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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vi

District Court Judges ix

Attorney General xiii

District Attorneys xiv

Public Defenders xv

Table of Cases Reported xvi

Cases Reported Without Published Opinion xx

General Statutes Cited and Construed xxv

Rules of Evidence Cited and Construed xxviii

Rules of Civil Procedure Cited and Construed xxviii

N. C. Constitution Cited and Construed xxix

Rules of Appellate Procedure Cited and Construed xxix

Opinions of the Court of Appeals 1-776

Order Adopting Amendment to General Rules of Practice for Superior and District Courts 779

Order Adopting Amendments to Rules of Appellate Procedure 780

Analytical Index 823

Word and Phrase Index 858

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	PAGE
Alexander v. Wilkerson	340
Allen v. Simmons	636
Avery Journal, Inc., McKinney v.	529
Bahakel Sports, Inc., George Shinn Sports, Inc. v.	481
Baldwin v. Lititz Mutual Ins. Co.	559
BarclaysAmerican/Leasing, Inc. v. N.C. Ins. Guaranty Assn.	290
Bd. of Adjustment of the Village of Pinehurst, Donnelly v.	702
Beam v. Floyd's Creek Baptist Church	767
Beatty v. Charlotte-Mecklenburg Bd. of Education	753
Bhatti v. Buckland	750
Blackwell, S. v.	359
Blalock Electric Co. v. Grassy Creek Development Corp.	440
Booth, Jones Cooling & Heating v.	757
Boyce Insulation Co., Carolina-Atlantic Distributors v.	577
Britt v. Sharpe	555
Brown, Cherry Bekaert & Holland v.	626
Brown, Clark v.	255
Buckland, Bhatti v.	750
Burgess v. Vestal	545
Burgner, VanCamp v.	102
Butler, Hare v.	693
Canady, S. v.	189
Carley Capital Group, First American Bank of Va. v.	667
Carolina-Atlantic Distributors v. Boyce Insulation Co.	577
Carson v. Moody	724
Casstevens v. Wagoner	337
Champs Convenience Stores v. United Chemical Co.	275
Charlotte-Mecklenburg Bd. of Education, Beatty v.	753
Cherry Bekaert & Holland v. Brown	626
Church, S. v.	647
City of Asheville, Watkins v.	302
Clark v. Brown	255
Coen, Randolph County v.	746
Collins v. Life Insurance Co. of Virginia	567
Continental Telephone Co. v. Gunter	741
Cook v. Norvell-Mackorell Real Estate Co.	307
Cotton, S. v.	615
County of Durham, Kearney v.	349
Crowell Constructors, Inc. v. State ex rel. Cobey	431
Deal, S. v.	456
Donnelly v. Bd. of Adjustment of the Village of Pinehurst	702
Duke University, LaBarre v.	563
Elliott v. Owen	465
Estate of Heffner, In re	327
Estes, S. v.	312
Evans, S. v.	88
Faircloth, S. v.	685
Fidelity National Title Ins. Co. v. Kidd	737
First American Bank of Va. v. Carley Capital Group	667
First Union National Bank, Kaplan v.	570
Floyd v. N.C. Dept. of Commerce	125
Floyd's Creek Baptist Church, Beam v.	767
Forbes v. Par Ten Group, Inc.	587
Foreclosure of Greenleaf Corp., In re	489
Forsyth County, Mahaffey v.	676
Gadson v. N.C. Memorial Hospital	169
George Shinn Sports, Inc. v. Bahakel Sports, Inc.	481
Godwin, Raleigh Federal Savings Bank v.	761
Graf Bae Farm, Watson v.	210
Grassy Creek Development Corp., Blalock Electric Co. v.	440
Gunter, Continental Telephone Co. v.	741
Gunter, Stallings v.	710
Hahn, Stallings v.	213
Hare v. Butler	693
Harris v. Temple	179

	PAGE
Hartsell v. Hartsell	380
HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.	203
Hinson v. National Starch & Chemical Corp.	198
Hodge, N.C. Dept. of Correction v.	602
Hoechst-Celanese Corp., Home Indemnity Co. v.	322
Home Indemnity Co. v. Hoechst-Celanese Corp.	322
Howard, S. v.	347
Huang, S. v.	658
Huffman, Rucker v.	137
Huntington Manor of Murphy v. N.C. Dept. of Human Resources	52
In re Blue Ridge Textile Printers v. Public Service Co.	193
In re Eaton Corp. v. Public Service Co.	174
In re Estate of Heffner	327
In re Foreclosure of Greenleaf Corp.	489
In re Mosser	523
In re Phillips	159
In re Randall	356
In re Request for Declaratory Ruling by Total Care, Inc.	517
In re Trueman	579
Industrial Innovators, Inc. v. Myrick-White, Inc.	42
Jenkins v. Richmond County	717
Jennings, Schall v.	343
Johnson v. Skinner	1
Johnson & Johnson Seafood, Spencer v.	510
Jones, S. v.	412
Jones v. McCaskill	764
Jones Cooling & Heating v. Booth	757
Kaplan v. First Union National Bank	570
Kearney v. County of Durham	349
Kidd, Fidelity National Title Ins. Co. v.	737
King, S. v.	283
LaBarre v. Duke University	563
Life Insurance Co. of Virginia, Collins v.	567
Lititz Mutual Ins. Co., Baldwin v.	559
Lowry v. Lowry	246
Mahaffey v. Forsyth County	676
Mahoney, McMillan v.	448
Martin, May v.	216
Mastrom, Inc., Young v.	120
May v. Martin	216
McCaskill, Jones v.	764
McKinney v. Avery Journal, Inc.	529
McMillan v. Mahoney	448
McNeil, S. v.	235
Medley v. N.C. Dept. of Correction	296
Melvin, S. v.	16
Moody, Carson v.	724
Morocco, S. v.	421
Mosser, In re	523
Myrick-White, Inc., Industrial Innovators, Inc. v.	42
N.C. Dept. of Commerce, Floyd v.	125
N.C. Dept. of Correction v. Hodge	602
N.C. Dept. of Correction, Medley v.	296
N.C. Dept. of Human Res., HCA Crossroads Residential Ctrs. v.	203
N.C. Dept. of Human Resources, Huntington Manor of Murphy v.	52
N.C. Dept. of Human Resources, Wall v.	330
N.C. Ins. Guaranty Assn., BarclaysAmerican/Leasing, Inc. v.	290
N.C. Memorial Hospital, Gadson v.	169
National Starch & Chemical Corp., Hinson v.	198

	PAGE
Nationwide Mutual Ins. Co., Sparks v.	148
News and Observer Publishing Co. v. Poole	352
Newton, Surratt v.	396
Nicholson, S. v.	143
Nobles, S. v.	473
Norvell-Mackorell Real Estate Co., Cook v.	307
Odom, S. v.	265
Ohio Casualty Group v. Owens	131
Owen, Elliott v.	465
Owens, Ohio Casualty Group v.	131
Par Ten Group, Inc., Forbes v.	587
Phillips, In re	159
Poole, News and Observer Publishing Co. v.	352
Public Service Co., In re Blue Ridge Textile Printers v.	193
Public Service Co., In re Eaton Corp. v.	174
Raleigh Federal Savings Bank v. Godwin	761
Randall, In re	356
Randolph County v. Coen	746
Ratley v. Ratley	219
Request for Declaratory Ruling by Total Care, Inc., In re	517
Richardson, S. v.	496
Richmond County, Jenkins v.	717
Ricks v. Town of Selma	82
Roane-Barker v. Southeastern Hospital Supply Corp.	30
Robbins, S. v.	75
Rucker v. Huffman	137
Schall v. Jennings	343
Schamens, Sturm v.	207
Scott, S. v.	113
Shadrick, S. v.	354
Sharpe, Britt v.	555
Sherrill, S. v.	540
Simmons, Allen v.	636
Skinner, Johnson v.	1
Smart, S. v.	730
Smith, S. v.	67
Smith, S. v.	184
Snow v. Yates	317
Southeastern Hospital Supply Corp., Roane-Barker v.	30
Sparks v. Nationwide Mutual Ins. Co.	148
Spencer v. Johnson & Johnson Seafood	510
Stallings v. Gunter	710
Stallings v. Hahn	213
S. v. Blackwell	359
S. v. Canady	189
S. v. Church	647
S. v. Cotton	615
S. v. Deal	456
S. v. Estes	312
S. v. Evans	88
S. v. Faircloth	685
S. v. Howard	347
S. v. Huang	658
S. v. Jones	412
S. v. King	283
S. v. McNeil	235
S. v. Melvin	16
S. v. Morocco	421
S. v. Nicholson	143
S. v. Nobles	473
S. v. Odom	265
S. v. Richardson	496
S. v. Robbins	75
S. v. Scott	113
S. v. Shadrick	354
S. v. Sherrill	540
S. v. Smart	730
S. v. Smith	67
S. v. Smith	184
S. v. Torres	364
S. v. Townsend	534
S. v. Treadwell	769
S. v. Tuggle	164
S. v. Whitted	502
S. v. Williams	333
S. v. Woodruff	107
State ex rel. Cobey, Crowell Constructors, Inc. v.	431
State ex rel. Utilities Comm. v. Village of Pinehurst	224
Sturm v. Schamens	207
Surratt v. Newton	396
Swilling v. Swilling	551

	PAGE
Temple, Harris v.	179
Torres, S. v.	364
Town of Selma, Ricks v.	82
Townsend, S. v.	534
Treadwell, S. v.	769
Trueman, In re	579
Tucker, United Carolina Bank v.	95
Tuggle, S. v.	164
United Carolina Bank v. Tucker	95
United Chemical Co., Champs Convenience Stores v.	275
VanCamp v. Burgner	102
Vaughn v. Vaughn	574
Vestal, Burgess v.	545
Village of Pinehurst, State ex rel. Utilities Comm. v.	224
Von Ramm v. Von Ramm	153
Wagoner, Casstevens v.	337
Wall v. N.C. Dept. of Human Resources	330
Watkins v. City of Asheville	302
Watson v. Graf Bae Farm	210
Whitted, S. v.	502
Wilkerson, Alexander v.	340
Williams, S. v.	333
Witherow v. Witherow	61
Woodruff, S. v.	107
Yates, Snow v.	317
Young v. Mastrom, Inc.	120

	PAGE
A. G. Boone Co., Harrington v.	582
Absalom Dillingham Cemetery, Williams Branch Cemetery Assn. v.	776
Acme Mills, Moore v.	583
All Wood Products Mfg. Corp. v. Light Source, Inc.	360
Allen, S. v.	583
Allen Construction, Pierce v.	583
Allenton, Inc., Corder v.	221
Allman, In re	221
Aquariums, Unlimited v. Neal	360
Armstrong, S. v.	361
Artis, Pless v.	773
Babaoff, Setzer v.	774
Badilla v. Badilla	582
Bagley, S. v.	583
Baucom, S. v.	222
Blythe, Swain v.	363
Boddie v. N.C. Dept. of Motor Vehicles	221
Boone v. Boone	582
Bowers, Love v.	361
Bradley Lumber Co. v. Harris-Teeter Supermarkets	773
Brady v. Lawson	773
Brinson, Dixon v.	360
Britt v. Britt	773
Britt, In re	360
Buckom, S. v.	222
Cardwell v. Forsyth County	582
Carpenter v. Sumerel	221
Carter v. Perkins	582
Carter, S. v.	361
Carter, S. v.	583
Cartwright, Morris v.	361
Carver v. Smart	773
Catoe, S. v.	583
Chamblin, State ex rel. Chamblin v.	775
City of Gastonia, Weisenhorn v.	776
City of Goldsboro, Lupton v.	773
City of Hickory Public Housing Authority v. Wilfong	221
Clark, S. v.	584
Cole, S. v.	222
Condon, Dimond v.	360
Corbett, In re	582
Corder v. Allenton, Inc.	221
County of Durham, Lawton v.	222
Cox, S. v.	584
Crater v. Crater	582
Creef, S. v.	774
Cromer v. Cromer	360
Crooks, S. v.	774
Crutchfield Plumbing & Heating Co., Huggins v.	582
Dail, S. v.	584
Davis v. Figgie International Co.	221
Davis v. Town of Carolina Beach	221
Dawson, S. v.	222
Deese, S. v.	361
Dept. of Transportation v. Ward	582
Dieck, S. v.	584
Dimond v. Condon	360
Dixon v. Brinson	360
Dodgen v. Wilson	221
Douglas v. Hertford, Inc.	360
Drady, Terry v.	586
Duke University v. Hester	360
Earley, S. v.	222
Evans, S. v.	222
Felton v. Wood	582
Ferebee v. Hiatt	582
Figgie International Co., Davis v.	221
First-Citizens Bank & Trust Co., Haughn v.	582
Floyd v. Integon General Ins. Corp.	360
Foreclosure of Green, In re	773
Forsyth County, Cardwell v.	582
Fowler, S. v.	584
Gibson, S. v.	362
Gilbert v. Great American South, Inc.	221
Gilmore v. Moebes	773
Glenn, S. v.	584
Glover v. N.C. Farm Bureau Mutual Ins. Co.	360
Gousse, S. v.	583
Graham Neville & Associates v. Parrish	773
Grant, S. v.	584

	PAGE
Great American South, Inc., Gilbert v.	221
Green, S. v.	584
Griffiths v. Sterling	582
Gurganus v. Gurganus	773
Gurganus, S. v.	362
Hainline, S. v.	222
Hairston, S. v.	362
Hamm, S. v.	362
Harper, S. v.	584
Harrington v. A. G. Boone Co.	582
Harris-Teeter Supermarkets, Bradley Lumber Co. v.	773
Haughn v. First-Citizens Bank & Trust Co.	582
Hauser, S. v.	362
Hawkins, S. v.	362
Hertford, Inc., Douglas v.	360
Hester, Duke University v.	360
Hiatt, Ferebee v.	582
Hiatt, Hood v.	221
Hibbard, S. v.	774
Highland Farms, Puhr v.	361
Hill, Hutchens v.	773
Hill Entertainment Corp., Singh v.	774
Holmes, S. v.	584
Holt, S. v.	222
Holt, S. v.	584
Hood v. Hiatt	221
Hoover, S. v.	362
Huggins v. Crutchfield Plumbing & Heating Co.	582
Huggins, Interstate Casualty Ins. Co. v.	582
Hull, Spivey v.	774
Hunt, S. v.	362
Hunt, Watkins v.	776
Hurst v. Hurst	360
Hutchens v. Hill	773
In re Allman	221
In re Britt	360
In re Corbett	582
In re Foreclosure of Green	773
In re Golden Rule Ins. Co. v. N.C. Dept. of Insurance	773
In re Lyles	361
In re Trust of Jacobs v. Weinstein	221
In re Welch	221
Insul Plus Corp., Rogers v.	773
Integon General Ins. Corp., Floyd v.	360
Interstate Casualty Ins. Co. v. Huggins	582
Iverson v. TM One, Inc.	221
J. F. Adkins, Inc., Sandhill Roofing Co. v.	361
Jackson v. Ryder Truck Rentals	583
Jackson, S. v.	584
James, S. v.	774
Jenkins, S. v.	362
Jenkins, S. v.	774
Johns, S. v.	774
Johnson v. Johnson	221
Johnson v. Johnson	361
Johnson v. Standard Sunco, Inc.	361
Jolly, S. v.	584
Jones, Monroe v.	583
Jones, S. v.	222
Joyce v. Joyce	221
Kenny, S. v.	584
Knight v. Todd	361
Lane, S. v.	362
Lanier, St. James Inn v.	583
Lassiter, S. v.	584
Lawson, Brady v.	773
Lawton v. County of Durham	222
Lee, S. v.	774
Leggett, S. v.	774
Legrande, S. v.	362
Light Source, Inc., All Wood Products Mfg. Corp. v.	360
Lilley International, Tew v.	223
Lloyd v. Zurick American Ins. Co.	583
Locklear, S. v.	585
Love v. Bowers	361
Luck, S. v.	774
Lupton v. City of Goldsboro	773
Lyles, In re	361
Lymangrover v. Wake Forest University	222

	PAGE
Mann, Wake County ex rel. Smith v.	363
Marino, S. v.	585
McCorkle, S. v.	222
McCrae, S. v.	774
McKnight, S. v.	774
McLendon, S. v.	362
McMillan, S. v.	585
Michaels, S. v.	222
Miller, Omni Investments, Inc. v.	583
Moebes, Gilmore v.	773
Monroe v. Jones	583
Moore v. Acme Mills	583
Moore v. N.C. Dept. of Transportation	361
Morris v. Cartwright	361
Mullins, S. v.	585
Munden v. Munden	361
Murphy Farms, Inc., Waters v.	586
N.C. Dept. of Administration, Ward v.	586
N.C. Dept. of Insurance, In re Golden Rule Ins. Co. v.	773
N.C. Dept. of Motor Vehicles, Boddie v.	221
N.C. Dept. of Transportation, Moore v.	361
N.C. Farm Bureau Mutual Ins. Co., Glover v.	360
Neal, Aquariums, Unlimited v.	360
Neal, S. v.	222
Nichols v. Wilson	583
Nichols, Wilson v.	583
Norville v. Norville	361
Omni Investments, Inc. v. Miller	583
Owens, S. v.	774
Oxendine, S. v.	585
Parrish, Graham Neville & Associates v.	773
Pennington, S. v.	362
Perkins, Carter v.	582
Peterson, S. v.	585
Pierce v. Allen Construction	583
Pless v. Artis	773
Pope, S. v.	775
Powell, S. v.	775
Preslar, S. v.	775
Puhr v. Highland Farms	361
Putnam, Teague v.	363
Ragin, S. v.	775
Roberson, S. v.	775
Robey, S. v.	585
Rogers v. Insul Plus Corp.	773
Rose v. Rose	583
Rosemon, S. v.	775
Rouse v. Rouse	361
Russell, S. v.	223
Ryder Truck Rentals, Jackson v.	583
Salyers, S. v.	223
Sandhill Roofing Co. v. J. F. Adkins, Inc.	361
Sarauw, S. v.	775
Satterfield, S. v.	362
Saunders, S. v.	362
Sawyer, S. v.	223
Scriven, S. v.	775
Seaberry, S. v.	585
Sellers, S. v.	775
Setzer v. Babaoff	774
Shaver v. Shaver	583
Shepard, Streeter v.	776
Shoemaker, S. v.	363
Short, S. v.	585
Shumate, S. v.	585
Simonds, S. v.	363
Simpson, S. v.	363
Singh v. Hill Entertainment Corp.	774
Smart, Carver v.	773
Smith, S. v.	585
Soukkar, West v.	363
Spivey v. Hull	774
St. James Inn v. Lanier	583
Standard Sunco, Inc., Johnson v.	361
S. v. Allen	583
S. v. Armstrong	361
S. v. Bagley	583
S. v. Baucom	222
S. v. Buckom	222
S. v. Carter	361
S. v. Carter	583

	PAGE
S. v. Catoe	583
S. v. Clark	584
S. v. Cole	222
S. v. Cox	584
S. v. Creef	774
S. v. Crooks	774
S. v. Dail	584
S. v. Dawson	222
S. v. Deese	361
S. v. Dieck	584
S. v. Earley	222
S. v. Evans	222
S. v. Evans	222
S. v. Fowler	584
S. v. Gibson	362
S. v. Glenn	584
S. v. Gousse	583
S. v. Grant	584
S. v. Green	584
S. v. Gurganus	362
S. v. Hainline	222
S. v. Hairston	362
S. v. Hamm	362
S. v. Harper	584
S. v. Hauser	362
S. v. Hawkins	362
S. v. Hibbard	774
S. v. Holmes	584
S. v. Holt	222
S. v. Holt	584
S. v. Hoover	362
S. v. Hunt	362
S. v. Jackson	584
S. v. James	774
S. v. Jenkins	362
S. v. Jenkins	774
S. v. Johns	774
S. v. Jolly	584
S. v. Jones	222
S. v. Kenny	584
S. v. Lane	362
S. v. Lassiter	584
S. v. Lee	774
S. v. Leggett	774
S. v. Legrande	362
S. v. Locklear	585
S. v. Luck	774
S. v. Marino	585
S. v. McCorkle	222
S. v. McCrae	774
S. v. McKnight	774
S. v. McLendon	362
S. v. McMillan	585
S. v. Michaels	222
S. v. Mullins	585
S. v. Neal	222
S. v. Owens	774
S. v. Oxendine	585
S. v. Pennington	362
S. v. Peterson	585
S. v. Pope	775
S. v. Powell	775
S. v. Preslar	775
S. v. Ragin	775
S. v. Roberson	775
S. v. Robey	585
S. v. Rosemon	775
S. v. Russell	223
S. v. Salyers	223
S. v. Sarauw	775
S. v. Satterfield	362
S. v. Saunders	362
S. v. Sawyer	223
S. v. Scriven	775
S. v. Seaberry	585
S. v. Seaberry	585
S. v. Sellers	775
S. v. Shoemaker	363
S. v. Short	585
S. v. Shumate	585
S. v. Simonds	363
S. v. Simpson	363
S. v. Smith	585
S. v. Stewart	775
S. v. Thorpe	223
S. v. Trull	363
S. v. Turrubiarte	223
S. v. Valliere	223
S. v. Walker	363
S. v. Waters	586
S. v. Whetstine	363
S. v. White	775
S. v. Williams	586
S. v. Williams	586
S. v. Williams	775
State ex rel. Chamblin v. Chamblin	775
Sterling, Griffiths v.	582
Stewart, S. v.	775
Streeter v. Shepard	776

	PAGE
Sumerel, Carpenter v.	221
Swain v. Blythe	363
Taft, Warren v.	363
Teague v. Putnam	363
Terry v. Drady	586
Tew v. Lilley International	223
Thorpe, S. v.	223
TM One, Inc., Iverson v.	221
Todd, Knight v.	361
Town of Carolina Beach, Davis v.	221
Trull, S. v.	363
Turrubiarte, S. v.	223
Valliere, S. v.	223
Wake County ex rel. Smith v. Mann	363
Wake Forest University, Lymangrover v.	222
Walker, S. v.	363
Ward, Dept. of Transportation v.	582
Ward v. N.C. Dept. of Administration	586
Ward v. Westfeldt	776
Warren v. Taft	363
Waters v. Murphy Farms, Inc.	586
Waters, S. v.	586
Watkins v. Hunt	776
Weinstein, In re Trust of Jacobs v.	221
Weisenhorn v. City of Gastonia	776
Welch, In re	221
West v. Soukkar	363
Westfeldt, Ward v.	776
Whetstine, S. v.	363
White, S. v.	775
Wilfong, City of Hickory Public Housing Authority v.	221
Williams Branch Cemetery Assn. v. Absalom Dillingham Cemetery	776
Williams, S. v.	586
Williams, S. v.	586
Williams, S. v.	775
Wilson, Dodgen v.	221
Wilson, Nichols v.	583
Wilson v. Nichols	583
Wood, Felton v.	582
Zurick American Ins. Co., Lloyd v.	583

G.S.	
1-15(c)	Stallings v. Gunter, 710
1-54.1	Mahaffey v. Forsyth County, 676
1-75.4(5)(d)	Cherry Bekaert & Holland v. Brown, 626
1-75.12	Home Indemnity Co. v. Hoechst-Celanese Corp., 322
1-76	Snow v. Yates, 317
1-166	Sparks v. Nationwide Mutual Ins. Co., 148
1-279(c)	Surratt v. Newton, 396
1-347	Jenkins v. Richmond County, 717
1A-1	See Rules of Civil Procedure, infra
5A-23	Hartsell v. Hartsell, 380
7A-240	Schall v. Jennings, 343
7A-243	Schall v. Jennings, 343
7A-523(a)	In re Phillips, 159
7A-524	In re Phillips, 159
7A-558(b)	In re Phillips, 159
7A-647	In re Phillips, 159
	In re Randall, 356
7A-649	In re Randall, 356
7A-664(a)	In re Phillips, 159
8-1	Continental Telephone Co. v. Gunter, 741
8C-1	See Rules of Evidence, infra
14-1.1(a)(3)	State v. Williams, 333
14-7.3	State v. Williams, 333
14-41	State v. Nobles, 473
14-318.2	State v. Church, 647
14-318.4	State v. Church, 647
15A-401(e)	State v. McNeil, 235
15A-534(f)	State v. Nicholson, 143
15A-926(a)	State v. Evans, 88
15A-951(b)	State v. Melvin, 16
15A-1340.4(a)(1)f	State v. Smart, 730
	State v. Shadrick, 354
15A-1340.4(a)(2)m	State v. Torres, 364
15A-1343(d)	State v. Smith, 184

G.S.	
20-4.01(13)	Continental Telephone Co. v. Gunter, 741
20-79(d)	Johnson v. Skinner, 1
20-279.21(b)(3)(b)	Sparks v. Nationwide Mutual Ins. Co., 148
20-279.21(b)(4)	Ohio Casualty Group v. Owens, 131
20-279.21(e)	Ohio Casualty Group v. Owens, 131
31-32	Casstevens v. Wagoner, 337
31-33	Casstevens v. Wagoner, 337
32-20(a)	Kaplan v. First Union National Bank, 570
41-2.1(a)	In re Estate of Heffner, 327
42-38 *et seq.*	Allen v. Simmons, 636
42-40(3)	Surratt v. Newton, 396
42-42(a)	Surratt v. Newton, 396
42-42(a)(4)	Surratt v. Newton, 396
44A-18	Jones Cooling & Heating v. Booth, 757
45-21.36	United Carolina Bank v. Tucker, 95
	Raleigh Federal Savings Bank v. Godwin, 761
45-68	In re Foreclosure of Greenleaf Corp., 489
50-20(c)	Swilling v. Swilling, 551
50-20(f)	Swilling v. Swilling, 551
51-1	State v. Woodruff, 107
53B-4	State v. Whitted, 502
58-155.48(a)(1)	BarclaysAmerican/Leasing, Inc. v. N.C. Insurance Guaranty Assn., 290
62-70	State ex rel. Utilities Comm. v. Village of Pinehurst, 224
62-111(a)	State ex rel. Utilities Comm. v. Village of Pinehurst, 224
62-111(e)	State ex rel. Utilities Comm. v. Village of Pinehurst, 224
62-132	In re Blue Ridge Textile Printers v. Public Service Co., 193
	In re Eaton Corp. v. Public Service Co., 174
62-139(a)	In re Eaton Corp. v. Public Service Co., 174
62-140	In re Eaton Corp. v. Public Service Co., 174
74-49(7)b	Crowell Constructors, Inc. v. State ex rel. Cobey, 431

G.S.	
74-64(a)(1)a	Crowell Constructors, Inc. v. State ex rel. Cobey, 431
75-1.1	Rucker v. Huffman, 137
	Forbes v. Par Ten Group, Inc., 587
	Bhatti v. Buckland, 750
87-102(a)	Continental Telephone Co. v. Gunter, 741
87-106	Continental Telephone Co. v. Gunter, 741
90-95(h)(5)	State v. Morocco, 421
97-10.2(f)	Ohio Casualty Group v. Owens, 131
97-10.2(g)	Ohio Casualty Group v. Owens, 131
97-10.2(h)	Ohio Casualty Group v. Owens, 131
97-19	Cook v. Norvell-Mackorell Real Estate Co., 307
97-25	Watkins v. City of Asheville, 302
97-47	Wall v. N.C. Dept. of Human Resources, 330
97-88.1	Beam v. Floyd's Creek Baptist Church, 767
99B-4	Champs Convenience Stores v. United Chemical Co., 275
131E-176(16)(a)	In re Request for Declaratory Ruling by Total Care, Inc., 517
131E-178	In re Request for Declaratory Ruling by Total Care, Inc., 517
131E-183(a)(3)	Huntington Manor of Murphy v. N.C. Dept. of Human Resources, 52
131E-183(a)(13)a	Huntington Manor of Murphy v. N.C. Dept. of Human Resources, 52
131E-188(a)	Huntington Manor of Murphy v. N.C. Dept. of Human Resources, 52
131E-188(b)	HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Resources, 203
150B-2(5)	HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Resources, 203
150B-23(a)	Huntington Manor of Murphy v. N.C. Dept. of Human Resources, 52
150B-51	Crowell Constructors, Inc. v. State ex rel. Cobey, 431
153A-257	In re Phillips, 159
153A-435(a)	Hare v. Butler, 693
160A-314(a)	Ricks v. Town of Selma, 82

RULES OF EVIDENCE CITED AND CONSTRUED

Rule No.	
401	State v. Odom, 265
403	State v. McNeil, 235
	State v. Cotton, 615
	State v. Huang, 658
	State v. Faircloth, 685
404(b)	State v. Evans, 88
	State v. Melvin, 16
	State v. Whitted, 502
	State v. Faircloth, 685
405(a)	State v. Faircloth, 685
411	Johnson v. Skinner, 1
412	State v. McNeil, 235
608(a)	State v. Faircloth, 685
702	State v. Faircloth, 685
706(a)	Swilling v. Swilling, 551
804(b)(5)	State v. Whitted, 502

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
11	First American Bank of Va. v. Carley Capital Group, 667
59	Burgess v. Vestal, 545
59(8)	Schall v. Jennings, 343
60(b)(4)	Vaughn v. Vaughn, 574

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. I, § 18	Home Indemnity Co. v. Hoechst-Celanese Corp., 322
Art. I, § 22	State v. Treadwell, 769

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
3	Surratt v. Newton, 396
10(b)(2)	State v. Canady, 189
	State v. Scott, 113

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JOHN E. JOHNSON v. JOANN M. SKINNER, ADMINISTRATRIX OF THE ESTATE OF THOMAS E. CUMBERWORTH SKINNER, JOHN RAPHAEL GREEN, AND P. M. CONCEPTS, INC., D/B/A TOYOTA SANFORD

No. 8911SC684

(Filed 19 June 1990)

1. **Automobiles and Other Vehicles § 141 (NCI3d)— dealer tags placed on personal vehicle—statute applicable to employee of dealership**

N.C.G.S. § 20-79(d), which prohibits a manufacturer or dealer from attaching dealer tags to vehicles in personal use, applied to defendant mechanic who worked for defendant car dealership where defendant mechanic, as an individual and an agent of defendant dealership and with the knowledge and permission of the corporation, attached the tags to his personal automobile.

Am Jur 2d, Automobiles and Highway Traffic §§ 28, 153, 427, 994.

2. Automobiles and Other Vehicles § 141 (NCI3d)— dealer tags— statute prohibiting attachment to personal vehicle—safety statute

N.C.G.S. § 20-79(d), which prohibits a car manufacturer or dealer from attaching dealer tags to vehicles in personal use, is a safety rather than a revenue statute so that violation of the statute is negligence *per se*.

Am Jur 2d, Automobiles and Highway Traffic §§ 28, 153, 427, 994.

3. Automobiles and Other Vehicles § 90.1 (NCI3d)— dealer tags— statute prohibiting attachment to personal vehicle—violation of statute proximate cause of accident—instruction proper

In an action to recover for personal injuries sustained in an automobile accident, it was proper for the trial court to instruct the jury that the violation of N.C.G.S. § 20-79(d) prohibiting the attachment of dealer tags to a vehicle in personal use could be the proximate cause of the accident, since defendant dealership and defendant employee and car owner should have foreseen a danger to other motorists when for several months they allowed the car to be driven on the public highways with the dealer tags; defendant owner testified that he would not have allowed his car to be driven if he had been denied use of the dealer tags; and defendant dealership's officers and agents knew that by permitting defendant owner to use the dealer tags they were encouraging the operation of a vehicle by someone who had not complied with North Carolina's Financial Responsibility Act.

Am Jur 2d, Automobiles and Highway Traffic §§ 28, 153, 427, 994.

4. Automobiles and Other Vehicles § 87.8 (NCI3d)— negligence of car dealership and car owner—negligence not insulated by negligence of driver

Negligence of defendant car dealership and defendant employee and car owner was not superseded by the negligence of the driver, since the area of risk created by defendant dealership and defendant employee and car owner in allowing the attachment of dealer tags to a personal use vehicle included the subsequent accident and injuries suffered by plaintiff.

Am Jur 2d, Automobiles and Highway Traffic §§ 28, 153, 427, 994.

5. Negligence § 27.1 (NCI3d)— auto accident—evidence of uninsured status of vehicle owner—admissibility

In an action to recover for injuries sustained in an automobile accident, the trial court did not err in allowing evidence concerning the uninsured status of defendant car owner, since the evidence was admitted to show defendant's motive for using his employer's dealer tags, to show that defendant dealership had knowledge that defendant owner wanted to use the tags so his vehicle could be driven on the highway by himself and others after his insurance had lapsed, and to allow the jury to assess the foreseeability of an accident when dealer tags are loaned to a member of the class of persons who have not complied with North Carolina's Financial Responsibility Act, and the jury could not have decided the issue of foreseeability without knowing that defendant's automobile was uninsured. N.C.G.S. § 8C-1, Rule 411.

Am Jur 2d, Automobiles and Highway Traffic §§ 28, 153, 427, 994.

6. Evidence § 49.2 (NCI3d)— past and present earnings of auto accident victim—expert opinion—basis of opinion questioned

In an action to recover for injuries sustained in an automobile accident, the testimony of an economist as to the past and future economic earnings of plaintiff was not inadmissible because his opinion was based on the assumptions of medical experts and plaintiff's attorney; rather, defendants' complaint went to the weight of the expert evidence underlying the economist's testimony, and it was the function of cross-examination to expose such weaknesses.

Am Jur 2d, Expert and Opinion Evidence § 75.

Judge WELLS dissenting.

APPEAL by defendants from judgment entered by *Judge Coy E. Brewer, Jr.*, in LEE County Superior Court. Heard in the Court of Appeals on 10 January 1990.

Plaintiff John E. Johnson instituted this action against defendants for personal injury damages stemming from an automobile

accident. Defendants Joann M. Skinner, administratrix of the estate of Thomas E. Skinner ("Skinner"); John R. Green; and P.M. Concepts, Inc., d/b/a Toyota Sanford ("Toyota") filed an Answer denying negligence. Subsequent to the filing of the Answer, Skinner stipulated to his negligence in the operation of the vehicle during the accident. The matter came on for trial, and a jury found that the negligence of Green and Toyota were also proximate causes of the accident and awarded $750,000 to the plaintiff against all defendants. Defendants appealed.

The record reveals the following facts: at the time of the accident, Toyota operated an automobile dealership in Sanford, North Carolina, where Green worked as a mechanic. Green and the decedent Skinner lived together with a third person, Jinene Pierce.

At least one month, but perhaps as long as several months before the accident, Green obtained a set of dealer license plates from Toyota and placed them on his 1977 Pontiac Grand Prix. Before he placed the dealer tags on his automobile, Green turned in his personal motor vehicle plates to the Department of Motor Vehicles and canceled his insurance on the vehicle. Green testified that he believed when he put the dealer tags on his Grand Prix the automobile would be covered by Toyota's liability insurance. Green's possession and use of the dealer tags were known to the president, general manager and service manager of Toyota.

Green was attempting to sell his automobile at the time of the accident and borrowed the dealer tags primarily for the purpose of allowing prospective purchasers to test drive the automobile. However, he also allowed Skinner and Pierce to have free access to the vehicle and to use it for personal trips. Both Skinner and Pierce often drove the automobile with the plates attached, and on several occasions they drove the car onto the premises of the Toyota dealership where they were observed by employees and officers of the corporation.

On 10 May 1987, the decedent Skinner borrowed Green's Pontiac to go on a social outing with Pierce and other friends. Plaintiff elicited testimony from Pierce tending to show that Green knew of the trip and that Skinner and Pierce had permission to use the automobile. Green was not in the automobile at the time of the accident, and Toyota had no knowledge of the trip. On the return drive home from the lake, Skinner negligently collided with Johnson, causing his injuries.

Green testified that on the day of the accident he had gone to his mother's house, that he did not know of the trip to the lake and that he had not given Skinner or Pierce permission to use his Pontiac for that particular trip.

Johnson offered evidence tending to show that on the day after the accident Green was instructed by the president of Toyota to say that his car had been stolen, that the dealer tags had been loaned to Green on the Friday before the accident, not that he had had the tags for weeks, and that Toyota had told Green to return the tags on the following Monday. Over objection of all defendants, plaintiff also elicited testimony from Green that he had no liability insurance on the automobile at the time of the accident.

Plaintiff also presented testimony of four expert witnesses. Dr. David Ciliberto, a medical expert specializing in orthopedics, testified that Johnson sustained multiple fractures, and life-threatening injuries to his head. Dr. Ciliberto expressed the opinion that plaintiff "has permanent injury." Dr. Charles Matthews, a neurologist, testified that plaintiff suffered from a pain syndrome known as reflex sympathetic dystrophy in which patients often experience "agonizing pain." He testified that therapy might or might not benefit plaintiff. Katherine Currie, a vocational evaluator, testified with respect to Johnson's ability to return to gainful employment. She stated that plaintiff showed low or below average performance on tests for dexterity, size discrimination, sorting, color discrimination and assembly. Ms. Currie did not feel that plaintiff would be able to return to competitive employment. Dr. Finley Lee, Jr., an economist and professor of business administration, testified concerning Johnson's past and future economic losses. Dr. Lee based his economic determinations on the assumption that Johnson was totally disabled. This assumption, in turn, was based on information provided by plaintiff's attorney.

Love & Wicker, by Dennis A. Wicker, for plaintiff appellee.

Robert C. Bryan for defendant appellant P. M. Concepts, Inc., d/b/a Toyota Sanford.

Van Camp, West, Webb & Hayes, by Stanley W. West and W. Carole Holloway, for defendant appellants Joann M. Skinner and John Raphael Green.

ARNOLD, Judge.

Defendants' first two assignments of error concern the liability of Green and Toyota based on their violation of a statute. The parties stipulated that defendant Skinner had been negligent in his operation of the automobile. Concerning the liability of Green and Toyota, the case went to the jury based on an alleged violation of N.C. Gen. Stat. § 20-79(d) (1987), which at the time of the accident provided:

> No manufacturer or dealer in motor vehicles, trailers or semitrailers shall cause or permit any such vehicle owned by such person or by any person in his employ, which is in the personal use of such person or employee, to be operated or moved upon a public highway with a "dealer" plate attached to such vehicle.

Id. (A 1989 amendment, effective 1 October 1989, rewrote subsection (d). The amendment is not applicable to this litigation. *See* N.C. Gen. Stat. § 20-79 (1989)). Violation of this statute could result in a misdemeanor conviction and the imposition of a fine of not less than $100 or more than $1,000. N.C. Gen. Stat. § 20-79(a). The trial judge determined that the statute was a safety statute and violation of it, negligence *per se*.

[1] First, Green argues that N.C. Gen. Stat. § 20-79(d) does not apply to him because he is not a "manufacturer" or "dealer" in motor vehicles. His argument is unconvincing. Toyota is a corporation, an artificial entity, which cannot itself actually "cause or permit" the attachment of dealer tags in violation of the statute. For a corporate dealer like Toyota to violate N.C. Gen. Stat. § 20-79(d), some agent or employee must cause or permit the attachment of the tags. Green, as an individual and an agent of Toyota and with the knowledge and permission of the corporation, attached the tags to his personal automobile. In this context, the statute applies.

[2] All defendants next argue that N.C. Gen. Stat. § 20-79(d) is not a safety statute. The trial court instructed that a violation of the statute would constitute "negligence within itself." Defendants contend the statute is only a revenue measure, and a violation of the statute therefore is not negligence *per se*. Defendants note that courts in other jurisdictions have found dealer tag statutes to be revenue, rather than safety statutes. *Combron v. Cogburn*,

116 Ga. App. 373, 157 S.E.2d 534 (1967); *Burke v. Auto Mart*, 37 N.J. Super. 451, 117 A.2d 624 (1955). Nevertheless, North Carolina courts have expressly stated that N.C. Gen. Stat. § 20-79(d) is a safety statute. In *Kraemer v. Moore*, 67 N.C. App. 505, 313 S.E.2d 610, *review denied*, 311 N.C. 758, 321 S.E.2d 137 (1984), Judge Braswell wrote:

> Many jurisdictions, including North Carolina and now Massachusetts, have safety statutes which make it unlawful for a dealer to permit any person or employee to operate a vehicle for personal use with a "dealer" tag plate attached.

Kraemer at 508, 313 S.E.2d at 612-613. This language is clear and unambiguous and not an inadvertent use of the term "safety" as defendants suggest.

[3] Defendants' next assignment of error presents the main and very difficult issue in this case—the proximate cause of the accident. They contend that illegally lending a dealer tag to an employee which facilitates the use of an automobile cannot be the proximate cause of a subsequent accident. They urge, as a matter of law, that the violation of the dealer tag statute cannot be the proximate cause of plaintiff's injuries. In determining whether there was sufficient evidence for the trial court to find defendants negligent, the question is whether the evidence when taken in the light most favorable to the plaintiff either failed to establish a prima facie case of negligence on the part of Green and Toyota, or whether the evidence established beyond question that the negligence of Green or Toyota was insulated as a matter of law by the intervening negligence of Skinner.

It is the jury's domain, under appropriate instructions from the court, to apply the standard of the reasonable person to the facts in order to determine what was the proximate cause of the aggrieved party's injuries. *Williams v. Smith*, 68 N.C. App. 71, 314 S.E.2d 279, *cert. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984). "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not. But that is rarely the case." *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1944). "Proximate cause is a cause which in natural and continuous sequence, unbroken by any new or independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred,

and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed." *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). Thus, it is axiomatic that proximate cause requires foreseeability. *Wiggins v. Paramount Motor Sales*, 89 N.C. App. 119, 365 S.E.2d 192 (1988).

The test of foreseeability does not require that defendant must foresee the injury in the precise form in which it occurred. All that the plaintiff is required to prove in establishing proximate cause is that in "the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected." *Hairston* at 234, 311 S.E.2d at 565 (citations omitted); *see, generally*, Byrd, Proximate Cause in North Carolina Tort Law, 51 N.C.L. Rev. 951 (1973).

In *Hairston*, a deceased motorist's wife brought a wrongful death action against an automobile dealership and the driver of a flatbed truck. The truck driver had negligently struck a van that was parked on the edge of the interstate behind the decedent's vehicle. The decedent was standing between the van and his own automobile when the collision occurred, and he was crushed to death between the two vehicles. *Hairston* at 231, 311 S.E.2d at 564. Just prior to the accident, the decedent had purchased his automobile from the dealership. Before leaving the sales lot, the dealer had changed the wheels on decedent's new vehicle, but the dealer's mechanic had failed to tighten the lug nuts on one wheel. *Id.* at 230, 311 S.E.2d at 563. The decedent traveled several miles from the dealership when the left rear wheel came off. He pulled over to the edge of the interstate and moments later the accident occurred. *Id.* at 231, 311 S.E.2d at 564.

The jury in *Hairston* found the driver who operated the flatbed truck and the automobile dealership liable, but the trial judge allowed the dealer's motion for judgment notwithstanding the verdict. We upheld the ruling, finding that although the dealership was negligent in failing to tighten the lug bolts on the wheel, the acts of negligence were not the proximate cause of the death of the plaintiff's intestate, and that such negligent acts of the dealership were insulated by the subsequent negligent acts of the truck

driver. *See id.* at 232, 311 S.E.2d at 564. The Supreme Court reversed. Writing in *Hairston*, Justice Martin stated:

> The law requires only reasonable prevision. A defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable.
>
> We note, however, that the law of proximate cause does not always support the generalization that the misconduct of others is unforeseeable. *The intervention of wrongful conduct of others may be the very risk that defendant's conduct creates.* In the absence of anything which should alert him to the danger, the law does not require a defendant to anticipate specific acts of negligence of another. *It does, however, fix him with notice of the exigencies of traffic, and he must take into account the prevalence of that "occasional negligence which is one of the incidents of human life."*

Hairston at 234, 311 S.E.2d at 565 (citations omitted and emphases added). In the case *sub judice*, the jury was asked to decide whether plaintiff was injured or damaged as a proximate result of defendants' negligence. The court instructed that to hold that the violation of the dealer tag statute was a proximate cause of plaintiff's injury, the jury must find that plaintiff's injury, or at least some similar injurious result, was foreseeable, and that by facilitating the use of the Pontiac by placing dealer tags on it, defendants created a safety risk to the public, greater than would exist otherwise, from the fact that the vehicle had dealer plates on it.

Defendants argue that *Kraemer v. Moore*, 67 N.C. App. 505, 313 S.E.2d 610 (1984), controls here. In *Kraemer*, an automobile dealership's employee placed a dealer tag on his personal vehicle. Plaintiff was injured when a ladder the employee had attached to his vehicle came unfastened, flew off and struck plaintiff as he walked along the road. *Id.* at 506, 313 S.E.2d at 611. Plaintiff obtained a judgment against the employee and then brought an action against the dealer, but this Court refused to hold the company liable. Nevertheless, proximate cause was not the question before us in *Kraemer*; instead, the issue was one of insurance. *Id.* We did not rule there that the improper use of dealer tags could never be the proximate cause of an accident; rather, we found that plaintiff's evidence also "fails to show that the use of the dealer tag was a proximate cause of his injuries." *Id.* at 509, 313 S.E.2d at 613.

Furthermore, the holding in *Kraemer* turned on facts that are distinguishable from those before us now. First and foremost, the dealership in *Kraemer* did not know that the employee was using a dealer tag on his personal vehicle. That fact is inapposite to the situation here. In *Kraemer*, the dealer previously had allowed the employee to use dealer plates for the purpose of transporting the employee's unsold vehicles to the defendant's car lot but had not given him permission to put the dealer tags on his own personal truck. *Id.* at 508, 313 S.E.2d at 612. From this the Court concluded, "[t]he plaintiff's evidence . . . fails to show that the defendant caused or permitted the employee to unlawfully use the dealer tag in violation of G.S. § 20-79(d)." *Id.* Second, the dealer did not know that the employee had taken the ladder for his personal use. And finally, the plaintiff in *Kraemer* was injured by the ladder, not the employee's car. *Id.* at 506, 313 S.E.2d at 611.

Even though *Kraemer* is distinguishable, we note that courts in other jurisdictions have refused to hold automobile dealers liable in situations similar to the one here. Some courts have determined that no causal connection exists between the violation of a dealer tag statute and the accident causing injuries. *Cambron*, 116 Ga. App. 373, 157 S.E.2d 534; *Burke*, 37 N.J. Super. 451, 117 A.2d 624; *see* Annotation, *License Plates—Improper Use*, 99 A.L.R.2d 904 (1965). However, many of these cases turned on other issues such as agency or ownership, or involved statutes not applicable here or ones not interpreted as safety statutes. *See also Pray v. Narragansett Improv. Co.*, 434 A.2d 923 (1981). Several jurisdictions, however, have upheld claims based on the premise that the misuse of dealer or personal plates was a proximate cause of an accident. In *Barnett v. Rosenthal*, 40 Conn. Supp. 149, 483 A.2d 1111 (1984), defendant was found negligent because he violated a statute by failing to turn in to the motor vehicle commissioner license plates that had been attached to an automobile that he sold. Whether leaving the license plates in the automobile after the sale, which had facilitated the vehicle's use, could be the proximate cause of the injuries was a question for the jury, the court said. *Id.*

In the only case we uncovered where, as here, the dealer tags were loaned illegally to an employee for a significant period of time, the court ruled that the misuse of the tags could constitute the proximate cause of an accident. *Wieland v. Kenny*, 385 Mich. 654, 189 N.W.2d 257 (1971). While test driving a personal vehicle

that carried a dealer plate, an employee of the dealer negligently drove his car into the path of plaintiff's motorcycle, causing injuries. *Wieland v. Kenny*, 22 Mich. App. 30, 176 N.W.2d 699 (1970). The plaintiff, rightly fearing that the employee would be uncollectible, also sued the dealer on the theory that its use of the plate violated a Michigan statute. The Michigan Supreme Court estopped the dealer from arguing that his negligence was not the proximate cause of the injuries: "[W]e cannot hear him or anyone else on behalf of the defendant dealership say there was no causal connection between the aforesaid statutory violation and the plaintiff's sustained injuries." *Wieland*, 385 Mich. at 658, 189 N.W.2d at 259. There is, therefore, authority for the proposition that the illegal use of a dealer's plate could be the proximate cause of a subsequent injury.

Defendants argue that even if violation of N.C. Gen. Stat. § 20-79(d) could be a proximate cause of the accident, no evidence was presented to support the jury charge that defendants "created a safety risk to the public, because of the fact that the vehicle had dealer plates on it, greater than would exist otherwise." The trial judge recognized that merely facilitating the addition of another vehicle into highway traffic was insufficient to create liability. Plaintiff then rested his theory of negligence on the contention that uninsured motorists who are unable to register their vehicles are, as a class, a somewhat greater risk of injury to people on the highway than insured motorists. While this theory of negligence gives us pause, the trial judge was correct in submitting this case to the jury. The evidence presented indicates that the use of the dealer tags was a direct cause in fact of the accident. Green testified that he would not have allowed Skinner to drive his car if he had been denied use of the dealer tags. Toyota's Service Manager Terry Brown, Green's direct supervisor, testified he was aware that Green was using dealer tags on his Pontiac at least three or four months before the collision. Two months before the collision Green told Brown that General Manager Dan Nipper had given him permission to use the plates. Brown also testified that he had seen Pierce and Skinner drive the Pontiac on Toyota's premises a number of times, and that the president of the company, Phil McLamb, knew that Green was allowing others to drive the vehicle with the dealer tags prior to the accident.

The crucial question here is whether Toyota and Green should have foreseen a danger to other motorists when for several months

they allowed the Pontiac to be driven on the public highways. On this point there was competent evidence that both Toyota and Green could have foreseen that their negligence might result in injury to other motorists. When Phil McLamb found out Green was using the dealer plates he exclaimed, "[M]ake damn sure he's careful." Similarly, evidence was presented from which the jury could conclude that Green knew Skinner previously had used lack of care in driving the Pontiac. Again, it should be stressed that the law does not require that Green and Toyota had foreseen the occurrence of the accident in a precise manner; instead, their actions may be the proximate cause of the injuries if at the time of their negligence they could have foreseen that "some injury would result from [their] act[s] or omission[s], or that consequences of a generally injurious nature might have been expected." *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (quoting *Hart v. Curry*, 238 N.C. 448, 449, 783 S.E.2d 170, 170 (1953)). Based on the facts of this case, the accident that occurred was within the reasonable realm of foreseeable events.

We also base our decision on certain policy considerations, which are always inherent in a case of this nature. Toyota's officers and agents knew that by permitting Green to use the dealer tag they were encouraging the operation of a vehicle by someone who had not complied with North Carolina's Financial Responsibility Act. *See* N.C. Gen. Stat. §§ 20-279.1 to -279.39 (1989). The purpose of this statute is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons. *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E.2d 571 (1971). To hold that a knowing and flagrant violation of the dealer tag statute can never constitute the proximate cause of a highway accident would eviscerate the safety component of N.C. Gen. Stat. § 20-79(d).

At the time of plaintiff's accident, Toyota had roughly 150 dealer tags and, according to the president of the company, no written policy to govern their use. The company's service manager testified that no one ever inventoried the dealer tags assigned to his department to determine who was using the tags, nor was he ever instructed concerning any restrictions on the use of the tags. It would be contrary to the public policy inherent in N.C. Gen. Stat. § 20-79(d) to remove the specter of civil liability as an incentive for dealers to comply with our dealer tag law. We hold, therefore, that it was proper for the trial court to instruct

the jury that the violation of the dealer tag statute could be the proximate cause of the accident.

[4] Defendants make a related argument that even if the combined negligence of Green and Toyota was a proximate cause of plaintiff's injuries, their negligence was superseded by the negligence of Skinner. However, it is clear that in North Carolina there may be two or more proximate causes of an injury, and even where those causes originate from separate and distinct sources or agencies operating independently of each other, if they join together producing injury, each may be liable. *McEachern v. Miller*, 268 N.C. 591, 151 S.E.2d 209 (1966). Furthermore, where defendant's conduct helps precipitate an intervening event, he may still be held liable if the second event is reasonably regarded as part of the risk of his original conduct. *See* Byrd, *supra*, at 966. In other words, a defendant may be liable despite the negligent act of another if at the time of his act he is *on notice* of circumstances that make the intervention of others likely. For example, reasonable people are required in many situations to anticipate the intermeddling of children; likewise, in some situations, reasonable people must anticipate the "exigencies of traffic," and that " 'occasional negligence which is one of the incidents of human life.' " *Hairston*, 310 N.C. at 234, 311 S.E.2d at 565 (citations omitted).

Nevertheless, we still must decide if the evidence in this case is susceptible to the single inference that the defendants' negligence ceased to be the proximate cause and was superseded and insulated by the subsequent negligence of Skinner. From our Supreme Court we learn the following:

> An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted.

Harton v. Telephone Co., 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906). Again, whether the intervening act of a third person is the proximate cause of an injury and sufficient to excuse the defendant's lack of care depends on foreseeability. *Tyndall v. United States*, 295 F.Supp. 448 (1969). Unless only one inference may be

drawn from the evidence, it is for the jury to decide "whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to occur as a result of his own negligent act." *Hairston*, 310 N.C. at 238, 311 S.E.2d at 567. We are here only to determine if reasonable persons could differ on this question of foreseeability, and on the facts of this case, such a disagreement is reasonable. Skinner's negligence was not so highly improbable as to bear no reasonable connection to the harm threatened by Green and Toyota's original negligence. The area of risk created by defendants' negligence included the subsequent events and injuries suffered by plaintiff.

[5] Defendants next assign error to the admission of evidence concerning the insured status of Green. Counsel for both Green and Toyota objected to this line of questioning and were granted a continuing objection to specific questions relating to insurance in general and whether a particular vehicle was insured. Defendants' earlier motion in limine as to evidence of insurance had also been denied. N.C. Gen. Stat. § 8C-1, Rule 411 provides as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Rule 411 enumerates several examples for which evidence of insurance is admissible, but it does not by its terms limit admissibility to those examples alone. 1 L. Brandis, *Brandis on North Carolina Evidence* § 88 (1988). In the case *sub judice*, evidence that Green's automobile was uninsured was not offered to demonstrate the cause of the accident or to suggest the relative wealth of the defendants. Instead, the evidence was offered for the following purposes: (1) to show Green's motive for using the dealer tags; (2) to show that Toyota had knowledge that Green wanted to use the tags so his Pontiac could be driven on the highway by himself and others after Green's insurance had lapsed; and (3) to allow the jury to assess the foreseeability of an accident when dealer tags are loaned to a member of the class of persons who have not complied with North Carolina's Financial Responsibility Act. The jury could not have decided the issue of foreseeability without knowing that Green's

automobile was uninsured. Therefore, defendants' assignment of error concerning this issue is overruled.

[6] Defendants also assign error to the testimony of Dr. Finley Lee, Jr., an economist who testified to the past and future economic earnings of the plaintiff. Dr. Lee testified that plaintiff's future loss of income would be $442,134.00, and that he based this calculation on several things, including information provided by plaintiff's counsel and on the assumption that plaintiff was totally and permanently disabled. Defendants argue that Dr. Lee's testimony was inadmissible because his opinion was based on the assumptions of other experts, not exclusively on assumptions of his own, and that his use of a questionnaire that he sent to plaintiff's counsel was improper. In effect, defendants contend that plaintiff's attorney and the opinions of medical experts are not sources of information reasonably relied upon by economists who testify as experts. *See* N.C. Gen. Stat. § 8C-1, Rule 411.

Coincidentally, Dr. Lee also testified in *Hairston* and the Supreme Court upheld his testimony there. "We find equally untenable the argument that the expert's opinion testimony lacks a proper foundation based as it was on information gleaned from 'statistics that have been prepared by other people' and from the plaintiff or her lawyer." *Hairston*, 310 N.C. at 244, 311 S.E.2d at 571. Defendants' complaint here goes to the weight of the expert evidence concerning plaintiff's disability upon which Dr. Lee rested his assumption of total disability rather than the admissibility itself of Dr. Lee's testimony. In this regard, defendants' argument is fundamentally flawed. It is the function of cross-examination to expose the weaknesses in the assumptions underlying an expert's testimony, which defendants' counsel undertook to do in sixty-five pages of the transcript. *See id.* at 244, 311 S.E.2d at 571. Defendants' objection to the testimony of Dr. Lee is untenable.

Finally, we have examined defendants' other assignments of error and found them to be without merit. We find no error in the trial below.

No error.

Chief Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I cannot agree that the lending of defendant Toyota's dealer tag to defendant Green was a proximate cause of plaintiff's injury. *See Federated Mutual Insurance Co. v. Hardin*, 67 N.C. App. 487, 313 S.E.2d 801 (1984). I also perceive that *Kraemer v. Moore*, discussed by the majority, supports my position. I therefore must respectfully dissent.

STATE OF NORTH CAROLINA v. ANTHONY MELVIN

No. 8913SC645

(Filed 19 June 1990)

1. **Criminal Law § 76.2 (NCI3d)— voir dire on voluntariness of confession—mistrial—no voir dire required on retrial**

Where defendant's first trial ended in a mistrial, the court in his second trial was not required to conduct a voir dire to determine the admissibility of his confession since a voir dire was held at the first trial, and defendant offered no additional evidence justifying a reconsideration of the prior ruling on admissibility of the inculpatory statement; moreover, even if the trial court did err in failing to conduct a voir dire hearing during the second trial, such evidence was not prejudicial because the record revealed that there was competent evidence from documents and testimony of witnesses apart from the statements sufficient to justify the verdict rendered by the jury.

Am Jur 2d, Evidence §§ 582, 585.

2. **Criminal Law § 74 (NCI3d)— confession written down by another—acquiescence by defendant—investigator's reading to jury proper**

Where defendant made a statement to an investigator who read it back to defendant, and defendant had the investigator include a sentence at the bottom of his statement that "[t]he basic facts in this is true and untrue due to the slant that it is written," such acknowledgment was sufficient to indicate defendant's acquiescence in the correctness of the writing, and the trial court therefore did not err in permitting the investigator to read the confession as part of his testimony.

Am Jur 2d, Evidence §§ 532, 595.

3. **Criminal Law § 214 (NCI4th)— speedy trial—time between mistrial and next term of court—improper exclusion—defendant not prejudiced**

For purposes of the Speedy Trial Act the trial court erred in excluding the time period between the declaration of a mistrial and the beginning of the next term of court; however, this error was harmless since this exclusion was not necessary to bring the commencement of defendant's retrial within the statutory 120 day period.

Am Jur 2d, Criminal Law § 852.

4. **Criminal Law § 224 (NCI4th)— speedy trial—continuances granted—time properly excluded**

Continuances granted for the illness of a State's witness, a crowded court calendar, and representation of another client in federal court by defense counsel were for facially valid reasons, and the trial court properly excluded them from the time computation under the Speedy Trial Act.

Am Jur 2d, Criminal Law §§ 860-864.

5. **Criminal Law § 288 (NCI4th)— motions to continue—complaint about service on attorney—no motions to vacate orders**

Defendant could not complain on appeal that motions to continue were not served upon his attorney of record and that proof of service was not made by the State as required by N.C.G.S. § 15A-951(b) where there was no motion to vacate any of the orders, and they therefore remained in effect.

Am Jur 2d, Continuance §§ 27, 48.

6. **Criminal Law § 34.7 (NCI3d)— writing insurance applications without "applicants' " knowledge—evidence of other false applications properly admitted**

In a prosecution of defendant for obtaining property by false pretenses where the evidence tended to show that defendant wrote insurance applications for people without their knowledge and paid the first month's premium in order to get a six months' advance on the annual commission, the trial court did not err in admitting evidence concerning other allegedly false applications submitted by defendant, since the trial court admitted the evidence as proof of opportunity, intent,

preparation, and plan, and the court gave an appropriate limiting instruction. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 321, 324-326.

7. **False Pretense § 3.1 (NCI3d)— filling out false insurance applications—receiving commissions—sufficiency of evidence**

In a prosecution for obtaining property by false pretenses, evidence presented by the State was sufficient to support a permissible inference that defendant intended to cheat or defraud when without authority he submitted a life insurance application filled out based on information taken from another company's policy, paid the first month's premium himself, and received the advance on his commission under false pretense.

Am Jur 2d, False Pretenses §§ 7, 10, 70-72, 75.

8. **Criminal Law § 1102 (NCI4th)— sentence—attempt to get witness to perjure herself—aggravating factor properly found**

In a prosecution for obtaining property by false pretenses when defendant allegedly filed false insurance applications in order to get advances on commissions, the trial court properly found as an aggravating factor that defendant attempted to induce a State's witness to perjure herself.

Am Jur 2d, Criminal Law §§ 598, 599.

9. **Jury § 7.14 (NCI3d)— peremptory challenges—no showing of racial discrimination**

Defendant failed to make a prima facie showing of racial discrimination in the State's use of peremptory challenges to remove minority jurors where the prosecutor accepted three out of five potential black jurors and accepted a black alternate; he used three peremptory challenges to excuse two black jurors and one white juror; the white juror and one of the black jurors were excused because they knew the defense attorney; the other black juror was excused because the prosecution thought "she had a hard look on her face"; and he further stated that race did not play a role in his excusing two black jurors.

Am Jur 2d, Jury § 235.

APPEAL by defendant from judgment entered 11 April 1989 by *Judge Darius B. Herring* in COLUMBUS County Superior Court. Heard in the Court of Appeals 18 January 1990.

This is an appeal from a conviction for obtaining property by false pretenses in violation of G.S. 14-100. Defendant was employed from January 1987 to May 1987 by the Carolina National Life Insurance Company (hereinafter Carolina National) which was formerly known as the American Educators Life Insurance Company of North Carolina. Defendant, a licensed insurance agent, was involved in selling individual life insurance policies to customers. Under its compensation procedure whenever an agent turned in a completed insurance application with the first month's premium, the company paid the agent a six months' advance on the annual commission which was calculated by multiplying the agent's commission on the monthly premium for the particular policy by six.

On or about 13 March 1987, defendant submitted an application for life insurance on Neacie Newkirk along with the first month's premium of $50.85 to Carolina National's office in Whiteville, N.C. The application indicated that Ms. Newkirk was the purchaser of the policy and her 22-year-old daughter was the principal beneficiary. The application appeared to contain both the signature of defendant and the alleged insured, Neacie Newkirk. Pursuant to the company's compensation procedure, defendant received a check in the amount of $152.46 as an advance on his commission.

On 26 October 1987 defendant was indicted on the charge of obtaining property by false pretenses in violation of G.S. 14-100. Defendant was initially tried on 13 June 1988, but the trial resulted in a mistrial. At the second trial, Ms. Newkirk testified that defendant had previously written a policy for her when he was employed with another company. She stated that she did not sign or authorize anyone to sign the policy application in question. She further testified that she did not pay the initial premium and had not authorized anyone to make payments on her behalf. A. B. Parker, an investigator for the North Carolina Department of Insurance, testified that defendant made a statement to him indicating that he had written applications on several people without their knowledge and had paid the initial premiums himself. Defendant's statement to Parker further indicated that defendant took the personal information on Neacie Newkirk for the Carolina National application from a Farm Bureau application that he wrote for her several years ago. Mr.

Parker further testified that he wrote down defendant's statement which defendant then read but refused to sign. Defendant said he would not sign until after he had conferred with his attorney; however, he told Parker to add the following sentence to the statement: "The basic facts in this is true and untrue due to the slant that it is written." The jury returned a guilty verdict and the trial court sentenced defendant to serve five years' imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Gayl M. Manthei, for the State.

McGougan, Wright and Worley, by Dennis T. Worley, for defendant-appellant.

EAGLES, Judge.

Defendant assigns as error the trial court's failure to suppress his confession, denial of a speedy trial, denial of his motion to dismiss, and the State's use of peremptory challenges to remove black jurors. After careful review of the record, we find no error.

[1] Defendant first assigns as error the trial court's denial of defendant's motion to suppress his confession and the subsequent reading of the confession into evidence on the grounds that its admission violated his constitutional rights because the trial court refused to grant a *voir dire* hearing at the second trial. Defendant contends that the trial court erred in reasoning that there was no need for a *voir dire* at the second trial since one had been held during the first trial. Defendant argues that since no error was found in *State v. Thompson*, 52 N.C. App. 629, 279 S.E.2d 125, *disc. rev. denied*, 303 N.C. 549, 281 S.E.2d 400 (1981), where the trial court conducted a *voir dire* hearing on defendant's motion to suppress during both the first trial and second trial, the *Thompson* court intended to require that in a second trial after a mistrial, a *voir dire* hearing must be held in order to determine whether any additional evidence could be brought out which would warrant reconsideration of the order from the first trial. Defendant contends that "[i]n the case at bar, such evidence *could possibly have arisen*, [emphasis added] therefore, Defendant should have been granted a *voir dire* hearing in his second trial." We disagree.

In *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *cert. granted*, 479 U.S. 1077, 107 S.Ct. 1271, 94 L.Ed. 2d 133, on remand

to 354 S.E.2d 705, appeal after remand 322 N.C. 251, 368 S.E.2d 838 (1988), the trial court's decision to suppress defendant's confession was reversed by the Supreme Court. On appeal after retrial, defendant acknowledged that the admissibility of the statement had already been decided adversely to him but contended that there was "additional evidence which was not previously before this Court which mandates the reversal of our prior decision." 317 N.C. at 6, 343 S.E.2d at 817. The Supreme Court stated that defendant had failed to show any new evidence justifying a reconsideration of the court's prior ruling. "Since the evidence relating to the admissibility of the inculpatory statement made by defendant is virtually identical to the evidence which was previously before us, the doctrine of 'law of the case' applies to make our prior ruling on this issue conclusive." *Id. See also State v. Wright*, 275 N.C. 242, 166 S.E.2d 681, *cert. denied*, 396 U.S. 934, 90 S.Ct. 275, 24 L.Ed.2d 232 (1969).

Here, at the retrial, defendant failed to produce any additional evidence justifying a reconsideration of the prior ruling on the admissibility of the inculpatory statement. This conclusion is bolstered by defendant's assertion in his brief that additional evidence "could possibly have arisen," such that a *voir dire* hearing in his second trial should have been held. The trial court stated that it had reviewed the previous trial court's order on the admissibility of the statement, concluding that it remained in effect and rejected defendant's offer of proof on the motion. Assuming *arguendo* that the trial court erred in failing to conduct a *voir dire* hearing on the admissibility of the confession during the second trial, any error was not prejudicial because the record reveals that the State has shown beyond a reasonable doubt that the omission did not contribute to the verdict. *See State v. Haskins*, 278 N.C. 52, 62, 178 S.E.2d 610, 616 (1971). There was competent evidence from the documents and testimony of witnesses sufficient to justify the verdict rendered by the jury.

[2] Defendant further argues that the trial court also erred in allowing the "purported in-custody statement" to be read to the jury. Defendant argues that the purported confession was not signed or otherwise admitted by defendant to be correct. Defendant correctly cites *State v. Walker*, 269 N.C. 135, 139, 152 S.E.2d 133, 137 (1967), for the proposition that

> "[i]f a statement purporting to be a confession is given by accused, and is reduced to writing by another person, before the written instrument will be deemed admissible as the written confession of accused, he must in some manner have indicated his acquiescence in the correctness of the writing itself. If the transcribed statement is not read by or to accused, and is not signed by accused, or in some other manner approved, or its correctness acknowledged, the instrument is not legally, or *per se*, the confession of accused; and it is not admissible in evidence as the written confession of accused."

Id. We note that here the trial court declined to allow the admission of the statement into the evidence because it was not signed by defendant but allowed Mr. Parker to read it during his testimony. On this record we hold that the trial court properly could have admitted defendant's statement into evidence. Here defendant acknowledged the correctness of part of the writing by having Mr. Parker include at the bottom of the confession the statement that some of the facts were true and some were not due to the slant it was written. This acknowledgment was sufficient. The trial court did not err in permitting Parker to read the confession as part of his testimony. Accordingly, defendant's first assignment of error is overruled.

Defendant next assigns as error the trial court's denial of defendant's motion to dismiss for failure to comply with the speedy trial provisions in G.S. 15A-701 *et seq.* Defendant argues that the continuances granted by the trial court between the declaration of the mistrial and the second trial aggregated 299 days which clearly exceeds the 120-day statutory period in G.S. 15A-701(a1)(4). Defendant argues that the interim continuances were not valid exclusions of time under the Speedy Trial Act. We disagree.

Initially we note that

> [t]he Speedy Trial Act, G.S. 15A-701 *et seq.*, established a new statutory right to trial within 120 days of the last act triggering the criminal process. It adopted in part provisions of federal speedy trial statutes. Both the federal and the North Carolina statutes allow courts to exclude periods of time from computation of the statutory period. Indeed, the exclusions appear almost to have swallowed up the rule.

> Once a defendant shows that the 120-day period under the Act has been exceeded, the State must assume the burden of justifying periods it contends were properly excluded. On appeal, however, the burden shifts: once the motion to dismiss has been denied, defendant-appellant assumes the twin burdens of assuring that the record is properly made up, and showing that error has occurred to his or her prejudice. If the record is deficient or silent upon a particular point, we will presume that the trial judge acted correctly.

State v. White, 77 N.C. App. 45, 50, 334 S.E.2d 786, 790-91, *cert. denied*, 315 N.C. 189, 337 S.E.2d 864 (1985). "By producing the orders for continuance, all entered for facially valid reasons, the State carried its burden of going forward with evidence to show that the continuance periods should be excluded from the computation." *State v. Kivett*, 321 N.C. 404, 409, 364 S.E.2d 404, 407 (1988). We note parenthetically that the North Carolina Speedy Trial Act G.S. 15A-701 *et seq.* was repealed by Session Laws 1989, c. 688, s. 1, effective October 1, 1989.

G.S. 15A-701(b)(7) excludes "[a]ny period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding."

[3] Here defendant argues that the "continuances were not valid exclusions of time under the Speedy Trial Act and that Defendant should have been granted a dismissal under the provisions of N.C.G.S. 15A-701." On the contrary, there is no evidence of record suggesting that these delays were the result of dilatory tactics by the State. The first continuance excluded the period from 13 June 1988 through 8 August 1988 because "[d]efendant was tried before a jury this term and a mistrial was declared by the Court because the jury was hopelessly deadlocked and could not reach a verdict." Defendant contends that this exclusion merely excluded the time between the mistrial and the next term of court. Defendant cites *State v. Kivett*, 321 N.C. 404, 364 S.E. 2d 404 (1988), where the Supreme Court found that the trial court erred in excluding the time period between an indictment and the next term of court. The trial court erred in excluding the time period between the declaration of mistrial and the beginning of the next term of court;

however, on this record the error was harmless since this exclusion was not necessary to bring the commencement of the retrial within the statutory 120-day period. *See State v. Kivett, supra.*

[4] The second period excluded was from 8 August 1988 to 31 October 1988. The reason stated was that the trial of other cases prevented the trial of this case and the defendant failed to return to court. The third exclusion, from 31 October 1988 through 28 November 1988, was granted because a witness for the State had a stroke and was unable to be in court. The fourth exclusion, from 28 November 1988 through 23 January 1989, was granted because the witness who had the stroke was recuperating and unable to come to court. Finally, the fifth exclusion from 23 January 1989 until 10 April 1989, was allowed because defense counsel was in federal court and the State's witness was still recovering from a stroke. These were facially valid reasons. On this record there is no evidence to support an attack on the orders granting these continuances. Our opinions have suggested that trial judges should make findings of fact for each period of exclusion which will assist appellate review, but neither the Act nor our opinions require detailed findings. *See State v. White, supra.* Where the trial court finds that the "ends of justice served by granting the continuance outweigh the best interests of the public and defendant in a speedy trial," as was done here for all five continuances, there is no error.

[5] Defendant also contends that the motions to continue were not served upon his attorney of record and that proof of service was not made by the State as required by G.S. 15A-951(b). While G.S. 15A-951(b) does require that each written motion be served upon the attorney of record of the opposing party or upon the defendant if he is not represented by counsel, our Supreme Court noted in *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986), "[a]n irregular order, one issued contrary to the method of practice and procedure established by law, is voidable." *Id.* at 235, 345 S.E.2d at 183. "An order issued without notice where actual notice is required is irregular and thus voidable, but it is not void. It stands until set aside by a motion to vacate." *Id.* at 236, 345 S.E.2d at 183. It may not be attacked collaterally under the Speedy Trial Act. *See id.* Here there was no motion to vacate any of the orders and they remain in effect. Accordingly, this assignment of error must also fail.

[6] Thirdly, defendant assigns as error the admission into evidence of Parker's testimony as to information contained in defendant's confession concerning other allegedly false applications submitted by defendant and the trial court's instruction to the jury on these prior bad acts. Defendant contends that the evidence through the "purported in-custody statement" was not sufficient to prove intent or design and should not have been admitted. He also contends that the jury should not have been instructed on evidence of prior bad acts. We disagree.

In *State v. Wilson*, 57 N.C. App. 444, 291 S.E.2d 830, *disc. rev. denied*, 306 N.C. 563, 294 S.E.2d 375 (1982), defendant was charged with obtaining money under false pretenses. In *Wilson*, defendant promised to assist potential home buyers in obtaining a house if they paid him a down payment. Defendant failed to help them obtain a house and did not refund their down payment. During trial, the trial court admitted evidence that defendant had made similar representations to other parties and did not obtain the houses for them or refund their down payments either. This court held that this evidence was properly admitted.

> To be relevant, evidence must have some logical tendency to prove a fact at issue in the case. "[E]vidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact."
>
> One of the essential elements of the crimes with which defendant was charged was intent to cheat and defraud *at the time* defendant represented . . . that he would assist them in obtaining houses. Evidence that defendant previously had represented to some five other parties that he would help them obtain houses, and that they had neither obtained houses nor received their money back, was relevant to show defendant's fraudulent intent in his transactions with the [victims].

Id. at 450, 291 S.E.2d at 834.

> Such relevant evidence is not rendered inadmissible merely because it may show the commission of a separate offense. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite

mental intent or state, even though the evidence discloses the commission of another offense by the accused.

Id. at 451, 291 S.E.2d at 834.

Here, the evidence of prior bad acts was offered to show that the act in question was done knowingly with the intent to cheat or defraud. The trial court admitted the evidence as "proof of opportunity, intent, preparation, and plan under Rule 404(b)." Also, the trial court gave limiting instructions to the jury that it was to consider the evidence solely for the purpose of showing that defendant had the intent, knowledge and "that there existed in his mind a plan, scheme, system, or design involving the crime charged in this case." Accordingly, this assignment of error is overruled.

[7] Defendant further assigns as error the trial court's denial of his motion to dismiss at the close of all the evidence on the grounds that the State failed to prove each element of the offense and failed to properly allege a violation of G.S. 14-100. Defendant contends that the State failed to prove the intent to defraud. Defendant asserts that the testimony at trial only revealed that an application was submitted and the first month's premium was paid and did not reveal whether further premiums were paid on the policy. Defendant further contends that "[t]here is no evidence that Mr. Melvin forged the application, paid the premium himself, deceived or defrauded Ms. Newkirk in any way, or that he deceived and defrauded the company in any way." Defendant argues that "no evidence was offered to show that Mr. Melvin intended to deceive or defraud either Ms. Newkirk or Carolina National Life Insurance Company." Defendant contends that the State failed to prove beyond a reasonable doubt that he obtained the six months' advanced commission by means of false pretense which was calculated to deceive and did deceive. We disagree.

"A motion for [directed verdict] is properly denied if there is any competent evidence to support the allegations contained in the bill of indictment; and all the evidence which tends to sustain those allegations must be considered in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn therefrom." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974). G.S. 14-100(a) provides that

> If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, . . .; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

" 'Intent [,however,] is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.' '[I]n determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged . . . .' " *State v. Hines*, 54 N.C. App. 529, 533, 284 S.E.2d 164, 167 (1981) (citations omitted). "Thus, '[i]t was for the jury to determine, under all circumstances, defendant's ulterior criminal intent.' " *Id.* (Citation omitted.) "The gist of obtaining property by false pretense is the false representation of a subsisting fact intended to and which does deceive one from whom property is obtained. The state must prove, as an essential element of the crime, that defendant made the misrepresentation as alleged." *State v. Linker*, 309 N.C. 612, 614-15, 308 S.E.2d 309, 310-11 (1983).

Here, the jury found that defendant had the requisite intent sufficient to convict him of obtaining property by false pretense. Defendant contends that if further premiums were paid, then no fraud was perpetrated upon the company. On the contrary, fraud was perpetrated at the time defendant turned in the application and premium on behalf of Neacie Newkirk which she neither paid nor authorized to be paid on her behalf. While defendant did in fact pay the premium himself, the company then paid him six months' advance on his commission. We find the evidence presented by the State sufficient to support a permissible inference that defendant intended to cheat or defraud when without authority he submitted the premium and application filled out based on information

taken from another company's policy and received the advance on his commission under false pretense. There was sufficient competent evidence for the jury to determine defendant's ulterior criminal intent. Accordingly, this assignment of error is overruled.

[8] Next, defendant assigns as error the trial court's finding as an aggravating factor that defendant attempted to induce the State's witness, Neacie Newkirk Boykin, to perjure herself. Defendant contends that there was no credible evidence to support the aggravating factor. We disagree.

> If a sentence greater than the presumptive term is to be imposed upon a defendant, the trial judge must make written findings of aggravating and mitigating factors. The record must specifically reflect each factor in mitigation or aggravation which the trial judge finds proven by a preponderance of the evidence. G.S. § 15A-1340.4 expressly distinguishes between factors which the General Assembly requires trial judges to consider ("statutory factors") and other, "non-statutory," factors which *may* be considered. Regarding non-statutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentencing, such as conduct while awaiting sentencing, the trial judge *may* consider them, but such consideration is not required.

State v. Cameron, 314 N.C. 516, 518-19, 335 S.E.2d 9, 10 (1985). "A ruling committed to a trial judge's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision." *Id.*, 335 S.E.2d at 11.

On this record we conclude that the State did in fact prove beyond a preponderance of the evidence that defendant attempted to induce Ms. Newkirk to perjure herself. At the sentencing hearing when Ms. Newkirk was shown the application for insurance, she stated that she had not discussed the application with defendant but that defendant had approached her downstairs in the courthouse prior to the beginning of the first trial in June 1988. She testified that she did not "remember the exact words, but it was something to the effect that he said he was in trouble and he needed me to say on the witness stand that we had discussed the policy." She did not remember him saying anything else. The trial court then found as a factor in aggravation that "defendant at a prior trial, which resulted in a mistrial, attempted to induce

the State's witness, Neacie Newkirk Boykin, to perjure herself so as to defeat the ends of justice." On this record, we find no error.

[9] Finally, defendant assigns as error the trial court's overruling of his objection to the State's use of peremptory challenges to remove minority jurors. Defendant contends that he made out a prima facie showing of racial discrimination in the jury selection under the standards of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Defendant argues that under *Batson* he must show the following: "that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; second, the defendant is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that lends itself to potential abuse; and third, the defendant must show that these facts and any other relevant circumstances . . . raise an inference that the prosecutor used peremptory challenges to exclude prospective jurors on the basis of race." Defendant contends that since he is black and the prosecutor exercised peremptory challenges to exclude two black prospective jurors, without more, an inference is raised that the prosecutor used the peremptory challenges to exclude the prospective jurors because they were black. We disagree.

In *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988) our Supreme Court cited *Batson, supra*, for the proposition that "a prima facie case of purposeful discrimination in the selection of a petit jury may be established on evidence concerning the prosecutor's exercise of peremptory challenges at the trial."

> In order to establish such a prima facie case the defendant must be a member of a cognizable racial group and he must show the prosecutor has used peremptory challenges to remove from the jury members of the defendant's race. The trial court must consider this fact as well as all relevant circumstances in determining whether a prima facie case of discrimination has been created. When the trial court determines that a prima facie case has been made, the prosecution must articulate legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group. The prosecutor's explanation need not rise to the level of justifying a challenge for cause. At this point the trial court must deter-

mine if the defendant has established purposeful discrimination. Since the trial court's findings will depend on credibility, a reviewing court should give those findings great deference.

Id. at 254-55, 368 S.E.2d at 840.

