moving party's claim or defense is nonexistent. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 421 (1979).

In the instant case the depositions, affidavits and testimony presented at the hearing on the motion showed the following facts: Defendant Carefree Carolina Communities, Inc. (herein "Carefree"), operates a retirement community. Third party defendant R. P. Thomas contacted defendant's agent, who agreed to allow Thomas

to use the clubhouse on defendant's premises for a political rally held on 16 October 1984 in connection with Thomas's re-election campaign. Plaintiff attended the rally in response to an advertisement run in the local newspaper by the committee to re-elect Thomas. At the event defendant had signs, literature and salespeople promoting the sale of available units in the retirement community.

As plaintiff was leaving the clubhouse around 7:00 p.m., he slipped and fell on a flagstone walkway. According to plaintiff's deposition testimony, some of the flagstones were broken and these broken flagstones created a hole one to three inches deep and eight to twelve inches wide. This hole was partially covered by fallen leaves. At the time of the accident, plaintiff was 75 years old, and he stated that he attended the function "[f]or the good of the party."

Plaintiff's status on defendant's premises is determinative of the duty defendant owed plaintiff with respect to the condition of the premises. If plaintiff was an invitee as plaintiff contends, defendant would have the duty to keep the premises in a reasonably safe condition and to warn of any hidden defects which defendant in the exercise of reasonable care should have discovered. *Long v. Methodist Home*, 281 N.C. 137, 139, 187 S.E.2d 718, 720 (1972), and *Goldman v. Kossove*, 253 N.C. 370, 373, 117 S.E.2d 35, 37 (1960). If, however, plaintiff was a licensee as defendant contends, defendant would have only the duty to refrain from wilfully or wantonly injuring plaintiff and from doing any act which increased the hazard to him while on the property. *Andrews v. Taylor*, 34 N.C. App. 706, 709, 239 S.E.2d 630, 632 (1977).

Whether a person is an invitee or licensee is determined by the nature of the business that person has on the premises. As stated by our Supreme Court in *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981).

> A licensee is one who enters on the premises with the possessor's permission, express or implied, *solely for his own purposes* rather than the possessor's benefit. An invitee is a person who goes upon the premises in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979); *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E.2d 154 (1959).

Id. at 497, 279 S.E.2d at 586-87 (emphasis in original).

Applying this test to the case at bar, we hold that plaintiff was a licensee. The undisputed evidence is that plaintiff went to the clubhouse in response to a paid political advertisement, not at defendant's invitation; that he went for political reasons; and that he had no interest in defendant's promotional efforts to sell retirement units. Hence, there is no showing of a mutual benefit between plaintiff and defendant. *See Martin v. City of Asheville*, 87 N.C. App. 272, 360 S.E.2d 467 (1987), and *Turpin v. Church*, 20 N.C. App. 580, 202 S.E.2d 351 (1974).

Plaintiff argues that defendant indirectly invited him as a member of the general public and thus indirectly benefited from his presence. In support of his position, plaintiff relies on *Coston v. Hotel*, 231 N.C. 546, 57 S.E.2d 793 (1950). *Coston*, however, is distinguishable from the present case. In *Coston*, plaintiff was in the lobby of defendant hotel to visit a friend. The Court held that plaintiff was an invitee for the reason that she used the "facilities in the hotel that were reasonably within the invitation extended by a place of that kind for the use of the public generally." *Id.* at 547, 57 S.E.2d at 795. In the present case, defendant's clubhouse is located in a private, residential retirement community, and there is no evidence to support a finding that the clubhouse was ever open to the general public without express invitation.

Plaintiff also contends that even if this Court should hold that he is as a matter of law a licensee, he is nevertheless entitled to a trial on the issue of defendant's wilful and wanton negligence. Nothing in the record suggests, however, that defendant engaged in wilful or wanton conduct. Plaintiff's argument that the condition had existed for some time without repair might have bearing if plaintiff were an invitee, which he is not. This Court will not impose on a property owner the same duty owed to a licensee as is owed to an invitee. As to the licensee, the property owner is liable only for wilful or wanton negligence or affirmative or active negligence which increases the hazard to the licensee on the premises. *Briles v. Briles*, 43 N.C. App. 575, 576, 259 S.E.2d 393, 394 (1979), *disc. rev. denied*, 299 N.C. 329, 265 S.E.2d 394 (1980).

Based on the evidence adduced at the summary judgment hearing and applicable law, defendant was entitled to summary judgment. Accordingly, the judgment of the trial court is affirmed.

Affirmed.

Judge EAGLES concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that the plaintiff was, as a matter of law, a licensee. I believe the defendant's forecast of evidence does support a finding that plaintiff was a licensee, but plaintiff offered evidence supporting a finding that plaintiff was an invitee. This conflict in the evidence cannot support entry of summary judgment.

Regardless of the plaintiff's status when he arrived on the premises, the defendant's forecast of evidence does not forestall the plaintiff from showing that his status of a licensee was converted to that of an invitee as soon as he was exposed to sales staff, signs and other sales materials of Carefree.

> Generally, under the "economic benefit" test, anyone who, while on the premises, engages, with the knowledge or consent of the occupant, or at his request, in some activity which directly or indirectly furthers the occupant's economic interests, gains invitee status as long as he is so engaged, without regard to the status he held at the time of his entry. . . .

62 Am. Jur. 2d *Premises Liability* § 107 (1990); *see Mazzacco v. Purcell*, 303 N.C. 493, 497-98, 279 S.E.2d 583, 587 (1981) (person on premises for benefit of landowner is invitee).

The defendant knowingly engaged or invited the engagement of the plaintiff and others in its business when it communicated sales information to those, including plaintiff, who attended the political rally. The defendant benefited from the prospect of sales to the listeners generally and also specifically to the plaintiff, a person who by his age was a prime prospect. *See* Restatement (Second) of Torts § 332, comment (f) (1965) (benefit to owner may be "indirect and in the future").

Furthermore, assuming the plaintiff is found to be an invitee, I believe the evidence presents genuine issues of material fact on the issues of whether the defendant breached its standard of care and whether the plaintiff was contributorially negligent.

Accordingly, I would vacate the entry of summary judgment for the defendant Carefree and remand for trial. Regarding defendant Thomas, the record reflects that his motion for summary judgment has not been ruled upon by the trial court and thus remains outstanding, and the issues raised in that motion are not before this court.

STATE OF NORTH CAROLINA v. DAVID ALAN WRIGHT

No. 8922SC517

(Filed 5 June 1990)

Rape and Allied Offenses § 4.1 (NCI3d) — statutory rape — evidence of masturbation by victim

In a prosecution of defendant for the statutory rape of his stepdaughter, testimony by the victim's grandmother that she had observed the victim masturbate with a washcloth and with her fingers on several occasions should have been admitted pursuant to N.C.G.S. § 8C-1, Rule 412(b)(2) as evidence of specific incidences of sexual behavior offered for the purpose of showing that the acts charged were not committed by defendant where the victim's pediatrician testified that genital irritation she observed on the victim could have been caused by repeated acts of intercourse, penetration with other objects, or masturbation.

Am Jur 2d, Rape §§ 15, 18, 85, 86.

APPEAL by defendant from judgment entered 17 November 1988 by *Judge Ralph A. Walker* in IREDELL County Superior Court. Heard in the Court of Appeals 10 January 1990.

Lacy H. Thornburg, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, and Bailey, Patterson, Caddell & Bailey, P.A., by Allen A. Bailey, for defendant-appellant.

GREENE, Judge.

Defendant appeals his jury conviction of statutory first-degree rape. The trial court sentenced defendant to prison for life.

The record shows that the grand jury indicted 32-year-old defendant for the offense of having sexual intercourse with defendant's 11-year-old stepdaughter on approximately 28 January 1988, in violation of N.C.G.S. § 14-27.2 (1986). Prosecutrix was twelve years old at the time of trial.

During trial, the State adduced prosecutrix's testimony that defendant had intercourse with her a number of times before the date for which defendant was indicted, and that on the date of indictment her mother went to a hospital to visit a relative and left prosecutrix alone with defendant, who allegedly got into bed and had intercourse with prosecutrix.

After prosecutrix testified, prosecutrix's pediatrician, Dr. Amy Ferguson ("physician") testified. After several routine office visits, physician examined prosecutrix in a hospital emergency room on 28 November 1987, when prosecutrix complained about a spanking that defendant administered to her. Physician examined prosecutrix for evidence of physical abuse but found none, although during a cursory visual examination she noted chronic irritation of prosecutrix's external genitalia. Based on the irritation, physician asked prosecutrix whether she had been sexually abused, and prosecutrix denied sexual abuse. After prosecutrix denied sexual abuse, physician testified that she did not believe that a pelvic examination was necessary. Physician testified that she again examined prosecutrix on 10 February 1988 after prosecutrix complained of defendant's sexual abuse. Physician testified that during a pelvic examination of prosecutrix, she again found chronic internal and external irritation of prosecutrix's vagina and decreased muscle tone for a child of prosecutrix's age. Physician gave her opinion that the condition of prosecutrix's genitalia was consistent with numerous penetrations and repeated acts of intercourse. She also testified that these physical findings were consistent with repeated masturbation and "chronic penetration with other objects."

After the State rested its case, defendant sought to introduce testimony by prosecutrix's maternal grandmother ("Grandmother"), to show evidence of prosecutrix's repeated acts of masturbation as alternate explanations for prosecutrix's genital condition. Pur-

suant to the State's objections based on the 'rape shield' evidence statute, N.C.G.S. § 8C-1, Rule 412, the trial court conducted an *in camera* hearing to determine whether the evidence was admissible. At the hearing, Grandmother testified: she observed prosecutrix in the bathtub "trying to push a washcloth inside of her [vagina] . . . using . . . two fingers," that "[p]robably three-fourths" of a terrycloth washcloth with dimensions of six inches by six inches was in prosecutrix's vagina, that she cared for prosecutrix on several occasions and that she "had seen [prosecutrix] doing [a similar thing in the bathroom] quite a bit," including an instance during the summer of 1987, the summer before the alleged rape. During that time, she testified that she observed prosecutrix with her entire index finger inserted in her vagina, "just moving her finger back and forth." She testified that "[prosecutrix] did not try to hide the fact that she played with herself. She would be laying on the couch watching TV through her clothes [sic], rubbing herself. It was just practically all the time." She testified that she first saw prosecutrix exhibit similar behavior when prosecutrix was five years old when "[prosecutrix] had her hands down in her pants. She was standing with her legs bowed out . . . [s]he had her right hand down in there and she was moving her arm up and down." She testified that after prosecutrix ceased this behavior "she would be very red around her vagina." She testified that when prosecutrix was five years old and before prosecutrix's mother and defendant were married, she observed prosecutrix trying to place a little boy's penis in her vagina, after which prosecutrix had redness around the outside of her vagina.

After hearing the *in camera* evidence, the trial court ruled on defendant's request to admit evidence:

> There are several things that strike me. If the incident involving the washcloth did occur, [physician] testified that her findings were consistent with [prosecutrix] having been penetrated by a large object. Whether or not the washcloth, how far it had protruded, whether for personal hygiene or self[-]gratification, there is just too much speculation as far as that evidence is concerned and whether or not a washcloth being pushed by two fingers could have caused the opening of the hymen to the extent testified to by [physician]. Obviously, [Grandmother], since '84 or '85 has interpreted a lot of [prosecutrix]'s actions as being manipulation or masturbation or playing with herself. Whether that has been out of curiosity

> or just a natural tendency for her hand to go to her genital area is so much speculation. There is absolutely no evidence that anything was done about this to suggest that this may be a cause of [prosecutrix]'s story or this would explain [prosecutrix]'s condition found by [physician] would leave too much to speculation to the jury and on the grounds of relevancy and on the question of it falling within the exceptions to the rape shield statutes, I have considerable problem with whether or not it does in fact fall into that exception and; therefore, it would be highly prejudicial at this juncture to interject this into the evidence. I find that the evidence should not be heard by the jury.

The court later allowed Grandmother to testify before the jury about prosecutrix's single act of pushing the washcloth into her vagina, stating: "[u]pon reconsideration[,] the court has . . . determined that the evidence involving the incident to which this witness has testified involving [prosecutrix] . . . should be admissible and should be heard by the jury; therefore, the court has admitted this evidence to this extent."

Defendant testified and denied that he had ever touched prosecutrix sexually or had intercourse with her.

The dispositive issue is whether the excluded *in camera* testimony from Grandmother showed (I) prosecutrix's 'sexual behavior' which (II) was relevant according to Rule 412(b).

Rule 412 prohibits introduction of evidence of the complainant's sexual behavior during prosecution of a rape offense unless such evidence is relevant. N.C.G.S. § 8C-1, Rule 412 (Cum. Supp. 1989). We must determine whether Grandmother's testimony was evidence of sexual behavior of the complainant and, if so, whether that evidence was relevant as that term is defined by Rule 412(b).

I

Sexual behavior is defined by statute as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a).

Grandmother's excluded testimony shows complainant's sexual activity in the form of masturbation. This 'sexual behavior' clearly

was not 'the sexual act at issue in the indictment,' intercourse between defendant and prosecutrix.

II

Relevant evidence is defined in Rule 412 as any evidence of sexual behavior which:

> (1) Was between the complainant and defendant; or (2) [i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or (3) [i]s evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or (4) [i]s evidence of sexual behavior offered as a basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

N.C.G.S. § 8C-1, Rule 412(b).

Grandmother's excluded testimony was that she observed prosecutrix masturbate with a washcloth and with her fingers on several occasions. Physician's testimony was that repeated acts of intercourse, penetration or masturbation could create the degree of irritation that prosecutrix suffered. Therefore, Grandmother's excluded evidence provided an alternative explanation for the victim's physical condition, consistent with physician's testimony and should have been admitted as evidence relating to whether the rape occurred. *See State v. Ollis*, 318 N.C. 370, 376, 348 S.E.2d 777, 781 (1986). The excluded evidence was "evidence of specific incidences of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant" and therefore was relevant evidence. N.C.G.S. § 8C-1, Rule 412(b)(2). Although acting in an inadvertent and blameless manner, prosecutrix clearly qualifies as someone other than defendant who could have caused her physical injuries. The evidence was offered to show that prosecutrix's genital condition could have occurred without intercourse. Accordingly, the trial court erred in excluding Grandmother's testimony.

Furthermore, we determine that the error was prejudicial to defendant because it "probably influenced the jury verdict." *See*

Dept. of Transportation v. Craine, 89 N.C. App. 223, 226, 365 S.E.2d 694, 697, *dism. allowed, review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988). Since prosecutrix's acts of penetrative masturbation were the only alternative explanation for the condition of her genitalia, and limitation of testimony concerning prosecutrix's masturbation left the jury with no alternative to the State's contention that only intercourse would have caused the degree of genital irritation that prosecutrix experienced, omission of the evidence requires a new trial.

Because this error requires new trial, we do not address defendant's remaining assignments of error.

New trial.

Judges JOHNSON and PARKER concur.

TIN ORIGINALS, INC. v. COLONIAL TIN WORKS, INC. AND THOMAS W. LAROSE

No. 8912SC999

(Filed 5 June 1990)

1. **Fiduciaries § 2 (NCI3d)— fiduciary relationship—distributor and manufacturer**

The trial court did not err by allowing defendants' motion for directed verdict on the issue of fiduciary duty in an action arising from plaintiff's sale of defendants' decorative tin items to the public. Although plaintiff relied on *General Tire and Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, nowhere in *General Tire* does the court state that a fiduciary relationship existed between the distributor and the manufacturer. Review of reported North Carolina cases fails to reveal any case where mutually interdependent businesses, situated as the parties were here, were found to be in a fiduciary relationship with one another.

Am Jur 2d, Independent Contractors §§ 7, 9.

2. Appeal and Error § 147 (NCI4th)— verdict—no objection at trial—not appealable

Plaintiff in an action arising from the sale by defendant of plaintiff's decorative tin items failed to object at the appropriate time and could not assign error to the acceptance of the verdict where the jury returned to the courtroom with only the first of several issues answered; that answer was "not guilty," contrary to the court's instructions; the foreman filled in the answers to the other issues while the jurors were in the courtroom; and the jurors thereafter indicated their assent to the verdict in open court.

Am Jur 2d, Appeal and Error § 637; Trial §§ 1193, 1199, 1214, 1218.

APPEAL by plaintiff from judgment entered 25 May 1989 by *Judge George M. Fountain, Jr.* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 3 April 1990.

This is an action for fraud, slander, breach of fiduciary duty, breach of contract and Chapter 75 violations. Plaintiff alleges that defendants were obligated to sell to plaintiff all of defendants' production of decorative tin items. Plaintiff distributed and sold defendants' items to the public. Plaintiff alleges that the business relationship with defendants collapsed when defendants decided to sell for themselves and took actions to price plaintiff out of the market. Plaintiff alleges that defendants' actions were all part of a plan to control the market for defendants' decorative items. The trial court allowed defendants' motion for directed verdict on the issue of breach of fiduciary duty and the jury returned a verdict for defendants on plaintiff's other claims. Plaintiff appeals.

Brooks, Pierce, McLendon, Humphrey & Leonard, by John L. Sarratt and Jeffrey A. Batts, for plaintiff-appellant.

Turner, Enochs, Sparrow, Boone & Falk, by Donald G. Sparrow and Laurie S. Truesdell, for defendant-appellees.

EAGLES, Judge.

Plaintiff argues that the trial court erred in granting a directed verdict in favor of defendants on the issue of fiduciary duty. Additionally, plaintiff asserts that on remand the jury should be instructed that the basis for plaintiff's Chapter 75 claim is breach

of fiduciary duty. Finally, plaintiff asserts that the trial court erred in accepting the jury's verdict. We are not persuaded and find no error in the trial court.

I. Directed Verdict.

[1] A motion for directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure presents the question of whether plaintiff's evidence is sufficient to submit to the jury. The trial court must consider the evidence in the light most favorable to the non-movant and conflicts in the evidence must be resolved in favor of the non-movant. *See, e.g., Northwestern Bank v. NCF Financial Corp.*, 88 N.C. App. 614, 365 S.E.2d 14 (1988), *citing Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979). Whether a fiduciary relationship exists is determined by the specific facts and circumstances of the case. Generally, "[t]he existence or non-existence of a fiduciary duty [is] a question of *fact* for the jury." *HAJMM Co. v. House of Raeford Farms, Inc.*, 94 N.C. App. 1, 13, 379 S.E.2d 868, 875 (emphasis in original), *disc. rev. allowed*, 325 N.C. 271, 382 S.E.2d 439 (1989). Plaintiff argues that there was evidence of a fiduciary relationship between the parties and that the issue was for the jury to decide. We disagree.

Plaintiff relies in particular on *General Tire and Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960). In *General Tire* the court stated that where two parties have entered into an exclusive distributorship agreement of indefinite duration and the distributor "has expended substantial sums in establishing and promoting the distributorship and such expenditures were within the contemplation of the parties," the manufacturer must give the distributor reasonable notice of his intent to terminate the relationship. *Id.* at 472, 117 S.E.2d at 489. Plaintiff argues that *General Tire* supports the argument that a fiduciary relationship existed between the parties in this action. We disagree. Nowhere in *General Tire* does the court state that a fiduciary relationship existed between the distributor and manufacturer. We are unwilling to engraft on *General Tire* an implicit holding that there was a fiduciary relationship in that case.

Plaintiff also argues that the evidence showed that plaintiff placed special trust and confidence in defendants, primarily because of the parties' dependence upon each other. The evidence showed that defendants were plaintiff's only source of decorative tin items and that these items constituted 80% of plaintiff's sales, and that

defendants were aware of this situation. Defendants assert that special trust and confidence are not the only requirements for finding a fiduciary relationship but that "resulting superiority and influence" must have developed. Defendants argue that the parties were in equal bargaining positions and dealt at arm's length. Therefore, no fiduciary relationship arose between the parties.

> The courts generally have declined to define the term "fiduciary relation" and thereby exclude from this broad term any relation that may exist between two or more persons with respect to the rights of persons or property of either. In this, the courts have acted upon the same principle and for the same reason as that assigned for declining to define the term "fraud." The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. . . . "[I]t extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other."

Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). Even when we apply this broad standard to this case, we find the evidence insufficient to submit to the jury the issue of whether a fiduciary relationship existed between the parties. Our review of reported North Carolina cases has failed to reveal any case where mutually interdependent businesses, situated as the parties were here, were found to be in a fiduciary relationship with one another. We decline to extend the concept of a fiduciary relation to the facts of this case.

Due to our disposition of plaintiff's arguments on the alleged fiduciary relationship, we need not address plaintiff's argument that the Chapter 75 issue should be submitted to the jury on remand.

II. Form of the Verdict.

[2] Plaintiff asserts she is entitled to a new trial based on the jury's manifest disregard of its duties and the court's instructions and the jury's failure to deliberate on the issues. Plaintiff argues that when the jury returned to the courtroom only the first of several issues was answered and it was answered "not guilty," contrary to the trial court's instructions. While the jurors were

in the courtroom the foreman wrote on the issues sheet, filling in the answers to the other issues "no." Thereafter, the trial court read the issues and answers and the jurors each indicated their assent to the verdict in open court.

Plaintiff argues that the answer "not guilty" shows that the jurors used the improper standard in this case. Additionally, plaintiff argues that the foreman's filling in the remaining issues with the word "no" and the trial court's polling the jury individually does not correct the jury's failure to deliberate on each issue. Defendants argue that there was no timely objection or exception to the form of the verdict or to the foreman's filling in the blanks on the issues sheet in open court. Additionally, the jury was polled individually and they each agreed with the answers on the verdict sheet.

"Error can only be asserted by an exception taken at an appropriate time and in an appropriate manner." *Conrad v. Conrad*, 252 N.C. 412, 415, 113 S.E.2d 912, 914 (1960). G.S. 1A-1, Rule 46(b) provides that

> [w]ith respect to rulings and orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor[.]

Here, plaintiff failed to object at the appropriate time.

The transcript reveals the following discussion when the jury returned to the courtroom:

> COURT: Members of the jury, you've agreed on a verdict.
>
> FOREMAN, JUROR #5: We have, your Honor.
>
> COURT: Well, you've only answered one of the issues. It's necessary that you answer—
>
> FOREMAN, JUROR #5: —fill in the rest of the data, yes.
>
> COURT: Do you want to do it right there?

FOREMAN, JUROR #5: Yes, sir.

COURT: All right. If all have agreed, you may do so.

(The foreman wrote on the issues sheet in the courtroom on the jury box rail.)

* * *

COURT: You answered the first issue "not guilty." I assume you mean by that "no"—

FOREMAN: "No," yes, sir.

COURT: —is that correct?

At no time during this discussion did plaintiff's counsel object or otherwise voice a concern regarding the court's procedure. Plaintiff cannot now assert error in the trial court's actions.

For the reasons stated we find no error.

Judges WELLS and GREENE concur.

DANIEL STACHLOWSKI v. CAROL STACH

No. 899DC887

(Filed 5 June 1990)

Appeal and Error § 205 (NCI4th)— notice of appeal—not timely

Plaintiff failed to give timely notice of appeal and the merits of his contention were not considered where a district court judge held in open court on 17 January 1989 that he was giving a Washington State child custody order full faith and credit and that he would not modify the custody arrangement; that announcement constituted entry of the court's order for the purposes of determining when notice of appeal had to be given; it was necessary for plaintiff to give notice of appeal within 10 days after 17 January 1989; and plaintiff did not give notice until 6 April 1989.

Am Jur 2d, Appeal and Error § 316.

Judge PARKER dissenting.

APPEAL by plaintiff from *Wilkinson (Charles W., Jr.), Judge.* Order entered 17 January 1989 in District Court, PERSON County. Heard in the Court of Appeals 2 April 1990.

In this civil action, plaintiff seeks modification of a Washington State order giving defendant custody of the parties' two minor children. On 17 January 1989, the district judge entered an order in open court giving the Washington State order full faith and credit in North Carolina. He then ruled that there was no change in circumstances sufficient to justify changing the custody arrangement. Plaintiff appealed.

John W. Lunsford for plaintiff, appellant.

Nancy McKenzie Kizer and J. Kevin Moore for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff argues on appeal that the district judge abused his discretion by failing to modify the Washington State custody order because of "substantial and material changes in circumstances" affecting the welfare of the children. We do not even consider the merits of this contention, however, because plaintiff failed to give timely notice of appeal from the district judge's order as required by G.S. 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure.

G.S. 1-279(c) and Appellate Rule 3(c) clearly provide that written notice of appeal from a judgment or order of a superior or district court must be given within 10 days of entry of said judgment or order. Failure to do so is a jurisdictional flaw which requires dismissal of the appeal. *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983). Furthermore, the date of entry of judgment "does not depend on the date of formal signing or filing, but instead depends upon the date when oral notice of the judgment is given in open court." *Patel v. Mid Southwest Electric*, 88 N.C. App. 146, 148, 362 S.E.2d 577, 578 (1987), *disc. rev. denied*, 322 N.C. 326, 368 S.E.2d 868 (1988) (citations omitted).

In the present case, the district judge announced in open court on 17 January 1989 that he was giving the Washington State order full faith and credit and that he would not modify the custody arrangement. That announcement constituted entry of the court's order for the purpose of determining when notice of appeal had

to be given. It was therefore necessary for plaintiff to give notice of appeal within 10 days after 17 January 1989. Because he did not give notice until 6 April 1989, this Court has no jurisdiction to consider plaintiff's appeal.

Appeal dismissed.

Judge COZORT concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

I respectfully dissent for the reason that in my opinion the order was not entered on 17 January 1989. The transcript reflects that at the hearing on that date, the trial judge made the following statement:

> Well, I think the first thing the Court will do is give the Washington Order the full faith and credit it deserves and once doing that I see no change in circumstances to change the custody of the child. You may have some point that maybe the girl is spending too much time with her aunt. I don't know but I'm going to let the mother keep custody of both the children. As to the visitation, do y'all need me to set something?

Then followed a discussion among the court and counsel about visitation rights which ultimately ended with counsel for defendant agreeing to draw the order when the parties had agreed on visitation. The written order that was entered on 6 April 1989 contained 29 numbered findings of fact and four conclusions of law. None of these findings or conclusions other than that there had been no change in circumstances and that the Washington order should be given full faith and credit were made at the 17 January 1989 hearing. Conclusions of law must be based on findings of fact supported by competent evidence. In this case no findings of fact to support the conclusions of law were made at the 17 January hearing. At most, all the trial judge did was to indicate how he would rule so that the attorney for the prevailing party could draw the order.

In my view, what occurred at the hearing on 17 January was not covered by either paragraph one or two of G.S. 1A-1, Rule 58. Paragraph one states:

> [T]he 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 the present case, the judge made a contrary direction—he directed the lawyer for the prevailing party to draw the order. Furthermore, paragraph one clearly contemplates a situation where entry of a proper order or judgment by the clerk without further action by the judge can be accomplished. In this case since the trial judge gave no indication as to his findings of fact in open court, the clerk could not possibly have entered a proper order.

Similarly, paragraph two is inapplicable. Paragraph two of Rule 58 provides:

> 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.

In the present case, nothing in the record suggests that the judge directed the clerk to make a notation in the minutes.

As this Court noted in *Barringer & Gaither, Inc. v. Whittenton*, 22 N.C. App. 316, 206 S.E.2d 301 (1974):

> Rule 58 is designed to achieve the objectives of (1) making the moment of the entry of judgment easily identifiable, and (2) furnishing fair notice to all parties of the entry of the judgment.

Id. at 317, 206 S.E.2d at 302. The case presently before the Court for review is just another of many illustrative of the fact that these worthy objectives are not being accomplished by the application of Rule 58.

DEBRA KAY SHADKHOO v. SHILO EAST FARMS, INC.

No. 8918SC529

(Filed 5 June 1990)

Negligence § 6.1 (NCI3d) — night club patron — falling speaker — res ipsa loquitur — directed verdict for defendant

The trial court properly directed verdict for defendant in an action in which a patron of defendant's nightclub alleged that she had been injured when a speaker fell from another speaker onto her knee while she was dancing. Although plaintiff relied on the doctrine of *res ipsa loquitur*, the evidence, viewed in the light most favorable to plaintiff, shows that defendant did not control the placement of the speaker that fell on plaintiff.

Am Jur 2d, Negligence §§ 1870-1872, 1876.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from judgment entered 14 February 1989 by *Judge Steve Allen* in GUILFORD County Superior Court. Heard in the Court of Appeals 21 December 1989.

This is a personal injury action. Plaintiff alleged that she was injured by a speaker that fell on her knee while she was dancing in defendant's nightclub. Plaintiff alleged that the speaker was not properly fastened to the speaker on which it was stacked and that defendant should have known that vibrations from the music might cause it to fall. Plaintiff relied on the doctrine of *res ipsa loquitur*.

The evidence at trial tended to show that when the accident occurred, plaintiff was a patron at defendant's place of business, the Carousel Lounge. Plaintiff testified that she and a friend were dancing about five feet away from the speakers and that the speakers were placed close to the dance floor. During the time plaintiff and her friend were dancing on the dance floor no one else was near the speakers. Additionally, she testified that neither plaintiff nor her friend came into contact with the speakers before the accident. Plaintiff was injured when a speaker that had been stacked on top of another speaker fell off the bottom speaker onto plaintiff while she was dancing, hitting her in the left knee. Defendant testified that the speaker that fell was owned by the band that

was playing at the club and that the band had set up their own equipment.

At the close of all of the evidence the trial court granted defendant's motion for directed verdict. Plaintiff appeals.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for plaintiff-appellant.

Henson Henson Bayliss & Teague, by Jack B. Bayliss, Jr., for defendant-appellee.

EAGLES, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for a directed verdict. She argues that the evidence was sufficient to go to the jury on the issue of defendant's negligence. We disagree and affirm the trial court's order.

Defendant's motion for directed verdict, renewed at the close of all of the evidence, presents the question of whether the evidence viewed in the light most favorable to plaintiff will justify a verdict in plaintiff's favor. *Rayfield v. Clark*, 283 N.C. 362, 196 S.E.2d 197 (1973). "[T]he evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E.2d 549, 554 (1973). "It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted." *Rappaport v. Days Inn of Am., Inc.*, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979).

Plaintiff contends that the doctrine of *res ipsa loquitur* applies here and that, aided by this doctrine, the evidence is sufficient to submit the case to the jury. The principle of *res ipsa loquitur* is generally stated:

> [W]hen a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.

Newton v. Texas Co., 180 N.C. 561, 567, 105 S.E. 433, 436 (1920). "For the doctrine [of *res ipsa loquitur*] to apply the plaintiff must

prove (1) that there was an injury, (2) that the occurrence causing the injury is one which ordinarily doesn't happen without negligence on someone's part, (3) that the instrumentality which caused the injury was under the exclusive control and management of the defendant." *Jackson v. Neill McKay Gin Co.*, 255 N.C. 194, 197, 120 S.E.2d 540, 542 (1961).

Plaintiff argues that the trial court erroneously concluded that there was no evidence that the cause of the injury was under the exclusive control and management of the defendant. We disagree. The evidence, in the light most favorable to plaintiff, shows that defendant did not control the placement of the speaker that fell on plaintiff. Although there was testimony that defendant's agents would direct bands not to place their equipment in front of exits and would generally patrol the premises for the safety of patrons, there is no evidence that the defendant had control over the speaker in question.

Since the evidence failed to show that defendant had exclusive control over the instrumentality that caused the injury, i.e., the speaker, the order of the trial court is affirmed.

Affirmed.

Judge ORR concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the statement by the majority that the evidence shows that defendant did not control the speakers that fell on plaintiff is incorrect. The speakers, which were about 2 and ½ feet high and weighed 3 or 4 hundred pounds, were situated where defendant directed. Defendant's own evidence was that the bands were "given an area where they could set their speakers up," and that they were told, "Here's the stage, and set up your equipment and your speakers." If the speakers were instruments being used by the band or somebody else this would not be evidence that they were in defendant's control; but the speakers were not used by anybody, they only reproduced sounds, and that they were placed where defendant directed that they be placed when one of them slipped off onto the dance floor and struck plaintiff is evidence that they were in defendant's control. Certainly, they

were not in the control of the band, which could not have placed the speakers elsewhere; and since defendant could have had them placed anywhere it chose, and had employees on the floor who admittedly could have moved or changed the speakers as they saw fit, it can hardly be claimed that they were in no one's control. Since it is unlikely that the speaker would have fallen onto plaintiff if proper care had been used in placing it on the one under it, or further from the dance floor, the evidence raises a question for the jury in my opinion.

KENNETH P. GUMMELS, AND ALAN 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. 8930SC992

(Filed 5 June 1990)

Administrative Law and Procedure § 30 (NCI4th); Hospitals § 2.1 (NCI3d)— certificate of need—petition for contested case hearing—timely mailed—received late—not timely filed

A petition for a contested case hearing arising from the issuance of a certificate of need for nursing home beds was not timely filed with the Office of Administrative Hearings where it is undisputed that the thirty day deadline for filing the petition was 5 July 1988; the petition was mailed on 1 July 1988; and it was not received by the OAH until 6 July 1988. The language of N.C.G.S. § 131E-188(a) leaves no room for judicial construction; the statute clearly contemplates that a petition for a contested case hearing must be filed, not mailed or served, with the OAH within the thirty day deadline.

Am Jur 2d, Administrative Law §§ 357, 359, 360.

APPEAL by petitioner from order entered 13 April 1989 by *Judge James U. Downs* in CHEROKEE County Superior Court. Heard in the Court of Appeals 15 March 1990.

On 3 June 1988 the N.C. Department of Human Resources, Division of Facility Services in the Certificate of Need Section

(the "Department"), issued a certificate of need (CON) awarding sixty nursing home beds to Evangeline of Andrews, Inc. Petitioner had previously attempted to apply for a CON for the same beds. Because petitioner missed the deadline for filing its application to be considered for a CON, its application was not considered by the Department. In July 1988 petitioner attempted to file a petition with the Office of Administrative Hearings (OAH) seeking a contested case hearing concerning the Department's decision to award the nursing home beds to Evangeline. On 1 July 1988 petitioner placed the petition in the U.S. Mail. The petition was filed in the OAH on 6 July 1988. On 3 August 1988 petitioner deposited a fifty-thousand dollar bond with the Cherokee County Superior Court. On 5 August 1988, an administrative law judge (ALJ) entered an order dismissing petitioner's petition for a contested case hearing. From that order, petitioner appealed to the Superior Court of Cherokee County. Respondents' motions to dismiss petitioner's appeal in Cherokee County Superior Court for lack of subject matter jurisdiction were denied on 29 January 1989. On 22 March 1989 the trial court affirmed the administrative law judge's order dismissing petitioner's petition for a contested case hearing. From this order petitioner appeals. Respondents cross-appeal from the denial of their motions to dismiss.

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 North Carolina Department of Human Resources.

Bode, Call & Green, by Robert V. Bode and Diana E. Ricketts, for respondent-intervenor.

WELLS, Judge.

We first note that in their cross-appeal respondents have asserted that the Superior Court of Cherokee County lacked subject matter jurisdiction to hear petitioner's appeal from the decision of the ALJ, contending that under the facts of the case, such an appeal was required to be filed in the Superior Court of Wake County. Without deciding the issue raised by respondents' cross-appeal, we assume for the purposes of our review that appeal of the ALJ's decision to the Superior Court of Cherokee County was proper in this case.

Petitioner argues that the trial court erred by affirming the ALJ's order dismissing its petition for a contested case hearing. The petition was dismissed on grounds that neither the petition nor the fifty-thousand dollar bond, which is a condition precedent to proceeding with a contested case hearing, was timely filed.

Petitioner contends that because the petition was placed with postage paid in the U. S. Mail prior to the filing deadline, it was timely filed. Petitioner in effect argues that the petition was filed when mailed, rather than when it was received by the agency. For the following reasons, we disagree.

Administrative and judicial review of a decision of the Department of Human Resources to issue, deny or withdraw a certificate of need or exemption is governed by N.C. Gen. Stat. § 131E-188 (1988), which in pertinent part provides:

> (a) . . . A petition for a contested case shall be filed within 30 days after the Department makes its decision. . . .