Here, there are other relevant circumstances to be considered. The prosecutor accepted three out of five potential black jurors and accepted a black alternate. The prosecutor used three peremptory challenges to excuse two black jurors and one white juror. The white juror and one of the black jurors were excused because they knew the defense attorney. The other black juror was excused because "she had a hard look on her face, and . . . she made me [prosecutor] feel uncomfortable the way she was looking. She just worried me the way she was looking." The prosecutor further stated that race did not play a role in his excusing the two black jurors. The trial court then found that the peremptory challenges were exercised without racial prejudice. On this record, we find no evidence of invidious discrimination and conclude that the trial court did not err in refusing to grant defendant's motion.

No error.

Judges PHILLIPS and ORR concur.

ROANE-BARKER, PLAINTIFF/CROSS-APPELLANT v. SOUTHEASTERN HOSPITAL SUPPLY CORPORATION, DEFENDANT/APPELLANT

No. 8910SC1185

(Filed 19 June 1990)

1. Rules of Civil Procedure § 37 (NCI3d)— failure to produce requested documents—sanctions properly imposed

The trial court did not abuse its discretion in awarding sanctions where it was clear that defendant was dilatory and disobeyed the order of the trial court to produce the documents requested, and at no time prior to imposition of sanctions did defendant formally object on the ground of confidentiality or seek a protective order from the court. Moreover, the sanction of striking defendant's answer and counterclaim, though

severe, was nevertheless proper, since it was expressly authorized by statute, and plaintiff was prejudiced by the expense and delay caused by defendant's failure to produce requested documents.

Am Jur 2d, Depositions and Discovery §§ 390-392.

2. **Rules of Civil Procedure §§ 37, 55.1 (NCI3d)— sanctions for failure to make discovery—entry of default—requested documents produced—no ground to set aside entry of default**

Where defendant failed to produce documents requested by plaintiff and ordered by the court, the court struck defendant's answer and counterclaim, and the trial court then entered default against defendant, defendant did not thereafter, by producing the required documents, show good cause to set aside the default.

Am Jur 2d, Depositions and Discovery §§ 390-392.

3. **Contracts § 33 (NCI3d)— malicious interference with contract—plaintiff's employees hired by defendant—employee placed in same territory—interference with plaintiff's accounts**

In an action for malicious interference with contract, the trial court did not err in refusing to grant defendant's motions to dismiss, for summary judgment, or for directed verdict where plaintiff alleged that three of its salesmen, hired by defendant and placed in their former territories, did solicit plaintiff's customers, and that defendant further induced the salesmen to interfere with plaintiff's existing accounts.

Am Jur 2d, Interference §§ 39-41.

4. **Contracts § 36 (NCI3d)— malicious interference with contract—lost profits—evidence admissible**

In an action for malicious interference with contract and unfair trade practices where plaintiff alleged that defendant hired three of its employees and placed them in their former territories, plaintiff was entitled to show evidence of its lost profits by comparing its past history of profits with gross sales of plaintiff's former salesmen while working for defendant.

Am Jur 2d, Interference §§ 57, 58.

5. Unfair Competition § 1 (NCI3d)— malicious interference with contract—unfair or deceptive trade practice

Because defendant's acts in hiring three of plaintiff's salesmen and placing them in their former territories did amount to tortious interference with contract, the trial court did not err in finding an unfair or deceptive trade practice, trebling the jury verdict, awarding costs, and awarding attorney's fees.

Am Jur 2d, Interference §§ 31, 57, 58; Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 697, 735.

APPEAL by defendant from a judgment entered 14 April 1989 by *Judge Donald W. Stephens* in WAKE County Superior Court. Plaintiff cross-appeals. Heard in the Court of Appeals 4 May 1990.

Maupin, Taylor, Ellis and Adams, P.A., by James A. Roberts, III, and Hunter, Wharton & Lynch, by John V. Hunter, III, for plaintiff-appellee/cross-appellant.

Womble Carlyle Sandridge & Rice, by Donald L. Smith, William E. Moore, Jr. and Hoyt G. Tessener, for defendant-appellant.

LEWIS, Judge.

Defendant appeals from an order sanctioning it for abuse of discovery. Pursuant to Rule G.S. 1A-1, Rule 37(b)(2)c & e, defendant's answer and counterclaims were stricken and it was assessed attorney's fees. The events leading up to these sanctions are as follows:

On 9 July 1986, plaintiff filed suit against defendant alleging malicious interference with contract, unfair and deceptive trade practices, misappropriation of trade secrets and unfair competition.

Plaintiff is engaged in the business of selling medical supplies and equipment throughout North Carolina and South Carolina. Defendant is a direct competitor of plaintiff in both North Carolina and South Carolina.

On 15 May 1986 defendant hired three of plaintiff's salesmen. ("A, B, & C"). Defendant placed these three salesmen in the same sales territory that they were previously servicing for plaintiff. Salesmen A, B, and C all had employment contracts with plaintiff which they signed when they joined plaintiff. These contracts contained covenants not to compete. Initially, A, B, and C were parties

to this action; however, the claims against them were dismissed and only defendant Southeastern remains.

On 19 January 1987, plaintiff requested in its Second Request for Production of Documents all sales analysis reports for A, B & C. After serving the Request on the defendant, plaintiff noticed several depositions. In a letter dated 5 March 1987 counsel for plaintiff expressed concern that the documents had not yet been produced and that these documents were necessary for an upcoming deposition. Defendant responded by letter on 11 March 1987 stating, "I will have something on the documents very soon and certainly within time for these depositions." Plaintiff's counsel's affidavit indicates that on 20 March 1987, plaintiff received oral reassurances that the documents were going to be produced in the near future. When these documents were not produced, the depositions were cancelled.

On 3 April 1987, plaintiff filed its first Motion to Compel and Motion for Sanctions. On 8 April 1987, defendant filed its Response to Request for Production of Documents. The Response objected to plaintiff's request on the grounds that the documents requested were not sufficiently identified and that the request was too broad because it included all customers ever serviced by A, B & C while employed with plaintiff, and that all documents are not relevant nor likely to lead to relevant evidence. Defendant on 8 April 1987 also produced five full boxes of computer generated sales records at its office. Defendant's counsel stated that it would have to review these documents before turning them over to plaintiff. After a brief examination of these records, plaintiff told defendant that these were not the documents requested and that they were not in a readable form. Defendant's counsel reiterated its position that the documents requested were beyond the scope of discovery and that if plaintiff would identify the specific accounts claimed to have been diverted by defendant, he would provide information for those accounts.

On 9 April 1987, plaintiff again wrote defendant expressing concern about defendant's failure to produce the requested documents. On 14 April 1987, defendant responded with a letter containing the following excerpt:

> [M]y clients are having difficulty retrieving documents which deal with the customers serviced by these salespeople with [plaintiff] prior to their having come to work for [defendant].

> The reason for its difficulty is two-fold: (1) My clients are unsure of the clients serviced by these salespeople prior to their having come to work for [defendant] and (2) These same customers would have been serviced by [plaintiff] . . . If you would supply us with a list of the specific doctors or other medical accounts which you would like to have the information on, I think this would be of great service and aid to us in determining whether or not such documents exist. I am requesting that you provide us with a list of the specific accounts which you requested documents on.

Plaintiff responded to defendant's letter by refusing to produce a list of plaintiff's accounts or customers and further stating, "As we have discussed on several occasions, Jim Williams, Southeastern's Director of Alternate Care Development identified several documents in his deposition which could be examined to determine those customers which had switched their accounts from Roane-Barker to Southeastern as a result of the solicitations of the three [salesmen]." Plaintiff went on to pinpoint exact pages in Williams' deposition which identified the specific reports plaintiff was asking to be produced.

On 21 May 1987, Southeastern's counsel wrote that he was serving interrogatories "to facilitate the production of documents." Plaintiff filed timely answers identifying the specific customers which plaintiff contended had been unlawfully solicited by the defendant. Counsel for defendant then agreed to produce the sales data for the accounts identified by the plaintiff and stated that there was no need for plaintiff's hearing on the Motion to Compel and for Sanctions scheduled for 24 May 1987. The parties entered into a consent order which provided that "the documents requested in plaintiff's Second Request for Production of Documents to Southeastern Hospital Supply shall be reproduced at the office of counsel for plaintiff no later than 8 July 1987." This consent order was entered into by Judge Henry W. Hight, Jr. A few days before this deadline, defendant requested an extension of time to produce the documents.

On 10 August 1987, plaintiff's counsel wrote defendant concerning the production of the documents. Plaintiff stated that it required defendant to produce the documents by 13 August 1987 as promised or it would again seek sanctions. On 12 August 1987, plaintiff received certain documents from defendant which defend-

ant thought were responsive to plaintiff's request. However, plaintiff indicated that the documents were not responsive to its request and, on 14 August 1987, plaintiff again moved to compel discovery and for sanctions.

Judge James H. Pou Bailey heard plaintiff's motion on 20 August 1987. On 21 August 1987, Judge Bailey entered an order striking defendant's answer and counterclaims, required defendant to produce the requested documents by 1 September 1987, and assessed defendant plaintiff's attorneys' fees incurred in obtaining compliance with its request for production. On 28 August 1987, defendant produced all sales analysis reports for A, B, and C.

On 1 March 1988, plaintiff obtained an entry of default. On 3 March 1988, counsel for defendant filed a notice of substitution of counsel, motions to set aside default, for protective order, and for relief from the court's previous orders. On 15 March 1988, defendant filed Motions for summary judgment, and to set aside the order for payment of attorneys' fees.

The motions came before Judge Robert L. Farmer on 25 May 1988. Judge Farmer denied defendant's motions to set aside default, for relief from orders, and for summary judgment. On 19 July 1988, defendant filed motions to revise order pursuant to G.S. 1A-1, Rule 54(b) and for protective order (not related to the plaintiff's second request for production of documents). Judge James H. Pou Bailey heard the motions and allowed defendant's motion for protective order and revised the award of attorneys' fees, but refused to reinstate defendant's answer.

On 9 March 1989, defendant filed a motion to reconsider its motion for summary judgment and for partial summary judgment on damages. The motion to reconsider was denied. On 27 March 1989, defendant then filed a motion to set aside default and a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), both of which were denied.

The case was tried before a jury on the issue of damages. A verdict was returned for the plaintiff on 4 April 1989. On 10 April 1989 defendant filed a motion for judgment notwithstanding the verdict or in the alternative, a motion for a new trial. The court found an unfair trade practice and judgment was entered against defendant for trebled damages. On 14 April 1989, the court entered an order awarding plaintiff attorneys' fees. On 17 April

1989, the trial court denied defendant's motion for JNOV, or in the alternative for a new trial and taxed expert witness fees against defendant. Defendant gave notice of appeal and plaintiff cross-appealed.

I. *Imposition of Discovery Sanctions.*

[1] It should be noted at the outset that sanctions under G.S. 1A-1, Rule 37, are within the sound discretion of the trial court. "Broad discretion must be given to the trial judge with regard to sanctions." *Martin v. Solon Automated Services, Inc.*, 84 N.C. App. 197, 201, 352 S.E.2d 278, 281, *disc. rev. denied and appeal dismissed*, 319 N.C. 674, 356 S.E.2d 789 (1987), *quoting* 8 Wright & Miller, *Federal Practice & Procedure: Civil* § 2284 at 765 (1970). "The choice of sanctions under Rule 37 lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion." *Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984); *See also Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 603 (1982) (trial judge's discretion is "practically unlimited").

After carefully reviewing the record, we find that the trial court did not abuse its discretion in awarding sanctions. It is clear that appellant was dilatory and disobeyed the order of the trial court to produce the documents requested. Appellants admitted in open court at the hearing that they had not complied with the plaintiff's request. Defendant now argues that the reason they did not comply with the request or the court's order is because the documents requested contained confidential information. However, at no time prior to the imposition of sanctions did defendant formally object on the grounds of confidentiality or seek a protective order from the court. Defendant argues that it "interpreted the proper scope of the requests to require only sales figures for accounts Plaintiff claimed were 'diverted.'" However, the consent order entered into by the parties expressly agreed that defendant would comply with plaintiff's second request for the production of documents. Defendant may not unilaterally "interpret" the relevant scope of its response and only provide that information it considers discoverable. The parties agreed and consented to the order entered by Judge Hight and that order expressly required defendants to comply with plaintiff's second request. Thus, appellants were subject to the imposition of sanctions for violation of the court's previous order. *See Martin v. Solon Automated Services,*

Inc., supra, and *Routh v. Weaver, supra* (appellants subject to sanctions for failing to comply with earlier court orders requiring compliance with discovery requests).

We must now determine whether the sanctions imposed were proper. Although the sanctions imposed were severe, they are among those expressly authorized by statute. Absent specific evidence of injustice, we cannot hold they constitute an abuse of discretion. *Martin, supra,* at 201, 352 S.E.2d 281; *First Citizens Bank v. Powell,* 58 N.C. App. 229, 292 S.E.2d 731 (1982), *aff'd,* 307 N.C. 467, 298 S.E.2d 386 (1983). Defendant argues that injustice resulted from the entry of default because plaintiff was not prejudiced by its actions because trial had not been calendared and plaintiff had ample time to examine and analyze the information. However, Rule 37 does not require the plaintiff to show that it was prejudiced by the defendant's actions in order to obtain sanctions for abuse of discovery. The proximity of the discovery abuse to the date of trial is one factor the trial court may consider when determining whether or not to award sanctions. *See Hayes v. Browne,* 76 N.C. App. 98, 331 S.E.2d 763 (1985), *disc. rev. denied,* 315 N.C. 587, 341 S.E.2d 25 (1986) (sanctions appropriate when plaintiff failed to complete discovery 10 days before trial). Plaintiff twice sought court intervention to obtain compliance with its requests. Some of plaintiff's depositions were cancelled due to defendant's failure to produce the requested documents, resulting in delay of its trial preparation. Furthermore, plaintiff was forced to defend numerous motions made by defendant seeking relief from Judge Bailey's orders. This expense and these delays clearly prejudiced the plaintiff. The sanctions ordered were within the discretion of the trial court.

II. *Refusal to Set Aside Default.*

[2] Defendant also appeals the refusal of the trial court to set aside entry of default pursuant to G.S. 1A-1, Rule 55(d). Defendant has the burden of establishing "good cause" to set aside the entry of default and refusal to set aside is within the sound discretion of the trial court. *Britt v. Georgia-Pacific Corp.,* 46 N.C. App. 107, 108, 264 S.E.2d 395, 397 (1980); *Bailey v. Gooding,* 60 N.C. App. 459, 463, 299 S.E.2d 267, 270, *disc. rev. denied,* 308 N.C. 675, 304 S.E.2d 753 (1983). The entry of default against defendant was the direct result of the sanctions imposed against it under Rule 37. Defendant argues that because it ultimately produced the requested documents ordered by the court, it has shown good

cause to set aside default and cites *Stone v. Martin*, 69 N.C. App. 650, 318 S.E.2d 108 (1984). However, in *Stone*, the defendants had refused to answer discovery requests based on their reasonable interpretation of existing case law. After sanctions were imposed, appellate decisions subsequently restricted the scope of defendant's alleged privilege. Coupled with the defendant's willingness to comply with these adverse decisions, the change in law was deemed a significantly changed circumstance to merit modification of the earlier court order. 69 N.C. App. at 653, 318 S.E.2d at 111. Judge Greene, in his concurrence in *Martin, supra*, distinguished *Stone* in a manner applicable to the circumstances of this case:

> The 'changed' circumstances in the instant case do not rise to the level upheld by this Court in *Stone*. The defendants in *Stone* stood willing to comply with discovery as the result of a changed circumstance, the change in law. Defendants here argue their alleged willingness to comply is itself the changed circumstance. Such an interpretation invites improper manipulation of the 'changed circumstances' standard. To strike Judge Bailey's sanctions simply because defendants belatedly make effort to comply would reward their delay of discovery. This defeats the purpose of sanctions under N.C.R. Civ. P. 37(b). Therefore, Judge Bailey had ample discretion to rule no legally significant circumstances had changed.

Martin v. Solon Automated Services, Inc., 84 N.C. App. at 204, 352 S.E.2d at 282 (Greene, J., concurring). We find without further discussion that the trial court did not abuse its discretion in refusing to set aside entry of default.

III. *Denial of Defendant's Motions to Dismiss for Failure to State a Claim, for Summary Judgment and for Directed Verdict.*

[3] Defendant contends that the trial court erred by failing to enter judgment as a matter of law against plaintiff. Defendant argues that the "mere" hiring of plaintiff's employees by a competitor and then placing them in their former territories, standing alone, is not actionable. *Peoples Sec. Life Ins. Co. v. Hooks*, 322 N.C. 216, 367 S.E.2d 647 (1988), *reh'ring denied*, 322 N.C. 486, 370 S.E.2d 227 (1988), is the primary case relied upon by defendant. Our Supreme Court held in *Hooks* that hiring the competitor's former employees and assigning them to the same territory they had worked in their prior employment was not by itself sufficient

to state a claim for tortious interference with contract. *Id.* In *Hooks* the plaintiff had alleged that because defendant had hired fifteen of its employees that it was unable to service its policyholders or collect its insurance premiums. The Court found that this allegation was not enough to make out a claim for tortious interference, specifically stating that "[t]he complaint does not allege that the defendant solicited or serviced policyholders of [plaintiff]. Neither does the complaint allege that the defendant directly interfered with existing policies. Rather, it alleges that because the defendant induced certain of the plaintiff's employees to change employers, he generally 'interfered with plaintiff's business.' " *Hooks, supra,* at 224, 367 S.E.2d 652. The court also emphasized that "[t]he privilege [to interfere] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved." *Id.* at 220, 367 S.E.2d at 650 (quoting *Smith v. Ford Motor Co.*, 289 N.C. 71, 91, 221 S.E.2d 282, 294 (1976)).

The Supreme Court made this qualification clear in *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988). In *United Laboratories* defendants had hired plaintiff's employee and placed him in the same sales territory he had previously serviced for the plaintiff. Unlike the plaintiff in *Hooks*, United Laboratories alleged that the defendants had hired its salesman away from it, that this former salesman had solicited the same customers he had serviced for the plaintiff, and that defendant corporation had agreed to pay all of the salesman's legal expenses incurred in defending an action by plaintiff. *Id.* The Court in *United Laboratories* distinguished *Hooks*, finding defendant's conduct was exercised for a wrongful purpose.

In this case, we find the facts, as alleged in the complaint and deemed admitted by default, more closely approximate *United Laboratories* than *Hooks*. Plaintiff here alleges that the salesmen hired by defendant did solicit plaintiff's customers and further induced the salesmen to interfere with plaintiff's existing accounts. We distinguish *Hooks* and hold that the trial court did not err in refusing to grant defendant's motions to dismiss, for summary judgment, or for directed verdict.

IV. *Denial of Motion for Partial Summary Judgment as to Damages, Admitting Plaintiff's Evidence of Damages and Instructing the Jury.*

[4] Defendant contends that plaintiff's proof of damages was both legally and factually deficient. Defendant argues that plaintiff's proof of damages included speculative evidence of plaintiff's lost profits for all diverted accounts, without regard to defendant's net profits on those accounts. Plaintiff's case is based upon malicious interference with contract, statutory and common law unfair competition and unfair and deceptive trade practices. Unfair and deceptive trade practices and unfair competition claims are neither wholly tortious nor wholly contractual in nature and the measure of damages is broader than common law actions. *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 232, 314 S.E.2d 582, 584-85, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984).

Plaintiff was entitled to recover damages which were the natural and probable result of the tortfeasor's misconduct. Plaintiff showed 1. the sales and gross profits made by the salesmen to its customers during their last year of employment with plaintiff; 2. the sales plaintiff made to these same customers during the two-year period after the salesmen were employed with defendant, which was the period of the restrictive covenants; 3. the sales the salesmen made to those same customers during that two-year period on behalf of the defendant.

Defendant's sales were made in the same geographic area and to the same customers as plaintiff's sales would have been. This evidence was both relevant and admissible. It was for the jury to decide how much weight to give such evidence. Plaintiff was entitled to show evidence of its lost profits by comparing its past history of profits with gross sales of plaintiff's former salesmen while working for defendant. *See Mosley & Mosley Builders, Inc. v. Landin, Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d 416 (1988).

V. *Refusal to Allow Defendant to Read Case Law to the Jury.*

We summarily dispose of this argument by stating that the trial court did not abuse its discretion in refusing to allow counsel to read case law concerning its liability. Entry of default against the defendant removed the issue of liability from consideration.

VI. *Finding of an Unfair Trade Practice and Unfair Competition and Denial of Motions for JNOV or New Trial.*

[5] G.S. § 75-1.1(a) provides that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." Since the allegations in the complaint were deemed admitted by virtue of the defendant's default, the only issue the court was left to consider was whether the allegations in the complaint amounted to a violation of § 75-1.1(a). In *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 664, 370 S.E.2d 375, 389 (1988), the Court specifically held that tortious interference with a restrictive covenant by a competitor stated a claim for unfair and deceptive trade practices under § 75-1.1. Because defendant's acts did amount to tortious interference with contract, as in *Kuykendall*, the court did not err in finding an unfair or deceptive trade practice, trebling the jury verdict, awarding costs and awarding attorney's fees.

Defendant also argues that the trial court erred when it denied its motion for judgment notwithstanding the verdict or in the alternative, for a new trial. We disagree. Defendant's arguments on this issue all are directed to matters concerning its liability. Again, because of the entry of default against it, defendant was not entitled to defend itself based on affirmative defenses deemed waived when Judge Bailey struck the answer. Denial of JNOV or a new trial was proper.

PLAINTIFF APPELLANT'S CROSS-APPEAL

Plaintiff cross-appealed only as an alternative if this Court did not affirm the trial court. Because we affirm the trial court, we do not address the matters raised in plaintiff's cross-appeal.

Affirmed.

Judges ORR and GREENE concur.

INDUSTRIAL INNOVATORS, INC. v. MYRICK-WHITE, INC. AND HOMER S. WHITE

No. 8914SC727

(Filed 19 June 1990)

Injunctions § 16 (NCI3d)— injunction bond—when defendant is entitled to damages

A defendant is entitled to damages on an injunction bond only when there has been a final adjudication substantially favorable to the defendant on the merits of the plaintiff's claim.

Am Jur 2d, Injunctions §§ 315, 381, 382.

APPEAL by plaintiff from order entered 18 January 1989 by *Judge F. Gordon Battle* in DURHAM County Superior Court. Heard in the Court of Appeals 16 January 1990.

Newsom, Graham, Hedrick, Bryson & Kennon, by Charles F. Carpenter and Richard S. Boulden, for plaintiff-appellant.

Glenn, Bentley, Mills and Fisher, P.A., by Stewart W. Fisher, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from an award of damages for defendants on a bond executed by plaintiff as security for an injunction against defendants.

On 27 January 1988, the plaintiff filed its complaint alleging the plaintiff employed defendants to develop a control system for the "G & C Sliver Machine," and thereafter plaintiff disclosed certain "confidential and proprietary information" to the defendants and that defendants did communicate such confidential information to competitors of the plaintiff. The plaintiff requested an injunction enjoining the defendants from engaging "in any activity wherein they represent to any other corporation, partnership, or entity, that they are acting on behalf of [the plaintiff] or that they have the right to market certain technology and proprietary information on behalf of [the plaintiff]." The plaintiff also requested the court to determine "the damages [the plaintiff] may have already suffered. . . ."

On 14 March 1988, Judge Wiley F. Bowen issued a preliminary injunction providing in pertinent part:

1.

That Defendants, Myrick-White, Inc. and Homer S. White, are hereby restrained and enjoined from representing to any corporation, partnership, or other entity, that the Plaintiff is interested in licensing, selling, or otherwise providing information regarding certain technology for systems control and operation for fee or otherwise, or that the Defendants can obtain that information from the Plaintiff for a fee.

2.

The Defendants are hereby restrained and enjoined from discussing, providing, communicating, or releasing any information concerning the control systems developed for the Plaintiff or revealing any trade secrets or proprietary information concerning the operation, manufacture, and performance of said control systems and machines.

As a condition for issuance of the preliminary injunction, the plaintiff was required to post a bond in the amount of $10,000.00. On 14 March 1988, the plaintiff posted a bond which was executed by the plaintiff and two individual sureties. On 28 March 1988, the defendants filed an answer and counterclaim denying the material allegations of the complaint and alleging that the plaintiff had "misappropriated the trade secrets of Myrick-White in violation of . . . N.C.G.S. § 66-152 *et seq.*" Defendants attached to their answer and counterclaim a copy of an agreement dated 8 July 1986, between the plaintiff and defendant Myrick-White, Inc. The agreement essentially provided that Myrick-White was to write "an applications software package" for the system produced by the plaintiff and that the "software is to run on the existing 16[-]bit microcomputer being produced by Myrick-White and will have specifications outlined [in this agreement]." In the agreement plaintiff agreed that in the event it became "unable to use the software package to the extent of at least three systems per quarter, Myrick-White will have rights to use the software package along with access to design and manufacturing information and license to use any associated technology, trade secrets, or patents belonging to Industrial Innovators." In the counterclaim the defendants allege the plaintiff had failed to lease three systems per quarter, and this

default on the part of the plaintiff entitled them to use the software. The agreement finally provided that in the event of a controversy or dispute between the parties relating to the performance of the 8 July 1986 agreement, the matters would be referred to arbitration. The defendants requested the complaint be dismissed and among other things requested damages in the amount of $100,000.00 for the misappropriation of trade secrets.

On 15 March 1988, pursuant to the plaintiff's request that the matter be referred to arbitration, Judge Wiley F. Bowen ordered referral of the matter to arbitration and continued in effect the injunction and bond. On 26 August 1988, the arbitrators entered an award declaring the rights of the parties under the written contract dated 8 July 1986. The award provided in pertinent part:

> 1. We declare the rights of the respective parties under the written contract dated July 8, 1986, to be as follows:
>
> A.
>
> The Defendant MYRICK-WHITE, INC., is the owner of the 16-bit microcomputer developed by it prior to July 8, 1986, and is joint owner with the Plaintiff, INDUSTRIAL INNOVATORS, INC., of the 16-bit applications software package developed in accordance with the contract between the parties.
>
> By reason of the failure of INDUSTRIAL INNOVATORS, INC., to purchase three applications packages each quarter, MYRICK-WHITE, INC., has a non-exclusive right to market the software applications program, including any technology developed in connection with the 8-bit program developed earlier by MYRICK-WHITE, INC., for INDUSTRIAL INNOVATORS, INC., and incorporated in the 16-bit program, and any technology associated therewith. The associated technology which MYRICK-WHITE, INC., is entitled to use and market includes the patents and technology belonging to INDUSTRIAL INNOVATORS, INC., and incorporated in the drawbox or drafting unit developed by INDUSTRIAL INNOVATORS, INC., for use on the Super Card III carding machine, but does not include the patents and technology belonging to INDUSTRIAL INNOVATORS, INC., and incorporated in the Super Card II and earlier carding machines developed by INDUSTRIAL INNOVATORS, INC. The right of MYRICK-WHITE, INC., to utilize the associated technology belonging to the INDUSTRIAL INNOVATORS, INC., ceases and terminates on July

7, 1991, which is the termination date of the contract between the parties, and MYRICK-WHITE, INC., is not entitled thereafter to make any further use of technology belonging to INDUSTRIAL INNOVATORS, INC.

During the term of the contract, MYRICK-WHITE, INC., is obligated to pay to INDUSTRIAL INNOVATORS, INC., the sum of $500 for each software application program which its [sic] sells or licenses for use on a carding machine, up to 50 during any calendar year, and the sum of $250 for the 51st and each additional software application program which it sells or licenses for use on a carding machine during that calendar year. After July 7, 1991, MYRICK-WHITE, INC., is under no obligation to make such payments to INDUSTRIAL INNOVATORS, INC.

B.

INDUSTRIAL INNOVATORS, INC., is the owner of all technology and patents developed by it in connection with the Super Card III carding machine and the drawbox or drafting unit incorporated therein, the Super Card II carding machine, or any predecessor carding machine, and is joint owner with MYRICK-WHITE, INC., of the 16-bit applications software package developed in accordance with the contract between the parties.

INDUSTRIAL INNOVATORS, INC., has a non-exclusive right to market the software applications program in competition with MYRICK-WHITE, INC., [sic]. During the term of the contract INDUSTRIAL INNOVATORS, INC., is obligated to pay to MYRICK-WHITE, INC., the sum of $500 for each software application program which its [sic] sells or licenses for use on a carding machine, up to 50 during any calendar year, and the sum of $250 for the 51st and each additional software application program which it sells or licenses for use on a carding machine during that calendar year. After July 7, 1991, INDUSTRIAL INNOVATORS, INC., is under no obligation to make such payments to MYRICK-WHITE, INC.

INDUSTRIAL INNOVATORS, INC., has no right to utilize the 16-bit microcomputer developed by MYRICK-WHITE, INC., or the technology developed by MYRICK-WHITE, INC., and incorporated therein; however, MYRICK-WHITE, INC., is obligated under the contract between the parties to supply INDUSTRIAL INNOVATORS, INC., with all 16-bit microcomputers required by

INDUSTRIAL INNOVATORS, INC., for use in connection with the software applications program during the term of the contract, upon the same terms and conditions, including price, extended to other customers of MYRICK-WHITE, INC. The obligation of MYRICK-WHITE, INC., to supply INDUSTRIAL INNOVATORS, INC., with 16-bit microcomputers ceases and terminates after July 7, 1991.

C.

From and after the expiration of the contract between the parties on July 7, 1991, the parties are joint owners of the 16-bit applications software package developed in accordance with the contract, and each has the right to use, sell, market, and license others to use, the applications software package. The rights of each party to use the technology of the other, and the obligation of MYRICK-WHITE, INC., to supply INDUSTRIAL INNOVATORS, INC., with its requirements for the 16-bit microcomputer cease and terminate upon expiration of the contract.

2. MYRICK-WHITE, INC., is not entitled to recover money damages of INDUSTRIAL INNOVATORS, INC.

On 21 September 1988, Judge Henry W. Hight, Jr. entered the following order:

THIS MATTER coming on for hearing upon plaintiff's Motion to Dissolve Preliminary Injunction and Motion for Damages for Wrongful Injunction;

AND the court having considered the evidence and heard the arguments of counsel makes the following findings of fact:

1. That an Arbitrator[s'] Award was issued in this case dated August 29, 1988.

2. That such award provides findings which in the circumstances of this case are equivalent to a final judgment on the merits.

3. That at this time the defendants' Motion to Determine Damages is not yet ripe for hearing; however, defendants are entitled to a dissolution of the preliminary injunction entered by Judge Milton Read on the 3rd day of May, 1988.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That defendants' Motion to Dissolve Preliminary Injunction is allowed and the injunction granted by the Honorable J. Milton Read, Jr. on the 3rd day of May, 1988 is hereby dissolved.

2. That the hearing to determine damages to which the defendants may be entitled, if any, is hereby continued until the award of the arbitrators has been confirmed by the court.

On 12 December 1988, Judge Anthony Brannon entered an order confirming the award of the arbitrators. On 20 January 1989, Judge F. Gordon Battle, upon defendants' motion for damages for wrongful injunction, entered the following pertinent findings of fact and conclusions of law and order:

Findings of Fact

11. That the award of the arbitrators in this case[,] which is now the judgment of the court[,] provides findings which in the circumstances of this case are the equivalent to a ruling in favor of defendants upon the causes of action asserted in the Plaintiff's Complaint.

12. That the Temporary Restraining Order and the two Preliminary Injunctions issued against defendants restrained and enjoined the defendants from discussing, providing, communicating, or releasing any information concerning the computer control system which is the subject of this cause of action. That defendants were thereby restrained from doing business with respect to the computer control system.

13. That considered in light of the award of the arbitrators, defendants had a right to do business with respect to the control system which is the subject of this litigation.

14. That Myrick-White, Inc. sustained lost profits and loss of income from consulting fees in an amount in excess of $10,000, which damages would not have occurred but for the issuance of the Temporary Restraining Order and the Injunctions.

Conclusions of Law

2. That Myrick-White, Inc. sustained lost profits and loss of income from consulting fees in an amount in excess of

$10,000.00, which damages would not have occurred but for the issuance of the Temporary Restraining Order and the Injunctions.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

That defendant Myrick-White, Inc. have and recover jointly and severally from Industrial Innovators, Inc. and their surety, Employers Mutual Casualty Company, the sum of $10,000.00.

The issues are (I) whether plaintiff's exceptions should be deemed abandoned for failure to comply with North Carolina Rule of Appellate Procedure 10(c); and (II) whether the confirmation of the award of arbitration is equivalent to a finding that the defendants were wrongfully enjoined.

I

Every assignment of error contained in the record on appeal must "state plainly and concisely and without argumentation the basis upon which error is assigned." N.C.R. App. P. 10(c); *Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988). The plaintiff's assignments of error are as follows:

1. The Plaintiff excepts to and assigns as error, the Court's award of $10,000.00 to the Defendants based on the Defendants' Motion for Damages for Wrongful Injunction, said Order being dated January 18, 1989.

2. The Plaintiff excepts to and assigns as error, the Court's sustaining of the Defendants' objection to the proposed testimony of William V. McPherson at the hearing of Defendants' Motion for Damages for Wrongful Injunction on January 11 and 12, 1989.

In these assignments of error the plaintiff states the actions of the trial court with which it is displeased, but it fails to state "the grounds upon which the errors are assigned as required by the rules . . . ." 92 N.C. App. at 335, 374 S.E.2d at 437. "Therefore, in accordance with Rule 10(c), plaintiff's exceptions upon which assignments of error are based are deemed abandoned." *Id.*

II

Although plaintiff did not comply with Appellate Rule 10(c) in preserving his assignments of error, this court is required to determine, when appellant argues such in his brief, whether the judgment is supported by findings of fact and conclusions of law. N.C.R. App. P. 10(a); *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982). Accordingly, we address the plaintiff's argument that the findings of fact are insufficient to support the judgment because the trial judge did not determine the defendants were wrongfully enjoined.

Where a defendant seeks to recover damages without the proof of malice or want of probable cause, plaintiff's damages are limited by the amount of the bond, and liability exists only upon a determination that defendant has been "wrongfully enjoined or restrained." N.C.G.S. § 1A-1, Rule 65(c) (1983) (trial court must set bond to cover damages "as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained"); *Stevenson v. N.C. Dept. Ins.*, 45 N.C. App. 53, 56, 262 S.E.2d 378, 380 (1980) (recovery limited "to the amount of the penalty of the injunction bond"); *Electrical Workers Union v. Country Club East*, 283 N.C. 1, 9, 194 S.E.2d 848, 853 (1973) (enjoined party can seek damages on bond without proof of malice or want of probable cause).

There exist three possibilities for determining whether a defendant has been wrongfully enjoined:

> One possibility is that liability on the bond is determined solely by the *ultimate* merits. Regardless how circumstances appeared when the provisional order was issued, the plaintiff would be liable if he lost in the ultimate decision on the merits, and he would be relieved of liability if he won. The other basic possibility is that liability is determined solely by preliminary merits. The plaintiff under this view would be liable if the preliminary injunction was erroneous on the basis of evidence adduced at the time, even if a final decision on the merits went in his favor; by the same token he would be relieved of liability if the preliminary order was correct as of the time it was issued, even though he ultimately lost. A combination of these rules is also possible, for instance, a rule that imposes liability if either preliminary error or ultimate error is demonstrated.

Dobbs, *Should Security be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C.L. Rev. 1091, 1147 (1974) (emphasis in original). North Carolina case law presents a somewhat confusing picture of the standard for determining liability under an injunction bond. *Compare Thompson v. McNair*, 65 N.C. 448, 449 (1870) (impossible to determine whether injunction was "wrongfully sued out, until the action at law is disposed of") *with Blatt Co. v. Southwell*, 259 N.C. 468, 471, 130 S.E.2d 859, 861 (1963) ("no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision").

Any standard for determining whether the defendant was wrongfully enjoined should be consistent with the very purpose of the bond which is to "require that the plaintiff assume the risks of paying damages he causes as the 'price' he must pay to have the extraordinary privilege of provisional relief." *Dobbs*, at 1149. Consistent with that purpose, and we believe consistent with present North Carolina case law, Professor Dobbs observed:

> The fact that the plaintiff's position seemed sound when it was presented on the *ex parte* or preliminary hearing is no basis for relieving him of liability, since the very risk that requires a bond is the risk of error because such hearings are attenuated and inadequate. To say that proof of the inadequate hearing, against which the bond is intended to protect, relieves of liability on the bond is merely to subvert the bond's purpose. Thus the few cases that seem to deal with this situation seem correct in assessing liability to the plaintiff who loses on the ultimate merits, even when his proof warranted preliminary relief at the time it was awarded.

Dobbs, at 1149-1150.

Accordingly, a defendant is entitled to damages on an injunction bond only when there has been a final adjudication substantially favorable to the defendant on the merits of the plaintiff's claim. Such an adjudication is equivalent to a determination that the defendant has been wrongfully enjoined. A final judgment for the defendant which does not address the merits of the claim, i.e., dismissal for lack of jurisdiction, gives rise to damages on the injunction bond only if the trial court determines that defendant was actually prohibited by the injunction "from doing what he was legally entitled to do." *See* Note, *Recovery for Wrongful In-*

terlocutory Injunctions Under Rule 65(c), 99 Harvard L.Rev. 828, 838 (1986).

> This "defendant's entitlement" standard suggests that if a defendant wins a final judgment, but the court has not yet ruled on the merits of the controversy, the defendant should not be allowed to recover unless he also shows that he was entitled to engage in the enjoined activity.

Id. A voluntary dismissal of a complaint is equivalent to a finding that the defendant was "wrongfully enjoined." *Blatt*, 259 N.C. at 472, 130 S.E.2d at 862; *Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 78, 311 S.E.2d 1, 4 (1984). A dismissal by stipulation generally precludes an award of damages on an injunction bond. *See* Quick, *The Triggering of Liability on Injunction Bonds*, 52 N.C.L. Rev. 1252, 1269 (1974).

Here, the injunction was granted at plaintiff's request on the grounds that defendants were disclosing information to competitors which was inconsistent with the agreement between the plaintiff and defendants. The award of the arbitrators which was ultimately adopted by the trial court was an adjudication on the merits of the plaintiff's claim, substantially favorable to the defendants and equivalent to a finding that defendants were wrongfully enjoined. Accordingly, the trial court did not err in determining that the defendants were entitled to damages which "would not have occurred but for the issuance of the Temporary Restraining Order and the Injunctions."

Affirmed.

Judges JOHNSON and PARKER concur.

HUNTINGTON MANOR OF MURPHY, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT

No. 8910DHR904

(Filed 19 June 1990)

1. **Hospitals § 2.1 (NCI3d) — denial of certificate of need — request for contested case hearing timely**

A petition for a contested case hearing after the denial of an application for a certificate of need for a nursing home was timely under the statutes then in effect where it was received by the Department of Human Resources and by the Office of Administrative Hearings within thirty days of the agency's decision, although it was not filed by the Office of Administrative Hearings until two days later. N.C.G.S. §§ 131E-188(a) and 150B-23(a).

Am Jur 2d, Hospitals and Asylums § 4; Licenses and Permits § 5.

2. **Hospitals § 2.1 (NCI3d) — certificate of need for nursing home — denial based on lack of access by low income people — denial improper**

In acting on petitioner's request for a certificate of need for development of a nursing home, respondent erred in concluding that low income people would not have access to the nursing home and that petitioner's application for the certificate did not comply with N.C.G.S. §§ 131E-183(a)(3) and 13a, since respondent's findings consisted only of unrelated statistical information concerning the poverty rates in a geographical area, and Medicaid eligibility statewide and in Cherokee County based upon statistics reported in 1984 and obviously compiled during an earlier period; there were no findings of fact connecting these poverty rates and Medicaid eligibility to the conclusion about low income people; in its application petitioner stated that the proposed services would be available to all people without regard to income, race, sex, etc.; petitioner, in responding to a question to define "medically indigent," did so and then stated its proposed method of serving such persons; and there was no minimum income criterion for accepting patients.

Am Jur 2d, Hospitals and Asylums § 4; Licenses and Permits § 5.

APPEAL by petitioner from the decision entered 24 January 1989 by I. O. Wilkerson, designee of the Secretary of the Department of Human Resources. Heard in the Court of Appeals 7 March 1990.

On 16 October 1986, petitioner filed an application for a certificate of need for the development of a 30-bed nursing home facility in Murphy, North Carolina with the North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section (hereinafter the agency). The agency denied the application on 26 March 1987.

Petitioner then filed a petition with the agency for a contested case hearing on 24 April 1987, which was subsequently filed in the Office of Administrative Hearings on 29 April 1987. The contested case hearing was held before Thomas R. West, Administrative Law Judge on 9 February and 10 February 1988. On 3 October 1988, Judge West recommended that the agency's decision be reversed and that petitioner receive its certificate of need.

On 24 January 1989, I. O. Wilkerson, Jr., Director of the Division of Facility Services, rejected the recommended decision and affirmed the agency's decision to deny petitioner's certificate of need application.

From the final agency decision affirming the denial of its certificate of need application on 24 January 1989, petitioner appeals.

Harrell & Leake, by Larry Leake, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James A. Wellons, for respondent-appellee North Carolina Department of Human Resources, Division of Facility Services, Certificate of Need Section.

ORR, Judge.

Petitioner brings forth five assignments of error on appeal. For the reasons set forth below, we find that the Secretary's designee erred in denying petitioner's certificate of need application.

I.

[1] The first issue we must address is whether petitioner's appeal should be dismissed for lack of subject matter jurisdiction. Respondent argues that the appeal must be dismissed for lack of subject matter jurisdiction because the petition for a contested case hearing was not filed in a timely manner.

The agency initially denied petitioner's application on 26 March 1987. Petitioner's request for a contested case hearing was *received* by the Office of Administrative Hearings on 27 April 1987, and *filed* on 29 April 1987. There is no evidence in the record before us which explains the two-day delay between the receipt and filing of petitioner's request. Petitioner's request was also served by mail on the Division of Facility Services (the Department) on 24 April 1987, and received on 27 April 1987.

The applicable statutes in effect at the time of petitioner's request for a contested case hearing are N.C. Gen. Stat. § 131E-188(a) (1986) and § 150B-23(a) (1986 Special Supp.). Section 131E-188(a) is set forth as follows:

> (a) After a decision of the Department to issue, deny or withdraw a certificate of need or exemption, any affected person shall be entitled to a contested case hearing under Article 3 of Chapter 150A of the General Statutes, if the Department receives a request therefor within 30 days after its decision.

N.C. Gen. Stat. § 131E-188(a) (1986).

Section 150B-23(a) states:

> Except as provided in subsection (a1), all contested cases other than those conducted under Article 3A of this Chapter shall be commenced by the filing of a petition with the Office of Administrative Hearings.

N.C. Gen. Stat. § 150B-23(a) (1986 Special Supp.).

We note that Chapter 150A referred to in § 131E-188(a) above was recodified as Chapter 150B, effective 1 January 1986. We further note that there is no time limit set for filing a contested case hearing request under § 150B-23(a). The only time limit set by either statute is the 30-day time limit under § 131E-188(a). This limit states only that the request must be *received* by the Department within 30 days of its decision.

Under the above statutes, we therefore find that petitioner's request was *received* within the 30-day time limit. The agency action denying petitioner's request was taken on 26 March 1987. The 30-day period in which petitioner had to submit its request for a contested case hearing with the Department ended on Saturday, 25 April 1987. Because this day was a holiday, the next business day for the Department to receive petitioner's request was on Monday, 27 April 1987, the day the Office of Administrative Hearings and the Department (Division of Facility Services) received petitioner's request. *See generally*, N.C. Gen. Stat. § 1A-1, Rule 6(a) (1983).

Respondent argues that this Court should read the above statutes *in pari materia* and find that a petition for a contested case is not timely unless it is *filed* in the Office of Administrative Hearings within 30 days of the agency's decision. Even reading the statutes together, we are unable to find that the 30-day time limit for receipt of the request for a contested case hearing under § 131E-188(a) is equally applicable as a time limit for filing a petition with the Office of Administrative Hearings commencing a contested case under § 150B-23(a).

We note that this issue has been settled under the current statutory construction of §§ 131E-188(a) and 150B-23(a), which state that a request for a contested case hearing shall be *filed* with the Office of Administrative Hearings within 30 days of the agency's action. Under the current statutes, a request must be *filed* within 30 days, not just *received.*

Therefore, we hold that petitioner's appeal should not be dismissed for lack of subject matter jurisdiction because petitioner's request for a contested case hearing was received within the statutorily allotted 30 days under the above applicable statutes at the time of the request.

II.

[2] The dispositive issue now before us is whether the Secretary's designee, I. O. Wilkerson (Director of the Division of Facility Services), erred in concluding that petitioner's certificate of need application was nonconforming to N.C. Gen. Stat. §§ 131E-183(a)(3) and (13)a. (hereinafter Criteria 3 and 13a). For the reasons set forth below, we hold that the Secretary's designee so erred. Criteria 3 and 13a are set forth as follows:

> (3) The need that the population served or to be served by such services has for such services, and the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, women, handicapped persons and other underserved groups, and the elderly, are likely to have access to those services.
>
> . . .
>
> (13) The contribution of the proposed service in meeting the health-related needs of members of medically underserved groups, such as low income persons, racial and ethnic minorities, women, and handicapped persons, which have traditionally experienced difficulties in obtaining equal access to health services, particularly those needs identified in the applicable health systems plan, annual implementation plan, and State Health Plan as deserving of priority. For the purpose of determining the extent to which the proposed service will be accessible, the Department shall consider:
>
> a. The extent to which medically underserved populations currently use the applicant's proposed services in comparison to the percentage of the population in the applicant's service area which is medically underserved, and the extent to which medically underserved populations are expected to use the proposed services if approved.

N.C. Gen. Stat. §§ 131E-183(a)(3) and (13)a (1986).

The standard of review for an administrative decision is found in N.C. Gen. Stat. § 150B-51, effective 1 January 1986, which applies to all petitions for review filed on or before 1 September 1987. N.C. Gen. Stat. § 150B-51 (Cum. Supp. 1985 and 1987). Although petitioner's contested case hearing was not held until February 1988, petitioner *filed* its petition in April 1987. Therefore, the following section, § 150B-51, applies in this case:

> Based on the record and the evidence presented in the court, the court may affirm, reverse, or modify the decision or remand the case to the agency for further proceedings.

N.C. Gen. Stat. § 150B-51 (Cum. Supp. 1985).

Our scope of review under § 150B-51 is commonly known as the "whole record" test, which requires the reviewing court to consider all of the evidence, including that which supports the

findings and that which is contradictory. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citations omitted). The court must consider whether the administrative decision is supported by *substantial* evidence based upon the entire record as submitted. *Id.* The court is not allowed to replace the agency's judgment when there are two reasonably conflicting views, although the court could have reached a different decision had the matter been before it *de novo*. *Id.* The credibility of the witnesses and the resolution of conflicting testimony is a matter for the administrative agency to resolve, not the reviewing court. *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300-01 (1980) (citations omitted).

Keeping these principles of law in mind, we now turn to whether there was substantial evidence to support the findings of fact and conclusions of law. Substantial evidence is considered more than a scintilla or a permissible inference, or relevant evidence which is adequate to support a conclusion. *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982) (citations omitted).

Petitioner argues in its brief that the evidence does not support the conclusions of law made by the Secretary's designee.

In its order, the Secretary's designee made the following conclusions of law:

> 9. Low income persons will not have adequate access to Huntington Manor.
>
> 10. Huntington Manor's application did not comply with Review criteria 3 and 13(a).

These conclusions of law are based upon the following findings of fact:

> 25. A document entitled *Estimate of Medically Indigent by HSA and County—1984* prepared by the Division of Facility Services, Department of Human Resources, shows that in 1984:
>
> A. 25.4% of the people in Cherokee County had incomes below the federal poverty guidelines. Only six counties of the twenty-six located in HSA I (Western North Carolina) had higher poverty rates.

B. Cherokee has one of the highest poverty rates in HSA I.

C. When the number of people with incomes below the federal poverty guidelines that are eligible to receive Medicaid is subtracted from the number of people with incomes below the federal poverty guidelines, a number of people that are described as "medically indigent" by the Department of Human Resources is determined. 79.5% of the people with incomes below the federal poverty guidelines in Cherokee County are "medically indigent."

29. Although statistics were not introduced for the entire State, the statistics introduced by the Section show that in 1984, the average percentage of people with incomes below the poverty guidelines in HSA I, II, and III was 17.2%.

33. If that position is valid, a determination can be made of what percentage of days should be paid for by Medicaid at Huntington Manor if those days are to equal the state average.

A. The average percentage of patient days paid by Medicaid statewide is 75%. No evidence was introduced to show the average percentage of people with income levels below the poverty guidelines in North Carolina who are eligible to receive Medicaid. Evidence was introduced to show that percentage in HSA I and HSA I, II, and III in 1984.

B. In 1984, Cherokee County had a total estimated population of 19,978 people. Of Cherokee County's total population, 1,039 people (5.2%) were Medicaid eligible.

C. In 1984, the geographic area comprised of Health Service Areas I, II, and III had a total estimated population of 3,261,423 people. Of this total population for Health Service Areas I, II, and III, 172,841 people (5.3%) were Medicaid eligible.

34. The algebra follows:

A. $\frac{5.2\%}{x} = \frac{5.3\%}{75\%}$

B. 5.2% multiplied by 75% = 5.3 multiplied by x.

C. .039 = .53 (x)

D. x = .735 (74%)

We find that the above findings of fact do not support the conclusion of law that "Low income persons will not have adequate access to Huntington Manor." The above findings contain only unrelated statistical information concerning the poverty rates in a geographical area, medicaid eligibility statewide and in Cherokee County based upon statistics reported in 1984 and obviously compiled during an earlier period. There are simply no findings of fact connecting these poverty rates and Medicaid eligibility to the conclusion, as a matter of law, that "Low income persons will not have adequate access to Huntington Manor."

Moreover, there is substantial evidence to the contrary. In its application, petitioner stated, "The proposed services will be available to all persons without regard to income, race, ethnic background, sex, handicapped status, etc." Further, in response to a question to define "medically indigent," petitioner responded,

> This facility would define 'medically indigent' as those persons who cannot afford the services of a nursing home as a private pay patient, a Medicare patient, or a third party insured patient. It is proposed that services be offered these patients through the participation by the facility and the patients through the participation by the facility and the patients in the Medicaid program.

Petitioner's witness, Kenneth Gummels, who submitted petitioner's application, testified that although he projected that Huntington Manor would serve 33 percent private paid patients, ten percent Veteran's Administration (VA) patients and 57 percent Medicaid patients, there is no minimum income criteria for accepting patients, and that patients are accepted as they apply for admission with no income-screening device. Mr. Gummels made it clear throughout his testimony that the above projected rates are projections only, and that these rates could change at any time depending on the demands and needs of the medically indigent or indigent population in Cherokee County. Respondent's statistical evidence to the contrary is speculative at best.

Therefore, we find that the evidence of record and the findings of fact do not support the conclusion of law that "Low income persons will not have adequate access to Huntington Manor."

For the same reasons, we find that the evidence of record and findings of fact numbers 25 through 34 do not support the

conclusion that "Huntington Manor's application did not comply with Review criteria 3 and 13(a)." There are no findings of fact to link the statistical findings above to this conclusion of law.

Moreover, the statistical evidence respondent presented on this issue again is a projection only. Petitioner presented evidence that the statistical percentages of occupancy rates in a 30-bed center such as Huntington Manor are subject to change at least three percentage points either way with only one patient change. For example, if a private patient moved to another facility, and a Medicaid eligible patient filled the existing vacancy, then the percentage of Medicaid eligible patients in the facility would be increased by three percent.

Further, none of the witnesses testified that they would expect any nursing home facility to serve individuals who had no source of income for long periods of time. Respondent's argument in its brief and in its line of questioning at the hearing imply that Criteria 3 and 13a include a requirement that a nursing home plan should serve a certain number of individuals with no source of income for an indefinite period of time. Mr. Gummels testified that Huntington Manor would serve such individuals until Medicaid eligibility could be established, but would not do so indefinitely, because it would unfairly increase private pay rates. We do not find such policy unreasonable or out of compliance with the above criteria.

For the reasons set forth above, we hold that there is not substantial evidence under the "whole record" test in § 150B-51 to support the findings of fact and conclusions of law in question. Therefore, we find that the Secretary's designee erred in denying Huntington Manor's application for a certificate of need on the above findings of fact and conclusions of law.

Pursuant to § 150B-51, we reverse the above decision because there is not substantial evidence to support the above findings of fact and conclusions of law, and hold that based upon the evidence of record, petitioner is entitled to receive approval of its certificate of need application. We therefore remand this case to the agency for further action consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

CANDACE CLARK WITHEROW, PLAINTIFF v. CHARLES WILLIAM WITHEROW, JR.

No. 8921DC457

(Filed 19 June 1990)

1. **Divorce and Alimony § 25.1 (NCI3d)— joint child custody award—sufficiency of findings**

The trial court did not err in awarding joint custody of the minor children to the parties where the court made findings regarding the parties' financial status and what would best serve the interests of the children, and the court had before it plaintiff's own admission that she indeed thought defendant to be a fit and proper person as stated in her verified reply to defendant's answer and counterclaim.

Am Jur 2d, Divorce and Separation § 990.

2. **Divorce and Alimony § 24.1 (NCI3d)— child support—incorrect financial affidavit as basis—award improper**

A child support award based on a financial affidavit which includes personal expenditures not yet made by a party with no concrete plans to make such expenditures cannot possibly reflect the relative abilities of the parties to pay support at that time, and the award may not stand.

Am Jur 2d, Divorce and Separation §§ 1035, 1039, 1040.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by plaintiff from judgment entered 19 January 1989 by *Judge William B. Reingold* in FORSYTH County District Court. Heard in the Court of Appeals 20 December 1989.

Clyde C. Randolph, Jr. for plaintiff-appellant.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow and Ronald B. Black, for defendant-appellee.

ORR, Judge.

On 12 July 1988, plaintiff-wife filed this complaint alleging that she and defendant were residents of Forsyth County, North Carolina. They were married on 29 August 1970, subsequently having four children.

Plaintiff alleged that defendant is healthy, able-bodied and earns a substantial income from a family owned business and that he owns substantial assets in real estate, stock and securities. Plaintiff contends defendant is able to provide reasonable support and maintenance for her and their minor children. She alleged that she, on the other hand, is a full-time homemaker, without income from employment, and that she and the children are dependent upon defendant for support and maintenance. Plaintiff prayed for exclusive custody of the minor children, child support, alimony without divorce, and reasonable attorney's fees.

Defendant denied all material allegations in plaintiff's complaint. He requested absolute or joint custody, a dismissal of plaintiff's action and a divorce from bed and board.

Plaintiff filed a reply in which she admitted that defendant is a fit and proper person to have visitation with the children. Thereafter, on 9 December 1988, plaintiff voluntarily dismissed her claim for temporary and permanent alimony pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a).

At trial, plaintiff and defendant submitted numerous pieces of documentary evidence. Plaintiff submitted sworn statements from defendant and herself. One of the pieces of evidence introduced by defendant is a sworn statement from a Certified Public Accountant who had prepared the parties' joint tax returns from 1984 through 1987.

The trial court made several findings of fact and conclusions of law. It then awarded joint legal custody of the minor children to both parties but gave primary physical custody to plaintiff. The court also ordered defendant to pay plaintiff $250.00 per child per month for the support and maintenance of the children. The court further ordered defendant to increase that amount to $333.00 per child per month once the oldest child was graduated from high school or reached the age of 18. Defendant was ordered to continue to maintain insurance on the children. Plaintiff was awarded title to the family automobile, the former homeplace of the couple with all the furnishings, and attorney's fees. From that order, plaintiff now appeals.

Plaintiff's appeal, which raises four issues for our review, challenges the trial court's award of joint custody, its factual finding concerning defendant's reasonable living expenses and his gross

monthly wages. Plaintiff also challenges the trial court's award of monthly support for the minor children.

I.

[1] We shall first address the issue of whether the trial court erred in awarding joint custody of the minor children to the parties. Plaintiff contends that the court erred in entering this order because there are no findings of fact supported by credible evidence in the record which would support a joint custody award. According to plaintiff, there is no showing that the best interests of the children will be served from this arrangement. Defendant argues that plaintiff's assignment of error, which does not assert that the trial court abused its discretion in this award, should be overruled because there is sufficient evidence to support the findings of fact and conclusions which are the basis of the court's decision.

Pursuant to N.C. Gen. Stat. § 50-13.2, an order for custody can be made to the person who "will best promote the interest and welfare of the child." Joint custody and any other custody award must include findings of fact which support such a determination of the child's best interests. N.C. Gen. Stat. § 50-13.2(a) and (b) (1987). The "welfare of the child is the paramount consideration which must guide the Court . . ." in its decision. *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). Findings of fact regarding the competing parties must be made to support the necessary legal conclusions. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E.2d 466 (1978). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Id.* at 604, 244 S.E.2d at 468. However, the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute. *Green v. Green*, 54 N.C. App. 571, 284 S.E.2d 171 (1981). This is a discretionary matter with the court which can only be disturbed upon " 'a clear showing of abuse of discretion.' " *Dixon v. Dixon*, 67 N.C. App. 73, 76, 312 S.E.2d 669, 672 (1984) (citation omitted).

In the case at bar, the court found that the parties had stipulated that plaintiff should have primary physical custody of the children, and that the issue of joint custody was within the court's discretion. The court further found that defendant's gross wages per month were in excess of $3,000.00 and that plaintiff's monthly wages were

approximately $262.00. The court then found that there was no evidence before it which persuaded it that a joint custody award should not be ordered and "that it would be within the best interest of the welfare of the minor children . . . that an order for joint legal custody . . . be entered . . . ."

Based upon the foregoing, we conclude that the trial court's decision is sufficiently supported and there was no abuse of discretion. In addition to findings regarding the parties' financial status and what would best serve the interests of the children, the court had before it plaintiff's own admission that she indeed thought defendant to be a fit and proper person as stated in her verified reply to defendant's answer and counterclaim. We find no reason to disturb the trial court's ruling as to this matter.

II.

[2] The next issue is whether the trial court erred in finding as a fact that the reasonable expenses of defendant were accurately reflected in his financial affidavit. Plaintiff first argues that defendant overestimated his expenses. She also argues that the court erred in taking into its consideration rental payments which defendant was not making at the time of the hearing but which he might make in the future upon moving out of his parents' residence. Defendant contends, on the other hand, that the court was correct in considering these payments because he has a right to be able to afford to move from his parents' home in the future and not to have to provide such support as would make it impossible for him to move into his own residence.

In accordance with N.C. Gen. Stat. § 50-13.4, both the father and mother of a child are liable for the support of a minor child based upon, among other factors, their relative ability to provide support. The court is required to make findings regarding the parents' income, estates and present reasonable expenses in order to determine the parties' relative abilities to pay support. *Bottomley v. Bottomley*, 82 N.C. App. 231, 346 S.E.2d 317 (1986). Therefore, "[t]he amount of each parent's contribution to the support of the child is based upon the trial court's evaluation of each parent's circumstances, including a determination of certain factors mandated by G.S. 50-13.4(c). . . ." *Boyd v. Boyd*, 81 N.C. App. 71, 77, 343 S.E.2d 581, 585 (1986). However, the trial court's consideration of these factors is "an exercise in sound judicial discretion . . . ." *Id.* at 78, 343 S.E.2d at 586. The court must evaluate the

parents' present earnings as well as their reasonable living expenses for which an allowance must be made.

Defendant completed a financial statement form in which he was asked to list "[his] monthly expenses . . . ." In that affidavit, defendant states that he pays $500.00 per month as rental or mortgage payments. However, defendant testified that he has lived in his parents' home since his separation with plaintiff and that he is not paying his parents any rent or other fees. He further stated that he allocated the $500.00 per month rent figure as "[his] estimate for when [he] get[s] his own apartment."

On this basis, we find that the trial court abused its discretion in computing defendant's child support amount based upon the proposed rental payment. The trial court's award was based, in part, on its finding that "the reasonable expenses of the defendant are accurately reflected in said affidavit." Consequently, an award which takes into consideration an unsubstantiated expense rather than a current expense is an abuse of the court's discretion. While this Court is mindful of the trial court's broad discretion, we are also aware of the fact that the relative ability of a party to pay support is based upon that party's net income as well as his "disposable income (net income after deducting personal expenses) . . . ." *Plott v. Plott*, 313 N.C. 63, 75, 326 S.E.2d 863, 871 (1985). Where, as here, the trial court includes personal expenditures not yet made by a party with no concrete plans to make such an expenditure, the award entered cannot possibly reflect the relative abilities of the parties to pay support at that time.

III.

The next issue which plaintiff raised is whether the trial court erred in finding as a fact that defendant's gross wages from employment are $3000.00 per month, and in failing to make findings of fact on matters for which she made requests. Plaintiff argues that findings of fact and conclusions of law are necessary when requested by a party. Defendant contends that the court's findings with regard to this amount are supported.

In reviewing plaintiff's argument on these points, we find that she cited no authority in support of her contention that the court erred in its finding regarding defendant's wages. Consequently, that portion of her assignment of error is abandoned. *See* North Carolina Rules of Appellate Procedure, Rule 10 (1984). With respect

to the latter portion of her assignment, plaintiff states in her brief that the refusal of the trial court to grant paragraphs 6, 7, 8 and 9 of her request for findings of fact was error. We disagree. With the exception which we noted previously, the trial court made findings of fact which are amply supported by the record. The court was not obligated to make the specific findings which plaintiff requested. It is sufficient that the court made those findings which were necessary in order to resolve the material questions raised in this case. This assignment of error is overruled.

IV.

Plaintiff's last assertion is that the trial court erred in awarding her child support in the amount of $250.00 per month per child because such amount is inadequate.

Without determining whether such amount is indeed inadequate, we will sustain plaintiff's assignment of error as to this issue on the basis of our earlier conclusion that the court abused its discretion in making an award based upon an amount which was represented as an actual expense despite defendant's admission that the amount merely represented his estimate of what he might spend for housing in the future. As we already noted, "[t]o comply with G.S. 50-13.4(c), the order for child support must be premised upon the interplay of the trial court's conclusions of law as to the amount of support necessary 'to meet the reasonable needs of the child' and *the relative ability of the parties to provide that amount.*" *Plott* at 72, 326 S.E.2d at 867.

Accordingly, we shall reverse that portion of the trial court's order relating to the computation of child support to be paid by defendant. We shall not disturb the remaining portions of the court's order as we find no abuse of discretion as to those matters.

Affirmed in part, reversed in part and remanded for entry of findings consistent with the decision reached herein.

Judge EAGLES concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part; dissenting in part.

I concur in the majority opinion except for the part about the trial court's finding of fact as to defendant's gross monthly wages from employment being supported by evidence. While the evidence does show that $3,000 is the amount the family business pays defendant each month as wages the evidence, including that which he presented, also indicates without contradiction that his real compensation from the business is substantially more than that. The evidence shows without dispute that: The company enables him to be a member of a country club that has few, if any, members who earn only $3,000 a month; it has loaned him $48,576.16 in exchange for two interest bearing notes upon which no payment of either principal or interest has been made, though the first loan was in 1971 and the other in 1987. The stated purpose of the first loan (of $15,000) was to enable defendant to buy stock in the company; the second loan was to enable defendant to pay his share of the loss that was incurred in buying an airplane with three other people. When defendant's living expenses are taken into account, buying stock for $15,000, losing $33,576.16 in the joint purchase of an airplane, and belonging to a country club cannot be reconciled with the finding that his monthly compensation from the company is only $3,000. That finding should be vacated also and one made as to his real monthly income from the company.

STATE OF NORTH CAROLINA v. MARGARET CRAWFORD SMITH AND STEVEN JEROME CRAWFORD

No. 8926SC472

(Filed 19 June 1990)

1. Criminal Law § 57 (NCI3d)— guns found at crime scene— admissibility of evidence

Defendants' objection to testimony that three guns were found on the premises at the time of defendants' arrests was not timely; moreover, there was no prejudicial error in admission of the evidence since it was relevant to illustrate the circumstances surrounding one defendant's arrest, and it was relevant to the conspiracy charge and the charges of possession with intent to sell or deliver cocaine or marijuana, as

firearms are frequently involved for protection in the illegal drug trade.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44, 46, 47.

2. Narcotics § 4.3 (NCI3d)— constructive possession of drugs— sufficiency of evidence

Evidence was sufficient to support an inference of constructive possession of marijuana, cocaine, and drug paraphernalia and an inference that defendant had the intent to sell or deliver marijuana where it tended to show that defendant had control of the residence where the drugs and paraphernalia were found; the utilities were in the name of defendant and her husband, and she was also the lessee of the premises; there was substantial evidence of defendant's close physical proximity to the narcotics; and $335 in cash was found on defendant's person.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44, 46, 47.

3. Narcotics § 4.3 (NCI3d)— constructive possession of drugs— sufficiency of evidence

Evidence was sufficient to support an inference of constructive possession of cocaine and drug paraphernalia where it tended to show that defendant was arrested in his mother's house where the drugs and paraphernalia were found; he had resided with his mother for over a month; he kept clothes in the chest of drawers where cocaine was found; he slept in the bed where seventeen baggies of cocaine were found; he admitted that the baggies in the bedroom belonged to him; and the officer who searched the bedroom during the raid testified that defendant was in the bedroom at the time of the raid.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44, 46, 47.

4. Narcotics § 1.3 (NCI3d)— small amounts of cocaine found in one room—only one possession—no misdemeanor possession

There was no merit to defendants' contention that .22 grams of cocaine found on top of a dresser should be considered a separate possession from 2.1 grams of cocaine in seventeen baggies found a few feet away between the bed and a wall, and the trial court therefore was not required to instruct on the lesser included offense of misdemeanor possession of cocaine.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 44, 46, 47.

APPEAL by defendants from judgments entered 8 December 1988 by *Judge Robert E. Gaines* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 9 January 1990.

Defendants Margaret Crawford Smith and Steven Crawford were each indicted on 31 May 1988 for felonious possession with intent to sell or deliver cocaine, felonious possession of cocaine, felonious possession with intent to sell or deliver marijuana, misdemeanor possession of marijuana, misdemeanor possession of drug paraphernalia, and common law conspiracy. In addition, defendant Smith was charged with felonious possession of a firearm by a convicted felon. The trial court granted defendant Smith's motion to sever the firearm possession charge. At the close of the State's evidence, the court dismissed the conspiracy charges against both defendants. After all the evidence, the court dismissed the marijuana charges against defendant Crawford.

Defendant Smith was convicted of felonious possession with intent to sell or deliver marijuana, for which she was sentenced to five years imprisonment and possession of drug paraphernalia, for which a one year sentence was imposed. Both sentences are to run concurrently. She was also convicted of felonious possession of cocaine for which a five year sentence, to run consecutively with the other two, was imposed.

Defendant Crawford was convicted of felonious possession of cocaine and misdemeanor possession of drug paraphernalia. He received two years for the cocaine conviction and one year for the drug paraphernalia charge, the sentences to run concurrently.

Both defendants appealed in open court.

Attorney General Lacy H. Thornburg, by Associate Attorney General Lars F. Nance, for the State.

Public Defender Isabel Scott Day, by First Assistant Public Defender James Gronquist, for defendants-appellants.

JOHNSON, Judge.

The State's evidence tended to show the following: On 12 April 1988 at approximately 10:00 p.m., six Charlotte Police Officers,

pursuant to a search warrant, requested entrance to a residence in Charlotte. After being denied admittance, the officers forced entrance into the house. Upon entry, the officers found defendant Smith (who is the mother of defendant Crawford) and another female in the front left room.

A second officer found two juvenile females in the kitchen. A third officer proceeded to the right rear bedroom and found defendant Crawford, two other males, and a female. Defendant Crawford testified at trial that he was not in the bedroom at the time of the search, but that there were three males and two females in the bedroom when it was searched.

All the occupants were searched and taken to the living room where they were secured while the officers searched the house. On a shelf in the living room, an officer found a vase which contained four "nickel" bags of marijuana, a partially smoked marijuana cigarette in defendant Smith's pocketbook, several "roaches" in ashtrays, and a pack of rolling papers and a bag of marijuana in a photograph holder. He also found $335 on defendant Smith's person.

The officer searching the rear bedroom found a bottle labeled "manitol" containing .22 grams of cocaine on top of a dresser, a box of plastic baggies in a dresser drawer, seventeen individual baggies containing a total of 2.1 grams of cocaine in a larger bag wedged between a bed and the wall, a pistol on the bed under some clothing, two more pistols inside a trunk at the foot of the bed, a "power hitter," and some scales.

The State's evidence also showed that the utilities for the residence were in the name of defendant Smith and Curtis Lee Smith, and that defendant Smith had paid the rent on the house since 1985.

Defendant Crawford testified that he had lived with his mother for over a month; that he kept his clothes in the dresser drawer where the cocaine was found; that he had slept in the bed where the seventeen baggies were found; and that the pistols and ammunition were his. He denied having seen the cocaine on the dresser or behind the bed, but admitted that the baggies were his. He stated that he was unaware that marijuana was being smoked in the house that night.

Defendant Smith offered no evidence.

[1] By their first Assignment of Error, defendants argue that the trial court erred in allowing testimony by a State's witness that three guns were found on the premises at the time of defendants' arrests on the grounds that the presence of the guns was irrelevant and unduly prejudicial. We find no error.

The State points out in its brief that defendants failed to object to the testimony in question when it was given, and only raised an objection three witnesses later when the guns were being offered in evidence. In fact, prior to trial, defense counsel for one of the defendants stated to the court that he did not object to admitting evidence as to the firearms.

G.S. § 8C-1, Rule 103(a) provides that a party may not assign error to a ruling to admit or exclude evidence unless a substantial right is involved, and a timely objection or a motion to strike appears in the record. 1 Brandis, North Carolina Evidence § 27 (3d ed. 1988). The objection or motion to strike should be made by a party as soon as he has reason to know that evidence is inadmissible. *Id.; State v. Atkinson*, 309 N.C. 186, 305 S.E.2d 700 (1983). Otherwise, the objection is waived. *Id.*

In the instant case, defendants' objection was not timely made, and, therefore, the defendants have waived this assignment of error. *State v. Sloane*, 76 N.C. App. 628, 334 S.E.2d 78 (1985).

Assuming, however, that this argument is properly before us, we find no prejudicial error. The decision to admit or exclude evidence is a matter addressed to the sound discretion of the trial court which will not be disturbed absent an abuse of discretion and "only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." G.S. § 8C-1, Rule 401. "Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." G.S. § 8C-1, Rule 403; *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986).

We think that the testimony concerning the guns was relevant to "illustrate the circumstances surrounding [defendant Crawford's] arrest." *State v. Teasley*, 82 N.C. App. 150, 160, 346 S.E.2d 227,

233 (1986). We also cannot say that it is totally irrelevant to the conspiracy charge (which was dismissed at the close of the State's evidence), or the charges of possession with intent to sell or deliver cocaine or marijuana. As a practical matter, firearms are frequently involved for protection in the illegal drug trade.

We recognize the highly inflammatory nature of raising the issue of firearms before the jury, and that the probative value of the testimony concerning the guns may have been outweighed by the possibility of undue prejudice. In this case, however, if there was error in admitting the testimony, it was harmless to the defendants since the evidence against them was ample. We consider the possibility that a different result would have been reached if the testimony had been excluded to be remote. G.S. § 15A-1443(a). This assignment is overruled.

By their second Assignment of Error, defendants argue that the trial court erred in denying their motions to dismiss the charges of possession of cocaine, possession with intent to sell and deliver marijuana (as to defendant Smith), and misdemeanor possession of drug paraphernalia. They contend that there was insufficient evidence for the jury to find beyond a reasonable doubt that either defendant had constructive possession of the drugs found on the premises, or that they had the intent to sell or deliver them. We disagree.

In ruling on a motion to dismiss in a criminal action, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of all reasonable inferences which may be drawn from the evidence. *State v. Davis*, 325 N.C. 693, 386 S.E.2d 187 (1989). The State must present substantial evidence that the offense charged has been committed, and that defendant committed it. *Id.* The evidence may be direct, circumstantial, or both. *Id.*

Defendants were convicted on the theory of constructive possession. Possession may be either actual or constructive, and a person may be deemed to have constructive possession of a controlled substance if he has "both the power and the intent to control its disposition or use." *State v. Thorpe*, 326 N.C. 451, 454, 390 S.E.2d 311, 313 (1990), *quoting State v. Fuqua*, 234 N.C. 168, 170, 66 S.E.2d 667, 668 (1951). When narcotics are found "on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be

sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Davis, supra* at 697, 386 S.E.2d at 190, *quoting State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If, however, the person accused does not have exclusive possession of the premises where the substances are found, the State must present evidence of "other incriminating circumstances" to justify the inference of constructive possession. *State v. Davis, supra, citing State v. Brown*, 310 N.C. 563, 569, 313 S.E.2d 585, 589 (1984).

[2] In the case of defendant Smith, the evidence showed that she had control of the residence where the substances and paraphernalia were found. The utilities were in the name of defendant and her husband. She was also the lessee of the premises. There was also substantial evidence of her close proximity to the narcotics: Officer Davis of the Charlotte Police Department testified that marijuana was found in a vase just to the left of where defendant Smith was standing; a partially smoked "roach" was in defendant Smith's purse; several "roaches" were in an ashtray across from where she stood; and cigarette rolling papers were in a picture frame on a coffee table across from defendant Smith. Officer Davis also testified that $335 in cash was found on defendant Smith's person. We also find Officer Davis's testimony that a power hitter with a marijuana leaf on it was found in the rear bedroom to be relevant to showing the connection in use and purpose of the living room and rear bedroom. The officer described the power hitter as "a device for smoking marijuana."

Considering the circumstantial evidence as a whole, *State v. Thorpe, supra*, and in the light most favorable to the State, we hold that the evidence presented was sufficient to support an inference of constructive possession of the marijuana, cocaine, and drug paraphernalia, and that defendant Smith had the intent to sell or deliver the marijuana.

[3] We also find the evidence of constructive possession sufficient to withstand defendant Crawford's motion to dismiss. Defendant Crawford testified that he had resided with his mother for over a month; that he kept his clothes in the chest of drawers where cocaine was found; and that he slept in the bed where the seventeen baggies of cocaine were found. He also admitted that the baggies in the bedroom belonged to him. Officer Hamilton, who searched the bedroom during the raid, testified that defendant Crawford

was in the bedroom at the time of the raid, and that the bedroom was "really close in together."

Our Supreme Court has held that constructive possession may be inferred by evidence that the accused was in "close juxtaposition to the narcotic drugs." *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972). In the case of defendant Crawford, the evidence showed that he was in close juxtaposition to the cocaine and paraphernalia, as well as having nonexclusive control of the bedroom. His motion to dismiss the charges against him was properly denied.

[4] Last, defendants argue that the trial court erred in failing to instruct the jury on the lesser included offense of misdemeanor possession of cocaine. Again, we disagree. Defendants failed to object at trial to the lack of an instruction on misdemeanor possession of cocaine. They have therefore waived that argument pursuant to Rule 10(b)(2) of the N.C. Rules of Appellate Procedure. It is correct as defendants point out that the State's attorney requested an instruction on misdemeanor possession of cocaine and the court refused. Neither defense attorney raised an objection to the court's decision.

Even if the issue were properly preserved for appeal, we would be compelled to find it to be without merit. Defendants base their argument on the fact that cocaine was found in two separate locations in the rear bedroom. They contend that the .22 grams of cocaine in a plastic bottle on top of the dresser should be considered a separate possession from the 2.1 grams of cocaine in the seventeen baggies found a few feet away between the bed and the wall. The smaller amount (.22 grams), being less than a gram, would, if considered alone, require an instruction on misdemeanor possession of cocaine.

The State argues persuasively that if separate packages of illicit drugs located within a few feet of each other in the same room must be considered separate possessions, drug dealers could simply divide cocaine into packages containing less than one gram each to avoid being prosecuted for a felony. We agree with the State that the total amount found in the rear bedroom was undoubtedly over one gram, as required by G.S. § 90-95(d)(2) for felony possession. There was no dispute as to the amount involved. Defendant Crawford testified that he had never seen cocaine in the house and denied possessing it. The issue was whether defendants possessed the cocaine, rather than a dispute as to the amount.

This Court has stated that "[i]n the absence of a conflict in the evidence, the contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense." *State v. Coats*, 46 N.C. App. 615, 617, 265 S.E.2d 486, 487 (1980). Defendants' argument is without merit.

We hold that defendants received a fair trial free of prejudicial error.

No error.

Judges PARKER and GREENE concur.

STATE OF NORTH CAROLINA v. JOHNNY LEE ROBBINS

No. 895SC562

(Filed 19 June 1990)

1. **Burglary and Unlawful Breakings § 6.3 (NCI3d) — first degree burglary — intent to commit underlying felony of rape — rape not defined — absence of plain error**

In a prosecution for first degree burglary where defendant's conviction was based on the theory that at the time of the break-in he intended to commit the underlying felony of rape, the trial court's error in failing to define rape was not "plain error" where the evidence tended to show that defendant entered the victim's house through a window and awakened her while standing naked next to her bed; the victim had previously made it clear to defendant that she had no interest in having a romantic relationship with him; she had previously shown her dislike for defendant by scratching his face; at one point during the attack defendant was straddling the victim; and the victim made every effort to resist defendant's brutal attack.

Am Jur 2d, Burglary §§ 24, 36, 45, 52, 69.

2. **Burglary and Unlawful Breakings § 5.11 (NCI3d) — first degree burglary — intent to commit rape — sufficiency of evidence**

The evidence in a first degree burglary prosecution was sufficient to show that defendant entered the victim's home

with the intent to commit rape where it tended to show that defendant stated that he intended to "make love" to the victim; he brutally attacked the victim in the face of her prior personal rejection of him; he was totally nude during the attack; and he straddled the victim during the attack.

Am Jur 2d, Burglary §§ 24, 36, 45, 52, 69.

3. **Assault and Battery § 27 (NCI4th)— assault with dangerous weapon with intent to kill inflicting serious injury—knife—sufficiency of evidence**

In a prosecution for assault with a dangerous weapon with intent to kill inflicting serious injury, evidence of intent to kill was sufficient to be submitted to the jury where it tended to show that the victim was six years old at the time of the attack; defendant deliberately attacked him with a knife causing him to suffer extremely serious injuries; and the location of the injuries, in the neck area, was relevant in determining intent to kill.

Am Jur 2d, Assault and Battery §§ 48, 51, 53, 91.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendant from judgment entered 22 January 1987 by *Judge William C. Griffin* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 16 January 1990.

Defendant was charged with first-degree burglary and two counts of assault with a deadly weapon with intent to kill inflicting serious injury. Upon a jury verdict of guilty of first-degree burglary, guilty of one count of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of assault with a deadly weapon inflicting serious injury, the trial court imposed active sentences of life imprisonment, twenty years, and ten years, respectively. The sentences are to run consecutively. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General L. Darlene Graham, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: On 16 June 1986 at approximately 3:00 a.m., prosecuting witness Cora Dixon was awakened in her bed by the defendant's striking her about the face with his fist. Defendant, who was unclothed during the attack, then pushed Ms. Dixon to the floor and cut her neck with a knife. Ms. Dixon attempted to push defendant's knife away from her. Defendant sat on the floor with his legs apart, straddling Ms. Dixon. During the struggle, Ms. Dixon's son, six-year-old Maurice, came into the bedroom and yelled for defendant to stop hitting his mother. Ms. Dixon called to her son to run.

Defendant released Ms. Dixon and grabbed Maurice as the child was running from the room. Defendant put the boy on the bed and stabbed him in the neck. While doing this, he held Ms. Dixon to the floor with his foot.

When Ms. Dixon managed to get up, defendant threw her on the bed and began choking her. Ms. Dixon scratched defendant and he let her go. Defendant went into the front room, and Ms. Dixon tried to escape through the front door. Defendant pulled her back, told her she could not leave, and continued trying to cut her.