G.S. § 131E-188(a). Pursuant to N.C. Gen. Stat. § 150B-23 (1987) the petition is to be filed with the OAH.

Our courts have traditionally acknowledged the rule of statutory construction that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must adhere to its plain and definite meaning. *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 367 S.E.2d 655, *rehearing denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). In addition, because the right to appeal to an administrative agency is granted by statute, compliance with statutory provisions is necessary to sustain the appeal. *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 375 S.E.2d 712 (1989) (upholding DHR's dismissal of employee grievance appeal because it was filed one day late). *See also Smith v. Daniels Int'l*, 64 N.C. App. 381, 307 S.E.2d 434 (1983) (notice of appeal filed two days after statutory deadline; appeal properly dismissed). Finally, in administrative as well as judicial proceedings, there is a clear distinction between "filing" and "serving" a petition or other document. For example, the administrative code defines "file or filing" as:

> . . . to place the paper or item to be filed into the care and custody of the Chief Hearings Clerk of the Office of Administrative Hearings, and acceptance thereof by him, except

> that the administrative law judge shall note thereon the filing date. . . .

26 N.C. Administrative Code 3.0002(a)(2). "Service or serve" is defined as:

> . . . personal delivery or, . . . delivery by first class United States Postal Service mail or a licensed overnight express mail service, postage prepaid and addressed to the party at his or her last known address. . . . Service by mail or licensed overnight express mail is complete upon placing the item to be served, . . . in an official depository of the United States Postal Service or upon delivery, . . . to an agent of the overnight express mail service.

26 N.C.A.C. 3.0002(a)(3). *See also* N.C. Gen. Stat. § 1A-1, Rule 5(b), (d), and (e) of the N.C. Rules of Civil Procedure (1983 & Supp. 1989) (service by mail is complete upon depositing the pleading in a post office depository; in contrast, filing means "filed with the court" either by filing with the clerk or the judge) and Rule 26 of the N.C. Rules of Appellate Procedure ("filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing . . .").

The language of G.S. § 131E-188(a) leaves no room for judicial construction. The statute clearly contemplates that a petition for a contested case hearing must be filed—not mailed or served—with the OAH within the 30-day deadline. It is undisputed that the 30-day deadline in this case was July 5, 1988. It is also undisputed that the petition was mailed on July 1, 1988; however, it was not filed with the OAH until July 6, 1988. Depositing the petition in the mail did not satisfy the filing requirement of G.S. § 131E-188(a). Petitioner's petition was filed after the statutory deadline. Petitioner bears the responsibility of filing its petition with the OAH on or before the requisite date. Petitioner failed to comply with the mandatory requirement for timely filing of its petition for a contested case hearing. Therefore, the trial court properly affirmed the decision of the ALJ to dismiss the petition.

In his remaining assignment of error petitioner contends that although his cash bond was filed one month after his petition for a contested case hearing, it was nevertheless timely. Because we

affirm the trial court's order for the reasons stated above, we need not reach this assignment of error.

Affirmed.

Judges EAGLES and GREENE concur.

E. TRUITT HAAS, MARY C. HAAS, LAURA A. NORRIS, DEBORAH K. COFFEY, ANTHONY E. HAAS, KIMBERLY L. SINGLETON, E. TRUITT HAAS AS GUARDIAN AD LITEM FOR CHRISTOPHER R. NORRIS AND RUSSELL W. COFFEY, MINOR CHILDREN, LEON HOLLAR, COLLENE HOLLAR, AND MAX J. ROBERTS, PLAINTIFFS v. CALDWELL SYSTEMS, INC.; CHARLES B. FOUSHEE, JR.; CALDWELL COUNTY; CALDWELL INDUSTRIAL SERVICES, INC., DEFENDANTS, AND CALDWELL COUNTY, THIRD-PARTY PLAINTIFF v. THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES AND THE NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, THIRD-PARTY DEFENDANTS

No. 8925SC1086

(Filed 5 June 1990)

1. **State § 4.4 (NCI3d)— damages from operation of waste incinerator—state third party defendant—sovereign immunity no bar to jurisdiction**

The trial court had subject matter and personal jurisdiction over the North Carolina Department of Human Resources and the North Carolina Department of Natural Resources and Community Development as third party defendants in an action claiming damages from the operation of a waste incinerator. N.C.G.S. § 143-291 (Tort Claims Act) provides a specific waiver of tort immunity where an individual is injured due to the negligence of a state employee and, although direct tort suits against the State are not within the jurisdiction of the superior court, the State may be joined as a third party defendant in the State courts.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 255, 649, 658.

2. State § 4.4 (NCI3d)— damages from waste incinerator—Rule 12(b)(6) dismissal—improper

Caldwell County sufficiently stated a claim for relief against the State as a third party plaintiff in an action for damages from the operation of a waste incinerator and the State's motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) should not have been granted.

Am Jur 2d, States, Territories, and Dependencies §§ 99, 100.

APPEAL by third-party plaintiff from *Allen (C. Walter), Judge.* Order entered 5 May 1989 in Superior Court, CALDWELL County. Heard in the Court of Appeals 30 April 1990.

This is a civil action wherein original plaintiffs seek damages for injuries to their persons and property caused by the operation of a waste incinerator by original defendant Caldwell Systems, Inc. (hereinafter "CSI"). Plaintiffs' complaint alleges that operation of this incinerator on land leased from defendant Caldwell County (hereinafter "the County") resulted in the "emission of harmful or noxious amounts of . . . fumes, particulates, gases and vapors," as well as the movement of chemicals which caused contamination of plaintiffs' property and water supply. In response to plaintiffs' complaint, the County filed a third-party complaint seeking either indemnification or contribution jointly and severally from the North Carolina Department of Human Resources and the Department of Natural Resources and Community Development (hereinafter "DHR" and "NRCD"). The County also sought to recover costs of the action including $93,000.00 which it agreed to pay for condemnation of a portion of the property owned by two of the plaintiffs.

On 28 October 1988, third-party defendants moved to dismiss the complaint against them on three separate grounds:

1. The Court lacked jurisdiction of the subject matter,

2. The Court had no personal jurisdiction over the third-party defendants, and

3. The complaint failed to state a claim upon which relief could be granted.

On 5 May 1989, the trial court entered an order granting third-party defendants' motion to dismiss on all three grounds. Third-party plaintiff appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by George W. House, William G. Ross, Jr., and Stanley P. Barringer, Jr., for third-party plaintiff, appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Nancy E. Scott, for third-party defendant North Carolina Department of Human Resources.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Alan S. Hirsch, for third-party defendant North Carolina Department of Natural Resources and Community Development.

HEDRICK, Chief Judge.

[1] In its first two assignments of error, the County contends the trial court erred by concluding 1) that it lacked subject matter jurisdiction over the third-party claims and 2) that it lacked personal jurisdiction over the third-party defendants. The apparent justification for the judge's ruling on both issues was the defense of sovereign immunity.

The doctrine of sovereign immunity bars tort actions against the State of North Carolina and agencies thereof unless the State consents to be sued or otherwise waives its immunity. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983).

Although the law in North Carolina is unsettled as to whether a defense of sovereign immunity states a lack of subject matter jurisdiction or personal jurisdiction, G.S. 143-291, also referred to as the North Carolina Tort Claims Act, provides a specific waiver of tort immunity where an individual is injured due to the negligence of a state employee. *Zimmer v. N.C. Dept. of Transportation*, 87 N.C. App. 132, 360 S.E.2d 115 (1987). Furthermore, although direct tort suits against the State are not within the jurisdiction of the Superior Court, the Supreme Court, citing Rule 14(c) of the North Carolina Rules of Civil Procedure, has determined that "the State may be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 332, 293 S.E.2d 182, 187 (1982).

In the present case, the County's complaint alleges that the injuries suffered by the original plaintiffs resulted from negligence on the part of DHR and NRCD officers, employees or agents while acting within the course of their employment. Such a claim clearly falls within the scope of the Tort Claims Act and is not barred by a defense of sovereign immunity. We therefore conclude that the trial court had jurisdiction to hear the County's third-party claims as well as personal jurisdiction over third-party defendants.

[2] In their remaining assignment of error, third-party plaintiffs complain the trial court should not have dismissed the complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. They argue that the complaint alleges each element required to state a claim against DHR and NRCD for contribution or indemnification under the North Carolina Tort Claims Act. We agree.

For purposes of ruling on a motion to dismiss for failure to state a claim, the allegations in the complaint are treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282 (1976). A complaint may not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that plaintiff can prove no set of facts which would entitle him to recovery. *Pedwell v. First Union Natl. Bank*, 51 N.C. App. 236, 275 S.E.2d 565 (1981). Such a situation occurs where there is an absence of law to support the claim, an absence of facts sufficient to make a good claim, or disclosure of some fact which necessarily defeats the claim. *Collins v. Edwards*, 54 N.C. App. 180, 282 S.E.2d 559 (1981). Legal support for this third-party claim against the State can be found, as previously discussed, in G.S. 143-291 (the North Carolina Tort Claims Act) and in Rule 14(c) of the North Carolina Rules of Civil Procedure (allowing the State to be joined as a third-party defendant in State Courts). Facts alleged which support the County's claim include the following:

1. Third-party defendants are departments of the State.

2. DHR and NRCD had an obligation to protect the original plaintiffs by permitting, supervising, inspecting and monitoring operation of the incinerator.

3. The County relied on the permitting, supervision, inspection and monitoring done by DHR and NRCD because of statutory provisions which assigned these duties to those departments

and by virtue of DHR's and NRCD's "active assumption" of such duties.

4. Employees of these departments breached this obligation to protect by failing to properly investigate or abate the hazardous conditions existing on and near the incinerator site, by not informing the County of these conditions so that it might attempt to take action, and by negligently informing the County that there was no such hazardous condition on the property.

5. This breach of duty by DHR and NRCD is what prevented the County from taking action to abate the emissions causing damage to the original plaintiffs' property.

6. If the County is found liable to the original plaintiffs for negligence, such negligence was either passive (with DHR and NRCD being actively negligent) or joint (with DHR and NRCD being equally negligent).

7. If the County is found passively negligent, it is entitled to indemnification to the extent permitted by law.

8. If the County is found jointly negligent, it is entitled to contribution from DHR and NRCD as joint tortfeasors to the extent permitted by law.

We believe these facts, as alleged by third-party plaintiff, sufficiently support a claim for relief. Furthermore, the record discloses no fact which necessarily defeats this claim.

For the reasons stated herein, the order of the Superior Court is reversed and remanded for proceedings consistent with this opinion.

Reversed and Remanded.

Judges JOHNSON and EAGLES concur.

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

No. 8927SC1141

(Filed 5 June 1990)

1. **Assignments § 2 (NCI4th)— personal injury action—not assignable**

The trial court did not err by granting a motion by the defendants Wallace for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action in which plaintiff was attempting to recover from defendant Watts sums paid to defendants Wallace under an employee benefit plan for injuries suffered by their son and caused by defendant Watts. Although plaintiff contended that the Wallaces were necessary parties in the subrogation claim against Watts, allowing plaintiff equitable subrogation rights against defendants Wallace 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.

Am Jur 2d, Assignments § 37.

2. **Contracts § 25.1 (NCI3d)— employee benefit plan—medical expenses for injured son—refusal to provide lien to repay—breach of contract**

Plaintiff stated a claim for breach of contract and defendants' motion for dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) should not have been granted where defendants obtained payments for their son's medical expenses caused by a third party from plaintiff under an employee benefit plan and then refused to make a written agreement and failed to provide a lien to repay plaintiff from any judgment or settlement received.

Am Jur 2d, Master and Servant § 397; Restitution and Implied Contracts §§ 3, 10, 153.

3. **Quasi Contracts and Restitution § 1.2 (NCI3d)— employee benefit plan—expenses for injuries caused by third person—refusal to assist claim against third party—unjust enrichment**

Plaintiff presented a valid claim for unjust enrichment upon which relief might be granted in an action in which de-

fendants obtained from plaintiff under an employee benefit plan medical expenses for injuries caused to their son by a third party but did not assert, assist, or cooperate in a claim against the third party for those expenses.

Am Jur 2d, Master and Servant § 397; Restitution and Implied Contracts §§ 3, 10, 153.

APPEAL by plaintiff from order entered 19 July 1989 by *Judge J. Marlene Hyatt* in GASTON County Superior Court. Heard in the Court of Appeals 2 May 1990.

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 and did not appeal.

Plaintiff then filed this action and defendants Connie P. and Rodney E. Wallace filed a motion to dismiss the action as to them 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 these defendants. Plaintiff appeals.

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

No counsel for appellee on appeal nor any pro se appearance.

LEWIS, Judge.

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, 334 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 states that the trial court erred in dismissing this action as against the defendants Connie and Rodney Wallace because the complaint and amended complaint state one or more claims for relief against them. This appeal does not address the claims which plaintiff alleged against defendant Jack Rankin Watts, Jr. in the prior action, *Harris-Teeter v. Watts*, which was heard in this Court on 6 December 1989, 97 N.C. App. 101, 387 S.E.2d 203 (1990).

There are three possible "claims for relief," according to plaintiff, which would permit plaintiff "to [have] its day in court."

I. Equitable subrogation.

[1] Plaintiff states that the Wallaces "are necessary parties in the subrogation claim" against Watts. He quotes verbatim his argument for equitable subrogation which he had included in his brief in the prior related appeal, *Harris-Teeter v. Watts*, *id.* In that action, this Court agreed with the statement by the defendant: "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." *Id.* at 103, 387 S.E.2d at 205. 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 assignments of causes of action to recover for personal injuries." *N. C. Baptist Hospitals v. Mitchell*, 323 N.C. 528, 534, 374 S.E.2d 844, 847 (1988), *citing* Annot., 40 A.L.R.2d 500, 502 (1955). (Emphasis deleted.) We did not allow plaintiff's subrogation claim in the prior related action and it is likewise rejected in the case at bar.

II. Breach of contract.

[2] Plaintiff described the alleged "contract" between plaintiff and defendants in his amended complaint.

> The group plan contains a provision which applies when . . . a dependent covered under the plan is injured through the act . . . of another person: the Plaintiff will advance benefits under the plan only on condition that the employee or a dependent agrees in writing to repay the Plaintiff in full any sums advanced to cover such expenses from the judgment or settlement the employee or a dependent receives and to provide the Plaintiff with a lien to repay the Plaintiff to the extent of medical benefits advanced by the Plaintiff.

Neither the record on appeal nor plaintiff's brief contain a copy of the actual contract or a quotation of the exact contract language. However, since defendants failed to file an answer to the amended complaint which contained the quote above, the court, on a 12(b)(6) motion, must take as true the facts as alleged.

Defendants here obtained, after applying under the agreement, sums in excess of $10,000 for medical expenses for injuries caused by a third party. Defendants thereby accepted the terms offered in that provision of the plan. Acceptance of an offer by conduct is a valid acceptance. *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980). Defendants refused to make a written agreement and failed to provide a lien to repay the plaintiff. They have given plaintiff clear notice by their unequivocal conduct that they will not honor the repayment provision of the benefit plan, and their actions constitute a repudiation and a breach of the contract. *Millis Constr. Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 358 S.E.2d 566 (1987). Plaintiff has therefore stated a claim against defendants for breach of contract.

III. Unjust enrichment.

[3] Plaintiff alleges that defendants have been unjustly enriched in that they have retained the benefits of plaintiff's payments "without asserting, assisting, or cooperating in a claim against Watts for medical expenses." Plaintiff further states that defendants are primarily liable for these medical expenses because of their obligation to provide for the support of their minor child. *Alamance County Hosp. v. Neighbors*, 315 N.C. 362, 365, 338 S.E.2d 87, 89 (1986). We agree with plaintiff's statement in his amended com-

plaint: that defendants "have taken advantage of the group plan benefits without complying with the express or implied provisions or the spirit of the plan which provides for the Plaintiff in situations such as this, to recoup its losses when a third party causes injuries to covered persons." Plaintiff has presented a valid claim upon which relief *may* be granted.

The trial court erred in dismissing this action against the defendants because the complaint and amended complaint state two claims, (1) breach of contract, and (2) unjust enrichment, upon which relief may be granted. This action is hereby remanded for further proceedings on the merits of plaintiff-appellant's claims.

Reversed and remanded.

Judges ORR and GREENE concur.

CLINTON ROLAND SYKES, PETITIONER v. WILLIAM S. HIATT, COMMISSIONER, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 8914SC346

(Filed 5 June 1990)

1. **Automobiles and Other Vehicles § 2.5 (NCI3d) — South Carolina DWI — citation rather than warrant — failure to appear — North Carolina license suspended**

The trial court did not err by holding that the Department of Motor Vehicles had validly suspended petitioner's driving privileges based on a bond forfeiture in South Carolina where defendant was stopped on Highway I-95 in South Carolina; he was given a breathalyzer examination by an officer of the South Carolina Highway Patrol; his blood alcohol level was .12; cash bond was set in lieu of jail; petitioner was summoned to appear before a trial officer; petitioner did not appear and the trial officer entered a disposition of forfeited bond; South Carolina notified the North Carolina Division of Motor Vehicles that petitioner had forfeited his bond when he failed to appear in court; and DMV subsequently notified petitioner that his driving privileges were being suspended pursuant to the N.C.G.S. § 20-16(a)(7) and N.C.G.S. § 20-23. Both the South

Carolina Code and the North Carolinia General Statutes now permit criminal process by issuance and service of a citation; N.C.G.S. § 20-16(a)(7) authorizes the DMV to suspend the license of an operator upon a showing that the licensee had committed an offense in another state which would be grounds for suspension or revocation if committed in North Carolina, and driving while impaired is grounds for revocation in North Carolina. N.C.G.S. § 15A-302.

Am Jur 2d, Automobiles and Highway Traffic §§ 133, 135, 978; Evidence § 45.

2. **Evidence § 2 (NCI3d)— DWI in South Carolina—license revocation in North Carolina—judicial notice of similarity between impaired driving statutes**

N.C.G.S. § 8-4 permits the court to take judicial notice of other states' statutes and the trial court did not err in a license revocation proceeding by taking judicial notice of the similarity between the South Carolina impaired driving statutes and the North Carolina statute.