Ms. Dixon managed to get away again and stood in the bedroom doorway. She begged defendant to leave them alone. Defendant threw down his hands, uttered an obscenity, and dropped his knife. Ms. Dixon grabbed her son by the hand and ran next door to the home of her neighbor, Delphine Smith. A rescue squad arrived and took Ms. Dixon and her son to a hospital.

Ms. Dixon testified that she had known defendant for about three years. He was a friend of an ex-boyfriend of hers. She stated that she had never dated the defendant, and had made it clear to him on more than one occasion that there could never be anything between them. She also testified that on the night defendant broke into her home, he did not say or do anything to indicate that he was trying to rape her.

Ms. Smith testified that she had heard the struggle going on next door and had called the police. After Ms. Dixon and Maurice had been in her home for about five minutes, defendant knocked on her door and said he was not going to do anything, and that he wanted to know if "they" were all right. Ms. Smith told defendant to leave. As he did so, he was confronted by police.

Defendant said to Officer Rodenberg, who was at the scene, "Lock me up. I have done something terrible." After being taken to the police department and advised of his rights, defendant gave a statement to police admitting that he had stabbed Ms. Dixon's son. Also on 16 June, defendant gave another statement to Officer Enos in which he stated that he had drunk some rum earlier in the evening and had been dropped off near Ms. Dixon's house. He walked to her house, and entered through a window with the intention of "making love" to Ms. Dixon. She was asleep, and defendant started beating her. He admitted stabbing both Ms. Dixon and Maurice, and admitted that the knife found at the scene of the crime was his.

Defendant also stated that after the Dixons left their house, he called the police and told them what had transpired. He also said that the last time he had seen the prosecuting witness before the night of 16 June was probably during the previous April. At that time, Ms. Dixon had become upset when defendant told her not to hit her child and had scratched defendant on the face.

The medical doctor who treated Maurice testified that the child had two wounds to the neck and a punctured right lung. He stated that the injuries were very severe, and that Maurice was hospitalized for twelve days. Ms. Dixon sustained a number of cuts and her right lung was punctured. She was hospitalized for five days.

[1] By his first Assignment of Error, defendant contends that he is entitled to a new trial for first-degree burglary because the trial judge failed to properly define and explain the elements of burglary when instructing the jury. Defendant's first-degree burglary conviction is based on the theory that at the time of the break-in, he intended to commit the underlying felony of rape. The jury charge failed to define the crime of rape. Defendant made no objection at trial to the instructions given, thus waiving the issue on appeal. Rule 10(b)(2), N.C. Rules App. Proc. Defendant, therefore, contends that the lack of an instruction defining rape constituted "plain error." *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). We disagree.

Our Supreme Court has addressed the similar question of whether the failure to define the underlying felony of larceny in a burglary case constituted prejudicial error. *State v. Simpson*, 299 N.C. 377, 261 S.E.2d 661 (1980). In that case, the Court held

that the trial court's failure to define larceny did not constitute prejudicial error:

> The failure to define larceny in burglary cases in which larceny is specified as the felony the accused intended to commit is not *always* prejudicial and does not *invariably* require a new trial. The extent of the definition required depends upon the evidence in the particular case. *State v. Spratt*, 265 N.C. 524, 144 S.E.2d 569 (1965). "In some cases, as where the defense is an alibi or the evidence develops no direct issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, 'felonious intent' may be simply defined as an 'intent to rob' or 'intent to steal.' On the other hand, where the evidence raises a direct issue as to the intent or purpose of the taking, a more comprehensive definition is required." *State v. Mundy*, 265 N.C. 528, 144 S.E.2d 572 (1965) (citations omitted). So it is also with respect to when, and to what extent, the word larceny must be defined and explained in burglary cases. In the case before us, there was no necessity for any definition or explanation of the word "larceny" because there was no evidence suggesting the television was borrowed, or taken for some temporary purpose, or otherwise negating a taking with felonious intent to steal.

State v. Simpson, *supra* at 384, 261 S.E.2d at 665.

Defendant argues that in this case intent to commit the underlying felony was in issue, and therefore, "rape" should have been defined. The victim testified that defendant did not attempt to rape her, and defendant stated that he intended to "make love" to the victim. We agree that the evidence raised at least an issue regarding defendant's intent when he entered the victim's house, and therefore, the trial court should have defined the crime of rape. Even assuming that the trial court's failure to define rape constituted prejudicial error, we do not find that it amounted to "plain error" so as to entitle the defendant in this case to a new trial.

Our Supreme Court has stated that the plain error rule is to be applied cautiously, and in assessing a defect in jury instructions, the reviewing court "must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, *supra* at 661, 300 S.E.2d at 379, *citing United States v. Jackson*, 569 F.2d 1003 (7th Cir.), *cert. denied*, 437 U.S. 907, 57 L.Ed.2d 1137 (1978). In examining

the entire record, we do not believe that the trial court's failure to define rape had a probable impact on the jury's finding defendant guilty of burglary. Defendant entered the victim's house through a window and awakened her while standing naked next to her bed. Ms. Dixon had previously made it clear to the defendant that she had no interest in having a romantic relationship with him. On 26 June 1986, she had also shown her dislike for defendant by scratching his face. During the 16 June attack, defendant at one point was straddling Ms. Dixon. She made every effort to resist his brutal attack. Upon these facts, we do not think the court's failure to define rape probably had an effect on the jury's verdict. The intent to commit rape had to exist at the time defendant entered the victim's dwelling; abandonment of the intent after entering is not a defense. *State v. Rushing*, 61 N.C. App. 62, 300 S.E.2d 445 (1983). We do not think this is the rare case in which the plain error doctrine is applicable to justify a new trial on the issue of burglary.

[2] Second, defendant argues that the evidence was insufficient to persuade a rational trier of fact beyond a reasonable doubt that defendant entered the victim's home with the intent to commit rape. We disagree.

Viewing the evidence in the light most favorable to the State, and giving the State the benefit of all reasonable inferences to be drawn therefrom, we find the evidence sufficient. Intent must ordinarily be proved inferentially from circumstantial evidence. *State v. Freeman*, 307 N.C. 445, 298 S.E.2d 376 (1983). Sexual intent may be derived from a defendant's words or from his dress or demeanor. *Id.; State v. Planter*, 87 N.C. App. 585, 361 S.E.2d 768 (1987).

In the case at bar, defendant stated that he intended to "make love" to the victim. We think these words combined with the following circumstances are sufficient evidence of defendant's intent to commit rape to go to the jury. Defendant broke into the rear bedroom window of the victim's home and remained in the home when he knew the victim was asleep there. He also removed all of his clothes and was standing naked next to the victim when she awoke. Ms. Dixon also testified that at one point in the attack she was on the floor and defendant "was sitting straight up with his legs opened up and [she] was in between them." Defendant was straddling her. In sum, defendant's brutal attack on the victim

in the face of her prior personal rejection of him, his sexually oriented reason given later to police for the break-in, defendant's total nudity during the attack, and his straddling the victim during the attack all contribute to create circumstantial evidence of his intent to rape sufficient to go to the jury. This argument is overruled.

[3] Third, defendant urges that there was insufficient evidence to go to the jury on the charge that he assaulted Maurice Dixon with a dangerous weapon with intent to kill inflicting serious injury. Defendant contends that the evidence of his intent to kill Maurice was legally insufficient. Again, we disagree.

"Intent to kill" must be proved by the State, and may be inferred from "the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972); *State v. Musselwhite*, 59 N.C. App. 477, 480, 297 S.E.2d 181, 184 (1982). The requisite intent may be inferred from the deadly character of the weapon used and the viciousness of the assault. *State v. Thacker, supra.*

The evidence in this case shows that Maurice was six years old at the time of the attack. Defendant's deliberate attack on him with a knife caused the child to suffer extremely serious injuries, including a punctured trachea and a punctured lung. We also agree with the State that the location of the injuries is relevant to determining intent to kill. Defendant concentrated his attack on Maurice's neck area, a part of the body that is vital to both respiration and the circulatory system. We find the evidence of intent to kill the child was sufficient to withstand defendant's motion to dismiss the charge of assault with a dangerous weapon with intent to kill inflicting serious injury.

No error.

Judge PARKER concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I agree with the majority that the failure of the trial court to define "rape" for the jury was error. However, contrary to

the majority, I believe the instructional error did have "a probable impact on the jury's finding of guilt." *See State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (defining "plain error").

Since I agree with the majority that there were no other errors in the trial, I would vacate the first degree burglary conviction and remand for a new trial on first degree burglary.

WALTER G. RICKS AND WIFE, MARIE RICKS, PLAINTIFFS v. TOWN OF SELMA, DEFENDANT

No. 8911SC948

(Filed 19 June 1990)

1. **Municipal Corporations § 4.4 (NCI3d) — sewer system — charge for services available but unused permissible**

A city's power to set rates for services furnished by a sewer system includes the power to charge for services available but not received. N.C.G.S. § 160A-314(a).

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 569, 573, 574.

2. **Municipal Corporations § 4.4 (NCI3d) — sewer system — classification of customers discriminatory**

A town ordinance which provided for a charge for water and sewer services available but unused was discriminatory where a customer receiving both water and sewer services and a customer receiving only water services paid a fee apart from usage for sewer service, but for the water and sewer customer, the fee for sewer service unconnected to use was one flat fee, while the customer who received only water service paid one flat fee *per unit* for sewer service unconnected to use.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 569, 573, 574.

APPEAL by plaintiffs from judgment entered 10 April 1989 by *Judge Howard E. Manning, Jr.* in JOHNSTON County Superior Court. Heard in the Court of Appeals 13 March 1990.

This is an appeal from an order upholding the validity of an ordinance entitled "Multiple Service Meters Ordinance and Rate Schedule" which states the following:

> When more than one housekeeping and/or business establishment is serviced through the same water and/or sewer meter, the following rates and policies will apply:
>
> A. *Water Fee Structure*: If water is metered then the current 1,000 gallon rate will be applied, plus one flat fee.
>
> B. *Sewer Rate Structure*: If sewer service is received, the current 1,000 gallon rate will be applied plus one flat fee.
>
> C. *Absence of Either Water or Sewer Service*: If due to economical, or physical limitations, a customer does not receive one of the above-mentioned services, (water/sewer) then the following rates will apply:
>
> 1) *For services not received, but available, (water and/or sewer)*: The minimum charge will be applied on a per unit basis. Example: 42 units: 42 times flat fee.

Selma, N.C., Code Section 13.20.020 (enacted 13 September 1983). The case was tried on the basis of the following stipulated facts: Plaintiffs own and operate a mobile home park in the Town of Selma and have done so for at least twenty years. The Town of Selma annexed plaintiffs' property containing the mobile home park on 1 July 1978. Prior to annexation, and from the date of annexation until 1983, plaintiffs provided water and sewer services to the mobile home park by private wells and septic tanks constructed at plaintiffs' expense. Both water and sewer service from the Town of Selma were available to plaintiffs' property. On 27 April 1983, plaintiffs tapped onto the municipal water service, but plaintiffs have never connected any of their 41 housing units to the municipal sewer system. Plaintiffs have made payments to defendant Town of Selma for the sewer services that were available, but not received, under Section 13.20.020. Another ordinance, entitled "Sewer Connections," provides:

> Sewer System Connection required. All owners of improved property which is located near a line of the sewer system of the Town shall install and connect with such sewer system all toilets, bathtubs, sinks and sanitary drains upon their property so that the contents empty into said sewage system.

Selma, N.C., Code Section 13.08.010 (enacted 14 September 1965).

The case was tried before the court without a jury. In its judgment, the court concluded that Section 13.20.020 was a valid exercise of the town's statutory authority and that plaintiffs had not shown discrimination in the town's exercise of that authority. From this judgment, plaintiffs appeal.

Charles E. Hester, Jr. for plaintiff appellants.

Spence and Spence, by Robert A. Spence, Sr. and E. Craig Jones, Jr., for defendant appellee.

ARNOLD, Judge.

[1] Plaintiffs first assign error to the trial judge's conclusion that Section 13.20.020, setting rates for either water or sewer service available but not received, was a valid exercise of the statutory authority granted to the town under N.C. Gen. Stat. § 160A, Article 16. We disagree. The town possessed sufficient statutory authority to set an availability charge for water or sewer service available but not received.

As of 13 September 1983, the date this ordinance was enacted, neither our courts nor legislature had addressed the question before us. However, in 1989, the General Assembly passed an amendment to N.C. Gen. Stat. § 160A-317 granting cities the authority to require payment of a periodic availability charge as an alternative to requiring connection to a sewer collection line and to avoid hardship. The amendment took effect 8 August 1989 and does not therefore resolve the question before us.

Since the authority to set an availability charge was not explicit in Chapter 160A before the amendment to N.C. Gen. Stat. § 160A-317, we must determine whether those grants of power given to cities in Chapter 160A should be construed to include the supplementary power to set availability charges. Grants of power are to be broadly construed to include any additional and supplementary powers necessary or expedient to effectuate the grants of power, with the condition that the exercise of the additional or supplementary powers not be contrary to law or public policy. N.C. Gen. Stat. § 160A-4.

N.C. Gen. Stat. § 160A-314(a) grants cities the power to establish rates "for the use of or the services furnished by any public enter-

prise." "Public enterprise" includes "[w]ater supply and distribution systems" and "[s]ewage collection and disposal systems of all types, including septic tank systems." N.C. Gen. Stat. § 160A-311(2), (3). The question before us is specifically whether making sewer service available is "furnishing a service" within the meaning of the statute. Plaintiffs argue that a city's power to set rates "for the use of or the services furnished by" a water or sewer system should be limited to charging for actual use, not mere availability. We disagree and find that by making sewer service available, a city has furnished a service, thus authorizing it to set a rate for this service. We construe the statutory language in this way because of the powers granted to a city with regard to providing water and sewer service, and the policies involved, it is "expedient," *see* N.C. Gen. Stat. § 160A-4, to allow a city the supplementary power to charge for service available but not received.

First, Chapter 160A, Article 4A, entitled "Extension of Corporate Limits," sets out the policies and procedures with regard to a city's power to annex. One policy underlying annexation is "to provide the high quality of governmental services needed . . . for the public health, safety and welfare." N.C. Gen. Stat. §§ 160A-33(3), 160A-45(3). Before a city may exercise its annexation power it must submit a report outlining its plan to extend to the future residents the major municipal services available to current municipal residents. N.C. Gen. Stat. §§ 160A-35(3), 160A-47(3). Sewer service is a major municipal service. *See* N.C. Gen. Stat. §§ 160A-35(3)b, 160A-47(3)b.

Second, a city has the power to build, enlarge and operate a sewage system, N.C. Gen. Stat. § 160A-312, as well as to make special assessments against benefited property for building or extending a sewage system. N.C. Gen. Stat. § 160A-216(4).

Further, a city has the power to require that owners of improved property within the city limits, and within a reasonable distance of a sewer collection line, connect their premises with the sewer line, and may set a charge for that connection. N.C. Gen. Stat. § 160A-317.

In sum, when a city exercises its annexation power, it must extend sewer service into the annexed area if it provides that service within the pre-annexation city limits. The city then has authority to extend the system into the annexed area and to finance the cost of this construction with assessments against the benefited

property. Once the system is complete, the city has the power to require certain property owners to connect to the sewer line and to charge them a connection fee.

Property owners outside the city limits often dispose of their sewage through private septic tanks. In this case, plaintiffs had constructed and maintained private septic tanks for their mobile home park at their own expense. When an area is annexed and sewage services extended, those services may not be needed or desired by those new residents who have septic tanks. It is therefore practical to allow residents with septic tanks an alternative to connecting to the sewer system that does not offend any law or public policy. An availability charge is such an alternative.

Construing the rate-setting authority in N.C. Gen. Stat. § 160A-314 broadly to include the power to charge for services available but not received is not contrary to law or public policy. *See* N.C. Gen. Stat. § 160A-4. First, the city's interest in public health is not compromised. The city can extend sewer service into the annexed area, providing the "high quality of governmental services needed therein for the public health, safety and welfare." *See* N.C. Gen. Stat. §§ 160A-33(3), 160A-45(3). Those residents who do not connect to the sewer system and continue to rely on septic tanks can be regulated to ensure that the septic tanks do not present a public health hazard. Second, the financial soundness of the city's sewer system is not threatened. The city can finance the construction of the sewer system construction by making special assessments against the benefited property under N.C. Gen. Stat. § 160A-216(4). The availability charge can cover those costs of operating the system that are not tied to actual use. Third, the property owners' interest in getting a return on their investment in a septic system is respected. Therefore, we hold that a city's power to set rates for services furnished by a sewer system includes the power to charge for services available but not received.

[2] Plaintiffs next assign error to the trial judge's conclusion that they did not show discrimination in the town's exercise of its authority to set an availability charge. The ordinance in question applies to multiple unit establishments serviced through the same water and/or sewer meter. A customer who uses both water and sewer service pays 1) one flat fee for water, 2) a usage rate for water, 3) one flat fee for sewer, and 4) a usage rate for sewer. A customer who uses only one of the two available services pays 1) one flat

fee for the service received, 2) a usage rate for the service received, and 3) for the service available but not received, one flat fee *for each unit in the establishment.* Plaintiffs argue that the charge for the service available but not received is discriminatory. We agree.

Section 160A-314(a), which grants cities the authority to establish rates, also provides: "Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service . . . ." A public utility, whether publicly or privately owned, may not discriminate in the establishment of rates. *Town of Taylorsville v. Modern Cleaners,* 34 N.C. App. 146, 148, 237 S.E.2d 484, 486 (1977) (citations omitted). The statutory authority of a city to set rates for its services and to classify its customers is not a license to discriminate among customers of essentially the same character and services. *Id.* at 149, 237 S.E.2d at 486. Section 160A-314(a) must be read as a codification of the general rule stated in 12 McQuillin, *Municipal Corporations* § 35.37(b), at 621 (3d ed. 1986):

> A municipality has the right to classify consumers under reasonable classifications based upon such factors as the cost of service, the purpose for which the service or the product is received, the quantity or the amount received, the different character of the service furnished, the time of its use or any other matter that presents a substantial difference as a ground for distinction.

See Taylorsville at 149, 237 S.E.2d at 486. Rates may be fixed in view of dissimilarities in conditions of service, but there must be some reasonable proportion between the variance in the conditions and the variances in the charges. *Id.*, quoting *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 465, 78 S.E.2d 290, 300 (1953). The burden of proof is on the party claiming that a rate-setting ordinance is unreasonable or discriminatory. 12 McQuillin § 35.37(a) at 617.

Applying these principles to the present case, we hold that the charge for services available but not received is discriminatory. Plaintiffs receive water service only, although sewer service is also available. Customers who receive water and sewer services, and customers like plaintiffs, who receive only water services, pay a fee apart from usage for sewer service. For the customer receiving both water and sewer services, the fee for sewer service that is unconnected to use is one flat fee. For the plaintiffs, whose mobile home park contains forty-one units, the fee for sewer service

that is unconnected to use is forty-one flat fees, or one flat fee per unit. Plaintiffs argue, and we agree, that the variance in circumstances between a customer receiving both services and a customer receiving only water does not justify the variance in the charge unconnected to use for sewer service.

Defendant Town of Selma presented no justification for the difference in charges. Section 13.08.010 requires owners of improved property near a sewer line to connect with the sewage system. An availability charge, according to the language of Section 13.20.020, is designed as an alternative to mandatory connection "[i]f due to economical, or physical limitations, a customer does not receive one of the above-mentioned services, (water/sewer) . . . ." Although the ordinance purports to recognize a customer's economic or physical limitations, the amount of the availability charge virtually coerces a property owner to abandon their private waste disposal arrangement and connect to the municipal sewer system. Once a municipality has exercised its authority to set an availability charge as an alternative to requiring connection, it must set a reasonable availability charge, not one that is in effect a weapon to coerce connection.

The order is affirmed to the extent that it concluded that defendant Selma had the statutory authority to set an availability charge, but is reversed to the extent that it concluded that Section 13.20.020 was not discriminatory.

Affirmed in part, reversed in part.

Judges LEWIS and DUNCAN concur.

STATE OF NORTH CAROLINA v. GERALD THOMAS EVANS

No. 8926SC812

(Filed 19 June 1990)

1. Burglary and Unlawful Breakings § 5.1 (NCI3d) — fingerprints — sufficiency of evidence

In a prosecution of defendant for breaking and entering and larceny, fingerprint evidence was sufficient to be submitted to the jury where it tended to show that the only finger-

prints located on the exterior of the apartment broken into were defendant's; prior to the breaking and entering the window on which the prints were found had been covered with a window screen; defendant's thumbprint was found on a piece of glass from the broken pane through which the perpetrator reached to unlock the window; and this evidence was substantial evidence that the fingerprints were impressed contemporaneously with the break-in.

Am Jur 2d, Burglary § 45.

2. Burglary and Unlawful Breakings § 5.6 (NCI3d)— felonious breaking—entry thwarted—sufficiency of evidence

In a prosecution of defendant for felonious breaking, the evidence was sufficient to prove that defendant had the intent to commit a felony where the evidence tended to show that, at the time a tenant left for work, neither the window nor the door pane was broken; defendant was found trying to unscrew a broken window; his hand was bleeding; he stated that he was trying to repair the window to his apartment because he had been unable to get maintenance personnel to do it, when in fact it was not his apartment and maintenance had not been called to make the repair; blood was found on the curtains inside the apartment; the tenant testified that she did not know defendant, had not given him permission to enter her apartment, and had not requested any window repairs; and in the absence of any proof or evidence of lawful intent, the jury could reasonably infer an intent to commit larceny from the unlawful entry.

Am Jur 2d, Burglary § 45.

3. Criminal Law § 307 (NCI4th)— two break-ins in one apartment complex—consolidation proper

The trial court did not err in consolidating for trial charges of felonious breaking of an apartment, felonious breaking and entering of another apartment in the same complex, and larceny, since the similarity in *modus operandi*, time, place, and motive was sufficient to justify joinder based on a series of acts or transactions connected together or constituting parts of a single plan or scheme. N.C.G.S. § 15A-926(a).

Am Jur 2d, Burglary § 42.

4. Larceny § 7.1 (NCI3d)— guilt of earlier larceny—evidence of intent

The evidence of defendant's guilt of an earlier larceny at an apartment was properly considered by the jury in determining whether defendant had the intent to commit larceny when he broke into a second apartment. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 324.

APPEAL by defendant from Judgments of *Judge W. Terry Sherrill* entered 5 April 1989 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 13 February 1990.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Grady Jessup, for defendant appellant.

COZORT, Judge.

Defendant was tried by jury and found guilty of felonious breaking, felonious breaking and entering, and larceny. On appeal he challenges the sufficiency of the evidence to support the verdicts against him, the trial court's consolidation of the charges for trial, and other alleged errors. We find no error.

The evidence at trial tended to show the following: On 9 August 1988, Talitha Stoner and James Hayes resided at Apartment N-4 at the Middle Plantation Apartments. When Stoner returned from work on that day, she found that the apartment had been broken into and several items stolen, including a jewelry box, a television set, and a videocassette recorder. It appeared that entry was obtained through a window next to the back door, which led into the kitchen from a patio. The outer screen had been removed from the window, and the upper middle pane of the lower window sash had been cut or broken out. A Charlotte Police Crime Laboratory employee lifted several latent fingerprints, including three from the exterior wooden surface of the lower window sash and one from a piece of glass found on an ironing board located nearby. Those prints were later identified as belonging to defendant. Hayes testified that he recognized defendant as a resident of apartment N-2, "two doors down" from the Stoner-Hayes apartment.

On 16 August 1988, at 10:45 or 11:00 a.m., James Brody, a maintenance employee at the Middle Plantation Apartments, observed defendant on the patio and at a window located next to the back door of Apartment M-3, where Mary Lou Martis resided. When Brody asked what he was doing, defendant stated that he was trying to fix the window because he had been unable to get a maintenance man to do it and that he had cut his hand. Brody responded that he was the maintenance man and that he had not heard anything about a broken window. Brody then went to the office, where he told Lynn Lawrence, acting office manager, what he had observed. Lawrence called the police and then followed Brody to the apartment. When Brody and Lawrence arrived at Apartment M-3, defendant was still there, trying to unscrew the storm window. He stated again that he was trying to repair the window and that he lived in the apartment. Brody testified that the glass on the inside window had been broken and that defendant's hand was bleeding. Lawrence also observed that the bottom right panel to the back door had been broken out. Entry was apparently foiled because the back door was locked with a key-operated dead bolt and the window was locked with a screw-type lock system.

Upon being further questioned by Brody and Lawrence, defendant said he was leaving and walked off. He was later seen getting into a car which "fled through the parking lot and the trunk flew up on the car." Defendant was thereafter apprehended by the police and arrested.

The State's motion to consolidate the charges was granted. The trial court in turn denied defendant's motion to sever. At the close of the State's evidence, defendant renewed his motion to sever, which was denied. Defendant offered no testimony. The jury found defendant guilty as charged. Defendant was sentenced to a prison term of 24 years. Defendant appealed.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the charge of breaking and entering and larceny on the ground of insufficiency of the evidence. He argues that the State failed to produce substantial evidence of circumstances tending to show that defendant's fingerprints could have been impressed only at the time the crime was committed. We do not agree.

To withstand a motion for directed verdict in a case involving only fingerprint evidence as circumstantial evidence of defendant's

guilt, the State must come forward with substantial evidence that the fingerprint or prints could only have been impressed at the time the crime was committed. *State v. Scott*, 296 N.C. 519, 523, 251 S.E.2d 414, 417 (1979). What constitutes substantial evidence is a question of law for the court; what the evidence proves or fails to prove is a question for the jury to decide. *Id.* In the case below, the State introduced evidence that crime investigators located seven prints on a window through which the perpetrator had obtained unlawful entry into a private residence. Three prints were lifted on the exterior window sash, one was taken from the interior bottom sash, another from the interior window on the pane next to the pane that was broken out, and two prints were lifted from the piece of glass on the ironing board. The fingerprints located on the exterior sash belonged to defendant. Of the two on the interior surface of the window, one was of no value and one was identified as not defendant's. One of the prints on the piece of glass was of no value; the other was defendant's. Thus, the only fingerprints located on the exterior were defendant's, and, prior to the breaking and entering, that window had been covered with a window screen. That evidence, coupled with the fact that defendant's thumbprint was found on a piece of glass from the broken pane through which the perpetrator reached to unlock the window, was substantial evidence that the fingerprints were impressed contemporaneously with the break-in. Defendant's motion for directed verdict was properly denied.

[2] Defendant next challenges the sufficiency of the evidence to prove felonious breaking. He contends that the evidence was insufficient to prove that he had the intent to commit a felony at Apartment M-2. We do not agree. The State was required to prove that defendant broke into the apartment "with the intent to commit a felony therein, to wit: larceny" in violation of N.C. Gen. Stat. § 14-54(a) (1989). The evidence tended to show that, when the tenant left for work, neither the window nor the door pane was broken, that defendant was found trying to unscrew a broken window, that his hand was bleeding, and that he stated that he was trying to repair the window to his apartment because he had been unable to get maintenance personnel to do it, when in fact it was not his apartment and maintenance had not been called to make the repair. Blood was found on the curtains inside the apartment. The tenant testified that she did not know defendant, had not given him permission to enter her apartment, and had not requested

any window repairs. Therefore, there was substantial evidence that defendant committed the breaking. Whether he had the requisite intent to commit a larceny therein was a question for the jury to decide and could be inferred from defendant's conduct and the surrounding circumstances. *State v. Cochran*, 36 N.C. App. 143, 242 S.E.2d 896 (1978). In the absence of any proof or evidence of lawful intent, the jury could reasonably infer an intent to commit larceny from the unlawful entry. *Id.* And, for reasons stated later in this opinion, the jury could also infer defendant's intent from the fact of his guilt of the larceny at Apartment N-4. This assignment of error is overruled.

[3] Four of defendant's assignments of error challenge the trial court's rulings consolidating the two charges for trial and denying defendant's motions to sever. Defendant argues that consolidation was error because there was no transactional connection between the offenses, as required by statute, and because consolidation impermissibly allowed the jury to consider entirely circumstantial evidence of defendant's guilt of one offense to prove his guilt of the other. We find no error in the court's rulings.

Consolidation of criminal offenses for trial is controlled by N.C. Gen. Stat. § 15A-926, which provides that offenses may be joined only when "the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (1989). It is not enough that the acts are of the same class of crime or offense if the requisite transactional connection is lacking. *State v. Greene*, 294 N.C. 418, 421, 241 S.E.2d 662, 664 (1978). In ruling on a motion to consolidate, the trial court must find a transactional connection between the offenses and, further, must determine that the defendant can receive a fair hearing on more than one charge at the same trial and that consolidation will not hinder or deprive the accused of his ability to present his defense. *Id.; State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). In determining prejudice to the defendant, the question is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust. *State v. Greene*, 294 N.C. at 423, 241 S.E.2d at 665. While a motion to consolidate charges is addressed to the sound discretion of the trial court, the determination of whether the offenses are transactionally related is a question of law fully reviewable on appeal. *State v. Corbett*, 309 N.C. 382,

387, 307 S.E.2d 139, 143-44 (1983) (quoting *State v. Silva*, 304 N.C. at 126, 282 S.E.2d at 452).

We find that the similarity in *modus operandi*, time, place, and motive was sufficient to justify joinder based on a series of acts or transactions connected together or constituting parts of a single plan or scheme. N.C. Gen. Stat. § 15A-926(a) (1989); *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981). As in *Bracey*, the trial court's finding of a transactional connection was based on a commonality of facts, not solely on commonality of crimes. Nor do we find that the offenses were so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to defendant, or that the nature of the evidence was such that severance was necessary to promote a fair determination of defendant's guilt of each offense. *See* N.C. Gen. Stat. § 15A-927(b) (1989). There was, accordingly, no abuse of discretion in the trial court's rulings. These assignments of error are overruled.

[4] By his next three assignments of error, defendant contends that the trial court erred in allowing the jury to consider the fact of larceny at Apartment N-4, if the jury found defendant guilty of that offense, in determining whether defendant had felonious intent at Apartment M-2. In closing argument, the State argued that a finding of guilt of the earlier offense could be used to prove intent in the second offense. Defendant's objection was overruled. The trial court later instructed the jury in part as follows:

> The State had also alluded to the fact that with respect to intent, with respect to this incident, if you believe the evidence presented by the State with respect to the earlier offense, that is if you are convinced that Mr. Evans committed that earlier offense, the felonious breaking and entering of the Stoner and Hayes apartment, then you may consider that evidence to determine whether or not Mr. Evans had the intent to commit a felony, to commit the crime of larceny, once he was inside, that is had he obtained entry, into Ms. Martis' apartment. Mr. Maloney is correct in saying that you can consider that but only for that purpose.
>
> In other words, you cannot consider because if you find he was guilty of that earlier offense, you cannot consider that the mere fact that he was guilty of the earlier offense means he is guilty of the second offense. You can consider whether or not you believe that earlier offense occurred and whether

he is guilty of it in determining whether he had the intent that would be required—that you will be required to find in order to find him guilty of the second offense.

Defendant timely objected to the court's instruction.

We hold that evidence of defendant's guilt of the earlier larceny was properly considered by the jury in determining whether defendant had the intent to commit larceny when he broke into the second apartment. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1989); *State v. McClain*, 240 N.C. 171, 81 S.E.2d 364 (1954). Furthermore, we find no error in the trial court's comment that "Mr. Maloney is correct." The court was merely commenting on the law and did not express an opinion about the State's case.

We have considered defendant's remaining assignments of error and find them to be without merit.

We conclude that defendant received a fair trial, free of prejudicial error.

No error.

Judges WELLS and LEWIS concur.

UNITED CAROLINA BANK v. THOMAS S. TUCKER AND JANET H. TUCKER

No. 8913SC446

(Filed 19 June 1990)

1. Mortgages and Deeds of Trust § 32 (NCI3d)— foreclosure proceeding under power of sale—value of property at time of sale—defense available to debtor

An order entered by the clerk of court in a foreclosure proceeding under a power of sale is not an "order or decree of court" which would make the value of the property unavailable to the debtors as a defense under N.C.G.S. § 45-21.36 in an action by the foreclosing creditor to obtain a deficiency judgment.

Am Jur 2d, Mortgages §§ 699, 922.

2. Mortgages and Deeds of Trust § 32 (NCI3d)— deficiency action—application where creditor bids on property subject to prior liens

The statute permitting the debtors to raise the value of the property as a defense to a creditor's action for a deficiency judgment, N.C.G.S. § 45-21.36, applied where the creditor purchased property at a foreclosure sale which was subject to prior liens or deeds of trust.

Am Jur 2d, Mortgages §§ 699, 922.

APPEAL by defendants from judgments entered 23 January 1989 and 13 February 1989 by *Judge Henry V. Barnette, Jr.* in BRUNSWICK County Superior Court. Heard in the Court of Appeals 18 October 1989.

Baxley and Trest, by Roy D. Trest, for plaintiff-appellee.

Stanley & Stanley, by Davey L. Stanley, for defendant-appellant Thomas S. Tucker.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Nancy M. Guyton, for defendant-appellant Janet H. Tucker.

PARKER, Judge.

This action was instituted by plaintiff United Carolina Bank for a deficiency judgment against the defendants Thomas S. Tucker and Janet H. Tucker following a foreclosure sale.

Defendants were indebted to plaintiff in the original principal amount of $78,169.69. This debt was evidenced by a promissory note and secured by a second deed of trust upon real estate owned by defendants. Pursuant to the power of sale contained in the deed of trust, the trustee foreclosed on the property after defendants defaulted on the debt. At the foreclosure sale held on 18 May 1988, plaintiff was the highest bidder with a bid of $50,000.00. Plaintiff took title to the property by deed dated 1 June 1988 and recorded in the Brunswick County Registry in Book 733 at page 500. Plaintiff then claimed a deficiency of $33,812.84 in this action.

In their answer, the defendants pursuant to G.S. 45-21.36 raised the value of the property as a defense. Prior to trial, plaintiff moved for summary judgment against defendant Thomas Tucker

on 12 September 1988, and against defendant Janet Tucker on 24 January 1989. Both defendants responded to the motions with an affidavit from a real estate appraiser that the fair market value of the property was $153,000.00, which was greater than the amount of the debt at the time of foreclosure. The trial judge granted summary judgment in favor of plaintiff, and defendants appeal.

[1] On appeal defendants' sole assignment of error is that the trial judge erred in granting summary judgment in favor of plaintiff. Summary judgment should be granted only if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E.2d 137, 140 (1980). Defendants contend that, pursuant to G.S. 45-21.36, they are entitled to raise the value of the property at the time and place of sale as a defense to this deficiency action and that a genuine issue of material fact exists as to the fair value of the property. Plaintiff argues that the clerk's order authorizing the trustee to proceed with the sale was an "order or decree of court," making G.S. 45-21.36 unavailable to defendants as a defense. We agree with defendants and reverse.

There are two methods of foreclosure in North Carolina: foreclosure by judicial action and foreclosure by power of sale. *Phil Mechanic Construction Co. v. Haywood*, 72 N.C. App. 318, 321, 325 S.E.2d 1, 3 (1985). Each method of foreclosure is governed by different statutory procedures. General Statute 1-339.1 *et seq.* govern judicial sales, and G.S. 45-21.1 *et seq.* govern foreclosures pursuant to power of sale.

"Foreclosure by action requires formal judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails." *Id.* General Statute 1-339.1 specifically excludes from the definition of judicial sale "[a] sale made pursuant to a power of sale [c]ontained in a mortgage, deed of trust, or conditional sale contract." G.S. 1-339.1(a)(1)a. Because judicial foreclosure is a civil action, there is a right to jury trial. *See In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 663, 266 S.E.2d 686, 691, *disc. rev. denied and appeal dismissed*, 301 N.C. 90, 273 S.E.2d 311 (1980). In judicial foreclosure, the sale must be confirmed by the court pursuant to G.S. 1-339.28; and "[b]efore confirmation, the prospective purchaser has no vested interest in the property. His bid is but an offer subject to the

approval of the court." *In re Green*, 27 N.C. App. 555, 557, 219 S.E.2d 552, 553 (1975), *disc. rev. denied and appeal dismissed*, 289 N.C. 140, 220 S.E.2d 798 (1976) (citing *Page v. Miller*, 252 N.C. 23, 25, 113 S.E.2d 52, 55 (1960)).

A foreclosure by power of sale is a special proceeding commenced without formal summons and complaint and with no right to a jury trial. *In re Foreclosure of Sutton Investments*, 46 N.C. App. at 663, 266 S.E.2d at 691. General Statute 45-21.16 requires a hearing before the clerk of court to determine specified issues prior to authorizing the trustee to proceed with the sale. *In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 71, 284 S.E.2d 553, 555 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 149 (1982). At the hearing the clerk is required to determine four facts: (i) a valid debt; (ii) a default; (iii) the trustee's right to foreclose under the deed of trust; and (iv) sufficient notice to the debtor. G.S. 45-21.16(d). Unless there is an upset bid as provided in G.S. 45-21.27, "there is no legal requirement that the clerk either confirm the sale or direct the execution of a trustee's deed as a prerequisite to legal consummation of such sale by the trustee." *Products Corp. v. Sanders*, 264 N.C. 234, 244, 141 S.E.2d 329, 336 (1965). Sales conducted pursuant to Article 2A of Chapter 45 are not pursuant to judicial action; the article "does not affect any right to foreclosure by action in court, and is not applicable to any such action." G.S. 45-21.2.

In the instant case, it was undisputed that the mortgage instrument contained an express power of sale. The record shows that a hearing was conducted by the Clerk of Superior Court, Brunswick County, on 26 April 1988. In that hearing, the clerk found the four requisite facts outlined above and entered the following order: "NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Douglas W. Baxley, Substitute Trustee, can proceed with foreclosure under the aforesaid deed of trust recorded in Book 680, page 968, Brunswick County Registry, as provided in General Statute Section 45-21.16(d)."

As this Court has previously stated:

> G.S. 45-21.36 allows a debtor to claim a setoff against a deficiency judgment to the extent that the bid at the foreclosure is substantially less than the true value of the realty, where (1) the creditor forecloses pursuant to a power of sale clause,

(2) there is a deficiency, and (3) the creditor who forecloses is the party seeking a deficiency judgment.

Hyde v. Taylor, 70 N.C. App. 523, 526, 320 S.E.2d 904, 906-07 (1984). General Statute 45-21.36 also provides that "this section shall not apply to foreclosure sales made pursuant to an order or decree of court . . . ."

The availability of G.S. 45-21.36 as a defense to a debtor in an action for deficiency judgment after foreclosure is of longstanding duration under our law. In the case of *Loan Corporation v. Trust Co.*, 210 N.C. 29, 185 S.E. 482 (1936), *aff'd*, 300 U.S. 124, 57 S.Ct. 338, 81 L.Ed. 552 (1937), the denial of a deficiency judgment to plaintiff was upheld because the defendants successfully pled the fair value of the property as a defense. In that case the Court reasoned as follows:

> The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale.

Id. at 34-35, 185 S.E. at 485 (citation omitted). The court further stated that the statute did not "apply to a sale made under an order, judgment, or decree in an action to foreclose a mortgage or deed of trust, or similar instrument." *Id.* at 32, 185 S.E. at 484.

An order entered by the clerk of court in a foreclosure proceeding under a power of sale is not the type of "order or decree of court" specifically excluded under G.S. 45-21.36. The statutory requirement of a hearing by the clerk was intended "to meet minimum due process requirements, not to engraft upon the procedure for foreclosure under a power of sale all of the requirements of a formal civil action. To [do] so would . . . render the private remedy as expensive and time-consuming as foreclosure by action." *In re Foreclosure of Sutton Investments*, 46 N.C. App. at 663, 266 S.E.2d at 691 (1980). Taken to its logical conclusion plaintiff's argument would deprive every debtor of the benefit of asserting

the value of the property as a defense in a suit for deficiency judgment, since all foreclosures by power of sale must by statute have an order entered by the clerk authorizing the sale.

Plaintiff cites the case of *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), as support for its argument that the clerk's role in a foreclosure by power of sale is tantamount to an order or decree of court. Plaintiff, however, quotes *Turner* out of context. In that case, the court stated, "The clerk's role [under Chapter 45] is not merely ministerial." *Id.* at 1257. In *Turner*, the application of North Carolina's statutory provisions regulating foreclosures by power of sale was held to be violative of due process. *Id.* at 1254. At the time *Turner* was decided, the statutes did not require personal notice to the debtor of the foreclosure. The defendant in *Turner* argued that there was not enough state action involved under a power of sale foreclosure to warrant notice. The court responded that the clerk's role was more than ministerial. *Id.* at 1257.

Plaintiff also cites *In re Foreclosure of Otter Pond Investment Group*, 79 N.C. App. 664, 339 S.E.2d 854 (1986), as supporting its contention that G.S. 45-21.36 is not applicable to this case. *Otter Pond*, however, is clearly distinguishable on its facts from this case. In *Otter Pond*, the debtor-mortgagor was the highest bidder at the foreclosure sale. The debtor deposited a sum of money with the Clerk of Superior Court to support its bid but later defaulted on the bid. The property was resold to one of the creditor note holders at less than the sum bid by the debtor. Therefore, the clerk ordered disbursement of debtor's deposit in accordance with G.S. 45-21.30(d). The debtor attempted to retain its deposit by contending that the property sold for less than fair market value and invoked G.S. 45-21.36 to support its argument. *Id.* at 665, 339 S.E.2d at 854-55. In ruling against the debtor, this Court held that G.S. 45-21.36 was not available as a defense because the proceeding was a foreclosure sale, not an action for a deficiency judgment. *Id.* at 665, 339 S.E.2d at 855.

[2] Plaintiff further argues that G.S. 45-21.36 should not apply where the creditor is bidding on property which is subject to prior liens or deeds of trust. Plaintiff reasons that in some cases the prior liens or deeds of trust might exceed the fair market value of the property. Plaintiff cites *Northwestern Bank v. Weston*, 73 N.C. App. 162, 325 S.E.2d 694, *cert. denied*, 314 N.C. 117, 332 S.E.2d 483 (1985), to support its argument.

On its facts *Northwestern* is distinguishable from the present case. In *Northwestern* the holder of a second deed of trust was the purchaser at a sale to foreclose on the first deed of trust. After payment of the costs of sale and the sum due under the first deed of trust, the amount remaining, including the proceeds of resale by plaintiff, was insufficient to cover the indebtedness secured by the second deed of trust. Plaintiff, holder of the second deed of trust, sued defendant for the deficiency. *Id.* at 163, 325 S.E.2d at 695. Defendant attempted to raise G.S. 45-21.36 as a defense. The court found the statute to be inapplicable, stating that "the statute is designed to protect mortgagors from mortgagees who purchase at sales they have conducted or initiated pursuant to the power of sale in their mortgage contract with the mortgagors." *Id.* at 164, 325 S.E.2d at 696. Since the holder of the second deed of trust in that case did not conduct or initiate the foreclosure sale, it had no duty to defendant to bid the highest value for the property. *Id.* at 165, 325 S.E.2d at 696.

In the instant case, the foreclosure was conducted pursuant to G.S. 45-21.16. Defendants invoked G.S. 45-21.36 by way of defense and submitted the affidavit of Michael D. Powell, III, Real Estate Appraiser and licensed real estate salesman in North Carolina. Mr. Powell stated that the fair market value of the property as of 9 September 1988 was $153,000.00. Even giving plaintiff credit for the $5,000.00 spent on renovations and repairs, and the $71,033.41 loan payoff owing on the first deed of trust, there is still a genuine issue of material fact as to whether the value of the property is sufficient to cover the amount of the deficiency plaintiff claims defendants owe. For the foregoing reasons, summary judgment was not appropriate and the order of the trial judge is reversed.

Reversed.

Judges GREENE and LEWIS concur.

BETSY VANCAMP, PLAINTIFF v. WANDA CARTER BURGNER, SAMUEL RICHARD BURGNER, DEFENDANTS

No. 8915SC523

(Filed 19 June 1990)

Automobiles and Other Vehicles § 89.1 (NCI3d)— striking pedestrian—last clear chance—sufficiency of evidence

The trial court erred in failing to submit the issue of last clear chance to the jury where the evidence tended to show that defendant driver had about two seconds reaction time from the point when plaintiff pedestrian was still six feet off the road; this was described as "ample reaction time" by an accident reconstruction expert; defendant driver stated that she did not see plaintiff until a "split second" before impact when plaintiff had already been in the road for 3.5 seconds and crossed 14 feet of it; and there was adequate evidence for a jury to conclude that, if defendant driver had kept a proper lookout, she reasonably could have acted effectively to avoid hitting plaintiff.

Am Jur 2d, Automobiles and Highway Traffic §§ 475, 479.

Judge LEWIS dissenting.

APPEAL by plaintiff from judgment entered 22 February 1989 by *Judge B. Craig Ellis* in ORANGE County Superior Court. Heard in the Court of Appeals 8 November 1989.

On 16 December 1986 at approximately 6:40 a.m., plaintiff as a pedestrian proceeded to cross a street in Hillsborough, North Carolina at a point where there were no traffic control signals or a marked pedestrian crosswalk. Although it was still fairly dark, the sky was beginning to lighten and the area was illuminated by two street lights and a yard light. Plaintiff was wearing a light colored coat. The weather was clear and the street was straight with visibility unobstructed. Defendant was traveling slightly uphill as she approached plaintiff. When plaintiff was at least three-quarters of the way across the road and in the defendant's lane of travel, defendant's automobile struck plaintiff and inflicted serious bodily injury. Defendant-driver testified that she had her headlights on, that she was traveling 20 to 25 miles per hour, and that she never saw plaintiff until "a split second" before impact. She also stated

that she could not avoid hitting plaintiff because she did not have time to stop, but could only swerve to the left.

The plaintiff filed a complaint against Wanda Carter Burgner, the driver of the automobile, and her husband, Samuel Richard Burgner, co-owner of the automobile, alleging negligence. Defendants answered, denying negligence and alleging contributory negligence on the part of the plaintiff. Plaintiff filed a reply alleging last clear chance. The case was tried before a jury on the issue of liability and the trial court granted defendants' motion for directed verdict at the close of plaintiff's evidence. Plaintiff appeals.

Blackwell & Lapping, by Jeff Blackwell, for plaintiff-appellant.

Babb and Barr, by Billy R. Barr, for defendants-appellees.

JOHNSON, Judge.

The sole issue raised by this appeal is whether the trial court erred in deciding that the doctrine of last clear chance was inapplicable as a matter of law to the facts of the case. We find that the evidence required submitting the issue of last clear chance to the jury and the trial court erred in directing a verdict for defendants.

The plaintiff must prove the following four elements to be entitled to a jury instruction on last clear chance:

> (1) the pedestrian, by his own negligence, placed himself in a position of helpless peril, (2) the defendant was aware of, or by the exercise of reasonable care should have discovered, plaintiff's perilous position and his incapacity to escape, (3) the defendant had the time and means to avoid injury to the plaintiff by the exercise of reasonable care after he discovered or should have discovered the situation, and (4) the defendant negligently failed to use the time and means available to avoid injuring the pedestrian.

Schaefer v. Wickstead, 88 N.C. App. 468, 470-71, 363 S.E.2d 653, 655 (1988), *quoting, Watson v. White*, 309 N.C. 498, 308 S.E.2d 268 (1983).

There is no dispute that plaintiff, who has loss of right field of vision in both eyes, did place herself in a position of helpless peril. *Id.* The crux of the issue before us is whether defendant-driver, by the exercise of reasonable care, should have discovered

plaintiff's perilous position and her incapacity to escape in time to avoid injury.

The plaintiff's evidence included expert testimony from an accident reconstruction expert to the effect that the stopping distance for defendant's automobile on that street at the estimated speeds would be from approximately 29 to 42 feet, which, at the estimated speeds, would take less than one second. Headlights on low beam illuminate for approximately 300 feet and, for a roadway 18 feet wide, an object 6 feet off the highway would be illuminated from 150 feet away. The expert testified that the average reaction time for a driver is between 1 and 1.5 seconds. The expert also stated that the average walking speed of a pedestrian is 4 feet per second, and that that was also the speed he measured for plaintiff. Plaintiff was hit by defendant-driver when she had walked 14 feet into the road. Therefore, she was actually in the roadway for about 3.5 seconds before she was hit and was walking from 6 feet off the roadway 5 seconds before impact. The expert testified that, assuming the car was in a skid for the last second, and that the average driver has a reaction time of 1.5 seconds (or 2 seconds because of darkness), that defendant-driver had 2 seconds reaction time from the point when plaintiff was 6 feet off the road. He described this as "ample reaction time."

Two questions arise at this juncture. At what point in crossing the street was plaintiff in a position of "helpless peril," and what duty does a driver have to look outside of his own lane of travel? We disagree with defendants' argument that plaintiff was in no peril until she walked into defendant-driver's lane of travel. A pedestrian who is walking across the street, and is about to walk into the path of an oncoming car, and who does not see the car, is obviously in peril before she steps directly in front of the car. It is also plain to us that the driver of an automobile has a duty to look ahead outside his or her immediate lane of travel. In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), Justice Lake stated the following:

> For the present it is sufficient to note that a motorist upon the highway does owe a duty to all other persons using the highway, including its shoulders, to maintain a lookout in the direction in which the motorist is traveling.

Id. at 576, 158 S.E.2d at 852-53 (citations omitted).

Assessing the expert testimony with these principles in mind, and viewing all the evidence in the light most favorable to plaintiff, we think the evidence was sufficient to create a jury question regarding the application of the doctrine of last clear chance to this case. Even if defendant-driver were held not to have a duty to observe plaintiff until she entered the road, there would still be a jury question as to the application of the doctrine. We recognize, as defendant points out, that there is a distinction between last "clear" chance and last "possible" chance. *Sink v. Sumrell*, 41 N.C. App. 242, 249, 254 S.E.2d 665, 670 (1979). As this Court said in *Sink v. Sumrell*, "it must be such a chance as would enable a reasonably prudent man in a like situation to act effectively." *Id.* at 249, 254 S.E.2d at 670. Every case must turn on its particular facts. *Exum v. Boyles*, *supra*. In this case, we believe there is adequate evidence for a jury to conclude that if defendant-driver had kept a proper lookout she reasonably could have acted effectively to avoid hitting plaintiff. The trial court's finding that defendant-driver did all she could after seeing plaintiff begs the question of when defendant-driver reasonably should have discovered plaintiff and ignores the evidence that she could have seen plaintiff a few seconds sooner. It is noteworthy that defendant-driver stated that she did not see plaintiff until "a split second" before impact when plaintiff had been in the road for 3.5 seconds and crossed 14 feet of it.

We hold that plaintiff presented sufficient evidence to establish a *prima facie* case of last clear chance, and that the trial court erred in taking that issue from the jury and directing a verdict for defendants.

New trial.

Judge COZORT concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent. I find the trial court did not err in granting defendants' motion for directed verdict and refusing to apply the doctrine of last clear chance at the conclusion of plaintiff's evidence. Plaintiff's evidence was insufficient to invoke the doctrine of last clear chance.

Both the majority and the appellee rely upon the testimony of an accident reconstruction expert to support their contention that defendant reasonably could have avoided hitting plaintiff. Using that same testimony, I conclude that, even though plaintiff may have had a last "possible" chance to avoid injury, she did not have the last "clear" chance. The distinction is significant, as the majority points out. Citing *Sink v. Sumrell*, 41 N.C. App. 242, 249, 254 S.E.2d 665, 670 (1979), the majority concedes: "We recognize, as defendant points out, that there is a distinction between last 'clear' chance and last 'possible' chance." However, the majority, stating that "[e]very case must turn on its particular facts," interprets those alleged "facts" presented by the accident reconstruction expert in a manner which requires "a reasonably prudent man in a like situation" to exercise a higher standard of care than that required by North Carolina law. *Id.*

The expert testified that "the average walking speed of pedestrians and . . . also the walking speed that I measured for [plaintiff]" was four feet per second. The accident occurred when plaintiff was fourteen feet into the roadway. Therefore, according to the expert's projections, it would have taken the plaintiff 3.5 seconds to reach the point of impact. According to the plaintiff's expert, the average reaction time for drivers at night is two seconds. The expert also stated that the time needed to stop defendant's vehicle after applying the brakes "would have been about one second." Under ideal conditions using the expert's projections, if the defendant had attempted to stop the car immediately, as soon as plaintiff entered the roadway, it would have taken defendant a total of three seconds to see plaintiff and then to stop her car before impact. This leaves only one-half of one second difference between the time that plaintiff reached the point of impact and the time required for defendant to be able to stop her car. These calculations are estimates made by a person who was not present at the time of the accident and who has relied on the "average" gait of pedestrians and of plaintiff, and has relied on "an average coefficient of friction" to determine the emergency stopping distance. The slightest variation in any of these "averages" could easily produce a different calculation with an additional one-half of one second. This is, I believe, an improbable last possible chance and certainly not a last clear chance to avoid the accident.

The majority and the plaintiff quote that portion of the expert's testimony in which the expert states that it takes "5 seconds for

the pedestrian to go from 6 feet off the pavement to the point of impact." Figuring a reaction time of two seconds and that the car was "in a skid for the last second," the expert stated "[t]hat still leaves an additional two seconds or ample reaction time for the driver to have seen the pedestrian. . . ."

The court in *Artis v. Wolf* examined a situation in which "no evidence indicates that [the defendant] should have expected [the plaintiff] to walk on into danger." 31 N.C. App. 227, 229, 228 S.E.2d 781, 782, *disc. rev. denied*, 291 N.C. 448, 230 S.E.2d 765 (1976). The same court held that the defendant "may have had the last 'possible' chance but he did not have the necessary last clear chance to avoid the accident." *Id.*

According to the majority: "The crux of the issue before us is whether defendant-driver, by the exercise of reasonable care, should have discovered plaintiff's perilous position and her incapacity to escape in time to avoid injury." The court in *Sink, supra*, defined the last clear chance doctrine, placing proper emphasis on the ability of the defendant to be able to avoid the accident:

> In order for the last clear chance doctrine to apply, there must be evidence that a reasonable person under the conditions existing *had the time and means* to avoid injury to the imperiled person. . . .

41 N.C. App. at 249, 254 S.E.2d at 670. (Emphasis added.)

The decision of the trial court to grant defendants' motion for directed verdict was correct based upon the insufficiency of plaintiff's own evidence of last clear chance.

STATE OF NORTH CAROLINA v. BOBBY LEE WOODRUFF

No. 8918SC1019

(Filed 19 June 1990)

1. Bigamy § 2.1 (NCI3d)— minister authorized to perform marriages—sufficiency of evidence of bigamy

Evidence was sufficient to support a charge of bigamy where it tended to show that defendant and a woman other than his wife took part in a marriage ceremony conducted by

the assistant pastor of defendant's church; the assistant pastor led the singing and preached to the regular congregation when defendant was away; although the assistant pastor was not "an ordained minister" or a "magistrate," he was "authorized by his church" to perform marriages; and the minister of the church, defendant, requested and authorized the assistant pastor to perform the marriage ceremony in question. N.C.G.S. § 51-1.

Am Jur 2d, Bigamy §§ 11, 55, 56.

2. Criminal Law § 401 (NCI4th)— private counsel assisting prosecutor—no abuse of discretion

Defendant failed to show abuse of discretion by the trial judge in allowing a private attorney to participate in the prosecution of the case, since defendant never expressed an actual intent to call the lawyer, who prepared a verified complaint for divorce for defendant's wife, as a witness; any testimony defendant might have elicited from the attorney could have been presented in other ways; and defendant was never prevented from calling the attorney as a witness or from presenting any relevant or material testimony.

Am Jur 2d, Prosecuting Attorneys § 13.

Judge EAGLES dissenting.

APPEAL by defendant from *Sitton (Claude), Judge*. Judgment entered 13 April 1989 in Superior Court, HENDERSON County. Heard in the Court of Appeals 29 May 1990.

Defendant was charged in a proper bill of indictment with bigamy in violation of G.S. 14-183.

The evidence presented by the State tends to show the following: Defendant and Willie Mae Woodruff were duly married on 15 August 1956 in Thomaston, Georgia. The couple moved to Henderson County in 1960, and defendant became the pastor of the Faith Revival Center in Hendersonville, N.C., the position defendant held at the time of his trial.

In 1981, defendant began preaching polygamy at his church. On one occasion, defendant discussed his intention to marry another woman with his wife stating, "he got this revelation that a man could have all the wives that he wanted. . . ."

On 5 June 1986 at about 4:00 in the afternoon, defendant telephoned Willie Mae Woodruff, his wife, and told her that he

and Anita Partin (who was currently married to Arlow Partin) were going to be married at his church that evening at 7:00 p.m. Shortly before 7:00 p.m., defendant and Willie Mae Woodruff left their house to drive to the church. They stopped at Bojangle's and met Anita Partin who followed the Woodruffs to the church in her own car.

When they arrived at the church, the Assistant Pastor, Roland McMahan, was there. With respect to Roland McMahan, Willie Mae Woodruff testified, "[h]e was [the] Assistant Pastor. He preached whenever my husband was out of town. He carried on the chores that my husband would ordinarily carry on." McMahan led the group into the sanctuary where he performed a ceremony and pronounced defendant and Anita Partin to be husband and wife. With respect to the marriage ceremony, Willie Mae Woodruff testified as follows: "[They] went on into the sanctuary, then he (Roland McMahan) got in front of the pulpit and he started the ceremony and they went through the ceremony and . . . at the end, he said, 'According to the Revelation, God is revealed in this time of polygamy' and then he pronounced Bobby Lee Woodruff and Anita Partin husband and wife." Willie Mae Woodruff also testified that Roland McMahan asked defendant if he took Anita Partin to be his wife and Anita Partin if she took defendant to be her husband, and both replied that they did, and Roland McMahan pronounced them "man and wife." With respect to whether she had consented to this marriage, Willie Mae Woodruff testified, "I told him (defendant) I didn't understand it, but the way he preaches a woman is under total submission to a man; a woman doesn't have a say so, but the man does. Because I was a Minister's wife, I felt it my duty to do what he said to do."

Following the ceremony, defendant and Anita Partin left the church in her car to go to Carolina Landing on their honeymoon. Willie Mae Woodruff and her granddaughter joined them the following day. All four of them returned to Hendersonville two days later; and then defendant, Willie Mae Woodruff, and Anita Partin left together to go on a two week "honeymoon" to Gatlinburg and Nashville, Tennessee.

Following this "honeymoon," the trio returned to Hendersonville, and Anita Partin moved into the house owned and shared by defendant and Willie Mae Woodruff. Anita Partin continued to live there for eighteen months during which time defendant

would sleep with her one night and Willie Mae Woodruff the following night. Willie Mae Woodruff's grandson and granddaughter were also living at the house at this time.

On 26 December 1987, defendant and Willie Mae Woodruff separated, and he and Anita Partin moved out of the house and into an apartment. Then on 11 April 1988, Willie Mae Woodruff had defendant indicted for bigamy because "[H]e kept coming to [her] house tormenting [her] and bossing [her] around and everything and [she] just couldn't take it anymore. . . ." She filed for divorce ten days later on 21 April 1988.

The jury found defendant guilty of bigamy. From a judgment imposing a prison sentence of three years to be suspended for five years except for an active sentence of forty days, defendant appealed.

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

Blanchard & Edney, by J. Michael Edney, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant contends the trial court erred in denying his motion to dismiss. He argues the evidence was not sufficient to support the charge of bigamy. His only contention on appeal is that the evidence does not disclose that defendant and Anita Partin were married by "an ordained minister of any religious denomination, [a] minister authorized by his church, or . . . a magistrate" as provided in G.S. 51-1. The evidence, however, discloses that the marriage ceremony between defendant and Anita Partin was conducted by Roland McMahan, who was the Assistant Pastor of defendant's church and who led the singing and preached to the regular congregation when defendant was away. Although McMahan was not "an ordained minister" or a "magistrate," he was "authorized by his church" to perform marriages. Indeed, the evidence is clear that the minister of the church, defendant, requested and authorized McMahan to perform the marriage between defendant and Anita Partin. We hold that the evidence is sufficient in all respects to take the case to the jury and to support the verdict.

[2] Defendant also contends the trial court erred "in allowing attorney Edwin Groce to appear as counsel with the State thereby

denying defendant the right to call Groce as a witness." Defendant argues that the ruling by the trial court denied him his constitutional right to call Edwin Groce as a witness. We disagree.

Defendant correctly concedes that "it is a matter within the discretion of the trial judge to determine whether a private attorney may assist the District Attorney in the prosecution of a case." *State v. Best*, 280 N.C. 413, 186 S.E.2d 1 (1972). We note further that the trial judge's discretion in allowing or disallowing private prosecution will be interfered with only upon a showing of abuse of that discretion. *State v. Boykin*, 298 N.C. 687, 259 S.E.2d 883 (1979).

In the present case, defendant has failed to show abuse of discretion by the trial judge in allowing a private attorney to participate in the prosecution of his case. At trial, defendant objected to the State's motion to have Mr. Groce appear as Associate Counsel for the State on the grounds that he might need to call Groce as a witness for the defense in order to respond to questions he intended to ask Willie Mae Woodruff on cross-examination concerning a verified complaint for divorce signed by the witness and prepared by Groce. Defendant never expressed an actual intent to call Groce as a witness, and as the trial judge pointed out, defendant could have presented that testimony in other ways. Defendant, however, conducted a thorough cross-examination of Willie Mae Woodruff and chose to ask only one question pertaining to her filing for divorce. Defendant was never prevented from calling Groce as a witness or from presenting any relevant or material testimony. Therefore, we find no error in the trial judge's ruling allowing attorney Edwin Groce to assist in the prosecution of this case.

Based on exceptions 2, 3, 4, and 5 noted in the record, defendant contends the court erred in allowing "Winnie Mae" (Willie Mae) Woodruff to testify that: (1) McMahan, defendant and Anita Partin "stood and talked for a few minutes and then they went in before the altar and had the marriage ceremony," (2) "when they went on into the sanctuary, then he (McMahan) got in front of the pulpit and he started the ceremony and they went through the ceremony and I don't remember everything that was said in the ceremony, but I do know at the end, he said, 'According to the Revelation, God is revealed in this time of polygamy' and then he pronounced Bobby Lee Woodruff and Anita Partin husband

and wife," and (3) that McMahan asked Bobby Woodruff if he took Anita Partin to be his wife. At trial, defendant argued that the testimony was "hearsay," and he advances the same contention on appeal.

Rule 801(c) of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Clearly, these statements were not offered to "prove the truth of the matter asserted." This contention borders on the frivolous.

Next, based on twenty-eight exceptions noted in the record, defendant contends the trial court erred in admitting testimony of "Winnie Mae" (Willie Mae) Woodruff, Bobby Lee Woodruff, and Anita Partin because it was irrelevant and immaterial. In his brief, he contends the testimony excepted to, relating to the operation of the church and the doctrine of the church, was irrelevant and immaterial and prejudiced defendant because the purpose of this evidence was to "attempt to link this defendant to the television evangelist Jim Baker [sic] and his PTL Club." Obviously, the testimony challenged by these exceptions was not irrelevant or immaterial because it tended to show that McMahan was "authorized by his church" to perform marriages.

Finally, assignment of error No. 25 is set out in the record as follows: "The defendant was tried and convicted upon a defective indictment." This assignment of error is not supported by an exception noted in the record. Thus, no question is presented for review. The bill of indictment is in all respects proper.

Defendant received a fair trial free from prejudicial error.

No error.

Judge JOHNSON concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent.

In my judgment the record is devoid of evidence that Roland McMahan had the requisite authority from his church to perform

marriages. Testimony from McMahan and the defendant unequivocally stated that McMahan was not ordained and had no authority to perform weddings. The testimony of the wife Willie Mae Woodruff focused on the purported ceremony itself and the defendant's announced belief in Biblical authority for polygamy and did not deal with whether McMahan was authorized by his church to perform marriage ceremonies. The fact that defendant may have believed that polygamy was scripturally permissible, that he intended to marry a second person while still married, and that a purported ceremony was conducted, does not supply the missing element of proof in this criminal prosecution. There is no evidence that McMahan was "authorized by his church" as required by G.S. 51-1. Accordingly, I dissent and would vote to vacate the conviction.

STATE OF NORTH CAROLINA v. BERRY SCOTT

No. 8913SC687

(Filed 19 June 1990)

1. **Appeal and Error § 447 (NCI4th)— constitutional issue raised for first time on appeal—issue not considered**

Defendant in a rape case could not raise for the first time on appeal the constitutional issue of double jeopardy as grounds for excluding evidence of a prior rape for which he had been acquitted.

Am Jur 2d, Appeal and Error §§ 517, 581, 601, 602, 623; Evidence § 332; Rape §§ 70-73.

2. **Criminal Law § 884 (NCI4th)— failure to object to jury instructions—waiver of appeal rights**

Defendant was barred from assigning error to the trial court's instruction to the jury that evidence of a prior rape for which defendant had been acquitted could be considered to the extent that it was relevant to defendant's intent, knowledge, plan, scheme, system, or design, since defendant failed to object to the proposed jury instruction during the charge conference or during the trial. Appellate Rule 10(b)(2).

Am Jur 2d, Appeal and Error §§ 517, 581, 601, 602, 623; Evidence § 332; Rape §§ 70-73.

3. Criminal Law § 884 (NCI4th)— failure to object to jury instructions—waiver of appeal rights

By failing to object to the jury charge, defendant waived his right to appeal any possible error regarding the trial court's instructions to the jury that defendant's alleged conduct constituted three distinct and separate offenses of rape.

Am Jur 2d, Appeal and Error §§ 57, 581, 601, 602, 623; Evidence § 332; Rape §§ 70-73.

APPEAL by defendant from judgment entered 25 January 1989 by *Judge Darius B. Herring, Jr.* in COLUMBUS County Superior Court. Heard in the Court of Appeals 6 February 1990.

After a trial by jury, defendant was convicted of one count of crimes against nature, one count of second-degree kidnapping, and three counts of second-degree rape. Upon conviction, defendant was sentenced to ten years for crimes against nature, thirty years for kidnapping and forty years for the three counts of rape. The sentences for kidnapping and rape were to run consecutively with the crimes against nature sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

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

JOHNSON, Judge.

The State's evidence tended to show, *inter alia*, that at approximately 11:30 p.m. on the evening of 26 June 1988, the victim, an adult female, drove to Flowline in Whiteville where her friend, Keith Gore, worked. After chatting for approximately 45 minutes, she agreed to go to a nearby Time Saver Convenience Store to get some food. When she arrived at the Time Saver she saw the defendant, whom she had not seen in two years, parked in a car with other people. Defendant came over to the victim's car and talked with her briefly and asked her if she could give him a ride home. After explaining that she had to take some food back to her friend at Flowline, the victim agreed to give the defendant a ride home.

Defendant, the victim and Mr. Gore sat in the car and engaged in friendly conversation until approximately 1:30 a.m. After leaving

Flowline, defendant requested that the victim stop at Time Saver to get some cigarettes, and she complied. As the victim began to back out of the parking lot, defendant pulled out a small brown pocketknife, held it to her throat, and ordered her to drive to Whiteville Apparel.

After arriving at Whiteville Apparel, defendant returned the pocketknife to his pocket and took the keys from the ignition. When the victim refused to get out of the car, defendant came to the driver's side and pulled her through the window. Once outside of the car, a struggle ensued. Defendant subsequently pulled the victim away from the car into the weeds, pulled off the victim's pants and underwear, pushed her on her back and forced her to have vaginal intercourse.

Later, when it began to rain, defendant pulled the victim up and ordered her to get in the back seat of the car where he forced her to have vaginal intercourse once again. Afterwards, the two of them got out of the car and returned to the front seat. Defendant then got out of the car to urinate and the victim locked the doors. Fearing defendant would carry out his threat to break the window and kill her, the victim let him back in the car and drove to defendant's house in Whiteville, as ordered.

Defendant and the victim arrived at his house around 3:00 a.m. and went to his bedroom where defendant forced her to have vaginal intercourse for the third time. Defendant also forced her to perform fellatio. Sometime later, defendant led the victim to her car.

After arriving at her apartment at approximately 5:30 a.m., the victim's roommate awoke to find her sitting on the side of the bathtub crying. Shortly thereafter, she was taken to the Columbus County Hospital Emergency Room. Once released, the victim directed the investigating officer, Detective Cutchin, to the area behind Whiteville Apparel where defendant first raped her.

Of the many witnesses presented by the State, Inez Ward, head nurse at the Columbus County Emergency Room, testified that she observed slight bleeding in the victim's vaginal area and that there was also bruising and swelling on her right buttocks.

In addition, M. J. Budzynski, a forensic serologist with the State Bureau of Investigation, testified that his examination of the rape kit prepared at Columbus County Hospital revealed no

sperm on the vaginal smears, but that there was sperm on the oral smears.

Defendant brings forward five Assignments of Error. First, he contends that the trial court erred by allowing the State to introduce testimony from Wanda Freeman that defendant had raped her. Second, defendant assigns error to the trial court's instructions to the jury on the testimony of Ms. Freeman. Third, defendant contends that the trial court improperly instructed the jury on the knife used to perpetrate the crime. Fourth, defendant assigns error to the trial court's instruction to the jury that the conduct constituted three separate acts of rape. Finally, defendant assigns error to Detective Cutchin's testimony regarding the substance of the defendant's post-arrest statements. We have reviewed each assignment of error and find that defendant received a fair trial free from prejudicial error.

I

[1] By his first argument, defendant contends that the trial court erred in allowing the State to introduce testimony from Wanda Freeman that she was raped by defendant on 6 July 1986. Specifically, defendant contends that such testimony should have been excluded since he was acquitted of that crime. We note at the outset that when the State called Ms. Freeman as a witness, defendant made a general objection and a *voir dire* hearing was conducted. During *voir dire*, defendant argued that Ms. Freeman's testimony was precluded by Rules 403 and 404 of the Rules of Evidence. The trial court thereafter made a ruling based upon the Rules of Evidence, without mention of defendant's constitutional rights. On appeal, defendant now attempts to raise a double jeopardy claim as a basis of acquiring a new trial. This he cannot do since the record discloses that defense counsel did not specifically object so as to place this constitutional claim before the trial judge at the *voir dire* hearing. A reading of defense counsel's remarks during the *voir dire* does not point to the presentment of a double jeopardy argument before the trial court. A portion of the *voir dire* of Mr. Worley is as follows:

> MR. WORLEY: Judge, we're here in this case in Columbus County today to try this defendant on the charges involving . . . that occurred on June 27th, 1988.

> We're not here to retry the Wanda Freeman case. Judge, that case ended in a not guilty verdict, and if the laws of the land and the State of North Carolina are to mean anything, a not guilty verdict should stand. And to permit the State to try to come in and use this testimony again, for which this defendant has stood trial, Judge, we would submit to the Court [sic] is nothing else but to try to prejudice this defendant.
>
> Judge, I think that the—the admissibility is governed by the 400 sections of the Rules of Evidence.
>
> Section 404 says that character evidence is not admissible to prove conduct, with some exceptions.
>
> Then you go back to Rule 403. It says, even though evidence may be relevant sometimes under 403, we're not going to admit it, because of the potential prejudicial effect, the waste of time that it would have on the case that you're trying now.
>
> Judge, I would submit to the Court that it is improper to —to admit this evidence under Rule 404. And the Court is —you will have to make a determination, the purpose for which it is being used. You will have to make a determination that the probative value of this evidence substantially outweighs the prejudicial effect.
>
> . . . .
>
> Judge, it's too remote in time. The facts are so different. And you heard from Attorney Craig Wright. The facts are so different. . . .
>
> . . . .
>
> I'd ask the Court not to admit it under Rule 404, under the probative value.

The above portion of the *voir dire* is sufficient to establish that defense counsel's theory below relied upon the N. C. Rules of Evidence rather than the constitution. According to the prevailing law,

> [t]he theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions. Further, a constitutional question

> which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.

State v. Hunter, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982). Thus, the issue of double jeopardy was not timely raised.

II

[2] By his second argument, defendant contends that the trial court's instructions as to the testimony of Ms. Freeman allowed the jury to misapply the evidence. We disagree.

> Rule 10(b)(2) of the Rules of Appellate Procedure provides that:
>
> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Defendant failed to object to the proposed jury instruction during the charge conference or during the trial and is therefore barred from assigning error to the trial court's instruction to the jury that the Freeman evidence could be considered to the extent that it was relevant to defendant's intent, knowledge, plan, scheme, system or design.

We note that the "plain error" rule adopted in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), allows for the review of assignments of error normally barred by such waiver rules as Rule 10(b)(2). Before deciding that an error by the trial court amounts to "plain error," the appellate court must be convinced that absent the error the jury probably would have reached a different verdict. *Id.* Assuming, *arguendo*, that the jury instruction was objectionable, we nonetheless do not find plain error. We overrule this assignment.

III

By his third argument, defendant contends that the trial court erred by failing to give requested instructions. Defendant requested that the trial court give a special instruction that the knife presented was not the knife in question. Our review of the instructions given convinces us that the trial court gave such instruction in substance. This assignment of error is overruled.

IV

[3] By his fourth argument, defendant contends that the trial court erred in instructing the jury that the alleged conduct in this case constituted three separate acts of rape. As indicated earlier herein, to preserve the right to appeal a party must object to the jury charge before the jury retires. Rules App. Proc., Rule 10(b)(2). Defendant contends that the trial court's instruction erroneously compelled the jury to find that the act of intercourse in the car did not constitute a continuation of the intercourse outside the car. The specific complained of instruction is as follows:

> I also instruct you, members of the jury, that each act of forceable [sic] intercourse constitutes a distinct and separate offense. So, where an act of vaginal intercourse is interrupted by some event, as when it begins to rain on the parties on the ground outside, and the act is terminated, and then after a new act of forcible intercourse begins, then that constitutes a separate and distinct offense. And that is how three charges of [sic] three counts arise in this case upon the State's allegations and contentions, all of which are denied by the defendant.

Given the fact that defendant failed to challenge the above-quoted instruction, we conclude defendant waived his right to appeal any possible error regarding the trial court's instruction to the jury that the alleged conduct constituted three distinct and separate offenses. We overrule this assignment of error.

V

Finally, defendant contends that the State was improperly permitted to impeach the defendant by offering extrinsic evidence on a collateral matter. We disagree and overrule this assignment.

Having carefully reviewed the record and the briefs, we conclude defendant received a fair trial, in which there was

No error.

Judges ARNOLD and ORR concur.

DAVID A. YOUNG, PLAINTIFF v. MASTROM, INC., DEFENDANT

JOHN R. BEITH, PLAINTIFF v. MASTROM, INC., DEFENDANT

MASTROM, INC., PLAINTIFF v. C. DAVID CARPENTER, DEFENDANT

No. 8920DC713

(Filed 19 June 1990)

1. **Master and Servant § 11.1 (NCI3d)— covenants not to compete—unenforceability for lack of consideration**

Covenants not to compete in three employment contracts were unenforceable for lack of consideration where there was no agreement as to the terms of the covenants at the time of employment, and none of the employees received a salary increase or other benefit for signing the covenants.

Am Jur 2d, Master and Servant §§ 106, 107.

2. **Master and Servant § 11.1 (NCI3d)— covenant not to compete—no trade secrets known by employee—covenant nevertheless enforceable**

The fact that employees do not possess unique trade secrets as a result of their employment cannot properly serve as a basis for holding restrictive covenants invalid, since customers developed by an employee are the property of the employer and may be protected by a valid covenant not to compete.

Am Jur 2d, Master and Servant §§ 106, 107.

APPEAL by Mastrom, Inc., the defendant in 84 CVD 946 and 85 CVD 006 and plaintiff in 85 CVD 117, from judgment entered 20 February 1989 by *Judge Ronald W. Burris* in MOORE County District Court. Heard in the Court of Appeals 16 January 1990.

Plaintiffs Young and Beith, who are former employees of defendant Mastrom, Inc. ("Mastrom"), instituted a declaratory judgment action on 27 December 1984 to determine the validity of covenants not to compete contained in their employment contracts with Mastrom. Mastrom counterclaimed for damages and injunctive relief for breach of the employment contract.

Mastrom, as plaintiff, filed a breach of employment contract action against its former employee, defendant Carpenter, seeking damages and injunctive relief. All parties agreed to consolidate the three actions for trial as they contain common issues of law and fact. They also agreed that only the issue of the validity of the covenants not to compete would be determined by the trial court. After a hearing, the trial court made findings of fact and concluded as a matter of law that the restrictive covenants in all three employment contracts were invalid and of no force and effect. Mastrom appeals the judgment.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by P. Wayne Robbins and Carol M. White, for appellant Mastrom, Inc.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr. and S. Jon Fullenwider, for appellees.

JOHNSON, Judge.

Mastrom is a business engaged in providing consultant services to the medical and dental professions. Although the three employees' exact job descriptions are not entirely clear from the record, they apparently worked with Mastrom's accounting and bookkeeping, and some or all of them worked directly with clients.

As to plaintiff Young's action against Mastrom, the trial court made the following pertinent findings of fact: Young interviewed for employment with Mastrom in the summer of 1971. He was not shown an employment contract or restrictive covenant during this time. On 16 August 1971, Young accepted an offer of employment from Mastrom and began work. On 23 August 1971, Young signed an employment contract containing a restrictive covenant. He had not seen the covenant prior to 23 August, and if it was discussed at all during initial interviews, it was only in general terms. Young received no salary increase or other benefits for signing the restrictive covenant. On 18 February 1972, Young signed a second employment contract (with restrictive covenant) for which he received no increase in compensation or benefits.

As to plaintiff Beith, the trial court found that he accepted employment with Mastrom effective 17 June 1974. On 21 June 1974, Beith signed an employment contract with Mastrom which included a covenant not to compete. Prior to 21 June, Beith had not seen the employment contract, personnel policy, or a copy

of the restrictive agreement. If the restrictive covenant was mentioned at all in pre-employment interviews, it was only in general terms. Beith did not receive any increase in salary or benefits when he signed the restrictive covenant.

With regard to defendant Carpenter's employment with Mastrom, the trial court found as fact that Carpenter interviewed with Mastrom in February of 1976. During the interview, Carpenter was not shown a copy of the employment contract, restrictive covenant, or personnel policy. On the Friday following the interview, Carpenter accepted employment with Mastrom. He reported for work on 1 March 1976, and on 2 March 1976, he was given an employment contract to sign which contained the restrictive covenant. Carpenter received no increase in salary or benefits for signing the contract.

Although not mentioned in the findings of fact, the evidence tends to show that Young, Beith and Carpenter resigned their positions with Mastrom effective 31 January 1985 and formed their own business which provides services similar to those performed by Mastrom. Some of the clients the three employees had serviced at Mastrom followed them to their new business.

In holding that the three restrictive covenants were invalid and unenforceable, the trial court concluded as a matter of law that the covenants were not supported by adequate consideration; were not ancillary to an independent employment contract; and that the employees did not possess unique trade secrets as a result of their employment with Mastrom.

Before addressing Mastrom's argument that the restrictive covenants are valid and enforceable, we note that factual findings made in a nonjury trial have the force and effect of a jury verdict, and, if supported by competent evidence, are conclusive on appeal even though there may be contrary evidence. *Industrial & Textile Piping, Inc. v. Industrial Rigging*, 69 N.C. App. 511, 317 S.E.2d 47, *disc. rev. denied*, 312 N.C. 83, 321 S.E.2d 895 (1984). The resolution of conflicting inferences raised by the evidence is also binding on appeal. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975).

To be enforceable, a covenant not to compete must be (1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration;

and (5) designed to protect a legitimate business interest of the employer. *A.E.P. Industries v. McClure*, 308 N.C. 393, 403-04, 302 S.E.2d 754, 760-61 (1983). The promise of new employment will serve as valuable consideration and support an otherwise valid covenant. *Wilmar, Inc. v. Corsillo*, 24 N.C. App. 271, 210 S.E.2d 427 (1974), *cert. denied*, 286 N.C. 421, 211 S.E.2d 802 (1975). If the employment relationship already exists, a future covenant must be based on new consideration. *Greene Co. v. Kelley*, 261 N.C. 166, 134 S.E.2d 166 (1964). This Court has also held that if a covenant is a part of an original verbal employment contract, it will be considered to be based on valuable consideration. *Robins & Weill v. Mason*, 70 N.C. App. 537, 320 S.E.2d 693, *disc. rev. denied*, 312 N.C. 495, 322 S.E.2d 559 (1984). It is immaterial that the written contract is executed after the employee starts to work. *Id.* However, the terms of a verbal covenant which is later reduced to writing must have been agreed upon at the time of employment in order for the later written covenant to be valid and enforceable. *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 293 (1989).