Am Jur 2d, Automobiles and Highway Traffic §§ 133, 135, 978; Evidence § 45.

APPEAL by petitioner from judgment entered 2 December 1988 by *Judge Anthony M. Brannon* in DURHAM County Superior Court. Heard in the Court of Appeals 22 September 1989.

Petitioner instituted this action to recover his North Carolina driver's license. On 31 October 1987 petitioner received a citation for driving under the influence of alcohol in South Carolina. He was summoned to appear in court in South Carolina on 16 November 1987 but failed to appear. South Carolina notified the North Carolina Division of Motor Vehicles (herein "DMV") that petitioner had forfeited his bond when he failed to appear in court. The DMV subsequently notified petitioner that his driving privileges were being suspended pursuant to G.S. 20-16(a)(7) and G.S. 20-23. After appealing the suspension through an administrative hearing, petitioner appealed to the trial court. The trial court affirmed the action of the DMV, and petitioner appeals.

Rudolph L. Edwards for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William B. Ray, for William S. Hiatt, Commissioner, North Carolina Division of Motor Vehicles, respondent-appellee.

PARKER, Judge.

[1] On appeal, petitioner first argues that no valid bond forfeiture occurred in South Carolina and that the trial court erred in holding that the DMV had validly suspended his driving privileges based on this bond forfeiture.

General Statutes Chapter 20, Article 2, reads as follows:

20-16. Authority of Division to suspend license.

(a) The Division shall have authority to suspend the license of any operator with or without a preliminary hearing upon a showing by its records or other satisfactory evidence that the licensee:

(7) Has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation.

G.S. 20-16(a)(7).

General Statute 20-23 authorizes DMV to suspend or revoke a resident's license "upon receiving notice of the conviction as defined in G.S. 20-24(c) of such person in another state of the offenses hereinafter enumerated which, if committed in this State, would be grounds for the suspension or revocation of the license of an operator." The section applies only to offenses set forth in G.S. 20-26(a).

General Statute 20-26(a), in turn, cross references to G.S. 20-17 for an additional list of offenses to which G.S. 20-23 and G.S. 20-24(c) are applicable. General Statute 20-17(2) reads as follows:

20-17. Mandatory revocation of license by Division.

The Division shall forthwith revoke the license of any driver upon receiving a record of such driver's conviction for any of the following offenses when such conviction has become final:

(2) Impaired driving under G.S. 20-138.1.

Petitioner contends that DMV could not validly suspend his driver's license pursuant to these statutes because he was not convicted of the offense of driving while impaired in South Carolina. Petitioner argues that conviction under G.S. 20-24(c) is defined as

"a final conviction of a criminal offense or a determination that a person is responsible for an infraction."

Petitioner admits that he received a citation in South Carolina for which he posted a cash bond in the amount of $218.00 to insure his appearance in court. Relying on *In re Revocation of License of Wright*, 228 N.C. 584, 46 S.E.2d 696 (1948), petitioner argues, however, that no bond forfeiture occurred in South Carolina when he failed to appear because the notice from South Carolina stated only that a uniform traffic ticket was issued. There could be no legal bond forfeiture without a legal proceeding, and there could be no pending legal proceeding unless a warrant had been issued. *Id.* at 588, 46 S.E.2d at 699. *See also In re Donnelly*, 260 N.C. 375, 132 S.E.2d 904 (1963).

Since the Supreme Court's decisions in *Wright* and *Donnelly*, the South Carolina Code and the North Carolina General Statutes have been amended to permit service of process by citation for misdemeanor traffic violations. South Carolina Code Ann. § 56-7-10 states:

> There will be a uniform traffic ticket used by all law enforcement officers in arrests for traffic offenses . . . .
>
> . . . The service of the uniform traffic ticket shall vest all traffic, recorders', and magistrates' courts with jurisdiction to hear and to dispose of the charge for which the ticket was issued and served.

S.C. Code Ann. § 56-7-10 (Law. Co-op. 1976). This section has been interpreted by the South Carolina Supreme Court to vest jurisdiction in the traffic court to hear and dispose of traffic charges without the necessity of an arrest warrant. *State v. Prince*, 262 S.C. 89, 91, 202 S.E.2d 645, 646 (1974).

Under G.S. 15A-302, North Carolina now also permits criminal process by issuance and service of a citation. General Statute 15A-921(1) provides that a citation may serve as the pleading in a criminal case. A citation directs a person to appear in court and answer a misdemeanor or infraction charge or charges. G.S. 15A-302(a).

In view of these statutory changes which now permit the institution of legal proceedings without a warrant, *Wright, supra, and Donnelly, supra,* do not preclude revocation of petitioner's

license in this case. From the face of the record and the Uniform Traffic Ticket issued to petitioner the following facts are made to appear. Defendant was stopped on Highway I-95 south of Hardeeville, South Carolina, on 31 October 1987 at 2:49 a.m. He was taken to jail, where he was given a breathalyzer examination at 4:20 a.m. by an officer of the South Carolina Highway Patrol. Petitioner's blood alcohol level was 0.12. In lieu of jail, a cash bond in the amount of $218.00 was set and accepted by D. Youngblood. Petitioner was summoned to appear before trial officer R. E. Grayson on 16 November 1987 at 7:00 p.m. in the City Hall of Hardeeville, South Carolina. On 16 November 1987 petitioner did not appear and trial officer Grayson entered a disposition of "forfeited bond." The face of the violator's copy of the ticket states, "Present this summons to the trial officer shown above." The ticket further states in bold letters:

> IF YOU FORFEIT BAIL . . . THIS VIOLATION WILL BE PLACED AGAINST YOUR DRIVING RECORD. FAILURE TO COMPLY WITH THE TERMS OF THIS SUMMONS WILL RESULT IN THE SUSPENSION OF YOUR DRIVERS LICENSE BY YOUR HOME STATE.

Petitioner stipulated that he received a copy of this Uniform Traffic Ticket.

Under S.C. Code Ann. § 56-5-2940, the forfeiture of bail in a driving under the influence case is the equivalent of conviction for purposes of punishment. *See State v. Langford*, 223 S.C. 20, 73 S.E.2d 854 (1953). General Statute 20-24(c) defines "conviction" as a "final conviction of a criminal offense." General Statute 20-16(a)(7) authorizes the DMV to suspend the license of an operator upon a showing by its records that the licensee "has committed an offense in another state, which if committed in this State would be grounds for suspension or revocation." Driving while impaired is grounds for revocation in this State. G.S. 20-17(2). Respondent stipulated to the breathalyzer report showing 0.12 blood alcohol concentration. Under G.S. 20-138.1(a)(2) a person who has an alcohol concentration of 0.10 or more at any relevant time after driving commits the offense of driving while impaired. From the evidence in this case, defendant clearly committed an offense in South Carolina for which his license could be revoked if committed in North Carolina, and his forfeiture of bond amounted to a conviction of the offense of impaired driving in South Carolina.

[2] Petitioner also contends the trial court erred in taking judicial notice of the similarity between the South Carolina impaired driving statutes and the North Carolina statute. This argument is without merit, as G.S. 8-4 permits the court to take judicial notice of other states' statutes.

Based on the foregoing, the judgment of the trial court is affirmed.

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. LLOYD NEILL STRICKLAND

No. 8913SC677

(Filed 5 June 1990)

1. **Constitutional Law § 34 (NCI3d)— double jeopardy—recesses between jury selection and empanelment—prosecution dismissed—jeopardy not attached**

The prosecution of defendant for solicitation to commit the murder of his wife was not barred by double jeopardy where a previous prosecution was voluntarily dismissed before the jury was empaneled. There was nothing in the record to suggest that the court abused its discretion in granting the State recesses which delayed the empanelment of the jury for some four and a half hours after the selection process was completed.

Am Jur 2d, Criminal Law §§ 260, 261.

2. **Criminal Law § 113 (NCI4th)— solicitation to murder—defense counsel not informed of statements—discovery not abused**

The testimony of an undercover SBI agent concerning defendant's solicitation of him to murder his wife and others was admissible despite defense counsel not being informed before trial of the statements pursuant to discovery where the court found upon competent evidence that the District Attorney did not learn of the statements until the trial began.

Am Jur 2d, Depositions and Discovery §§ 455, 457.

3. Criminal Law § 34.4 (NCI3d)— solicitation to commit murder— subsequent solicitation— admissible

Evidence of a subsequent solicitation to commit murder was admissible in defendant's trial for solicitation to murder to show knowledge, modus operandi or common plan or scheme, and to show a continuing offense. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 323-326, 329.

APPEAL by defendant from judgment entered 3 February 1989 by *Strickland, Judge*, in BRUNSWICK County Superior Court. Heard in the Court of Appeals 5 February 1990.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane R. Garvey, for the State.

Powell and Gore, by W. James Payne, for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of common law solicitation to commit the murder of his wife, Barbara Strickland, upon evidence which tends to show that: While incarcerated in the Brunswick County jail in early 1988, defendant asked a fellow inmate, Billy Owens, to kill his wife before the trial of their divorce case in December, 1988. Defendant agreed to pay Owens $10,000 and give him his 1976 truck as down payment. He drew diagrams of their house where she was living, suggested that he kill her when she went to the kennels behind the house to feed the dogs, and showed him how best to reach the kennels without being seen. He also gave Owens a note to give to his mother who had power of attorney over his property. The note directed her to give Owens the truck and title certificate. Defendant also promised to send Owens a picture of his wife. Upon being released from prison Owens contacted the police and accompanied by a detective he went to Strickland's mother's house where he delivered the note and received title to and possession of the truck. When Owens received the picture of Mrs. Strickland through the mail a detective was present and Strickland's fingerprints were on the picture. Strickland sent Owens a letter which referred to a fictitious agreement to buy a boat and stated that he needed to close the transaction soon.

[1] One contention defendant makes—that because of a previous prosecution which was voluntarily dismissed this one is barred

by the Double Jeopardy Clauses of the state and federal Constitutions—can be summarily disposed of because the record shows that the prior prosecution was dismissed before the jury was empaneled, and it has been held in many cases that jeopardy does not attach in a jury trial until the jury is empaneled and sworn. *State v. Chavis*, 24 N.C. App. 148, 210 S.E.2d 555 (1974), *cert. denied and appeal dismissed*, 287 N.C. 261, 214 S.E.2d 434 (1975), *cert. denied*, 423 U.S. 1080, 47 L.Ed.2d 91, 96 S.Ct. 868 (1976). Defendant does not argue that the rule is otherwise. His argument is that in granting the State recesses which delayed the empanelment of the jury for some four and a half hours altogether after the selection process was completed, the court exceeded its authority. The argument has no legal basis. Continuances, postponements and recesses are within the sound discretion of the trial judge, *State v. Carter*, 289 N.C. 35, 220 S.E.2d 313 (1975), *vacated in part, modified on other grounds*, 428 U.S. 904, 49 L.Ed.2d 1211, 96 S.Ct. 3212 (1976), and nothing in the record, which does not contain a transcript of the prior proceeding, suggests that the court abused its discretion in granting the recesses involved.

[2, 3] Defendant's other two contentions concern the court refusing to suppress the testimony of undercover SBI agent Ray Freeman about defendant soliciting him to murder his wife, District Attorney Mike Easley and two law enforcement officers. The alleged solicitation occurred when the agent was posing as a hit man named "Greg Becton." The basis for the suppression motion was that defense counsel was not informed pursuant to discovery before trial of the statements made to Freeman. In determining the motion the court found upon competent evidence that the District Attorney did not learn of defendant's statements to Freeman until trial began and concluded therefrom that the discovery process had not been abused. In this ruling we see no error. His final contention, that the evidence of the latter solicitation, which occurred eleven months after the one he was being tried for, was inadmissible is also overruled. Evidence of that solicitation was admissible on many grounds: It was admissible to show knowledge, Rule 404(b), N.C. Rules of Evidence, *State v. Ray*, 209 N.C. 772, 184 S.E. 836 (1936); to show *modus operandi* or common plan or scheme, *State v. Bagley*, 321 N.C. 201, 362 S.E.2d 244 (1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912, 108 S.Ct. 1590 (1988), *State v. Beam*, 184 N.C. 730, 115 S.E. 176 (1922); and to show a continuing offense. *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954).

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. DAVID KNIGHT

No. 8920SC940

(Filed 5 June 1990)

1. **Assault and Battery § 27 (NCI4th)— assault with deadly weapon inflicting serious injury—knife—evidence of deadly weapon**

There was evidence in a prosecution for assault with a deadly weapon inflicting serious injury that defendant used a knife and that it was a deadly weapon in that the victim was seriously cut about the body many times, including having the end of his nose sliced off.

Am Jur 2d, Assault and Battery §§ 48, 53.

2. **Assault and Battery § 37 (NCI4th)— assault with a deadly weapon inflicting serious injury—instruction on knife as deadly weapon**

The trial court in a prosecution for assault with a deadly weapon inflicting serious injury properly charged that a knife was a deadly weapon where the victim was seriously cut about the body many times, including having the end of his nose sliced off.

Am Jur 2d, Assault and Battery § 48.

3. **Assault and Battery § 116 (NCI4th)— assault with a deadly weapon inflicting serious injury—refusal to charge on simple assault—no error**

The trial court in a prosecution for assault with a deadly weapon inflicting serious injury was not required to charge on the lesser included offense of simple assault where there was evidence that the victim was seriously cut about the body many times, including having the end of his nose sliced off, and there was no evidence presented that the serious injuries

were not inflicted or that they resulted from a simple assault of some kind.

Am Jur 2d, Assault and Battery § 50.

APPEAL by defendant from judgment entered 13 April 1989 by *Judge William H. Helms* in UNION County Superior Court. Heard in the Court of Appeals 10 May 1990.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patricia F. Padgett, for the State.

Charles B. Brooks, II for defendant appellant.

PHILLIPS, Judge.

[1, 2, 3] In appealing his conviction of assault with a deadly weapon inflicting serious injury defendant makes three contentions: That there is no evidence that he used a deadly weapon; that the court erred in refusing to charge on simple assault; and in charging that a knife was a deadly weapon, in that there was no evidence that he used a knife. None of the contentions has merit.

The deadliness of the weapon used, that it was a knife and that the court's charge was correct is indicated by evidence to the effect that the victim was seriously cut about the body many times, one of which sliced the end of his nose off. *State v. Torain*, 316 N.C. 111, 340 S.E.2d 465, *cert. denied*, 479 U.S. 836, 93 L.Ed.2d 77 (1986); *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981). No evidence having been presented that these serious injuries were not inflicted, or that they resulted from a simple assault of some kind, the court was not required to charge on this lesser included offense. *State v. Wilson*, 315 N.C. 157, 337 S.E.2d 470 (1985).

No error.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JUNE 1990

AFRO-GUILD, INC. v. MOORING No. 8918SC694	Guilford (88CVS9212)	Affirmed
CAREY v. ELLINGTON No. 899SC906	Vance (87CVS97)	Appeal Dismissed
DIXON v. STUART No. 8921SC460	Forsyth (86CVS2479)	Affirmed
ELLENBERG v. TOWN OF BEAUFORT No. 893SC828	Carteret (88CVS618)	Affirmed
HINTON v. WATKINS No. 8910SC1134	Wake (89CVS00269)	Affirmed
HODGES v. COCA-COLA BOTTLING No. 8910IC1216	Ind. Comm. (542392)	Affirmed
IN RE COX No. 8922DC1176	Alexander (85J10)	Reversed & Remanded
IN RE GARDNER No. 8926SC382	Mecklenburg (87SP345)	No Error
IN RE HICKS No. 8927DC738	Gaston (85J26) (350-89-0132)	Affirmed
LAMB v. McKESSON CORP. STATE v. LAMB No. 8917SC935	Rockingham (86CVS0388) (87CRS6318)	Affirmed
LANGSTON v. N.C. DEPT. OF TRANSPORTATION No. 8910IC1179	Ind. Comm. (TA-9733)	Affirmed
LOTWIN v. TRIANGLE EQUIPMENT No. 8915SC907	Orange (88CVS44)	Affirmed
MALONE v. JONES No. 8910SC1049	Wake (87CVS11442)	Affirmed
PARKER v. EMERSON'S LEATHER No. 8910IC1048	Ind. Comm. (815117)	Affirmed
RALEIGH INN v. AETNA CASUALTY & SURETY CO. No. 8910SC845	Wake (87CVS6103)	No Error

STATE v. BLUE No. 8921SC872	Forsyth (88CRS8306)	No Error
STATE v. CLARK No. 8914SC979	Durham (85CRS30459) (85CRS30040) (87CRS19097) (87CRS19098) (85CRS30464)	No Error
STATE v. CURTIS No. 8928SC844	Buncombe (88CRS7932)	No Error
STATE v. FEELY No. 8926SC939	Mecklenburg (89CRS12277)	No Error
STATE v. GARDNER No. 896SC881	Halifax (88CRS7993)	No Error
STATE v. GIRARD No. 8927SC953	Gaston (88CRS13089)	No Error
STATE v. HAMPTON No. 8912SC908	Cumberland (88CRS29656) (88CRS29657) (88CRS29658) (88CRS32324)	No error in part; reversed in part & remanded
STATE v. HOBSON No. 895SC1128	New Hanover (86CRS22242) (86CRS22243) (86CRS22244) (86CRS22506) (86CRS22507)	Affirmed
STATE v. INGLE No. 8928SC1063	Buncombe (88CRS17135) (88CRS17295)	No Error
STATE v. JENKINS No. 8918SC922	Guilford (88CRS44911)	No Error
STATE v. KING No. 8922SC735	Davidson (88CRS10621)	No Error
STATE v. McADAMS No. 8927SC639	Gaston (88CRS20038)	No Error
STATE v. McKINNON No. 8912SC1122	Cumberland (88CRS12893)	No Error
STATE v. MERRITT No. 8918SC1080	Guilford (88CRS67623)	Affirmed
STATE v. NIXON No. 8913SC731	Brunswick (88CRS6479)	No Error

STATE v. SESSOMS No. 894SC1039	Sampson (88CRS4802)	Affirmed
STATE v. THEIS No. 8918SC739	Guilford (86CRS85834) (87CRS20210) (87CRS20324) (87CRS20325) (86CRS20326) (86CRS20327) (86CRS20328) (86CRS20329) (86CRS20330) (86CRS20331) (87CRS20332) (87CRS20333)	Dismissed
STATE v. TUCKER No. 8918SC1021	Guilford (89CRS511)	Remanded
STATE v. WRIGHT No. 8926SC1165	Mecklenburg (89CRS19853)	No Error
SUNSET BEACH TAXPAYERS ASSN. v. SUNSET BEACH AND TWIN LAKES, INC. No. 8913SC205	Brunswick (85CVS920)	Affirmed as Modified
WISE v. COX CONSTRUCTION CO. No. 8910IC1005	Ind. Comm. (069838)	Affirmed
WON, INC. v. FIDELITY SERVICE CORP. No. 8924SC506	Watauga (87CVS532)	Affirmed
YARBORO v. TECNIC ENGINEERING CORP. No. 8910IC1115	Ind. Comm. (811645)	Affirmed

APPENDIX

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

Beginning 18 October 1982, Canon 3A(7) of the Code of Judicial Conduct and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, were suspended, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state have been allowed on an experimental basis, in accordance with the terms of rules then adopted and published in 306 N.C. 797, and amended on 10 November 1982, published in 307 N.C. 741, on 24 June 1987, published in 319 N.C. 681, and on 30 June 1988, published in 322 N.C. 868.