[1] The issue of whether the employment relationship already existed at the time the employees discussed the terms of their covenants with Mastrom (so that the promise of new employment could not serve as consideration for signing the restrictive covenants) hinged on the credibility of the witnesses. The trial court, acting as fact finder, determined that during the pre-hiring interviews, none of the three employees were shown a copy of an employment contract, the restrictive covenant, or the personnel policy. As to employees Young and Beith, the court found that if the restrictive covenants were discussed at all during pre-employment interviews, it was only in general terms. The court made no finding that employee Carpenter discussed the restrictive covenant prior to becoming employed at all. Under the rule of *Stevenson v. Parsons, supra*, the *terms* of an oral covenant later executed in writing must be agreed on at the time of employment for the promise of employment to serve as consideration, thus making an otherwise valid covenant enforceable. In the instant cases there was no agreement as to the terms of the covenants at the time of employment. Therefore, the promise of employment cannot serve as consideration. The court also found that none of the employees received a salary increase or other benefit for signing the covenants. In reviewing the record, we find that these findings of fact are well supported

by the evidence. We therefore agree with the trial court that the covenants are unenforceable for lack of consideration.

Mastrom argues that in the case of former employee Young, consideration existed for the second restrictive covenant he signed about six months after he began work. The trial court found that Young received no consideration. We agree with the trial court. Mastrom contends that as part of the new contract, Young changed from being paid a straight salary to a base plus incentive pay plan. However, the evidence does not show that this change, which was implemented over a period of months, was linked to Young's signing of the noncompetitive agreement. Further, the promises in the second covenant as to the rate of compensation, employee expense reimbursement, vacation and sick leave are all stated to be in the discretion of the Board of Directors, state no figures, and are so illusory that they could not provide consideration for the second covenant. *Whittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824 (1989).

We also find that the thirty day notice provision in the second noncompetitive covenant signed by Young does not in this case create compensation. The provision stated that thirty days notice "shall" be given by either party rather than "may" be given as in Young's first contract. Mastrom argues that this guarantees a month's wages before termination and serves as consideration for the second covenant. However, Mastrom did not follow the thirty day provision. Young wrote Mastrom on 11 December 1984 of his intention to resign effective 31 January 1985, which he noted allowed for the thirty day notice required in his contract. Mastrom's vice president, G. Monroe Wilson, wrote Young on 20 December 1984 that he was immediately relieved of his duties and would be paid "normal pay for December and severance pay in lieu of the stated thirty (30) days notice." Since Mastrom did not follow the termination provision of the second covenant, the mutual exchange of promises regarding notice would serve as consideration only for that particular provision, and would not support the entire agreement. *See Collier Cobb & Assoc. v. Leak*, 61 N.C. App. 249, 300 S.E.2d 583 (1983).

[2] Because we find that none of the three employees' noncompetitive agreements were supported by consideration, we need not address the other grounds cited by the trial court as bases for holding the agreements unenforceable. However, we do observe

that the fact that the employees did not possess unique trade secrets as a result of their employment with Mastrom cannot properly serve as a basis for holding the covenants invalid. Customers developed by an employee are the property of the employer and may be protected by a valid covenant not to compete. *Whittaker General Medical Corp. v. Daniel, supra; United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 370 S.E.2d 375 (1988).

For the foregoing reasons, the decision of the trial court is

Affirmed.

Judges PARKER and GREENE concur.

CHARLES FLOYD v. N.C. DEPARTMENT OF COMMERCE

No. 8910SC1033

(Filed 19 June 1990)

State § 12 (NCI3d)— state employee—dismissal for insubordination—sufficiency of evidence

There was substantial evidence to support petitioner bank examiner's dismissal for insubordination where it tended to show that petitioner took sick leave one week rather than carry out his assignment to examine consumer finance companies in cities several hours from his home; on one occasion he reported commute time from his field assignment to a doctor in Raleigh and back again as travel time in violation of established policy; and he used regular work hours, during which his next assigned office was closed, to conduct personal business in violation of the established policy on vacation and sick leave.

Am Jur 2d, Public Officers and Employees §§ 247-250.

APPEAL by petitioner from judgment entered 5 April 1989 by *Judge A. Leon Stanback* in WAKE County Superior Court. Heard in the Court of Appeals 4 April 1990.

Petitioner Charles Floyd was employed as a Bank Examiner I by the Banking Commission within the North Carolina Depart-

ment of Commerce. His position included examining consumer finance companies across the state for compliance with a variety of state and federal laws and regulations. On the date of his dismissal, Floyd had worked in the Department of Commerce for more than fourteen years.

Reitzel Deaton, Floyd's supervisor, assigned him to examine consumer finance companies in Yadkinville, Wilkesboro and Elkin during the week of 7 April to 11 April 1986. On Monday, 7 April, upon learning of his assignment, Floyd began reviewing the master list of finance companies needing examinations in an effort to stay closer to Raleigh because of illness in his family. Deaton informed Floyd that his field assignment could not be changed. Floyd then met with Mr. Hal Lingerfelt, the Deputy Commissioner of Banks, and Mr. James A. Currie, the Commissioner of Banks. Currie ordered Floyd to proceed with his field assignment or to take sick leave. Floyd took sick leave the afternoon of 7 April and the remainder of that week, 8 April to 11 April.

Petitioner was assigned to examine finance companies in Burlington the week of 14 April 1986. He had approved sick leave on Wednesday 16 April to see his doctor in Raleigh. Floyd commuted from Burlington to Raleigh on 15 April and from Raleigh back to Burlington on 17 April and reported this commute time on his April time sheet as travel time.

The week of 21 April 1986, Floyd was assigned to examine one finance company in Jacksonville and five finance companies in New Bern. Floyd completed his work in Jacksonville at approximately 3:00 p.m. on 21 April and returned to Raleigh rather than continuing to New Bern. On the morning of 22 April, he returned to New Bern before his next assigned office opened at 1:00 p.m. Floyd did not notify the Raleigh office of his return trip to Raleigh on 21 April or his stay in Raleigh on the morning of 22 April.

On 6 May 1986, a pre-dismissal conference was held and on 7 May 1986, Currie notified Floyd in writing that his employment was terminated for failure to carry out his work assignments as directed. The dismissal letter set out Floyd's acts of insubordination as follows:

> Monday, April 7, 1986, you were present at a meeting with Mr. Lingerfelt and me to discuss your refusal to perform field assignments for that week. You refused to go to Yadkinville

that day as required and opted to use leave for the remainder of the week rather than resign. On April 14 and 17, you commuted from Burlington to Raleigh for your personal convenience, traveling during working hours, in violation of this office's long standing policy on commuting and resulting in loss of productive work hours. On April 21 you returned to Raleigh from Jacksonville, without permission or notice, rather than continuing your assignments at New Bern. This resulted in loss of productive work time and your being out of touch with this office; compounded by your moving (without permission) Friday's assignment to Wednesday. Thus your whereabouts for that week were unknown for two days.

Floyd petitioned for and received a hearing before an Administrative Law Judge of the State Personnel Commission. The A.L.J. recommended that the State Personnel Commission uphold respondent's decision to dismiss Floyd for insubordination. The full State Personnel Commission modified several of the A.L.J.'s legal conclusions, but adopted the recommendation that Floyd's dismissal be upheld. Floyd sought judicial review of the Personnel Commission's decision in Wake County Superior Court. From a judgment affirming the decision of the State Personnel Commission, petitioner appeals.

Genevieve C. Sims for petitioner appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for respondent appellee.

ARNOLD, Judge.

Petitioner Floyd contends that the superior court judge erred in affirming the State Personnel Commission's decision and order because it was not supported by substantial evidence. A permanent employee subject to the State Personnel Act may only be discharged for just cause. N.C. Gen. Stat. § 126-35. According to State Personnel Commission regulations promulgated pursuant to N.C. Gen. Stat. § 126-35, disciplinary action including dismissal can be imposed on the basis of either job performance or personal conduct. N.C. Admin. Code tit. 25, r.01J.0604. Petitioner was dismissed for personal misconduct in the form of insubordination. Insubordination is a willful failure or refusal to comply with known policies and procedures. *Kandler v. Dept. of Correction*, 80 N.C. App. 444, 451, 342 S.E.2d 910, 914 (1986).

Petitioner Floyd does not contest the agency's findings as to his conduct in April 1986. Rather, he argues that his conduct did not constitute insubordination. Therefore, the question before us is whether there is substantial evidence in the whole record to support the Commission's conclusions that petitioner's conduct constituted insubordination.

Initial judicial review of administrative agency decisions is governed by N.C. Gen. Stat. § 150B-51(b). Under § 150B-51(b)(5), the initial reviewing court, here, the superior court, applies the "whole record" test to determine if the agency's findings and conclusions are supported by substantial evidence in light of the whole record.

Appellate judicial review of the decision of the lower court is governed by N.C. Gen. Stat. § 150B-52. The scope of review to be applied by this Court is the same as for other civil cases. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988). Our review is, therefore, limited to determining if the superior court made any errors of law. *Id.* To make this determination, we must decide whether the superior court was correct as a matter of law in holding that the State Personnel Commission's decision and order was supported by substantial evidence in light of the whole record. *See id.*

> The "whole record" test does not permit the reviewing court to substitute its judgment for the agency's as between two reasonably conflicting views; however, it does require the court to take 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."

Watson v. N.C. Real Estate Comm., 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987) (quoting *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982)). Ultimately, the whole record test is a means to determine if the administrative decision had a rational basis in the evidence. *Henderson* at 531, 372 S.E.2d at 890.

The Commission made three conclusions of law that form the basis of its decision to uphold petitioner's dismissal. First, the Commission adopted the A.L.J.'s first conclusion of law, which stated:

> The respondent had just cause to dismiss the petitioner for personal misconduct in the form of insubordination on April 7, 1986 when the petitioner willfully refused to accept a reasonable work assignment, to examine certain consumer finance companies in Yadkinville, Wilkesboro and Elkin.

The facts surrounding Floyd's assignment for the week of 7 April and his unsuccessful efforts to convince his superiors to change that assignment are uncontested. Floyd argues, however, that his conduct in not carrying out the assigned work was not a willful failure to comply with known policies and procedures, *Kandler* at 451, 342 S.E.2d at 914, for two reasons. He contends first that Currie, the Commissioner of Banks, gave him the option of proceeding with the assignment or taking sick leave and second, that he had been allowed in the past to change his assignment when he had personal or transportation problems.

Were this question before us for de novo review, we might find, in light of past department practice and Currie's proposal that Floyd take leave rather than going on the assignment, that Floyd's failure to carry out this assignment was not insubordination. However, the "whole record" test is not a tool of judicial intrusion and we are not permitted to replace the agency's judgment with our own even though we might rationally justify reaching a different conclusion. *Henderson* at 535, 372 S.E.2d at 892. There is evidence in the record that both Deaton and Currie told Floyd on the morning of 7 April that his field assignment for that week could not be changed. This statement of current departmental policy is sufficient to support the Commission's conclusion that Floyd's failure to carry out that assignment was insubordination.

Next, the Personnel Commission concluded that petitioner's actions in reporting his commute time on 15 and 17 April as part of his travel time because of approved sick leave on 16 April was in violation of established policy. Floyd does not contest that he reported his commute time as travel time, but argues that that action did not violate policy. The Banking Commission's policy on travel time is set out in a March 1984 memo and states in part:

> Is commute mileage time to be reported as part of a day's travel time?

> Yes, on official commutes (either from Raleigh or an official lodging location) . . . . Commutes for your own convenience also should not be reflected as travel time.

The policy regarding "commutes for your own convenience" does not explicitly state its application to circumstances where an employee has approved midweek sick leave in Raleigh during a week he is assigned to another part of the state. However, the Personnel Commission could reasonably conclude that a commute to visit a doctor was for the employee's personal convenience within the meaning of the policy and therefore that Floyd's actions in reporting his commute time as travel time was in violation of established policy.

Finally, the Personnel Commission concluded that petitioner's absence without approved leave from his work stations in Jacksonville and New Bern on 21 and 22 April constituted personal misconduct. Floyd does not contest that he returned to Raleigh from Jacksonville on the afternoon of 21 April and did not arrive in New Bern until 11:00 a.m. on 22 April. He argues that department policy allowed examiners to use unproductive time, such as the morning of 22 April when his next assigned office was closed, for personal business. The Banking Commission's policy on vacation and sick leave is set out in a March 1984 memo and provides formal procedures for requesting leave time. Whether formal policy on leave was strictly followed in situations where an examiner had several hours before an office opened, as occurred on 22 April, is unclear. However, the Personnel Commission could reasonably conclude from the March 1984 memo that Floyd violated policy by conducting personal business during work hours without approved leave.

We hold that the Superior Court did not err in affirming the State Personnel Commission's decision and order, which was supported by substantial evidence in light of the whole record.

Affirmed.

Judges LEWIS and DUNCAN concur.

OHIO CASUALTY GROUP, PLAINTIFF v. CHRISTINE R. OWENS, JULIAN A. COLEMAN, ALAMANCE COUNTY HOSPITAL, GRAIN DEALERS MUTUAL INS. COMPANY, AND AMERISURE INSURANCE COMPANIES, DEFENDANTS

No. 8926SC689

(Filed 19 June 1990)

Insurance § 69 (NCI3d) — underinsured motorist coverage — reduction in benefit by amount of workers' compensation paid improper

Plaintiff automobile liability insurance carrier which provided uninsured/underinsured motorist coverage to defendant who was injured within the course and scope of her employment was not entitled to reduce its $50,000 limit in underinsured motorist coverage by the $20,392.70 in workers' compensation benefits paid by defendant insurance company. N.C.G.S. § 20-279.21(b)(4) and (e); N.C.G.S. § 97-10.2(f), (g) and (h).

Am Jur 2d, Automobile Insurance §§ 322, 326, 328.

APPEAL by defendants Amerisure Insurance Companies and Alamance County Hospital from Order of *Judge Frank W. Snepp, Jr.*, entered 2 February 1989 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 6 December 1989.

Hedrick, Eatman, Gardner & Kincheloe, by Scott C. Lovejoy, for plaintiff appellee.

William Benjamin Smith for defendant appellant, Christine R. Owens.

Carruthers & Roth, P.A., by Charles J. Vinicombe, for defendant appellants, Alamance County Hospital and Amerisure Insurance Companies.

COZORT, Judge.

Plaintiff Ohio Casualty Group (Ohio Casualty) initiated the case below to have the court declare its legal obligation to defendant Christine R. Owens.

On 22 May 1985, Ms. Owens, driving her automobile and acting within the course and scope of her employment, collided with a vehicle driven by Julian A. Coleman. He was insured by Grain Dealers Mutual Insurance Company (Grain Dealers), which has

stipulated that it is prepared to tender its policy limit of $25,000. Workers' compensation insurance for Ms. Owens' employer Alamance County Hospital was provided by Amerisure Insurance Companies (Amerisure). By 16 March 1987, Amerisure on behalf of Ms. Owens' employer had paid her $20,392.70 in medical expenses and compensation benefits.

At the time of the accident, Ms. Owens' automobile liability insurance contract with Ohio Casualty provided "uninsured/underinsured motorist coverage" to a maximum of $50,000. Under that provision she made a claim for $25,000 (the difference between her policy limit and the $25,000 payable by Coleman's liability insurer Grain Dealers). Ohio Casualty refused to pay that claim, tendering instead $4,607.30 as satisfaction in full of its obligation.

Ohio Casualty maintained that it was entitled to reduce its $50,000 limit in underinsured motorist coverage by the $25,000 in liability coverage payable by Grain Dealers and the $20,392.70 in workers' compensation benefits paid by Amerisure. Ohio Casualty based its position on the following provision in its contract with Ms. Owens:

> [D]amages under this [uninsured/underinsured motorist] coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury or property damage [to our insured] by or on behalf of persons or organizations who may be legally responsible . . . ; and
>
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. workers' compensation law; or
>
> b. disability benefits law.

On 12 May 1988, Ohio Casualty filed a complaint for declaratory judgment. After further pleadings, plaintiff Ohio Casualty and defendant Christine Owens made cross-motions for summary judgment. The trial court denied Ms. Owens' motion, granted Ohio Casualty's motion, and declared

> [t]hat Plaintiff's obligation and liability to the Defendant, Christine R. Owens, pursuant to their contract of insurance is $4,607.30 . . . representing the difference between the Plaintiff's $50,000.00 underinsured motorist coverage and the

> $25,000.00 of primary coverage heretofore tendered by . . . Grain Dealers [and the] $20,392.70, heretofore paid to . . . Christine R. Owens, by the Defendant, Amerisure . . . .

On appeal, the defendants contend that the trial court's order is contrary to North Carolina's Motor Vehicle Safety and Financial Responsibility Act and applicable case law. We agree.

The fundamental purpose of the Motor Vehicle Safety and Financial Responsibility Act of 1953, N.C. Gen. Stat. §§ 20-279.1 to -.39, "is to compensate the innocent victims of financially irresponsible motorists." *Nationwide Insurance Co. v. Aetna Casualty Co.*, 283 N.C. 87, 90, 194 S.E.2d 834, 836 (1973); *see also Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 625-26, 298 S.E.2d 56, 59 (1982), *cert. denied*, 307 N.C. 698, 301 S.E.2d 101 (1983) (purpose and scope of act). Although uninsured/underinsured motorist coverage can be specifically rejected by an insured, it is not voluntary insurance governed exclusively by the terms of the particular insurance contract. *Lichtenberger v. American Motorists Ins. Co.*, 7 N.C. App. 269, 272-73, 172 S.E.2d 284, 286-87 (1970); *Nationwide Ins. Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603-04 (1977). The provisions of the Motor Vehicle Safety and Financial Responsibility Act are, in effect, written "into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail." *Chantos*, 293 N.C. at 441, 238 S.E.2d at 604 (1977).

In the case below, Ms. Owens' contract with Ohio Casualty was a motor vehicle liability policy as defined in N.C. Gen. Stat. § 20-279.21. Her policy included uninsured/underinsured motorist coverage. Section 20-279.21(b)(4) provides, regarding such coverage, that

> Underinsured motorist coverage shall be deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. *Exhaustion of such liability coverage* for purpose of any single liability claim presented for underinsured motorist coverage shall be deemed to occur when either (a) the limits of liability per claim have been paid upon such claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage shall be deemed

to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant *pursuant to the exhausted liability policy.*

In any event, *the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance*; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-40-15(9) and (10). [Emphases added.]

Section 20-279.21(b)(4) allows an insurer to reduce its uninsured/underinsured coverage only by the amount of liability insurance in force at the time of the accident. Moreover, our courts have repeatedly held that where policy terms purporting to exclude certain risks from uninsured/underinsured coverage are in conflict with the provisions of the Motor Vehicle Safety and Financial Responsibility Act such exclusions are unenforceable. *See, e.g., Indiana Lumbermens Mutual Insurance Co. v. Parton*, 147 F. Supp. 887 (M.D.N.C. 1957); *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. review denied*, 316 N.C. 731, 345 S.E.2d 387 (1986).

The Legislature's intent with regard to N.C. Gen. Stat. § 20-279.21(b)(4) is plain when it is read in conjunction with the Workers' Compensation Act. N.C. Gen. Stat. § 97-10.2 provides for the subrogation of the workers' compensation insurance carrier (here Amerisure) to the employer's right, upon reimbursement of the employee, to any payment, including uninsured/underinsured motorist insurance proceeds, made to the employee by or on behalf of a third party as a result of the employee's injury. Section 97-10.2 reads, in pertinent part, as follows:

(f) (1) If the employer has filed a written admission of liability for benefits under this Chapter with . . . the Industrial Commission, then any amount obtained by any person by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be dis-

bursed by order of the Industrial Commission for the following purposes and in the following order of priority:

a. First to the payment of actual court costs taxed by judgment.

b. Second to the payment of the fee of the attorney representing the person making settlement or obtaining judgment, and except for the fee on the subrogation interest of the employer such fee shall not be subject to the provisions of § 90 of this Chapter [G.S. 97-90] but shall not exceed one third of the amount obtained or recovered of the third party.

c. *Third to the reimbursement of the employer for all benefits by way of compensation or medical treatment expense paid or to be paid by the employer* under award of the Industrial Commission.

d. Fourth to the payment of any amount remaining to the employee or his personal representative.

* * * *

(g) *The insurance carrier affording coverage to the employer under this Chapter shall be subrogated to all rights and liabilities of the employer* hereunder but this shall not be construed as conferring any other or further rights upon such insurance carrier than those herein conferred upon the employer, anything in the policy of insurance to the contrary notwithstanding.

(h) *In any proceeding against or settlement with the third party, every party to the claim for compensation shall have a lien to the extent of his interest under (f) hereof 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.* Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal represent-

> ative join therein; provided, that this sentence shall not apply if the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee. [Emphasis added.]

Applied to the case below, N.C. Gen. Stat. § 20-279.21(b)(4) mandates that Ms. Owens recover $25,000 from Ohio Casualty (the difference between the $50,000 maximum in uninsured/underinsured motorist coverage for which she contracted and the $25,000 in liability insurance payable to her from Grain Dealers). Pursuant to § 97-10.2 defendant Amerisure will have a lien on these insurance proceeds for $20,392.70 in workers' compensation benefits already paid to Ms. Owens on behalf of her employer, defendant Alamance County Hospital. Thus, she will recover a net total of $50,000.

Plaintiff Ohio Casualty contends that, notwithstanding §§ 20-279.21(b)(4) and 97-10.1(f), (g), and (h), it is entitled to reduce the coverage it contracted to provide by the $20,392.70 in workers' compensation benefits paid to defendant Christine Owens. Plaintiff's argument is based on N.C. Gen. Stat. § 20-279.21(e) and *Manning v. Fletcher*, 324 N.C. 513, 379 S.E.2d 854 (1989).

Section 20-279.21(e) provides that a

> motor vehicle liability policy need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law nor any liability for damage to property owned by, rented to, in charge of or transported by the insured.

Our Supreme Court has noted that two "public policies are inherent in N.C.G.S. § 20-279.21(e). First, the section *relieves the employer of the burden of paying double premiums* (one to its workers' compensation carrier and one to its automobile carrier), and second, the section denies the windfall of a double recovery to the employee." *Manning*, 324 N.C. at 517, 379 S.E.2d at 856 (emphasis added).

As *Manning* recognized, § 20-279.21(e) is directed at automobile liability policies secured by employers for the benefit of their employees. At issue in *Manning* was a liability policy including uninsured/underinsured motorist coverage that had been provided by an employer. In the case below, by contrast, Ms. Owens, not her employer, contracted and paid for uninsured/underinsured motorist coverage. Because she is provided this coverage only by

her own liability insurance policy and because of Amerisure's lien on insurance proceeds in the amount of workers' compensation benefits it has provided, Ms. Owens will not recover twice for the same injury. Thus, plaintiff's reliance on *Manning* is misplaced.

For the reasons stated above, the trial court's order of 2 February 1989 is reversed and the cause remanded for the entry of judgment for defendants Owens, Alamance County Hospital, and Amerisure Insurance Companies on the issue of plaintiff's liability pursuant to the insurance contract.

Reversed and remanded.

Judges JOHNSON and LEWIS concur.

BOBBY DEAN RUCKER AND WIFE, JAQUITHA MELISSA HUSKEY RUCKER, PLAINTIFFS v. TED HUFFMAN AND WIFE, GINGER N. HUFFMAN, DEFENDANTS

No. 8927DC982

(Filed 19 June 1990)

1. **Contracts § 21.2 (NCI3d)— house built by defendant—water accumulation underneath—breach of contract**

The trial court did not err in concluding that defendant breached a contract with plaintiffs to correct a problem with water accumulation under a house built by defendant and sold to plaintiffs.

Am Jur 2d, Contracts §§ 375, 377; Vendor and Purchaser §§ 330, 332.

2. **Contracts § 29.2 (NCI3d)— house built by defendant—breach of contract—award of damages proper**

In an action for breach of contract to correct a water accumulation problem under a house built by defendant and sold to plaintiffs, the trial court's unchallenged finding as to cost of repair was sufficient to support its conclusion as to an award of damages.

Am Jur 2d, Damages § 420.

3. Unfair Competition § 1 (NCI3d)— house built by defendant—water accumulation underneath—misrepresentation by defendant—inadequate repair—unfair or deceptive trade practice

In an action to recover for breach of contract to correct a water accumulation problem under a house built by defendant and sold to plaintiffs, the trial court did not err in concluding that defendant's actions constituted an unfair or deceptive trade practice where the record revealed that defendant was a licensed contractor; he represented that the problem with water standing under the house was small when in fact it was quite significant; and defendant's sole attempt to repair the problem was unsuccessful and defendant refused to attempt further repairs. N.C.G.S. § 75-1.1.

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

APPEAL by defendant Ted Huffman from judgment entered 18 April 1989 in CLEVELAND County District Court by *Judge George W. Hamrick*. Heard in the Court of Appeals 7 March 1990.

On 21 January 1987 plaintiffs entered into a contract with defendants for the sale of a house and lot in a subdivision near Kings Mountain, North Carolina. The house was being constructed by defendant Ted Huffman. Prior to purchase, defendant Ted Huffman told plaintiffs that there was a small problem of water coming under the house, but that he would take care of it and that it was not anything major. Plaintiffs moved into the house in March 1987 and after the first rain they observed a foot and a half of water standing under the house. Defendant made one attempt to fix the problem; however, water continues to accumulate under the house and stands on the surface for several days after each rain.

Following a non-jury trial, defendant Ginger Huffman was dismissed as a party to the action and plaintiffs were awarded $1,500.00 in damages against defendant Ted Huffman for breach of contract, trebled for unfair trade practices. Defendant Ted Huffman appeals.

Hamrick, Mauney, Flowers & Martin, by Fred A. Flowers, for plaintiff-appellees.

Brenda S. McLain for defendant-appellant.

WELLS, Judge.

In his first two assignments of error defendant argues that the trial court erred in finding sufficient evidence of breach of contract and in finding that there was sufficient evidence to support an award of damages. We note initially that defendant has not excepted to any of the trial court's findings of fact. It is settled law that findings of fact not excepted to are conclusive on appeal; therefore, the sufficiency of the evidence is not before us in this case. *In re Caldwell*, 75 N.C. App. 299, 330 S.E.2d 513 (1985). Pursuant to App. R. 10(a), our scope of review is limited to whether the findings of fact support the conclusions of law and whether the judgment is supported by the findings and conclusions.

[1] Defendant first argues that the trial court erred in finding that defendant breached a contract with plaintiffs to correct a problem with water accumulating under plaintiffs' house. The exception on which this assignment of error is based is actually and correctly labeled a conclusion of law. Accordingly, we limit our review to whether the findings support this conclusion.

In determining that defendant had breached his duty to repair the water problem associated with plaintiffs' house the trial court found the following:

> 2. That the defendant, Ted Huffman, is a licensed contractor . . . [and that he and his wife] executed a deed to the plaintiffs for Lot No. 11, Block "A" in Williamsburg Subdivision area near Kings Mountain, ...
>
> 3. That the defendants entered into a Contract of Sale of a residence located on the lot referred to above to the plaintiffs, and that [the] transaction and loan was [sic] closed about March 16, 1987.
>
> 4. That the defendant, Ted Huffman, told the plaintiffs that there was a small water problem with the lot and foundation but that he would fix it, ...
>
> 5. That after the sale of the house, water continued [sic] to accumulate under the house and stands on the surface for several days following each rain and that it has been doing so for about a year. . . .
>
> 6. That the water came in on the east side and ran to the west side and puddles up and at times the plaintiff has to

siphon water from under his house and uses three water hoses to siphon the water.

. . .

8. That after closing the sale, the plaintiff notified the defendant and complained about the water problem under the house.

. . .

In addition to these findings the trial court "concluded" that defendant had not repaired and remedied the water problem. This conclusion, more accurately labeled a finding of fact, in combination with the other findings, supports the trial court's conclusion of law that defendant breached his duty to repair the water problem as promised. This assignment of error is overruled.

[2] Defendant also contends that there is insufficient evidence to support an award of damages. We disagree. In addition to the findings of fact previously listed, the trial court also found that "the cost of making repairs to the house to prevent the water from puddling under it is about $1,500." Again, defendant has not challenged *any* of the trial court's findings, including this one. Consequently, it is binding on appeal. The court's unchallenged finding as to cost of repair is sufficient to support its conclusion as to an award of damages. This assignment is overruled.

[3] In his final assignment of error defendant contends that the trial court erred in concluding that defendant's actions constituted an unfair or deceptive trade practice in violation of N.C. Gen. Stat. § 75-1.1 (1988). We disagree.

The plaintiffs alleged in their second cause of action that defendant knew at the time the residence was delivered and surrendered to the plaintiffs that a water problem existed and that defendant had represented to plaintiffs that the residence was without substantial defect. The plaintiffs further alleged that the representation that the residence was without substantial defect amounted to bad faith and that the transaction was an unfair trade practice.

G.S. § 75-1.1(a) declares unlawful ". . . unfair or deceptive acts or practices in or affecting commerce. . . ." Whether a trade practice is unfair or deceptive usually depends on the facts of each case and the impact the practice had in the marketplace. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980). The

terms "unfair" and "deceptive" are not defined in the statute; however, prior decisions of our Supreme Court have established what, as a matter of law, constitutes an unfair or deceptive trade practice. *Id.* (Noting that similarity in language between Section 5(a)(1) of the Federal Trade Commission Act and G.S. § 75-1.1 makes reliance on federal decisions interpreting the Act appropriate for guidance in construing our statute.) *See also Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981). The Court in *Johnson* also notes that the language of the statute contemplates two distinct grounds for relief and that while an act or practice which is unfair may also be deceptive, or vice versa, it need not be so in order for there to be a violation. *Johnson, supra.* Finally, bad faith on the part of defendant is irrelevant in an alleged violation of G.S. § 75-1.1. *Marshall, supra.* It is the effect of defendant's conduct on the consuming public, and not his intent, that is the relevant consideration for the court. *Id.*

Defendant first contends that his conduct is not within the scope of G.S. § 75-1.1. We disagree. Defendant argues that the sale of the residence in this case was a transaction between private parties and did not involve trade or commerce within the context of the statute. While it is true that private parties involved in the sale of a residence do not come within the purview of this statute, *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988), residential developers are clearly involved in trade or commerce and are subject to claims of unfair trade practices. *See, e.g., Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981) (conduct of residential subdivision developers is within scope of G.S. § 75-1.1). The record in this case reveals that defendant is a licensed contractor and that he built the residence that he sold to plaintiffs. For the purposes of G.S. § 75-1.1 defendant's conduct is within the scope of the statute.

Defendant also contends that the facts in this case do not rise to the level of a deceptive or unfair trade practice. He asserts that because he disclosed to plaintiffs that there was a small problem with water coming under the house that plaintiffs were not deceived.

The trial court concluded that defendant had violated the statute's prohibition against unfair or deceptive trade practices by making a deceptive and fraudulent statement at the time the residence was sold. Our Supreme Court has determined that as

contemplated by Chapter 75 the concept of unfairness is broader than and includes the concept of deception. *Johnson, supra.* Here the trial judge found that defendant's conduct was deceptive. As we have previously noted, however, it is not necessary that an act or practice be *both* unfair *and* deceptive in order to be violative of the statute. *Id.* In determining whether a representation is deceptive, its effect on the average consumer is considered, and proof of actual deception is not required. *Id.* If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. *Id.* Generally, a consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to establish an unfair or deceptive act under G.S. § 75-1.1. *Marshall, supra, citing Johnson, supra.*

In this case the trial court found the following: Defendant, a licensed contractor and builder of the residence in question, represented to the plaintiffs that there was a small water problem with their lot and foundation, but that defendant would fix it. Plaintiffs, relying on this statement, proceeded with the purchase of the house and lot. Rather than water being a small problem, the record shows that the water accumulates under plaintiffs' house in significant amounts and stands on the surface for several days following each rain. Defendant's sole attempt to repair the problem was unsuccessful and defendant refuses to attempt further repairs. Based on these facts, the trial court concluded that defendant's actions violated the statute. Clearly, defendant's representation that the problem with water standing under the house was small when, in fact, it was quite significant, had the capacity or tendency to mislead the average consumer.

The purpose of G.S. § 75-1.1 is consumer protection. Our courts have previously stated that the statute applies to dealings between buyers and sellers at all levels of commerce and was enacted because no other legal remedies were adequate or effective in dealing with this type of problem. *See generally United Virginia Bank v. Air-Lift Associates, Inc.*, 79 N.C. App. 315, 339 S.E.2d 90 (1986). (Citations omitted.) We hold that the trial court's finding of a deceptive trade practice and its award of treble damages should be affirmed.

For the reasons stated, we find no error in the trial below.

No error.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. JEFFREY BRYAN NICHOLSON

No. 8922SC871

(Filed 19 June 1990)

1. **Rape and Allied Offenses § 5 (NCI3d)— attempted first degree rape—insufficiency of evidence**

Evidence was insufficient to submit a charge of attempted first degree rape to the jury where the evidence tended to show that defendant entered the home of the victim, held a gun to her head, carried her to various rooms in her house, and then gave the victim the gun and apologized after she ran outside her house, but there was no evidence that would give rise to a reasonable inference that the attack on the victim was sexually motivated or that defendant at any time had the intent to gratify his passion on the victim.

Am Jur 2d, Rape §§ 88, 89.

2. **Kidnapping § 1.2 (NCI3d)— no evidence of lesser offense of false imprisonment**

The trial court did not err in failing to instruct on and submit to the jury the offense of false imprisonment as a lesser included offense of second degree kidnapping where defendant was charged with restraining the victim for the purpose of terrorizing her; the State's evidence unerringly pointed to a purpose to terrorize the victim in defendant's act of grabbing her at gunpoint and telling her that he was going to kill her; the jury clearly rejected defendant's testimony that the whole incident was a misunderstanding; and there was thus no evidence supporting the lesser included offense.

Am Jur 2d, Abduction and Kidnapping §§ 14, 27, 32.

3. **Arrest and Bail § 197 (NCI4th)— bail revoked during trial—no new conditions set—defendant not entitled to mistrial**

The trial court did not err in denying defendant's motion for a mistrial after the court revoked bail during trial and

failed to impose new conditions for bail as set forth in N.C.G.S. § 15A-534(f), where the court's action was taken at the end of the first day of trial, after the victim had testified and after the jury had been excused for the evening; when defendant was brought to court the next day, he was not in shackles or dressed in prison garb and was not escorted by a deputy sheriff; and the trial court's action did not affect defendant in the preparation and defense of his case to his prejudice.

Am Jur 2d, Bail and Recognizance § 27.

APPEAL by defendant from Judgments of *Judge James C. Davis* entered 13 April 1989 in IREDELL County Superior Court. Heard in the Court of Appeals 15 February 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Randy L. Miller, for the State.

D. Blake Yokley for defendant appellant.

COZORT, Judge.

Defendant appeals from jury verdicts finding defendant guilty of second-degree kidnapping and attempted first-degree forcible rape. We vacate the conviction for attempted first-degree rape but find no error in the conviction for second-degree kidnapping.

The State's evidence presented at trial tended to show the following: On the morning of 10 October 1988, defendant rang the doorbell of the residence of Betty Jean Thompson to ask for a bandage for his finger. Ms. Thompson knew defendant as her neighbors' son-in-law and had known defendant's wife since the wife was a child. Ms. Thompson gave defendant a bandage, and defendant left. Approximately twenty minutes later, defendant returned and asked for some matches. While Ms. Thompson was in the kitchen looking for matches, defendant entered the house and grabbed her by placing his left arm around her neck and shoulder. In his right hand was a pistol which he pointed toward her head. Defendant told Ms. Thompson that he was going to kill her and forced her to walk from the kitchen into the living room, where she either fell or slid down onto the floor. She asked him why he was doing this to her. Defendant never spoke but jerked her up from the floor, placed his hands under her legs and picked her up, and began to carry her across the living room toward

the back of the house where the bedrooms and bathrooms were located. Ms. Thompson then screamed and she either fell or was dropped to the floor, and defendant then slammed himself down on top of her. Defendant then began to cry, and Ms. Thompson wiggled free and ran outside. Defendant followed her, told her he was sorry, and handed her the gun. Defendant was later arrested.

Defendant's version of the events was that he had gotten the gun from his house earlier because he had seen a German Shepherd near the house and he was going to shoot it. When he came back outside with the gun, the dog was gone, and defendant put the gun in his pocket. Defendant then went back inside and started washing dishes but cut his finger. He proceeded to the Thompson residence, gun in hand because he thought he might see the dog again. He received a bandage from Ms. Thompson and returned home. Later he was cold and decided to light a kerosene heater but could not find any matches. He again went to the Thompson residence (with the gun) and asked Ms. Thompson for matches. Ms. Thompson asked him in and he followed her into the kitchen. When she turned around to give him the matches, she saw the gun, panicked, and began to run. They collided in the ensuing confusion; defendant tried to grab her arm and explain. He told her he was not going to hurt her and began crying. After Ms. Thompson ran outside, defendant told her he was sorry he had scared her and gave her the gun.

[1] By his first assignment of error defendant contends that the trial court erred in denying his motion to dismiss the charge of attempted first-degree rape at the close of the State's evidence because there was insufficient evidence that defendant intended to rape his victim. We agree.

To prove the charge of attempted first-degree rape against defendant, the State was required to prove that defendant had the intent to have vaginal intercourse with the victim by force and against her will and that in the ordinary and likely course of events his assaultive acts would result in the commission of a rape. N.C. Gen. Stat. §§ 14-27.2, 14-27.6 (1989); *State v. Dowd*, 28 N.C. App. 32, 220 S.E.2d 393 (1975). Although the State is not required to show an actual physical attempt to have sexual intercourse with the victim, there must be substantial evidence that defendant had the intent to gratify his passion upon the victim notwithstanding any resistance on her part. *State v. Schultz*, 88

N.C. App. 197, 362 S.E.2d 853 (1987), *aff'd per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988). Viewing the evidence presented at trial in the light most favorable to the State, as must be done in considering defendant's motion to dismiss, we fail to discern any evidence that would give rise to a reasonable inference that the attack on the victim was sexually motivated or that defendant at any time had the intent to gratify his passion on the victim. The conviction for attempted first-degree rape must be vacated.

We note that, in vacating a conviction for attempted rape, this Court previously has remanded a similar case for sentencing for assault on a female. *See State v. Rushing*, 61 N.C. App. 62, 300 S.E.2d 445 (1983), *aff'd per curiam*, 308 N.C. 804, 303 S.E.2d 822 (1983). More recent decisions, however, have foreclosed that option. In *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987), our Supreme Court ruled that assault on a female is not a lesser included offense of attempted second-degree rape. Relying on *Wortham*, this Court has held that simple assault is not a lesser included offense of attempted second-degree rape. *State v. Robinson*, 97 N.C. App. 597, 389 S.E.2d 417 (1990). Therefore, there appears to be no lesser included offense for which defendant could be sentenced on remand.

Defendant next contends that the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping, because the alleged restraint forming the basis of the kidnapping charge was an inherent and inevitable feature of the alleged attempted rape and, therefore, convictions for both violated his constitutional rights against double jeopardy. Our decision to vacate the conviction for attempted first-degree rape renders this issue moot.

[2] Defendant further contends that the trial court erred in failing to instruct on and submit to the jury the offense of false imprisonment as a lesser included offense of second-degree kidnapping. As defendant did not request such an instruction, he would be barred from raising this alleged error on appeal, *see* N.C.R. App. P. 10(b)(2), unless the omission constituted "plain error." *See State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). Under the plain error rule, an appellate court will review defects in jury instructions despite the failure of a defendant to bring the defect to the attention of the trial court if the defect affected a substantial right. *State v. Rathbone*, 78 N.C. App. 58, 65, 336 S.E.2d 702, 706 (1985), *disc. review denied*, 316 N.C. 200, 341 S.E.2d 582 (1986).

Defendant must show that the omission was error and that, in light of the record as a whole, the error had a probable impact on the verdict. *State v. Bell*, 87 N.C. App. 626, 635, 362 S.E.2d 288, 293 (1987).

In *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986), the defendant was convicted of kidnapping to facilitate attempted second-degree rape and contended on appeal that the trial court erred in denying his timely request for an instruction on false imprisonment. The Supreme Court agreed, holding that the failure to instruct was error because there was evidence from which the jury could have concluded that defendant intended not to commit rape as charged but some other sexual offense. In *Whitaker*, there was no question about the unlawfulness of the restraint, only about the defendant's intent. In the case before us, defendant was charged with restraining the victim for the purpose of terrorizing her. The State's evidence unerringly pointed to a purpose to terrorize the victim in defendant's act of grabbing the victim at gunpoint and telling her that he was going to kill her. The jury clearly rejected defendant's testimony that the whole incident was a misunderstanding. There thus being no evidence supporting the lesser included offense of false imprisonment, the trial court did not commit plain error in failing to instruct the jury on false imprisonment.

[3] By his last assignment of error, defendant contends that the trial court erred in denying his motion for a mistrial after the court revoked bail during trial and failed to impose new conditions for bail as set forth in N.C. Gen. Stat. § 15A-534(f) (1989). Although the record does not disclose the court's reason for revoking bail, it does reveal that the court's action was taken at the end of the first day of trial, after the victim had testified and after the jury had been excused for the evening, and that, when defendant was brought into court the next day, he was not in shackles or dressed in prison garb and was not escorted by a deputy sheriff. Defendant fails to convince this Court that the trial court's action affected defendant in the preparation and defense of his case to his prejudice. We decline to order a new trial based on the record before us. This assignment of error is overruled.

As for defendant's conviction of second-degree kidnapping, we find no error in the trial below. We vacate the judgment for attempted first-degree rape.

No error in part, vacated in part.

Judges WELLS and LEWIS concur.

SHIRLEY SPARKS, PETITIONER v. NATIONWIDE MUTUAL INSURANCE CO., RESPONDENT

No. 8928DC1285

(Filed 19 June 1990)

Insurance § 69.4 (NCI3d)— hit-and-run accident—recovery against John Doe—insurer's refusal to defend—insurer's obligation to pay judgment

Where petitioner recovered a default judgment against John Doe, an unidentified hit-and-run driver, the trial court erred in determining that defendant insurer was not bound and obligated to pay the judgment, since petitioner was driving the automobile of the insured with the consent and approval of the insured when it was struck by the vehicle of another insured, that vehicle having been struck by the hit-and-run driver, and petitioner in all other respects complied with the requirements of N.C.G.S. § 20-279.21(b)(3)(b) so that she was entitled to benefit from uninsured motorist coverage; furthermore, petitioner was not required to name the insurer in her action against John Doe, only to give insurer notice, which she did; and respondent could not attempt to defend its prior election not to provide a defense to John Doe by alleging that service of process on John Doe was insufficient, as respondent had actual notice of the action. N.C.G.S. § 1-166.

Am Jur 2d, Automobile Insurance §§ 299-302, 330, 331, 335.

APPEAL by petitioner from order entered 15 September 1989 by *Judge Peter L. Roda* in BUNCOMBE County District Court. Heard in the Court of Appeals 30 May 1990.

Petitioner was involved in a motor vehicle collision in which a hit and run driver ran into the rear of a vehicle driven by John Thurman causing that car to strike the vehicle driven by petitioner. Petitioner received personal injuries as a result of the accident.

She initiated suit against Thurman and against John Doe, the unknown hit and run driver. The identity of the hit and run driver was never established. Service was obtained on John Doe by publication. At all times relevant, the owner of the car driven by petitioner, Jack Weatherford, and Thurman were insured by respondent, Nationwide Mutual Insurance Company. Respondent received the complaint of petitioner against John Doe, the hit and run driver and Thurman. Respondent provided a defense for Thurman but not Doe.

John Doe was severed from the lawsuit and judgment was entered by default against John Doe in favor of petitioner for the sum of $5,000.00. Petitioner filed a Petition for Declaratory Judgment seeking a declaration that respondent was bound and obligated to pay the judgment entered against John Doe. The trial court entered an order granting summary judgment for respondent. Petitioner appeals.

Moore, Lindsay & True, by Ronald C. True and William H. Leslie, for petitioner-appellant.

Robert G. McClure, Jr., P.A., by Frank J. Contrivo, for respondent-appellee.

LEWIS, Judge.

Petitioner contends: "The Court erred in entering an Order of Summary Judgment in favor of Respondent in that the same is contrary to G.S. 20-279.21 and applicable case law." That portion of the statute, entitled " 'Motor vehicle liability policy' defined," which is applicable for the case at bar, addresses uninsured motorist coverage.

> Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer.

N.C.G.S. § 20-279.21(b)(3)(b). Chapter 20, Article 9A of the General Statutes which contain the statute quoted above was adopted as the "Motor Vehicle Safety and Financial Responsibility Act of 1953." In interpreting this statute, this Court has stated: "To properly evaluate the effect of [the statute] . . . , it is necessary to understand

the policies behind . . . the North Carolina Financial Responsibility Act. . . ." *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 636, 313 S.E.2d 856, 859, *disc. rev. denied*, 311 N.C. 306, 317 S.E.2d 682 (1984).

> The primary purpose of the compulsory motor vehicle liability insurance required by North Carolina's Financial Responsibility Act is to compensate innocent victims who have been injured by financially irresponsible motorists. *Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964). Furthermore, the Act is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished. *Moore v. Insurance Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967).

Id., 313 S.E.2d 860. The following analysis will focus on the wording of the statute "liberally construed" and the extent to which petitioner complied with the statute.

The statute includes specific requirements which the "insured" must meet in order to benefit from "uninsured motorist coverage." N.C.G.S. § 20-279.21(b)(3)(b). Each requirement will be listed below in the words of the statute, and the manner in which petitioner complied with the statute will be specified.

(1) The liability insurance covers "the named insured and . . . any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies. . . ." N.C.G.S. § 20-279.21(b)(3)(b). [Petitioner was driving the automobile of the insured with the consent and approval of the insured.]

(2) The liability coverage must be with "an insurance carrier duly authorized to transact business in this State." N.C.G.S. § 20-279.21(a). [The parties stipulated that the insured was properly covered by respondent.]

(3) The "persons insured" driving the insured's vehicle must have "sustained bodily injury." N.C.G.S. § 20-279.21(b)(3)(b). [The parties stipulated that this was an action by petitioner for "damages for personal injuries."]

(4) "[T]he identity of the operator or owner of a vehicle . . . cannot be ascertained." *Id.* [The parties stipulated that the driver was a "hit and run driver."]

(5) "[T]he insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles." *Id.* [The parties stipulated "[t]hat the collision . . . was investigated at the scene, within 24 hours of the collision, by appropriate law enforcement officials."]

(6) "The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in such notice the time, date and place of such injury." Additionally, "[s]uit may not be instituted against the insurer in less than 60 days from the posting of the first notice of such injury . . . to the insurer. . . ." *Id.* [The parties stipulated that "the Petitioner placed Respondent on notice of Petitioner's claims for personal injuries more than 60 days prior to instituting suit as against Respondent's insured and the hit and run driver."]

(7) "[W]ithin 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer such further reasonable information concerning the accident and the injury as the insurer shall request." *Id.* [The parties stipulated that "the collision . . . was reported to Respondent and/or its agents within 15 days of the collision."]

Petitioner adhered to each of the requirements set forth in the statute. Respondent properly received petitioner's complaint but, even though respondent was granted ample opportunity to do so, respondent failed to provide a defense for the uninsured hit and run driver. Thereafter, a default judgment was entered against Doe.

Respondent contends that North Carolina has "no statutory scheme for default judgment against a fictitious person." North Carolina General Statute § 1-166 provides:

> When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name. . . .

The applicable statute for the case at bar is based upon the situation in which "the identity of the operator or owner of a vehicle . . . cannot be ascertained." N.C.G.S. § 20-279.21(b)(3)(b). This statute states that, in that situation, the plaintiff "*may* institute an action directly against the insurer." *Id.* (Emphasis added.) The statute

does not require that the insurer be a named party. The failure by the petitioner in this case to name the insurer as a party is not fatal. Since a major purpose of accurately identifying the defendant is to provide notice, and, in the case at bar, the insurer had actual notice of the action, respondent's argument is without merit.

Respondent also questions the service of process against John Doe which was accomplished by publication in the Black Mountain News once a week for three consecutive weeks. The notice indicated that the pleading against John Doe had been filed because of his "negligent operation of an automobile on the 25th day of March, 1987." Relying on Rule 4(k)(2) of the North Carolina Rules of Civil Procedure as it read at the time of the commencement of the underlying action, respondent states that this notice was inadequate because it contained "no description of 'John Doe' . . . nor . . . any description of the subject motor vehicle accident. . . ." The applicable Rule of Civil Procedure states: "If the defendant is unknown, he may be *designated by description* and process may be served by publication. . . ." (Emphasis added.) A challenge to the notice would have been appropriate at the time of the underlying action when respondent was already defending Thurman and had actual notice. Respondent could have elected to intervene pursuant to Rule 24 of the North Carolina Rules of Civil Procedure. However, at this point in the appeal, we note that respondent was provided with appropriate notice of the action and may not attempt to defend its prior election not to provide a defense to John Doe by alleging that "[s]ervice of process on 'John Doe' was insufficient."

Finally, respondent alleges that "The Motor Vehicle Safety and Financial Responsibility Act does not require that [the insurance company] provide a defense or indemnification for a fictitious 'John Doe.'" Therefore, respondent contends, it had no duty to defend because respondent was not named directly as a party in the underlying action. As discussed above, the statute states only that the insurer *may* be named directly in a suit against an unknown uninsured motorist. N.C.G.S. § 20-279.21(b)(3)(b). The statute does not require that the insurer be a named party. The statute does clearly intend for the insurer "to compensate the innocent victims of financially irresponsible motorists." *Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co.*, 283 N.C. 87, 90, 194 S.E.2d 834, 837 (1973). Petitioner strictly adhered to every requirement set forth by the

statute, and the ordinary meaning of the statute indicates that the insurer in this situation must compensate the victim of an automobile accident in which "the identity of the operator or owner of a vehicle . . . cannot be ascertained. . . ." N.C.G.S. § 20-279.21(b)(3)(b). "Where the language of a statute . . . is clear and its meaning unmistakable, there is no room for construction, but we merely follow the intention as thus plainly expressed." *State v. Norfolk Southern R.R. Co.*, 168 N.C. 103, 109, 82 S.E. 963, 966 (1914).

We reverse the granting of summary judgment in favor of the respondent and remand this action to the trial court.

Reversed and remanded.

Judges ORR and GREENE concur.

MARIE S. VON RAMM v. OLAF T. VON RAMM

No. 8914DC701

(Filed 19 June 1990)

1. **Rules of Civil Procedure § 60.4 (NCI3d)— motion to set aside denied—appeal—underlying judgment not reviewed**

Defendant's notice of appeal from the trial court's order denying his motion to set aside an earlier child support order referred only to the denial to set aside and therefore did not present the underlying judgment for review.

Am Jur 2d, Appeal and Error § 711.

2. **Appeal and Error § 450 (NCI4th)— child support—stipulation that appeal was proper—no jurisdiction conveyed by stipulation**

A stipulation by the parties that notice of appeal from two judgments was "timely and proper" could not confer jurisdiction on the Court of Appeals to review one judgment for which no proper notice of appeal was given.

Am Jur 2d, Appeal and Error §§ 723, 725.

3. Divorce and Alimony § 24.1 (NCI3d) — child support — mortgage payments not compelled

The trial court's judgment did not compel defendant to pay mortgage payments on the parties' home but instead allowed defendant to pay child support in the form of cash or mortgage payments, and the judgment was therefore proper.

Am Jur 2d, Divorce and Separation §§ 630, 1024, 1025, 1044.

APPEAL by defendant from judgment entered 30 January 1989 by *Judge Richard G. Chaney* in DURHAM County District Court. Heard in the Court of Appeals 10 January 1990.

Pulley, Watson, King & Hofler, P.A., by Tracy Kenyon Lischer and Donna B. Slawson, for plaintiff-appellee.

Maxwell, Martin, Freeman & Beason, P.A., by James B. Maxwell, for defendant-appellant.

GREENE, Judge.

Defendant appeals the trial court's 30 January 1989 judgment denying defendant's motion to set aside a 17 June 1988 judgment relating to child support payments.

The record shows that defendant was married to plaintiff when plaintiff filed a complaint for alimony *pendente lite*, child custody and support in 1984. The trial court entered an order granting plaintiff's request in 1984, including these conclusions of law:

> Based upon the incomes, estates, and accustomed standard of living of the parties, [defendant] should pay to [plaintiff], to provide her sufficient means whereon to subsist during the pendency of this suit . . . $1,124.00 . . . per month; . . . [defendant] should pay to [plaintiff] as child sup[p]ort the following: . . . $2,959.00 per month . . . [and] $1,835.00 per month, of said sum *may be discharged by paying directly, if [defendant] so elects, the current house payment* . . . (emphasis added).

At the time the court granted defendant's divorce prayer, plaintiff and two children of the marriage occupied the family residence at 3433 Dover Road.

Defendant also filed a complaint requesting absolute divorce, which the court granted in 1986, reserving for later resolution

the issue of equitable distribution. Trial of equitable distribution matters was in June, 1987, but prior to the court's entry of judgment, defendant filed a motion in the cause in October, 1987, requesting that the court modify the 1984 child support, alimony and child custody provisions. Plaintiff filed a response to defendant's motion and moved the court to hold defendant in contempt for failure to comply with the court's order to pay child school expenses, and plaintiff's medical and insurance expenses. The court heard argument concerning these motions in March, 1988.

The court entered equitable distribution judgment on 25 April 1988, which included a provision awarding plaintiff the house and lot at 3433 Dover Road.

On 17 June 1988, the trial court entered its order concerning defendant's motion to modify and for plaintiff's motion for contempt, in which it modified the 1984 judgment, reducing defendant's child support payments somewhat and concluding as matters of law that defendant should pay the expenses plaintiff requested in her contempt prayer and "[e]xcept where modified . . . all other Orders governing support and maintenance of the minor children remain in full force and effect."

Within 10 days of entry of this order, defendant filed a Rule 59 motion to set it aside. In December, 1988, the court heard the parties' argument concerning defendant's motion to set aside the judgment and plaintiff's motion for contempt. On 30 January 1989, the court entered an order denying defendant's motion to set aside and instead of assessing defendant in contempt, ordered him to pay back child support and alimony to plaintiff.

Defendant gave written notice of appeal on 3 February 1989:

> NOW COMES OLAF T. VON RAMM, the Defendant in the above captioned matter, through counsel, and hereby gives notice of appeal to the Court of Appeals of North Carolina from the [Judgment] entered on the 30th day of January, 1989, in the District Court of Durham County by The Honorable Richard G. Chaney in regard to issues surrounding the amount and manner of continuing payments of child support.

In the settled record on appeal, the parties stipulated that "[n]otice of Appeal from the judgments [of June 1988 and January 1989] was given in a proper and timely fashion."

Subsequent to docketing of the record on appeal, plaintiff moved this court to dismiss defendant's purported appeal from the 17 June 1988 judgment, asserting that defendant had appealed only from the 30 January 1989 judgment denying defendant's Rule 59 motion.

The issues are: (I) whether defendant's notice of appeal vested this court with jurisdiction to review the 17 June 1988 judgment; (II) whether the parties' stipulation to a notice of appeal can confer jurisdiction on a reviewing court; and (III) whether the trial court erred in denying defendant's motion to set aside the June 1988 judgment.

I

[1] Defendant contends that the language of his notice of appeal "made apparent" his intent to appeal from the June 1988 judgment in addition to the January 1989 order. We disagree.

Proper notice of appeal requires that a party "shall designate the judgment or order from which appeal is taken . . ." N.C.R. App. P. 3(d) (Cum. Supp. 1989). "Without proper notice of appeal, this Court acquires no jurisdiction." *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984). A court "may not waive the jurisdictional requirements of [federal appellate] Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L.Ed.2d 285, 291 (1988) (footnote omitted).

Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review. *Chapparal Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985) (appellant's appeal of the court's denial of appellant's Rule 60 motion to set aside entry of summary judgment did not include appeal of the underlying summary judgment against appellant); *see also Brooks* (notice of appeal from judgment of contempt against appellant did not infer appellant's intent to appeal from a subsequent judgment dismissing appellant's counterclaim).

Despite these principles, we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction over an apparently unspecified portion of a judgment. First, "a mistake in designating the judgment, or in designating

the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979), citing 9 *Moore's Federal Practice* § 203.17[2], 3-80-3-82 (2d ed. 1990) (footnotes omitted) (emphasis added). Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the "*functional equivalent*" of the requirement. *Torres*, at 317, 101 L.Ed.2d at 291 (overlooking a party's failure to comply with a federal notice of appeal requirement of designating the petitioner's name) (emphasis added).

We determine that this court has jurisdiction to review only appellant's appeal of the trial court's January 1989 order, which denies defendant's Rule 59 motion. On its face, defendant's notice of appeal fails to specify any other judgment or order. Furthermore, a reader cannot 'fairly infer' from the language of the notice of appeal that appellant intended also to appeal the June 1988 order which underlies defendant's Rule 59 motion. The January 1989 judgment addressed multiple child support issues, including both defendant's continuing child support obligations and his past unpaid obligations of child support raised by plaintiff's motion for contempt. Although defendant's notice of appeal refers to "issues surrounding the amount and manner of continuing payments of child support," this language clearly directs this court's review to the portion of the January 1989 judgment concerning current, rather than past, child support obligations, and it is not the 'functional equivalent' of designating the June 1988 judgment. We decline to adopt a torturous interpretation of the language beyond its obvious purpose of limiting our review to a single child support issue in the 1989 judgment from which defendant appeals. Thus, according to either of the two liberal readings of defendant's notice of appeal set out above, it failed to give notice of appeal from the June 1988 judgment.

We do not address the issue of whether plaintiff was misled by defendant's mistaken notice of appeal, since we reach that inquiry only if we can infer that defendant intended to appeal from a judgment not specifically designated.

II

[2] Defendant next contends that the parties' stipulation that notice of appeal from the "judgments" was "timely and proper" gives this court jurisdiction to review the June 1988 order. We disagree.

"Jurisdiction is the power of a court to decide a case on its merits . . ." *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953). Appellate Rule 3 requirements for specifying judgments are jurisdictional in nature. *Brooks*, at 707, 318 S.E.2d at 352. "[J]urisdiction cannot be conferred by consent, waiver, or estoppel . . . [j]urisdiction rests upon the law and the law alone. It is never dependent on the conduct of the parties." *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953) (citations omitted).

We determine that defendant's notice of appeal did not empower this court to review the trial court's June 1988 order. Even if we assume *arguendo* that the parties' stipulation encompasses the 1988 order, the stipulation cannot supplant the Rule 3 designation requirements of our appellate law.

III

[3] Defendant contends that the trial judge erred in denying defendant's Rule 59 motion because the 1989 judgment improperly compelled defendant to continue paying child support in the form of plaintiff's home mortgage payments. We disagree.

Defendant has no basis for arguing that the trial court erred because our review of the 1984 judgment shows that it allows defendant to elect whether to pay support in the form of mortgage payments and does not compel defendant to pay mortgage payments on the home.

Dismissed in part and affirmed in part.

Judges JOHNSON and PARKER concur.

IN RE PHILLIPS

[99 N.C. App. 159 (1990)]

IN THE MATTER OF: VERA PHILLIPS

No. 8913DC905

(Filed 19 June 1990)

Courts § 16 (NCI3d)— custody of minor transferred by one district court to another—no authority of court to transfer

The Bladen County District Court erred in transferring custody of a minor child from Bladen County DSS to Cumberland County DSS and in transferring the entire action to Cumberland County District Court since the child's legal residence when the proceeding was initiated was Bladen County, the county of her parents' residence; neither the child's parents' incarceration outside Bladen County nor the child's hospitalization outside Bladen County affected her legal residence; though the child's hospitalization may have been a change in circumstances warranting modification of prior orders, change in circumstances did not authorize the court to exceed its statutory authority; and Cumberland County District Court orders entered while the child was hospitalized in Cumberland County did not conflict with continued custody by Bladen County DSS or continued jurisdiction of her case in Bladen County. N.C.G.S. §§ 7A-523(a), 7A-524, 7A-558(b), 7A-647, 7A-664(a), 153A-257.

Am Jur 2d, Infants §§ 29, 33.

ON writ of certiorari from judgment entered 11 April 1989 by *Judge David Garrett Wall, Sr.* in BLADEN County District Court. Heard in the Court of Appeals 7 March 1990.

This is an appeal by the Cumberland County Department of Social Services ("Cumberland DSS") from an order entered in Bladen County District Court transferring custody of a minor child from Bladen County Department of Social Services ("Bladen DSS") to Cumberland DSS and transferring the entire action to Cumberland County District Court.

On 15 June 1987, the Bladen County District Court ordered Bladen DSS to assume custody of Vera, the minor child. Vera's parents, Ann and Sylvester Phillips, were subsequently sentenced to life imprisonment and placed in the custody of the North Carolina Department of Corrections without bond pending appeal. Bladen DSS retained custody of Vera from 15 June 1987 until entry of

the order of 11 April 1989 transferring custody to Cumberland DSS. During this period, Vera was declared a dependent juvenile.

On 20 January 1989, Bladen County Mental Health Center and Bladen DSS officials took Vera to Cumberland Hospital, a private psychiatric facility in Cumberland County, due to serious emotional and psychological problems. Vera was admitted to Cumberland Hospital pursuant to N.C. Gen. Stat. § 122C-221, which provides for voluntary admissions of minors to facilities for the mentally ill. As required by N.C. Gen. Stat. § 122C-224, a hearing was held in Cumberland County District Court within fifteen days of Vera's admission to the hospital. Judge James F. Ammons ordered that Vera receive further inpatient treatment at the hospital for a period not to exceed fifty-six days. Judge Ammons further ordered that Vera not visit with her parents during this period and ordered Cumberland DSS to determine what future placement was in Vera's best interest.

On 7 February 1989, Bladen DSS moved for a review of the prior orders of the Bladen County District Court with regard to Vera's custody and visitation with her parents. At the hearing on 30 March 1989, the day before Vera's anticipated discharge from the hospital, the court ordered that Bladen DSS retain custody of Vera and upon her discharge from the hospital, find a suitable placement. The court also ordered that Vera have no contact with her parents.

The night before Vera's planned discharge, she suffered a relapse. On 31 March 1989, a second hearing was held in Cumberland County District Court. Janice B. Blanks, a Bladen DSS social worker, was present at the hearing. Judge Sol G. Cherry ordered that Vera receive further treatment for a period not to exceed thirty days. He further ordered that Vera not visit with her parents in prison, that attorneys representing any parties not interview her without the express approval of the court, and that a Cumberland County guardian ad litem investigate the best future course for Vera.

On 4 April 1989, Bladen DSS moved in Bladen County District Court to transfer Vera's case to Cumberland County District Court. A hearing was held on 11 April 1989. At that hearing, Judge Wall ordered this action transferred to Cumberland County District Court, custody of Vera transferred to Cumberland DSS and relieved Bladen DSS of any further involvement in the action. From this order, Cumberland DSS appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debra K. Gilchrist, Amicus Curiae.

Thomas M. Johnson for appellee Bladen County Department of Social Services.

David L. Kennedy for appellant Cumberland County Department of Social Services.

ARNOLD, Judge.

The issue before us is the validity of the following portions of the trial court's order:

> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:
>
> 1. That this action be transferred to the Cumberland County District Court, Juvenile Division, for further dispositional proceedings and further monitoring of the situation of the minor child, Vera Phillips.
>
> 2. That legal and physical custody of the minor child, Vera Phillips, be, and is hereby, transferred to the Cumberland County Department of Social Services.

We hold that the trial court exceeded its authority in entering the quoted provisions of the 11 April 1989 order.

While the trial court's order does not specify the statutes relied upon as authority, the order does contain the following conclusions which the trial judge apparently thought were a sufficient basis for the order:

> 2. That there has been a material and substantial change of circumstances surrounding the minor child, Vera Phillips, and her welfare and best interests, to warrant a change in the prior Orders of this Court so as to transfer this action to the Cumberland County District Court. . . .
>
> 3. That . . . it is impossible for this Court to properly monitor and control the activities of [Vera] and . . . that the [Bladen DSS], and . . . the attorney advocate . . . [and] the guardian ad litem for [Vera], and the attorneys for the parents of [Vera] are further prevented from performing and carrying out their specific lawful duties.

> 4. That, should [Vera] need additional foster home placement away from her minor brother . . . , and since there are no such additional foster placement available in Bladen County at this time, that Cumberland County is also the more advantageous and convenient place to have jurisdiction and control of [Vera] and the action herein because such county is where the treatment facility whereat [Vera] is currently being treated and is also the county in which any additional foster placement should be made for [Vera].

First, although Vera's hospitalization may have been a change in circumstances warranting modification of the prior orders pursuant to N.C. Gen. Stat. § 7A-664(a), any modification must be within the court's statutory authority. Change in circumstances does not authorize a court to exceed its statutory authority.

Second, we see no conflict between the Cumberland County District Court orders pursuant to N.C. Gen. Stat. § 122C-221 *et seq.* on the one hand and the continued custody of Vera by Bladen DSS and jurisdiction of her case in Bladen County on the other. The Bladen DSS initially took Vera to Cumberland Hospital for treatment and presumably saw treatment there as being in her best interest. Furthermore, the Cumberland County District Court orders pursuant to N.C. Gen. Stat. § 122C-221 *et seq.* merely affected Vera during her hospitalization in Cumberland County. They had no effect on her beyond her hospitalization. In fact, by the terms of Bladen's own order of 30 March 1989, Bladen DSS was to find a suitable placement for Vera *upon her discharge* from the hospital.

Third, the 31 March 1989 Cumberland County order that Vera receive thirty additional days of inpatient treatment included a provision that attorneys representing any parties not interview Vera without the express approval of that court. Limiting contact with her parents' attorneys was a legitimate condition on Vera's continued hospitalization. Moreover, assuming that a primary purpose of interviews by her parents' attorneys was to seek visitation with Vera, the restriction on interviews with the attorneys was consistent with Bladen's own order of 30 March 1989, which had prohibited visits with her parents.

Fourth, that Bladen lacked a facility like Cumberland Hospital and a foster placement for Vera separate from her brother does not confer authority on the trial court to transfer her to Cumberland

County. We recognize that the trial judge may simply have been trying to place Vera in the setting best equipped to treat her. This effort must be made, however, within the limits of the court's authority.

The order itself does not reveal adequate statutory authority for the trial court's action and our review of other statutes has likewise revealed no basis for the order. Pursuant to N.C. Gen. Stat. § 7A-523(a), the Bladen County District Court acquired jurisdiction over Vera in June 1987 when Bladen DSS initiated proceedings alleging Vera to be "neglected." Pursuant to N.C. Gen. Stat. § 7A-524, the Bladen County District Court retained continuing jurisdiction of Vera's case. Neither N.C. Gen. Stat. §§ 7A-523 or 7A-524 vests the court with the authority to transfer its jurisdiction to Cumberland County District Court.

While N.C. Gen. Stat. § 7A-558(b) authorizes a judge to transfer a proceeding that was begun in a district other than a juvenile's residence to the district where the juvenile resides, this statute is not applicable here. Vera's legal residence when the proceeding was initiated was Bladen County, the county of her parents' residence. *See* N.C. Gen. Stat. § 153A-257(a). Neither her parents' incarceration outside Bladen County nor her hospitalization outside Bladen County affected her legal residence. *See id.* at (a)(2). The proceeding was begun in the county of Vera's residence, so the transfer mechanism of N.C. Gen. Stat. § 7A-558(b) was not triggered.

Finally, N.C. Gen. Stat. § 7A-647, entitled "Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile," does not authorize a transfer to Cumberland DSS.

The 11 April 1989 order of the Bladen County District Court is

Reversed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. RAY NOBLE TUGGLE

No. 8917SC756

(Filed 19 June 1990)

Searches and Seizures § 24 (NCI3d) — information from informants — sufficiency of showing of probable cause

An affidavit submitted by a deputy sheriff when he applied for a search warrant was sufficient to support the magistrate's finding of probable cause where the deputy stated that one confidential informant had provided him with information which had resulted in numerous convictions; the informant had within one week of the affidavit seen a lawn mower at defendant's house similar to one reported stolen; the informant stated that defendant was involved in trading cocaine for stolen property; a second informant, with little indicia of reliability, provided evidence that defendant had sold controlled substances approximately two years earlier; and a third informant, who claimed to be an eyewitness to the transactions, provided evidence that defendant had traded property for cocaine one month earlier.

Am Jur 2d, Searches and Seizures §§ 68, 69.

APPEAL by the State from Order of *Judge James M. Long* entered 5 April 1989 in ROCKINGHAM County Superior Court. Heard in the Court of Appeals 8 February 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State, appellant.

A. D. Folger, Jr., and Robert S. Cahoon for defendant appellee.

COZORT, Judge.

On 17 May 1988, Deputies Lindsey Watkins and Gene Nelson of the Rockingham County Sheriff's Department appeared before a magistrate and obtained a warrant to search the defendant's home and all vehicles on the premises. On the same day officers executed the search warrant, found and seized contraband, and arrested the defendant.

On 22 August 1988, the defendant was indicted for, among other offenses, feloniously possessing stolen goods, trafficking in cocaine, maintaining a dwelling house to keep or sell controlled

substances, maintaining a vehicle to keep or sell controlled substances, possessing cocaine with intent to sell, feloniously possessing marijuana, and possessing marijuana with intent to sell.

On 2 September 1988, the defendant moved to suppress all evidence seized as a result of the search. The trial court "conclude[d] that the search warrant issued and served on May 17, 1988 . . . was issued without probable cause, and . . . therefore, the fruits of that search and all evidence obtained [from the] search should be suppressed." The State appealed, contending that the court erred by applying an incorrect legal standard for determining the existence of probable cause.

The issue presented by the case below is whether the affidavit submitted by Deputy Sheriff Watkins when he applied for a search warrant was sufficient to support the magistrate's finding of probable cause under the Fourth Amendment of the United States Constitution and Article 1, Section 20 of the North Carolina Constitution. We hold that the affidavit did establish probable cause, and we reverse the trial court's order to the contrary.

Deputy Watkins swore to the following:

> On May 17, 1988, this Applicant received information from a Confidential & Reliable Source of Information relating to stolen property being on the property of Ray Tuggle. Said confidential and reliable source shall be referred to as CRS #1.
>
> Said CRS #1 has previously provided information to this Applicant which has resulted in numerous convictions in the District and Superior Courts of Rockingham County.
>
> That CRS #1 has personal knowledge of an International Cub Cadet riding lawn mower having been reported stolen to the Rockingham County Sheriff's Department on May 1, 1988. That this case report is Rockingham County Sheriff's Department case number 88-6425-5.
>
> That CRS #1 has had occasion to be upon the premises, specifically an outbuilding, of Ray Tuggle. That CRS #1 has been at the residence of Ray Tuggle between the dates of May 10, 1988—May 17, 1988, and had the opportunity to observe an International Cub Cadet riding lawn mower, consistent in appearance with the aforementioned stolen riding lawn mower.

That CRS #1 has further related that Ray Tuggle will trade controlled substance, cocaine, for stolen property.

That CRS #1 has described the Ray Tuggle residence and location of outbuildings to this Applicant. That this Applicant has personal knowledge of the residence and outbuilding belonging to Ray Tuggle. That the description as given by CRS #1 is consistent with Applicant's personal knowledge.

That the Co-Applicant in this matter is employed as a Detective with the Rockingham County Sheriff's Department. That the Co-Applicant [*sic*] primary enforcement responsibility involves the investigation of violations of the North Carolina Controlled Substances Act.

That this Co-Applicant has received information from a confidential source (CS #2) in March of 1986 that Ray Tuggle was involved in the sale of controlled substances.

That this Co-Applicant has received information from a separate confidential source (CS #3) that Ray Tuggle is involved in the sale of controlled substances, and also that Ray Tuggle will trade controlled substance, cocaine, for property. That CS #3 has had occasion to be at the residence of Ray Tuggle during the month of April 1988, and has witnessed the trading of property for the controlled substance, cocaine.

That CS #3 has personally pointed out the residence of Ray Tuggle to this Co-Applicant and the description in [*sic*] consistent with the previously stated information in this Application.

Deputy Watkins' application for a search warrant was based entirely on information supplied by informants.

The controlling case on the sufficiency of informants' tips to establish probable cause is *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983). In *Gates* the Court abandoned the "two-pronged test" derived from *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). In place of the two-pronged test, which had directed "analysis" into two largely independent channels—the informant's "veracity" or "reliability" and his "basis of knowledge," the Court adopted the "totality-of-circumstances analysis that traditionally has guided probable-cause

determinations." *Gates*, 462 U.S. at 233, 238, 76 L.Ed.2d at 545, 548, 103 S.Ct. at 2329, 2332. Under *Gates*, 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.

Gates, 462 U.S. at 238, 76 L.Ed.2d at 548, 103 S.Ct. at 2332.

The Court emphasized, moreover, that

> after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. . . . "A grudging or negative attitude by reviewing courts toward warrants" is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner."

Gates, 462 U.S. at 236, 76 L.Ed.2d at 547, 103 S.Ct. at 2331 (citation omitted).

In the case below, the trial court's findings of fact represent an almost sentence-by-sentence dissection of Deputy Sheriff Watkins' affidavit. The trial court analyzed the information supplied by the affidavit in piecemeal fashion. Although the trial court did not specify the legal standard it applied, we find that its analysis was characteristic of the two-pronged test rejected by *Gates* and that the hearing on the defendant's motion amounted to a de novo review of the affidavit's sufficiency. That review was error. *Massachusetts v. Upton*, 466 U.S. 727, 733, 80 L.Ed.2d 721, 727, 104 S.Ct. 2085, 2088 (1984).

Viewing Watkins' affidavit as a whole, as required by *Gates* and *Upton*, we find that the magistrate had a substantial basis for concluding that probable cause existed. The reliability of the first informant (CRS #1) is established by Watkins' sworn statement that in the past CRS #1 had provided him with information which "resulted in numerous convictions in the District and Superior Courts

of Rockingham County." From CRS #1 the magistrate had before him evidence (1) that the suspect had at his residence during the week before 17 May 1988 a riding lawn mower similar to one reported stolen, and (2) that the suspect was involved in trading cocaine for stolen property. From the second informant (CS #2) the magistrate had evidence, albeit stale evidence with little indicia of reliability, that the suspect sold controlled substances during or before March 1986. From the third informant (CS #3), who claimed to be an eyewitness to the transaction or transactions, the magistrate had evidence that the suspect had traded property for cocaine during April 1988.

No single piece of evidence in the affidavit is conclusive. Only the reliability of the first informant is shown by the affidavit. The evidence from the first and third informants is fresher, more specific, and more credible than the evidence from the second informant. Nevertheless, the information from all three is consistent, and their cumulative evidence supports the determination that there was a "fair probability that contraband or evidence of a crime" would be found at defendant's residence. *Gates*, 462 U.S. at 238, 76 L.Ed.2d at 548, 103 S.Ct. at 2332. In the case below, as in other particular cases, it is not easy to determine whether the affidavit in issue establishes the existence of probable cause, but the "resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, 380 U.S. 102, 109, 13 L.Ed.2d 684, 689, 85 S.Ct. 741, 746 (1965).

The trial court's order of 5 April 1989 did not specify whether it was based on probable cause under the federal constitution, the state constitution, or both. However, in *State v. Arrington* our Supreme Court adopted the "totality of circumstances test of *Gates* and *Upton* . . . . for resolving questions arising under Article 1, Section 20 of the Constitution of North Carolina with regard to the sufficiency of probable cause to support the issuance of a search warrant . . . ." 311 N.C. 633, 643, 319 S.E.2d 254, 260-61 (1984). Therefore, our analysis of probable cause in the case below applies under both the United States and North Carolina Constitutions.

For the reasons stated above, the trial court's order of 5 April 1989 is

Reversed.

Judges WELLS and LEWIS concur.

ROSEMARIE L. GADSON v. NORTH CAROLINA MEMORIAL HOSPITAL AND THE STATE PERSONNEL COMMISSION

No. 8910SC889

(Filed 19 June 1990)

State § 12 (NCI3d)— promotion of one employee over another —no retaliation for earlier discrimination grievance

The State Personnel Commission did not err in concluding that petitioner failed to show that respondent hospital's stated reasons for promoting another employee over her were merely a pretext for petitioner's having prevailed in a racial discrimination claim against respondent ten years earlier, since respondent had legitimate reasons for designing the selection criteria as it did; size and complexity of respondent hospital made experience there a legitimate consideration in filling the position so that petitioner's experience in other employment was not considered; any supervisory experience petitioner acquired between 1975 and 1980 was not given more weight because the department was smaller and less complex at the time; experience of the employee who was promoted was weighted heavily because most of it was after 1981 when the department installed more sophisticated equipment and the duties of department personnel were expanded; differences in the applicants' job performance evaluations were not significant; there was no evidence that respondent knew, at the time of the promotion decision, of the other employee's alleged mood swings and so this could not be considered in the decision; petitioner's tardiness was considered in making the promotion decision; and eight years after petitioner had filed and prevailed on a grievance alleging racial discrimination by the department director, he rehired petitioner in another position.

Am Jur 2d, Job Discrimination §§ 129, 132, 146, 147, 149, 150, 747, 754.

APPEAL by petitioner from judgment entered 25 May 1989 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 7 March 1990.

This appeal involves respondent North Carolina Memorial Hospital's decision in 1987 to deny a promotion to petitioner Rosemarie L. Gadson, a black woman who prevailed in a racial discrimination claim against the Hospital. She now claims the Hospital's decision not to promote her in 1987 was in retaliation for her 1977 grievance.

In 1977, after several years in the Hospital's Communications Center, Gadson was denied a promotion to the position of Communications Center Supervisor. The position was awarded to a white woman. Andrew Melvin, Director of the Hospital's Communications Department, had made the personnel decision. On hearing Gadson's grievance, the Personnel Commission found that Gadson had been denied the 1977 promotion because of racial discrimination and awarded her back pay and attorney's fees. Gadson continued to work in the Communications Department until September 1980, when she moved out of state with her family.

In August 1985, Gadson returned to North Carolina. Beverly Williams, the Medical Center Telecommunications Supervisor, rehired Gadson as a Medical Center Telecommunications Specialist I (MCTS I). Melvin, who was still Director of the Communications Department, approved Williams' decision to rehire Gadson.

In March 1987, Gadson and another MCTS I, Wendy L. Freeland, applied for a promotion to MCTS II, a supervisory position. Gadson and Freeland were the only two applicants for the position. Williams, the Medical Center Telecommunications Supervisor, was responsible for filling the vacant MCTS II position. She drafted selection criteria and questions for the applicants and interviewed each applicant. Melvin, the Communications Center Director, reviewed the selection criteria and questions, participated in each applicant's interview, and reviewed each applicant's written materials. After conferring with Melvin and two members of the Personnel Department, Williams promoted Freeland to MCTS II.

In October 1987, Gadson filed a grievance against the Hospital alleging that she had been unfairly denied the promotion. On 27 April 1988, Gadson's case was heard by an Administrative Law Judge. The recommended decision of the A.L.J. concluded that

Gadson had made a prima facie showing of retaliation and that the Hospital had shown legitimate nondiscriminatory reasons for promoting Freeland rather than Gadson. The A.L.J. then concluded that the Hospital's stated nondiscriminatory reasons were only a pretext for retaliation, stating that the hiring process and selection criteria were slanted against Gadson.