Canon 3A(7) of the Code of Judicial Conduct is amended to read as follows:

> (7) A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

Rule 15 of the General Rules of Practice for the Superior and District Courts is amended to read as in the following pages.

Adopted by the Court in Conference this 13th day of June, 1990. These amendments shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals.

WHICHARD, J.
For the Court

WITNESS my hand and the Seal of the Supreme Court of North Carolina, this the 25th day of June, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

RULE 15

ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

(a) Definition.

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

(b) Coverage allowed.

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(1) The presiding justice or judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings, in the courtroom or the corridors immediately adjacent thereto.

(2) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and in camera proceedings.

(3) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(4) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated (b)(4).

(c) Location of equipment and personnel.

(1) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(2) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(3) The presiding judge may, however, exercise his or her discretion to permit the use of electronic media and still photography coverage without booths or other restrictions set out in Rule 15(c)(1) and (c)(2) if the use can be made without disruption of the proceedings and without distraction to the jurors and other participants. Such permission may be withdrawn at any time.

(4) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(5) Media personnel shall not exit or enter the booth area or courtroom once the proceedings are in session except during a court recess or adjournment.

(6) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) prior to the convening of proceedings;

(ii) during the luncheon recess;

(iii) during any court recess with the permission of the presiding justice or judge; and

(iv) after adjournment for the day of the proceedings.

(7) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals may waive the requirements of Rule 15(c)(1) and (2) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

(d) Official representatives of the media.

(1) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(2) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

(e) Equipment and personnel.

(1) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(2) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(3) Not more than one wired audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate

court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility. Provided, however, hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge; such approval may be withdrawn at any time.

(4) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(5) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

(f) Sound and light criteria.

(1) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(2) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

(g) Courtroom light sources.

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

(h) Conferences of counsel.

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

(i) Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

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

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS

§ 3 (NCI4th). Abatement on ground of pendency of prior action generally

Plaintiff insurer's declaratory judgment action to determine whether it was required by insurance policies to pay the costs of investigating and defending environmental actions was improperly stayed where claims in a New York action arising from a waste site in North Carolina had been dismissed and there was thus no prior action pending, and where defendant did not consent to suit in another jurisdiction. *American Motorists Ins. Co. v. Avnet, Inc.*, 385.

ACCORD AND SATISFACTION

§ 1 (NCI4th). Generally; definitions and elements

Plaintiff's acceptance of defendant's check tendered in full payment of a disputed claim did not constitute an accord and satisfaction where defendant was an agent with a fiduciary duty to account for money belonging to plaintiff. *Honig v. Vinson Realty Co.*, 392.

ADMINISTRATIVE LAW AND PROCEDURE

§ 5 (NCI3d). Availability of review by statutory appeal

The controlling judicial review statute in an appeal from a superior court ruling overturning an order of the Insurance Commissioner involving the Reinsurance Facility was G.S. 150B-51. *N.C. Reinsurance Facility v. Long*, 41.

§ 8 (NCI3d). Scope and effect of judicial review

The new Administrative Procedure Act allows administrative law judges to determine that a rule as applied in a particular case is void because it is not reasonably necessary to enable the agency to perform a function assigned to it by statute or to enable or facilitate the implementation of a program or policy in aid of which the rule was adopted. *Lenoir Mem. Hosp. v. N.C. Dept. of Human Resources*, 178.

§ 30 (NCI4th). Adjudication of contested case; generally

A petition for a contested case hearing arising from the issuance of a certificate of need for nursing home beds was not timely filed with the Office of Administrative Hearings. *Gummels v. N.C. Dept. of Human Resources*, 675.

§ 44 (NCI4th). Final decisions or orders

The appeal of a state employee who was discharged from an exempt policymaking position with the Department of Natural Resources and Community Development was remanded to the Office of Administrative Hearings where the Administrative Law Judge's recommended decision had been sent to the State Personnel Commission rather than to the employer administrative agency for review and final decision. *Johnson v. Natural Resources and Community Development*, 334.

APPEAL AND ERROR

§ 3 (NCI3d). Review of constitutional questions

An insurance company's constitutional contention that the board of the Reinsurance Facility lacked statutory authority and jurisdiction to exercise adjudicatory powers was not addressed where the company failed to comply with Rule 10 of the N.C. Rules of Appellate Procedure. *N.C. Reinsurance Facility v. Long*, 41.

APPEAL AND ERROR — Continued

The Court of Appeals will not pass upon the constitutionality of the Real Property Marketable Title Act when applied to extinguish vested remainders where the record does not reveal that the constitutional question was raised in or passed upon by the trial court. *Kirkman v. Wilson*, 242.

§ 14 (NCI3d). Appeal and appeal entries

Plaintiffs' appeal was dismissed as untimely where plaintiffs' oral motions for judgment n.o.v. and a new trial in open court were denied, plaintiffs then made written motions for judgment n.o.v. and for a new trial which were subsequently denied, and plaintiffs entered written notice of appeal within ten days of the denial of the written motions but more than ten days from the denial of the oral motions. *Middleton v. Middleton*, 217.

§ 28.1 (NCI3d). Necessity for request, objections, and exceptions

Plaintiff's assignment of error to the trial judge's findings with regard to defendant's disposable income was without merit where no exceptions were noted in the record on appeal to any of the trial judge's findings on this issue. *Glatz v. Glatz*, 324.

§ 45.1 (NCI3d). Effect of failure to discuss exceptions and assignments of error in brief

Defendants' contention that plaintiff's acceptance of remedies under a consent judgment barred his legal malpractice action was not addressed because it was not argued in their brief. *Cheek v. Poole*, 158.

§ 111 (NCI4th). Orders denying motions to dismiss generally

The denial of a motion to dismiss on the ground of a prior action pending is immediately appealable. *Gillikin v. Pierce*, 484.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Plaintiff in an action arising from the sale by defendant of plaintiff's decorative tin items failed to object at the appropriate time and could not assign error to the acceptance of the verdict. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 663.

§ 155 (NCI4th). Effect of failure to make motion, objection, request; criminal actions

A defendant in a cocaine prosecution did not object at trial and did not properly preserve for appeal his objection to testimony by an undercover agent regarding his description of how drugs could be hidden. *S. v. Mullen*, 472.

§ 157 (NCI4th). Appeal permitted without prior motion, objection, or request generally

An erroneous portion of a finding of fact was not binding on the Court of Appeals even though error was not assigned to that finding of fact by either party where error was manifest on the face of the record. *Tompkins v. Tompkins*, 299.

§ 203 (NCI4th). Appeal in civil actions generally; notice of appeal

Plaintiff properly perfected notice of appeal in a breach of warranty action arising from the sale of hosiery manufacturing equipment where plaintiff gave oral notice of appeal at a post-verdict motions hearing. *Stimpson Hosiery Mills v. PAM Trading Corporation*, 543.

ASSAULT AND BATTERY — Continued

§ 116 (NCI4th). Submission of lesser degrees of offenses; particular circumstances not requiring submission

The trial court in a prosecution for assault with a deadly weapon inflicting serious injury was not required to charge on the lesser included offense of simple assault where there was evidence that the victim was seriously cut about the body many times, including having the end of his nose sliced off. *S. v. Knight*, 696.

ASSIGNMENTS

§ 2 (NCI4th). Validity of assignment; rights and interests assignable

The trial court did not err by granting a motion for dismissal in an action in which plaintiff was attempting to recover sums paid to defendants under an employee benefit plan for injuries caused by a third party; allowing an assignment of rights arising out of an alleged cause of action for personal injury is contrary to the law of North Carolina. *Harris-Teeter Super Markets v. Watts*, 684.

ATTORNEYS AT LAW

§ 5.1 (NCI3d). Liability for malpractice

Defendants were not entitled to summary judgment as a matter of law on the issue of contributory negligence in a legal malpractice claim based on failure to adequately advise plaintiff of the terms of a separation agreement. *Cheek v. Poole*, 158.

§ 7.5 (NCI3d). Allowance of fees as part of costs

Plaintiff shareholder was entitled to recover reasonable attorney's fees incurred in prosecuting an action to recover a dividend paid by defendant corporation to all other preferred shareholders. *McGladrey, Hendrickson & Pullen v. Syntek Finance Corp.*, 151.

§ 30 (NCI4th). Presumption of authority

It is presumed that defendant's attorney had authority to sign a notice of voluntary dismissal of defendant's counterclaim. *Gillikin v. Pierce*, 484.

§ 42 (NCI4th). Professional malpractice; negligence generally

There was no error in granting partial summary judgment for defendant attorney on claims of breach of fiduciary duty, fraud, unjust enrichment, return of fee, restitution, and imposition of a constructive resulting trust. *Webster v. Powell*, 432.

§ 44 (NCI4th). Proof of malpractice; burden and sufficiency

The trial court did not err in an action for damages against an attorney by granting defendant attorney's motion in limine to preclude introduction of evidence related to defendant's failure to return plaintiff's money, unethical solicitation, commingling, excessive fees and unauthorized use of a deed of trust. *Webster v. Powell*, 432.

§ 51 (NCI4th). Fraud; liability under statutes; damages

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement in its submission of an issue relating to fraudulent practice. *Booher v. Frue*, 570.

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting agreement by determining that N.C.G.S. 84-13 applied to the facts of this case even though this case involved constructive fraud by breach of fiduciary duty. *Ibid.*

§ 57 (NCI4th). Division of fees

The trial court erred by entering summary judgment in favor of one defendant in an action arising from a fee-splitting agreement between North Carolina attorneys and a Texas attorney. *Booher v. Frue*, 585.

The trial court did not err in denying defendant's motions for a directed verdict and judgment n.o.v. in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney despite plaintiffs' testimony in which they denied the existence of an attorney-client relationship with defendant. *Booher v. Frue*, 570.

The trial court did not err in an action for constructive trust and constructive fraud arising from a fee-splitting arrangement by giving a peremptory instruction on whether a relationship of trust and confidence existed between plaintiffs and defendant. *Ibid.*

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement between attorneys in admitting testimony regarding contact and conversations of plaintiffs with other attorneys. *Ibid.*

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting agreement between a North Carolina attorney and a Texas attorney by allowing the introduction into evidence of N.C. Disciplinary Rules 2-106 and 2-107. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES

§ 2.5 (NCI3d). Proceedings based on offenses committed in other states

The trial court did not err by holding that the Department of Motor Vehicles had validly suspended petitioner's driving privileges based on a bond forfeiture in South Carolina where defendant was stopped for DWI and failed to appear in court in South Carolina. *Sykes v. Hiatt*, 688.

§ 47.3 (NCI3d). Nonsuit on basis of physical facts

The trial court erred in an action arising from an automobile accident by directing a verdict for defendants where there was more than one reasonable explanation for the short distance the vehicles traveled after impact. *McFetters v. McFetters*, 187.

§ 95.2 (NCI3d). Negligence of driver imputed to guest or passenger; driver under control of passenger; owner-passenger

The trial court erred by directing a verdict for defendants in an automobile accident case in which defendants raised contributory negligence where plaintiff was injured while riding in the front passenger seat with her fifteen-year-old son driving, her son was operating the vehicle pursuant to a learner's permit, and all of the evidence was that plaintiff's husband exercised control over their son's driving from the back seat. *McFetters v. McFetters*, 187.

§ 113.1 (NCI3d). Evidence of homicide held sufficient

The evidence was sufficient to support defendant's conviction of second degree murder arising out of an automobile collision which occurred when the vehicle

CONSPIRACY

§ 5.1 (NCI3d). Admissibility of acts and statements of co-conspirators

The State's evidence was sufficient to make a prima facie showing of a conspiracy to traffic in cocaine so that hearsay statements made by an alleged co-conspirator regarding "getting up with his man" were admissible against defendant. *S. v. Turner*, 442.

CONSTITUTIONAL LAW

§ 20 (NCI3d). Equal protection generally

The ownership distinction for ad valorem taxation purposes in G.S. 105-277.2 *et seq.* between forestland owned by corporations whose shareholders are actively engaged in or related to those actively engaged in the business of the corporation and forestland owned by corporations which do not meet that and other requirements does not violate the equal protection requirements of the state and federal constitutions. *In re Appeals of Timber Companies*, 412.

§ 23.4 (NCI3d). Scope of protection of due process; actions affecting businesses, corporations, and professions

The G.S. 1A-1, Rule 11(a) standard of reasonable inquiry was not unconstitutionally vague as applied where there was ample evidence that the assertions made by the attorney here were unfounded and that he had access to that information when his complaint was filed. *Central Carolina Nissan, Inc. v. Sturgis*, 253.

§ 28 (NCI3d). Due process and equal protection generally in criminal proceedings

The law and reasoning applicable to the Fourth Amendment of the U.S. Constitution in a search of luggage on a bus was also determinative of defendant's rights under the North Carolina Constitution. *S. v. Johnson*, 290.

§ 34 (NCI3d). Double jeopardy

The prosecution of defendant for solicitation to commit the murder of his wife was not barred by double jeopardy where a previous prosecution was voluntarily dismissed before the jury was empaneled. *S. v. Strickland*, 693.

§ 46 (NCI3d). Removal or withdrawal of appointed counsel

The trial court did not err in denying defendant's request to have substitute counsel appointed prior to trial because defendant didn't understand what his attorney was doing and didn't like the jury selected by the attorney. *S. v. Aytche*, 358.

§ 51 (NCI3d). Speedy trial; delays in and between arrest, issuing warrant, securing indictment, and arraignment

Defendant's constitutional right to a speedy trial was not violated by a pre-arrest delay of seven months after defendant sold drugs to an undercover officer where the delay was justified by the need to protect an ongoing undercover investigation. *S. v. Jones*, 342.

§ 80 (NCI3d). Cruel and unusual punishment; death and life sentences

The mandatory life sentence for first degree sexual offense does not constitute cruel and unusual punishment. *S. v. Jerrells*, 318.

CONTEMPT OF COURT

§ 6 (NCI3d). Hearings on order to show cause

It was noted that G.S. 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment is likely to be adjudged, including citations for criminal contempt for failure to pay child support. *Hammock v. Bencini*, 510.

CONTRACTS

§ 3 (NCI3d). Definiteness and certainty of agreement

Plaintiffs were not entitled to summary judgment in an action to recover $108,000 pursuant to a written contract where the agreement contained a provision permitting future agreement. *Mountain Fed. Land Bank v. First Union Nat. Bank*, 195.

§ 25.2 (NCI3d). Sufficiency of particular allegations

Plaintiff sufficiently stated a claim for breach of contract in an action to recover benefits paid to defendants under an employee benefit plan for injuries caused by a third party. *Harris-Teeter Super Markets v. Watts*, 684.

§ 26.1 (NCI3d). Evidence of negotiations; parol evidence rule

Defendants in a warranty action arising from the sale of hosiery manufacturing equipment waived objection to parol testimony concerning a precontract agreement. *Stimpson Hosiery Mills v. PAM Trading Corporation*, 543.

CORPORATIONS

§ 16.1 (NCI3d). Federal and state regulation of sale of securities

There was insufficient evidence to support a conviction for the sale of unregistered stock, for selling stock as an unregistered salesman, or for failing to disclose risks in the sale of stock. *S. v. Williams*, 274.

COSTS

§ 1.2 (NCI3d). Recovery of costs in particular actions

The trial court in plaintiff's first action had the authority only to order that costs be paid by plaintiff after she took a voluntary dismissal but not to order that the costs be paid within 30 days of the refiling of the action. *Fields v. Whitehouse and Sons Co.*, 395.

Rule 41(d) requires the judge in a second action following a voluntary dismissal to make his own determination as to costs of the first action not being paid and to allow the plaintiff 30 days within which to pay them and does not authorize actions to be dismissed because of failure to meet deadlines improperly set in the first action. *Schaffner v. Pantelakos*, 399.

§ 4 (NCI3d). Items of costs and amount of allowances, in general

The trial court had the discretion to tax deposition expenses as costs pursuant to Rule 41(d) and G.S. 6-20. *Alsup v. Pitman*, 389.

§ 4.1 (NCI3d). Witness fees

The trial court did not abuse its discretion by awarding costs which included a fee for a nontestifying expert witness. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 13.

COUNTIES

§ 9 (NCI3d). Liability for tort; governmental immunity

The Court of Appeals declined the county's invitation to expand the doctrine of sovereign immunity in a case in which plaintiffs sought a writ of mandamus to compel improvements in the Alamance County Courthouse. *Ragan v. County of Alamance*, 636.

CRIMINAL LAW

§ 26.9 (NCI3d). Plea of former jeopardy; new trial after appeal or postconviction attack

Where defendant was tried for first degree murder and convicted of second degree murder, and the appellate court held that the evidence did not support submission of second degree murder as a possible verdict, defendant could not be retried for either first or second degree murder. *S. v. Arnold*, 518.