The State Personnel Commission adopted all of the A.L.J.'s findings of fact and those conclusions of law regarding Gadson's prima facie case of retaliation and the Hospital's showing of legitimate nondiscriminatory reasons for its action. However, the Commission disagreed with the A.L.J.'s conclusion that "but for the earlier race discrimination case, Petitioner would have been chosen above Ms. Freeland for the promotion to MCTS II." Instead, the Commission concluded that petitioner had failed to carry her burden of proving that the Hospital's stated reasons were merely a pretext for retaliation for past protected activity. Accordingly, the Commission upheld the Hospital's decision not to promote Gadson to MCTS II. On appeal, the superior court affirmed the Personnel Commission's decision. Petitioner appeals.

Broughton, Wilkins & Webb, by William Woodward Webb, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for the respondent appellee Hospital.

ARNOLD, Judge.

N.C. Gen. Stat. § 126-36 in pertinent part provides:

"Any State employee . . . who has reason to believe that . . . promotion . . . was denied him . . . in retaliation for opposition to alleged discrimination . . . shall have the right to appeal directly to the State Personnel Commission." "The ultimate purpose of G.S. 126-36, G.S. 143-422.2, and Title VII (42 U.S.C. 2000(e), *et seq.*) is the same; that is, the elimination of discriminatory practices in employment." *Dept. of Correction v. Gibson*, 308 N.C. 131, 141, 301 S.E.2d 78, 85 (1983).

Petitioner does not dispute any of the Commission's findings of fact, nor does she dispute the conclusions of law regarding her prima facie case of retaliation and the Hospital's showing of legitimate nondiscriminatory reasons for its personnel decision. Therefore, the question raised by petitioner's primary assignment of error

is whether the Commission erred in concluding that petitioner failed to show that the Hospital's stated reasons were merely a pretext for retaliation.

Petitioner contends the Commission's order was "[u]nsupported by substantial evidence . . . in view of the entire record as submitted." N.C. Gen. Stat. § 150B-51(b)(5). The "whole record" test requires this Court to consider all the evidence, both that which supports the Commission's decision and that which detracts from it. *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 344, 342 S.E.2d 914, 919, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). Gadson argues that substantial evidence supports the conclusion that the Hospital's stated reasons for not promoting her were pretextual because the Hospital had weighted the hiring process and selection criteria against her. Specifically, she argues that the Hospital underemphasized her telecommunications experience outside the Hospital, her supervisory experience at the Hospital, and evaluations of her job performance as a MCTS I, while overemphasizing Freeland's experience in the Communications Center. She also argues that the Hospital considered her tardiness, but did not consider Freeland's behavior problems.

There is, however, substantial evidence in the record that the Hospital had legitimate reasons for designing the selection criteria as it did and that, therefore, the Hospital's stated reasons for its decision were not a pretext for discrimination. Williams testified that the size and complexity of the Hospital made experience at the Hospital a legitimate consideration in filling the MCTS II position. Melvin testified that any supervisory experience Gadson acquired between 1975 and 1980 was not given more weight because the department was smaller and less complex at that time. Similarly, Freeland's experience in the Communications Center was weighted heavily because most of it was after 1981, when the Center installed more sophisticated equipment and the duties of Center personnel were expanded. Melvin testified that the differences in the applicants' job performance evaluations were not significant because both received high ratings and any slight differences were attributable to different supervisors' evaluation styles. Finally, there was no evidence that the Hospital knew, at the time of the promotion decision, of Freeland's alleged mood swings, so these behavior problems could not have been considered. Gadson's tardiness was, however, documented by the Hospital and was considered in making the promotion decision. Moreover, evidence showed

that in 1985, eight years after Gadson had filed and prevailed on a grievance alleging racial discrimination by Melvin, the Communications Department Director, he approved the hiring of Gadson as a MCTS I. Petitioner offers no explanation for why Melvin would retaliate against her in 1987 for her 1977 opposition to discrimination when he did not do so in 1985.

From the whole record, substantial evidence supports the Commission's conclusion that the Hospital's stated reasons were legitimate and not a pretext for discrimination. Conversely, there is lacking substantial evidence that retaliation for past opposition to discrimination was the Hospital's "predominant reason," *see Ross v. Communications Satellite Corp.*, 759 F.2d 355 (1985), for denying Gadson the promotion.

Petitioner makes two further assignments of error under N.C. Gen. Stat. § 150B-51. She contends first that the Personnel Commission heard new evidence after receiving the A.L.J.'s recommended decision, and second, that the agency did not state the specific reasons for not adopting the A.L.J.'s recommended decision. We reject both these arguments. First, the Commission rejected the A.L.J.'s conclusion that the Hospital's reasons for not promoting Gadson were pretextual by stating in part that "said conclusion is inconsistent with prior decisions of this Commission." This statement in no way shows the Commission considered new evidence after receiving the A.L.J.'s recommended decision. Second, the Commission stated that Gadson had failed to carry the burden of showing that the Hospital's reasons for not promoting her were pretextual and discussed the shortcomings of Gadson's evidence. This is a sufficient statement of specific reasons for rejecting the A.L.J.'s recommended decision.

Petitioner's remaining assignments of error essentially repeat the substance of those already reviewed and we reject them without further discussion.

No error.

Judges JOHNSON and ORR concur.

IN THE MATTER OF: EATON CORPORATION, POST OFFICE BOX 1728, KINGS MOUNTAIN, NORTH CAROLINA 28086, CLAIMANT v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, RESPONDENT

No. 8910UC925

(Filed 19 June 1990)

1. **Gas § 1 (NCI3d)— gas overcharges—claim barred on basis of statute of limitations—error**

The Utilities Commission improperly barred plaintiff's claim for a refund of gas overcharges by applying the two-year statute of limitations of N.C.G.S. § 62-132, since that statute applies to rates permitted or allowed to take effect, while the rates which plaintiff contested were established by the Commission in a general rate case after full hearing.

Am Jur 2d, Public Utilities §§ 58, 59; Limitation of Actions § 453.

2. **Gas § 1 (NCI3d)— classification of customer—determination by Utilities Commission—no statute of limitations barring recovery of overcharges**

In a proceeding to recover for gas overcharges it was for the Utilities Commission to determine whether claimant maintained complete standby fuel and equipment and was therefore eligible for a lower rate schedule, but if claimant was entitled to recover under N.C.G.S. § 62-139(a), which prohibits a public utility from receiving greater compensation than that prescribed by the Commission, or under N.C.G.S. § 62-140, which prohibits discrimination by utilities as to rates or services, then there was no applicable statute of limitations.

Am Jur 2d, Public Utilities §§ 58, 59; Limitation of Actions § 453.

3. **Gas § 1 (NCI3d)— gas overcharges—statute of limitations—affirmative defense adequately raised**

In a proceeding to recover for gas overcharges an affirmative defense as to the statute of limitations was adequately raised by respondent, even though not raised in the pleadings, where, in the hearing before a Utilities Commission hearing examiner, respondent explained that it first offered claimant a refund calculated upon the basis of the statute of limitations in ordinary contracts cases.

Am Jur 2d, Public Utilities §§ 58, 59; Limitation of Actions § 453.

APPEAL by claimant from final order of the North Carolina Utilities Commission entered 14 June 1989. Heard in the Court of Appeals 12 March 1990.

On 18 May 1987 claimant Eaton Corporation wrote to the North Carolina Utilities Commission complaining of an overcharge for natural gas purchased from respondent, Public Service Company of North Carolina. The parties were unable to resolve the dispute. By letter filed 30 December 1987, claimant's grievance became a formal complaint.

After a hearing on the complaint, a Commission hearing examiner issued a Recommended Order Dismissing Complaint for the reason that the claim was barred by the two-year statute of limitations in G.S. 62-132. Claimant and the Public Staff filed exceptions. On 14 June 1989, the full Commission, with one member dissenting, issued its Final Order Overruling Exceptions and Affirming Recommended Order. Claimant and the Public Staff appeal.

North Carolina Utilities Commission—Public Staff Legal Division, by Staff Attorney David T. Drooz, for claimant-appellant.

Stott, Hollowell, Palmer & Windham, by James C. Windham, Jr., for claimant-appellant.

Burns, Day & Presnell, P.A., by F. Kent Burns, for respondent-appellee.

PARKER, Judge.

Claimant brings forward two assignments of error on appeal. First claimant contends the Utilities Commission erred in concluding that the two-year statute of limitations in G.S. 62-132 applies to this case. Claimant argues that the proper statute of limitations is found in G.S. 1-52(9). Second claimant contends the Commission erred in applying the two-year statute of limitations when that statute was not pleaded as a defense. We hold that the Commission erroneously interpreted and applied G.S. 62-132 and remand for further proceedings.

Claimant corporation manufactures automobile and truck components. In May 1977 claimant began using natural gas from re-

spondent and used less than 50 dekatherms per day. Later consumption increased, and for four months in the year ending 30 June 1980, the average use rose to more than 50 dekatherms per day.

Commission Rule R6-19.2(f) requires natural gas utilities to review each customer's consumption for the year ending 30 June for rate priority classification purposes. If consumption for any two months would have qualified the customer for a priority requiring a lower rate, the utility must, by 30 September, automatically reclassify the customer to a lower rate priority as defined in the rule. The rule defines priorities in terms of Mcf/day (thousand cubic feet per day). A dekatherm of gas is approximately one thousand cubic feet. Priority 2.1 is for industrial customers who use less than 50 dekatherms per day. Respondent's rate schedule 22 was available to industrial customers qualifying for priorities 1.2 through 2.4. This rate schedule was renumbered to 55 and later to 17, but the availability provisions remained the same. Priority 2.5 applies to industrial customers using between 50 and 300 dekatherms per day. Schedule 23, later renumbered to 60, then to 20, was available to industrial customers qualifying for priorities 2.5 through 2.7. This rate schedule also provided that the customer must maintain complete standby fuel and equipment.

On 1 January 1985, respondent amended claimant's priority rating and lowered claimant's rate from Schedule 55 to Schedule 60. The last schedule designations, *i.e.*, 55 to 17 and 60 to 20, were amended by a general rate making case in November 1986 after claimant was given a higher priority rating. We will refer to these schedules as Schedule 55/17 and Schedule 60/20. In a letter dated 2 December 1986 claimant asserted that the corporation had become eligible for the lower rate as of 1 September 1980, based on its increased level of consumption during the period ending 30 June 1980. Claimant demanded a refund of $15,724.73 representing the difference between charges applicable under the two rate schedules for the period from 1 September 1980 through 31 December 1984.

General Statute 62-132 provides that if (i) the rates or charges being collected by the utility are "other than the rates established by the Commission," and (ii) the rates or charges being collected are "unjust, unreasonable, discriminatory or preferential," then the Commission may upon petition by an interested party order a refund of unjust rates or charges collected within two years prior

to the petition. The two-year limit is not a true statute of limitation or repose, because it runs backward in time from the date of the petition, not forward from the date of the wrongful overcharge or the date of its discovery. By its own terms, the two-year limit on recovery applies only where a utility has charged unjust rates not established by the Commission.

[1] We first consider whether the rates charged claimant were "established" by the Commission. In *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 327, 230 S.E.2d 651 (1976), our Supreme Court discussed the difference between established rates and permitted rates as follows:

> There is moreover in Article 7 a clear statutory dichotomy between rates which are *made, fixed* or *established* by the Commission on the one hand and those which are simply *permitted* or *allowed* to go into effect at the instance of the utility on the other. Rates which are *established* by the Commission, that is after full hearing, findings, conclusions, and a formal order (*see* G.S. 62-81 for the required procedure for general rate cases or proceedings for "an increase in rates") "shall be deemed just and reasonable, and any rate charged by any public utility different from those so established shall be deemed unjust and unreasonable." G.S. 62-132. Rates which the Commission simply allows to go into effect by any of the three methods described are subject to being challenged by interested parties or the Commission itself and after a "hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission *may*" order refund pursuant to the provisions of G.S. 62-132.

Id. at 352, 230 S.E.2d at 666 (emphases in original). "Established rates" thus has a very specific statutory meaning. By the language of the statute, the right to challenge unjust rates and obtain a refund therefor under G.S. 62-132 does not extend to established rates.

Claimant argues that for the period in question it should have been on established Schedule 60/20, rather than established Schedule 55/17, *i.e.*, that it was charged the wrong established rate. From the record, there is no dispute that respondent's rate schedules 55/17 and 60/20 were established by Commission order in general

rate cases after full hearing. These rates were not permitted or allowed to take effect; they are established rates. Claimant's claim, therefore, cannot arise under G.S. 62-132, and the Commission improperly barred the claim by application of the two-year statute of limitations in G.S. 62-132.

[2] General Statute 62-139(a) prohibits a public utility from directly or indirectly, by any device whatsoever, collecting or receiving greater or less compensation than that prescribed by the Commission. General Statute 62-140 prohibits discrimination by utilities as to rates or services. Respondent's rate schedule 60/20 includes a requirement that the customer maintain complete standby fuel and equipment. Such equipment enables a business to continue operations if its allotment of natural gas is curtailed during a shortage. As an industrial customer's use of natural gas increases and its rate becomes more favorable, the risk also increases that during a shortage the customer will be subject to curtailment. The risk of curtailment is thus an integral part of natural gas rate structuring. Rule R6-19.2, under which natural gas utilities must annually evaluate customers on the basis of their consumption, is in fact entitled "Priorities for curtailment of service."

On appeal respondent contends that claimant was never in fact eligible for Rate Schedule 60/20. Although claimant claimed to have standby fuel and equipment, it was unable to accept curtailment of its natural gas supplies. Claimant asserts that other businesses without standby capacity were nevertheless under Schedule 60/20. The Commission has the power to determine questions of fact arising under G.S. 62-139 and G.S. 62-140. Whether claimant was eligible for Schedule 60/20 is a question of fact for the Commission.

Upon reconsideration of this matter the Commission may determine that claimant has a claim arising under G.S. 62-139 and/or G.S. 62-140. If so the Commission must consider the appropriate remedy and statute of limitations, including determination of any factual questions necessary to that decision. We merely note that claimant is correct in asserting that Article 7 does not contain a statute of limitations for actions arising under either G.S. 62-139 or G.S. 62-140.

[3] Claimant also argues the Commission erred in applying a statute of limitations when none was raised in the pleadings. "Great liberality is indulged in pleadings in proceedings before the Commission,

and the technical and strict rules of pleading applicable in ordinary court proceedings do not apply." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962).

In the hearing before the examiner, respondent explained that it first offered claimant a refund calculated upon the basis of the statute of limitations in ordinary contracts cases. An affirmative defense was thus raised by respondent. The examiner later ruled that the claim both arose under and was barred by G.S. 62-132. If claimant's claim had arisen under that statute, there would have been no error in the examiner's having considered the statute of limitations contained in that statute. Accordingly, on remand the Commission may determine whether all or a part of the claim, if any, is barred by the appropriate statute of limitations.

Remanded for further proceedings.

Chief Judge HEDRICK and Judge COZORT concur.

MERCEDES MORAS HARRIS v. PAUL TEMPLE AND THE KROGER COMPANY

No. 8912SC649

(Filed 19 June 1990)

1. Libel and Slander § 16 (NCI3d)— statement communicated to another—sufficiency of evidence

In an action for slander, evidence was sufficient to be submitted to the jury on the issue of whether defendant's statement was published or communicated to and understood by a third person where the evidence tended to show that defendant accused plaintiff of giving a worthless check for groceries, a statement easily understood by anyone who heard it; plaintiff's testimony that defendant was a few feet away from her when he made the remarks and that she heard him was some evidence that others a similar distance from the speaker also heard; and at the time the statement was made there were people an arm's length away from plaintiff entering the store, a lady directly behind plaintiff whose exit was blocked by the incident between plaintiff and defendant, bag boys, a cashier, and customers at the closest checkout counter ten

feet away, and others further away who were still close enough to hear.

Am Jur 2d, Libel and Slander § 444.

2. Libel and Slander § 18 (NCI3d) — punitive damages — sufficiency of evidence to support

Evidence in an action for slander was sufficient to support an award for punitive damages where defendant falsely accused plaintiff of giving a worthless check for merchandise, a criminal offense involving moral turpitude, and the law therefore presumed actual damages; and that defendant acted maliciously and with reckless indifference to the truth and plaintiff's rights was indicated by evidence tending to show that without making any inquiry at all into the validity of plaintiff's check, which could have been ascertained by a phone call, and based only on the irrelevant report that checks of her husband had been returned almost two years earlier, he loudly charged her with a criminal offense in the presence of many other people, continued to do so despite her explanation and protests, and in effect forced her to go through the humiliating experience of returning the groceries she had bought and the change received and departing from the store empty-handed.

Am Jur 2d, Libel and Slander §§ 352, 353.

APPEAL by defendants from judgment entered 28 February 1989 and order entered 15 March 1989 by *Judge Wiley F. Bowen* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 6 December 1989.

A. Maxwell Ruppe for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by David P. Sousa and Knox Proctor, for defendant appellants.

PHILLIPS, Judge.

[1] The trial of this action for slander ended in plaintiff obtaining judgment for $3,500 in compensatory damages and $7,500 in punitive damages for being falsely accused by the defendants of giving the Kroger store a worthless check for groceries. Since the action is for slander *per se*, the verdict and judgment can stand only

if the evidence presented is sufficient to establish the following: (1) That defendant spoke base or defamatory words which tended to prejudice her in her reputation, office, trade, business or means of livelihood or hold her up to disgrace, ridicule or contempt; (2) that the statement was false; and (3) that the statement was published or communicated to and understood by a third person. *West v. King's Department Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). That the evidence tends to establish the first two elements of the action is obvious and defendants do not argue otherwise; their argument is only that the evidence is insufficient to establish the third element.

When viewed in the light most favorable to plaintiff the evidence in pertinent part indicates the following: In October, 1985 plaintiff began buying groceries from the Kroger store on Ramsey Street in Fayetteville. In January, 1986, she applied for and received a card from Kroger's authorizing her to cash checks at the store. After that in buying groceries she gave the store thirty-eight checks, all of which were duly honored by her bank. On 23 September 1986 plaintiff, who was eight months pregnant, went to the store, selected groceries costing just under $30, paid with a $40 check approved by the cashier, and received the difference in cash. As she was about to leave the store she was stopped in the exit doorway by Paul Temple, an assistant store manager, who in a loud voice within the hearing of several other people accused plaintiff of writing a bad check for her groceries and demanded that she return the groceries and money she received as change. Temple testified that: He "was not aware that Mrs. Harris had been a regular Kroger customer, nor that she had a check cashing card;" but that he was informed that three checks of plaintiff's husband written on June 6 and June 7, 1984—more than a year before plaintiff married him and moved to Fayetteville—had been returned marked "insufficient funds," and that he stopped plaintiff because of the husband's "bad check" record. Other evidence by plaintiff indicated that no one but plaintiff could write checks on her account and that her husband's alleged bad checks were forgeries following the theft of his checkbook.

Defendants' main reliance is on *West v. King's Department Store, Inc., supra*, where the Court affirmed a directed verdict against plaintiff customer's slander *per se* claim under circumstances that were similar to but distinguishable from those recorded here. In *West*, while plaintiff's evidence showed that several other people

gathered in front of the store while she was being accused of taking merchandise without paying for it, it failed to show, so the Court held, that any of those people heard the slanderous charges and understood them. In that case the proximity of the onlookers to the speaker of the slander did not clearly appear and the court said that the evidence indicated only a possibility that someone might have heard the slander and that is not enough. *Tyer v. Leggett*, 246 N.C. 638, 99 S.E.2d 779 (1957). *West* does not hold, of course, nor does any other case of which we are aware, that publication of slanderous words cannot be proven by circumstances indicating that other persons were close enough to hear and understand the words. In *Southwest Drug Stores of Mississippi, Inc. v. Garner*, 195 So.2d 837 (1967); *Gaudette v. Carter*, 100 R.I. 259, 214 A.2d 197 (1965); *Pelot v. Davison-Paxon Co.*, 218 S.C. 189, 62 S.E.2d 95 (1950); *Little Stores v. Isenberg*, 26 Tenn. App. 357, 172 S.W.2d 13 (1943); and *Safeway Stores v. Rogers*, 186 Ark. 826, 56 S.W.2d 429 (1933), evidence similar to that recorded here was held to raise a jury question as to whether the slanderous words were heard and understood by other persons in the area. *See also* 50 Am. Jur. 2d *Libel and Slander* Sec. 151, p. 658 (1970); Annotation, *Defamation: Actionability of Accusation or Imputation of Shoplifting*, 29 A.L.R. 3d 961, 985-87 (1970).

The circumstances testified to in this case are clearly sufficient to support a finding that Temple's slanderous remarks were heard and understood by several people other than plaintiff. As to the understanding part, there is nothing ambiguous about an accusation that one has given a worthless check for merchandise; to hear such words is to understand them unless one is *non compos mentis*. And that plaintiff heard the slanderous remarks spoken in a loud voice from a few feet away, as she testified she did, is some evidence that others a similar distance from the speaker also heard. As to others being in position to hear the words just as readily as she did, plaintiff testified that:

> The entrance and exit doors are right beside each other separated by a frame. At the time Mr. Temple was talking to me, there were people going into the store that were less than an arm's length distance from me. When I was talking to Mr. Temple, they were looking at me. When Mr. Temple started pulling my cart forward into the alcove, I looked behind me and there was a lady right behind me who couldn't get out because I was right there. There were bag boys and checkout

girls at the other checkout booths and I was approximately 10 feet from the closest checkout counter.

This is evidence that Temple's loudly spoken words were heard by a large number of people—those within an arm's length of plaintiff entering the store, the lady immediately behind her, the bag boys, cashier, customers at the closest checkout counter, and others still further away than that. For it is a matter of common knowledge and experience that in the absence of some unusual noise that drowns them out words spoken at an ordinary conversational level in enclosed spaces such as the store in question are usually heard without difficulty by people who are ten or fifteen feet away from the speaker; it happens regularly in courtrooms, conference rooms, and offices to our knowledge and we know of no reason that would warrant a holding that as a matter of law sound is less penetrating in a supermarket. Since there is no evidence of any noises that might have drowned out Temple's accusations, and the evidence is that he made them in a loud voice, it is inferable that they were heard well beyond a distance of 10 to 15 feet by those in the vicinity of the other checkout counters. Furthermore, that at Temple's direction and pursuant to his accusation plaintiff returned the groceries and the change received from the store to the cashier and the cashier returned plaintiff's check to her is also some evidence that the cashier heard that the exchange had to be made because plaintiff's check was no good.

[2] Defendants' further contention—that the evidence does not support the award of punitive damages—is also without merit. Punitive damages for slander are allowable when actual damages are sustained and defendant's conduct was malicious, wanton, or recklessly indifferent to the truth and plaintiff's rights. *Cotton v. Fisheries Products Co.*, 181 N.C. 151, 106 S.E. 487 (1921); *Bowden v. Bailes*, 101 N.C. 612, 8 S.E. 342 (1888). In this case defendants having falsely accused plaintiff of giving a worthless check for merchandise in violation of G.S. 14-106, a criminal offense involving moral turpitude, *Oates v. Wachovia Bank and Trust Co.*, 205 N.C. 14, 169 S.E. 869 (1933), the law presumes that actual damages were sustained, as the jury found, and plaintiff did not have to prove them. *Badame v. Lampke*, 242 N.C. 755, 89 S.E.2d 466 (1955). And that defendant Temple acted maliciously and with reckless indifference to the truth and plaintiff's rights is indicated by evidence tending to show that without making any inquiry at all into the validity of plaintiff's check, which could have been ascertained by

a phone call, and based only upon the irrelevant report that checks of her husband had been returned almost two years earlier, he loudly charged her with a criminal offense in the presence of many other people, continued to do so despite her explanation and protests, and in effect forced her to go through the humiliating experience of returning the groceries she had bought and the change received and departing from the store empty-handed. *Cotton v. Fisheries Products Co., supra; Ward v. Turcotte*, 79 N.C. App. 458, 339 S.E.2d 444 (1986).

No error.

Judges WELLS and GREENE concur.

STATE OF NORTH CAROLINA v. ROBIN STACY SMITH

No. 8914SC1091

(Filed 19 June 1990)

1. **Criminal Law § 1502 (NCI4th)— restitution—condition of probation—limitations of civil remedy inapplicable in criminal prosecution**

By tying the amount of restitution which may be imposed as a condition of probation to such compensation as could ordinarily be recovered in a civil action, the General Assembly meant only that the trial court must refer to the measure of recoverable damages applying in the relevant civil action—in this case the measure of damages in a wrongful death action—for the limited purpose of computing an appropriate restitutionary amount to be imposed as a condition of probation under N.C.G.S. § 15A-1343(d), and the statute of limitations of the civil remedy is not applicable.

Am Jur 2d, Criminal Law §§ 572, 574, 575.

2. **Criminal Law § 1502 (NCI4th)— restitution as condition of probation—constitutional rights not violated**

The requirement that a defendant pay restitution as a condition of probation does not violate a defendant's equal

protection rights under the North Carolina and U. S. Constitutions. N.C.G.S. § 15A-1343(d).

Am Jur 2d, Criminal Law §§ 572, 574, 575.

APPEAL by defendant from order entered 19 May 1989 in DURHAM County Superior Court by *Judge Anthony Brannon*. Heard in the Court of Appeals 30 May 1990.

Defendant was charged with misdemeanor death by vehicle in violation of G.S. § 20-141.4(a2) arising out of the April 1985 collision of an automobile operated by defendant with a motorcycle operated by the decedent. Defendant was convicted in the district court. She appealed to the superior court. The jury found defendant guilty as charged, and the trial court sentenced her to a term of two years' imprisonment, suspended, with five years' supervised probation. As a condition of her probation, defendant was required to pay restitution in the amount of $500,000.00 to the decedent's parents. Defendant appealed to this Court. By opinion reported at 90 N.C. App. 161, 368 S.E.2d 33 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, --- U.S. ---, 109 S.Ct. 2453 (1989), we found no error in the trial, but vacated that portion of the judgment requiring defendant to pay restitution in the amount of $500,000.00 as a condition of probation on grounds, *inter alia*, that it was not supported by the evidence, and remanded the case to the trial court to determine an appropriate amount of restitution. Pursuant to the resentencing hearing, Judge Brannon entered his order requiring defendant, as a condition of probation, to make restitution in the amount of $4,500.00 to the decedent's mother, contingent upon defendant's completion of her G.E.D. degree, her further completion of a nursing program at Durham Technical Institute or similar institution, and her entry upon gainful employment. From this order defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

Berman & Shangler, by Dean A. Shangler, for defendant-appellant.

WELLS, Judge.

Defendant advances two arguments challenging the trial court's imposition as a condition of probation that defendant make restitu-

tion in the amount of $4,500.00 to the decedent's mother. Defendant first contends that the trial court erred by failing to give effect to the two-year statute of limitations pertaining to wrongful death actions in its application of the wrongful death act in the resentencing of defendant. Defendant also contends that the order of restitution violated her rights to equal protection under the fourteenth amendment to the United States Constitution and Article I § 19 of the North Carolina Constitution. We determine defendant's arguments to be without merit, and therefore we affirm the order entered below.

The authority of the trial court to impose restitution as a condition of probation is set forth in G.S. § 15A-1343(d). The provisions of that statute which were in effect at the time of defendant's conviction defined restitution, in pertinent part, as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action." In our opinion filed in the prior appeal of this case, we determined that the trial court properly referred to the wrongful death statute at G.S. § 28A-18-2 to compute the amount of restitution, but erred in its application of that statute.

[1] Defendant now contends that the language of G.S. § 15A-1343(d) and our opinion in the prior appeal of this case require, not just a showing of damages sufficient to support an award of compensation under the wrongful death act, but proceedings that are timely brought under G.S. § 1-53(4), the two-year statute of limitations applicable to the wrongful death act. Defendant insists that because the resentencing hearing in this case was held over two years after the victim's death, the trial court could not impose a restitutionary condition of parole predicated on a wrongful death measure of damages, and the trial court's refusal to apply the two-year statute of limitations in these resentencing proceedings, coupled with the failure of the victim's survivors to timely bring a civil wrongful death action, abrogates her vested right not to be sued or legally obligated to pay damages for the wrongful death of the victim. We disagree.

Defendant's argument plainly rests upon the premise that a monetary amount, determined to be appropriate restitution and imposed as a condition of probation in accordance with the provisions of G.S. § 15A-1343, is the legal equivalent of an award of damages in a civil judgment pursuant to a determination of civil liability. This is simply not the case. Restitution, imposed as a

condition of probation, is not a legal obligation equivalent to a civil judgment, but rather an option which may be voluntarily exercised by the defendant for the purpose of avoiding the serving of an active sentence. *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E.2d 380 (1983). Such an imposition of restitution "does not affect, *and is not affected by*, the victim's right to institute a civil action against the defendant based on the same conduct[.]" *Id.* (Citations omitted and emphasis added.) "Civil liability need not be established as a prerequisite to the requirement of restitution as a probation condition." *Id.* (Citations omitted.)

G.S. § 15A-1343(d) clearly details the criteria which the trial court must apply to arrive at an appropriate amount of restitution. For example, the basis of the restitutionary amount must be "the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant"; the trial court "shall take into consideration the resources of the defendant"; the restitutionary amount "must be limited to that supported by the record"; when the damage or loss caused by a defendant's offense or offenses appears to be greater than that which the defendant is able to pay, "the court may order partial restitution." Additionally, G.S. § 15A-1343(d) further provides that "[a]n order providing for restitution . . . shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant."

By defining restitution as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action," the Legislature plainly did not intend that G.S. § 15A-1343(d) import wholesale each and every condition precedent to recovery in a civil action as bearing on the trial court's requiring appropriate restitution as a condition of probation. Such a requirement would eviscerate the explicit purpose of the statute that restitution, imposed as a condition of probation, be an ancillary, rehabilitative alternative to the serving of an active sentence.

We cannot believe that the Legislature intended this result when it enacted G.S. § 15A-1343(d). Instead, we are persuaded that by tying the amount which may be imposed as restitution to such compensation as could ordinarily be recovered in a civil action, the General Assembly meant only that the trial court must refer to the *measure* of recoverable damages applying in the relevant civil action—such as the measure of damages in a wrongful

death action—for the limited purpose of computing an appropriate restitutionary amount to be imposed as a condition of probation under G.S. § 15A-1343(d). This was implicitly recognized by this Court in our prior opinion in this case. *See State v. Smith*, 90 N.C. App. at 167-69, 368 S.E.2d at 38-39. We therefore hold that, in the context of sentencing proceedings under G.S. § 15A-1343(d), the two-year statute of limitations at G.S. § 1-53(4) pertaining to actions instituted under the wrongful death act is not applicable. Consequently, we conclude that the trial court did not err in refusing to apply that statute of limitations to preclude the imposition of restitution as a condition of probation in this case.

[2] We next address defendant's contention that the order of restitution violated her equal protection rights under both the United States and North Carolina Constitutions. As we noted above, the order of restitution in this case was entered pursuant to G.S. § 15A-1343(d). This Court has previously held, albeit in a somewhat different factual context, that the language of G.S. § 15A-1343(d) passed constitutional muster under both the fourteenth amendment to the United States Constitution and Article I § 19 of the North Carolina Constitution. *State v. Stanley*, 79 N.C. App. 379, 339 S.E.2d 668 (1986). The fundamental reasoning in *Stanley* applies with equal force to the facts of this case. We therefore reject defendant's argument.

For the reasons stated, the trial court's order imposing restitution as a condition of defendant's probation must be and is

Affirmed.

Judges PARKER and DUNCAN concur.

STATE OF NORTH CAROLINA v. RICKY LYNN CANADY

No. 8916SC884

(Filed 19 June 1990)

1. **Criminal Law § 1064 (NCI4th)— sentencing hearing—method of proving aggravating circumstance—failure to object—appeal waived**

Failure of defendant to object to the nature of evidence offered by the State to prove prior convictions during the sentencing phase amounted to a waiver of his right to appeal the sufficiency of the evidence to support the finding of the prior convictions aggravating factor. Appellate Rule 10(b)(2).

Am Jur 2d, Criminal §§ 598, 599.

2. **Criminal Law § 1082 (NCI4th)— sentence greater than presumptive term—no error**

The trial court did not err in sentencing defendant to a term greater than the combined presumptive sentence for two crimes, since the judge found in aggravation of the sentence that defendant had been convicted of crimes punishable by more than 60 days' confinement and found no mitigating factors, and defendant's was well below the maximum sentence for his most serious felony.

Am Jur 2d, Criminal Law §§ 598, 599.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendant from a judgment entered 6 April 1989 by *Judge George R. Greene* in Superior Court, ROBESON County. Heard in the Court of Appeals 9 May 1990.

On 17 January 1989, defendant was indicted for second degree burglary and felonious larceny. Defendant entered a plea of not guilty and waived arraignment. Defendant was tried and found guilty on both charges. On 6 April 1989, Judge Greene sentenced the defendant to a twenty-year active sentence. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Charles Waldrup, for the State.

Locklear, Jacobs & Sutton, by Arnold Locklear, for the defendant.

LEWIS, Judge.

On 18 November 1988, defendant and two accomplices broke into an unoccupied home and stole several items of personal property.

Defendant assigns as error the admission into evidence of certain testimony that he had threatened his two accomplices about not testifying against him. This evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." N.C. Rule of Evidence 403; *State v. Smith*, 19 N.C. App. 158, 159, 198 S.E.2d 52, 53, *cert. denied*, 284 N.C. 123, 199 S.E.2d 662 (1973). The decision to admit or exclude evidence under Rule 403 is a matter within the sound discretion of the trial court. *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988). We do not find that the trial court abused its discretion by admitting this evidence.

[1] Defendant next argues that the trial court erred by sentencing the defendant for a period greater than the presumptive sentence based upon the fact that the State did not offer any exhibits into evidence. The State presented information to the court that defendant had prior convictions for felonious possession of marijuana, felonious possession of LSD, discharging a firearm into an occupied motor vehicle and escape from the Department of Corrections. The defendant never objected to the nature of the evidence offered by the State to prove the prior convictions and further stated in the record that his record did not show transgressions against property and are "not consistent with what he's been involved in in the past." Appellate Rule 10(b)(2) requires a party to object to the failure of the trial court to make necessary findings and conclusions in order to advance those issues on appeal. "The purpose of this rule appears to be to provide the trial court an opportunity to correct any obvious defects and thereby eliminate the need for an appeal and a new proceeding." *State v. Bradley*, 91 N.C. App. 559, 564, 373 S.E.2d 130, 132-33, *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989). Because defendant failed to object to the State's statements at sentencing, he has waived his right to appeal.

[2] Finally, defendant argues that the trial court erred in sentencing him to a prison term in excess of the presumptive sentence. The combined presumptive sentence is fifteen years for the two crimes. The judge found, in aggravation of the sentence, that the defendant was convicted of crimes punishable by more than sixty

days confinement and found no mitigating factors. Defendant's conviction of second degree burglary alone subjected him to a maximum sentence of forty years. Defendant's sentence of twenty years imprisonment is well below the maximum sentence for his most serious felony and is therefore proper. *State v. Phillips*, 84 N.C. App. 302, 305, 352 S.E.2d 273, 275, *disc. rev. denied*, 319 N.C. 462, 356 S.E.2d 12 (1987). The trial court did not err in sentencing the defendant to a term greater than the presumptive sentence combined.

No error.

Judge ORR concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part and dissenting in part.

I agree with the majority that there was no error in the defendant's trial. I disagree, however, with the majority's conclusion that the failure of the defendant to object to the district attorney's statements at the sentencing hearing amounted to a waiver of defendant's right to complain that the statements were insufficient to support findings in aggravation of the sentence. The only evidence presented at the sentencing hearing relating to the prior criminal conduct of the defendant was the following statement of the district attorney:

> Your Honor, first of all, I would like to present to the Court facts of a prior criminal record of the Defendant. The Defendant does have prior criminal convictions for felonious possession of marijuana, felonious possession of LSD, discharging a firearm into an occupied motor vehicle, and also escape from a department of corrections conviction. All of these would be within the time limits which would entitle the Court to find them as aggravating circumstances in that they are within ten years and also involve sentences of more than sixty days.

Based on the statements of the district attorney, to which defendant did not object, the trial judge found as aggravating factors that the defendant had "a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement."

I believe the statements of the district attorney are inadequate as a matter of law to support the findings of the trial judge and that the defendant has not waived the right to argue that issue in this court. "A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C.G.S. § 15A-1340.4(e) (1988). Prior convictions may also be proven by defendant's testimony. Here we had only the unsupported statement of the district attorney. This statement is not competent to prove prior convictions. *See State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 70-71 (1986); *accord State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1983) (prosecutor's unsworn statements deemed insufficient to prove prior convictions); *State v. Williams*, 92 N.C. App. 752, 376 S.E.2d 21, *disc. rev. denied*, 324 N.C. 251, 377 S.E.2d 762 (1989). Pursuant to his active inquisitorial function during sentencing, the trial court had the duty to examine all the evidence presented to determine if it would support any of the statutory sentencing factors, even absent a request by counsel. *See State v. Cameron*, 314 N.C. 516, 520, 335 S.E.2d 9, 11 (1985). Furthermore, the defendant's failure to object to the statements of the district attorney is not a bar to the defendant raising the issue on appeal. *See State v. Mack*, 87 N.C. App. 24, 359 S.E.2d 485 (1987), *disc. rev. denied*, 321 N.C. 477, 364 S.E.2d 663 (1988).

Therefore, since the remarks by the district attorney were not evidence according to the *Swimm* decision and since the defendant did not waive his right to argue this issue on appeal, I vote to remand to the trial court for resentencing.

IN THE MATTER OF: BLUE RIDGE TEXTILE PRINTERS, INC. (JAMES F. GENNUSA, PRESIDENT), POST OFFICE BOX 5334, STATESVILLE, NORTH CAROLINA, 28677, COMPLAINANT v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., RESPONDENT

No. 8910UC924

(Filed 19 June 1990)

1. **Gas § 1 (NCI3d)— appropriate rate schedule—sufficiency of evidence**

Evidence was sufficient to support the Utilities Commission's findings and conclusions regarding the proper rate schedule for complainant's account for gas service.

Am Jur 2d, Public Utilities §§ 87, 117, 123, 242, 244.

2. **Gas § 1 (NCI3d)— reclassification of gas customer—prior Utilities Commission order not violated**

The Utilities Commission did not violate its own order in placing complainant retroactively in a different classification for gas service, since the order to which respondent referred applied only to new gas customers, and complainant's plant was already in existence and receiving gas service from respondent when the order in question took effect.

Am Jur 2d, Public Utilities §§ 87, 117, 123, 242, 244.

3. **Gas § 1 (NCI3d)— overcharges for gas service—"established rate"—statute improperly applied**

The remedy and corresponding limitation period in N.C.G.S. § 62-132 should never have been applied in complainant's action to recover overcharges for gas service, since the rates charged by respondent were "established" by the Utilities Commission, that is, determined by the Commission after a full hearing, findings, conclusions, and a formal order, and that statute applies only where the rates in question are "other than those established by the Commission."

Am Jur 2d, Public Utilities §§ 87, 117, 123, 242, 244.

APPEAL by Public Staff of the North Carolina Utilities Commission and by respondent Public Service Company of North Carolina, Inc. from Order of the North Carolina Utilities Commis-

sion entered 5 June 1989. Heard in the Court of Appeals 12 March 1990.

This action was instituted by complainant Blue Ridge Textile Printers, Inc. (hereinafter "Blue Ridge") to obtain a refund for gas service overcharges since 1 September 1981. According to the record on appeal, the following facts are uncontroverted:

1. Since 1980 Blue Ridge has been receiving gas service from Public Service Co. of North Carolina, Inc. (hereinafter "Public Service") on two separate accounts referred to in the record as Accounts 4-1 and 7-0.

2. Before determining what rates to charge Blue Ridge and its other customers, Public Service assigns each account a curtailment priority pursuant to Commission Rule R6-19.2. These priorities determine the order in which Public Service may curtail service to its accounts in the event of a shortage.

3. To compensate customers whose accounts are assigned lower curtailment priorities, Public Service places these accounts on more favorable rate schedules.

4. Since August 1978, Public Service has had such a favorable rate schedule available to industrial customers "with no alternate fuel capability qualifying for Priority 2.5 through 2.7 under the North Carolina Utilities Commission Rule R6-19.2." Priority 2.5 is available to industrial customers for "process, feedstock, and plant protection" who use between 50 and 300 Mcf (1000 cubic feet) per day, and have "no alternate fuel capability."

5. This rate schedule, however, also provided that it was subject to certain special terms and conditions located on the reverse side of the schedule. Among these terms and conditions was the following: "The Customer agrees . . . to have and to maintain complete standby fuel and equipment available and agrees to use it whenever necessary."

6. Although this rate schedule, originally designated Rate Schedule 23, was succeeded by Rate Schedule 60 which was in turn succeeded by Rate Schedule 20, the present version is the same as the original except for minor differences in the availability language.

7. Plaintiff's account 7-0 was originally assigned to curtailment priority 2.1 and Rate Schedule 22 in October 1980. Although

Rate Schedule 22 was succeeded by Schedule 55 in January 1981, which was in turn succeeded by Schedule 17 in November 1986, the availability language in all three schedules was virtually identical. Such schedules were appropriate for "commercial and small industrial customers who are engaged primarily in the sale of goods, services, or manufacturing . . . who qualify for Priorities 1.2 through 2.4. . . ."

8. Under Commission Rule R6-19.2(f) as it was written in August 1981, all natural gas public utilities were required to review their customers' consumption every July or August for the previous twelve months and to automatically reclassify to a lower priority any customer whose consumption had increased to the point of placing it in a lower priority for any two of those months.

9. During April, May and June 1981, Blue Ridge's consumption of natural gas under account 7-0 exceeded 50 Mcf or 50 dekatherms per day. Because of this rise in consumption, the account's curtailment priority of 2.1, specifically reserved for accounts using less than 50 dekatherms per day, was no longer appropriate. Nevertheless, Public Service did not alter Blue Ridge's curtailment priority or rate schedule to reflect the increase.

In its final order entered 5 June 1989, the Commission declared that "Account 7-0 should have been reclassified to priority 2.5 as of September 1, 1981, based upon the increase in consumption." It then directed Public Service to make a refund to Blue Ridge's Account 7-0 for the difference between the actual charges to the account under Rate Schedules 55 and 17 and the charges that would have been made under Rate Schedules 60 and 20 (the schedules for priority 2.5) plus interest from 7 May 1985 until reassignment of the account. The Commission denied recovery for overcharges made more than two years prior to 7 May 1987, the date on which the Public Staff of the North Carolina Utilities Commission received complainant's letter containing the substance of his claim and requesting relief. The Commission determined that G.S. 62-132 barred recovery for any overcharges made more than two years prior to that date. Public Staff of the North Carolina Utilities Commission and respondent Public Service Company of North Carolina, Inc. appealed.

North Carolina Utilities Commission—Public Staff Legal Division, by Staff Attorney David T. Drooz, for claimant.

Stott, Hollowell, Palmer & Windham, by James C. Windham, Jr., for claimant.

Burns, Day & Presnell, P.A., by F. Kent Burns, for respondent.

HEDRICK, Chief Judge.

[1] Respondent argues on appeal that the Commission erred by placing Blue Ridge on a rate schedule for which it was never eligible. Public Service complains that by putting Blue Ridge on Rate Schedule 20 even though the corporation had no standby fuel or equipment, the Commission forced Public Service to discriminate against other rate 20 customers who were required to have such alternate fuel capability.

Appellate review of findings and conclusions by the Utilities Commission is governed by G.S. 62-94 which provides that "[u]pon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable." When the Commission's findings and conclusions are supported by competent, material and substantial evidence, considering the whole record, they are binding on the appellate court. *State ex rel. Utilities Comm'n v. Public Staff, N.C. Utils. Comm'n*, 317 N.C. 26, 343 S.E.2d 898 (1986).

We have reviewed the record on appeal and are satisfied that the Commission's findings and conclusions regarding the proper rate schedule for complainant's account 7-0 are based on competent, material and substantial evidence. Respondent's argument is therefore overruled.

[2] Respondent also contends the Commission erred "in placing Blue Ridge retroactively on a rate schedule in violation of its own order." Respondent refers us to an order by the Commission from 1978 in Docket No. G-100, Sub 21 which required new customers on priority 2.5 to install alternate fuel capability. Nevertheless, as the Commission explains, "[t]he 1978 Order . . . deals with the connection of new customers, not to reclassification of existing customers' priorities. . . ." Blue Ridge's plant was already in existence and receiving gas service from respondent when the 1978 order took effect. Consequently, the Commission did not violate

its own order when it placed Blue Ridge on priority 2.5 and Rate Schedule 20. Respondent's argument has no merit.

[3] Finally, Appellant Public Staff assigns as error the Commission's determination that the limitation provision in G.S. 62-132 barred claimant's recovery of overcharges made more than two years before the filing of the complaint. Public Staff complains that G.S. 62-132 does not apply to this case because the rates charged by Public Service were "established" by the Commission. According to appellant, G.S. 62-132 applies only where the rates in question are "other than those established by the Commission." We agree.

Chapter 62 provides "a clear statutory dichotomy" between rates "established" by the Commission and rates "permitted or allowed to go into effect at the instance of the utility." *Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 327, 230 S.E.2d 651 (1976). The remedy provided by G.S. 62-132 is available only where, upon petition of an interested party, the Commission holds a hearing and finds the rates charged to be (i) "other than the rates established by the Commission," and (ii) "unjust, unreasonable, discriminatory or preferential." "Established" rates, unlike "permitted" or "allowed" rates, are determined by the Commission after a full hearing, findings, conclusions and a formal order. Such rates are "deemed just and reasonable." In the present case, the rates charged by Public Service (from Rate Schedule 17) were clearly "established" by the Commission. As a result, the remedy and corresponding limitation period in G.S. 62-132 should never have been applied.

An appropriate claim for relief where the disputed rates are "established" by the Commission may exist under G.S. 62-140 which prohibits unreasonable discrimination by public utilities, or under G.S. 62-139 which prohibits a utility from receiving more compensation for services than the amount prescribed by the Commission. As Article 7 does not contain a statute of limitations for actions arising under G.S. 62-139 or G.S. 62-140, the Commission must, on remand, determine both the appropriate remedy and the proper statute of limitations.

The order of the Utilities Commission is remanded for further proceedings consistent with this opinion.

Remanded.

Judges PARKER and COZORT concur.

NORA M. HINSON v. NATIONAL STARCH & CHEMICAL CORPORATION

No. 8919SC776

(Filed 19 June 1990)

Negligence § 30.2 (NCI3d)— respiratory impairment—acidic cloud from defendant's plant—plaintiff's smoking—insufficiency of evidence of causation

The trial court properly directed verdict for defendant where the evidence, including testimony by plaintiff's medical expert, raised no more than speculation as to whether plaintiff's exposure to acetic acid released by defendant's plant caused plaintiff's respiratory impairment, or whether the exposure combined with plaintiff's cigarette smoking and occupational cotton dust exposure to cause the impairment.

Am Jur 2d, Negligence §§ 459, 463, 531.

APPEAL by plaintiff from order entered 23 February 1989 by *Judge W. Douglas Albright* in ROWAN County Superior Court. Heard in the Court of Appeals 18 January 1990.

J. Stephen Gray for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mark C. Kurdys, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals the trial court's entry of directed verdict for defendant.

The record shows that plaintiff was a fifty-year-old employee of a warehouse located near a chemical processing and production plant, which defendant owned. Defendant is a Delaware corporation. Plaintiff filed a complaint alleging that on 16 August 1984, plaintiff was eating lunch outside her employer's business when defendant's plant negligently released a cloud of vapor into the

air which drifted over plaintiff and which she inhaled. Defendant answered plaintiff's complaint, denying its allegations.

At trial, plaintiff offered evidence that defendant's negligence exposed her to acetic acid (or "vinegar acid"), a toxic chemical. Plaintiff offered medical evidence to show that after the exposure she was diagnosed as having some pulmonary impairment. Record evidence shows that plaintiff had smoked as much as two packs of cigarettes for approximately thirty years and had worked for approximately five years at a textile factory, where she was exposed to cotton dust. Plaintiff testified that she continued smoking for approximately four years after the date of defendant's alleged negligence. On the question of causation, plaintiff offered the testimony of Dr. Myron Goodman, an expert in the field of internal medicine, who testified in pertinent part:

DIRECT EXAMINATION

Q. Dr. Goodman, do you have an opinion satisfactory to yourself as to whether the inhalation of a chemical could have caused bronchitis?

A. Could you repeat that again?

Q. Do you have an opinion satisfactory to yourself, sir, as to whether the inhalation by Ms. Hinson in 1984 could have or might have caused some bronchitis, chemical bronchitis?

A. My feeling after examining her and reviewing the facts at hand, I can state, as I reported in my report, that this patient in my judgment definitely has respiratory impairment. She had symptoms after breathing in an odorous chemical as stated above in the history. *I would certainly say that it's possible that breathing in the chemical [on] the aforesaid date could have caused her to have the respiratory impairment.* I would also state that seeing her in person and listening to her description of symptoms was the most valid means for a report and the most helpful in the decision that impairment had been caused by chemicals as stated. *The inhaled chemical could have caused impairment.* It is extremely difficult to prove a situation like this, as stated above. There does exist respiratory impairment. The patient has inhaled an odorous chemical on above-stated date, and her description

as stated of the symptoms in my judgment is the most influential and accurate as far as determining impairment.

. . . .

Q. Do you feel that Ms. Hinson has any permanent impairment as far as limitations on her activities as to what she might be able to do, such as a job or something of that nature?

A. Yes, I think she does. *I cannot relate it to any specific etiology*, however, in all honesty.

Q. So you say then it would be hard to determine whether it was cigarettes or cotton dust or chemicals that would have caused this—

A. Yes.

. . . .

Q. When you next saw her after the initial time that you saw Ms. Hinson, I believe in October of 1986, would you describe what her condition was like at that time, sir?

. . . .

A. . . . So there was a—demonstrated by the pulmonary functions—a diminished pulmonary function, which I am satisfied with. Now, in all fairness—in all fairness—the patient did continue to smoke some. I don't think she had very much occupational exposure during that time. She did continue to smoke some. And I say there is a degree of decrease in pulmonary function there. *Now, whether that came from an inhaled chemical, I cannot say yes or no.*

. . . .

Q. Did you find, sir, in your examination that, in fact, there was anything inconsistent with an exposure to a chemical bronchitis or to chemicals that could have caused this problem?

A. No, I cannot say that.

. . . .

CROSS-EXAMINATION

Q. Now, you stated that you can't tell whether any respiratory impairment she had is related to her chemical inhalation or whether it's not related. Is that right?

A. *I cannot say categorically, one way or the other.*

Emphases added.

At the close of plaintiff's presentation of evidence, defendant moved for directed verdict according to N.C.G.S. § 1A-1, Rule 50. The trial court granted defendant's motion, determining that plaintiff's evidence failed to establish a question of fact for the jury "on the requisite causal connection between Plaintiff's exposure to chemicals discharged by the Defendant's facility and Plaintiff's alleged respiratory impairment," considered in the light most favorable to plaintiff.

The sole issue is whether Dr. Goodman's testimony on causation is sufficient to take the case to the jury.

Because the parties do not raise the question, we do not address the admissibility of 'might or could' opinion evidence, which is a threshold question separate from the subsequent question of the sufficiency of such evidence. *See Cherry v. Harrell*, 84 N.C. App. 598, 603, 353 S.E.2d 433, 437, *review denied*, 320 N.C. 167, 358 S.E.2d 49 (1987).

The purpose of a motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. N.C.G.S. § 1A-1, Rule 50 (Cum. Supp. 1989); *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990) (citation omitted). "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, resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence." *Id.*, at 191, 390 S.E.2d at 350 (citation omitted). The case should not be submitted to the jury " 'merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.' " *Lee v. Stephens*, 251 N.C. 429, 434, 111 S.E.2d 623, 627 (1959) (citation omitted) (expert medical testimony that it was possible that decedent's motor vehicle collision caused a cerebral hemorrhage presented no question of causation to the jury and was improperly submitted to the jury).

"[P]ositive causation testimony ordinarily will settle the matter of sufficiency, provided it is not inherently incredible. Whether [either word] 'could or might' is sufficient depends upon the general state of the evidence." 1 Brandis on North Carolina Evidence § 137, n.38 (Cum. Supp. 1989) (citation omitted). To defeat a motion for directed verdict and take the question of causation to the jury, non-movant's evidence " 'must indicate a reasonable scientific probability that the stated cause produced the stated result. . . .' " *Cherry*, at 603, 353 S.E.2d at 437 (citation omitted). When "evidence raises a mere conjecture, surmise and speculation as to [causation]," it is insufficient to present a question of causation to the jury. *Maharis v. Weathers Bros. Moving & Storage Co.*, 257 N.C. 767, 768, 127 S.E.2d 548, 549 (1962) (witness who opined that rags "could have caused" a fire and "that it was 'possible that this fire could have happened from any one of a number of causes' " is insufficient to present a causation question for the jury).

Drawing every reasonable inference from the evidence and considering the evidence in the light most favorable to plaintiff, we determine that the 'general state of the evidence,' including Dr. Goodman's expert testimony, raises no more than a possibility that defendant's actions caused plaintiff's pulmonary impairment. Some degree of probability, however small, must exist to provide the jury with a question of causation to resolve. We find applicable our Supreme Court's analysis of the law and circumstances in the *Maharis* decision. The facts in evidence in *Maharis* are analogous to the facts as presented in this case, illustrating that Dr. Goodman's testimony raises nothing more than speculation as to whether plaintiff's exposure to acetic acid alone caused her respiratory impairment, or combined with her cigarette smoking and occupational cotton dust exposure to cause the impairment.

Affirmed.

Judges JOHNSON and PARKER concur.

HCA CROSSROADS RESIDENTIAL CENTERS, INC. AND LAUREL WOOD OF HENDERSON, INC., PETITIONERS v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT (IN RE: PIA-ASHEVILLE, INC. D/B/A APPALACHIAN HALL, PROPOSED INTERVENOR-RESPONDENT)

No. 8910DHR805

(Filed 19 June 1990)

Administrative Law and Procedure § 55 (NCI4th)— motion to intervene denied—proposed intervenor not "party"—no right to appeal denial of motion

Appalachian Hall, which operated a hospital providing substance abuse, chemical dependency, and psychiatric services to adolescents and adults in Buncombe County, had no right of direct appeal to the Court of Appeals from the denial of its motion to intervene in two cases where petitioners sought certificates of need to develop adolescent chemical dependency treatment facilities in Buncombe and Henderson Counties, since Appalachian Hall was not and could not be a party to the contested hearing involving petitioners until its motion to intervene was approved. N.C.G.S. § 131E-188(b); N.C.G.S. § 150B-2(5).

Am Jur 2d, Administrative Law §§ 369, 576.

APPEAL by PIA-Asheville, Inc. (Appalachian Hall) from the Decision of I. O. Wilkerson, Jr., Director of the Division of Facility Services, North Carolina Department of Human Resources. Decision entered 23 March 1989. Heard in the Court of Appeals 13 February 1990.

Moore & Van Allen, by Noah H. Huffstetler, III and Margaret A. Nowell, for petitioner HCA Crossroads Residential Centers, Inc.

Bode, Call & Green, by Diana Evans Ricketts and S. Todd Hemphill, for petitioner-appellee Laurel Wood of Henderson, Inc.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James A. Wellons, for respondent-appellee N. C. Department of Human Resources.

Smith Helms Mulliss & Moore, by Maureen Demarest Murray, Alan W. Duncan, William K. Edwards and Leslie C. O'Toole, for proposed intervenor PIA-Asheville, Inc., d/b/a Appalachian Hall.

ORR, Judge.

This appeal concerns an attempt by PIA-Asheville, Inc. d/b/a Appalachian Hall (Appalachian Hall) to intervene in two contested cases which were consolidated and heard before the Office of Administrative Hearings. Appalachian Hall operates a 100-bed hospital in Buncombe County. That facility provides substance abuse, chemical dependency and psychiatric services to both adolescents and adults.

On 16 May 1988, petitioner HCA Crossroads Residential Centers, Inc. (HCA) filed an application with the North Carolina Department of Human Resources, Certificate of Need Section, for the issuance of a certificate of need to develop a 48-bed adolescent chemical dependency treatment facility in Buncombe County. Also on or about 16 May 1988, petitioner Laurel Wood of Henderson, Inc. (Laurel Wood) filed an application with the North Carolina Department of Human Resources, Certificate of Need Section, for the issuance of a certificate of need to develop a 66-bed adolescent chemical dependency treatment facility in Henderson County. Both applications were received and denied by the Certificate of Need Section on 21 November 1988.

Each applicant thereafter filed a petition requesting a contested case hearing before the Office of Administrative Hearings. Subsequent to these two requests, the two cases were consolidated for hearing.

On 3 January 1989 and 6 January 1989, Appalachian Hall filed motions to intervene in the contested case hearing for HCA and Laurel Wood. Thereafter, both HCA and Laurel Wood filed requests for recommended summary judgment rulings in their favors. On or about 9 January 1989, the Office of Administrative Hearings recommended that summary judgment be entered in favor of HCA. On 25 January 1989, the Office of Administrative Hearings denied Appalachian Hall's motion to intervene. Then, on 27 January 1989, it recommended summary judgment be entered in favor of Laurel Wood.

On 14 February 1989, Appalachian Hall filed another motion to intervene and exceptions to the Office of Administrative Hearings' recommendations. These materials, which were filed with I. O. Wilkerson, Jr., the Director of the North Carolina Department of Human Resources, Division of Facility Services (the Director), also contained proposed findings of fact and conclusions of law.

Thereafter, both Laurel Wood and HCA filed responses with the Director opposing Appalachian Hall's proposed intervention.

The Director heard Appalachian Hall's motion on 2 March 1989. That motion was denied on the same day. The Director then heard arguments by HCA and Laurel Wood regarding the issuance of the certificates of need. Thereafter, the Director filed a final agency decision rejecting the recommended decisions to grant summary judgment in favor of HCA and Laurel Wood. On or about 23 March 1989, the Director signed a final agency decision denying Appalachian Hall's motion to intervene in accordance with the decision made by the Office of Administrative Hearings. From that decision, Appalachian Hall now appeals.

In this appeal, Appalachian Hall challenges the denial of its motion to intervene by the Department. However, based upon the facts of this case and the issues raised by the parties, we must first address the threshold jurisdictional question of whether Appalachian Hall has met the requirements for a direct appeal to this Court pursuant to N.C. Gen. Stat. § 131E-188(b) which states in pertinent part:

> Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a).

Petitioner HCA first argues that Appalachian Hall has no right to an appeal before this Court in that Appalachian Hall was not a party to any contested case hearing. Appalachian Hall relies on the definition of "party" set out in N.C. Gen. Stat. § 150B-2(5) and contends that it is in fact a party entitled to a direct appeal to this Court.

The jurisdictional question before us thus turns upon whether the definition of a "party" as used in N.C. Gen. Stat. § 150B-2(5) for purposes of the Administrative Procedures Act controls the use of that term in § 131E-188(b) dealing with direct appeals to this Court.

Under N.C. Gen. Stat. § 150B-2(5) of the Administrative Procedures Act, "party" means any person or agency (1) named as a party, (2) admitted as a party, or (3) properly seeking as of right to be admitted as a party. The first two categories do not apply

to Appalachian Hall since it was neither named as a party nor admitted as a party for purposes of the contested case. Appalachian Hall therefore argues that category three applies in that it was a party to the contested case because it was "seeking as of right to be admitted as a party. . . ." This interpretation is directly at odds with N.C. Gen. Stat. § 150B-23(d) which states: "Any person may petition *to become a party* by filing a motion to intervene . . . ." This is precisely the action taken by Appalachian Hall, the denial of which is the substantive basis of their appeal. Appalachian Hall's status therefore could not be any clearer by virtue of this provision. It was not and could not be a party to the contested hearing until its motion to intervene was approved.

We acknowledge that there exists some confusion from the definition of "party" which would appear to be contradictory to the conclusion stated above. A plausible explanation for the provision deeming a person who is "seeking as of right to be admitted as a party . . ." to in fact be a "party" can be derived from the notice provisions under the Administrative Procedures Act. At various stages of the proceedings, "part[ies]" are required to be given notice. *See* N.C. Gen. Stat. § 150B-23(b). By virtue of the definition of "party," persons currently "seeking as of right to be admitted as a party . . ." would be entitled to notice. However, for purposes of § 131E-188(b) and the right of appeal directly to this Court, Appalachian Hall would had to *have been* a party to the contested case by virtue of being allowed to intervene pursuant to § 150B-23(d).

Since Appalachian Hall was not a party to the contested case, it does not meet the jurisdictional requirements of N.C. Gen. Stat. § 131E-188(b) and its direct appeal to this Court must be dismissed. The requirements under N.C. Gen. Stat. § 131E-188(b) are jurisdictional prerequisites for a direct appeal to this Court from a full agency decision and parties aggrieved by any other final agency decision are required to appeal to the Wake County Superior Court. *See Rowan Health Properties, Inc. v. N.C. Dept. of Human Resources*, 89 N.C. App. 285, 365 S.E.2d 635 (1988), and *Charlotte-Mecklenburg Hosp. Authority v. N.C. Dept. of Human Resources*, 83 N.C. App. 122, 349 S.E.2d 291 (1986).

Dismissed.

Judges ARNOLD and JOHNSON concur.

PHILLIP R. STURM v. DAVID W. SCHAMENS

No. 8921SC919

(Filed 19 June 1990)

Arbitration and Award § 17 (NCI4th)— right to compel arbitration— no implied waiver

Defendant stockbroker did not impliedly waive his right to compel arbitration where plaintiff did not show that a long trial had occurred, that plaintiff had lost any helpful evidence by the delay in defendant's requesting arbitration, that plaintiff had taken steps in litigation to his detriment, or that any other prejudice had occurred to him; furthermore, defendant's participation in two earlier proceedings involving the same controversy did not prejudice plaintiff where plaintiff took voluntary dismissals in them, and refiling the action began the case anew.

Am Jur 2d, Arbitration and Award §§ 51, 52.

APPEAL by defendant from an order entered by *Judge James A. Beaty* in FORSYTH County Superior Court. Heard in the Court of Appeals 3 April 1990.

Plaintiff Phillip Sturm filed this action seeking to recover for unfair trade practices and damages for losses he suffered as a result of an alleged unauthorized trade made by his broker, defendant David Schamens. Defendant filed a motion to dismiss or, alternatively, to stay the case and compel arbitration. The court denied defendant's motions and he appealed.

In 1984 plaintiff opened a securities account with Interstate Securities Corporation ("Interstate") where Schamens was his broker. At that time Sturm executed an Option Account Agreement, which was signed by both parties. The Agreement provided that any controversy between them would be settled by arbitration.

In May 1989 plaintiff filed this action alleging that on or about 23 December 1985 defendant made an unauthorized trade in plaintiff's securities account. Twice before, this controversy has been dismissed in a legal proceeding. In January 1986 plaintiff filed a cross-claim against Schamens in an action entitled *Alex. Brown & Sons, Inc. v. Phillip R. Sturm and David W. Schamens* (86CVS5074). The cross-claim sought damages allegedly resulting from the same

trade complained of here. Sturm took a voluntary dismissal of that cross-claim in May 1988. On 19 October 1987 Sturm filed an arbitration claim with the American Stock Exchange ("AMEX") against Interstate and Schamens. That claim also sought damages arising from the same acts forming the basis of this complaint. In November 1988 plaintiff withdrew the arbitration request.

Robert D. Hinshaw for plaintiff appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Jim W. Phillips, Jr., for defendant appellant.

ARNOLD, Judge.

The first question for review is whether the interlocutory order denying defendant's Motion to Dismiss is properly before us. It is not. Defendant's appeal as of right is dismissed and his petition for Writ of Certiorari is denied. *See Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426, *review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). None of the circumstances constituting an exception to the rule governing interlocutory actions are present here. *See id.* The appeal of this issue is premature.

The second question is whether Schamens waived his right to compulsory arbitration. The Option Agreement between Sturm and Schamens is an enforceable and irrevocable contract unless both parties agree otherwise or one party expressly or impliedly waives his right to arbitrate. *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 342 S.E.2d 853 (1986); N.C. Gen. Stat. § 1-567.1 *et seq.* (1989). Plaintiff argues defendant impliedly waived his right to compel arbitration. We disagree.

To show that an implied waiver has occurred, the party resisting arbitration must demonstrate he was prejudiced by his adversary's delay in seeking arbitration. *Servomation*, 316 N.C. at 544, 342 S.E.2d at 854. For example, the party resisting arbitration must show the delay forced him to bear substantial expense in an earlier trial, lose helpful evidence or take some step in earlier litigation that would now cause him prejudice if compelled to arbitrate. A showing that the adversary used judicial discovery procedures not available in arbitration might demonstrate such prejudice. *Id.; Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984).

Applying these rules, Sturm has failed to show the requisite prejudice. No long trial has occurred, nor has the plaintiff lost any helpful evidence or taken steps in litigation to his detriment. Plaintiff argues he was prejudiced by defendant's participation in the *Alex. Brown* litigation and the AMEX arbitration. Those matters, however, have no bearing on our determination. In both situations plaintiff took a voluntary dismissal. When a party has earlier taken a voluntary dismissal, refiling the action begins the case anew. *See Tompkins v. Log Systems, Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). It is "as if the suit had never been filed." *Id.* Schamens' only action to date in the current case has been to file a Motion to Dismiss and to Compel Arbitration, neither of which unfairly prejudices plaintiff.

Furthermore, examination of the record reveals no specific acts by defendant in the earlier proceedings that will now prejudice Sturm. Plaintiff contends that evidence gathered in the *Alex. Brown* proceeding could be used in this legal action but might not be admissible in an arbitration proceeding. Yet, he offers no specific example of this claim. Since rules concerning the use of evidence in arbitration proceedings are more liberal than in courts of law, we refuse to assume that plaintiff has been prejudiced by evidence gathered in the earlier litigation. Plaintiff also contends that he spent $5,000 in legal fees on his cross-claim against Schamens in the *Alex. Brown* proceeding. However, this claim is not supported by the record, nor is it sufficient to support a finding of waiver.

The record does not support a finding of fact that plaintiff has been prejudiced by defendant's earlier actions. Therefore, defendant has not waived his right to compel arbitration. The Order denying defendant's motion to dismiss is upheld. The Order denying his motion to stay the case and compel arbitration is reversed.

Reversed.

Judges LEWIS and DUNCAN concur.

DR. ROBERT WATSON AND LAURIE WATSON, PLAINTIFFS v. GRAF BAE FARM, INC., DEFENDANT

No. 8926DC878

(Filed 19 June 1990)

Process § 14.3 (NCI3d)— nonresident corporation—sale of horse in North Carolina—contacts sufficient for in personam jurisdiction

The quantity and quality of defendant nonresident corporation's contacts with this state were sufficient to support the exercise of in personam jurisdiction where plaintiffs first became aware of the sale of show horses by defendant through a magazine advertisement in a nationally distributed magazine which was sold in North Carolina; a condition of the sale from the very beginning of the transaction was that plaintiffs have the horse examined in North Carolina by a veterinarian to determine if the horse was suitable for plaintiffs' intended purposes; the final act of the contract, the veterinarian's pre-purchase exam, took place in North Carolina; the veterinarian did not approve the horse; and the horse was delivered by defendant to North Carolina as part of the contract.

Am Jur 2d, Foreign Corporations §§ 324, 325, 329, 332, 333, 355, 356.

APPEAL by defendant from judgment entered 19 May 1989 by *Judge Daphene L. Cantrell* in MECKLENBURG County District Court. Heard in the Court of Appeals 6 March 1990.

Defendant, of Aiken, South Carolina, advertised in a national publication that it offered certain Hanovarian horses for sale. Plaintiff Laurie Watson received the publication at her North Carolina residence. Several days later after calling, plaintiff drove to Aiken, discussed the potential sale with defendant, and after returning to North Carolina, telephoned defendant again and mailed defendant a deposit for the purchase of a horse. Plaintiffs went to Aiken and paid by check the balance of the purchase price. The parties agreed that the horse would undergo a "pre-purchase exam" by plaintiffs' veterinarian in North Carolina. Plaintiffs were later informed that the check would not be accepted by the South Carolina bank, so they made a wire transfer of the balance purchase price from North Carolina. The horse and bill of sale were delivered

by defendant to plaintiffs in North Carolina. The plaintiffs' veterinarian rejected the horse for the intended uses by plaintiffs. Defendant refused to accept the return of the horse. Plaintiffs filed a civil suit and defendant corporation filed a motion to dismiss for lack of jurisdiction. That motion was denied. The trial court ruled in favor of plaintiffs at a trial on all the issues. Defendant appeals.

Knox, Knox & Freeman, by H. Edward Knox, Allen C. Brotherton, and Bobby L. Bollinger, Jr., for plaintiffs-appellees.

Law Offices of Chandler & deBrun, by W. James Chandler, for defendant-appellant.

LEWIS, Judge.

Defendant appeals this case solely on the issue of whether there were sufficient minimum contacts to support *in personam* jurisdiction. The existence of minimum contacts is a question of fact and is controlled by the definition of "minimum contacts" found in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945).

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." . . . "Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.

Id. at 316-17, 90 L.Ed. at 102. (Citations omitted.)

The North Carolina "long-arm statute" which controls in this case is N.C.G.S. § 1-75.4.

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action . . . under any of the following circumstances:
>
> . . .

(5) Local Services, Goods or Contracts.—In any action which:

. . .

c. Arises out of a promise, made anywhere to the plaintiff . . . by the defendant to deliver or receive within this State goods . . . or other things of value. . . .

It is clear both from the wording of this statute and applicable case law that the provisions of this statute are to be liberally construed in favor of finding personal jurisdiction, consistent with due process limitations.

The criteria for determining whether minimum contacts are present include: (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action with those contacts, (4) the interest of the forum state, and (5) convenience to the parties. *Phoenix American Corp. v. Brissey*, 46 N.C. App. 527, 530-31, 265 S.E.2d 476, 479 (1980), *quoting Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965). This Court recently decided, in a case similar in several respects to the case at bar, that the defendant had made sufficient minimum contacts with the State of North Carolina to satisfy due process. *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 381 S.E.2d 156 (1989), *aff'd*, 326 N.C. 480, 390 S.E.2d 137 (1990). An examination of the facts in the case at bar in light of the factors cited above leads to the conclusion that defendant corporation made sufficient minimum contacts with this state sufficient to support *in personam* jurisdiction.

This cause of action arose directly from defendant's refusal to allow the return of the horse and refunding the money. When "the defendant has 'purposefully directed' his activities at residents of the forum . . . and the litigation results from alleged injuries that 'arise out of or relate to' those activities," then minimum contacts are more likely to be found. *Brickman v. Codella*, 83 N.C. App. 377, 384, 350 S.E.2d 164, 166 (1986), *quoting Burger King v. Rudzewicz*, 471 U.S. 462, 472, 85 L.Ed.2d 528, 541 (1985).

Defendant's contacts with North Carolina which subject it to *in personam* jurisdiction are as follows:

(1) Plaintiffs first became aware of the sale of show horses by defendant through a magazine advertisement in a nationally

distributed magazine which was sold in North Carolina. *See Keeton v. Hustler Magazine*, 465 U.S. 770, 79 L.Ed.2d 790 (1984).

(2) A condition of the sale was that plaintiffs have the horse examined in North Carolina by a veterinarian to determine if the horse is suitable for plaintiffs' intended purposes. This pre-purchase examination of the horse was contemplated by the parties from the very beginning of the transaction.

(3) The final act of the contract, the veterinarian's pre-purchase examination of the horse, took place in North Carolina. The contract was contingent upon this final act. However, the veterinarian did not approve the horse for plaintiffs' intended purposes, so the condition was not fulfilled. *See* N.C.G.S. §§ 25-2-601, 25-2-602.

(4) The horse was delivered to North Carolina as part of the contract.

We hereby affirm the judgment of the trial court.

Affirmed.

Judges WELLS and COZORT concur.

GEORGE STALLINGS v. KATHRYN M. HAHN

No. 8911DC548

(Filed 19 June 1990)

Process § 9.1 (NCI3d)— nonresident individual—insufficient contacts with North Carolina—no in personam jurisdiction

The quantity and quality of defendant nonresident individual's contacts with this state were insufficient to support the exercise of in personam jurisdiction over her where the only contacts between defendant and North Carolina were defendant's advertisement placed in a national magazine, long distance phone calls between the parties, and a cashier's check sent from plaintiff in North Carolina to defendant.

Am Jur 2d, Process § 79.

APPEAL by defendant from order entered 20 April 1989 by *Judge William A. Christian* in LEE County District Court. Heard in the Court of Appeals 5 February 1990.

Plaintiff instituted this civil action on 21 December 1988 alleging breach of contract and seeking damages in excess of $5,000. Defendant received process by certified mail on 24 December 1988. On 23 January 1989, defendant made a special appearance and moved to dismiss the action for lack of jurisdiction over the subject matter and over the person of the defendant. After a hearing, the trial court entered an order denying defendant's motions. Defendant appeals.

Staton, Perkinson, Doster & Post, by Ronald L. Perkinson, for plaintiff-appellee.

Harrington, Ward, Gilleland & Winstead, by F. Jefferson Ward, Jr., for defendant-appellant.

JOHNSON, Judge.

Defendant Kathryn M. Hahn, who is a citizen and resident of Pennsylvania, placed an advertisement in the December 1988 issue of *Hemmings Motor News*, a national monthly magazine, to offer for sale a 1958 Pontiac Bonneville and a parts car for the Bonneville for the price of $2,500. On or about 25 November 1988, plaintiff, who is a resident of North Carolina, telephoned defendant in Pennsylvania regarding the advertisement. Plaintiff did not reach defendant on the first call, and defendant returned plaintiff's call. After this long distance conversation, plaintiff sent defendant a deposit on the cars in the form of a cashier's check in the amount of $200. Defendant received the check in Pennsylvania. On 8 December 1988, plaintiff again telephoned defendant in Pennsylvania to make arrangements to pick up the cars in Pennsylvania, and defendant advised plaintiff that she was going to sell the cars to someone else. Defendant returned the deposit check to plaintiff.

Although a defendant may not ordinarily immediately appeal the denial of a motion to dismiss, this defendant may properly appeal under G.S. § 1-277(b) which provides for immediate appeal "from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant." *Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

We apply a two-part test to determine whether Ms. Hahn, a foreign defendant, may be subjected to *in personam* jurisdiction in this State. First, we consider whether there exists a basis for asserting jurisdiction under G.S. § 1-75.4, commonly known as the "long arm" statute. Second, if such a basis exists, we determine whether exercise of the jurisdiction by our courts would comport with due process of law guaranteed by the constitution. *Marion v. Long*, 72 N.C. App. 585, 325 S.E.2d 300, *disc. rev. denied and appeal dismissed*, 313 N.C. 604, 330 S.E.2d 612 (1985). Although the long arm provision is to be liberally construed in favor of jurisdiction, *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E.2d 476 (1980), the burden is on the plaintiff to establish a *prima facie* showing that one of the statutory grounds is applicable. *DeSoto Trail, Inc. v. Covington Diesel, Inc.*, 77 N.C. App. 637, 335 S.E.2d 794 (1985); *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E.2d 782 (1978).

In the instant case, the trial court made no finding that any particular provision of G.S. § 1-75.4 is applicable. Plaintiff contends in his brief that subsection 5(d) covers the situation. G.S. § 1-75.4(5)(d) provides that statutory jurisdiction is present in any action that "[r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." This Court has held that payments of money constitute "things of value" for purposes of this statute. *Church v. Carter*, 94 N.C. App. 286, 380 S.E.2d 167 (1989); *Schofield v. Schofield*, 78 N.C. App. 657, 338 S.E.2d 132 (1986). Therefore, we hold that statutory jurisdiction exists under G.S. § 1-75.4(5)(d).

We find, however, that this jurisdiction cannot constitutionally be exercised. The landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed.2d 95 (1945), established that "minimum contacts" between the forum state and defendant must exist before *in personam* jurisdiction may be exercised. The quality and quantity of contacts, the source and connection of the cause of action with those contacts, as well as convenience and interest of the forum state are useful criteria in determining the existence of minimum contacts. *Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E.2d 28 (1984). The facts of each case must be considered in light of "traditional notions of fair play and substantial justice." *International Shoe Co., supra* at 316, 90 L.Ed.2d at 102.

The only contacts between defendant and the forum State in this case are the advertisement placed in *Hemmings Motor News*, the telephone calls between plaintiff and defendant, and the cashier's check sent by plaintiff to defendant. Defendant never came to North Carolina; she received the deposit check in Pennsylvania; and delivery of the cars was to take place in Pennsylvania. The contacts in this case simply do not rise to the level of satisfying due process requirements. Placement of advertisements in a national publication cannot by itself support jurisdiction. *Marion v. Long, supra* and cases cited therein. In *Marion*, this Court found minimum contacts lacking when defendants had placed an advertisement similar to the one in the instant case, had also made a trip to North Carolina to trailer the plaintiff's automobile back to Georgia for repairs, and the oral contract for repairs was allegedly closed in North Carolina. In the case *sub judice*, the contacts are even less substantial than in *Marion*. Defendant Hahn has not entered the forum State. Also, all the elements of defendant's performance of the oral agreement, if there was one, were to take place in Pennsylvania. *Phoenix America Corp., supra* (Mere act of entering into a contract with a forum resident will not provide minimum contacts, especially if all the elements of defendant's performance are to take place outside the forum state.).

In sum, the quality and quantity of contacts in this case are insufficient to support exercise of *in personam* jurisdiction, and the trial court erred in denying defendant's motion to dismiss.

Reversed and remanded.

Chief Judge HEDRICK and Judge PHILLIPS concur.

JOHN L. MAY AND WIFE, VIRGINIA L. MAY, PLAINTIFFS v. FRED H. MARTIN AND WIFE, SALLY B. MARTIN AND MITCHELL T. KING, DEFENDANTS

No. 8928SC1162

(Filed 19 June 1990)

Easements § 7 (NCI3d)— action to establish easement—no patent ambiguity—complaint improperly dismissed

Plaintiffs' complaint alleging an easement across defendants' land based on a conveyance of "an easement granting a

30-foot right of way over the lands in the rear of lot 20 to Spring Park Road if and when said road is opened" stated a claim for relief since the description was not necessarily patently ambiguous because the ambiguities may be resolved by resorting to the plat referred to in the deeds of both parties or by other admissible evidence.

Am Jur 2d, Easements and Licenses §§ 21, 23.

APPEAL by plaintiffs from order entered 28 September 1989 by *Judge Janet Marlene Hyatt* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 3 May 1990.

Shuford, Best, Rowe, Brondyke & Wolcott, by James Gary Rowe and Patricia L. Arcuri, for plaintiff appellants.

Riddle, Kelly & Cagle, P.A., by E. Glenn Kelly, for defendant appellees.

PHILLIPS, Judge.

Plaintiffs' complaint seeking a declaratory judgment that they are entitled to an easement across the lands of the defendants was dismissed pursuant to the provisions of Rule 12(b)(6), N.C. Rules of Civil Procedure, for failing to state a claim for which relief can be granted. In substance, the complaint alleges the following: Plaintiffs and defendants own adjoining tracts of land in Buncombe County. Plaintiffs' title deed received in June, 1973 includes a conveyance by Paul A. Hoch and wife, Elizabeth May Hoch, to them of—

> an easement granting a 30-foot right of way over the lands in the rear of lot 20 to Spring Park Road if and when said road is opened and improved, as set forth in a deed recorded in Book 725 at Page 357 in the Buncombe County Registry, but nothing herein shall obligate the Grantor to open and improve said Spring Park Road.

The road known as "Spring Park Road" is shown on the plat of Section No. 1, Revision of Kenilworth Forest, recorded in Plat Book 24, at page 9, of Buncombe County Registry in August, 1948, and the deed of the Hochs, plaintiffs' predecessors-in-title, specifically refers to this plat. The road has been opened and improved from its eastern terminus at its intersection with White Pine Road to its western terminus at or near the southwest corner of Lot 20

shown in Plat Book 24, at page 9, Buncombe County Registry. Upon receiving notice of plaintiffs' intention to open the right of way across their lands, defendants notified plaintiffs that they do not recognize the validity of this right of way. In their answer defendants denied that plaintiffs are entitled to an easement; alleged that the description was too vague to be enforceable; claimed title to the land over which the easement would run by adverse possession; asked that the claim be removed as a cloud on their title; and moved that the action be dismissed.

The issue in this appeal is not whether plaintiffs may ultimately obtain the legal relief they seek, but whether it is manifest from the complaint that no relief can be granted under any evidence that may be presented in support of the allegations made. *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987). A complaint for declaratory relief is dismissible only when "there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy." *N. C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974). In this case a genuine controversy is alleged; plaintiffs allege that they are entitled to the 30-foot right of way over the lands of the defendants and defendants deny any such right.

Viewing the allegations of the complaint liberally, as our notice pleading practice requires, we are of the opinion that it does not affirmatively appear that no relief may be granted under the complaint. In dismissing the complaint the court was apparently of the opinion that no relief can be granted under it because the language granting plaintiffs a right of way is patently ambiguous. That is not necessarily the case; for aught that the record shows the ambiguities in the language at issue may be resolved by resorting to the plat referred to in the deeds of both parties or by other admissible evidence. In the setting that now exists, therefore, the complaint was erroneously dismissed. The cases defendants rely upon have no application. The only case involving just the pleadings, *Thompson v. Umberger*, 221 N.C. 178, 19 S.E.2d 484 (1942), was handed down when a complaint had to fully state a "cause of action," whereas our law now only requires that the complaint give notice of the claim or claims asserted. The other cases, *Oliver v. Ernul*, 277 N.C. 591, 178 S.E.2d 393 (1971), *M. E. Gruber, Inc. v. Eubank*, 197 N.C. 280, 148 S.E. 246 (1929), and *Adams v. Severt*, 40 N.C. App. 247, 252 S.E.2d 276 (1979), were decided upon evidence, either presented or forecast, and were

dismissed by judgment of nonsuit, or summary judgment, for not raising issues of fact for the jury.

Reversed.

Judges ARNOLD and COZORT concur.

ADELL RATLEY v. NOAH RATLEY

No. 8916DC1172

(Filed 19 June 1990)

Divorce and Alimony § 25.10 (NCI3d)— modification of child custody order—no showing of changed circumstances

The trial court was not required to modify a child custody order to give defendant either sole or joint custody of his children because the evidence showed that he was a "caring, loving and capable father," since a modification of a child custody order requires a substantial change of circumstances affecting the welfare of the children, and none was shown in this case.

Am Jur 2d, Divorce and Separation §§ 1003, 1011.

APPEAL by defendant from order entered 16 June 1989, *nunc pro tunc* 22 May 1989, by *Judge Robert F. Floyd, Jr.* in ROBESON County District Court. Heard in the Court of Appeals 3 May 1990.

Musselwhite, Musselwhite & McIntyre, by David F. Branch, Jr., for plaintiff appellee.

Hubert N. Rogers, III for defendant appellant.

PHILLIPS, Judge.

By an order entered in October, 1986 Judge Gardner awarded custody of the twin children of the parties to plaintiff and allowed defendant extensive visitation rights. Defendant's appeal is from Judge Floyd's denial of his motion to modify the order by awarding him either sole or joint custody.

The appeal has no basis. Though it has long been established in this jurisdiction that a child custody order may not be modified

in the absence of a substantial change of circumstances which affect the welfare of the child involved, G.S. 50-13.7; *Neighbors v. Neighbors*, 236 N.C. 531, 73 S.E.2d 153 (1952); *In re Means*, 176 N.C. 307, 97 S.E. 39 (1918), defendant does not argue in his brief that any such change has occurred. He argues only that his sole or joint custody should have been ordered because the evidence indisputably shows that he is a "caring, loving and capable father." The time for that argument, standing alone, passed long since. That defendant is a fit person to have sole or joint custody of the children, by itself, is no basis for modifying the order previously entered. Before the prior order can be modified it must be established that a substantial change of circumstances affecting the welfare of the children has occurred, *Searl v. Searl*, 34 N.C. App. 583, 239 S.E.2d 305 (1977), and that has not been done.

Affirmed.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 JUNE 1990

BODDIE v. N.C. DEPT. OF MOTOR VEHICLES No. 891SC1300	Dare (89CVS92)	Affirmed
CARPENTER v. SUMEREL No. 8930SC851	Swain (87CVS84)	Appeal Dismissed
CITY OF HICKORY PUBLIC HOUSING AUTHORITY v. WILFONG No. 8925DC740	Catawba (88CVD2636)	Affirmed
CORDER v. ALLENTON, INC. No. 8914SC987	Durham (87CVS3839)	Affirmed
DAVIS v. FIGGIE INTERNATIONAL CO. No. 893SC792	Carteret (85CVS986)	Appeal Dismissed
DAVIS v. TOWN OF CAROLINA BEACH No. 895SC1253	New Hanover (87CVS694)	New Trial
DODGEN v. WILSON No. 8927DC909	Gaston (89CVD189)	Affirmed
GILBERT v. GREAT AMERICAN SOUTH, INC. No. 8913SC1276	Brunswick (85CVS714)	Dismissed
HOOD v. HIATT No. 897SC920	Edgecombe (89CVS364)	Appeal Dismissed
IN RE ALLMAN No. 8919DC1201	Cabarrus (86J25)	Affirmed
IN RE TRUST OF JACOBS v. WEINSTEIN No. 8926SC1088	Mecklenburg (86SP417) (86SP418)	Affirmed in part; appeals dismissed in part
IN RE WELCH No. 8926DC1171	Mecklenburg (87J523)	Affirmed
IVERSON v. TM ONE, INC. No. 8926SC445	Mecklenburg (86CVS12221)	Affirmed
JOHNSON v. JOHNSON No. 8918DC759	Guilford (88CVD5123)	Dismissed
JOYCE v. JOYCE No. 895DC1078	New Hanover (87CVD3283)	Affirmed

LAWTON v. COUNTY OF DURHAM No. 8910IC1032	Ind. Comm. (604398)	Affirmed
LYMANGROVER v. WAKE FOREST UNIVERSITY No. 8921SC537	Forsyth (88CVS1161)	Affirmed
STATE v. BAUCOM No. 8915SC635	Alamance (88CRS6605)	No Error
STATE v. BUCKOM No. 898SC1282	Wayne (88CRS11464)	No Error
STATE v. COLE No. 8920SC1293	Moore (89CRS2161)	No Error
STATE v. DAWSON No. 897SC641	Wilson (87CRS5419) (87CRS5420) (87CRS5422) (87CRS5424) (87CRS5426) (87CRS5427)	In the trials—no error; remanded for resentencing
STATE v. EARLEY No. 8929SC1363	Rutherford (82CRS209) (82CRS1397)	Affirmed
STATE v. EVANS No. 8928SC1225	Buncombe (88CRS12806)	Affirmed
STATE v. EVANS No. 8916SC619	Robeson (88CRS8486)	No Error
STATE v. HAINLINE No. 8930SC1396	Cherokee (89CR621) (89CR1125)	Affirmed
STATE v. HOLT No. 8927SC1238	Gaston (88CRS027057) (88CRS027058)	No Error
STATE v. JONES No. 8918SC1252	Guilford (88CRS17768)	No Error
STATE v. McCORKLE No. 8918SC1406	Guilford (89CRS20342)	No Error
STATE v. MICHAELS No. 8927SC1233	Gaston (87CRS5911) (87CRS5912)	No Error
STATE v. NEAL No. 8926SC1356	Mecklenburg (88CRS79241)	Affirmed

STATE v. RUSSELL No. 8918SC1311	Guilford (88CRS55652) (88CRS20272)	No Error
STATE v. SALYERS No. 8919SC1250	Randolph (88CRS10338)	No Error
STATE v. SAWYER No. 891SC1290	Pasquotank (88CRS3460) (88CRS3461) (88CRS3462)	No Error
STATE v. THORPE No. 8923SC1158	Yadkin (89CRS99)	No Error
STATE v. TURRUBIARTE No. 8929SC1264	Rutherford (88CRS5292) (88CRS5293)	No Error
STATE v. VALLIERE No. 8920SC1200	Union (88CRS4190)	No Error
TEW v. LILLEY INTERNATIONAL No. 8911SC1362	Harnett (89CVS0055)	Reversed & Remanded

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, PUBLIC STAFF AND REGIONAL INVESTMENTS OF MOORE, INC., APPLICANT-APPELLEES v. VILLAGE OF PINEHURST, INTERVENOR-APPELLANT

No. 8910UC825

(Filed 3 July 1990)

1. **Utilities Commission § 19 (NCI3d)— transfer of water and sewer franchises—public convenience and necessity—inquiry required**

The "adverse effect" test of N.C.G.S. § 62-111(e) is inapplicable to transfer approval proceedings involving water and sewer franchises; furthermore, when the Utilities Commission is adjudging public convenience and necessity in the context of proposed transfers of water and sewer franchises under N.C.G.S. § 62-111(a), it must inquire into *all* aspects of anticipated service and rates occasioned and engendered by the proposed transfer and then determine whether the transfer will serve the public convenience and necessity.

Am Jur 2d, Public Utilities §§ 34, 79 et seq., 230 et seq.

2. **Utilities Commission § 19 (NCI3d)— transfer of utility franchises—contingent upon Commission—impropriety**

Transfers of utility franchises cannot be made contingent upon or subject to Utilities Commission approval but must be made, if at all, subsequent to such approval; though the Utilities Commission erred in concluding that the transfer in this case complied with the prior approval requirement of N.C.G.S. § 62-111(a), intervenor was not prejudiced since the Commission satisfied the public convenience and necessity inquiry in approving this transfer.

Am Jur 2d, Public Utilities §§ 34, 79 et seq., 230 et seq.

3. **Utilities Commission § 4 (NCI3d)— transfer of water franchise—improper communication between applicant and Commission—no prejudice**

Even if there was an improper communication between the applicant for a transfer of water and sewer franchises and the Utilities Commission in violation of N.C.G.S. § 62-70 when the Commission considered a late-filed affidavit in denying an interlocutory injunction, intervenor was not prejudiced since it had notice of the late-filed affidavit and it advanced

no contention that it was not afforded an opportunity to be heard with respect to the affidavit at a subsequent prehearing conference on its motion for a permanent stay order.

Am Jur 2d, Public Utilities §§ 34, 79 et seq., 230 et seq.

APPEAL by intervenor from order entered 3 February 1989 by the North Carolina Utilities Commission. Heard in the Court of Appeals 13 February 1990.

On 9 February 1987, Regional Investments of Moore, Inc. ("R.I.M.") filed an application in the Utilities Commission seeking approval to receive the franchises of the water and sewer systems operated by the subsidiaries of Pinehurst Enterprises, Inc. ("Pinehurst Enterprises") and serving an area in and around the Village of Pinehurst ("the Village"). On 26 February 1987, the Village filed its petition to intervene and a motion to dismiss R.I.M.'s application. In its motion to dismiss, the Village asserted that Pinehurst Enterprises, the proposed transferor, was without authority to transfer the franchises by virtue of a consent judgment, entered in case number 73CVS594 in Moore County Superior Court, which purported to grant the Village a right of first refusal to purchase these utilities.

R.I.M. did not oppose the Village's petition to intervene, but did oppose the motion to dismiss. Following proceedings at which argument was heard on the motion to dismiss and evidence was presented on the application, the Commission, by order of 7 January 1988, ordered the Village to institute action in the Moore County Superior Court within 60 days to resolve questions raised concerning the validity of the consent judgment and deferred ruling on the application until those questions were determined by that court.

On 1 March 1988, the Village advised the Commission that it had filed a "collateral action," *Village of Pinehurst v. Regional Investments of Moore, Inc.*, No. 88CVS133, in the Moore County Superior Court, as ordered by the Commission. The Village subsequently filed a motion in the Commission seeking, *inter alia*, an interlocutory stay order prohibiting R.I.M. "from diverting the profits from the utility operations to the wrongful enrichment of the would-be purchasers prior to approval thereof, and to the irreparable detriment of the rate-paying consuming public." By order entered 18 October 1988, the Commission denied the Village's motion for an interlocutory stay order.

On 15 December 1988 the Moore County Superior Court entered its order of summary judgment for R.I.M. in the collateral action, concluding that the Village had no legally enforceable right of first refusal to acquire the franchises in question.[1] Thereafter, R.I.M. filed in the Commission its motion for a final order approving its application to receive the water and sewer franchises. The Commission entered its order approving the transfer on 3 February 1989. From this order, the Village appeals.

Hunton & Williams, by Edward S. Finley, Jr., Frank A. Schiller and Alaine Y. Miller, for applicant-appellee Regional Investments of Moore, Inc.

DeBank, McDaniel, Heidgerd, Holbrook & Anderson, by William E. Anderson; and Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by W. Lamont Brown, for intervenor-appellant Village of Pinehurst.

WELLS, Judge.

We note at the outset that the Village, in violation of N.C. R. App. P., Rule 28, has presented its arguments in the brief without any reference whatsoever to assignments of error pertinent to the questions. The Village's appeal is therefore subject to dismissal. Because this appeal presents important questions of public interest, we exercise our discretionary authority pursuant to N.C. R. App. P., Rule 2, and proceed to an examination of the merits of the Village's appeal.

I. GENERAL STANDARDS OF REVIEW

The standards which govern the review of a determination of the North Carolina Utilities Commission are set forth at N.C. Gen. Stat. § 62-94. Under this provision, the essential test to be applied is whether the Commission's order is affected by errors of law or is unsupported by competent, material, and substantial evidence in view of the entire record as submitted. *Id.; see also Utilities Comm. v. Public Staff*, 323 N.C. 481, 374 S.E.2d 361 (1988). G.S. § 62-94(e) further provides that upon appeal "any . . . finding, determination, or order made by the Commission . . . shall be

1. The Village appealed from that order to this Court. By opinion reported at 97 N.C. App. 114, 387 S.E.2d 222 (1990), we affirmed the order of summary judgment. Pursuant to G.S. § 7A-30(2), the Village appealed that decision to the Supreme Court, where disposition remains pending.

prima facie just and reasonable." Thus, the party attacking an order of the Commission bears the burden under the statute of proving that such an order is improper. *Public Staff, supra.* Moreover, the credibility and weight of testimony are matters to be determined by the Commission. *Id.* Finally, in reviewing a decision of the Commission, "due account shall be taken of the rule of prejudicial error." N.C. Gen. Stat. § 62-94(c).

II. TRANSFER APPROVAL UNDER N.C. GEN. STAT. § 62-111(a)

Three of the six arguments advanced by the Village challenge the Commission's interpretation and application of G.S. § 62-111(a), governing the transfer of utility franchises. That statute provides in pertinent part:

> No franchise now existing or hereafter issued under the provisions of this Chapter . . . shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity.

A. *"Public Convenience and Necessity" Test.*

[1] The first issue we confront under this statute concerns the proper definition of "public convenience and necessity." The Commission's order provides in pertinent part:

> G.S. 62-111(a) requires the Commission to approve applications for transfers when such transfers are justified by the public convenience and necessity, that is, *that they will not adversely affect rates or service to the public.* (Emphasis added.)

The Village contends that this definition of "public convenience and necessity" is impermissibly narrow, in fact creating an "impaired service" test, and that the Commission erred in applying so narrow a test in its approval of the proposed transfer. R.I.M., relying on *Utilities Comm. v. Carolina Coach Co.*, 269 N.C. 717, 153 S.E.2d 461 (1967), counters that G.S. § 62-111(a) mandates that if the Commission finds that the transfer does not adversely affect service, then approval of the transfer must be given. R.I.M. concedes, however, that G.S. § 62-111(a) requires the Commission to

"consider every factor bearing upon the applicant's ability to serve the public adequately."

In addressing this issue, we note that G.S. § 62-111(e) provides in pertinent part:

> The Commission shall approve applications for transfer of *motor carrier franchises* made under this section upon finding that said . . . transfer . . . is in the public interest, *will not adversely affect the service to the public under said franchise*, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that the service under said franchise has been continuously offered to the public up to the time of filing said application[.] (Emphasis added.)

This is the sole provision within the whole of section 62-111 that incorporates language pertaining to "adversely affect the service to the public." It is plain that our Legislature in adopting G.S. § 62-111(e) sought through the narrow conditions enumerated therein to further effect the policy of the State, as declared in the Public Utilities Act of 1963, of favoring transfers of actively operated motor carrier franchises without undue restraint. *Utilities Comm. v. Express Lines*, 33 N.C. App. 99, 234 S.E.2d 628 (1977) (and cases cited therein). This reflects our Legislature's cognizance of the highly competitive nature of the motor carrier industry, *see Utilities Comm. v. Petroleum Carriers*, 7 N.C. App. 408, 173 S.E.2d 25 (1970), which is an altogether different circumstance from that obtaining in the case of water and sewer franchises where competition is nonexistent by virtue of the legal monopoly granted to such franchises. Significantly, we observe that the so-called "adverse effect" test argued for by R.I.M. is not itself a test at all but merely a component of the five-part test set forth in G.S. § 62-111(e). Thus, while a determination that a proposed transfer will not adversely affect service to the public is a *necessary* condition for satisfying the narrow standard under G.S. § 62-111(e), it plainly is not a *sufficient* condition for satisfying that statutory provision. *A fortiori*, such a determination cannot be a sufficient condition for satisfying the far broader public convenience and necessity test under G.S. § 62-111(a). We therefore discern no intent on the part of the Legislature that the so-called "adverse effect"

test be applied, as the ultimate standard of approval, under the public convenience and necessity inquiry pursuant to G.S. § 62-111(a).

Nor is R.I.M.'s reliance on *Carolina Coach* availing. That case, involving the transfer of a motor carrier franchise, was decided under G.S. § 62-111(a), prior to the enactment of G.S. § 62-111(e). *See Petroleum Carriers, supra.* If anything, the subsequent amendment of G.S. § 62-111 to add subpart (e) more clearly reflects the Legislature's intent to create a separate test, applicable only to transfers of franchises within the highly specialized class of utilities made up of motor carriers. *Carolina Coach* is thus not apposite to transfer approval proceedings of water and sewer franchises.

Consequently, we cannot agree with R.I.M. that the "adverse effect" inquiry is properly applied as the ultimate standard to proposed transfers of water or sewer franchises. Were it otherwise, a bad operator, providing poor service at questionable rates to a captive public, could transfer his franchise—and perhaps profit from his own misdeeds—simply upon a showing that the proposed transfer would not make bad matters worse. We cannot believe that the General Assembly intended that the public be thus held hostage. Instead, we are persuaded, and we so hold, that G.S. § 62-111(e) is inapplicable to transfer approval proceedings involving water and sewer franchises. We further hold that when the Commission is adjudging public convenience and necessity in the context of proposed transfers of water and sewer franchises under G.S. § 62-111(a), it must inquire into *all* aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity. This comports with the longstanding principle that the public convenience and necessity doctrine "is a relative or elastic theory rather than an abstract or absolute rule [and] [t]he facts in each case must be separately considered." *Utilities Comm. v. Casey*, 245 N.C. 297, 96 S.E.2d 8 (1957).

In making this inquiry, the question of whether the transfer will adversely affect service to the public is thus not the ultimate question, but rather a threshold question. However, we hasten to emphasize that, although G.S. §§ 62-111(a) and 62-111(e) may share in common some of the same elements which must be satisfied in order to meet those tests, we do not view the narrow standard of the five-part test in G.S. § 62-111(e) as setting forth a condition precedent which must be satisfied before proceeding to the public

convenience and necessity analysis under G.S. § 62-111(a). Instead, the plain language of G.S. § 62-111(e) unambiguously indicates the intent of the Legislature for that section to operate as a separate and distinct test, applying only to transfers of motor carrier franchises. *See also Petroleum Carriers, supra.* That the broader public convenience and necessity test necessarily subsumes under it some of the same elements does not alter this fact.

Clearly, had the Commission actually applied the "adverse effect" standard set forth in G.S. § 62-111(e) as the ultimate standard in this case, we would be compelled to reverse. Our careful examination of the Commission's order persuades us, however, that the Commission adequately inquired into and properly resolved the questions of whether R.I.M. could provide adequate, reliable service, and whether the transfer would occasion or engender a change in rates. Accordingly, we reject the Village's contention that the Commission incorrectly applied the public convenience and necessity test under G.S. § 62-111(a).[2]

B. *"Fit, Willing and Able" Under the Public Convenience and Necessity Test of G.S. § 62-111(a).*

The Village also argues that the Commission erred in finding R.I.M. "fit, willing, and able" to operate and improve the utility franchises in question. This, of course, is a condition of approval set forth in G.S. § 62-111(e) pertaining to transfers of motor carrier franchises. *See supra.* It is also a relevant question under the separate public convenience and necessity test of G.S. § 62-111(a).

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2. We further note, that although the Commission considered the question of the Village's suitability to operate these franchises to be irrelevant, it nevertheless went on to determine that the Village had not substantiated its claim that it would be a more suitable operator. It is undeniable that the intervention of the Village in these proceedings is predicated on its status as a potential purchaser "waiting in the wings" as a competing buyer of these franchises. Such status, however, does not render the question of whether the Village could provide better service at better rates than R.I.M. irrelevant in these transfer proceedings. On the contrary, the question of whether another potential purchaser of a water or sewer franchise can provide better service is plainly relevant under the broad public convenience and necessity test of G.S. § 62-111(a). But equally plainly, such a showing would not of itself be dispositive of the issue of whether approval should be granted. When weighing the broad aspects and implications of public convenience and necessity, the Commission is cloaked with wide discretion and is not required to reject an application for transfer merely because another potential purchaser produces evidence that it might be able to do a better job.

The record shows that the Commission, after hearing extensive evidence *pro* and *con*, found R.I.M. to be "fit, willing and able" to operate and improve these franchises. The Commission made sufficient findings and conclusions to properly resolve these issues. We recognize that there were evidentiary gaps and that the Commission could have made further inquiry into this question. Nevertheless, there is competent, material, and substantial evidence in the record to support this finding of the Commission. Accordingly, we are bound thereby. *Utilities Comm. v. Thornburg*, 314 N.C. 509, 334 S.E.2d 772 (1985).

C. *Prior Approval Under G.S. § 62-111(a).*

[2] The most disturbing aspect of this case is the suggestion in the Commission's order that transfers of utility franchises can be made contingent upon or subject to Commission approval. The Village vigorously argues that the Commission erred in failing to follow the law set out in G.S. § 62-111(a) requiring prior approval to transfer a utility franchise.[3] R.I.M., however, contends that the statute, in accordance with the Commission's own interpretation, permits completion of transfers contingent upon Commission approval.

G.S. § 62-111(a) plainly requires that "[n]o franchise . . . shall be sold, assigned, pledged, or transferred . . . except *after* application to and written approval by the Commission[.]" (Emphasis added.) We flatly reject any suggestion that the statute permits the completion of transfers contingent upon or subject to Commission approval. Such a proposition plainly flies in the face of the clear wording of the statute.

We recognize that before a proposed transfer can become ripe for consideration by the Commission, there must be an agreement to transfer; *i.e.*, the owner of the franchise and the proposed buyer must have reached agreement on the terms and conditions of the transfer or acquisition. But the actual transfer of assets or operational control may never precede the Commission's written approval. This requirement, imposed by the General Assembly, is

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3. The Village also contends that the Commission erred in failing to properly apply G.S. § 62-161 prohibiting issuance of securities without prior approval of the Commission. Our discussion of the questions raised regarding prior approval under G.S. § 62-111(a) applies with equal force to the issue of prior approval under G.S. § 62-161. We therefore deem it unnecessary to address this issue separately.

based on the sound rationale that, if such a change of control and assets were effected before approval has been granted, the Commission would then be placed in the wholly untenable position of having to nullify a *de facto* transfer as part of the approval proceedings, if the public convenience and necessity so required. The risk of disruption to the public and the practical problems posed by such a circumstance are obvious. Franchise assets could be encumbered, franchise operations and control assumed by the transferee, and the transferor thereafter dissolved—all before the Commission has given its approval to such transfer, and all under the guise that no transfer has actually taken place because the transaction has not been "legally consummated" in that it was contingent upon or subject to Commission approval. The statute may not be so circumvented. Our Legislature, by the unambiguous terms of the statute, clearly intended to prohibit such *de facto* transfers of franchises before the Commission has had the opportunity to pass upon the merits of the transfer under the public convenience and necessity test.

It is manifest on the face of the record that the parties to the transfer in this case have violated the clear requirement of G.S. § 62-111(a). In the period following the execution of the purchase agreement, and *prior* to the Commission's order of approval, Pinehurst Enterprises clearly operated these franchises, not as an independent utility, but as agent for R.I.M. The profits generated by such operation were deposited in R.I.M.'s bank account. Moreover, assets of Pinehurst Enterprises were pledged to secure financing for R.I.M. Most disconcerting, the Commission was plainly aware of these circumstances.

R.I.M., however, contends that no violation occurred because "the parties agreed to mechanisms to facilitate returning to the *status quo ante*" in the event Commission approval was not given. This contention, of course, is premised upon the recognition that a *de facto* transfer was contemplated by the purchase agreement, that such a transfer would be operative until the Commission issued its ruling, and that such a transfer indeed had occurred. R.I.M. further urges that it had no enforceable property rights in the assets of Pinehurst Enterprises because Commission approval was a condition precedent both under the agreement and the statute. This assertion plainly begs the question. Commission approval is a condition *precedent* to a *lawful* transfer under the statute. It is inescapable, however, that these parties—in every aspect of

their course of dealing—treated Commission approval as a condition *subsequent*, to the effect that an *unlawful, de facto* transfer occurred. The cold record cannot be contradicted by the facile argument that the purchase agreement was unenforceable until the Commission issued its approval of the transfer. The actions of Pinehurst Enterprises and R.I.M. in this case violated G.S. § 62-111(a) in that a transfer and pledging of the assets, ownership, and control of these franchises occurred before the Commission issued its written approval.

Nevertheless, we are constrained to conclude that the Commission did not commit reversible error in this instance. As we noted above, the Commission satisfied the public convenience and necessity inquiry in approving this transfer. The Commission's error in concluding that the transfer in this case complied with the prior approval requirement of G.S. § 62-111(a) therefore does not prejudice the Village. However, we admonish the Commission that lawful transfers of ownership and control cannot be made contingent upon or subject to Commission approval. The law clearly requires *prior* approval. In emergency situations, the Commission can issue temporary or interim orders giving conditional or temporary approval of operational control. But the Commission should never allow itself to be put in the position of having to undo a "done" deal where the public convenience and necessity might require it.

III. EX PARTE COMMUNICATIONS UNDER G.S. § 62-70

[3] The Village next asserts that the Commission conducted unlawful proceedings upon the Village's motion for interlocutory injunctive relief. G.S. § 62-70 provides in pertinent part:

> (a) In all matters and proceedings pending on the Commission's formal docket, with adversary parties of record, all communications or contact of any nature whatsoever between any party and the Commission or any of its members, or any hearing examiner assigned to such docket, whether verbal or written, formal or informal, which pertains to the merits of such matter or proceeding, shall be made only with full knowledge of, or notice to, all other parties of record. All parties shall have an opportunity to be informed fully as to the nature of such communication and to be present and heard with respect thereto.

The record discloses that on 30 September 1988, the Village filed with the Commission a motion for an interlocutory and permanent stay order, grounded on allegations that profits from the franchise operations were being unlawfully diverted to proposed transferee, R.I.M., prior to Commission approval of the transfer. Hearing on this motion was scheduled for 7 October 1988. On 4 October 1988, the Village's subpoena *duces tecum* issued summoning John Karsig, Jr., controller of Pinehurst Enterprises and president of R.I.M., to testify and present documents at the hearing. R.I.M. filed, *inter alia*, motions to quash and for a protective order on 6 October 1988.

At the hearing, the Village moved that Mr. Karsig be called to give testimony, which motion was denied upon R.I.M.'s objection. After the conclusion of the hearing, R.I.M., by hand-delivered letter, filed with the Commission John Karsig's affidavit. By its order entered 18 October 1988, the Commission denied the Village's motion for interlocutory injunctive relief, rescheduled the hearing on the Village's motion for permanent injunctive relief, and deferred ruling on R.I.M.'s motions to quash and for a protective order. The Commission's order provides, in pertinent part:

> On October 7, 1988, after the hearing had been concluded, RIM filed the affidavit of John Karsig, Jr. The cover letter to which the affidavit was attached stated that Mr. Karsig's affidavit was inadvertently omitted from RIM's Reply to the Motion of the Village of Pinehurst. In issuing this Order, the Commission has also considered the Reply of RIM *and the affidavit of Mr. Karsig*. (Emphasis added.)
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> . . .
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> This Order denying motion for interlocutory restraining order does not, however, foreclose further investigation into the merits of the allegations of the Village at the hearing on the permanent injunction.

Accepting *arguendo* the appearance of impropriety in this aspect of these proceedings, we cannot conclude that such redounded to the prejudice of the Village. The record shows that the Village had actual notice of the late-filed affidavit. It is unclear, both from the record and from the Village's argument in the brief, whether the Village was denied an opportunity to be heard with respect to the late-filed affidavit before the Commission's order was entered.

Moreover, a prehearing conference on the Village's motion for a permanent stay order was held on 14 November 1988. The Village advances no contention that it was not afforded an opportunity to be heard with respect to the late-filed affidavit at that time. Nevertheless, we caution the Commission that the requirements of G.S. § 62-70 are explicit.

IV. THE VALIDITY OF THE PRIOR CONSENT JUDGMENT

Finally, we address the Village's challenge to the Commission's conclusion that the sale of Pinehurst Enterprises to R.I.M. was not barred by the consent judgment of 3 December 1973. The question of the validity of the consent judgment was decided by this Court in the companion case of *Village of Pinehurst v. Regional Investments of Moore*, 97 N.C. App. 114, 387 S.E.2d 222 (1990). There, we held that the consent judgment was void as being violative of the rule against perpetuities. This precedent is binding, and we therefore reject this argument.

V. CONCLUSION

In sum, this appeal presents disturbing questions concerning transfer approval proceedings before the Utilities Commission. For the reasons stated, however, we are constrained to conclude that the Commission did not commit reversible error under the standards of G.S. § 62-94. The order of the Commission approving the transfer therefore must be and is

Affirmed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. WILLIE RECO McNEIL

No. 8914SC793

(Filed 3 July 1990)

1. Jury § 7.14 (NCI3d) — jury selection — peremptory challenges — no error

There was no error in a prosecution for rape, burglary, and common law robbery in allowing the State to exercise

four peremptory challenges against blacks where there was no prima facie case of discrimination and, although not required, the State articulated its reasons for its peremptory challenges.

Am Jur 2d, Jury §§ 173-176, 233 et seq.

2. Jury § 7.8 (NCI3d)— jury selection—challenges for cause refused—no error

There was no error in a prosecution for rape, burglary, and common law robbery in refusing to exclude two jurors for cause where one was employed as an Assistant Attorney General and the other may have glimpsed defendant in the hallway in handcuffs. The District Attorney offices operate independently of the Attorney General, the fact that both are employed by the State is insufficient to show prejudice, and the juror stated that he would be able to judge the case fairly. The trial court held a voir dire concerning the second juror and that juror stated that he did not see anything unusual and nothing that would impair his ability to be fair and impartial.

Am Jur 2d, Jury §§ 214, 267, 327.

3. Rape and Allied Offenses § 4.3 (NCI3d)— victim's past sexual behavior—voir dire hearing—closed to public—no error

There was no error in a prosecution for rape, burglary, and common law robbery in closing to the public a voir dire hearing to determine the relevance of the victim's past sexual behavior. Neither the public nor the defendant has a constitutionally protected interest in the disclosure of personal information of the victim's past sexual behavior unless it is determined to be relevant to the case being tried. N.C.G.S. § 8C-1, Rule 412.

Am Jur 2d, Rape § 82.

4. Searches and Seizures § 7 (NCI3d)— events at defendant's house when defendant arrested—admissible

There was no error in a prosecution for rape, burglary, and robbery in the court's refusal to exclude testimony of what occurred at defendant's home as fruit of an illegal entry where officers had probable cause to arrest defendant based on the victim's statement; the officers' failure to obtain a search warrant was not error in that there was every reason for

the officers to act to avoid the possibility of injury to the victim or her children; and the officers complied with the spirit of N.C.G.S. § 15A-401(e) if not the exact letter.

Am Jur 2d, Searches and Seizures §§ 41-44.

5. Criminal Law § 66.11 (NCI3d)— defendant's refusal to allow viewing by victim—admissible

There was no error in a prosecution for rape, burglary, and robbery in admitting testimony that defendant refused to allow the victim to view him immediately after his arrest where the victim had already named her attacker and the police were merely trying to determine if the man she thought was Reco McNeil was the same man who attacked her.

Am Jur 2d, Evidence § 371.

6. Criminal Law § 41 (NCI3d)— resisting arrest—admissible as evidence of guilt

There was no error in a prosecution for rape, burglary, and robbery in admitting testimony that defendant fought with law officers when they arrested him. The arrest was lawful and resisting arrest had some bearing upon the issue of guilt, similar to evidence of flight.

Am Jur 2d, Evidence § 279.

7. Criminal Law § 55.1 (NCI3d)— blood and semen expert—cross-examination on DNA testing not allowed—no error

There was no error in a prosecution for rape, burglary, and robbery by limiting defendant's cross-examination of the State's blood and semen expert concerning DNA testing where DNA testing was not done in this case. The court was well within its discretion in limiting cross-examination of the witness in a field outside her expertise, and there was no constitutional violation. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence § 826.

8. Constitutional Law § 70 (NCI3d)— right to confrontation—cross-examination—witness's residence

There was no constitutional error per se in a prosecution for rape, burglary, and robbery in refusing to permit defense counsel to ask a witness for the State his home address and place of employment where the witness testified that he had

briefly shared a jail cell with defendant, defendant had told him that he had gone to a woman's house and had sex with her, defendant had stated his name and that he lived in Durham, and the witness testified that he did not want to give his address because he had been harassed after testifying in a different case. The jury had a great deal of information about the witness which would tend to enable them to get a clear picture of who this witness was and his possible reasons for testifying and, under these circumstances, meaningful and open cross-examination was not thwarted.

Am Jur 2d, Constitutional Law § 849.

APPEAL by defendant from judgment entered 2 March 1989 by *Judge Samuel T. Currin* in DURHAM County Superior Court. Heard in the Court of Appeals 13 February 1990.

Defendant was indicted for second-degree rape, first-degree burglary, and common law robbery. After a jury trial, defendant was found guilty on all charges. The trial court imposed an active sentence of life imprisonment for the burglary conviction, forty years for the rape conviction (to begin at the expiration of the previous sentence), and ten years for common law robbery. This last sentence, which was to begin at the expiration of the other two, was suspended, with the provision that defendant be placed on supervised probation for five years at the time he is paroled or otherwise released.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Debra C. Graves, for the State.

Thomas F. Loflin, III for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show the following: Katrina McCoy, the prosecuting witness in this action, testified that she went to bed shortly after midnight on the morning of 15 June 1988. She was awakened by the sound of footsteps in her apartment and got out of bed to investigate. She saw a man in the bedroom doorway who got on top of Ms. McCoy and hit her left jaw with the back side of his fist. The blow caused Ms. McCoy to hit her

head on the headboard of her bed. The man continued to strike her and threatened to rape her. He then had vaginal intercourse with Ms. McCoy for about ten minutes. The man talked throughout this time, discussing acting as a pimp for the woman, saying he would take care of Ms. McCoy's two young daughters and son after he finished with her, and threatening to kill Ms. McCoy.

After ejaculating, the man shoved Ms. McCoy down the stairs, holding her by the hair and telling her he wanted her money. He searched Ms. McCoy's purse for money and finally found $1.00 in her daughter's wallet which was in Ms. McCoy's purse. The man was angry because there was not more money. The man continued during this time to jerk Ms. McCoy about by the hair. He dragged the woman into the kitchen by the hair as he looked for a knife. He stated that he wanted to cut Ms. McCoy's hair, but she feared he wanted to hurt her with a knife. The man became angry because he could not find a knife. Fearing that he might look in a certain drawer which held knives, Ms. McCoy began backing out of the kitchen. The man accused her of trying to see his face. Ms. McCoy did not reply, but thought that the statement was ridiculous because she already knew who the man was. He then put his hands around the woman's neck and started choking her. When he stopped choking her, Ms. McCoy unlocked the back door. The man heard the lock click, became angry, and threw Ms. McCoy down on the cement floor. He grabbed her up by the hair and, saying that it was time to go get the children, the attacker pushed Ms. McCoy toward the stairs. She dropped to the floor and grabbed him by the feet in an attempt to halt his progress towards her children. He pulled her up by the hair as he hooked his fingers inside her vagina. The man saw a broom on the floor and threatened to hit Ms. McCoy with it. He reached for it, but Ms. McCoy grabbed it first. They struggled with the broom. It broke; Ms. McCoy ended up with the handle part, and the man had the bristles. He dropped his part of the broom, turned, and dove out a living room window, with his left foot and head going through first. Ms. McCoy tried to hit her assailant with the broom handle as he left, but missed him and hit the window.

Ms. McCoy reported the crime. When the police arrived, she told them that she knew her attacker, and that he lived two doors away. She had met and talked with him six weeks earlier in back of her apartment. Her children were with her at the time. She

also described the clothing worn by the intruder as a dark shirt and pants, sneakers and a belt buckle.

Ms. McCoy testified that she wears bifocals, but did not have them on during the attack. She also stated that there were no interior lights on at the time, but that street lights shined in the kitchen and living room windows.

Officer Allen testified that he was the first officer to arrive at the scene. He stated that Ms. McCoy told him that she had been raped by a man named Reco who lived two doors down in apartment D. Officer Allen and other officers went to the apartment. A teenage boy, who was defendant's brother, opened the door. Officer Allen asked him if defendant lived there. He said yes, and invited the officers in. At that point, defendant descended the stairs. Officer Allen asked defendant if he would allow Ms. McCoy to look at him. Defendant conferred with his mother and denied the request. Defendant was placed under arrest. He fought with the officers, but they overpowered him.

Detective Hester testified that he searched defendant's home pursuant to a search warrant and found a pair of khaki pants, a belt buckle, and a pair of white sneakers. He opined that the pattern on the sole of the sneakers was consistent with a photographed impression on Ms. McCoy's face.

The testimony of other witnesses for the State will be described as necessary to the questions raised by defendant.

Defendant offered no evidence.

[1] By his first Assignment of Error, defendant contends that the trial court erred in allowing the State to exercise the four peremptory challenges it used against black persons. We disagree.

It is well settled that purposeful discrimination in jury selection violates the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed.2d 759 (1965). A prosecutor may exercise peremptory challenges for any reason as long as that reason is related to the prosecutor's view concerning the outcome of the case being tried. *State v. Batts*, 93 N.C. App. 404, 378 S.E.2d 211 (1989). However, the State may not challenge potential jurors solely on the basis of their race or on the assumption that black jurors would generally be unable to consider a charge against a member of the black

race impartially. *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986).

Under *Batson*, if the defendant establishes a *prima facie* case of purposeful exclusion, then the prosecutor must come forward with clear and reasonably specific neutral explanations for its challenges. *Id.* In the instant case, we agree with the trial court that no *prima facie* case was made out by defendant. Four of the twelve jurors seated were black, as was the first alternate. The State used four of its peremptories against black potential jurors and did not exercise its remaining two peremptory challenges. Therefore, the State accepted over fifty percent of the prospective black jurors tendered, including the alternate. This is insufficient to show an intent by the prosecutor to keep persons of the black race off the jury. *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987); *State v. Robinson*, 97 N.C. App. 597, 389 S.E.2d 417 (1990). No questions or statements made by the prosecutor in any way implied an intent to discriminate against blacks in jury selection. The fact that defendant is black and the alleged victim is white is not sufficient to tip the balance in favor of creating a *prima facie* case since great deference is to be accorded the trial court in determining the existence of a *prima facie* case. *Batson, supra.*

Although not required when a *prima facie* is not established, the State wisely articulated the reasons for its peremptory challenges. One challenged juror's brother was on probation and she had been to court with him that week for a revocation hearing. She also knew personally a proposed defense witness. A second juror stated that he had once been falsely accused of a crime. A third had two convictions for driving while impaired and seemed unsure of himself in *voir dire*. The fourth was excused because one of the veteran detectives stated that he did not feel comfortable with him. We find the reasons given were reasonably specific and racially neutral. This argument is overruled.

[2] Second, defendant argues that the court erred in refusing to excuse two prospective jurors for cause. The first juror referred to is employed as an Assistant Attorney General for the State of North Carolina. A juror may be challenged for cause if he is unable to render a fair and impartial verdict. G.S. § 15A-1212(9). A person may not be excluded solely because of the nature of his employment. *State v. Hunt*, 37 N.C. App. 315, 246 S.E.2d 159, *cert. denied*, 295 N.C. 736, 248 S.E.2d 865 (1978). However, a rela-

tionship such as employment will disqualify a juror if the position is such that the juror is "subject to strong influences which [run] counter to defendant's right to a trial by an impartial jury." *State v. Lee*, 292 N.C. 617, 625, 234 S.E.2d 574, 579 (1977). While the juror was employed by the Attorney General's Office, defendant was prosecuted by an Assistant District Attorney of the Fourteenth Judicial District. District attorney offices operate independently of the Attorney General. The fact that the prosecutor and the juror are both employed by the State is insufficient to show prejudice. The juror stated that he would be able to judge the case fairly, and there is no evidence in the record to suggest otherwise.

Defendant argues that a second juror should have been excluded for cause because he may have glimpsed defendant in the hallway in handcuffs when the jurors were returning from lunch recess. Defense counsel raised the possible problem and the court immediately held a *voir dire*. The juror stated that he did not see anything unusual and nothing that would influence his ability to be fair and impartial. This argument is without merit.

[3] By his fourth argument, defendant urges that the court erred in closing to the public a *voir dire* hearing conducted to determine the relevance of Ms. McCoy's past sexual behavior. The hearing to determine relevance was held in camera as required by G.S. § 8C-1, Rule 412, known as the Rape Shield Statute. Defendant relies on *Waller v. Georgia*, 467 U.S. 39, 81 L.Ed.2d 31 (1984), which held that closure of a suppression hearing over the defendant's objection violated the accused's Sixth Amendment right to a public trial. We find the present case distinguishable. In *Waller*, the closed hearing was held to determine whether relevant evidence was inadmissible because obtained in violation of the defendant's Fourth Amendment rights. In the instant case, the *voir dire* was held to decide whether the victim's past sexual behavior was relevant at all. We do not see that the defendant or the public has a constitutionally protected interest in the disclosure of personal information of the victim's past sexual behavior unless it is determined to be relevant to the case being tried. This argument is overruled.

[4] By his sixth argument, defendant contends that testimony of what occurred in defendant's home should have been excluded at trial because, he argues, it was the fruit of an illegal entry. We disagree. It is undisputed that the officers had probable cause

to arrest defendant based on Ms. McCoy's statement that he was the intruder.

We do not find that the officers' failure to obtain a search warrant was error under the circumstances. G.S. § 15A-401(b) provides that an officer may make a warrantless arrest of any person if the officer has probable cause to believe that the person "[m]ay cause physical injury to . . . others . . . unless immediately arrested." *State v. Matthews*, 40 N.C. App. 41, 251 S.E.2d 897 (1979). In the case at bar, Ms. McCoy showed evidence of having been beaten; the window of her home had been completely broken out; and she stated that defendant, who lived two doors away, had threatened to kill her and her children. There was every reason for the officers to act to avoid the possibility of injury to Ms. McCoy or her children.

Before entering defendant's residence, Officer Allen knocked on the door and asked defendant's brother, who answered the door, if defendant was there. The brother said yes, and for the officer to come on in. Officer Allen immediately made it clear to defendant that he was there to investigate a felony. Defendant contends that the officer failed to give notice of his authority and purpose before entering as required by G.S. § 15A-401(e). We find no error. Officer Allen made no secret of his reason for being there, and defendant's brother invited him in. The officer complied with the spirit of section 401 if not the exact letter. Evidence found as the result of the entry need not be excluded as tainted. *State v. Sutton*, 34 N.C. App. 371, 238 S.E.2d 305 (1977), *cert. denied and appeal dismissed*, 294 N.C. 186, 241 S.E.2d 521 (1978).

[5] By his seventh argument, defendant contends that the court erred in admitting testimony that he refused to allow Ms. McCoy to view him immediately after his arrest. We doubt that under the facts of this case, that the viewing would have been as inherently suggestive as a "show-up" would have been since Ms. McCoy had already named her attacker, and police were merely trying to determine if the man she thought was Reco McNeil was the same man who attacked her. *See United States v. Wade*, 388 U.S. 218, 18 L.Ed.2d 1149 (1967). We are not aware that a defendant's refusal to be viewed in this type of situation is information which may not be commented on in the same way as a defendant's failure to testify. *See State v. Roberts*, 243 N.C. 619, 91 S.E.2d 589 (1956). This argument is overruled.

[6] We also find no merit to defendant's eighth argument that testimony that defendant fought with law enforcement officers when they arrested him should have been excluded. We have concluded above that the arrest of defendant was lawful. We believe that defendant's resisting arrest is properly viewed as bearing upon the issue of guilt, similar to evidence of flight. *State v. Parker*, 45 N.C. App. 276, 262 S.E.2d 686 (1980). This argument is without merit.

[7] By his ninth argument, defendant contends that the court violated his constitutional right to confront the witnesses against him when it limited his cross-examination of the State's blood and semen expert who had examined body fluids taken from Ms. McCoy after the rape. Defense counsel elicited from the expert witness that she knew of DNA testing, that the SBI was in the process of developing a laboratory for it, and that the expert would not be working in that area. DNA testing was not done on samples collected in the instant case. Defense counsel continued to ask about the type of results that might be obtained through DNA testing. At this point a *voir dire* was held in which the witness stated that she had never done DNA testing. The court ruled that she was not competent to testify as an expert on DNA testing. The court ruled that testimony elicited on *voir dire* regarding DNA was inadmissible pursuant to G.S. § 8C-1, Rule 403 because it would only tend to confuse the jury. We agree. The court was well within its discretion in limiting cross-examination of the witness in a field outside her expertise, and there was no constitutional violation. *See State v. Young*, 58 N.C. App. 83, 293 S.E.2d 209 (1982).

[8] By his tenth question, defendant argues that the court committed constitutional error *per se* by refusing to permit defense counsel to ask a witness for the State his home address and place of employment. Under the particular facts of this case, we do not find that this amounted to a violation of defendant's Sixth Amendment right of confrontation.

Ricky Clayton testified that he briefly shared a jail cell with defendant, and that defendant told him that he had gone to a woman's house and had sex with her. Defendant stated his name and that he lives in Durham. During *voir dire*, Clayton testified that he did not want to give his address because he had had problems of being harassed after testifying in a different case. The

court sustained objections by the State to questions asking the witness his address and place of employment.

Defendant cites *Smith v. Illinois*, 390 U.S. 129, 19 L.Ed.2d 956 (1968), and *Alford v. United States*, 282 U.S. 687, 75 L.Ed. 624 (1931), for the proposition that a court's failure to allow a defendant to question an adverse witness about where he lives is a constitutional violation *per se*. In *Smith*, the defendant was not permitted to elicit either the correct name of the adverse witness nor his address. The witness gave a name at trial which he admitted on cross-examination was false.

We find a case from the Fifth Circuit interpreting and applying the holdings of *Smith* and *Alford* to be persuasive. The Court stated that "it appears to us that the purpose of *Alford/Smith* was to safeguard the opportunity for a meaningful and open cross-examination, not to require that a witness always divulge his or her home address." *United States v. Alston*, 460 F.2d 48, 51 (5th Cir.), *cert. denied*, 409 U.S. 871, 34 L.Ed.2d 122 (1972). The Court in *Alston* found no error in the District Court's refusal to order the government witness, an undercover narcotics agent, to reveal his home address. The Court went on to say that "the witness should have the opportunity to demonstrate to the trial judge that the defendant's solicitation of his or her home address constitutes only an attempt to 'harass, annoy or humiliate.' " *Id.* at 52; *McGrath v. Vinzent*, 528 F.2d 681 (1st Cir. Mass.), *cert. dismissed*, 426 U.S. 902, 48 L.Ed.2d 827 (1976); *State v. Thornton*, 309 So.2d 266 (1975); Annotation, *Right to Cross-examine Witness as to His Place of Residence*, 85 A.L.R. 533 (1978).

In the instant case, Ricky Clayton testified to his correct name, that he lived in Durham, that he had shared a jail cell with the defendant, and that he was presently on probation for breaking and entering. Detailed cross-examination also revealed that he had a lengthy criminal record, was testifying under subpoena, and had testified in previous criminal trials. On *voir dire*, the witness stated that he would rather not give his home address because he had had problems after testifying in another case and had been forced to leave Durham. We think that the jury heard a great deal of information about the witness which would tend to enable them to get a clear picture of who this witness was and his possible motivations for testifying. The witness had a reasonable fear of being harassed if his home address were made public since this

had happened to him before, to the extent of forcing him to leave Durham. We do not believe that under these particular circumstances that meaningful and open cross-examination was thwarted by the protection of Clayton's home address. This argument is overruled.

We have carefully reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judges ARNOLD and ORR concur.

PATRICIA LOWRY, PLAINTIFF v. R. FRANK LOWRY, JR., AND SMITH MOORE SMITH SHELL & HUNTER (NOW SMITH HELMS MULLISS & MOORE), DEFENDANTS

No. 8918SC1051

(Filed 3 July 1990)

1. **Divorce and Alimony § 19.5 (NCI3d)— settlement agreement based on mutual mistake—insufficiency of evidence**

The trial court properly entered summary judgment for defendant on plaintiff's claim that the parties' settlement agreement was the result of a mutual mistake where a $6,300 mathematical error may have resulted in plaintiff's use of incorrect data to make her settlement offer, but there was no showing that the parties' subsequent agreement was based on the erroneous information; nor was there evidence that the parties were mutually mistaken as to whether plaintiff was to receive $550,000 gross or net in settlement of the marital estate.

Am Jur 2d, Divorce and Separation § 831.

2. **Attorneys at Law § 5.1 (NCI3d)— computational error in negotiations—no negligence by attorneys**

The trial court properly entered summary judgment for defendant attorneys on plaintiff's claim of negligence where plaintiff made no showing as to how a computational error, made early in the settlement process but later corrected and

not even reflected in the final separation agreement, amounted to negligence on the part of her attorneys.

Am Jur 2d, Attorneys at Law §§ 197, 208.

3. Attorneys at Law § 5.1 (NCI3d)— attorneys' representation of plaintiff in settlement negotiations—no negligence by attorneys

The trial court properly entered summary judgment for defendant attorneys on plaintiff's claim of negligence in agreeing to settle her case for an amount which she did not authorize, failing adequately to explain the amount of the final settlement to plaintiff, and failing adequately to document the settlement agreement, since plaintiff, by signing the agreement, having it incorporated into a consent judgment and consent order, and receiving the benefits of the agreement for almost three years, ratified the separation agreement and was estopped from claiming that it was not the settlement she authorized.

Am Jur 2d, Attorneys at Law §§ 197, 208.

4. Attorneys at Law § 5.1 (NCI3d)— attorneys' representation of plaintiff in settlement negotiations—no constructive fraud—no breach of fiduciary duty

The trial court properly entered summary judgment for defendant attorneys on plaintiff's claims of constructive fraud and breach of fiduciary duty where all the evidence tended to show that plaintiff's counsel was more than merely open, fair, and honest in her dealings with plaintiff but was a zealous advocate on plaintiff's behalf, writing over 19 letters to plaintiff, conducting over 88 telephone conferences with her, and having conferences in the office for the purpose of explaining matters.

Am Jur 2d, Attorneys at Law § 215.

5. Attorneys at Law § 7.7 (NCI3d)— defendants entitled to attorney fees—no findings made—denial of sanctions improper

The trial court erred in denying defendants' motion for sanctions without making any findings of fact or conclusions of law as to whether defendants were entitled to attorney fees.

Am Jur 2d, Costs § 72.

APPEAL by plaintiff from judgments entered 25 April 1989 and 1 May 1989 in Superior Court, GUILFORD County, by *Judge Russell G. Walker, Jr.* Defendants cross-appeal. Heard in the Court of Appeals 10 April 1990.

Clark & Wharton, by David M. Clark, for plaintiff-appellant.

Booth, Harrington, Johns & Campbell, by Frank A. Campbell, for defendant-appellee and cross-appellant R. Frank Lowry, Jr.

Adams Kleemeier Hagan Hannah & Fouts, by Daniel W. Fouts and Margaret E. Shea, for defendant-appellee and cross-appellant Smith Helms Mulliss & Moore.

LEWIS, Judge.

Plaintiff is appealing the entry of summary judgment against her in this legal malpractice action. Defendants have cross-appealed the denial of their motion for attorneys' fees pursuant to G.S. 1A-1, Rule 11.

Plaintiff and defendant R. Frank Lowry, Jr. were married 28 December 1964. They divorced and entered into a separation agreement in November, 1984 ("Separation Agreement"). On 29 October 1985, plaintiff filed an action against defendant Lowry for breach of the Separation Agreement. On 18 July 1986, the parties entered into a Consent Order which incorporated the Separation Agreement into the court order and made the Agreement subject to specific performance.

Plaintiff was represented in connection with her divorce, alimony and equitable distribution proceeding against defendant Lowry by the defendant law firm Smith, Moore, Smith, Shell & Hunter (now Smith, Helms, Mulliss & Moore, hereinafter referred to as "Smith, Helms").

On 25 November 1987, plaintiff filed a complaint against her former husband and her former attorneys alleging that the settlement agreement was the result of a mutual mistake by plaintiff and defendant Lowry and their attorneys acting on their behalf. The complaint alleges negligence against Smith, Helms and was twice amended to include claims for constructive fraud and breach of fiduciary duty.

On 6 March 1989, Smith, Helms filed a motion for summary judgment and for attorneys' fees. On 7 March 1989, defendant Lowry filed a motion for summary judgment and attorneys' fees. On 1 May 1989, the trial court entered judgment in favor of defendant Lowry and defendant Smith, Helms dismissing plaintiff's complaint on all claims. In that same order the court denied defendants' motions for attorneys' fees. Plaintiff appeals the entry of summary judgment against her and defendants cross-appeal denial of their motions for attorneys' fees.

I. SUMMARY JUDGMENT

The entry of summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). Summary judgment should be looked upon with favor where no genuine issue of material fact is presented. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

A. *Summary Judgment in Favor of Defendant Lowry*

[1] We first address whether entry of summary judgment was proper against plaintiff in favor of defendant Lowry.

In her complaint, plaintiff alleges that the settlement agreement was the product of mutual mistake by both parties and their attorneys acting on their behalf. Plaintiff alleges essentially two mistakes contained in the Separation Agreement. First, plaintiff alleges that there was a $6,300 mathematical error in an appendix that she claims was used to value her share of the marital estate. The $6,300 error occurred in totaling defendant Lowry's assets (the appendix reflecting a $472,303 total which should have been $478,603). This appendix was included in a settlement demand letter dated 25 July 1984 from Jeri Whitfield, plaintiff's divorce and settlement attorney, to Richard Pinto, defendant husband's divorce and settlement attorney.

Plaintiff's former attorney Jeri Whitfield admits that the appendix does contain the computational error. However, plaintiff does not dispute the fact that no agreement was reached based upon the 25 July 1984 settlement offer. Plaintiff alleges that the error was carried forward in the settlement negotiations and that her settlement offer was in part based upon the erroneous appen-

dix. She argues that her offer would have been increased by $3,150 had she known of the error. However, at best, this demonstrates that the plaintiff used incorrect data when she made her settlement offer. It does not show that the subsequent agreement was based thereon. Further, plaintiff does not argue that the Separation Agreement was intended to be an equal division of the marital estate. In fact, paragraph sixteen of the parties' Agreement recites that the distribution of the property "is *equitable* and that said distribution is binding upon the parties pursuant to N.C.G.S. § 50-20(d). . . ." (Emphasis added.) We find no issue of material fact based upon the alleged $6,300 error.

Second, plaintiff alleges that the parties were mutually mistaken about whether she was to receive $550,000.00 gross or $550,000.00 net in settlement of the marital estate. Specifically, the plaintiff alleges that the parties were mistaken about a credit that the defendant received for the payment of temporary alimony. In September 1984 Dr. Lowry had paid the plaintiff temporary alimony for eight months in the amount of $4,000.00 per month or $32,000.00. Plaintiff was able to negotiate a credit of $3,000.00 per month or $24,000.00.

On 5 September 1984, Whitfield sent Pinto a settlement demand letter which stated in pertinent part:

> Mrs. Lowry will sign the Separation Agreement as written and will accept $550,000 ($574,000 less $24,000 credit) in settlement of all rights growing out of the marriage . . . Please let me know promptly whether Dr. Lowry intends to sign the Separation Agreement and settle this matter or if we expect to litigate further. This is our final effort to compromise. . . .

Attached to this letter is an appendix which contains no mathematical errors. According to the testimony of defendant Lowry and the affidavits of Whitfield and Pinto, the 5 September 1984 settlement demand was not accepted by defendant Lowry. The attorneys continued to negotiate. Pinto's affidavit indicates that he offered to settle for $550,000.00 less credits. Whitfield negotiated a further credit for Ms. Lowry of $1,000.00 for unpaid October alimony and $550.00 for the cost of one-half of an appraisal which she had paid. This made the total credits defendant Lowry was to receive amount to $25,450.00 ($27,000 − $1,000 − $550).

Ms. Whitfield prepared a handwritten document which indicated the property the plaintiff was to receive. The handwritten worksheet was headed "Property to be received by Pat." The $25,450.00 credit appeared on the worksheet as "advance payment 9 mos. @ 3000 less 1000 for Oct. plus $550 appraisers fee (27000-550-1000 = 25450)." The total settlement figure that appears on the bottom of this worksheet is $550,000.00, not $574,000.00. Plaintiff admits that she had a telephone conversation with Whitfield regarding the numbers on this worksheet. She further admits that Whitfield went over this worksheet with her at the law offices "paragraph by paragraph." Plaintiff's copy of this worksheet which was given to her by Ms. Whitfield indicates that she made a number of notations on the document including a notation to the side of the worksheet adding up how much her attorney's fees, the capital gains tax and the credit defendant Lowry was to receive as one lump figure. Ms. Lowry was given this draft to take home.

The appendix to the final Separation Agreement which plaintiff signed appeared as follows:

APPENDIX I

Property to be received by Patricia Lowry

Item	Value	
1983 Honda	$7,000.00	
Greensboro furniture, fixtures	30,362.00	
Stocks	9,400.00	
Proceeds from sale of Greensboro residence	33,640.00	
	80,402.00	sub total
Promissory Note (at 10% interest)	40,000.00	
Cash, including lump sum alimony	179,148.00	
Pension and profit sharing plans	225,000.00	

The total amount of property plaintiff would receive under this appendix is $524,550. The advance payments made by defendant Lowry were not listed. Adding the defendant's credit of $25,450 results in a gross settlement of $550,000. Plaintiff argues that the parties were mutually mistaken as to this credit. She contends that the actual settlement of the parties was to be as set forth in the 5 September settlement demand letter, where she was to receive $574,000 gross; $550,000 net. However, even if we accept

plaintiff's testimony as true for the purposes of summary judgment that she understood that the credit was not to be taken out of her $550,000 net settlement, she has made no showing that defendant Lowry was also acting under this mistaken belief. On the contrary, both the testimony of defendant Lowry and the testimony of Richard Pinto indicate that they were always under the belief that the settlement was for $550,000 gross. There is no evidence that either Pinto or defendant Lowry knew that plaintiff was signing the Agreement under the mistaken belief that the credit had not been taken out of the gross settlement, leaving her only $524,550 as opposed to $550,000. The Separation Agreement on its face shows that the total settlement "to be received" was $524,550. Plaintiff has failed to show any evidence of a mutual mistake by the parties in the execution of this Agreement. A unilateral mistake by a party to a contract, unaccompanied by fraud, imposition, undue influence, or like circumstances of oppression is insufficient to avoid a contract. Summary judgment against plaintiff in favor of defendant Lowry was proper.

B. *Summary Judgment in Favor of Defendant Smith, Helms*

Plaintiff alleged three causes of action against Smith, Helms: (1) Negligence; (2) Constructive Fraud; (3) Breach of Fiduciary Duty.

(1) *Negligence*

a. The $6,300 mathematical error:

[2] Plaintiff has alleged that attorney Whitfield was negligent in carrying forward the $6,300 mathematical error in the early draft of Appendix I. The uncontradicted evidence shows that Whitfield prepared three other appendices after this draft was prepared. We find no computational errors in any of these subsequent drafts. The affidavits for both Whitfield and Pinto state that the erroneous draft was never relied upon after its initial preparation. Furthermore, plaintiff has merely testified that she relied on the early appendix to make her 5 September 1984 *offer*. This offer, as shown by the continued negotiations and ultimate changes in the final Separation Agreement, was clearly rejected by the defendants. Plaintiff has not made any showing as to how this early error, which was later corrected and not even reflected in the final Separation Agreement, amounts to negligence on the part of her attorney. Summary judgment on this issue was proper.

b. The $25,450 credit:

[3] Plaintiff has alleged that attorney Whitfield was negligent in agreeing to settle the case for an amount the plaintiff did not authorize, failing to adequately explain the amount of the final settlement to plaintiff, and failing to adequately document the settlement agreement.

Plaintiff admits that (1) Whitfield called her on the telephone and went over the agreed upon terms of the Separation Agreement with her; (2) that she came to Whitfield's office and that Whitfield went over the terms of the Separation Agreement with her "paragraph by paragraph"; (3) that she was given the draft worksheet to take home with her; (4) that she had an opportunity to read the final Separation Agreement before she signed it; (5) that she moved to have this Agreement incorporated into a consent judgment and consent order, and (6) that she signed the consent judgment and consent order.

We hold that summary judgment was proper because plaintiff, by signing the Agreement, having it incorporated into a consent judgment and consent order, and receiving the benefits of the Agreement for almost three years, ratified the Separation Agreement. *See Hill v. Hill*, 94 N.C. App. 474, 380 S.E.2d 540 (1989) (wife bound by subsequent ratification of property settlement agreement); *Amick v. Amick*, 80 N.C. App. 291, 341 S.E.2d 613 (1986) (plaintiff estopped from denying validity of separation agreement since plaintiff relied upon and performed some of his obligations pursuant to its terms); *Davis v. Davis*, 256 N.C. 468, 124 S.E.2d 130 (1962) (party to agreement cannot ignore it when, without excuse, he made no effort to ascertain its terms at time of execution).

The plaintiff was given ample opportunity to read and evaluate the Separation Agreement she signed. She is an educated woman and at one time was a licensed realtor. We find it important to note that the error she alleges required no legal explanation and could easily have been discovered by adding four numbers contained in the Appendix to the Separation Agreement (80,402.00 sub total + $40,000 Promissory Note + 179,148.00 Cash + 225,000 Pension and profit sharing plans = $524,550). This case is very different from our recent holding in *Cheek v. Poole*, 98 N.C. App. 158, 390 S.E.2d 455, *disc. rev. denied*, 327 N.C. 137, 394 S.E.2d 169 (1990), where it was held that genuine issues existed as to whether the plaintiff acted reasonably in executing a consent judgment that omitted language that plaintiff's duty to pay his former

wife part of his military pension plan terminated upon death or remarriage in light of the fact that he had produced a letter on law firm stationary advising him that his duty would in fact terminate on the happening of one of those events. We held that a genuine issue existed as to whether a reasonable person would have known of the legal significance of language in the consent judgment. *Id.* at 164-65, 390 S.E.2d 460. Here the dispute is not over the language in the contract and its legal effect. It is over a simple mathematical addition. Her attorney owed her a duty to review and explain to her the legal import and consequences which would result from her executing the Separation Agreement. However, this duty does not relieve her from her own duty to ascertain for herself the contents of the contract she was signing. *Biesecker v. Biesecker*, 62 N.C. App. 282, 285, 302 S.E.2d 826, 828-29 (1983). She has received benefits under the Separation Agreement for almost three years without complaint. We hold that she ratified the contract and affirmed its terms by her actions and is furthermore estopped from claiming that it is not the settlement she authorized. Summary judgment was proper.

(2) *Constructive Fraud & Breach of Fiduciary Duty*

[4] Plaintiff twice amended her complaint to allege causes of action for breach of fiduciary duty and constructive fraud. In order to prove constructive fraud, plaintiff must prove (1) a relation of trust and confidence, and (2) consummation of a transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. *Booher v. Frue*, 86 N.C. App. 390, 392, 358 S.E.2d 127, 128 (1987), *aff'd*, 321 N.C. 590, 364 S.E.2d 141 (1988); *Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981). There is no evidence in the record that defendant Whitfield in any way took advantage of her position of trust to harm the plaintiff. In fact, all of the evidence tends to show that attorney Whitfield was more than merely "open, fair and honest" in her dealings with Ms. Lowry; she was a zealous advocate on Ms. Lowry's behalf. The record shows that plaintiff received over 19 letters from defendant and that over 88 telephone conferences were held. When Ms. Lowry indicated that she did not understand the terms of the Separation Agreement over the telephone, Whitfield told her to come to the office and she did so, receiving a complete explanation of the settlement terms. Ms. Lowry retained Whitfield in later proceedings to enforce the terms of the Separation Agreement as well as having the Agreement incorporated into a consent order. We find that summary judgment was proper as to these claims.

II. RULE 11 SANCTIONS

[5] Defendants have cross-appealed denial of their motion for sanctions pursuant to G.S. 1A-1, Rule 11. The trial court's decision to impose or not to impose mandatory sanctions under Rule 11 is subject to *de novo* review. *Turner v. Duke*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "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." *Id.* In the present case the trial court failed to make any findings of fact or conclusions of law. Rather the two Orders each state "the defendant is not entitled to attorney fees" and denies the motions.

In *Turner v. Duke, supra*, no sanctions were originally imposed by the trial judge. The Court of Appeals reviewed the matter on an abuse of discretion standard and found no error. The Supreme Court, however, reviewed the matter *de novo*, pronouncing a new standard and remanded the matter for imposition of mandatory sanctions.

We remand this part of the case to the trial court for findings of fact and conclusions of law so that we can review them as required by *Turner v. Duke, supra.*

Affirmed in part, reversed in part and remanded.

Judges ARNOLD and DUNCAN concur.

ROBERT W. CLARK v. JOSEPH G. BROWN

No. 8927SC514

(Filed 3 July 1990)

1. Libel and Slander § 16 (NCI3d)— statement to newspaper reporter—plaintiff's competency as lawyer attacked—statement slander and libel per se

Evidence was sufficient to show that defendant district attorney's statement was both slander and libel *per se* where

it tended to show that defendant told a newspaper reporter, and thus spoke with the intent that the words be reduced to writing, that plaintiff assistant district attorney was incompetent because he conducted only two days of trial before stating that he had nothing else ready to go forward for trial; ordinary men would naturally understand defendant's statements as disgracing plaintiff in his profession as an attorney and hurtful to his reputation; and plaintiff introduced evidence showing that defendant's words were false, that plaintiff was competent as an attorney, and that termination of superior court after only two days of trial did not show incompetence as a matter of law.

Am Jur 2d, Libel and Slander §§ 9-12, 122, 123, 148, 195-199.

2. **Libel and Slander § 16 (NCI3d)— plaintiff's competency as lawyer attacked—qualified privilege claim rebutted—summary judgment for defendant improper**

The trial court erred in entering summary judgment for defendant district attorney in a libel and slander action by plaintiff, a former assistant district attorney, based on defendant's statement to a reporter that he dismissed plaintiff because plaintiff was incompetent where plaintiff raised genuine issues of fact on both the falsity of the charge of incompetence and the existence of actual malice, thus rebutting defendant's claim of qualified privilege, by offering evidence that he was a competent assistant district attorney, that defendant fired him within days after the newspaper published a letter from plaintiff's mother in support of defendant's political opponent, and that defendant's statement to the newspaper about plaintiff was of a vehement character.

Am Jur 2d, Libel and Slander §§ 9-12, 122, 123, 148, 195-199.

3. **Contracts § 34 (NCI3d)— intentional interference with contract—insufficiency of evidence**

The trial court properly entered summary judgment for defendant district attorney on plaintiff attorney's claim of intentional interference with contract where plaintiff contended that defendant intentionally interfered with his contractual relations with his clients when defendant required plaintiff to negotiate directly with defendant rather than allowing plaintiff to negotiate with assistant district attorneys, but there

was no evidence that defendant induced plaintiff's clients to breach their contracts with plaintiff; defendant was clearly justified in setting the requirement that plaintiff negotiate with him because of his prosecutorial duties and scope of authority; and there was no evidence supporting plaintiff's contention that defendant's actions caused plaintiff actual damages, as plaintiff, within a week after establishing his private law practice, accepted employment and began work with another county's district attorney's office.

Am Jur 2d, Interference §§ 6, 25, 28, 57-61.

APPEAL by plaintiff from judgment filed 21 February 1989 by *Judge John R. Friday* in GASTON County Superior Court. Heard in the Court of Appeals 22 November 1989.

Gillespie, Lesesne & Connette, by Edward G. Connette, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Assistant Attorney General, for the State.

GREENE, Judge.

In this civil action, plaintiff appeals the trial court's grant of summary judgment for defendant on plaintiff's claims of libel, slander, intentional interference with contract and interference with prospective economic advantage.

The evidence, viewed in the light most favorable to plaintiff, tends to show that plaintiff was employed in December 1984 by defendant district attorney as an assistant district attorney for Gaston County. In the spring of 1986, defendant was engaged in a primary re-election campaign and plaintiff was a friend of defendant's opponent in that election. Plaintiff promised defendant that plaintiff would remain neutral in the primary election. During the week of 28 April 1986, plaintiff was prosecuting at a term of criminal superior court in Gaston County over which Judge Sitton presided, and court ended on 30 April 1986, Wednesday morning. Plaintiff told Judge Sitton that he had nothing "else that was ready to go forward for trial." On Saturday, 3 May 1986, a letter from plaintiff's mother was published in the *Gastonia Gazette* newspaper in support of defendant's primary opponent. Defendant became aware of the letter sometime before he arrived at the office on

the following Monday morning, 5 May 1986. On that morning, defendant called plaintiff into his office and told him to "clean out [his] desk." Plaintiff immediately called the *Gastonia Gazette* and other media offices, informing them that he had been fired by defendant for what he assumed "was for political reasons." Immediately after talking to plaintiff, a reporter for the *Gastonia Gazette* called defendant, who told defendant that plaintiff had told the newspaper that plaintiff "had been terminated for political reasons," and defendant told the newspaper that "among other things, that [defendant] had let [plaintiff] go because he was incompetent." On 5 May 1986, the *Gastonia Gazette* published a news article which stated in pertinent part:

> [Plaintiff], 32, an assistant district attorney since December 1984, said he was fired from his $36,100 a year job because he supports [defendant]'s opponent . . . in Tuesday's Democratic primary.
>
> . . .
>
> But [defendant] says it was job performance that caused him to fire [plaintiff].
>
> "Incompetence," [defendant] said. "Capital I-N-C-O-M-P-E-T-E-N-C-E. Last week I assigned him to superior court. He held court Monday and Tuesday, and he quit about Wednesday at 10 a.m. He said he had nothing further for the court to hear.["]
>
> "He hasn't held a full five days of superior court once since I hired him. He just can't seem to get things done. He tries one case and decides he's through."

Plaintiff instituted suit against defendant on the claims set out above. Defendant answered, denying the claims and asserting the affirmative defense of privilege. Defendant moved for summary judgment, offering defendant's deposition, plaintiff's discovery answers, and affidavits by defendant and two other persons.

Defendant's deposition testimony on cross-examination was:

> Q. And then did you spell out the word "incompetent" for him?
>
> A. I may have. I saw the story and the way the story was written, it was written as if I had. I don't recall that I did that, but it sounds like me.
>
> Q. Do you have any reason to disagree with the quote?

A. No, it sounds exactly like something I would do.

Q. Why did you fire [plaintiff]?

A. Because of the remarks that he made in court to Judge Sitton and the fact that he did not have enough cases to continue beyond Wednesday morning.

. . .

Q. Did you ever say [plaintiff] was incompetent as an attorney?

A. No. I never made the statement that he was incompetent as an attorney.

Q. Would you ever have said that?

A. No.

After plaintiff left employment at the district attorney's office, he started his own private practice in the county. Defendant instituted a policy requiring that when plaintiff was defense counsel in any criminal case, plaintiff must negotiate directly with defendant. Defendant testified that he was concerned that plaintiff "having worked as an assistant district attorney in our office, might get overly sympathetic reactions from some of the assistants he had worked with and that in all fairness his cases should be handled just like any other lawyer's cases had been handled." By 9 June 1986, plaintiff had closed his Gastonia private law practice and joined the district attorney's office in Buncombe County. Plaintiff offered several affidavits at the summary judgment hearing to show that plaintiff enjoyed an excellent reputation as an assistant district attorney and that the fact that a superior court calendar ended on Wednesday was not incompetence by the prosecuting attorney.

The issues presented are whether summary judgment for defendant was appropriate, based on (I) defendant's affirmative defense of qualified immunity for libel and slander and (II) plaintiff's failure to show a material issue of fact on his claims of interference with contractual relations.

Summary judgment is appropriate when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (Cum. Supp. 1989). The evidence must be viewed in the light most favorable to the

non-movant, with the jury resolving questions of credibility. *Shuping v. Barber*, 89 N.C. App. 242, 244, 365 S.E.2d 712, 714 (1988) (citations omitted). As movant, defendant has the burden of showing at least one of the three grounds justifying summary judgment in his favor: (1) "an essential element of plaintiff's claim is nonexistent . . . [2] plaintiff cannot produce evidence to support an essential element of his claim, or . . . [3] plaintiff cannot surmount an affirmative defense which would bar the claim." *Id.* (citations omitted).

I

A

Libel and slander

[1] Plaintiff first asserts that defendant's statement was libel *per se* or slander *per se*. We agree.

In construing the publication, we are guided by the rule that to be actionable *per se*, the words:

> 'must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule
>
> . . .
>
> The question always is how would ordinary men naturally understand the publication
>
> . . .
>
> [T]he [publication] . . . must be . . . stripped of all insinuations, innuendo, colloquium, and explanatory circumstances. The article must be defamatory on its face "within the four corners thereof." '

Tyson v. L'Eggs Products, Inc., 84 N.C. App. 1, 12, 351 S.E.2d 834, 840-41 (1987) (citation omitted).

"[F]alse words imputing to a merchant or businessman conduct derogatory to his character and standing as a businessman tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se*." *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955) (slander *per se: Shreve v. Duke Power Co.*, 97 N.C. App. 648, 650, 389 S.E.2d 444, 446 (1990); libel

per se: Ellis v. Northern Star Co., 326 N.C. 219, 223, 388 S.E.2d 127, 130 (1990)). The false words

> (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. That is to say, it is not enough that the words used tend to injure a person in his business. To be actionable *per se*, they must be uttered of him in his business relation.

Id.

> Whe[n] such words are spoken, the law raises a *prima facie* presumption of malice and a conclusive presumption of legal injury and damage, entitling the victim of the defamation to recover damages, nominal at least, without specific proof of injury or damage.

Badame, at 756, 89 S.E.2d at 467 (citation omitted).

As here, when defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel. *Bell v. Simmons*, 247 N.C. 488, 494, 101 S.E.2d 383, 387 (1958) (defamatory statements made to a newspaper reporter with the intent that the newspaper publish them, which are published, are both slander and libel).

First, we determine as a matter of law that ordinary men would naturally understand defendant's statements to the newspaper reporter as disgracing plaintiff in his profession as an attorney and hurtful to his reputation. "Incompetent" means "[o]f inadequate ability or fitness; not having the requisite capacity or qualification; incapable." Oxford English Dictionary 166 (1st ed. 1971). On its face, the statement has but one meaning, defamatory *per se*, which degrades plaintiff's legal ability and disgraces him in his capacity as an attorney. Such imputations tend to prejudice plaintiff in his livelihood.

Second, reviewing the evidence in the light most favorable to plaintiff, we determine that plaintiff introduced evidence showing that defendant's words were false, that plaintiff was competent as an attorney, and that termination of superior court after only two days of trial did not show incompetence as a matter of law.

B

Qualified privilege

[2] Plaintiff next argues that he introduced evidence showing material issues of fact concerning defendant's affirmative defense of qualified privilege. We agree.

Qualified privilege is a defense for a defamatory publication, which:

> grew out of the desirability in the public interest of encouraging a full and fair statement by persons having a legal or moral duty to communicate their knowledge and information about a person in whom they have an interest to another who also has an interest in such person.

Stukuls v. State, 397 N.Y.S.2d 740, 744, 366 N.E.2d 829, 833 (1977).

A defamatory statement is qualifiedly privileged when made (1) on subject matter (a) in which the declarant has an interest, or (b) in reference to which the declarant has a right or duty, (2) to a person having a corresponding interest, right or duty, (3) on a privileged occasion, and (4) in a manner and under circumstances fairly warranted by the occasion and duty, right or interest. *Towne v. Cope*, 32 N.C. App. 660, 663, 233 S.E.2d 624, 626-27 (1977) (citation omitted). "This duty may be public, personal, or private and of a legal, judicial, political, moral, or social nature." *Shuping*, at 245, 365 S.E.2d at 714 (citation omitted). "Publication of the official acts of public men and bodies is in the public interest." *Yancey v. Gillespie*, 242 N.C. 227, 230, 87 S.E.2d 210, 212 (1955).

"Whe[n] the affirmative defense of privilege is alleged, the burden is on the defendant to establish facts sufficient to show that the publication of the alleged defamation was made on a privileged occasion." *Shuping*, at 245, 365 S.E.2d at 714 (citations omitted). " 'Whether the occasion is privileged is a question of law for the court, subject to review, and not for the jury, unless the circumstances of the publication are in dispute, when it is a mixed question of law and fact.' " *Id.* (citation omitted).

If the court determines as a matter of law that the occasion is privileged, defendant has "a presumption that the statement was made in good faith and without malice." *Shreve*, at 651, 389 S.E.2d at 446. Since defendant's presumption rebuts plaintiff's presumption of actual malice, plaintiff then has the burden of prov-

ing "both the falsity of the charge and that it was made with actual malice." *Boston v. Webb*, 73 N.C. App. 457, 460, 326 S.E.2d 104, 106, *review denied*, 314 N.C. 114, 332 S.E.2d 479 (1985) (citation omitted).

> Actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant . . . or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity.

Kwan-Sa You v. Roe, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990) (citations omitted). If plaintiff cannot meet his burden of showing actual malice, the qualified privilege operates as an absolute privilege and bars any recovery for the communication, even if the communication is false. *See Stukuls*, at 742, 366 N.E.2d at 831.

The trial court determined, and we agree, that defendant's statements were entitled to qualified privilege. Defendant was a district attorney running for re-election who had a political interest in responding to accusations that he had acted improperly in firing plaintiff for political reasons. Defendant also had an interest in defending his employment decisions. Defendant's firing of a governmental employee was clearly the 'official act of a public man.' The persons to whom defendant ultimately communicated the statements were the citizens and voters of the county, who had a public interest in their elected district attorney's official acts. Defendant made the statements in an appropriate manner, an interview, to a local newspaper reporter for news publication in response to plaintiff's statements made for news publication, circumstances fairly warranted by plaintiff's presentation of information. Therefore, defendant's statements are presumed to be made in good faith and without malice, cancelling plaintiff's presumption of actual malice arising on statements defamatory *per se*.