§ 34.4 (NCI3d). Admissibility of evidence of other offenses

Evidence of a subsequent solicitation to commit murder was admissible in defendant's trial to commit murder. *S. v. Strickland*, 693.

§ 34.6 (NCI3d). Admissibility of evidence of other offenses to show knowledge or intent

The trial court did not abuse its discretion in a prosecution for murder arising from the furnishing of dangerous drugs by allowing the jury to consider testimony about another incident in which defendant supplied the same drugs to another party who suffered a near fatal overdose. *S. v. Liner*, 600.

§ 34.8 (NCI3d). Admissibility of other offenses to show modus operandi or common plan, scheme or design

Evidence that defendant had pled guilty to two counts of taking indecent liberties with his stepdaughter three years earlier was properly admitted in defendant's trial for rape of his stepdaughter to show common scheme or plan. *S. v. Hall*, 1.

Testimony of defendant's daughter concerning prior acts of misconduct was admissible in a prosecution for first degree rape and first degree sexual offense. *S. v. Everett*, 23.

§ 45 (NCI3d). Experimental evidence

A defendant charged with first degree murder of her husband as an accessory before the fact was not prejudiced by the trial court's erroneous refusal to permit a lay witness to testify and submit documents demonstrating how words and phrases from legitimate letters sent by defendant to the perpetrator could have been pieced together and photocopied to produce what would appear to be copies of authentic love letters. *S. v. Arnold*, 518.

§ 50.1 (NCI3d). Admissibility of opinion testimony; opinion of expert

Testimony by a clinical social worker who counseled an alleged rape victim that the victim had a reputation for truthfulness in her school community constituted improper expert testimony on the credibility of the victim as a witness. *S. v. Hall*, 1.

The trial court did not err in a prosecution for first degree rape and first degree sexual offense of a victim who was four years old at the time of trial by allowing a pediatrician to testify that in his best opinion penetration occurred more than two or three times. *S. v. Everett*, 23.

CRIMINAL LAW — Continued

§ 51 (NCI3d). Qualification of experts

An expert in the field of child psychiatry was properly permitted to testify about post-traumatic stress disorder even though there was no evidence that he had received specialized training in such disorder. *S. v. Hall*, 1.

The trial court properly exercised its discretion in permitting a clinical social worker to testify regarding the profile of sexually abused children. *Ibid.*

§ 66.12 (NCI3d). Identification testimony; confrontation in courtroom

The trial court did not abuse its discretion in denying defendant's motion to be seated away from the defense table during identification testimony by an assault victim. *S. v. Aytche*, 358.

§ 66.16 (NCI3d). Sufficiency of evidence of independent origin of in-court identification in cases involving photographic identifications

Although the showing of only one photograph to a witness some seven months after the alleged crime occurred and after the witness had been notified that he would be receiving a photograph of the defendant was impermissibly suggestive, the evidence was sufficient to support the trial court's conclusions that the pretrial identification procedure did not create a substantial likelihood of irreparable misidentification and that the in-court identification was of independent origin. *S. v. Jones*, 342.

§ 66.19 (NCI3d). Conduct of hearing on admissibility of identification; questions and evidence permitted

Any error in conducting a voir dire hearing immediately after identification testimony was admitted rather than before was harmless. *S. v. Jones*, 342.

§ 67 (NCI3d). Evidence of identity by voice

The trial court in a cocaine prosecution did not err by admitting testimony concerning the identity of defendant's voice as the voice heard on a radio transmitter. *S. v. Mullen*, 472.

§ 73.2 (NCI3d). Statements not within hearsay rule

An officer's testimony that an informant knew where defendant lived did not constitute hearsay. *S. v. Jones*, 342.

§ 79 (NCI3d). Acts and declarations of companions, codefendants, and co-conspirators prior to or during commission of crime

Testimony by two former employees of defendant adult entertainment center concerning their past arrests and plea arrangements in obscenity cases was admissible to show intent and plan on the part of defendant to engage in a conspiracy to disseminate obscenity. *S. v. Cinema Blue of Charlotte*, 628.

§ 79.1 (NCI3d). Acts and declarations of companions, codefendants, and co-conspirators subsequent to commission of crime

Testimony by two codefendants concerning their guilty pleas to the obscenity charges for which defendants were being tried was admissible to strengthen their credibility as witnesses. *S. v. Cinema Blue of Charlotte*, 628.

§ 86.3 (NCI3d). Prior convictions; effect of defendant's answer; further cross-examination of defendant

The trial court erred in a prosecution for felonious breaking or entering of a motor vehicle and misdemeanor larceny from a vehicle by allowing the prosecutor

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

§ 322 (NCI4th). Joinder of charges against defendants charged with same multiple offenses

The trial court did not abuse its discretion in granting the State's motion to join all defendants and charges for trial in a prosecution for conspiracy to disseminate obscenity and dissemination of obscenity. *S. v. Cinema Blue of Charlotte*, 628.

§ 374 (NCI4th). Comments by the judge regarding admission of particular evidence

The trial court's comment following a witness's answer in an armed robbery prosecution did not import an expressed opinion, demonstrate favoritism, and was not prejudicial. *S. v. Summerlin*, 167.

§ 382 (NCI4th). Examination of witnesses by trial court; clarification of testimony

The trial court's questions to a fingerprint expert about fingerprints taken from several beer cans found at the victims' house clarified the witness's testimony and did not constitute an expression of opinion. *S. v. Redfern*, 129.

§ 400 (NCI4th). Miscellaneous remarks and actions by court

The trial judge did not express an opinion on the evidence by his numerous questions and remarks during the trial, some of which occurred outside the presence of the jury. *S. v. Redfern*, 129.

§ 417 (NCI4th). Limitations on opening statements

The trial court did not err in a robbery prosecution by allowing the prosecutor to mention in his opening statement that the victim had graduated second in his high school class and obtained a college scholarship. *S. v. Summerlin*, 167.

§ 425 (NCI4th). Counsel's comment on failure to call particular witnesses or offer particular evidence

The trial court erred a prosecution for felonious breaking or entering of a motor vehicle and felonious larceny from a motor vehicle by allowing the prosecutor to argue that an alibi witness for defendant had not appeared because she had not wanted to lie. *S. v. Wilson*, 86.

§ 500 (NCI4th). Miscellaneous occurrences during jury deliberations

A juror was not intimidated or forced to vote in favor of conviction when the trial court denied his request to be excused after the alternate jurors had already been excused. *S. v. Redfern*, 129.

§ 687 (NCI4th). Court's discretion to give substance of, or to refuse to give, requested instruction

There was no prejudicial error in a murder prosecution arising from the furnishing of drugs where the trial court refused to charge the jury in accordance with defendant's written requests for instructions as to the definition of intent and proximate cause. *S. v. Liner*, 600.

§ 745 (NCI4th). Instruction on witness credibility generally

The trial court did not err in a robbery prosecution by not instructing the jury that the testimony of law enforcement officers is to be evaluated as any other witness where the jury was instructed to apply the same tests of truthfulness which they applied in their everyday affairs. *S. v. Williams*, 68.

§ 753 (NCI4th). Court's discretion to give substance of, rather than precise language of, requested instruction

There was no error in a robbery prosecution where the trial court failed to give defendant's requested instruction that the State had the burden of proving the identity of the defendant as the perpetrator where the trial judge instructed the jury that the State must prove defendant guilty beyond a reasonable doubt. *S. v. Williams*, 68.

The fact that defendant in a robbery prosecution presented no evidence did not give rise to the necessity of an instruction that the number of witnesses and quantity of evidence is not determinative of guilt because the instructions given were substantially the same. *Ibid.*

§ 813 (NCI4th). Instructions on character evidence generally

State v. Bogle, 324 N.C. 190, stands for the principle that a criminal defendant will be entitled to an instruction on a good character trait as substantive evidence of innocence when defendant satisfies a four-part test. *S. v. Moreno*, 642.

§ 815 (NCI4th). Instructions on character evidence; requirement of showing prejudice

The trial court in a prosecution for trafficking in cocaine correctly refused to instruct the jury on character traits including honesty, loyalty, and generosity as substantive evidence of innocence where those traits did not pertain to the charges against defendant; the court correctly refused to instruct the jury on good character as it pertained to defendant's not dealing in drugs because that was plainly evidence of a fact; and, although the trial court erred by refusing to instruct on law-abidingness as a character trait and on evidence of defendant's not using drugs as a character trait, that error was not prejudicial. *S. v. Moreno*, 642.

§ 884 (NCI4th). Appellate review of jury instructions; objections; waiver of appeal rights

An assignment of error to the court's failure to limit its conspiracy instructions to conspiracy to commit first degree murder will not be considered on appeal where defendant failed to request an instruction, to object to that portion of the charge, or to argue plain error. *S. v. Arnold*, 518.

§ 903 (NCI4th). Unanimity of verdict

The trial court did not err in a prosecution for driving while impaired in its instructions to the jury on the offense of DWI and in failing to provide the jury with defendant's requested two-pronged verdict. *S. v. Garvick*, 556.

§ 904 (NCI4th). Denial of right to unanimous verdict

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that defendant could be found guilty of taking an indecent liberty if it found that he willfully took an indecent liberty with a child for the purpose of arousing "or" gratifying sexual desire. *S. v. Jerrells*, 318.

§ 1079 (NCI4th). Consideration of aggravating and mitigating factors generally; discretion of court

The trial court did not consider improper factors in sentencing defendant to greater than the presumptive term for second degree murder but based the sentence on his finding of one aggravating factor and no mitigating factors. *S. v. Vance*, 105.

CRIMINAL LAW — Continued

§ 1081 (NCI4th). Consideration of aggravating and mitigating factors where mitigating factors outnumber aggravating factors

The trial court did not abuse its discretion in finding that one aggravating factor outweighed five mitigating factors in imposing a sentence upon defendant for conspiracy to murder her husband. *S. v. Arnold*, 518.

§ 1082 (NCI4th). Consideration of aggravating and mitigating factors where there is an aggravating factor but no mitigating factor

The trial court did not err when sentencing defendant for armed robbery by imposing a sentence in excess of the presumptive term after finding one factor in aggravation and none in mitigation. *S. v. Summerlin*, 167.

§ 1114 (NCI4th). Aggravating factors; lack of acknowledgment of wrongdoing; lack of remorse

The trial court erred when sentencing defendant for robbery and assault by aggravating his sentence for failure to admit and express remorse. *S. v. Williams*, 68.

Defendant's assertion that his sentence was punishment for failure to plead guilty was unsupported. *S. v. Summerlin*, 167.

§ 1133 (NCI4th). Position of leadership or inducement of others aggravating factor generally

The trial court's finding as an aggravating factor for conspiracy to disseminate obscenity and dissemination of obscenity as an accessory before the fact that defendants induced others to participate in each offense was not improperly based on evidence necessary to prove an element of each offense. *S. v. Arnold*, 518.

§ 1177 (NCI4th). Position of trust or confidence aggravating factor generally

The evidence supported the trial court's finding as an aggravating factor for conspiracy by defendant to murder her husband that defendant took advantage of a position of trust or confidence to commit the offense. *S. v. Arnold*, 518.

§ 1189 (NCI4th). Aggravating factors; prior convictions; commission of joinable offense

The trial court did not aggravate defendant's sentence for second degree murder by the use of prior convictions for joinable offenses for which defendant had been sentenced previously. *S. v. Vance*, 105.

§ 1223 (NCI4th). Mental disease or illness mitigating factor

The trial court was not required to find voluntary intoxication or limited mental capacity as a factor in mitigation where defendant failed to show conclusively that either disability reduced his culpability for the offenses charged. *S. v. Redfern*, 129.

DAMAGES

§ 6 (NCI3d). Special damages

The trial court properly ruled that plaintiff's recoverable damages for negligent manufacture and inspection of a pressure vessel which exploded did not include economic or pecuniary losses such as the cost to replace other allegedly defective pressure vessels not damaged by the explosion. *Chicopee, Inc. v. Sims Metal Works*, 423.

DAMAGES — Continued

§ 9 (NCI3d). Mitigation of damages

The trial court erred in a warranty action arising from the sale of hosiery equipment in its instruction on plaintiff's duty to mitigate damages. *Stimpson Hosiery Mills v. PAM Trading Corporation*, 543.

DECLARATORY JUDGMENT ACT

§ 3 (NCI3d). Requirement of actual justiciable controversy

The trial court lacked subject matter jurisdiction to enter partial summary judgment in a declaratory judgment action brought by the owners of four tracts of land whose deeds included rights of first refusal where defendant had sought to exercise his right of first refusal as to only one deed. *Nichols v. Lake Toxaway Co.*, 313.

The trial court correctly granted defendant's motion to dismiss a declaratory judgment action seeking a declaration that district court judges must appoint counsel for indigent defendants at criminal contempt hearings for nonsupport where the plaintiff in this case was no longer incarcerated at the time of the filing and hearing of this action. *Hammock v. Bencini*, 510.

§ 4 (NCI3d). Availability of remedy in particular controversy

The trial court did not err by finding that an attorney failed to produce case law or plausible legal argument in support of his attempt to prelitigate defenses to an anticipated action or to challenge prosecutorial discretion in the Attorney General's Office in a declaratory judgment action. *Central Carolina Nissan, Inc. v. Sturgis*, 253.

DEEDS

§ 4 (NCI3d). Competency of grantor

Summary judgment was improvidently granted as to a claim for mental incapacity of the grantor in an action by the heirs under a will to invalidate a deed. *Hayes v. Turner*, 451.

§ 9 (NCI3d). Deeds of gift

The issue of whether a gift deed was void ab initio because it was not acknowledged and registered in due form was not properly before the court. *Hayes v. Turner*, 451.

§ 21 (NCI3d). Stipulation for reconveyance of land to grantor

The trial court incorrectly entered partial summary judgment for plaintiff as to one lot in a declaratory judgment action seeking to have certain Option to Purchase clauses in deeds declared void and unenforceable as violating the Rule Against Perpetuities. *Nichols v. Lake Toxaway Co.*, 313.

DIVORCE AND ALIMONY

§ 16.11 (NCI3d). Attorney fees and costs

The trial court correctly denied plaintiff's motion for attorney fees and expenses in a divorce action where plaintiff first asserted her claim for attorney fees in a motion filed three months after entry of an income withholding order. *Glatz v. Glatz*, 324.

DIVORCE AND ALIMONY — Continued

§ 21.1 (NCI3d). Enforcement of alimony awards; jurisdiction; notice and opportunity for hearing

The trial court obtained personal jurisdiction over defendant in a 1988 proceeding to recover alimony arrearages from defendant by assignment of his monthly wages where plaintiff served the motion for assignment of wages and the show cause order on the attorney of record who represented defendant in the original divorce and alimony action in 1976. *Miller v. Miller*, 221.

§ 23.6 (NCI3d). Child custody; refusal to take jurisdiction

The trial court properly dismissed petitioner's North Carolina custody action on the grounds that Georgia had previously assumed jurisdiction in the case. *In re Bhatti*, 493.

§ 24.1 (NCI3d). Determining amount of child support

The trial court did not err in an action for child custody and support by ordering defendant to pay a portion of the expenses incurred for private schooling for a child with a learning disability. *Sikes v. Sikes*, 610.

§ 24.5 (NCI3d). Modification of child support order; changed circumstances

Defendant's contention in a child custody and support action that the court erred by ordering retroactive and prospective child support even though he was in compliance with a previous support order was without merit. *Sikes v. Sikes*, 610.

§ 24.9 (NCI3d). Findings

There were sufficient findings and conclusions to support payment of child support where the court made specific findings concerning the actual sums expended by plaintiff since custody of the sons was transferred to her, the reasonableness of those sums, and defendant's ability to contribute to the payment of those past expenditures. *Sikes v. Sikes*, 610.

The trial court did not abuse its discretion in an action for child custody and support by finding that both parties had the ability to contribute to the support of the children and that the sums ordered were reasonable. *Ibid.*

§ 25 (NCI3d). Custody generally

The trial court erred in a child custody action by authorizing law enforcement officers to pick up the children and deliver them to respondent in an effort to assist the Georgia court in enforcing its order. *In re Bhatti*, 493.

§ 27 (NCI3d). Attorneys fees and costs generally

The trial court did not abuse its discretion by ordering defendant to pay a portion of plaintiff's attorney fees in an action for child custody and child support. *Sikes v. Sikes*, 610.

§ 28 (NCI3d). Attacks based on jurisdiction

The trial judge erred by not extending full faith and credit to an Illinois judgment by refusing to enforce automatic adjustment provisions, allowing defendant a credit against his child support obligation, and refusing to award prejudgment interest where the trial judge concluded that those provisions would be unenforceable under North Carolina law. *Glatz v. Glatz*, 324.

DIVORCE AND ALIMONY — Continued

§ 30 (NCI3d). Distribution of marital property in divorce action

Letters sent by defendant's counsel to the trial court did not unduly influence the court in favor of defendant in an equitable distribution proceeding. *Stiller v. Stiller*, 80.

The trial court in an equitable distribution proceeding erred in using the "withdrawal value" to determine the respective values of the parties' vested retirement benefits. *Ibid.*

The trial court did not err in failing to credit plaintiff with the value of repairs made to the marital home and payment of property taxes after the date of separation. *Ibid.*

The trial court erred in an equitable distribution action by classifying the parties' home as marital property where defendant built a shrimp boat prior to his marriage, the shrimp boat was subsequently sold, and the parties financed the construction of their house with monies received from the sale of the boat. *Lewis v. Lewis*, 138.

EJECTMENT

§ 2 (NCI3d). Jurisdiction of summary ejectment

The trial court lacked subject matter jurisdiction to hear a summary ejectment action where the complaint alleged that there was no rent and that no lease existed, the record contained neither allegations nor evidence of a landlord-tenant relationship, and plaintiff did not allege any of the statutory violations required by summary ejectment. *Hayes v. Turner*, 451.

ELECTRICITY

§ 7.1 (NCI3d). Sufficiency of evidence of defendant's negligence in causing electrical fire

Plaintiff's evidence was insufficient to show that negligence by defendant was the proximate cause of an electrical fire which injured plaintiff electrician while he was working in a switchgear power cabinet at defendant's sawmill. *Murphey v. Georgia Pacific Corp.*, 55.