When defendant's presumption of good faith rebuts plaintiff's presumption of actual malice, plaintiff assumes the burden of showing actual malice, and our review of the evidence in the light most favorable to plaintiff shows genuine issues of material fact on both the falsity of the charge and the existence of actual malice, precluding entry of summary judgment for defendant. We determine that there is ample evidence in the record that defendant's statement was false and made with actual malice. Defendant fired plaintiff within days after the newspaper published a letter from plaintiff's mother

in support of defendant's political opponent, and the vehement character of the statement to the newspaper are some evidence of defendant's ill-will toward plaintiff. Plaintiff also introduced evidence that he was a competent assistant district attorney.

II

[3] Plaintiff contends that defendant intentionally interfered with his contractual relations with his clients when defendant required plaintiff to negotiate directly with defendant, rather than allowing plaintiff to negotiate with assistant district attorneys. We disagree.

> The tort of interference with contract has five elements:
>
> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person;
>
> (2) the defendant knows of the contract;
>
> (3) the defendant intentionally induces the third person not to perform the contract;
>
> (4) and in doing so acts without justification;
>
> (5) resulting in actual damage to plaintiff.

United Laboratories, Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citation omitted).

Assuming, *arguendo*, that a valid contract existed between plaintiff and his clients, of which defendant had knowledge, no record evidence supports plaintiff's contention that defendant intentionally induced plaintiff's clients to breach their contracts with plaintiff. Plaintiff's deposition testimony was that plaintiff did not think that defendant contacted any of plaintiff's clients and defendant testified that he never contacted or attempted to contact any of plaintiff's clients. Assuming for the sake of argument that defendant's requirement that plaintiff negotiate directly with defendant rather than with assistant district attorneys virtually destroyed plaintiff's ability to enter into attorney-client contracts with criminal defendants, defendant was clearly justified in setting such a requirement because of his prosecutorial duties and scope of authority. Finally, there is no record evidence supporting plaintiff's contention that defendant's actions caused plaintiff actual damages. Within a week after plaintiff established his private law practice,

he accepted employment and began work with the Buncombe County District Attorney's Office.

We find no merit in plaintiff's remaining assignments of error. We vacate entry of summary judgment on plaintiff's defamation action and remand it for trial. We affirm entry of summary judgment on the remaining claims.

Affirmed in part, vacated in part and remanded.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT WILSON ODOM

No. 8926SC444

(Filed 3 July 1990)

1. **Larceny § 7 (NCI3d)— shoplifting—felonious larceny—evidence sufficient**

There was no error in a prosecution for felonious larceny arising from shoplifting by denying defendant's motion to dismiss for insufficient evidence that the merchandise was stolen where a loss prevention associate at Ivey's testified that he was personally familiar with the men's department and the bathrobes and slippers in the men's accessories section; defendant did not have a trash bag in his possession when the loss prevention associate first saw him; the loss prevention associate saw defendant about forty-five minutes later, around closing time, leaving the store with a full trash bag, which was subsequently found to contain 19 Christian Dior bathrobes and four pairs of slippers, each bearing an Ivey's price tag; there was no receipt in the trash bag and defendant could not produce one; and the loss prevention associate looked in the men's section and saw an empty rack where bathrobes were to be found.

Am Jur 2d, Larceny §§ 50, 123, 124.

2. **Larceny § 7.4 (NCI3d)— shoplifting—felonious larceny—possession of recently stolen property—evidence sufficient**

There was no error in a prosecution for felonious larceny arising from shoplifting by denying defendant's motion to dismiss

based on insufficient evidence that defendant was the perpetrator of the crime where the State relied on the doctrine of recent possession and there was evidence of exclusive possession in that defendant was seen taking from the store a black plastic trash bag containing something, defendant hid the bag behind a planter, returned for the bag and took it behind a dumpster, defendant remained in the vicinity of the bag after he reappeared from behind the dumpster, and no one else approached or touched the bag; and there was evidence of recency in that defendant was first seen without the trash bag, and then forty-five minutes later left the store with an obviously full trash bag; defendant immediately hid the trash bag, left, returned, and took the bag behind a dumpster; and a store employee retrieved the trash bag within about five minutes and found the bag to contain bathrobes and slippers.

Am Jur 2d, Larceny §§ 50, 123, 124.

3. **Larceny § 8.4 (NCI3d)— felonious larceny—shoplifting—instructions—possession of recently stolen property—no error**

There was no error in a prosecution for felonious larceny arising from shoplifting in instructing the jury on the doctrine of possession of recently stolen property where the evidence supported the giving of the instruction.

Am Jur 2d, Larceny § 174.

4. **Larceny § 6.1 (NCI3d)— felonious larceny—shoplifting—evidence of value and ownership—competent**

There was no error in a prosecution for felonious larceny arising from shoplifting by admitting testimony of a loss prevention associate from the store on the value and ownership of the stolen merchandise based on price tags on the merchandise. The price tags were hearsay, but qualified as business records and the loss prevention associate who testified as to the value of the stolen merchandise also testified that his employment required him to act as a shopper, that he frequently looked at store merchandise, and that he knew the price of almost anything in the men's department. Nothing indicates that the source of information or circumstances of preparation of the price tags lacked trustworthiness and the loss prevention associate was a qualified witness whose testimony was admissible to prove the value of the stolen merchandise.

Am Jur 2d, Larceny §§ 130, 148.

5. Larceny § 8.3 (NCI3d)— shoplifting—value of stolen items—instructions—denied—no error

There was no error in a prosecution for felonious larceny arising from shoplifting in refusing the jury's request for additional instructions on the element of value where defendant did not object to the instruction given or request any special instructions on the element of value and a review of the entire record shows that it is not probable that the jury's verdict would have been different if an additional instruction had been given.

Am Jur 2d, Trial §§ 906 et seq.

6. Larceny § 6 (NCI3d)— felonious larceny—shoplifting—empty clothing rack—admissible

There was no error in a prosecution for felonious larceny arising from shoplifting in admitting evidence of an empty clothing rack. The empty clothing rack was relevant because a store employee's observation of an empty rack in the section of the store where he knew that men's robes were displayed and sold made it more probable that a theft had taken place. Moreover, the probative value of the empty rack outweighed any prejudice defendant may have suffered. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Larceny § 155.

APPEAL by defendant from judgment entered 5 January 1989 by *Judge Hollis M. Owens, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 16 November 1989.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Teresa L. White, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

PARKER, Judge.

Defendant was convicted of felonious larceny; State's evidence tended to show the following: At 8:15 p.m. on 16 April 1988, defendant was observed in the men's accessories section of Ivey's department store in the South Park Mall in Charlotte, North Carolina,

by a senior store security employee, Robert Russell Pressley. Defendant was not carrying anything in his hands. About 9:00 p.m. Pressley again saw defendant, who was leaving the store by the Morrison Boulevard exit. Pressley made his observations from the security office of Ivey's, which is 25 to 30 feet from the Morrison Boulevard exit and provided a very good view of the exit and defendant's activities. Defendant was carrying a large black plastic trash bag which appeared to be filled with something. He placed the bag behind a planter near the exit and walked away from the bag. He returned, picked up the bag, and disappeared behind a large trash dumpster, where he remained out of sight for about 15 seconds. When he reappeared, he did not have the bag in his possession. Pressley and an associate left the store, found a black plastic bag behind a planter, looked inside, and saw several Christian Dior brand men's robes and several pairs of men's slippers. Defendant was subsequently arrested and charged with felonious larceny. He appeals from a jury verdict of guilty.

Defendant raises the following five assignments of error: (i) insufficiency of the evidence to support his conviction, (ii) insufficiency of the evidence to support a jury instruction on the doctrine of recent possession, (iii) improper admission of evidence on the issues of value and ownership of the property, (iv) improper denial of the jury's request for additional instructions on the element of value, and (v) improper admission of evidence regarding an empty clothing rack.

I.

[1] Defendant contends the trial judge erred by denying his motion to dismiss the charge against him at the close of all the evidence. Defendant argues that the evidence was insufficient to show a larceny had been committed or defendant was the perpetrator. We find these contentions to be without merit.

On a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and whether there is substantial evidence that the defendant was the perpetrator of the offense. If so, the motion to dismiss is properly denied. *State v. Triplett*, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986); *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982); *State v. Lively*, 83 N.C. App. 639, 642, 351 S.E.2d 111, 114 (1986), *disc. rev. denied*, 319 N.C. 461, 356 S.E.2d 10 (1987). The trial court must consider all evidence in the light most favorable

to the State and give the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Primes*, 314 N.C. 202, 217, 333 S.E.2d 278, 287 (1985); *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 208 (1978). Larceny consists of (i) the wrongful taking and carrying away, (ii) of the personal property of another, (iii) without his consent, and (iv) with the intent to deprive permanently the owner thereof. *State v. Edwards*, 310 N.C. 142, 146, 310 S.E.2d 610, 613 (1984); *accord State v. McLaughlin*, 321 N.C. 267, 271, 362 S.E.2d 280, 282-83 (1987).

The State presented substantial evidence that the merchandise was stolen. At trial, Pressley, who had been employed by Ivey's for approximately 16 months as a loss prevention associate, testified he was personally familiar with the men's department of Ivey's, particularly since it was on the first floor of the store, where he usually worked. Pressley knew where the robes and slippers were in the men's accessories section. He had looked at the robes, both as a prospective customer and in the exercise of his employment duty to observe shoppers while posing as a shopper himself.

When Pressley first saw him in the men's accessories section, defendant did not have a trash bag in his possession. About 45 minutes later, around closing time, Pressley saw defendant leaving the store with the trash bag which was full. Pressley's subsequent investigation showed the bag contained 19 men's Christian Dior brand bathrobes and four pairs of slippers, each bearing an Ivey's price tag. The tags bore the name "Ivey's," and the letters "d-e-p-t," followed by a number and a price. All the evidence was collected in two parcels and stored in Pressley's evidence locker. At trial Pressley testified the evidence remained in the locker until he brought it to the courtroom. Pressley identified the two parcels; their contents were subsequently admitted into evidence. Pressley also testified he knew the significance of some of the numbers on the price tags; they represented telephone extension numbers for departments at Ivey's. He testified that the number 650 on the tag on one of the robes shown him at trial was the telephone extension number for the men's department at Ivey's.

Pressley further testified he was familiar with selling procedures at Ivey's. The store used a three-part receipt form. One copy was retained by the customer as proof of purchase, one was sent to the loss prevention department, and one went to the central office. Pressley searched the trash bag for such a receipt but found

none. Furthermore, when requested to produce a receipt for the merchandise in the bag, defendant could not do so. Following his discovery of the robes and slippers, Pressley returned to the men's accessories section and looked in the area where he knew men's robes were to be found. He observed an empty rack there.

Defendant cites *State v. Mullinax*, 263 N.C. 512, 139 S.E.2d 639 (1965), for the proposition that unless substantial evidence shows the property allegedly stolen is in fact missing, a charge of larceny or robbery should be dismissed. 263 N.C. at 514-15, 139 S.E.2d at 640. In *Mullinax*, there was no evidence of the ownership of money found in defendant's possession and no evidence that money was taken from the country club. The court stated that no official, agent, or employee of the country club testified to any of the relevant facts needed. *Id.*

We find *Mullinax* to be inapposite. In the case *sub judice*, Pressley, an employee of Ivey's, testified based on his personal knowledge. We conclude there was substantial evidence, which, taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, showed the merchandise in the trash bag was stolen from Ivey's.

[2] Next, defendant contends the State failed to prove he was the perpetrator of the crime. The State relied on the doctrine of recent possession of stolen goods to prove defendant's guilt. The doctrine of recent possession is a rule of law under which, upon an indictment for larceny, the possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of the property. *State v. Hamlet*, 316 N.C. 41, 44, 340 S.E.2d 418, 420 (1986); *State v. Maines*, 301 N.C. 669, 673, 273 S.E.2d 289, 293 (1981). To invoke the doctrine, the State must prove:

> (1) [T]he property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and (3) the possession was [discovered] recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. at 674, 273 S.E.2d at 293 (citations omitted).

Above we concluded there was evidence sufficient to show the property was stolen, thus satisfying the first element of the doctrine. To support the element of exclusive possession, "[i]t is sufficient that [the defendant] be in such physical proximity to [the stolen property] that he has the power to control it to the exclusion of others and that he has the intent to control it." *Id.* at 675, 273 S.E.2d at 293-94 (quoting *State v. Eppley*, 282 N.C. 249, 254, 192 S.E.2d 441, 445 (1972)). Applying these principles we note that Pressley saw defendant take from the store a black plastic bag containing something. He saw defendant hide the bag behind a planter, leave, return for the bag, and take it behind a dumpster. Defendant remained in the vicinity of the bag after he reappeared from behind the dumpster. No one else approached or touched the bag from the time Russell first saw defendant with it until Russell looked in it. Clearly, the property was within defendant's exclusive possession and control.

Discussing recency, the North Carolina Supreme Court has said:

> The purpose of the recency requirement is to determine whether the accused's possession of stolen property is sufficiently short under the circumstances of the case to rule out the possibility of a transfer of the stolen property from the thief to an innocent party. The possession must be so recent after . . . the larceny as to show that the possessor could not have reasonably come by it, except by stealing it himself or by his concurrence.

State v. Hamlet, 316 N.C. at 43, 340 S.E.2d at 420. Applying these principles, we note that Pressley first saw the defendant in the store at 8:15 p.m. without any trash bag. Forty-five minutes later, he saw defendant leave the store with an obviously full trash bag. Pressley saw defendant immediately hide the bag, leave, return, and take the bag behind the dumpster. Within about five minutes, Pressley retrieved a black trash bag containing the robes and slippers. We conclude the State's evidence as to recency was sufficient. We hold all the evidence was sufficient to show defendant was the perpetrator of the crime and, accordingly, overrule this assignment of error.

II.

[3] In his second assignment of error, defendant contends the trial judge erred by instructing the jury on the doctrine of recent

possession, because the instruction was not supported by the evidence. This contention is without merit.

A trial judge should not give instructions which present to the jury possible theories of conviction not supported by the evidence. *State v. Taylor*, 304 N.C. 249, 274, 283 S.E.2d 761, 777 (1981), *cert. denied*, 463 U.S. 1213, 103 S.Ct. 3552, 77 L.Ed. 2d 1398 (1983); *State v. Buchanan*, 287 N.C. 408, 421, 215 S.E.2d 80, 88 (1975). As previously shown, from substantial evidence that defendant was in possession of the property very recently after its theft, the presumption validly arose that he also committed the larceny of it. We conclude the evidence supported the giving of an instruction on the doctrine of recent possession and hold the trial court did not err; therefore, this assignment is overruled.

III.

[4] In his third assignment of error, defendant contends the trial court erred by admitting improper evidence of value and ownership. As our previous discussion shows, defendant's contention as to evidence of ownership is without merit. Defendant contends the price tags on the stolen merchandise were hearsay and should not have been admitted as evidence of value. We agree that price tags are hearsay, but previous cases are consistent with the interpretation that they qualify as business records and thus may be excepted from the hearsay exclusion. *See also Boone v. Stacy*, 597 F. Supp. 114 (1984).

To support a charge of felonious possession of stolen property, the State must prove the items taken had a value of more than $400.00. G.S. 14-72. As to evidence of value, this Court has said:

> The general rule in North Carolina is that a witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific personal property. "[I]t is not necessary that the witness be an expert; it is enough that he is familiar with the thing upon which he professes to put a value and has such knowledge and experience as to enable him intelligently to place a value on it." 1 Stansbury's N.C. Evidence § 128 at 408 (Brandis rev. 1973); *State v. Cotten*, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

State v. Boone, 39 N.C. App. 218, 221, 249 S.E.2d 817, 820 (1978), *modified on other grounds*, 297 N.C. 652, 256 S.E.2d 683 (1979). Where a merchant has established a retail price which he is willing

to accept as the worth of merchandise offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss. *State v. Williams*, 65 N.C. App. 373, 374-75, 309 S.E.2d 266, 267 (1983), *disc. rev. denied*, 310 N.C. 480, 312 S.E.2d 890 (1984).

The present case is analogous to *State v. Austin*, 75 N.C. App. 338, 330 S.E.2d 661 (1985). In *Austin*, defendant was charged with misdemeanor larceny from a department store of property having a value of $161.00. The sole witness at trial was a security officer employed by the store. The officer observed defendant take the merchandise and later retrieved the property. *Id.* at 339, 330 S.E.2d at 662. She testified as to the number of items stolen, their retail value, and the approximate total value of the goods. *Id.* at 342, 330 S.E.2d at 663-64. Citing *Williams*, this Court held that mathematical inaccuracy in her testimony did not bar its admission, rather, it was for the jury to resolve any lingering question as to the value of the stolen goods. *State v. Austin*, 75 N.C. App. at 342, 330 S.E.2d at 664.

In the case *sub judice*, Pressley testified his employment required him to act as a shopper and he frequently looked at store merchandise. He testified he knew the price of almost anything in the men's department. On cross-examination he was able to describe specific merchandise of the men's department, unrelated to the subject of litigation, and quote its price. To distinguish Ivey's merchandise from that of any other store, Pressley had to know what the store's price tags looked like and be familiar with the information on them. That the price tags in this case were business records kept in the course of a regularly conducted business whose regular practice it was to make such records is indisputable. That retail stores and consumers rely on such records is equally indisputable. Nothing indicates the source of information or circumstances of preparation of the price tags in this case lacked trustworthiness. Under *Boone* and *Williams*, that Pressley's knowledge was gained from price tags themselves cannot be a bar to its admission as evidence of value. We conclude that under *Williams* and *Austin*, Pressley was a qualified witness and his testimony was admissible to prove value of the stolen merchandise.

IV.

[5] In his fourth assignment of error, defendant contends the trial court erred by refusing the jury's request for additional instruc-

tions on the element of value. After deliberations were begun, the jury submitted three questions in writing to the trial judge. Two of the questions were, "When determining the value of the robes and slippers, is value defined as list price?" and "The term market value of the evidence was used. Please define this term for the jury." The trial judge declined to give any further instructions in response to these two questions.

As a general rule, it is not error for the court to fail to define and explain terms of common usage and meaning, absent a request for a special instruction. *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980); *State v. Jennings*, 276 N.C. 157, 162, 171 S.E.2d 447, 450 (1970). Value is a term of common usage, and defendant did not object to the instruction given or request any special instruction on the element of value.

Defendant argues, however, that the trial judge's refusal to clarify the meaning of value for the jury constituted plain error and is thus reviewable by this Court. *See, e.g., State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986); *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). "In deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79. A review of the entire record in the instant case shows it is not probable that the jury's verdict would have been different if an additional instruction had been given. Evidence of value consisted of Russell's opinion, which we concluded above was properly based on the price tags, and the merchandise itself, which was obviously new. Therefore, no confusion was possible, and this assignment of error is overruled.

V.

[6] Finally, defendant contends the trial judge erred by admitting evidence of an empty clothing rack. Defendant argues this evidence was irrelevant under Rule 402 of the N.C. Rules of Evidence and should have been excluded as prejudicial under Rule 403.

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.

That Russell observed an empty rack in the section of the store where he knew men's robes were displayed and sold is relevant because this evidence makes it more probable that a theft had taken place. Moreover, the probative value of the empty rack outweighed any prejudice the defendant may have suffered by its admission. Testimony that robes had been removed from the rack was stricken and the jury was instructed not to consider it. We hold the trial court did not err in admitting the evidence.

For the foregoing reasons we find no error in defendant's trial.

No error.

Judges EAGLES and ORR concur.

CHAMPS CONVENIENCE STORES, INC. AND COMMERCIAL UNION INSURANCE COMPANY, PLAINTIFFS v. UNITED CHEMICAL COMPANY, INC., DEFENDANT

No. 8928SC672

(Filed 3 July 1990)

Sales § 22.2 (NCI3d)— floor cleaner ordered—automotive cleaner delivered—use by plaintiff contributory negligence

Plaintiff store owner's recovery in a products liability action based on negligence was barred by N.C.G.S. § 99B-4 because plaintiff's employee was contributorily negligent as a matter of law where the evidence showed that plaintiff's employee ordered a floor cleaner from defendant; defendant instead delivered a cleaner for automobile parts; the employee conceded that she did not read the name of the product delivered or the directions for its use, both of which were printed on the label; she also conceded that if she had read the label she would not have applied the parts cleaner to the floor; and although the employee and her co-worker commented on the "bad odor" of the product, neither of them checked the label before continuing to mop it on the floor.

Am Jur 2d, Products Liability §§ 702, 934.

Judge LEWIS dissenting.

APPEAL by defendant from Judgment of *Judge Charles C. Lamm, Jr.*, entered 19 January 1989 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 6 December 1989.

Roberts Stevens & Cogburn, P.A., by Isaac N. Northup, Jr., for plaintiff appellees.

Morris, Bell & Morris, by William C. Morris, III, for defendant appellant.

COZORT, Judge.

This product liability action has its origin in mistake and unhappy coincidence. Marta Sprinkle, an employee of plaintiff Champs Convenience Stores, Inc., ordered from the defendant a product named Dust Command, used for controlling dust on wooden floors. The defendant, however, delivered a product named Carbo-Solv, used for cleaning carburetors and other small parts of combustion engines. Both Dust Command and Carbo-Solv were distributed by the defendant in five-gallon containers. On 31 August 1987, without reading the label, Sprinkle and another employee mopped Carbo-Solv on the floor of Miller's Grocery, one of the plaintiffs' convenience stores. On 4 September 1987, the Food and Drug Protection Division of the North Carolina Department of Agriculture embargoed the entire contents of the store. Plaintiff eventually closed the store.

On 10 December 1987, the plaintiffs sued, alleging, among other things, that the defendant "[n]egligently delivered a toxic chemical to plaintiff representing to plaintiff that this product was suitable for cleaning the floors of Miller's Grocery." The defendant answered and asserted, among other defenses, contributory negligence by the plaintiffs. At trial, the jury found defendant was negligent, found no contributory negligence by plaintiffs' employee, and awarded plaintiffs $148,000 in damages. The defendant moved alternatively for judgment notwithstanding the verdict or a new trial. The trial court denied that motion.

The defendant contends on appeal that the trial court erred in denying its motions for a directed verdict and for judgment notwithstanding the verdict. We agree.

In initiating this action the plaintiff sought relief based on theories of negligence and breach of contract. The negligence claim was grounded in the delivery of the wrong product. The breach of contract claim was grounded in Marta Sprinkle's conversation

with Bill Robinson, an employee of the defendant, regarding the type of product she needed. Based on the evidence brought forward at trial, however, the liability issues submitted to the jury dealt exclusively with negligence:

1. Were the plaintiffs, Champs Convenience Stores, Inc. and Commercial Union Insurance Company, injured or damaged by the negligence of the defendant, United Chemical Company, Inc.?

2. Did the plaintiffs' employee, Marta Sprinkle, by her own negligence contribute to plaintiffs' injury or damage?

Marta Sprinkle testified that she called United Chemical and spoke with a Bill Robinson:

Q Tell us about your conversation with Mr. Robinson, please.

A Well, I told him who I was and where I worked, and I said, "We need something to put on some wood floors to control the dust." And I told him that my boss man said it was "dust-something or other," and that's all I knew.

Q What did Mr. Robinson say to you?

A He said, "Did you say 'Miller's Grocery' in Haw Creek?" And I said, "Yes." And he said, "We used to sell to the previous owner."

Q And did he tell you what he used to sell?

A He said it was Dust Command.

* * * *

Q Did you ask him what size he thought you needed?

A Yes. He said, "How long has it been? Have you put it down recently?" And I told him I had no idea when the last time was anything was put on the floor.

Q So did he tell you how much he thought you needed?

A He told me he thought it would take about five gallons.

Q And did he tell you whether the product came in the five-gallon size?

A Yeah; it came in a five-gallon bucket.

Q Did you talk to him any more about Dust Command?

A Yes, I did.

Q What else did you ask him and what else did he tell you?

A Well, I asked him about—if I had to close the store to put it down, and he said he would advise it because it kind of made the floor slick. He asked me what our hours were, and I told him, and he told me to close when I closed, just go ahead and mop it down and then lock the door and go home and we'd go right back into business the next morning.

Q Did you ask anything about whether you needed any special equipment?

A Yes, sir, I did. I asked him how to put it down, if we had to have something special to put it down with. He asked me if we had any old mops, because he said, "You'll have to throw them away when you get through." I told him we had some old mops. So he told us just to—I said, "Do you have to have buckets or any kind of buffer or anything?" He said, "No, just open the bucket and put the mops in it and mop it down." He said, "Don't wring it out," because he said, "You don't need to get it on your hands or anything."

She testified further that, when she and a co-worker mopped the floor with the product, they "commented that it had a bad odor."

On cross-examination Ms. Sprinkle testified as follows:

Q And then later a five-gallon container was delivered, which you've identified as this one right in front of me, along with an invoice that said "Dust Command" on it; right?

A That's correct.

Q And, in fact, you even had a question about the product that the delivery man could not answer for you?

A That's correct.

Q But you never consulted the label yourself to try to answer that question after the delivery man left, did you?

A No, I did not.

Q And you had never used Dust Command before?

A No, I had not.

Q And certainly had never read a Dust Command label to find out what the directions said on a Dust Command label?

A No, I had not.

* * * *

MR. MORRIS, III.: Let me just put this up here so you can refer to it.

(Black bucket was placed next to the witness on the stand.)

Q Now, then, that label contains directions for use, does it not?

A Yes, it does.

Q Okay. And you can, of course, read?

A Yes, I can.

Q I believe over there on the right side of the label are the directions; is that right?

A Yes.

Q Okay. The name of the product is on the label, and it says "Carbo Solve?" [*sic*]

A Yes, it does.

Q And beneath that it says "cold parts and carburetor cleaner," doesn't it?

A Yes, it does.

Q And then under the description it says "Description: An economical monophase and cold parts cleaner. Cleans a variety of equipment used in combustion engines such as small parts, rocker arms, carburetors, pistons, et cetera, as well as transmissions and brake housings and components," doesn't it?

A Yes, it does.

Q Now, then, I believe you testified in your deposition, which was June of 1988; do you remember that?

A Yes, I do.

* * * *

Q Just to clarify that, you were given a copy of the label at the deposition; correct?

A Right.

Q And at that time you read the label?

A Yes, I did.

Q And when you read the label at the deposition, you realized that it was a product for cleaning car parts?

A Yes, sir.

Q And you also realized, after reading the label at your deposition, that it was not a product—not a floor cleaner?

A That's correct.

Q Now, I believe you testified in your deposition that if you had read the label before you applied this Carbo Solve, [*sic*] you would not have applied it to the floor?

A That's correct.

Q And as the manager of Miller's Grocery, it was your practice to make sure that the invoices for deliveries matched the product that was delivered?

A That's correct.

Q I believe you even said that you always compared the invoice to the product delivered to make sure that they matched?

A That's correct.

Q But that you did not do that on the occasion that Carbo Solve [*sic*] was delivered to Miller's Grocery?

* * * *

A No, I did not.

At the close of the plaintiffs' evidence, the defendant moved for a directed verdict on the plaintiffs' breach of warranty claim. The trial court granted that motion. The defendant also moved for a directed verdict on the plaintiffs' negligence claim. That motion was denied. We find the trial court erred in denying that motion.

This case is governed by North Carolina's Products Liability Act. N.C. Gen. Stat. §§ 99B-1, *et seq.* (1989). N.C. Gen. Stat. § 99B-1(3) provides that a

> "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, *selling*, advertising, packaging or labeling of any product. [Emphasis added.]

The verb sell means "to deliver . . . offer, present . . . to give up [property] to another for money or other valuable consideration." Webster's Third New International Dictionary of the English Language Unabridged 2061 (1966). In this case we hold that "selling" encompasses delivery of products and that plaintiffs' action falls within the scope of a "product liability action."

N.C. Gen. Stat. § 99B-4 provides in part that

> No manufacturer or seller shall be held liable in any product liability action if:
>
> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; provided, that in the case of prescription drugs or devices the adequacy of the warning by the manufacturer shall be determined by the prescribing information made available by the manufacturer to the health care practitioner; or
>
> * * * *
>
> (3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

When, as in the case below, a product liability action is "founded on negligence, '[t]here is no doubt that [plaintiff's] contributory negligence will bar his recovery to the same extent as in any

other negligence case.'" *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 672, 268 S.E.2d 504, 506 (1980) (quoting Prosser, Law of Torts § 102 (4th ed. 1971)). Moreover, the "Products Liability Act specifically reaffirms the applicability of contributory negligence as a defense in product liability actions." *Id.* at 678, 268 S.E.2d at 510.

At trial Ms. Sprinkle conceded (1) that she did not read the name of the product delivered or the directions for its use, both of which were printed on the label, and (2) that if she had read the label she would not have applied Carbo-Solv to the floor. She also testified that, although she and her co-worker commented on the "bad odor" of the product, neither of them checked the label before continuing to mop it on the floor.

There is certainly ample evidence to support the jury's finding that defendant was negligent in delivering the wrong product. Nevertheless, Ms. Sprinkle's testimony conclusively establishes that the product delivered was labeled with "express and adequate instructions" and that her failure to read the product's name or the directions for its use "was a proximate cause of the occurrence that caused injury or damage to the claimant." N.C. Gen. Stat. § 99B-4(1) and (3) (1989). Consequently, plaintiffs' recovery in this product liability action grounded in negligence is barred by § 99B-4 because plaintiff's employee was contributorily negligent as a matter of law.

We note that our holding is limited to the peculiar facts presented by the case below. We do not imply that in all circumstances failure to read a product's label is contributory negligence as a matter of law. *See*, for example, *Ziglar v. E.I. DuPont Co.*, 53 N.C. App. 147, 280 S.E.2d 510, *disc. review denied*, 304 N.C. 393, 285 S.E.2d 838 (1981), where this Court found summary judgment improper for the defendant where a farm laborer, without reading the label, consumed a highly toxic clear liquid packaged in a translucent one-gallon container similar to a plastic milk jug.

For the reasons stated above, the denial of defendant's motion for directed verdict is reversed and the cause remanded for entry of directed verdict.

Reversed and remanded.

Judge JOHNSON concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent.

The Carbo-Solv arrived in a five gallon can as expected with an invoice reciting that the product ordered had arrived. Bill Robinson told the plaintiffs' agents how to apply the material, leaving little reason to consult the label. In *Ziglar, supra*, the product had a distinct and unpleasant odor ("like rotten eggs"). Here, the odor was also distinct and unpleasant. Nevertheless, the Supreme Court, in *Ziglar*, stated "[w]e further hold that the defense of contributory negligence was not established in this case as a matter of law." *Id.* at 160. For us to reverse this judgment and direct entry of judgment for the defendant is contrary to *Ziglar* and G.S. 2D § 99B-4. I believe that the adequacy of the label and the proximate cause of the injury in this case are issues of fact for the jury. After a full trial on all of the issues, the jury found negligence on the part of the defendant and no contributory negligence by the plaintiff. I find no error.

STATE OF NORTH CAROLINA v. IDELLA KING

No. 8926SC1305

(Filed 3 July 1990)

1. Narcotics § 4.6 (NCI3d) — two defendants — instruction on constructive possession — no error

The trial court did not improperly express an opinion by instructing the jury regarding close proximity as it related to defendant but not her twin sister, since there was no conflict with regard to the evidence that both defendant and her sister lived at the residence where the police officer found cocaine and both were present and on the premises at the time the cocaine was discovered; the fact that one was outside the house and one inside the house made no difference; the complained of instruction was followed with an instruction on constructive possession as it applied to both defendants; the sister had testified that she was the one in the bedroom where the cocaine was found and defendant testified that she was outside, so that a close proximity instruction was necessary only for

defendant; and there was incriminating evidence inside a cookie tin containing cocaine which directly linked defendant to ownership of that tin.

Am Jur 2d, Trial §§ 642, 674, 876-882.

2. Narcotics § 4.7 (NCI3d)— trafficking in cocaine—instruction on lesser offense not required

The trial court in a trafficking case did not err in failing to instruct on the lesser included offense of possession of cocaine since defendant maintained throughout trial that none of the cocaine found in her house was hers; evidence was sufficient to support an inference that defendant was in constructive possession of the entire amount of cocaine found in her house, not just the amount found in a cookie tin; and the cookie tin was located only inches from a paper bag containing a large amount of cocaine.

Am Jur 2d, Trial §§ 642, 674, 876-882.

APPEAL by defendant from judgment entered 21 June 1989 by *Judge Robert W. Kirby* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 6 June 1990.

On 21 June 1989, a jury convicted defendant of trafficking in cocaine by possession in violation of N.C. Gen. Stat. § 90-95(h) (1985). Defendant received an active sentence of seven years imprisonment.

From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane R. Garvey, for the State.

Wayne C. Alexander, P.A., by James E. Williams, Jr. and David F. Williams, for defendant-appellant.

ORR, Judge.

Defendant argues six assignments of error on appeal. For the reasons below, we find no error.

The following facts are pertinent to defendant's appeal. Defendant and her twin sister, Izella King, were indicted on 24 August 1987 for trafficking in cocaine by possession. On 21 October 1987, defendant moved to suppress the evidence obtained pursuant to

the search warrant for the premises where defendant resided. This motion to suppress was granted by Judge W. Terry Sherrill, and the State appealed to this Court. In a unanimous decision filed 15 November 1988, this Court upheld the facial validity of the search warrant and remanded the case to the trial court for findings regarding whether the informant information underlying the warrant was obtained lawfully.

On 9 March 1989, after a second suppression hearing into the informant information in the warrant, Judge Sherrill held that the information had been obtained lawfully and denied defendant's motion to suppress the evidence. Defendant and her sister were tried before a jury on 19 June 1989. Defendant was convicted of trafficking in cocaine on 21 June 1989 and sentenced to seven years imprisonment. The jury was unable to reach a verdict as to Izella King, and the trial court declared a mistrial. Defendant appealed her conviction.

The State's evidence tended to show that on 30 June 1987, defendant's residence was searched pursuant to a valid search warrant. Defendant lived at 1509 Luther Street with her sister, Izella, and possibly Bo King, who was named in the search warrant as allegedly selling cocaine from the residence.

Officer Tom Hazelton of the Charlotte Police Department testified that when he and the other officers arrived to search the residence, he observed a person, later identified as Izella King, getting into a car parked in front of the residence. When he entered the residence, he observed defendant walking out of a bedroom. He asked defendant her name and she identified herself as Idella King. Officer Hazelton later testified that but for defendant's self-identification, he would not have been able to tell the difference between defendant and her twin sister.

Both defendant and her sister were secured in the living room of the residence, and Officer Hazelton searched the bedroom from which he observed defendant leaving. He found a brown paper bag on a dressing table containing what was later identified as cocaine. The brown bag contained several smaller bags of cocaine in different amounts. Officer Hazelton also found a cookie tin next to the brown paper bag. The cookie tin contained 14 bags of cocaine, $271.00 and pay receipts for defendant Idella King. A total of 87.91 grams of cocaine was found in the brown bag and cookie tin. Officer

Hazelton also found a briefcase containing $36,871.00 between the bed and the wall in the same bedroom.

Defendant and Izella King testified at trial in their own defense. Both maintained that it was defendant that Officer Hazelton observed outside the house and Izella who was walking out of the bedroom. Throughout the booking process, however, defendant identified herself as the one who was walking out of the bedroom.

Izella King also testified that her brother, Bo King, visited the residence on 30 June 1987 and used the telephone in the bedroom where the cocaine was found just before the police arrived with the search warrant. She further testified that she thought her brother had a brown paper bag with him at the time.

Both defendant and her sister testified that the approximately $36,000.00 in cash found in the same bedroom was their property. They asserted that they accumulated this cash over an eight-year period of time prior to 1984 from approximately $300.00 per month social security death benefits from their deceased father's account, a janitorial job and money received from recycling cardboard by their mother. Defendant also testified that an additional $38,000.00 found at her mother's house during a search a month later was part of this "inheritance."

I.

[1] Defendant first argues that the trial court improperly intimated an opinion by instructing the jury regarding close proximity as it related to defendant but not Izella King. Defendant asserts that because the trial court used one co-defendant's name in instructing on close proximity without using the other's name, it was an impermissible expression of opinion concerning disputed evidence.

The trial court instructed concerning close proximity as follows:

> A persons [sic] awareness of the presence of cocaine, and her power and intent to control its disposition or use, may be shown by direct evidence or may be inferred from the circumstances.
>
> If you find beyond a reasonable doubt that the cocaine was found in close proximity to the defendant Idella King, that would be a circumstance from which, together with other circumstances, you may infer that the defendant was aware of the presence of that substance and had the power and intent

> to control its disposition or use. However, the defendants [sic] physical proximity, if any, to the cocaine does not by itself permit an inference that the defendant was aware of its presence or had the power and intent to control its disposition or use. Such an inference may be drawn from this and other circumstances which you find from the evidence beyond a reasonable doubt.

Defendant did not object to this instruction when it was given or at any other stage of the proceedings. Failure to object is fatal to the argument unless defendant can establish that the instructions affect a substantial right and should be considered under the "plain error" rule. *State v. Odom*, 307 N.C. 655, 660-61, 300 S.E.2d 375, 378 (1983) (citations omitted). In determining whether a defect in jury instructions constitutes "plain error," this Court must review the entire record and decide if the alleged error had a probable impact on the jury's guilty verdict. *Id.* at 661, 300 S.E.2d at 378-79 (citation omitted).

It is uncontested that the State's evidence and defendant's evidence are in direct conflict regarding whether it was defendant or her sister, Izella, coming out of the bedroom where Officer Hazelton found the cocaine. However, there is no conflict that both defendant and Izella lived at the residence where Officer Hazelton found the cocaine and both were present and on the premises at the time the cocaine was discovered. The fact that one of them was outside the house and one inside the house makes no difference in the case before us.

In *State v. Leonard*, 87 N.C. App. 448, 455, 361 S.E.2d 397, 401 (1987), *disc. review denied and appeal dismissed*, 321 N.C. 746, 366 S.E.2d 867 (1988), this Court relied on *State v. Harvey*, 281 N.C. 1, 12-13, 187 S.E.2d 706, 714 (1972), in defining constructive possession as it relates to illegal narcotics.

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss or motion for judgment

> as of nonsuit by presenting evidence which places the accused 'within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession.' (Citations omitted.)

See State v. Williams, 307 N.C. 452, 298 S.E.2d 372 (1983) (sufficient evidence of constructive possession exists when bills addressed to defendant were found in a dwelling next to an outbuilding containing heroin, and the mailbox in front of the dwelling bore defendant's name); *State v. Allen*, 279 N.C. 406, 183 S.E.2d 680 (1971) (constructive possession is a jury issue when heroin was found in defendant's residence, even though defendant was not on the premises during the search); and *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986) (constructive possession conviction for possession and intent to sell heroin upheld where defendant admitted staying occasionally at his sister's house and standing on the porch where heroin was found).

In *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986), *citing*, *State v. Baize*, 71 N.C. App. 521, 323 S.E.2d 36 (1984), *disc. review denied*, 313 N.C. 174, 326 S.E.2d 34 (1985), this Court stated:

> [C]onstructive possession depends on the totality of circumstances in each case. No single factor controls, ... [W]e identified three typical situations regarding the premises where drugs were found: (1) some exclusive possessory interest in the defendant and evidence of defendant's presence there; (2) sole or joint physical custody of the premises of which defendant is not an owner; and (3) in an area frequented by defendant, usually near defendant's property.

81 N.C. App. at 93, 344 S.E.2d at 79.

We have reviewed the entire record in the case *sub judice* and find that the alleged instruction error did not have a probable impact on the jury's finding of guilt. The trial court continued with the following instructions on constructive possession:

> If you find beyond a reasonable doubt that . . . defendants exercised control over those premises . . . this could be a circumstance from which you may infer that the defendants were aware of the presence of cocaine and had the power and intent to control its disposition or use.

First, the instruction may be interpreted as a direct acknowledgement of the testimony of both defendants. Izella testified that she was the one who had been in the bedroom where cocaine was found, and defendant testified that she was outside. Therefore, a close proximity instruction was necessary only for defendant.

Second, even if a close proximity instruction was necessary for both defendants, it was not reversible error for the trial court to exclude Izella's name in its instruction to the jury. Under the above principles of law, either or both of the defendants could have been found guilty of the charges. Both defendants resided at the address searched, both had physical custody of the premises searched and both were in close juxtaposition to the cocaine. It makes no difference in this case that one defendant was outside the house and one was inside. Moreover, there was incriminating evidence inside the cookie tin containing cocaine which directly linked defendant to ownership of that tin.

Defendant is unable to show under the "plain error" rule that but for the alleged erroneous instruction, she probably would not have been convicted. Therefore, we hold that the trial court did not commit reversible error in this jury instruction.

II.

[2] Defendant next argues that the trial court erred in refusing to instruct the jury on possession of cocaine. At the jury instruction conference, defendant requested the trial court to instruct on the lesser included offense of simple possession of cocaine because the cookie tin containing items identifying defendant as its owner contained less than 28 grams of cocaine required under N.C. Gen. Stat. § 90-95(h)(3) for a trafficking conviction. The trial court denied defendant's request on the basis that defendant maintained throughout the trial that none of the cocaine was hers. We find that the trial court did not err.

In *State v. Agubata*, 92 N.C. App. 651, 375 S.E.2d 702 (1989), this Court held that a defendant was not entitled to an instruction on the lesser included offense of possession of heroin under similar circumstances. The defendant in *Agubata* disclaimed any knowledge of the presence of heroin in his house, as defendant disclaimed any knowledge of the presence of cocaine in her house in the case before us.

Citing *State v. Siler*, 66 N.C. App. 165, 311 S.E.2d 23, *modified and affirmed*, 310 N.C. 731, 314 S.E.2d 547 (1984), the *Agubata* Court stated that "[o]nly when there is evidence of a lesser included offense is the judge required to charge on a lesser offense." 92 N.C. App. at 660, 375 S.E.2d at 707. Under § 90-95(h)(3), trafficking in cocaine requires proof of possession of cocaine in the amount of 28 grams or more. There is nothing in the statute which requires the 28 grams to be in one container.

Moreover, there is sufficient evidence stated in section I above to support an inference that defendant was in constructive possession of the entire amount of cocaine found in her house, not just the amount discovered in the cookie tin. We note that the cookie tin (which defendant denied owning throughout the trial) was located only inches from the paper bag containing the larger amount of cocaine. Therefore, we find that the trial court did not commit reversible error in not instructing on the lesser included offense of possession of cocaine.

Defendant assigns four additional errors. We have considered these assignments of error and find them to be without merit. For the above reasons, we find no error.

No error.

Judges COZORT and DUNCAN concur.

BARCLAYSAMERICAN/LEASING, INC., PLAINTIFF v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANT

No. 8926SC1133

(Filed 3 July 1990)

Bankruptcy and Insolvency § 4 (NCI3d); Landlord and Tenant § 5 (NCI3d)— automobile rentals—residual value insurance policy—insolvent insurer—petition to lift automatic bankruptcy stay—lease terminated

Summary judgment should not have been granted for plaintiff and should have been granted for defendant in an action in which plaintiff sought to recover from defendant sums owed

plaintiff by its insolvent insurer pursuant to a residual value insurance policy on leased automobiles. Although N.C.G.S. § 58-155.48(a)(1) requires defendant to assume an insolvent insurer's obligations to the extent of covered claims, the orders of the bankruptcy court affording the plaintiff relief from the automatic stay in this case effected a termination of the lease in that the orders made clear that all of the vehicles which were the subject matter of the lease were to be returned, plaintiff was required to dispose of all of those vehicles and apply the proceeds to the indebtedness, and the lessee was to retain no rights whatsoever in any of the vehicles. The effect of the relief was thus to extinguish the lease and, by the express terms of the residual value policy, plaintiff's claim pertaining to such vehicles is not covered and defendant is not required to assume the insolvent insurer's obligation.

Am Jur 2d, Insurance §§ 88 et seq.

Judge DUNCAN concurring.

APPEAL by defendant from order and judgment entered 14 June 1989 in MECKLENBURG County Superior Court by *Judge Frank W. Snepp*. Heard in the Court of Appeals 1 May 1990.

This is an action brought under Chapter 58 of the North Carolina General Statutes in which plaintiff, a North Carolina corporation, seeks to recover of defendant North Carolina Insurance Guaranty Association sums owed plaintiff by its insolvent insurer pursuant to claims filed under a residual value insurance policy.

On 28 February 1983, plaintiff purchased from Integrity Insurance Company ("Integrity"), a New Jersey corporation, a "Leased Vehicle Residual Value Protection Insurance Policy," indemnifying plaintiff against residual value losses on enrolled leased vehicles. On 15 December 1983, plaintiff entered into a lease agreement with Adjusters Auto Rental, Inc. ("Adjusters"), an Ohio corporation. By supplement to that agreement, plaintiff agreed to lease to Adjusters 300 1984 Mercury Topaz automobiles. The stated term of the lease for these vehicles was 36 months, commencing 10 January 1984. Plaintiff enrolled these leased vehicles for protection under the above policy.

On 18 April 1986, Adjusters filed in the United States Bankruptcy Court for the Northern District of Ohio a voluntary petition

for reorganization under Title 11, Chapter 11 of the United States Code. Plaintiff thereafter moved that the automatic stay imposed pursuant to 11 U.S.C. § 362 be lifted. Pursuant to Adjusters' stated intent to cease its operations on 15 August 1986, the bankruptcy court, by order entered 15 August 1986, modified the automatic stay, ordering

> 1. . . . BarclaysAmerican/Leasing, Inc. (a) to take possession of any of [Adjusters'] vehicles in which [Barclays] has a security interest or a lessor's interest, (b) to dispose of all such vehicles, and (c) to apply the net proceeds derived from such disposition to the indebtedness owed[.]
>
> 2. [Adjusters] waives its right to receive notice regarding the disposition of its vehicles by [Barclays].

By "Stipulated Order" entered 29 August 1986, the bankruptcy court ordered Adjusters to "continue to use its best efforts to promptly deliver possession of all of the remaining automobiles to Barclays[.]" This order also contained a finding that plaintiff alleged Adjusters to be in default under the lease.

On 29 December 1986, plaintiff made a claim with Integrity pursuant to the leased vehicle residual value policy for 294 of the 300 automobiles that were the subject matter of plaintiff's lease with Adjusters. The next day the Commissioner of Insurance of the state of New Jersey filed a "Complaint for Rehabilitation of Domestic Insurer" against Integrity and that same day obtained an order granting to the Commissioner exclusive possession of the business of Integrity and staying payment of claims. By order of 24 March 1987, the Superior Court of New Jersey, Chancery Division—Bergen County, determined Integrity to be insolvent.

On 7 December 1987, plaintiff brought the present action against defendant, seeking recovery of $300,000.00 plus interest for sums allegedly owed it by insolvent Integrity. Thereafter, plaintiff amended its complaint to add a second claim for relief in the amount of $323,610.00, based on allegations that, prior to its insolvency, Integrity maintained deposits of securities with the North Carolina Commissioner of Insurance, that such securities or proceeds thereof were delivered to defendant, and that plaintiff had and was entitled to enforce a lien therein pursuant to G.S. § 58-185.

On 17 January 1989, plaintiff moved for summary judgment on both claims. By order of 14 June 1989, the trial court allowed

plaintiff's motion with respect to its first claim for relief, but dismissed plaintiff's second claim for relief.

Defendant appeals.

Plaintiff cross-assigns error.

Tucker, Hicks, Hodge and Cranford, P.A., by John E. Hodge, Jr., for plaintiff-appellee.

Moore & Van Allen, by Joseph W. Eason and Christopher J. Blake, for defendant-appellant.

WELLS, Judge.

Defendant advances two arguments challenging the trial court's entry of summary judgment for plaintiff on its first claim for relief. First, defendant contends that plaintiff's claim was not within the coverage of the residual value policy issued by Integrity. Second, defendant contends that the North Carolina Insurance Guaranty Association Act does not apply to the residual value policy in that such policy is "credit insurance," expressly excluded from coverage under the Act. We find it unnecessary to reach this second question. For assuming *arguendo* that the residual value policy is within the Act, we conclude that plaintiff's claim is not within the coverage of that policy.

The provisions of the North Carolina Insurance Guaranty Association Act applicable to this case are set forth at Chapter 58, Article 17B of the North Carolina General Statutes.[1] In cases where an insurer is insolvent, G.S. § 58-155.48(a)(1) requires the Association to assume the insurer's obligations "to the extent of the covered claims existing prior to the determination of insolvency and arising within 30 days after the determination of insolvency[.]" The Act defines a covered claim, in pertinent part, as

> an unpaid claim . . . which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies[.]

N.C. Gen. Stat. § 58-155.45(4).

1. We note that effective 5 June 1989, the North Carolina Insurance Guaranty Association Act was amended and recodified at N.C. Gen. Stat. § 58-48-1, *et seq.* These amendments are not applicable to this case.

The leased vehicle residual value policy issued to plaintiff by Integrity provides in pertinent part:

VII. EXCLUSIONS

This policy does not apply to:

. . .

(b) Any *Enrolled Vehicle* for which the relevant lease is terminated prior to the Scheduled Lease Termination Date, whether by default of the Lessee, prepayment or otherwise. (Emphasis added.)

The scheduled termination date of the lease for the enrolled vehicles in this case, as set forth in the supplement to the lease agreement between plaintiff and Adjusters, is "36 months from Rental Commencement Date. RENTAL COMMENCEMENT DATE: January 10, 1984." Consequently, the dispositive question is whether the lease between plaintiff and Adjusters terminated prior to 10 January 1987. If so, then plaintiff's claim is not within the coverage of the residual value policy, and defendant is therefore not required to assume this obligation of Integrity.

Defendant argues that the orders of the bankruptcy court, affording plaintiff relief from the automatic stay, effected a termination of the lease between plaintiff and Adjusters prior to the scheduled termination date. We agree.

In addressing this issue, we note that we are not required to construe whether the granting of relief from the automatic stay imposed pursuant to 11 U.S.C. § 362 operates generally to terminate contract rights on an executory contract under federal bankruptcy law. We are concerned here only with the narrow question, arising under North Carolina insurance law, of whether the relief granted plaintiff by the bankruptcy court in the Ohio action effected a termination of the lease between plaintiff and Adjusters within the meaning of the exclusionary clause of the residual value policy issued by Integrity. We hold that it did.

The settled law of this State places the burden of showing an exclusion on the insurer. *Reliance Ins. Co. v. Morrison*, 59 N.C. App. 524, 297 S.E.2d 187 (1982) (and cases cited therein). Exclusions from coverage are not favored and should be strictly construed to effect coverage under the policy. *Id.; see also W & J Rives, Inc. v. Kemper Ins. Co.*, 92 N.C. App. 313, 374 S.E.2d 430 (1988),

disc. rev. denied, 324 N.C. 342, 378 S.E.2d 809 (1989) (*citing Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E.2d 775 (1984)).

The orders entered by the bankruptcy court make clear that Adjusters, pursuant to plaintiff's allegations of default, were required to return *all* of the vehicles that were the subject matter of its lease with plaintiff, which necessarily included the 300 cars enrolled under the residual value policy issued by Integrity. Moreover, plaintiff was required to dispose of all of these vehicles and apply the proceeds of such disposition to the indebtedness of Adjusters. Finally, the orders make equally clear that Adjusters retained no rights whatsoever in any of the vehicles.

The undeniable effect of the relief afforded to plaintiff in the bankruptcy court was thus to extinguish the lease between plaintiff and Adjusters with respect to the 300 cars that were enrolled under the residual value policy. This occurred in August 1986, well before the scheduled termination date of 10 January 1987. We cannot rewrite the order of the bankruptcy court under the guise of the rule of strict construction. *See Reliance Ins. Co., supra.* Consequently, by the express terms of the residual value policy issued by Integrity, plaintiff's claim pertaining to such vehicles is not covered. Because plaintiff's claim is not covered by the policy, defendant, as a matter of law, is not required under the Act to assume Integrity's obligation.

Summary judgment is appropriate only when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P., Rule 56. Summary judgment for the nonmovant may be entered where this standard is satisfied. *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979) (and cases cited therein). Because there is no genuine issue of material fact and defendant, rather than plaintiff, is entitled to summary judgment as a matter of law, the trial court erred in entering summary judgment for plaintiff on its first claim for relief. We therefore reverse the order of summary judgment for plaintiff on its first claim for relief and remand this case for entry of summary judgment on this claim for defendant.

Finally, plaintiff has attempted to bring forward two cross-assignments of error challenging the trial court's dismissal of its second claim for relief asserting a lien under former G.S. § 58-185

in assets of Integrity held by defendant pursuant to former G.S. § 58-155.60. Because this claim is predicated on the existence of defendant's liability as insurer of Integrity's obligations under G.S. § 58-155.48, our disposition of defendant's appeal has rendered plaintiff's cross-assignments of error moot, and we therefore do not consider them.

Reversed and remanded.

Judge PARKER concurs.

Judge DUNCAN concurs and files a separate concurring opinion.

Judge DUNCAN concurring.

I agree that the orders entered by the bankruptcy judge effected a termination of the lease agreement between Barclays and Adjusters. I write separately to underline the fact-specific ground for our holding today, and to emphasize that we have not said that a petition to lift an automatic stay constitutes, as a matter of law, an election by the lessor to terminate a lease agreement. Ordering that Adjusters return the automobile to Barclays left nothing executory between these two parties, and thus I agree that, in this case, the lifting of the stay brought the lease to an end.

JOE C. MEDLEY, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANT

No. 8910IC1136

(Filed 3 July 1990)

State § 8.3 (NCI3d)— medical care for inmates—doctor as independent contractor—doctor as agent of State—liability under Tort Claims Act

A doctor who contracted to provide medical services for prison inmates was an independent contractor and not an employee of the State within the meaning of the State Tort Claims Act. However, the doctor was an agent of the State for whose negligent treatment of inmates the State would be liable under the Tort Claims Act. Furthermore, the State

is constitutionally required to provide medical care for its inmates, and it cannot be relieved of this duty by contracting out medical care.

Am Jur 2d, Penal and Correctional Institutions § 201.

APPEAL by plaintiff from Decision and Order entered 25 August 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 May 1990.

North Carolina Prisoner Legal Services, Inc., by Richard E. Giroux and Norma Ware, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kim L. Cramer, for defendant-appellee.

ORR, Judge.

This action began as a claim brought by plaintiff, an inmate at Odom Correctional Center, against the Department of Correction (the Department) and several of its employees. Defendant alleged that the Department was liable for the negligence of its employees Dr. John H. Stanley, Dennis Lassiter, and Marsha W. Lilly, who proximately caused his injuries.

Plaintiff was placed in the custody of the Department on 14 June 1978, and at that time plaintiff was suffering from diabetes. Several years later, plaintiff developed an infection under a toenail. On 3 April 1984, he was seen by Dr. Stanley who diagnosed plaintiff as having an infection due to an ingrown toenail. When minor treatment failed to remedy the problem, plaintiff was admitted to Central Prison Hospital. Thereafter, on 16 April 1984, a limited amputation of the toe was performed. When plaintiff's condition failed to improve, an above-knee amputation was performed on his leg on 14 May 1984.

On 3 April 1987, plaintiff filed this claim with the Industrial Commission (the Commission). On 18 May 1987, defendant filed an answer which included motions to dismiss the claim as to Dr. Stanley pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2) and (6) on the grounds that he is an independent contractor and not an officer, employee, involuntary servant or agent of the State who would be covered by the Tort Claims Act.

After the Commission heard defendant's motions to dismiss Dr. Stanley, on 25 January 1989 Deputy Commissioner Winston L. Page, Jr., filed an order dismissing plaintiff's claim against Dr. Stanley pursuant to an order of summary judgment. The Full Commission affirmed and adopted the decision of the deputy commissioner on 25 August 1989. From that decision, plaintiff now appeals.

In his brief, plaintiff essentially argues that the Commission erred in determining that Dr. Stanley is not an employee or agent of the State whose wrongful conduct would subject the State to a cause of action under the North Carolina Tort Claims Act. Plaintiff first contends that Dr. Stanley is indeed an employee as that term is defined by the common law of this state. In the alternative, plaintiff argues that the Department has a non-delegable duty to provide adequate medical care to its inmates; therefore, the State cannot shield itself from liability due to negligence which results when the work is contracted out to other persons. Plaintiff also argues that Dr. Stanley is an actual or apparent agent of the State for whose negligence the State is liable.

The State argues, on the other hand, that the Commission's decision was correct because the evidence shows that Dr. Stanley is an independent contractor for whose conduct it is not responsible. Furthermore, the State argues that there is no justifiable basis for imposing liability under theories of apparent authority or non-delegable duty.

Because plaintiff is appealing the Commission's entry of a summary judgment order, instead of addressing the questions which we are usually limited to pursuant to N.C. Gen. Stat. § 143-293, we must determine whether the pleadings, interrogatory answers, affidavits or other materials contained a genuine question of material fact, and whether at least one party was entitled to a judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1983).

The relevant and unchallenged evidence contained in the record consists of answers to interrogatory questions posed to the Department by plaintiff, an affidavit given by the Director of Health and Services for the Department, and a copy of Dr. Stanley's contract for professional services with the Department. These materials tend to show that Dr. Stanley worked as a physician who provided medical care to prison inmates pursuant to a contract which he executed with the Department of Correction. Dr. Stanley worked 10 to 12 hours per week at Odom Correctional Center. He had

the responsibility for referring prisoners to other facilities as it became necessary. When such determinations were made, nurses employed by the Department would arrange for the transfer. The doctor exercised his own medical judgment in accordance with the standards of his profession, although his medical records along with all of the records at the prison units were reviewed once a year by a medical audit team. The final decisions on the renewal of his contract were made by the Secretary of the Department of Correction's Office.

Dr. Stanley and other medical services providers are under contracts which state that either party can terminate the contract upon 30 days notice. These providers do not receive any of the benefits provided to state employees nor are they covered by the Personnel Act. These providers are under the administrative authority of the unit superintendent; however, the superintendent has no authority over their medical judgment and clinical decisions. These medical services providers are subject to the regulatory control of the North Carolina Board of Medical Examiners, the North Carolina Medical Association and other regulatory boards. None of these providers are subject to directions or regulations from correctional personnel who provide medical services, nor do they perform any custodial or supervisory duties for the unit.

Dr. Stanley's contract specifically states that he was hired to "[a]dminister medical services to the inmate population . . . twice weekly and in emergency situations at any time as they apply in the realm of a general practitioner of medicine." His employment was intended to run for five years from the contract date unless either party exercised its right to terminate upon 30 days notice.

In the instant case, both plaintiff and defendant rely on certain factors applied by the Supreme Court in considering whether a person is an independent contractor or an employee. In *Hayes v. Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), the Court said you must consider whether the person employed:

> (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing work rather than another;

> (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Id. at 16, 29 S.E.2d at 140. All of these factors must be considered because no one factor is controlling. *Id.*

As previously noted, Dr. Stanley is engaged in the independent calling of medicine. He is allowed to, and indeed he is expected to, use his independent judgment and special skills in the execution of his work. He has contracted to treat as many inmates as show up during his office hours for a fixed monthly price. There are no terms in his contract which call for termination based upon his exercise of his independent judgment. He is not in the regular employ of the Department of Correction; rather, he has a private medical practice to which he devotes his time. According to the affidavit of the Director of Health Services, contractual nurses and contractual physicians' assistants are subject to orders from the unit physicians. However, contractual physicians are not under that same control. Dr. Stanley's contract only requires him to provide services two days per week and he was at liberty to choose the specific days on which he would provide those services.

Applying these facts to the test above indicates that the Commission was correct in concluding that Dr. Stanley is not an "employee" of the Department. He exercises his independent judgment in treating inmates at Odom Correctional Center. Therefore, the State is not answerable for any allegations of negligent treatment or rendering of services on this basis.

The next question which we must address is whether the Department is answerable for allegations of negligence made against Dr. Stanley based upon the alternative theory of agency.

The United States Supreme Court was confronted with the similar question of whether a physician employed by North Carolina to provide medical services to state prison inmates acted under color of state law for the purposes of the maintenance of a law suit under 42 USCS § 1983. There, the doctor was a private physician who provided orthopedic services to inmates pursuant to a contract for services. *West v. Atkins*, 101 L.Ed.2d 40, 46 (1988). The doctor was paid a fixed sum to provide these services on a weekly basis and he also maintained a separate private practice away from the correctional facility. *Id.* The Court again noted that

" '[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.' " *Id.* at 53 (quoting *Estelle v. Gamble*, 50 L.Ed.2d 251 (1976)). Because common law requires North Carolina to provide medical care to its prison inmates, even though the state employs physicians who exercise their professional judgment in order to fulfill this obligation, "[b]y virtue of this relationship, effected by state law," the Court concluded that the doctor was clothed with the authority of state law. *Id.* The Court then said that the doctor was " 'a person who may fairly be said to be a state actor.' " *Id.* (citation omitted).

There, just as here, the only medical care which plaintiff could have received would have been through the State. If Dr. Stanley acted negligently in rendering treatment to plaintiff, then the resultant injury was caused by the State's "exercise of its right to punish [Medley] by incarceration and [by denying] him a venue independent of the State to obtain needed medical care." *Id.* Likewise, the fact that this doctor was hired as a contractual employee without the same benefits or obligations applicable to other state employees does not alter the analysis applied in *West.*

Therefore, we conclude that the Commission erred in concluding that defendant was entitled to a judgment as a matter of law. Finding no factual dispute in this instance, we are compelled to rely on *West* and conclude that Dr. Stanley was an agent of the State for whose conduct the State may be answerable.

Furthermore, as *West* points out, the State is required under both the federal and state constitutions to provide adequate medical care to prisoners. If the State chooses to delegate this duty to another, it is still answerable for such conduct. *Id.* at 54.

Therefore, the State could be liable to Medley if Dr. Stanley's conduct was negligent since it hired him to perform its duty of providing medical care to Medley because "[c]ontracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights." *Id.*

Accordingly, this matter is reversed and remanded to the Industrial Commission for further proceedings consistent with the decision reached here today.

Reversed and remanded.

Judges GREENE and LEWIS concur.

GEORGE E. WATKINS, EMPLOYEE, PLAINTIFF v. CITY OF ASHEVILLE, EMPLOYER, SELF-INSURED, DEFENDANT

No. 8910IC1186

(Filed 3 July 1990)

Master and Servant § 69 (NCI3d)— workers' compensation— surgery's effect on disability—reasonableness of employee's refusal to have surgery—finding supported by evidence

Evidence was sufficient to support the finding by the Industrial Commission that a lumbar laminectomy recommended by plaintiff's orthopaedic physician had a high probability of significantly reducing the period of plaintiff's disability and would be sought by a similarly situated reasonable man. Therefore, the Commission properly ordered that plaintiff undergo such surgery or lose his right to compensation. N.C.G.S. § 97-25.

Am Jur 2d, Workmen's Compensation § 386.

APPEAL by plaintiff from Opinion and Award entered 8 May 1989 for the Full Industrial Commission by J. Randolph Ward, Commissioner. Heard in the Court of Appeals 4 May 1990.

On 14 April 1986, plaintiff sustained a back injury arising out of and in the course of his employment with defendant. Plaintiff incurred temporary total disability on 14 May 1986 and returned to work on 7 July 1986. Plaintiff became disabled again on 17 February 1987, and was entitled to workers' compensation of $179.20 per week from 17 February 1987 until the end of the temporary total disability period.

This matter was heard initially before Deputy Commissioner Morgan S. Chapman on 15 April 1988. By Opinion and Award filed 3 August 1988, Deputy Commissioner Chapman found that plaintiff had not reached maximum medical improvement and awarded plaintiff temporary total disability compensation "for so long

as [such] disability continues." The Hearing Commissioner also found that back surgery recommended by plaintiff's orthopaedic surgeon involved substantial risks and concluded that plaintiff's decision to avoid such surgery was reasonable.

Defendant appealed to the Full Commission. The Full Commission entered an Opinion and Award on 8 May 1989, which struck the finding of fact that plaintiff's refusal to have surgery was reasonable and concluded as a matter of law that plaintiff undergo surgery or forego compensation.

From the Opinion and Award of 8 May 1989, plaintiff appeals.

DeVere C. Lentz, Jr., P.A., by Shirley H. Brown, for plaintiff-appellant.

Nesbitt & Slawter, by William F. Slawter; and Russell & King, P.A., by J. William Russell and Kathy A. Gleason, for defendant-appellee.

ORR, Judge.

Plaintiff first argues that the Full Commission erred in finding as fact "[t]hat the surgery recommended by plaintiff's physician has a high probability of significantly reducing the period of plaintiff's disability and would be sought by a similarly situated reasonable man." For the reasons set forth below, we find no error.

In reviewing an opinion and award of the Industrial Commission, this Court is limited in its inquiry to two questions of law: "(1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether . . . the findings of fact of the Commission justify its legal conclusions and decisions." *Dolbow v. Holland Industrial*, 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983), *disc. review denied*, 310 N.C. 308, 312 S.E.2d 651 (1984) (citation omitted). Because the Commission is the sole judge of the credibility of the witnesses and the weight given to their testimony, the Commission may assign more credibility and weight to certain testimony than other testimony. Furthermore, the determination of the Commission is conclusive upon appeal even though the evidence is capable of supporting two contrary findings. *Id.* at 697, 308 S.E.2d at 336 (citations omitted).

The Commission's "findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support

them." *Mayo v. City of Washington*, 51 N.C. App. 402, 406, 276 S.E.2d 747, 750 (1981), *citing, Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E.2d 389, 390-91 (1980). "[I]f the totality of the evidence, viewed in the light most favorable to the complainant, tends directly or by reasonable inference to support the Commission's findings, these findings are conclusive on appeal even though there may be plenary evidence to support findings to the contrary." *Id.* at 406-07, 276 S.E.2d at 750 (citations omitted).

With these basic principles in mind, we now turn to whether there is competent evidence in the case before us to support the Commission's finding "[t]hat the surgery recommended by plaintiff's physician has a high probability of significantly reducing the period of plaintiff's disability and would be sought by a similarly situated reasonable man."

The controversy over this finding of fact arises under N.C. Gen. Stat. § 97-25 (1985), which states in part,

> The refusal of the employee to accept any medical, hospital, surgical or other treatment or rehabilitative procedure when ordered by the Industrial Commission shall bar said employee from further compensation until such refusal ceases and no compensation shall at any time be paid for the period of suspension unless in the opinion of the Industrial Commission the circumstances justified the refusal, in which case, the Industrial Commission may order a change in the medical or hospital service.

This portion of § 97-25 was construed in *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 229 S.E.2d 325 (1976), *disc. review denied*, 292 N.C. 467, 234 S.E.2d 2 (1977). The *Crawley* Court stated that:

> The general rule is that where the surgery is of serious magnitude and risk, involves much pain and suffering and is of uncertain benefit, the refusal of the claimant to undergo surgery is reasonable and will not prejudice his claim.

Id. at 290, 229 S.E.2d at 329 (citations omitted).

David O. Jarrett, M.D., orthopaedic surgeon, qualified as an expert witness, and testified before the Commission that he provided a course of treatment for plaintiff as a result of plaintiff's back injury. This course of treatment began on 16 May 1986 and included

hospital treatment in May 1986 and eight days of hospital treatment and diagnosis in February 1987. Dr. Jarrett's testimony addressed both the probability that surgery would significantly reduce plaintiff's disability and plaintiff's refusal of such surgery.

Dr. Jarrett testified that he recommended that plaintiff undergo back surgery (lumbar laminectomy with removal of the disc) in order to alleviate plaintiff's condition and possibly return to work. Dr. Jarrett further testified that it was his opinion in July 1987 that plaintiff's condition would be improved with surgery and that his disability would be reduced from a 100% disability without surgery to a 10% to 15% disability with the surgery.

According to Dr. Jarrett, the longer plaintiff waited to have surgery, the "poorer the results." Dr. Jarrett explained this statement, "[i]n my own experience, the patients that have surgery that actually had a disc fragment out as this man has had, do well and are able to continue on life in a normal manner." Dr. Jarrett also testified that "[b]etter than 90% of the patients that have a laminectomy within a year are almost back to normal." While Dr. Jarrett could not testify that plaintiff would *definitely* improve with surgery, his testimony supported the Commission's finding that the recommended surgery "had a high probability of significantly reducing the period of plaintiff's disability . . . ."

We will now address that portion of the Commission's finding that the recommended surgery "would be sought by a similarly situated reasonable man." Under § 97-25, reasonableness is determined by whether the surgery is of serious magnitude and risk, involves much pain and suffering and is of uncertain benefit. 31 N.C. App. at 290, 229 S.E.2d at 329-30.

Regarding whether the surgery is of serious magnitude and risk, Dr. Jarrett explained that although he considered this surgery "of serious magnitude and risk," lumbar laminectomies are "fairly common," that the risks "are unusual but they can occur" and that there are "similar risks associated with most any surgical procedure that a person would undergo." He further testified that he has performed hundreds of laminectomies and that plaintiff is not "at a higher risk as a surgical candidate than [any other] patient."

Dr. Jarrett further testified concerning the pain and suffering associated with the surgery. He stated that the "surgery involves considerable pain but the pain is short-lived [a week or so]."

Dr. Jarrett did not testify to the "certain benefit" of the surgery to plaintiff. He testified, however, to the probabilities of plaintiff's condition improving after surgery as discussed above. He also stated that for "some patients" this surgery has an "uncertain outcome." Dr. Jarrett testified that he last examined plaintiff in February 1989 and recommended surgery at that time to improve plaintiff's condition.

Richard Weiss, M.D., neurosurgeon, examined plaintiff on referral by defendant, and was deposed concerning his medical findings and conclusion on 25 May 1988. Dr. Weiss generally concurred with Dr. Jarrett's findings and recommendations, except that he believed the risk of the surgery is "minimal."

There is ample evidence to support plaintiff's arguments and his valid concerns about this surgical procedure. However, there is sufficient evidence under the previously stated principles of law to support the Commission's determination that the surgery is not of serious magnitude and risk, does not involve much pain and suffering and is not of uncertain benefit to plaintiff.

Therefore, we are compelled to affirm the Commission's decision "[t]hat the surgery recommended by plaintiff's physician has a high probability of significantly reducing the period of plaintiff's disability and would be sought by a similarly situated reasonable man." Based upon the Legislature's intent to authorize the Commission upon proper findings to require plaintiff to undergo that surgery or lose his right to compensation, we must affirm no matter how seemingly valid plaintiff's reasons are for refusing to submit to surgery.

We have considered plaintiff's remaining assignment of error that the Commission erred in concluding as a matter of law that defendant was entitled to an order that plaintiff undergo a lumbar laminectomy or forego compensation on the grounds that defendant's request for such an order was not timely. We find this assignment to be without merit.

For the reasons set forth above, we find that the Commission did not err in its finding of fact or conclusion of law.

Affirmed.

Judges GREENE and LEWIS concur.

OSCAR M. COOK v. NORVELL-MACKORELL REAL ESTATE COMPANY AND AETNA LIFE AND CASUALTY COMPANY

No. 8910IC1281

(Filed 3 July 1990)

1. **Master and Servant § 96.3 (NCI3d)— workers' compensation— jurisdictional question—independent appellate review of jurisdictional facts**

Jurisdictional facts found by the Industrial Commission were not binding on the Court of Appeals in an action raising the jurisdictional question of whether an employment relationship within the Act existed between plaintiff and defendant Norvell-Mackorell at the time of the accident.

Am Jur 2d, Workmen's Compensation §§ 128, 153, 167-175.

2. **Master and Servant § 50 (NCI3d)— workers' compensation— statutory employer—independent contractor**

N.C.G.S. § 97-19, the statutory employer statute, may apply as between two independent contractors, but does not apply between a principal and an independent contractor. An independent contractor is one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work.

Am Jur 2d, Workmen's Compensation §§ 128, 153, 167-175.

3. **Master and Servant § 50.1 (NCI3d)— workers' compensation— subject matter jurisdiction—defendant not statutory employer**

The Industrial Commission properly concluded that it did not have subject matter jurisdiction over plaintiff's claim against defendant Norvell-Mackorell where Norvell-Mackorell operated a rental management business, in the course of which it managed Briarcreek apartments, where plaintiff's injuries occurred during a roofing project; Norvell-Mackorell's usual practice when major repairs at Briarcreek were necessary was to procure price quotes from several contractors and submit such quotes to the owners for their authorization, subsequently engaging the contractor authorized by the owners; the management agreement with the owners of Briarcreek contained no provision requiring Norvell-Mackorell to perform major repairs or

renovations for the apartment complex; Norvell-Mackorell engaged Rainbow Roofing pursuant to the owners' authorization; Norvell-Mackorell neither required from Rainbow Roofing nor obtained from the Industrial Commission a certificate that Rainbow Roofing had complied with N.C.G.S. § 97-19; Norvell-Mackorell paid Rainbow Roofing out of its general rental management account, which expense was reimbursed by the owners of Briarcreek; Norvell-Mackorell received no additional compensation for the roofing project; Norvell-Mackorell was neither contractually obligated to replace the shingles on the roofs at the apartment buildings nor permitted to exercise its independent judgment in engaging Rainbow Roofing; and Norvell-Mackorell was accordingly not an independent contractor, but merely an agent for the owners, and was not plaintiff's statutory employer.

Am Jur 2d, Workmen's Compensation §§ 128, 153, 167-175.

APPEAL by plaintiff from opinion and award entered 24 July 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 June 1990.

Plaintiff instituted this action in the Industrial Commission pursuant to the provisions of the North Carolina Workers' Compensation Act, seeking compensation for injuries sustained during employment. At the 16 November 1988 proceedings before the deputy commissioner, the evidence tended to establish that on 19 December 1987 plaintiff was injured while employed as a roofer by defendant Kenneth Owens, d/b/a Rainbow Roofing Company ("Rainbow Roofing," not a party to this appeal), an unincorporated business that carried no workers' compensation insurance as required by G.S. § 97-93. On this date, Rainbow Roofing was undertaking a roofing repair project at Briarcreek Apartments ("Briarcreek") in Valdese, North Carolina that involved replacing the shingles on all five apartment buildings in the Briarcreek complex. Rainbow Roofing had been engaged to perform this work by defendant-appellee Norvell-Mackorell Real Estate Company ("Norvell-Mackorell"). Norvell-Mackorell was under contract with the owners of Briarcreek to perform certain real estate management services, including leasing and maintaining Briarcreek, as well as collecting rent. At the time Rainbow Roofing was engaged to undertake the roofing project at Briarcreek, Norvell-Mackorell neither required from Rainbow Roofing nor obtained from the Industrial Commission

a certificate stating that Rainbow Roofing had complied with G.S. § 97-93.

By opinion and award filed 2 December 1988, the deputy commissioner awarded plaintiff compensation as against defendant Owens, but dismissed plaintiff's claim against defendants Norvell-Mackorell and its insurance carrier, Aetna Life and Casualty Company, for lack of subject matter jurisdiction. This dismissal was based on the deputy commissioner's finding and concluding that Norvell-Mackorell was an agent for the owners of Briarcreek, rather than a principal, intermediate, or subcontractor, and therefore was not subject to G.S. § 97-19, the "statutory employer" provision.

Plaintiff duly appealed to the full Commission from that portion of the deputy commissioner's opinion and award dismissing his claim against Norvell-Mackorell. By opinion and award entered 24 July 1989, the full Commission affirmed and adopted as its own the opinion and award of the deputy commissioner. Plaintiff appeals.

Simpson, Aycock, Beyer & Simpson, P.A., by Louis E. Vinay, Jr., for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson and Howard M. Widis, for defendant-appellees.

WELLS, Judge.

[1] Plaintiff brings forward a single argument challenging the Commission's finding and concluding that defendant Norvell-Mackorell was acting as agent for the owners of the property in procuring roofing services from plaintiff's employer, Rainbow Roofing, and therefore was not plaintiff's statutory employer within the meaning of G.S. § 97-19 of the North Carolina Workers' Compensation Act. Because this raises the jurisdictional question of whether an employment relationship within the Act existed between plaintiff and Norvell-Mackorell at the time of the accident, the jurisdictional facts found by the Commission, though supported by competent evidence, are not binding on this Court. *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433 (1988) (and cases cited therein). Instead, we are required to review the evidence of record and make independent findings of jurisdictional facts established by the greater weight of the evidence with regard to plaintiff's employment status. *Id.*

[2] G.S. § 97-19 provides in pertinent part:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate . . . stating that such subcontractor has complied with G.S. 97-93 [requiring that employers carry workers' compensation insurance] . . . shall be liable . . . to the same extent as such subcontractor would be if he were subject to the provisions of this Article for payment of compensation and other benefits . . . on account of injury or death of . . . any employee of such subcontractor due to an accident arising out of and in the course of the performance of work covered by such subcontract.

(We note that the amendments to G.S. § 97-19, effective 13 July 1989, are neither applicable to the present case nor germane to the rationale upon which our holding is based.)

This is the so-called "statutory employer" or "contractor under" statute. It is an exception to the general definitions of "employment" and "employee" set forth at G.S. § 97-2 and was enacted by the Legislature to deliberately bring specific categories of conceded nonemployees within the coverage of the Act for the purpose of protecting such workers from "financially irresponsible subcontractors who do not carry workmen's compensation insurance, and to prevent principal contractors, intermediate contractors, and sub-contractors from relieving themselves of liability under the Act by doing through sub-contractors what they would otherwise do through the agency of direct employees." *Withers v. Black*, 230 N.C. 428, 53 S.E.2d 668 (1949); *Green v. Spivey*, 236 N.C. 435, 73 S.E.2d 488 (1952); *see also* Larson *The Law of Workmen's Compensation*, vol. 1C § 49.00 *et seq.* G.S. § 97-19, by its own terms, cannot apply unless there is first a contract for the performance of work which is then sublet. Consequently, G.S. § 97-19 may apply as between two independent contractors, one of whom is a subcontractor to the other; but it does not apply as between a principal, *i.e.*, an owner, and an independent contractor. *See Beach v. McLean*, 219 N.C. 521, 14 S.E.2d 554 (1941).

Plaintiff contends that, although Norvell-Mackorell may have been an agent of the owners of Briarcreek for purposes of leasing apartments and collecting rent, it was nevertheless a principal contractor with respect to the roofing work performed by Rainbow

Roofing and thus falls within G.S. § 97-19. Alternatively, plaintiff contends that the owners of the apartment complex were in a dual status, being both owners of the property and principal contractors with respect to the maintenance thereof. Consequently, Norvell-Mackorell, by virtue of its contract of maintenance with the owners, occupied a position of an intermediate contractor (*i.e.*, a first-tier subcontractor) with respect to the roofing work performed by Rainbow Roofing, plaintiff's employer. We reject both arguments.

It is clear that both of plaintiff's contentions rest upon the single premise that Norvell-Mackorell was not an agent for the owners of Briarcreek, merely obligated under the management agreement to procure on behalf of the owners a suitable party to replace the shingles on the roofs of the buildings within that apartment complex, but rather an independent contractor with the owners of Briarcreek, contractually obligated to itself perform this work, which obligation Norvell-Mackorell sublet to Rainbow Roofing. It has long been the rule in this State that an independent contractor is one "who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Youngblood, supra* (and cases cited therein).

[3] Having carefully reviewed the evidence of record, we find the following jurisdictional facts to be established by the greater weight of the evidence: that on the date of the accident, Norvell-Mackorell operated a rental management business, in the course of which it managed Briarcreek apartments where the roofing project was being performed and plaintiff received his injuries; that when major repairs at Briarcreek were necessary, Norvell-Mackorell's usual practice under its management agreement with the owners of Briarcreek was to procure price quotes from several contractors and submit such quotes to the owners for their authorization, subsequently engaging the contractor authorized by the owners to perform the work; that the management agreement with the owners of Briarcreek contained no provision requiring Norvell-Mackorell to perform major repairs or renovations to the apartment complex as part of its duties; that pursuant to the owners' authorization, Norvell-Mackorell engaged Rainbow Roofing to perform the roofing project at Briarcreek; that Norvell-Mackorell neither required from Rainbow Roofing nor obtained from the Industrial Commission a certificate that Rainbow Roofing had complied with G.S. § 97-19;

that Norvell-Mackorell paid Rainbow Roofing out of its general rental management account, which expense was reimbursed by the owners of Briarcreek; and that Norvell-Mackorell received no additional compensation for the roofing project beyond that ordinarily received by it for the performance of its management duties.