EMINENT DOMAIN

§ 5.8 (NCI3d). Particular items which may be compensated

Defendants were not entitled to compensation for the construction of a median strip in front of their remaining property as part of a project to expand a two-lane highway to four lanes. *Dept. of Transportation v. Fox*, 61.

§ 6.9 (NCI3d). Cross-examination of value witness

The trial court in a highway condemnation action erred in allowing defendants' counsel to refer to the value of three noncomparable properties fifteen times during his cross-examination of plaintiff's appraisal witness where it was obvious that counsel's primary intent was to allow the jury to hear the values of those properties and not to impeach the credibility of plaintiff's witness. *Dept. of Transportation v. Fox*, 61.

ESTOPPEL

§ 4.1 (NCI3d). Equitable estoppel; conduct of party sought to be estopped

Defendants were estopped from raising G.S. 1-50(5), a statute of repose, in bar of plaintiffs' action for breach of warranty and negligence arising from a defective air conditioning system in an office condominium project where defendants entered into an extension agreement with plaintiffs in which they agreed not to raise a defense based on any statute of limitations. *One North McDowell v. McDowell Development Co.*, 125.

§ 4.6 (NCI3d). Conduct of party asserting estoppel; reliance

Estoppel was not applicable to a claim for constructive fraud and constructive trust arising from a fee-splitting agreement between attorneys where plaintiffs accepted the proceeds from various claims of their son's estate with full knowledge of the fee-splitting agreement. *Booher v. Frue*, 570.

EVIDENCE

§ 2 (NCI3d). Judicial notice; legislative, executive, and judicial acts of the United States and other states

G.S. 8-4 permits the court to take judicial notice of other states' statutes and the trial court did not err in a license revocation proceeding by taking judicial notice of the similarity between the North Carolina and South Carolina impaired driving statutes. *Sykes v. Hiatt*, 688.

§ 18 (NCI3d). Experimental evidence

The trial court did not err in a DWI prosecution by requiring defendant to state his reasons for a demonstration of how a chemical analyst inserted an ampul into the breathalyzer machine. *S. v. Garvick*, 556.

§ 20 (NCI3d). Rebuttal of matters adduced by the adverse party

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement by allowing rebuttal evidence from plaintiff about payments made to a Texas attorney. *Booher v. Frue*, 570.

§ 23 (NCI3d). Competency of allegations in pleadings

There was no prejudicial error in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney where the trial court denied defendant's request to admit a particular paragraph of plaintiffs' complaint and a corresponding answer from the Texas attorney. *Booher v. Frue*, 570.

§ 46.1 (NCI3d). Evidence of other matters

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting arrangement with a Texas attorney by allowing plaintiffs' counsel to read to the jury portions of the Texas attorney's deposition. *Booher v. Frue*, 570.

§ 48.1 (NCI3d). Failure to prove qualification of expert

The trial court did not err in a DWI prosecution by failing to certify defendant's chemistry professor as an expert. *S. v. Garvick*, 556.

EXECUTORS AND ADMINISTRATORS

§ 6 (NCI3d). Nature of right to possession of assets

The heirs under a will were the proper parties to contest title to real estate. *Hayes v. Turner*, 451.

FALSE IMPRISONMENT

§ 2 (NCI3d). Actions for false imprisonment

The trial court in an action for false imprisonment did not err in instructing the jury that a person may be detained if a rational and prudent man should "suspect" that a concealment or larceny of merchandise has taken place. *Lenins v. K-Mart Corp.*, 591.

The trial court did not err in instructing the jury that evidence of plaintiff's acquittal of concealment of merchandise and shoplifting could not be considered as evidence of lack of probable cause by defendant. *Ibid.*

The court's instructions sufficiently apprised the jury as to when a merchant or his employee who detains or causes the arrest of any person for concealing merchandise will not be held civilly liable for false imprisonment. *Ibid.*

FIDUCIARIES

§ 1 (NCI3d). Generally

The trial court did not err in an action for constructive fraud and constructive trust arising from a fee-splitting agreement by instructing the jury on alternative bases for the plaintiffs' recovery of damages or restitution. *Booher v. Frue*, 570.

§ 2 (NCI3d). Evidence of fiduciary relationship

The trial court did not err by allowing defendants' motion for directed verdict on the issue of fiduciary duty in an action arising from plaintiff's sale of defendants' decorative tin items. *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 663.

GUARANTY

§ 2 (NCI3d). Actions to enforce guaranty

The court did not err by finding and concluding that a loan modification agreement did not materially alter a note which defendants had guaranteed and did not release defendants from their original obligation. *Kirkhart v. Saieed*, 49.

HIGHWAYS AND CARTWAYS

§ 7 (NCI3d). Construction of highways; signs and warnings

The trial court properly granted directed verdict for the city in a wrongful death action arising from a motorcycle-truck accident where plaintiff contended that the city was negligent in failing to install a protected left turn signal. *Talian v. City of Charlotte*, 281.

HOMICIDE

§ 8 (NCI3d). Intoxication and use of drugs

Evidence of a perpetrator's use of marijuana prior to a killing did not negate premeditation and deliberation. *S. v. Arnold*, 518.

HOMICIDE — Continued

§ 21.7 (NCI3d). Sufficiency of evidence of guilt of second degree murder

The evidence was sufficient to support defendant's conviction of second degree murder arising out of an automobile collision which occurred when the vehicle defendant was driving at a high rate of speed while intoxicated crossed the center line and struck an oncoming vehicle. *S. v. Vance*, 105.

The year and a day rule did not require dismissal of a prosecution for second degree murder arising from an automobile collision where the evidence supported the conclusion that the victim's death was the proximate result of injuries he received in the collision. *Ibid.*

The trial court did not err in a murder prosecution based on defendant's furnishing drugs to the victim by denying defendant's motion to dismiss based on the contention that the state did not produce sufficient evidence of malice or intent. *S. v. Liner*, 600.

§ 28.8 (NCI3d). Defense of accidental death

The trial court did not err in a murder prosecution arising from the furnishing of drugs by not instructing the jury on accident and misadventure. *S. v. Liner*, 600.

§ 30 (NCI3d). Submission of question of guilt of lesser degrees of the crime, generally; guilt of second degree murder on charge of premeditated and deliberate murder

The trial court erred in submitting second degree murder as a possible jury verdict in a prosecution of defendant for first degree murder of her husband as an accessory before the fact where all of the evidence tended to show a first degree murder based on premeditation and deliberation. *S. v. Arnold*, 518.

In a prosecution of defendant for first degree murder of her husband as an accessory before the fact, the State failed to meet its burden of showing that error by the trial court in submitting second degree murder as a possible verdict was harmless beyond a reasonable doubt. *Ibid.*

§ 30.3 (NCI3d). Guilt of manslaughter; involuntary manslaughter

The trial court did not err in a murder prosecution arising from the furnishing of drugs by not submitting involuntary manslaughter as a possible verdict. *S. v. Liner*, 600.

§ 31 (NCI3d). Verdict, generally; specifying degree of crime

The jury did not render inconsistent verdicts in finding defendant guilty of second degree murder as an accessory before the fact and of conspiracy to commit murder. *S. v. Arnold*, 518.

HOSPITALS

§ 2.1 (NCI3d). Control and regulation

The North Carolina Department of Human Resources erred in its calculation of the number of beds available for development under the 1987 State Medical Facilities Plan by not including an adjustment for twenty-six beds which had been approved for development but subsequently abandoned. *Lenoir Mem. Hosp. v. N.C. Dept. of Human Resources*, 178.

A petition for a contested case hearing arising from the issuance of a certificate of need for nursing home beds was not timely filed with the Office of Administrative Hearings. *Gummels v. N.C. Dept. of Human Resources*, 675.

HUSBAND AND WIFE

§ 4.2 (NCI3d). Contracts and conveyances between husband and wife; form and mode; compliance with statutory formalities

Neither G.S. 39-13.1 nor G.S. 52-8 cured the failure of the certifying officer to find that a 1962 deed from a wife to her husband was not unreasonable or injurious to the subscribing wife. *Dunn v. Pate*, 351.

INDEMNITY

§ 3.1 (NCI3d). Pleadings

Plaintiff subcontractor's complaint was sufficient to state a claim against defendant contractor for indemnity for an amount paid because of injuries to a third party from damaged glass installed by plaintiff at defendant's direction. *Hartrick Erectors, Inc. v. Maxson-Betts, Inc.*, 120.

INSURANCE

§ 1 (NCI3d). Authority of Commissioner of Insurance

There was substantial evidence to support a trial court order vacating the Commissioner of Insurance's decision to increase Universal's ceding expense allowance. *N.C. Reinsurance Facility v. Long*, 41.

§ 93 (NCI3d). Excess insurance clause

The trial court in a declaratory judgment action to determine which of two insurance companies was liable for payment of damages resulting from a collision between a rented truck and a car correctly concluded that defendant Continental provided primary coverage and plaintiff CNA provided excess coverage. *L.R.C. Truck Line, Inc. v. Berryhill*, 306.

§ 101 (NCI3d). Automobile insurance; insurer's duty of cooperation and assistance

An insurer's unjustified refusal to be examined by an automobile insurer's physician violated the cooperation clause of the automobile policy and barred plaintiff's action for medical payments as a matter of law. *Lockwood v. Porter*, 410.

§ 110.2 (NCI3d). Automobile insurance; liability for costs and interest

An automobile liability insurer was not liable for prejudgment interest when such payment would result in a total amount which exceeded the stated policy limits. *Barnes v. Hardy*, 381.

§ 113 (NCI3d). Fire insurance generally

The trial court in an action to recover under a homeowners policy for losses sustained in a house fire properly denied defendant insurer's motion for summary judgment on the issue of material misrepresentation in the application for the policy where plaintiff had three mortgages on his house but the application listed only two, but plaintiff testified that he orally disclosed the other mortgage to defendant's agent. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 13.

§ 130 (NCI3d). Fire insurance; notice and proof of loss

Plaintiff's evidence of damages was sufficient to support his claim under a homeowners policy for damages sustained in a house fire. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 13.

INSURANCE — Continued

§ 131 (NCI3d). Computation of fire loss

A replacement cost rider was inapplicable where the damages awarded did not exceed the policy limit, and the court's instruction on the rider was harmless error. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 13.

§ 132 (NCI3d). Right to interest

Any prejudgment interest awarded by the trial court in an action to recover under a homeowners policy for a fire loss should have commenced sixty days after the date of the proof of loss. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 13.

§ 149 (NCI3d). General liability insurance

Where plaintiffs' primary liability insurer in an amount of $500,000.00 was declared bankrupt after an injury to a third party, the N.C. Insurance Guaranty Association became plaintiffs' insurer in the amount of $300,000.00, and plaintiffs also had an umbrella policy with a second insurer at the time of the injury, the umbrella policy did not "drop down" and become the primary liability coverage for a $185,000.00 claim by the injured third party. *Newton v. United States Fire Ins. Co.*, 619.

An injured worker's claim against a co-employee individually was not excluded from coverage under the employer's liability policy by a provision excluding coverage for an obligation for which the insured may be held liable under the workers' compensation law, but there was an issue of fact as to whether the employer assumed liability for the employee's injuries in a contract with a temporary employment service so that a policy exclusion for bodily injury to an employee arising out of and in the course of the employment would not apply. *Ibid.*

INTEREST

§ 2 (NCI3d). Time and computation

An automobile liability insurer was not liable for prejudgment interest when such payment would result in a total amount which exceeded the stated policy limits. *Barnes v. Hardy*, 381.

JUDGMENTS

§ 21 (NCI3d). Setting aside of consent judgments generally

Defendant was not entitled to have a consent judgment granting plaintiff a divorce from bed and board set aside on the ground that defendant was not represented by counsel or on the ground that the parties misrepresented to the court that they were separated. *Wilson v. Wilson*, 230.

JURY

§ 7.14 (NCI3d). Manner, order, and time of exercising peremptory challenges

Defendant failed to make a prima facie showing of racial discrimination in the prosecutor's use of peremptory challenges where only one peremptory challenge was exercised for a person of the same race as defendant, and that person was excused because she had been convicted of a felony. *S. v. Aytche*, 358.

LIMITATION OF ACTIONS

§ 4.2 (NCI3d). Accrual of negligence actions

Where plaintiff textile manufacturer contracted for defendant machine company to manufacture and install two drying ranges containing pressure vessels, and defendant machine company subcontracted with another company to manufacture the vessels, the "initial purchase for use" of the pressure vessels within the meaning of the six-year statute of repose of G.S. 1-50(6) occurred when plaintiff purchased the drying ranges, not when defendant machine company purchased the vessels from the subcontractor for assembly into the drying ranges. *Chicopee, Inc. v. Sims Metal Works*, 423.

Plaintiff met its burden of proving that its action for negligent manufacture and inspection of pressure vessels was brought no more than six years after the date of initial purchase for use within the meaning of G.S. 1-50(6). *Ibid.*

The trial court correctly granted defendant attorney's motion for a directed verdict on negligence and breach of contract claims where the alleged wrongful conduct was readily apparent as early as 6 October 1981 and plaintiffs did not file their claims until 29 April 1985. *Webster v. Powell*, 432.

§ 8 (NCI3d). Exceptions to operation of limitation laws

The trial court erred by granting summary judgment for defendants on the statute of limitations in a legal malpractice action. *Cheek v. Poole*, 158.

MALICIOUS PROSECUTION

§ 11.2 (NCI3d). Effect of acquittal, discharge, or discontinuance

Testimony about a prior criminal trial in which plaintiff was found not guilty of concealing merchandise and shoplifting was relevant to prove the elements of malicious prosecution. *Lenins v. K-Mart Corp.*, 590.

§ 13.2 (NCI3d). Sufficiency of evidence on issue of probable cause

Lack of probable cause for a breaking prosecution was not established where defendant admitted the breaking but was found not guilty of a breaking and entering charge, the magistrate discussed the subsequent breaking charge with an assistant district attorney who did not give any thought to the double jeopardy rule and left issuance of the warrant for breaking to the magistrate's discretion, and the breaking charge was dismissed on the ground of double jeopardy. *Flippo v. Hayes*, 115.

§ 14 (NCI3d). Instructions

The trial court in an action for malicious prosecution did not err in instructing the jury that a person may be detained if a rational and prudent man should "suspect" that a concealment or larceny of merchandise has taken place. *Lenins v. K-Mart Corp.*, 590.

The trial court did not err in instructing the jury that evidence of plaintiff's acquittal of concealment of merchandise and shoplifting could not be considered as evidence of lack of probable cause by defendant. *Ibid.*

The trial court did not err in instructing the jury that legal malice "occurs when a person institutes a legal proceeding, although he does not believe there's any possibility for success of the action." *Ibid.*

MANDAMUS

§ 2 (NCI3d). Ministerial or discretionary duty

A petition for writ of mandamus to compel improvements to the Alamance County Courthouse was remanded with instructions that the complaint be dismissed because mandamus lies only to compel the performance of a specific act required by statute and there were no ministerial functions at issue here that the trial judge could order the County Commissioners to fulfill. *Ragan v. County of Alamance*, 636.

MASTER AND SERVANT

§ 10.2 (NCI3d). Actions for wrongful discharge

The trial court did not err by granting defendants' motion for dismissal of plaintiff's claim for wrongful discharge based upon the issuance of two employee handbooks. *Rucker v. First Union Nat. Bank*, 100.

The trial court did not err by dismissing plaintiff's claim for punitive damages based on alleged misrepresentation of the terms of employment manuals. *Ibid.*

The trial court erred in dismissing plaintiff's claim for vacation pay following her dismissal. *Ibid.*

A claim for severance pay was properly dismissed because G.S. 95-25.7 has been preempted by ERISA. *Ibid.*

§ 65.2 (NCI3d). Back injuries

The evidence supports the Industrial Commission's findings that plaintiff suffered additional injuries to his back in October of 1984 as a result of an accident suffered at work in February of 1984, despite defendants' assertion that plaintiff's injury could have stemmed from earlier back problems. *Vandiford v. Stewart Equipment Co.*, 458.

Although plaintiff's back and leg injuries are scheduled injuries suffered in 1984, plaintiff's workers' compensation hearing was held in 1988 and *Whitley v. Colombia Mfg. Co.*, 318 N.C. 89, clearly controls. *Ibid.*

There was ample support in the record to uphold the Industrial Commission's findings that plaintiff was entitled to permanent and total disability benefits despite testimony that plaintiff was able to earn some wages, and defendants were not entitled to a credit for a preexisting five percent disability. *Ibid.*

§ 68.1 (NCI3d). Asbestosis and silicosis

The Industrial Commission did not err by holding that plaintiff was not last injuriously exposed to the hazards of asbestos while in the employment of defendant where there was nothing in the medical records to indicate that plaintiff's exposure to asbestos worsened his condition and plaintiff himself did not testify that the exposure had any effect on his condition. *Barber v. Babock & Wilcox Construction Co.*, 203.

§ 68.4 (NCI3d). Subsequent injury or incident; aggravation of original injury

Where plaintiff became pregnant after suffering a compensable back injury, the child was delivered by cesarean surgery rather than natural childbirth solely because of her compensable back injury, and plaintiff became pregnant because of a defect in her method of birth control, plaintiff's pregnancy was not an independent intervening cause attributable to plaintiff's own intentional conduct, and plaintiff was thus entitled to compensation for the increased medical expenses and scar caused by the cesarean surgery. *English v. J. P. Stevens & Co.*, 466.

MASTER AND SERVANT — Continued

§ 69 (NCI3d). Amount of workers' compensation recovery generally

The Industrial Commission is not authorized by G.S. 97-29 to order an employer to pay a totally disabled employee's common consumer debts as a "rehabilitative service." *Grantham v. Cherry Hospital*, 34.

§ 89.1 (NCI3d). Remedies against fellow employee as third person

An issue of material fact existed as to whether alleged actions by an injured worker's co-employee amounted to willful and wanton negligence so as to subject the co-employee to common law liability to the injured worker. *Newton v. United States Fire Ins. Co.*, 619.

The Workers' Compensation Act was an employee's exclusive remedy against the employer based on vicarious liability for the willful and wanton negligence of a co-employee. *Ibid.*

§ 89.4 (NCI3d). Distribution of recovery of damages at common law against third party tortfeasor

Lifetime monthly payments from a third party tortfeasor pursuant to the settlement of a third party action were proceeds of the settlement and not future benefits, and an employer and its insurer were not entitled to a lien in the monthly payments where they had agreed to waive "any lien which they had as to the proceeds from this settlement and recovery." *Turner v. CECO Corp.*, 366.

§ 93 (NCI3d). Proceedings before the Commission generally

The Industrial Commission Deputy Commissioner did not abuse her discretion during a workers' compensation asbestosis hearing by accepting a defense witness as an expert on corporate safety despite defendant's failure to list the witness as an expert. *Barber v. Babcock & Wilcox Construction Co.*, 203.

§ 93.2 (NCI3d). Proceedings before the Commission; admissibility of evidence

Air sample test data were admissible in a workers' compensation asbestosis hearing as corroborative of expert testimony that testing was routinely done, but the specific test data were not admissible as corroborative evidence because the witness had no independent knowledge of the air quality at the job site. *Barber v. Babcock & Wilcox Construction Co.*, 203.

Although the Industrial Commission erred in a workers' compensation asbestosis hearing by relying on air sample test data after stating that that data was not being received into evidence to prove the truth and accuracy of the results, the error was harmless because the results were admissible under the business records exception to the hearsay rule. *Ibid.*

§ 93.3 (NCI3d). Proceedings before the Commission; expert evidence

A corporate safety expert was competent to testify concerning the routine practice of the defendant employer in removing asbestos. *Barber v. Babcock & Wilcox Construction Co.*, 203.

MAYHEM

§ 1 (NCI3d). Nature and elements of the crime

Defendant could properly be convicted of both assault with a deadly weapon inflicting serious injury and maiming. *S. v. Aytche*, 358.

MUNICIPAL CORPORATIONS

§ 2.4 (NCI3d). Remedies to attack annexation or annexation proceedings

In order to obtain further review of an annexation ordinance after infirmities have been corrected by the municipality pursuant to an order of remand, whether the order of remand addressed all or merely some of the issues raised in the initial petition, appellate jurisdiction in the superior court must be perfected anew by filing a separate petition in accordance with G.S. 160A-38(a). *Ingles Markets, Inc. v. Town of Black Mountain*, 372.

§ 10 (NCI3d). Civil liability of municipal officers and agents

The trial court properly granted defendant building inspector's motion for dismissal of a negligence claim against him in his official capacity where the duty of the city and its building inspectors in performing their official duties was owed to the general public rather than to plaintiffs individually. *Lynn v. Overlook Development*, 75.

§ 12.3 (NCI3d). Waiver of governmental immunity

The trial court erred by granting a motion for dismissal of the City of Asheville on a claim for compensatory damages arising from a building inspector's alleged willful and wanton conduct, but did not err by dismissing a claim against the city based on the inspector's negligence. *Lynn v. Overlook Development*, 75.

§ 30.19 (NCI3d). Changes in continuation of nonconforming use

Petitioner was entitled under a town's zoning ordinance to replace a mobile home on his property as a nonconforming use within 180 days after the original mobile home on the property was moved. *In re Appeal of Hensley*, 408.

§ 33.4 (NCI3d). Right of access

The trial court erred in a declaratory judgment action seeking a judgment that plaintiff was entitled to construct an intersection with a driveway angle of less than ninety degrees as part of a mall expansion by concluding that city council minutes requiring the ninety degree angle were ambiguous. *R. L. Coleman & Co. v. City of Asheville*, 648.

§ 34 (NCI3d). Parking Ordinances

The trial court did not err in an action arising from a mall expansion by finding and concluding that the parking area as actually constructed reasonably met the requirements established by the City. *R. L. Coleman & Co. v. City of Asheville*, 648.

§ 42.1 (NCI3d). Claims against municipality; to whom notice must be given

Delivery of the summons to the mayor's assistant was insufficient to confer personal jurisdiction over defendant city before plaintiff voluntarily dismissed the action, and plaintiff's subsequent action instituted within one year was barred by the statute of limitations. *Johnson v. City of Raleigh*, 147.

NARCOTICS

§ 4.2 (NCI3d). Sufficiency of evidence in cases involving sale to undercover narcotics agent; defense of entrapment

The State's evidence was sufficient to support defendant's conviction of conspiracy to traffic in cocaine sold to an undercover officer. *S. v. Turner*, 442.

NARCOTICS — Continued

§ 4.5 (NCI3d). Instructions generally

Where defendant was indicted for conspiracy with a named person to traffic in cocaine by delivering 28 or more but less than 200 grams of cocaine to the named person, the trial court committed plain error in instructing the jury on an agreement by defendant with the named person to deliver 28 grams or more of cocaine "to another." *S. v. Turner*, 442.

§ 4.7 (NCI3d). Instructions as to lesser offenses

The trial court erred by instructing a jury that possession of more than one gram of cocaine is a lesser-included offense of possession with intent to sell. *S. v. Hyatt*, 214.

§ 5 (NCI3d). Verdict and punishment

Defendant's right against double jeopardy was not violated by his conviction and sentencing for both trafficking in cocaine by transportation and trafficking in cocaine by delivery. *S. v. Turner*, 442.

Double jeopardy barred sentencing defendant both for felonious possession of cocaine and for possession with intent to sell or deliver the same cocaine. *S. v. Williams*, 405.

NEGLIGENCE

§ 6.1 (NCI3d). Res ipsa loquitur; application of doctrine

The trial court properly directed verdict for defendant in an action in which a patron of defendant's nightclub alleged that she had been injured when a speaker fell from another speaker onto her knee while she was dancing. *Shadkhoo v. Shilo East Farms*, 672.

§ 31 (NCI3d). Effect of doctrine of res ipsa loquitur on sufficiency of evidence

The doctrine of res ipsa loquitur did not apply to create an inference of negligence by defendant motel owner in an action by plaintiff motel guest to recover for injuries received when a sudden surge of scalding hot water came out of a shower head after he had stopped the flow of water from the shower head by pushing in the shower-bath control knob. *Simpson v. Cotton*, 209.

§ 57.11 (NCI3d). Cases involving other injuries to invitees where evidence is insufficient

The absence of non-skid strips on the floor of a motel shower would not give rise to a claim for negligence against the motel owner. *Simpson v. Cotton*, 209.

§ 59.1 (NCI3d). Particular cases where person on premises is licensee

Plaintiff was a licensee rather than an invitee while he was on the premises of defendant's retirement community to attend a political rally in response to a paid political advertisement, and defendant was thus not liable for simple negligence allegedly causing plaintiff's fall on broken flagstones in a walkway. *McIntosh v. Carefree Carolina Communities*, 653.

OBSCENITY

§ 1 (NCI3d). Statutes proscribing dissemination of obscenity

The statute proscribing the dissemination of obscenity, G.S. 14-190.1, is not unconstitutionally vague and overbroad. *S. v. Cinema Blue of Charlotte*, 628.

RAPE AND ALLIED OFFENSES — Continued

§ 4.1 (NCI3d). Evidence of improper acts, solicitations, and threats; proof of other acts and crimes

Evidence that defendant had pled guilty to two counts of taking indecent liberties with his stepdaughter three years earlier was properly admitted in defendant's trial for rape of his stepdaughter to show common scheme or plan. *S. v. Hall*, 1.

Testimony by an alleged statutory rape victim's grandmother that she had observed the victim masturbate with a washcloth and with her fingers on several occasions should have been admitted pursuant to Rule of Evidence 412(b)(2) as evidence of specific incidences of sexual behavior offered for the purpose of showing that the acts charged were not committed by defendant where the victim's pediatrician testified that irritation she observed on the victim could have been caused by intercourse or by masturbation. *S. v. Wright*, 658.

§ 4.3 (NCI3d). Character or reputation of prosecutrix

Testimony by a clinical social worker who counseled an alleged rape victim that the victim had a reputation for truthfulness in her school community constituted improper expert testimony on the credibility of the victim as a witness. *S. v. Hall*, 1.

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

There was sufficient evidence that defendant acted "by force and against the will of the other person" to support his conviction of second degree rape of his fifteen-year-old stepdaughter. *S. v. Hall*, 1.

Where defendant was indicted and convicted for rape and first degree sexual offense with indictments covering three consecutive periods, there was insufficient evidence for the first two periods but sufficient evidence to prove at least one incidence of each of the alleged crimes in the third indictment. *S. v. Everett*, 23.

§ 7 (NCI3d). Verdict; sentence and punishment

The mandatory life sentence for first degree sexual offense does not constitute cruel and unusual punishment. *S. v. Jerrells*, 318.

§ 19 (NCI3d). Taking indecent liberties with child

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that defendant could be found guilty of taking an indecent liberty if it found that he willfully took an indecent liberty with a child for the purpose of arousing "or" gratifying sexual desire. *S. v. Jerrells*, 318.

ROBBERY

§ 3 (NCI3d). Competency of evidence

The trial court did not err in an armed robbery prosecution by permitting testimony regarding the victim's scholastic achievements. *S. v. Summerlin*, 167.

§ 5.4 (NCI3d). Instructions on lesser included offenses and degrees

The trial court did not err in an armed robbery prosecution by failing to charge the jury on the offense of misdemeanor larceny. *S. v. Summerlin*, 167.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings

The trial court did not err in a proceeding in which sanctions were sought against an attorney under G.S. 1A-1, Rule 11(a) by finding that the attorney failed

RULES OF CIVIL PROCEDURE — Continued

§ 56.1 (NCI3d). Summary judgment; timeliness of motion; notice

Where defendant filed his motion for summary judgment two days after he filed his answer, the trial court erred in granting defendant's motion for summary judgment two weeks later despite plaintiff's request for a continuance in order to conduct discovery. *Brown v. Greene*, 377.

§ 56.2 (NCI3d). Summary judgment; burden of proof

Plaintiff in a legal malpractice action did not have the burden of proving at a summary judgment hearing that defendants breached the applicable standard of care. *Cheek v. Poole*, 158.

§ 56.4 (NCI3d). Summary judgment; necessity for and sufficiency of supporting materials; opposing party

Plaintiff's affidavit claiming ownership of certain items of personal property from the administratrix of an estate was irrelevant to the case and summary judgment was properly granted for the administratrix where the items of personal property were only mentioned in the administratrix's counterclaim and that claim was not responded to by plaintiff. *Powell v. First Union Nat. Bank*, 227.

§ 60 (NCI3d). Relief from judgment or order

Erroneous judgments may be corrected only by appeal and not by a motion under Rule 60. *Chicopee, Inc. v. Sims Metal Works*, 423.

SALES

§ 13.1 (NCI3d). Actions or counterclaims to rescind and recover purchase price

The trial court did not err in a warranty action arising from the sale of hosiery manufacturing equipment by instructing the jury that defendants could recover the balance of the purchase price if the jury awarded plaintiff actual or general damages for breach of express or implied warranty. *Stimpson Hosiery Mills v. PAM Trading Corporation*, 543.

§ 22 (NCI3d). Actions for personal injuries based upon negligence; defective goods or materials; manufacturer's liability

Where plaintiff textile manufacturer contracted for defendant machine company to manufacture and install two drying ranges containing pressure vessels, and defendant machine company subcontracted with another company to manufacture the vessels, the "initial purchase for use" of the pressure vessels within the meaning of the six-year statute of repose of G.S. 1-50(6) occurred when plaintiff purchased the drying ranges, not when defendant machine company purchased the vessels from the subcontractor for assembly into the drying ranges. *Chicopee, Inc. v. Sims Metal Works*, 423.

Plaintiff met its burden of proving that its action for negligent manufacture and inspection of pressure vessels was brought no more than six years after the date of initial purchase for use within the meaning of G.S. 1-50(6). *Ibid.*

The trial court properly ruled that plaintiff's recoverable damages for negligent manufacture and inspection of a pressure vessel which exploded did not include economic or pecuniary losses such as the cost to replace other allegedly defective pressure vessels not damaged by the explosion. *Ibid.*

G.S. 99B-3 barred recovery from the manufacturer of a trenching machine in a product liability action where the forecast of evidence shows that a belt guard

which would have prevented plaintiff's injury was removed from the trenching machine after it left the manufacturer's control and that the removal was contrary to the manufacturer's instructions. *Rich v. Shaw*, 489.

SEARCHES AND SEIZURES

§ 1 (NCI3d). Generally

The law and reasoning applicable to the Fourth Amendment to the U.S. Constitution in a search of luggage on a bus was also determinative of defendant's rights under the North Carolina Constitution. *S. v. Johnson*, 290.

§ 3 (NCI3d). Searches at particular places

The trial court correctly concluded in a prosecution for trafficking in cocaine that neither the bus on which defendant was riding nor defendant were seized by officers during a rest stop when two officers boarded the bus and began asking passengers questions. *S. v. Johnson*, 290.

§ 13 (NCI3d). Search and seizure by consent

A matchbox was lawfully seized during a warrantless search outside defendant's house where defendant did not have a reasonable expectation of privacy in the area searched, and defendant consented to an officer walking over to the area where the matchbox was found and the officer discovered the matchbox in plain view. *S. v. Williams*, 405.

§ 15 (NCI3d). Standing to challenge lawfulness of search

The trial court correctly found in a prosecution for trafficking in cocaine that defendant did not have a reasonable expectation of privacy in certain luggage and did not have standing to assert constitutional violations arising from the search of the luggage where officers boarded a bus during a rest stop and began asking passengers questions, one suitcase remained unclaimed, and defendant and all other passengers denied ownership of the suitcase. *S. v. Johnson*, 290.

§ 23 (NCI3d). Necessity and sufficiency of showing probable cause; cases where evidence is sufficient

There was probable cause to issue a warrant to search defendant's residence and a rented storage unit based on the totality of the circumstances. *S. v. O'Kelly*, 265.

§ 42 (NCI3d). Exhibiting or delivering warrant

The trial court properly refused to suppress evidence seized pursuant to a search warrant on the grounds that the warrant was not read to defendant and that defendant was not given an inventory of the items seized where two officers testified at the suppression hearing that the warrant was read to defendant and the trial court found that the officers in charge had prepared an inventory and mailed the inventory to defendant. *S. v. O'Kelly*, 265.

SHERIFFS AND CONSTABLES

§ 4 (NCI3d). Civil liabilities to individuals

Plaintiff's evidence was sufficient for the jury on the issue of defendant sheriff's negligence in failing to protect plaintiff's intestate from her husband after having promised her such protection. *Braswell v. Braswell*, 231.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

Plaintiff's evidence that he was abused and struck by defendant store's employees when he went to his wife's rescue upon seeing her being forcibly detained at the store was insufficient to support his claim for intentional infliction of emotional distress. *Lenins v. K-Mart Corp.*, 590.

TRESPASS TO TRY TITLE

§ 4 (NCI3d). Sufficiency of evidence and nonsuit

Vested remainders are exempted from extinguishment under the Real Property Marketable Title Act if they are disclosed by the muniments of title of which the competing titleholder's thirty-year chain of record title is formed provided they are referred to specifically by book and page of the recorded title transaction. *Kirkman v. Wilson*, 242.

Where testator's will devised all of his property to his son for life without the privilege to sell or convey with the remainder to plaintiffs, the son and his wife conveyed in fee simple all the devised lands by various general warranty deeds, and each defendant claims title as a result of mesne conveyances from the son and his wife, plaintiffs' nonpossessory vested remainder interests were extinguished by the marketable record title of certain defendants whose thirty-year record chain of title contained no deed referring specifically to testator's will, but plaintiffs' vested remainder interests were not extinguished by the marketable record title of other defendants whose thirty-year record chain of title contained deeds specifically referring to testator's will by book and page number. *Ibid.*

TRIAL

§ 10.1 (NCI3d). Expression of opinion on evidence by court during trial; particular cases

The trial court did not express an opinion on the evidence when he stated during jury selection that the case involved an incident at the K-Mart during which plaintiff was stopped and asked whether she had engaged in shoplifting and that "she denies that she had engaged in shoplifting, and of course, for that reason she was stopped." *Lenins v. K-Mart Corp.*, 590.

The trial court's remarks upon the opening of court for the second and third days of the trial that the jury should "sit back, relax and stay tuned for the next portion of the trial" did not equate plaintiffs' cases to fictional entertainment and was not an expression of opinion on the evidence. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 39.1 (NCI3d). Letters of credit

Plaintiffs were not entitled to summary judgment in an action to recover $108,000 where the parties had agreed to a stipulation by which defendant was to issue a loan and letter of credit to third parties, who did not respond to the letter of commitment and never applied for the letter of credit. *Mountain Fed. Land Bank v. First Union Nat. Bank*, 195.

WILLS

§ 21.4 (NCI3d). Undue influence, sufficiency of evidence

Summary judgment was improvidently granted as to claims for undue influence over the grantor in an action by the heirs under a will to invalidate a deed. *Hayes v. Turner*, 451.

§ 34 (NCI3d). Devise of estate in fee

A holographic will devised a tract in fee simple to testator's widow, and the last paragraph of the will which stated that, upon his wife's death, his daughter was to have the tract for her lifetime did not limit the devise to the widow to a life estate. *Osborne v. Hodgin*, 111.

WITNESSES

§ 1 (NCI3d). Competency of witness

The trial court did not err in a murder prosecution arising from the furnishing of drugs by finding a state's witness competent despite defendant's contention that the witness was suffering from paranoid schizophrenia, was manic depressive, had been under a mental health clinic doctor's care, and was a walking drug store. *S. v. Liner*, 600.

§ 1.2 (NCI3d). Age; children as witnesses

A four-year-old rape victim's testimony met the standards of G.S. 8C-1, Rule 601 and the trial court did not err in finding that she was competent to testify even though she did not understand her obligation to tell the truth from a religious standpoint and had no fear of certain retribution for mendacity. *S. v. Everett*, 23.

§ 1.4 (NCI3d). Absence of witness from list furnished defendant

The trial court did not err in allowing plaintiff to present testimony of an expert witness who had not been listed by plaintiff but who was listed as one of defendant's prospective witnesses. *Kinlaw v. N.C. Farm Bureau Mutual Ins. Co.*, 13.

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