We therefore conclude that Norvell-Mackorell was neither contractually obligated to replace the shingles on the roofs of the apartment buildings at Briarcreek nor permitted to exercise its independent judgment in engaging Rainbow Roofing to perform this work. Norvell-Mackorell accordingly was not an independent contractor with the owners of Briarcreek within the standards set forth in *Youngblood, supra*, with respect to the work performed to repair the roofs, but merely an agent for the owners, and thus had no contract to replace the roofing shingles which it could sublet to Rainbow Roofing. For these reasons, Norvell-Mackorell cannot be plaintiff's statutory employer within the meaning of G.S. § 97-19, notwithstanding its failure to ascertain Rainbow Roofing's compliance with the provisions of G.S. § 97-93. Hence, the Industrial Commission properly concluded that it did not have subject matter jurisdiction over plaintiff's claim against Norvell-Mackorell and correctly dismissed this claim.

For the reasons stated, the opinion and award of the Commission dismissing plaintiff's claim against Norvell-Mackorell must be and is

Affirmed.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. THOMAS ANDREW ESTES

No. 8930SC1260

(Filed 3 July 1990)

1. Rape and Allied Offenses § 5 (NCI3d)— first degree sexual offense—sufficiency of evidence of penetration

Evidence of penetration of the anal opening was sufficient to be submitted to the jury in a prosecution for first degree

sexual offense where the 11 year old prosecuting witness testified that defendant "stuck his thing" in her "back" when she was seven years old, and the victim went on to explain that she meant "where I go number two."

Am Jur 2d, Rape §§ 3, 101.

2. **Rape and Allied Offenses § 6.1 (NCI3d)— failure to instruct on lesser offense—no error**

The trial court did not err in failing to instruct the jury on the lesser included offense of attempted first degree sexual offense where defendant did not object to failure to include the instruction, and defense counsel concurred in the trial court's decision not to give such a charge.

Am Jur 2d, Rape § 110.

3. **Criminal Law § 305 (NCI4th)— consolidation of multiple sex offenses—no error**

Defendant was not prejudiced by the joinder of sex offenses occurring in 1985 and 1987 where all charges involved the same defendant acting against the same child over a two year period; the alleged activities all occurred at the same place, the child's grandmother's home; and the same witnesses were called to testify.

Am Jur 2d, Indictments and Informations §§ 221, 223.

APPEAL by defendant from a judgment entered 24 April 1989 by *Judge J. Marlene Hyatt* in Superior Court, SWAIN County. Heard in the Court of Appeals 7 June 1990.

On 13 June 1988, defendant was charged by indictment with first degree sexual offense, taking indecent liberties with a child, crimes against nature, first degree sexual offense and two counts of first degree statutory rape. On 15 August 1988, superseding indictments charged defendant with the same offenses. The cases were joined and defendant was tried at the 27 February 1989 session of Swain County Superior Court. The jury found the defendant guilty of first degree sexual offense and taking indecent liberties with a child. He was found not guilty of the other offenses.

From a judgment sentencing him to life imprisonment, the defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elizabeth G. McCrodden and Associate Attorney General Alexander M. Peters, for the State.

Whalen, Hay, Pitts, Hugenschmidt, Master, Devereux & Belser, P.A., by David G. Belser, for defendant-appellant.

LEWIS, Judge.

[1] Defendant first assigns as error the trial court's failure to dismiss the charge of first degree sexual offense as defined by G.S. 14-27.4. Pursuant to G.S. 14-27.1, the term "sexual act" is defined in pertinent part as follows:

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body. . . .

Defendant argues that there was insufficient evidence of penetration and therefore the charge should have been dismissed. The defendant was accused of having anal intercourse and other sexual acts with a seven year old girl on numerous occasions in 1985 and again on several occasions in 1987. The prosecuting witness testified as follows regarding the 1985 incidents:

> Q: When you were alone that time what, if anything, did Tommy do?
>
> A: In the room?
>
> Q: Um-huh?
>
> A: He just told me to pull my pants and panties down.
>
> Q: Did you?
>
> A: Um-huh.
>
> Q: What happened after you did that?
>
> A: He stuck his thing in me.
>
> Q: When he was in you—what part of him did he stick in you?
>
> A: Back and front.
>
> Q: Both?
>
> A: Yes.

Later, when the child was testifying about the 1987 incidents, she stated:

Q: Where was he when he told you to pull your pants down?

A: He was standing up.

Q: What did he do after you pulled them down?

A: He stuck his thing in me.

. . .

Q: What do you mean by his thing?

A: The thing he pees with.

. . .

Q: What part of you did he put it?

A: The back.

. . .

Q: By the back what do you mean?

A: Where I go number two.

Q: Did he go inside you?

. . .

A: Yes.

. . .

Q: After he put it in you what did he do?

A: Moved back and forth.

. . .

Q: And then after he did that what did he do?

A: He took it out and put it where I do number one.

Defendant argues that the State's testimony that the defendant "stuck his thing" in the "back and front" of the child is insufficient evidence of penetration of the anal opening to uphold his conviction for first degree sexual offense for the 1985 incidents. There was no physical evidence and the child did not demonstrate on anatomically correct dolls what happened to her.

In *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), the Supreme Court found that the charge of first degree sexual offense should not have been submitted to a jury where the victim testified that the defendant "put his penis in the back of me." However, in the present case, the victim did testify that the defendant put his penis in the "back" and went on to explain that she meant "where I go number two." The child's testimony, taken as a totality, is sufficient evidence that the defendant penetrated the anal opening in 1985. *See State v. Fletcher*, 322 N.C. 415, 423, 368 S.E.2d 633, 637 (1988) (Supreme Court held that a child's testimony that defendant "stuck his ding dong up her po po" was substantial evidence from which the jury could find that defendant had vaginal intercourse with the child victim, where the child defined "ding dong" as a penis and "po po" as a vagina).

Viewed in the light most favorable to the State, the defendant's motion to dismiss was properly denied.

[2] Defendant next asserts that the trial court erred in failing to instruct the jury on the lesser included offense of attempted first degree sexual offense. However, defense counsel failed to object to the failure to include the instruction. N.C.R.App. P. 10(b)(2). Therefore, our review is under the "plain error" rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). In the present case, the defense counsel not only failed to request or object to the omission of the instruction, but actually concurred in the trial court's decision:

> [defense attorney] I don't believe that the charge—I don't believe defendant—I'm trying to recall my recollection of some testimony. I don't believe the defendant said—they asked about did he touch up against her. He said no, only perhaps in process of turning around. I don't think that would constitute an "attempt" such that that would go on the attempt. My recollection of the evidence is such.
>
> THE COURT: I would not give a charge on "attempt."

The trial court did not commit plain error in failing to instruct the jury on this lesser included offense.

[3] Finally, the defendant argues that the trial court erred in joining all of the defendant's charges. G.S. 15A-926(a) allows for the joinder of two or more offenses for trial "when the offenses, whether felonies or misdemeanors or both, are based on the same

act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan."

Whether to consolidate offenses for trial is within the sound discretion of the judge and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Brown*, 300 N.C. 41, 46, 265 S.E.2d 191, 195 (1980). In the present case, defendant was charged with six offenses occurring in 1985 and in 1987. (Evidence showed that the child moved away from the defendant in 1986, but was allegedly involved in sexual acts with the defendant when she returned to visit in the area in 1987.) The six charges all involved the same defendant acting against the same child over a two year period. The alleged activities all occurred at the same place, the child's grandmother's home. The same witnesses were called to testify.

We hold that the defendant was not prejudiced by the joinder of these offenses, and that the State showed sufficient evidence of a single scheme or plan to permit joinder.

The defendant received a fair trial, free of prejudicial error.

No error.

Judges WELLS and EAGLES concur.

WESLEY D. SNOW v. GWYN YATES AND WIFE, ANITA YATES

No. 8921SC958

(Filed 3 July 1990)

1. **Appeal and Error § 126 (NCI4th)— motion for change of venue—immediately appealable**

The grant of defendants' motion for a change of venue was immediately appealable because the grant or denial of the motion asserting a statutory right to venue affects a substantial right.

Am Jur 2d, Appeal and Error § 89.

2. Venue § 5.1 (NCI3d)— action involving existence of lease— local venue proper

The trial court properly granted defendants' motion for a change of venue where plaintiff brought an action in Forsyth County for declaratory relief regarding the existence of a lease; plaintiff resides in Forsyth County and defendants reside in Ashe County; the lease was executed in Ashe County; the leased property is located in Ashe County; and the court moved the action to Ashe County. Local venue is proper for this action because the principal object of plaintiff's cause of action is a determination of leasehold estate or interest in real property; it is irrelevant that the thrust of plaintiff's action is to have the court declare the nonexistence of his leasehold interest rather than its existence. N.C.G.S. § 1-76.

Am Jur 2d, Venue § 14.

APPEAL by plaintiff from order entered 2 June 1989 by *Judge James A. Beaty, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 13 March 1990.

Littlejohn & Dummit, by Karin Bruce Littlejohn, for plaintiff-appellant.

Kilby & Hodges, by Sherrie R. Hodges, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals the trial court's grant of defendants' motion for change of venue.

Plaintiff brought an action in Forsyth County for declaratory relief regarding existence of a lease in which plaintiff is lessee and defendants are lessors. Plaintiff resides in Forsyth County and defendants reside in Ashe County. The lease was executed in Ashe County. The leased property is located in Ashe County. Plaintiff alleged:

> plaintiff met with the defendants and terminated the lease by notice of thirty days or more. . . . the *defendants are claiming that the lease is in full force and effect* and the defendants have not relet the premises, continuing to demand rent from the plaintiff. . . . An actual . . . controversy exists between the plaintiff and the defendants as to their legal rela-

> tions in respect to the contract of lease and the rights of the parties can be determined only by a declaratory judgment. [Plaintiff prayed the court for the following relief:] [*d*]*e*[*c*]*laring the rights of the plaintiff and the defendants under the contract of lease* . . . [d]eclaring that the *defendants are not entitled to recover from plaintiff any amounts alleged to be due under the lease from the date of termination* . . .

Emphases added.

Defendants filed a pre-answer motion to remove the action to Ashe County, pursuant to N.C.G.S. § 1A-1, Rule 12(b). The trial court granted defendants' motion.

The issues are (I) whether the interlocutory appeal of grant of defendants' motion for change of venue was permissible; (II) whether potential judgment on plaintiff's complaint directly affects an interest or estate in real property, so that venue is where the property is located; and (III) whether the clerk had authority to transfer the case pending appeal of the court's grant of the motion for proper venue.

I

[1] As a threshold matter, the parties do not address whether the trial court's grant of defendants' motion is immediately appealable. We determine that it is.

A right to venue established by statute is a substantial right. *Gardner v. Gardner*, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). When a defendant asserts improper venue in a timely writing, the question of removal is a matter of substantial right, and the court of original venue must consider and determine the motion before it takes any other action. *Little v. Little*, 12 N.C. App. 353, 355, 183 S.E.2d 278, 279 (1971). An appeal of an order disposing of such a motion is interlocutory because it "does not dispose of the case." *DesMarais v. Dimmette*, 70 N.C. App. 134, 135, 318 S.E.2d 887, 888 (1984). However, grant or denial of a motion asserting a statutory right to venue affects a substantial right and is immediately appealable. *Gardner*, at 719, 268 S.E.2d at 471. Immediate appeal prevents "injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment." *DesMarais*, at 136, 318 S.E.2d at 889.

II

[2] Plaintiff contends that N.C.G.S. § 1-76 is inapplicable because the judgment to which he is entitled based on his complaint allegations operates *in personam* and therefore does not directly affect title to the land. We disagree.

In case law parlance, when N.C.G.S. § 1-76 controls an action's venue, the venue is considered "local" because the action must be tried in the county which is the situs of land whose title is affected by the action. *Thompson v. Horrell*, 272 N.C. 503, 504-505, 158 S.E.2d 633, 634 (1968). Conversely, an action is "transitory" when it does not directly affect title to land and it must be tried in the county in which at least one of the parties resides when plaintiff commences suit. *Id.*, at 505, 158 S.E.2d at 635.

An action whose subject is "[r]ecovery of real property, or of an estate or interest therein, or for the *determination in any form of such right or interest . . .*" must "be tried in the county in which the subject of the action, or some part thereof, is situated." N.C.G.S. § 1-76(1) (Cum. Supp. 1989) (emphasis added); *Pierce v. Associated Rest and Nursing Care, Inc.*, 90 N.C. App. 210, 212, 368 S.E.2d 41, 42 (1988) (citation omitted) (N.C.G.S. § 1-76 controls venue for an action whose judgment would affect title to land).

"If the county designated . . . is not the proper one" defendant may demand in writing removal to the proper county before his time for answering expires. N.C.G.S. § 1-83 (Cum. Supp. 1989).

"In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint." *Pierce*, at 212, 368 S.E.2d at 42. To render an action local:

> [t]itle to property must be directly affected by the judgment. . . . It is the principal object involved in the action which determines the question, and if the judgment or decree operates directly and primarily on the estate or title, and *not alone in personam against the parties*, the action will be held local.

Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 206, 154 S.E.2d 320, 323 (1967) (citation omitted) (emphasis added).

A lease vests its lessors with " 'an estate or interest' in real property." *Sample v. Towne Motor Co., Inc.*, 23 N.C. App. 742, 743, 209 S.E.2d 524, 525 (1974). When a party brings an action

that "seeks to terminate [a vested estate or interest in real property] and will require the Court to determine the respective rights of the parties with respect to the leasehold interest," the action falls within the purview of N.C.G.S. § 1-76. *Id.* A suit to terminate a lease is subject to the local venue requirement regardless of whether the complainants are lessors or lessees. *Gurganus v. Hedgepeth*, 46 N.C. App. 831, 832, 265 S.E.2d 922, 923 (1980). When "[t]he thrust of plaintiff[-lessee]s' action is to have the court declare that they still hold a leasehold interest in the property . . . such an action falls within [N.C.]G.S. 1-76." *Id.*

We determine that local venue is proper for this action, for two reasons. First, the 'principal object' of plaintiff's cause of action is a determination of leasehold estate or interest in real property. According to plaintiff's allegations, the parties dispute the existence of the lease, and plaintiff would be entitled to the court's judgment declaring termination of defendants' lessor interest. It is irrelevant that the thrust of plaintiff's action is to have the court declare the nonexistence of his leasehold interest, rather than its existence. Our focus is on the effect of the potential judgment on the estate or interest and not on the manner in which the parties achieve the effect. The court's judgment adjudicating the existence or nonexistence of the lease will directly and primarily affect defendant-lessors' vested interest in the leasehold. Dispute over the existence of a lease substantively differs from a case in which the parties request the court to sort out their obligations either pursuant to a continuing lease or after they terminate the lease. *See Rose's Stores*, at 206, 154 S.E.2d at 324 (plaintiff's suit for specific performance, asking the court to construe the terms of a lease agreement, is a transitory action). In such a case, title is not in question.

Second, it is irrelevant that judgment will operate *in personam* if judgment also directly affects title to the property. According to the criteria in our Supreme Court's *Rose's Stores* decision, an action will be transitory only if judgment operates "alone" *in personam* against the parties and not directly on an estate or title. Therefore, we determine that the court was correct in ordering removal to local venue.

III

Our determination that the trial court correctly granted defendants' motion to remove for proper venue renders unnecessary our review of plaintiff's argument that plaintiff's appeal stayed

the superior court clerk's transfer of the case to Ashe County pursuant to the trial court's order for removal. *See* N.C.G.S. § 1-87 (Cum. Supp. 1989).

Affirmed.

Judges WELLS and EAGLES concur.

THE HOME INDEMNITY COMPANY, THE HOME INSURANCE COMPANY AND CITY INSURANCE COMPANY, PLAINTIFFS v. HOECHST-CELANESE CORPORATION, ET AL., DEFENDANTS

No. 8927SC1296

(Filed 3 July 1990)

1. **Abatement, Survival, and Revival of Actions § 3 (NCI4th)—pending action in New Jersey—stay in N. C.—standard of review**

Entry of an order under N.C.G.S. § 1-75.12 is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion.

Am Jur 2d, Abatement, Survival, and Revival § 18.

2. **Abatement, Survival, and Revival of Actions § 3 (NCI4th)—pending action in New Jersey—stay in N. C.—no abuse of discretion**

There was no abuse of discretion in granting a stay of a North Carolina action where the trial court found that there was a prior pending action in the federal courts of New Jersey by Hoechst-Celanese Corporation seeking a declaration that Home Indemnity is required to provide coverage to Hoechst-Celanese under the same policies at issue in the North Carolina action; none of the parties to the action were North Carolina corporations or have principal places of business in North Carolina; four of the sixty-one environmental sites from which the action arises are located in North Carolina and fifteen sites are located in New Jersey; resolution of these claims will involve the application of law other than the law of North Carolina and trying the case here while the action in New

Jersey is proceeding will place an unnecessary burden on the Superior Court of Cleveland County; and Hoechst-Celanese consented to trial of the action in federal court in New Jersey and our trial court found that this was a fair, convenient and reasonable forum.

Am Jur 2d, Abatement, Survival, and Revival § 18.

3. Abatement, Survival, and Revival of Actions § 3 (NCI4th)— pending action in New Jersey—stay in N. C.—no abuse of discretion

The trial court did not err in an action in which Home Indemnity sought a declaration that it was not required to provide insurance coverage for environmental claims by staying claims concerning excess carriers where Hoechst-Celanese Corporation has filed suit in New Jersey, acquiesced in its removal to federal court, and consented to suit by all parties, including the excess carriers, in New Jersey.

Am Jur 2d, Abatement, Survival, and Revival § 18.

4. Courts § 1 (NCI3d)— stay pending action in another state—no violation of open court provision

N.C.G.S. § 1-75.12, under which the North Carolina trial court stayed action pending an action in federal court in New Jersey, does not violate the North Carolina Constitution's open court provision. The state statute does not deny litigants access to North Carolina courts, but merely postpones litigation pending the resolution of the same matter in another sovereign court. North Carolina Constitution Art. I, § 18.

Am Jur 2d, Abatement, Survival, and Revival § 18.

Judge WELLS concurring.

APPEAL by plaintiffs from an order entered 28 August 1989 by *Judge Charles C. Lamm, Jr.* in Superior Court, CLEVELAND County. Heard in the Court of Appeals 5 June 1990.

Womble Carlyle Sandridge & Rice, by Richard T. Rice, Reid C. Adams, Jr., and Thomas L. Nesbit, for The Home Indemnity Co., The Home Insurance Co. and City Insurance Co.; Rivkin, Radler, Dunne & Bayh, by Richard S. Feldman, and Bell, Davis & Pitt, P.A., by Richard V. Bennett, for Commercial Union Insurance Co.; Underwood, Kinsey & Warren, by C. Ralph Kinsey, Jr., for Aetna

Casualty & Surety Co.; Petree Stockton & Robinson, by J. Anthony Penry; Sheft & Sweeney, by Sheldon Karasik and Howard Fishman, for AIU, American Home Assurance, Birmingham Fire Insurance Co., Highlands Insurance Co., Insurance Company of the State of Pennsylvania, Lexington Insurance Company, National Fire Insurance Company of Pittsburgh, Pa. and Fremont Indemnity Co.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins III, Max E. Justice and Josephine H. Hicks, for appellee Hoechst-Celanese Corporation.

LEWIS, Judge.

The issue before this Court is whether the trial court erred when it stayed litigation initiated in Cleveland County Superior Court pending final disposition of another similar action currently being litigated in the New Jersey federal courts.

On 14 February 1989, Hoechst-Celanese Corporation ("HCC") brought an action in state court in New Jersey seeking a declaration that its primary insurance carriers are obliged under liability policies issued to Celanese Corporation ("Celanese"), HCC's predecessor in interest, for environmental claims arising from Celanese operations at numerous sites throughout the United States. One of the defendants, Home Indemnity Company ("Home Indemnity") removed that case to federal court in New Jersey. On 9 March 1989, Home Indemnity filed this action in North Carolina seeking a declaration that it is not required to provide coverage under the same Home Indemnity policies at issue in the federal case for the same environmental claims.

HCC moved to stay the North Carolina action pursuant to G.S. 1-75.12. Judge Lamm granted HCC's motion to stay.

On 29 September 1989, the federal court in New Jersey denied a similar motion to stay filed by one of the defendants in that action. The court also denied a motion to limit the federal case to issues arising from the New Jersey sites, and on 26 January 1990, the Third Circuit rejected an appeal of that order.

Plaintiffs and certain defendants appeal the North Carolina stay.

[1] G.S. 1-75.12 gives the trial court the power, in its discretion, to enter a stay:

> 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 . . . may enter an order to stay further proceedings in the action in this State.

The appellants contend as a preliminary matter that the appropriate standard of review under G.S. 1-75.12 is an open question in North Carolina and urge this Court to adopt a *de novo* standard of review. However, we find to the contrary. Entry of an order under G.S. 1-75.12 is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. *Motor Inn Management, Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 711, 266 S.E.2d 368, 370, *disc. rev. denied and appeal dismissed*, 301 N.C. 93, 273 S.E.2d 299 (1980); *Allen v. Wachovia Bank & Trust Co., N.A.*, 35 N.C. App. 267, 241 S.E.2d 123 (1978).

[2] We find that the trial court did not abuse its discretion in granting the stay. In *Motor Inn*, this Court enumerated several factors to be considered by the trial court when it determines whether an action should be stayed under G.S. 1-75.12. 46 N.C. App. 713, 266 S.E.2d at 371. These factors include, among others, (1) the nature of the case; (2) the convenience of witnesses; (3) the availability of compulsory process to produce witnesses; (4) the relative ease of access to sources of proof; (5) the applicable law; (6) the burden of litigating matters not of local concern; (7) the desirability of litigating matters of local concern in local courts; and (8) convenience and access to another forum. *Id.*

Under the facts of the present case, granting the stay was not an abuse of discretion. The trial court found that there was a prior pending action in the federal courts of New Jersey by HCC seeking a declaration that Home Indemnity is required to provide coverage to HCC under the same policies at issue in the North Carolina action. The court also found that none of the parties to the action were North Carolina corporations or have principal places of business in North Carolina. Of the sixty-one environmental sites from which this action arises, fifteen sites are located in New Jersey; four sites are located in North Carolina. Resolution of these claims will involve the application of law other than the law of North Carolina and trying the case here while the action in New Jersey is proceeding will place an unnecessary burden on the Superior Court of Cleveland County. HCC consented to

trial of the action in Federal Court in New Jersey and our trial court found that this was a convenient, fair and reasonable forum.

We find that these findings are supported by the evidence and are sufficient to uphold the trial court's conclusion that it would work a substantial injustice to try the North Carolina case while the New Jersey action is proceeding.

[3] The appellants also contend that the trial court erroneously stayed the claims concerning the excess carriers without any consent from HCC to suit in another jurisdiction regarding the claims of these excess carriers. It bases this argument on the fact that HCC has not joined any of the excess carriers in the New Jersey action.

We find this contention to be meritless. HCC has filed suit in New Jersey and acquiesced in its removal to federal court. HCC has consented to suit by all parties, including the excess carriers, in New Jersey.

[4] Finally, appellants contend that G.S. 1-75.12 violates N.C. Const. Art. I § 18, our Constitution's open court provision. We reject this argument. Application of G.S. 1-75.12 does not result in a dismissal of the case; it merely stays or suspends the action. Once the stay has been lifted under the terms of the Order, the appellants may proceed with their action in North Carolina. We agree with the appellees that the stay statute does not deny litigants access to North Carolina courts, but merely *postpones* litigation here pending the resolution of the same matter in another sovereign court.

For these reasons, we

Affirm.

Judges WELLS and EAGLES concur.

Judge WELLS concurring.

Were we properly sitting in *de novo* review of the merits of defendant HCC's motion to stay this action, I would vote to reverse the trial court. I perceive that the risk of substantial injustice is far greater in staying this action than in allowing it to go forward.

I agree with the majority, however, that we are in an "abuse of discretion" review context, and I therefore cannot substitute my judgment for that of the trial court.

IN THE MATTER OF THE ESTATE OF ALONZO HENRY HEFFNER, TESTATOR

No. 8927SC818

(Filed 3 July 1990)

Banks and Banking § 4 (NCI3d)— certificate of deposit—failure of both parties to sign—no right of survivorship

Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with the requirements of N.C.G.S. § 41-2.1(a); therefore, the trial court erred in holding that testator's widow was the legal owner of the entire amount of a certificate of deposit since the statute clearly requires that both parties sign the written agreement, but testator's widow failed to do so, and testator's intent was irrelevant in light of the unambiguous language of the statute requiring signatures.

Am Jur 2d, Banks §§ 369 et seq.

APPEAL by movant-executor from judgment signed 31 March 1989 by *Judge Lester P. Martin, Jr.* in GASTON County Superior Court. Heard in the Court of Appeals 13 February 1990.

Bertie I. Heffner, the widow of Alonzo H. Heffner and nonmovant-appellee in this appeal, filed a dissent to the last will and testament of Alonzo H. Heffner on 31 March 1988. Susan Howell, executor of the estate of Alonzo H. Heffner, filed a motion for a hearing before the Clerk of Superior Court, seeking a determination of the proper distribution of funds. Bertie Heffner answered, alleging sole ownership of a certain certificate of deposit. After a hearing, the Clerk issued an order on 9 December 1988 transferring the matter to Superior Court. After hearing arguments and evidence in the matter, the court held that nonmovant Bertie Heffner was the legal owner of the entire amount of the certificate of deposit. Movant appeals.

Mullen, Holland, Cooper, Morrow, Wilder & Sumner, P. A., by Nancy Borders Paschall and Graham C. Mullen, for movant-appellant.

Wade W. Mitchem for appellee.

JOHNSON, Judge.

Alonzo H. Heffner executed a certain certificate of deposit in the amount of $54,215.81 at a branch office of North Carolina National Bank (the "Bank") on 3 November 1986. Under Title I on the certificate was typed "ALONZO H. HEFFNER." Under Title II was typed "BIRDIE HEFFENER [sic]." Above a space for signatures, a box marked "Joint Depositors with Survivorship" was marked with a typed "x." The only signature on the certificate was that of Alonzo Heffner. Above his signature appeared these words: "The undersigned Depositor(s) has read and agrees to be bound by the provisions set forth on this and the reverse side of this Certificate." The reverse side refers to G.S. § 41-2.1.

After Alonzo Heffner died on 19 October 1987, the Bank issued a certificate of deposit to Bertie Heffner for one-half of the balance of the original certificate of deposit executed by Alonzo Heffner. It issued a second certificate of deposit to the estate of Alonzo Heffner for the other half of the balance.

By this appeal, the movant-executor contends that the trial court erred in holding that Bertie Heffner, as surviving spouse of Alonzo Heffner, is the legal owner of the entire original certificate of deposit executed by Alonzo Heffner in the amount of $54,215.81. We agree with the executor.

Before addressing movant's argument, we note that the nonmovant-appellee has attempted in her brief to raise a question for our review as to whether the matter before us is justiciable. She has failed, however, to properly present this question as required by Rule 28(c) of the N.C. Rules of Appellate Procedure. We therefore decline to address it.

The right of survivorship has been statutorily abolished where it follows as a legal incident to an existing joint tenancy. G.S. § 41-2; *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964). Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with the requirements of G.S. § 41-2.1(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.

Under the facts of this case, we must therefore determine whether a written agreement not signed by the party asserting rights as a survivor is sufficient to satisfy the statutory requirements. We must conclude that it is not sufficient. The plain language clearly requires that both parties sign the written agreement. This Court has also, in considering the adequacy of written agreements purporting to create survivorship rights, recognized the necessity of meeting all the requirements of G.S. § 41-2.1(a). In *O'Brien v. O'Brien*, 45 N.C. App. 610, 263 S.E.2d 817 (1980), both parties had signed the signature card, but the block indicating an intention to create a right of survivorship had not been checked. This writing was found to be insufficient to create rights of survivorship. The *O'Brien* Court then examined the certificate of deposit itself which was not signed by either party. The Court determined that the certificate, being unsigned by the parties, did not constitute a signed written agreement as required by G.S. § 41-2.1(a). The necessity of meeting all the statutory requirements was again recognized by this Court in *Threatte v. Threatte*, 59 N.C. App. 292, 296 S.E.2d 521 (1982), *cert. withdrawn as improvidently granted*, 308 N.C. 384, 302 S.E.2d 226 (1983).

In the instant case, Bertie I. Heffner did not sign the certificate of deposit, which is the only writing purporting to serve as a contract showing survivorship. Since this writing does not meet the signing requirement contemplated by G.S. § 41-2.1(a), we are compelled by that statute and our prior interpretations of it to hold that the writing at issue is ineffective to create a right of survivorship.

We also find that the trial court's conclusion of law that testator intended to create right of survivorship in the certificate of deposit not controlling. The signing requirement of G.S. § 41-2.1(a) is unambiguous, and the parties failed to express their intent to create a right of survivorship in accord with the statute. We note parenthetically that the General Assembly has enacted a new statute

regarding creation of right of survivorship in joint bank accounts, G.S. § 53-146.1, which, being effective 1 July 1989, is not applicable to the case at bar. We mention this statute, however, to observe that it retains the critical requirement that the parties execute a *signed* statement of their intent to create right of survivorship.

To allow subjective determination of the parties' intent to govern rather than the strict requirements of the statute would have the effect of creating uncertainty and increased litigation both for depositors and for banking institutions called upon to pay out funds from joint accounts.

Reversed and remanded.

Judges ARNOLD and ORR concur.

ELI NATHANIEL WALL, EMPLOYEE, PLAINTIFF v. N.C. DEPARTMENT OF HUMAN RESOURCES: DIVISION OF YOUTH SERVICES, EMPLOYER, DEFENDANT

No. 8910IC865

(Filed 3 July 1990)

Master and Servant § 77.1 (NCI3d)— workers' compensation— award for permanent partial disability—no change of circumstances—no newly discovered evidence

The Industrial Commission properly denied plaintiff's motion to set aside an award for 20% permanent partial disability of the back where the Commission properly concluded that there had been no change of condition or newly discovered evidence, as plaintiff testified in substance that his condition was the same as it had been when the award was entered, and a neurologist's diagnosis that plaintiff was totally disabled amounted merely to a new opinion about an old condition. N.C.G.S. § 97-47.

Am Jur 2d, Workmen's Compensation §§ 340, 590, 600.

APPEAL by plaintiff from Opinion and Award filed 3 May 1989 by the North Carolina Industrial Commission. Heard in the Court of Appeals 5 March 1990.

Plaintiff, then an employee of defendant, suffered an accidental injury to his back on 1 June 1986 that was covered by our Workers' Compensation Act. His back had been injured twice before, and was operated on in 1970, 1983, and 1985; after his recovery from the 1985 injury and surgery he had intermittent pain in his low back and leg, but was able to resume work. Following the 1986 injury his back and leg pain was more constant and severe, because of which he had to stop working. On 16 March 1987, with the approval of the North Carolina Industrial Commission and based upon an evaluation by plaintiff's neurologist, Dr. Wesley A. Cook, Jr. of the Duke University Medical Center, the parties agreed that plaintiff had a 20% permanent partial disability of the back and defendant would compensate him therefor at the rate of $205.35 a week for sixty weeks. On 31 July 1987 plaintiff, after employing legal counsel, moved to set the award aside on the alternative grounds of change of condition, mutual mistake, and newly discovered evidence. The motion was denied by Deputy Commissioner Haigh upon findings that plaintiff's condition was substantially the same as it was when the prior award was entered, no mutual mistake was made, and no evidence material to the case had been newly discovered. The Deputy Commissioner's findings, conclusions, and award were adopted and affirmed by the Full Commission.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Alexander H. Barnes and Mark A. Scruggs, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for defendant appellee.

PHILLIPS, Judge.

As the parties recognize: Since their agreement was in settlement of plaintiff's claim for permanent disability under the Workers' Compensation Act and was approved by the Industrial Commission, it was a final award or judgment of the Commission, *Beard v. Blumenthal Jewish Home*, 87 N.C. App. 58, 359 S.E.2d 261 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988), which can be modified only as the law authorizes. One ground for modifying or setting aside such awards is a change in the plaintiff's condition under the provisions stated in G.S. 97-47; another is that the award was entered due to mutual mistake, G.S. 97-17; and still another is that evidence material to the case has been newly

discovered. *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985).

Mutual mistake has been eliminated from the case by plaintiff's failure to argue it in his brief, Rule 28(a), N.C. Rules of Appellate Procedure, and the only questions presented are whether the Commission's conclusions that no change of condition has been established and no newly discovered evidence presented are correct.

The Commission's conclusions are correct for two reasons in our opinion: First, the Commission's findings of fact that plaintiff's condition had not changed and that no newly discovered evidence had come into his possession since the prior award are supported by competent evidence, *Carroll v. Burlington Industries*, 81 N.C. App. 384, 344 S.E.2d 287 (1986), *aff'd*, 319 N.C. 395, 354 S.E.2d 237 (1987), and the findings support the Commission's conclusions of law to the same effect. Second, no evidence that would support a finding of either a change of condition or newly discovered evidence was presented.

To modify the prior award because of a change of condition under G.S. 97-47 plaintiff had to show an actual change of condition, "not a mere change of opinion with respect to a pre-existing condition." *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33 (1960). And to obtain a new trial on the ground of newly discovered evidence he had to show that when the award was entered evidence material to the case existed that he did not learn about, through due diligence, until later. *Grupen v. Thomasville Furniture Industries*, 28 N.C. App. 119, 220 S.E.2d 201 (1975), *disc. review denied*, 289 N.C. 297, 222 S.E.2d 696 (1976).

Neither of the required showings was made. Plaintiff testified in substance that his condition was the same then as it was when the award was entered, and the other evidence he relies upon neither shows any new condition nor that plaintiff was unaware of some material evidence when the first award was entered. What the evidence shows without contradiction is that: For several months before the award was entered plaintiff was unable to work and his medical care at the Duke University Medical Center included psychiatric treatment for back and leg pain, depression, headaches and hypertension. Six months after the award Dr. Ara Tourian, a neurologist at Duke University Medical Center, who specializes in human pain and the damage it causes to a patient's nervous system, diagnosed plaintiff as being totally disabled. The diagnosis

was based upon plaintiff's complaints and medical records and the results of some psychological tests that indicated his responses to the leg and back pain included elevated scales of hypochondriasis, depression, hysteria, psychasthenia, and schizophrenia. There was no testimony or other evidence that any of the conditions that Dr. Tourian found and upon which the diagnosis is based—pain, depression, etc.—had developed since, or were worse than they were before, the award was entered. Since plaintiff's condition had not changed we are obliged to regard Dr. Tourian's diagnosis as merely a new opinion about an old condition, *Pratt v. Central Upholstery Co., supra*, and thus no basis for modifying the prior award. And since the diagnosis was not made until several months after the award, it does not qualify as newly discovered evidence under the rule stated above for obvious reasons.

If the opinion had been obtained before the award for permanent partial disability of the back under G.S. 97-31(23) was entered, it might have, though not necessarily, led to an award for total incapacity under G.S. 97-29; but under the provisions of G.S. 97-47 and many decisions of our Courts the opinion came too late and the award cannot be disturbed, as the Commission ruled.

Affirmed.

Chief Judge HEDRICK and Judge DUNCAN concur.

STATE OF NORTH CAROLINA v. SEBASTIAN WILLIAMS

No. 903SC69

(Filed 3 July 1990)

1. Criminal Law § 1283 (NCI4th)— charge of habitual felon—sufficiency of indictment

An indictment returned by the Pitt County Grand Jury charging defendant with being an habitual felon and expressly setting forth each of the underlying felonies of which defendant was charged and convicted as being in violation of an enumerated N.C. General Statute sufficiently stated the name of the state or sovereign against whom the felonies were committed to comport with the requirements of N.C.G.S. § 14-7.3.

Am Jur 2d, Indictments and Informations §§ 46, 49.

2. Criminal Law § 1062 (NCI4th)— sentencing hearing—no attempt by court to circumvent parole process

The trial court did not improperly consider the impact of each of the sentencing options under N.C.G.S. § 14-1.1(a)(3) on defendant's parole eligibility with the intention of trying to circumvent the parole process, since it was defendant who initiated a colloquy during the sentencing hearing regarding the length of incarceration; at no time did the trial court express dissatisfaction with the length of time that would be served; and the court's comment to members of the jury explaining the difference in the sentences as it pertained to parole eligibility was made after both the discharge of the jury and the entry of judgment.

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

ON writ of certiorari to review judgment entered 12 July 1989 in PITT County Superior Court by *Judge William C. Griffin.* Heard in the Court of Appeals 8 June 1990.

Defendant was convicted of common law robbery and of being an habitual felon. The trial court consolidated the convictions for judgment and imposed an active sentence of fifty years' imprisonment. Defendant sought review of the judgment entered by petition for writ of certiorari. By order entered 7 September 1989 this Court allowed defendant's petition.

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

Assistant Public Defender Carlos W. Murray, Jr. for defendant-appellant.

WELLS, Judge.

[1] By his first assignment of error, defendant challenges the trial court's denial of his motion to dismiss the habitual felon indictment, contending that the allegations of the indictment fail to sufficiently set out a charge of habitual felon because the indictment does not allege the name of the state or other sovereign against whom the felony offenses were committed. We disagree.

G.S. § 14-7.3 sets forth the requisites for a proper indictment stating the charge of habitual felon and provides in pertinent part that "[a]n indictment which charges a person with being an habitual felon must set forth . . . the name of the state or other sovereign against whom said felony offenses were committed[.]" It is well established that an indictment is sufficient under the Habitual Felons Act if it provides notice to a defendant that he is being tried as a recidivist. *State v. Winstead*, 78 N.C. App. 180, 336 S.E.2d 721 (1985) (*citing State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977)). The indictment returned by the Pitt County Grand Jury charging defendant with being an habitual felon expressly set forth each of the underlying felonies of which defendant was charged and convicted as being in violation of an enumerated "North Carolina General Statute." We believe this is a sufficient statement of the name of the state or sovereign against whom the felonies were committed to comport with the requirements of G.S. § 14-7.3 and *State v. Winstead*. The trial court therefore did not err in denying defendant's motion to dismiss.

[2] By his remaining assignment of error, defendant challenges the manner in which the trial court arrived at the sentence imposed. Defendant was convicted of common law robbery, a felony, N.C. Gen. Stat. § 14-87.1, and of being an habitual felon. G.S. § 14-7.6 requires that "[w]hen an habitual felon . . . shall commit any felony under the laws of the State of North Carolina, he must, upon conviction . . . be sentenced as a Class C felon."

Defendant does not challenge the imposition of a sentence beyond the presumptive term under G.S. § 15A-1340.4 of the Fair Sentencing Act. Instead, he asserts that the trial court erred in its choice of which maximum sentence to impose, as allowed by G.S. § 14-1.1(a)(3). That provision empowers the trial court, in cases where the imposition of the maximum sentence for a class C felony is appropriate, with the discretionary authority to impose a term of imprisonment for fifty years or for life. The thrust of defendant's argument in support of this assignment of error appears to be that the trial court improperly considered the impact of each of the sentencing options under G.S. § 14-1.1(a)(3)—fifty years' imprisonment or life imprisonment—on defendant's parole eligibility, to the effect that the trial court impermissibly intruded upon the custodial function of the executive branch of government, circumventing the parole process. *See State v. Snowden*, 26 N.C. App. 45, 215 S.E.2d 157, *cert. denied*, 288 N.C. 251, 217 S.E.2d 675 (1975).

It is well established that a defendant's sentence "must be vacated and the case remanded for resentencing when the record affirmatively shows that the sentence was imposed after the trial judge stated dissatisfaction with the length of time committed offenders remain in custody and after he expressed an incorrect assumption as to the timing of parole eligibility." *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986) (and cases cited therein). Close scrutiny of the record in this case in accordance with this standard does not convince us that defendant is entitled to a new sentencing hearing.

Although the record discloses that a colloquy occurred between defendant and the trial court during the sentencing hearing regarding the length of incarceration, the subject of this colloquy was the computation of credit for good behavior to which defendant would be entitled under G.S. § 14-7.6. Significantly, it was not the trial court but defendant who attempted an explication of the procedures involved. At no time during this colloquy did the trial court express any dissatisfaction with the length of time that would be served. We also note that the record contains the court reporter's affidavit of the redacted comment of the trial court to members of the jury, explaining the difference between fifty years' imprisonment and life imprisonment as it pertains to parole eligibility. The record clearly indicates, however, that this comment was made after both the discharge of the jury and the entry of judgment. Again, the trial court expressed no dissatisfaction regarding the amount of time to be served. Although such a comment following the conclusion of the case was arguably improper, we cannot conclude that it rises to the level of the trial court's expressly employing the sentencing process "to thwart the parole process." *State v. Snowden, supra.* Defendant is therefore not entitled to a new sentencing hearing.

In the trial we find

No error.

The judgment imposing sentence is

Affirmed.

Judges JOHNSON and EAGLES concur.

HUGHIE CASSTEVENS, NELLIE WILES TALLEY, LOLA WILES BUELIN, WESLEY GENE WILES AND RUFUS LEE WILES, PLAINTIFFS-APPELLANTS v. NELLIE S. WAGONER AND HARVEY L. WAGONER, DEFENDANTS-APPELLEES

No. 8923SC1280

(Filed 3 July 1990)

Wills § 13.1 (NCI3d)— caveat—jurisdiction

The trial court did not have subject matter jurisdiction over an action seeking to set aside a will and deed where the record is devoid of any indication that plaintiffs filed an appropriate caveat before the Clerk of Superior Court or that the cause was duly transferred to the superior court in compliance with N.C.G.S. § 31-32 and N.C.G.S. § 31-33. It is obvious that plaintiffs attempted to initiate these purported caveat proceedings directly in superior court as part of their attack on the validity of the deed, so that the trial court had no subject matter jurisdiction to determine the question of the will's validity. It is equally clear that any standing plaintiffs might have to challenge validity of the deed is predicated on their purported status as heirs of the decedent, but plaintiffs would take nothing under the terms of the will and consequently have no legal interest in the estate and no standing to challenge the validity of the deed.

Am Jur 2d, Wills §§ 891 et seq.

APPEAL by plaintiffs and defendants from judgment entered 20 July 1989 in YADKIN County Superior Court by *Judge Julius A. Rousseau, Jr.* Heard in the Court of Appeals 30 May 1990.

On 28 August 1987, plaintiffs filed their pleading denominated as "Complaint and Caveat," seeking to set aside the 1971 will and 1979 deed executed by decedent Frank Casstevens, died 5 April 1986, on grounds that he lacked the requisite mental capacity to duly execute these instruments or, alternatively, that these instruments were procured by undue influence. By the will, the decedent devised, either outright or by vested remainder, all of his personal and real property to defendant Nellie S. Wagoner. By the deed, the decedent conveyed to this same defendant in excess of 230 acres of realty situated in Yadkin County.

Defendants answered and interposed, *inter alia*, a motion to dismiss the complaint for failure to post the $200.00 prosecution bond required by G.S. § 31-33 and a motion to sever the caveat to the will from plaintiffs' claim seeking to set aside the deed. The trial court denied these motions, but ordered plaintiffs to post the $200.00 prosecution bond with the Clerk of the Superior Court of Yadkin County.

Following a trial on the issues, the jury answered the questions going to the will's validity for defendants and, pursuant to the trial court's instructions, did not reach the questions going to the deed's validity. Both plaintiffs and defendants then moved for an award of attorney's fees under G.S. § 6-21(2), which motions the trial court denied.

From the judgment entered upon the jury's verdict, denying the relief sought and denying the motion for an award of attorney's fees, plaintiffs appeal. From the same judgment denying their motion for an award of attorney's fees, defendants cross-appeal.

Franklin Smith for plaintiff-appellants.

Shore, Hudspeth and Harding, by N. Lawrence Hudspeth, III, for defendant-appellees.

WELLS, Judge.

A single issue, which we raise *ex mero motu*, is dispositive of this appeal, namely, whether the trial court had subject matter jurisdiction over this action. We determine that it did not, and we therefore vacate the judgment entered.

It is well established that a caveat is a proceeding *in rem* to attack the validity of a will. *In re Will of Brock*, 229 N.C. 482, 50 S.E.2d 555 (1948); *see also* Wiggins, *North Carolina Wills* (2d ed.), § 124. The right to contest a will by caveat is conferred by statute, is in derogation of the ancient common law right to dispose of property by will at death, and thus the statutory provisions setting forth the procedures to be followed in caveat proceedings must be strictly construed. *In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d 795 (1950). "No caveat is properly constituted until the statutory requirements are met." *Id.* An attack upon a will offered for probate must be direct and by duly initiated caveat; a collateral attack on the will's validity is not permitted. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965). Absent

properly instituted caveat proceedings, the superior court has no jurisdiction to pass upon the validity of a will as an incident of its civil jurisdiction to determine questions concerning title to realty. *Brissie v. Craig*, 232 N.C. 701, 62 S.E.2d 330 (1950).

The procedures for perfecting jurisdiction in caveat proceedings are set forth at G.S. § 31-32, *et seq.; see also In re Will of Hester*, 84 N.C. App. 585, 353 S.E.2d 643, *rev'd on other grounds*, 320 N.C. 738, 360 S.E.2d 801 (1987). A caveat must be initiated by appropriate filing with the clerk of superior court. N.C. Gen. Stat. § 31-32. Upon the due posting of the statutory bond, "the clerk shall *transfer the cause* to the superior court for trial." *Id.* § 31-33 (emphasis added). Although it is often stated that, "[w]hen a caveat is filed the Superior Court acquires jurisdiction of the whole matter in controversy," *In re Will of Charles, supra* (and cases cited therein), such a pronouncement does not alter the affirmative statutory requirement that caveat proceedings can only be instituted by due filing of the cause before the clerk of superior court. *In re Will of Winborne, supra.* When a purported caveat is fatally defective from its inception, the superior court acquires no jurisdiction over the cause. *See Matter of Lamb's Will*, 303 N.C. 452, 279 S.E.2d 781 (1981).

The record is devoid of any indication that plaintiffs filed an appropriate caveat before the clerk of superior court or that the cause was duly transferred to the superior court in compliance with G.S. § 31-32 and G.S. § 31-33. Instead, it is obvious that plaintiffs attempted to initiate these purported caveat proceedings directly in the superior court as part of their attack on the validity of the 1979 deed. The trial court thus had no subject matter jurisdiction to determine the question of the will's validity. Moreover, it is equally clear that any standing these plaintiffs might have to challenge the validity of the 1979 deed is predicated on their purported status as heirs of the decedent, having a legally cognizable interest in the alleged intestate estate. *See Kelly v. Kelly*, 241 N.C. 146, 84 S.E.2d 809 (1954); *see also Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448 (1950). Under the terms of the 1971 will, however, plaintiffs would take nothing, and consequently they would have no legal interest in the decedent's estate and no standing to challenge the validity of the deed. *Id.* It is therefore inescapable that this action is in every respect an impermissible collateral attack on the validity of the 1971 will, incident to an attack on the validity of the 1979 deed. *Brissie v. Craig, supra.*

For the reasons stated, the judgment of the trial court must be vacated and this case remanded to the Yadkin County Superior Court for entry of an order dismissing plaintiffs' action.

Vacated and remanded.

Judges PARKER and DUNCAN concur.

CHARLES W. ALEXANDER, JR., PETITIONER v. I. O. WILKERSON, JR., DIRECTOR OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, RESPONDENT

No. 8919SC1030

(Filed 3 July 1990)

Administrative Law and Procedure § 37 (NCI4th)— contested case hearing—denial of continuance—no abuse of discretion

An administrative law judge did not abuse his discretion by denying petitioner's motion for a continuance where the proceeding involved the revocation of a license to operate a rest home, regulations required that a supervisor-in-charge be at the rest home at all times, petitioner moved for a continuance at approximately 5:15 p.m. so that he could return to the rest home to relieve the SIC then on duty, the administrative law judge questioned the parties to determine if a solution existed to the problem, the administrative law judge discovered that petitioner's son could drive one of petitioner's witnesses who was a qualified SIC back to the rest home, and petitioner refused that idea, saying that they had all come together and should all leave together.

Am Jur 2d, Administrative Law §§ 397 et seq.

APPEAL by petitioner from an order entered 6 April 1989 by *Judge William Helms* in CABARRUS County Superior Court. Heard in the Court of Appeals on 4 April 1990.

On 23 February 1988, the North Carolina Department of Human Resources (the "Department") notified petitioner that it had revoked his license to operate the Alexander Rest Home located in Concord, North Carolina. Petitioner was granted a hearing before

Administrative Law Judge Robert Reilly, Jr. The contested matter was heard on 26 July and 1 August 1988. After the hearing, Judge Reilly recommended upholding the revocation. The Department adopted Judge Reilly's recommended decision as its final decision on 2 November 1989. Judge Helms affirmed the Department's decision by order signed 13 April 1989. Petitioner appeals from that order.

The Alexander Rest Home is a home for the aged, licensed by respondent for a maximum capacity of twenty beds. In April 1987, petitioner became sole administrator of the facility and was issued a full license to operate the facility. In May 1987, petitioner's full license was renewed for one year. On 17 November 1987, however, respondent reduced petitioner's license to "provisional" and suspended new admissions to the home. On 23 February 1988, respondent revoked petitioner's license.

Between 25 March 1987 and 23 February 1988, petitioner's facility was surveyed fifteen times by various officials. Their findings, which resulted in the decision to revoke petitioner's license, are not set out here because petitioner has not challenged the sufficiency of the evidence to support the Department's findings of fact and conclusions of law.

The contested case hearing began on 26 July 1988, at which time the Department presented its evidence and rested its case. The hearing was reconvened on Monday, 1 August 1988, at 1:00 p.m. for the presentation of petitioner's evidence. Petitioner did not arrive until 1:30 p.m. Petitioner called two witnesses, Mrs. Lois Sprat, a rest home employee, and his son, and the petitioner himself testified. He also introduced twenty-two exhibits.

At approximately 5:15 p.m., petitioner abruptly requested that the hearing be recessed and continued at another time because he had to return to the rest home to relieve the supervisor-in-charge ("SIC") then on duty at the facility. The A.L.J., however, inquired and determined that there was a way simultaneously to proceed with petitioner's testimony and also to relieve the SIC. Petitioner refused this alternative. Judge Reilly then ruled that petitioner had forfeited his right to present any more evidence and concluded the hearing.

James D. Foster for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General James A. Wellons, for respondent appellee N.C. Department of Human Resources.

ARNOLD, Judge.

Petitioner challenges the Department's final decision on two grounds: (1) that the A.L.J. abused his discretion when he denied petitioner's motion to continue and (2) that he abused his discretion by terminating the hearing and rendering a recommended decision without hearing the remainder of petitioner's evidence. Presumably, petitioner believes his additional evidence would shift the weight of the evidence to his favor.

The powers of an A.L.J. are outlined in The Administrative Procedure Act, N.C. Gen. Stat. § 150B-33 (1987), and in the Rules of the Office of Administrative Hearings, N.C. Admin. Code tit. 26, r. 03 (March 1990). An A.L.J. may "[r]egulate the course of the hearings, including discovery, [and] set the time and place for continued hearings . . . . " G.S. § 150B-33(b)(4). "Requests for a continuance of a hearing shall be granted upon a showing of good cause." 26 N.C.A.C. 03.0018(a). If insufficient time remains to conclude testimony at a hearing, additional testimony should be taken by deposition or a continuance granted "if it appears in the interest of justice that further testimony should be received." 26 N.C.A.C. 03.0018(b). A motion for a continuance is addressed to the sound discretion of trial judges. *Spence v. Jones*, 83 N.C. App. 8, 348 S.E.2d 819 (1986). Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. *Doby v. Lowder*, 72 N.C. App. 22, 324 S.E.2d 26 (1984); *see* N.C. Gen. Stat. § 1A-1, Rule 40(b) (1983). Discretion of the trial judge in ruling on a motion for a continuance is not unlimited, but such a ruling is not reviewable absent manifest abuse of discretion. *Spence*, 83 N.C. App. 8, 348 S.E.2d 819.

The Alexander Rest Home is approximately a twenty-five minute drive from where the hearing was held. Applicable regulations required that a SIC be at the rest home at all times. Petitioner testified that he moved for a continuance because he had to relieve the SIC then on duty no later than 5:45 p.m. that evening. Petitioner also stated that he had called all of his witnesses, but had "five or six other things to do."

The A.L.J. questioned the parties at the hearing to determine if a solution existed to the problem and discovered that petitioner's college-age son could drive Mrs. Sprat, a qualified SIC, back to the rest home. Neither petitioner's son nor Mrs. Sprat expressed any objection to this plan, but merely deferred to petitioner's wishes.

Petitioner, however, refused this idea, saying that they had all come together and should all leave together. Petitioner also objected to Mrs. Sprat's relieving the on-duty SIC on the ground that she was sick. But when asked by the A.L.J. if she would be willing to relieve the SIC, Mrs. Sprat did not state that she was too sick to work. She agreed to the plan "[i]f it's agreeable with [the petitioner], since I work for him."

We hold that petitioner did not show good cause for his continuance motion. The A.L.J. made numerous findings of fact in his written order denying the motion, and those findings are supported by competent evidence in the record. There was no manifest abuse of discretion in the denial of petitioner's motion.

Affirmed.

Judges LEWIS and DUNCAN concur.

EDGAR SCHALL v. CHARLES JENNINGS

No. 8921SC1003

(Filed 3 July 1990)

1. **Courts § 4 (NCI3d)— subject matter jurisdiction—nonresident parties—action on $20,000 debt**

The trial court erred in dismissing an action to collect a $20,000 debt for lack of subject matter jurisdiction and in not remedying the error pursuant to N.C.G.S. § 1A-1, Rule 59(8). A contract action on an alleged $20,000 debt qualifies as a matter of a justiciable nature in which the amount in controversy exceeds $10,000 and is not otherwise delegated to the district courts; the fact that neither party resides in North Carolina is irrelevant to determining subject matter jurisdiction. N.C.G.S. § 7A-240, N.C.G.S. § 7A-243.

Am Jur 2d, Courts §§ 93, 154 et seq.

2. **Process § 8 (NCI3d)— personal jurisdiction—waived—service of nonresident defendant in North Carolina**

Defendant in a debt collection action waived the issue of personal jurisdiction by appearing at trial without raising

the question; even if he had not waived the issue, the record shows that he was personally served with summons and complaint in a hotel in Winston-Salem, North Carolina, and the North Carolina Supreme Court has unequivocally held that personal service of process within North Carolina confers personal jurisdiction over a nonresident party.

Am Jur 2d, Courts §§ 143, 145.

APPEAL by plaintiff from order entered 16 August 1989 by *Judge James A. Beaty, Jr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 3 April 1990.

Theodore M. Molitoris for plaintiff-appellant.

William L. Durham for defendant-appellee.

GREENE, Judge.

The plaintiff appeals the trial court's order denying his Rule 59 motion for a new trial.

This is the second appearance of this case on our docket. In the first visit the defendant appealed the trial court's grant of its own new trial motion without allowing the parties to be heard. *Schall v. Jennings*, 94 N.C. App. 601, 381 S.E.2d 353 (1989) (unpublished opinion). The facts of this case, as ably articulated in the first appeal are as follows:

> In his complaint, plaintiff alleged that he loaned defendant $20,000 in 1981. Defendant was then married to plaintiff's daughter; however, they later divorced. Plaintiff claimed that defendant paid annual interest on the loan from 1981 to 1985 but thereafter refused to pay. Plaintiff, a resident of Paris, France, filed suit 12 May 1987 to recover the loan principal and unpaid interest. Plaintiff claimed that defendant was a resident of Greensboro, North Carolina. The day before moving to London, England, on reassignment with R. J. Reynolds Tobacco, defendant was personally served with process on 12 May 1987 in Greensboro. Among other defenses, defendant denied that the loan was made, and he denied that he was a resident of Greensboro.
>
> While his case was pending, plaintiff initiated an attachment proceeding to levy on real property owned by defendant

in Guilford County. An order of attachment was thereafter issued on defendant's property. A consent order was entered allowing defendant to sell the attached property and to deposit $24,000 with the Clerk of Superior Court of Forsyth County. The funds were subsequently deposited with the Clerk and the order of attachment was cancelled.

On 26 April 1988 at the close of plaintiff's evidence, the trial court allowed defendant's motion to dismiss *for lack of personal and subject matter jurisdiction.* The trial court also ordered that the Clerk release defendant's funds. Plaintiff gave oral notice of appeal in open court.

On 27 April 1988, this Court allowed plaintiff's petition for a temporary stay of the trial court's order releasing the funds.

On 28 April 1988 the trial court on its own motion (1) set aside the order dismissing plaintiff's case and (2) granted plaintiff a new trial. The Clerk of Superior Court was ordered to stop payment on the check releasing defendant's funds. On 3 May 1988, this Court dissolved the temporary stay which had been entered on 27 April 1988. On 5 May 1988, defendant filed notice of appeal of the trial court's order of 28 April 1988 which had granted plaintiff a new trial.

Emphasis added.

After determining the trial court erred as a matter of procedure, we reversed the trial court's unilateral decision to grant a new trial, but gave the plaintiff the opportunity to move for a new trial. The plaintiff did so, and the trial court denied the motion, thus in effect affirming its original dismissal for lack of subject matter jurisdiction and lack of personal jurisdiction.

The issues are (I) whether the trial court possessed subject matter jurisdiction over this dispute; and (II) whether the trial court gained personal jurisdiction over the defendant.

I

[1] The plaintiff argues the trial court erred in dismissing the action for lack of subject matter jurisdiction and in not remedying this error pursuant to N.C.G.S. § 1A-1, Rule 59(8) (1983). We agree. All civil matters of a justiciable nature in which the amount in controversy exceeds $10,000.00, and not otherwise delegated to

the district courts, are properly brought before the superior courts. N.C.G.S. §§ 7A-240 and 243 (1989). A contract action on an alleged $20,000.00 debt qualifies. Furthermore, the fact that neither party resides in North Carolina is irrelevant to determining subject matter jurisdiction. In *Harris v. Pembaur*, 84 N.C. App. 666, 353 S.E.2d 673 (1987), the Court of Appeals found subject matter jurisdiction in a case where neither party was a resident of North Carolina, and the controversy arose out of an agreement for sale of a horse outside of North Carolina. In the case at hand we also have only out-of-state parties, and the plaintiff presented no evidence that the alleged loan agreement arose in North Carolina. According to *Pembaur*, subject matter jurisdiction is not precluded by non-citizenship of the parties. *Id.*, at 667-68, 353 S.E.2d at 675; *see also Miller v. Black*, 47 N.C. 342 (1855) (action may be maintained in North Carolina even though both parties are citizens of other states).

II

[2] The plaintiff also argues the trial court erred in dismissing the action for lack of personal jurisdiction. The defendant did not raise this issue in his answer or in a Rule 12(b)(2) motion. Since the defendant appeared at trial, through counsel, without raising the issue, it is waived. *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E.2d 769 (1974). Even if the defendant had not waived the issue, the record shows he was personally served with summons and complaint in a hotel in Winston-Salem, North Carolina. The North Carolina Supreme Court has unequivocally held that personal service of process within North Carolina confers personal jurisdiction over a nonresident party. *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581 (1987). The United States Supreme Court has recently confirmed the constitutionality of this approach. *Burnham v. Superior Court of California*, --- U.S. ---, 110 S.Ct. 2105 (1990).

The plaintiff's third assignment of error is immaterial since the trial court only addressed the issues of subject matter jurisdiction and personal jurisdiction in its 26 April 1988 order. Any other issues discussed in its order denying a new trial based on errors during trial are not properly before this court on appeal. Thus, since the trial court erred in dismissing this action for lack of subject matter jurisdiction and personal jurisdiction, we must reverse and remand for a new trial.

Reversed and remanded.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. WALTER HOWARD

No. 8927SC794

(Filed 3 July 1990)

Criminal Law § 1086 (NCI4th)— convictions consolidated—sentence less than maximum for most serious offense—separate findings in aggravation and mitigation not required

Since defendant's 40 year sentence for his four consolidated convictions did not exceed the 50 year maximum sentence for the most serious offense, the trial court did not err in failing to make separate findings in aggravation and mitigation of punishment for each offense.

Am Jur 2d, §§ 551 et seq.

APPEAL by defendant from judgment entered 3 March 1989 by *Judge Kenneth A. Griffin* in GASTON County Superior Court. Heard in the Court of Appeals 8 May 1990.

Defendant Walter Howard and a co-defendant were found guilty in a jury trial on 12 October 1987 of first-degree burglary, assault with a deadly weapon inflicting serious injury, and two counts of robbery with a dangerous weapon. The court consolidated the cases for judgment and imposed on defendant a sentence of fifty years imprisonment. Defendant appealed, and this Court granted a new sentencing hearing.

At defendant's resentencing, the cases were again consolidated for judgment and the court imposed a forty year sentence. Defendant again appealed.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General H. Al Cole, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant appellant.

ARNOLD, Judge.

Defendant's sole basis for appeal is the disparity between the sentence given to his co-defendant (twenty years) and that given to him (forty years). At the original trial both defendants were found guilty of all charges, and the cases were consolidated for judgment. In its original sentencing of Mr. Howard, the court found several aggravating factors including one that defendant had a prior conviction of a criminal offense punishable by more than sixty days confinement. *See* N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (1988). This same aggravating factor was the only one found against the co-defendant. The court found no mitigating factors for Mr. Howard, but did find the co-defendant was the least culpable defendant, and that he did not have a weapon in his possession or assault or threaten any person with a weapon. On appeal, this Court ordered a new sentencing hearing for defendant in *State v. Howard*, 92 N.C. App. 245, 374 S.E.2d 494 (1988) (unpublished).

At Mr. Howard's resentencing, the cases were again consolidated for judgment and the presiding judge found one aggravating factor, that defendant had a prior criminal conviction punishable by more than sixty days. He also found as a mitigating factor that at the time of the offense Mr. Howard was suffering from a mental condition insufficient to constitute a defense but that significantly reduced his culpability, and that the condition was caused by voluntary intoxication. *See* G.S. § 15A-1340.4(a)(2)(d). The court concluded the factor in aggravation outweighed the factor in mitigation and gave defendant an active sentence of forty years.

Having consolidated all four convictions for judgment, the sentencing court did not make separate findings of fact in aggravation and mitigation for each offense. First-degree burglary, a Class C felony with a presumptive sentence of fifteen years and maximum sentence of fifty years, is the most serious of defendant's convictions. N.C. Gen. Stat. § 14-1.1(a)(3) (1986); G.S. § 15A-1340.4(f). Since defendant's forty-year sentence for the consolidated convictions does not exceed the fifty-year maximum sentence for the most serious offense, the court did not err in failing to make separate findings in aggravation and mitigation of punishment for each offense. *State v. Miller*, 316 N.C. 273, 341 S.E.2d 531 (1986).

It is well settled that the balance struck in weighing the aggravating against the mitigating factors is a matter within the sound discretion of the trial judge and will not be disturbed unless

it is "manifestly unsupported by reason," or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 502-03 (1985) (citations omitted).

Under the facts of this case, the resentencing judge clearly did not abuse his discretion. The judge properly found one statutory aggravating factor and one statutory mitigating factor. A judge need not justify the weight accorded any factor supported by a preponderance of the evidence. *Id.* A judge may determine that one factor in aggravation outweighs one or more factors in mitigation and vice versa. *Id.* at 258, 337 S.E.2d at 502.

Affirmed.

Judges PHILLIPS and COZORT concur.

SHIRLEY KEARNEY AND JAMES TEDDER v. THE COUNTY OF DURHAM, COUNTY OF DURHAM ANIMAL CONTROL DEPARTMENT, BOBBY L. LEATHERS, AND JOHN P. BOND, III

No. 8914DC1194

(Filed 3 July 1990)

Master and Servant § 10.2 (NCI3d)— breach of contract and wrongful discharge—oral contract—employment at will—summary judgment for defendants

The trial court properly granted summary judgment for defendants in an action for wrongful discharge where plaintiffs agree that they did not have any type of written contract with the county; plaintiffs' representations of their oral agreement did not show either an employment contract for a fixed term or that plaintiffs could only be terminated for cause; defendants in any case came forward with considerable evidence that plaintiffs were discharged for cause; these cases are not included in any of the policy exceptions that have limited the application of the at-will doctrine; and, although plaintiffs' jobs were included in a manual adopted by resolution of the Durham County Board of Commissioners, that is insufficient

to create a property interest analogous to that of a statute or ordinance.

Am Jur 2d, Master and Servant §§ 45, 46, 49 et seq.

APPEAL by plaintiffs from judgment entered 12 July 1989 by *Judge Richard G. Chaney* in DURHAM County District Court. Heard in the Court of Appeals 7 May 1990.

Plaintiffs Kearney and Tedder are two former employees of Durham County (the "County"). On 27 December 1987, they instituted this action against the County alleging wrongful discharge, breach of contract, and intentional infliction of emotional distress. They sought, *inter alia*, monetary damages and reinstatement to their former positions. After discovery was conducted, defendants moved for summary judgment on 18 August 1988. The trial court granted this motion on 12 July 1989. Plaintiffs appeal.

McCreary & Read, by Daniel F. Read, for plaintiffs-appellants.

Durham County Attorney's Office, by Assistant County Attorney Lowell L. Siler, for defendants-appellees.

JOHNSON, Judge.

Plaintiff Kearney was hired by the Durham County Animal Control Department as a clerk typist III on 24 April 1984 and was discharged on 22 May 1987. The County includes in the record various warnings and evaluations of Kearney which indicate that she was terminated for poor work performance and inability to satisfactorily perform her job. Pursuant to County policy, Kearney appealed her discharge to the County Manager who upheld the decision.

Plaintiff Tedder was hired by the Animal Control Department in October, 1986 as a veterinarian technician and was discharged on 13 July 1987. The County also introduced documents showing that he was terminated for poor work performance and inability to satisfactorily perform his job. The County Manager upheld the decision. Tedder remained on probationary status during his employment with the County.

Neither employee signed a written contract of employment and there is no evidence that they orally agreed to a fixed term of employment with the County.

By their first Assignment of Error, plaintiffs contend that the court erred in granting summary judgment for defendants when, they argue, the parties had a contract that provided that plaintiffs would not be discharged except for cause. We disagree.

The granting of summary judgment is proper only when, on the basis of the materials before the court, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. G.S. § 1A-1, Rule 56; *Johnson v. Holbrook*, 77 N.C. App. 485, 335 S.E.2d 53 (1985). North Carolina is committed to the doctrine that "absent some form of contractual agreement between the employer and employee establishing a *definite* period of employment, the employment is presumed to be an 'at-will' employment, terminable at the will of either party, irrespective of the quality of performance by the other party, and the employee states no cause of action for breach of contract by alleging that he has been discharged without just cause." *Harris v. Duke Power Co.*, 319 N.C. 627, 629, 356 S.E.2d 357, 359 (1987), *citing Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971).

Plaintiffs agree that they did not have any type of written contracts with the County. They have stated that they had oral understandings with the County that their jobs were "secure" and they were "there permanent." We do not think that their representations of their oral employment agreement showed either an employment contract for a fixed term or that plaintiffs could only be terminated for cause. However, defendants have also come forward with considerable evidence that plaintiffs were discharged for cause.

We also do not find that the instant cases are included in any of the public policy exceptions that have limited the application of the "at-will" doctrine. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Sides v. Duke University Hospital*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985).

A statute or ordinance may create a property interest in continued employment, thus providing an exception to the "employment-at-will" rule. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed.2d 684 (1976); *Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979). There is no applicable statute or ordinance in this case. Plaintiffs' jobs were included in a manual adopted by resolution of the Durham County Board of Commissioners. "Generally, measures that prescribe binding rules of conduct are ordinances while measures that relate

to administrative or housekeeping matters are categorized as resolutions." C. Sands, M. Libonati, *Local Government Law*, § 11.14 at 11-14 (1981). In the absence of evidence that this resolution was adopted with the same formality and characteristics of an ordinance, it is insufficient to create a property interest analogous to that of a statute or ordinance. *Pittman v. Wilson County*, 839 F.2d 225 (4th Cir. 1988). We hold that the trial court did not err in granting summary judgment as to plaintiffs' claims for breach of contract and wrongful discharge.

Plaintiffs have not presented any argument that the trial court erred in granting defendants' motion for summary judgment as it pertained to their claim for intentional infliction of emotional distress. We deem this argument abandoned pursuant to G.S. § 1A-1, Rule 28(a) and do not address it.

Affirmed.

Chief Judge HEDRICK and Judge EAGLES concur.

THE NEWS AND OBSERVER PUBLISHING COMPANY, INC.; THE NORTH CAROLINA FIRST AMENDMENT FOUNDATION, INC.; AND THE NORTH CAROLINA PRESS ASSOCIATION v. SAMUEL H. POOLE, DEAN W. COLVARD, C. C. CAMERON, WILLIAM A. KLOPMAN AND HELLON SENTER

No. 8910SC1313

(Filed 3 July 1990)

Appeal and Error § 175 (NCI4th)— index of documents ordered—trial on merits—appeal from order moot

This appeal from an order of the trial court requiring defendants to provide an index of the documents in issue is dismissed as moot where plaintiffs proceeded with the merits of their action without the ordered index and the trial court issued a final order determining that the documents sought by plaintiffs were public records required by defendant to be made available for public inspection and examination.

Am Jur 2d, Appeal and Error §§ 80, 761-763.

APPEAL by defendants from order entered 17 November 1989 by *Judge James H. Pou Bailey* in WAKE County Superior Court. Heard in the Court of Appeals 5 June 1990.

Attorney General Lacy H. Thornburg, by Chief Deputy Attorney General Andrew A. Vanore, Jr. and Assistant Attorney General K. D. Sturgis, for defendants-appellants.

Everett Hancock & Stevens, by Hugh Stevens, for plaintiffs-appellees.

JOHNSON, Judge.

Plaintiffs filed this action pursuant to the Public Records Law, G.S. §§ 132-1 *et seq.* to obtain access to certain documents made or received by defendants in their capacity as members of the "Poole Commission." Defendants appeal that aspect of the 17 November 1989 trial court order which required them to "file with the [c]ourt, and serve upon the [p]laintiffs, an index of the documents at issue." The trial court stated in its order that "[a]n index of the documents at issue would assist the [c]ourt in its ultimate determination of this matter." Judge Bailey stayed operation of this portion of his order pending this appeal.

This Court takes judicial notice of the fact that since the 17 November order, the plaintiffs elected to proceed with the merits of their action even though defendants had not provided them with an index to the documents they sought. We further notice that on 18 April 1990, Superior Court Judge Henry V. Barnette, Jr. issued a final order in which he determined, *inter alia*, that the documents sought by plaintiffs are public records, and that defendants must make them available for public inspection and examinations.

It is well established that "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978); *Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969).

We hold that the issue raised by this appeal is moot as it can have no effect on the existing controversy between the parties,

and the question is not genuinely at issue at this stage of litigation. *Id.* We, therefore, *ex mero motu*, dismiss this action.

Dismissed.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. ALLEN GREGORY SHADRICK, DEFENDANT-APPELLANT

No. 9021SC42

(Filed 3 July 1990)

Criminal Law § 1145 (NCI4th) — aggravating circumstance of especially heinous, atrocious, or cruel offense — sufficiency of evidence

It was proper for the trial court to find that an involuntary manslaughter was especially heinous, atrocious, or cruel where the evidence tended to show that defendant and the victim were husband and wife; prior to the victim's death, defendant assaulted her by pushing her and pulling her by the hair of her head; defendant placed a gun to the victim's head and clicked the trigger; and defendant burned the victim's clothes in her presence and burned her pubic hair. N.C.G.S. § 15A-1340.4(a)(1)f.

Am Jur 2d, Homicide §§ 70, 87.

APPEAL by defendant from judgment entered 8 August 1989 in FORSYTH County Superior Court by *Judge Thomas W. Ross.* Heard in the Court of Appeals 8 June 1990.

Defendant was charged in a true bill of indictment with the first degree murder of his wife; however, pursuant to a plea arrangement, he pled guilty to the lesser offense of involuntary manslaughter. In sentencing defendant, the court found as an aggravating factor that the offense was especially heinous, atrocious, or cruel; found two statutory mitigating factors; concluded that the one aggravating factor outweighed the mitigating factors; and sentenced defendant to a term of imprisonment in excess of the presumptive term. From the judgment entered, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General John R. Corne, for the State.

White & Crumpler, by J. Matthew Dillon and David F. Tamer, for defendant-appellant.

WELLS, Judge.

Defendant argues there is insufficient evidence in the record to support the aggravating factor found by the court and therefore it was error for the court to sentence him to a term of imprisonment in excess of the presumptive term. The transcript shows that the court, in pronouncing its judgment, specifically found that on the day of the offense and prior to the victim's death, defendant assaulted the victim, his wife, by pushing her and pulling her by the hair of her head, that defendant placed a gun to the victim's head and clicked the trigger, and that defendant burned the victim's clothes in her presence and burned her pubic hair. Based on these findings and the evidence presented at the sentencing hearing, the court found that the facts disclosed excessive psychological suffering and dehumanizing aspects not normally present in the offense of involuntary manslaughter and that the preponderance of the evidence showed the existence of the aggravating factor set forth at N.C. Gen. Stat. § 15A-1340.4(a)(1)(f) (1988) ("[t]he offense was especially heinous, atrocious, or cruel").

In determining whether an offense is especially heinous, atrocious, or cruel, the focus should be on whether the facts of the case disclose excessive brutality or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983). The transcript shows that the sentencing court correctly applied that legal standard in determining this aggravating factor was present in this case. The findings made by the court in support of this aggravating factor are supported by ample, competent evidence in the record. Those findings and the evidence presented are sufficient to support the finding of this factor. The court's determination that the facts of this case disclose excessive psychological suffering and dehumanizing aspects not normally present in the offense of involuntary manslaughter is also supported by evidence in the record that shows the relationship between defendant and the victim was that of husband and wife, a relationship not normally present with respect to this offense. *See State*

v. Blalock, 77 N.C. App. 201, 334 S.E.2d 441 (1985) (defendant was victim's father).

We conclude that it was proper for the court to find the offense was especially heinous, atrocious, or cruel, and we therefore affirm the judgment entered.

Affirmed.

Judges JOHNSON and EAGLES concur.

IN THE MATTER OF: ERIC JACKSON RANDALL

No. 8913DC1249

(Filed 3 July 1990)

Infants § 20 (NCI3d) — juvenile delinquent — community based alternatives not considered

A trial court order committing a juvenile to the Division of Youth Services for 30 days arising from an assault charge and guilty plea was remanded where there was no evidence of the inappropriateness of any community-based alternatives and the trial court stated that training school was appropriate due to the nature of the actions involved. N.C.G.S. § 7A-649 lists ten dispositional alternatives for delinquent juveniles, nine being various community level alternatives and the most severe being the commitment to training school, and N.C.G.S. § 7A-647 presents several other community-based dispositional alternatives. A juvenile may not be committed to training school based upon the perceived seriousness of the offense alone.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 32, 33, 60.

APPEAL by juvenile from order entered 21 June 1989 by *Judge David G. Wall* in COLUMBUS County District Court. Heard in the Court of Appeals 7 June 1990.

This is a juvenile proceeding in which the district court found that the juvenile, Eric Jackson Randall, was delinquent. The basis for the delinquency adjudication was the juvenile's guilty plea to

simple assault. The assault charge and guilty plea arose from the "initiation" of another juvenile at the Boys Home of North Carolina in Lake Waccamaw, where the boys were residents. The juvenile Randall had apparently placed himself in the Boys Home to remove himself from a difficult home situation and had not previously had contact with the court system.

At the dispositional hearing the Assistant District Attorney introduced into evidence an intake counselor's report. In that report the intake counselor recommended that the juvenile be placed on supervised probation. The court further considered testimony from the juvenile's counselor at the Columbus County Mental Health Center. The counselor stated that he did not feel that a 30 day commitment would be an appropriate disposition because it would remove the juvenile from his therapy situation. Additionally, a social worker from Boys Home testified that she and the Admissions Committee recommended that the juvenile be placed on probation and that he remain at Boys Home for some period of time. The social worker testified that the juvenile had not been involved in any other incident while at the Home. There was also testimony from the juvenile court counselor that a local police officer was willing to involve the juvenile in a community service program at the police department.

After making findings of fact, including that community-based alternatives or resources would not be appropriate, the trial court committed the juvenile to the Division of Youth Services for a period of 30 days. The juvenile appeals from the sentence imposed.

Attorney General Thornburg, by Assistant Attorney General Debra K. Gilchrist, for the State.

Fred C. Meekins, Jr. for juvenile-appellant.

EAGLES, Judge.

Before a delinquent juvenile may be committed to training school, the trial court must find that two tests have been met: first, "that the alternatives to commitment . . . have been attempted unsuccessfully or are inappropriate," and second, "that the juvenile's behavior constitutes a threat to persons or property in the community." G.S. 7A-652(a). The trial court's findings must be sufficiently detailed and must be based on some evidence appearing in the record. *In re Vinson*, 298 N.C. 640, 672, 260 S.E.2d 591, 610 (1979).

The juvenile assigns error to the trial court's finding regarding the first test and argues that the State offered no evidence that the alternatives were inappropriate or had been unsuccessfully attempted. We agree.

G.S. 7A-649 lists ten dispositional alternatives for delinquent juveniles, the most severe of which is commitment to training school; the other nine are various "community-level" alternatives. *In re Brownlee*, 301 N.C. 532, 552, 272 S.E.2d 861, 873 (1981). G.S. 7A-647, which is to be read in tandem with G.S. 7A-649, presents several other community-based dispositional alternatives for delinquent juveniles.

In the present case there was no evidence of the inappropriateness of any community-based alternatives. Additionally, the trial court stated that training school was appropriate "due to the nature of the actions involved." As this court has stated previously, a juvenile "may not be committed [to training school] based upon the perceived seriousness of the offense alone." *In re Khork*, 71 N.C. App. 151, 156, 321 S.E.2d 487, 490 (1984). We are mindful that the determination of the appropriate disposition of juvenile cases is in the trial court's discretion. However, we cannot say from this record that the trial court considered the available community-based alternatives.

For the reasons stated, the order of the trial court is vacated and the cause remanded for proceedings consistent with this opinion.

Vacated and remanded.

Judges WELLS and LEWIS concur.

STATE OF NORTH CAROLINA v. DONALD M. BLACKWELL

No. 8929SC1053

(Filed 3 July 1990)

Criminal Law § 375 (NCI4th); Arrest and Bail § 144 (NCI4th)— driving while impaired—pretrial release—comments of judge—no error

A DWI defendant's pretrial release rights were not violated, comments made during the trial by the judge were made in a permissible effort to move the trial along, and none of the comments affected the verdict.

Am Jur 2d, Trial §§ 91 et seq.

APPEAL by defendant from judgment entered 8 March 1989 by *Judge Claude S. Sitton* in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 29 May 1990.

Attorney General Lacy H. Thornburg, by Associate Attorney General Hal F. Askins, for the State.

C. K. Brown, Jr. for defendant appellant.

PHILLIPS, Judge.

In appealing his conviction of driving while impaired defendant makes two contentions, neither of which has merit. First, he contends that the charge must be dismissed because the Magistrate failed to inform him of his right to be released pending trial and to permit him to obtain a blood test. In considering defendant's motion the Superior Court, upon conflicting evidence, found facts which support the conclusion that defendant's pre-trial release rights were not violated. Defendant's other contention is that during the trial the judge prejudiced the jury against him by making remarks that indicated his bias against him. Viewed in the context of the trial, most of the remarks complained of were made in a permissible effort to move the trial along and in our opinion none of them affected the verdict.

No error.

Judges ARNOLD and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JULY 1990

ALL WOOD PRODUCTS MFG. CORP. v. LIGHT SOURCE, INC. No. 8925SC968	Caldwell (89CVS810)	No Error
AQUARIUMS, UNLIMITED v. NEAL No. 9021DC123	Forsyth (89CVD5426)	Dismissed
CROMER v. CROMER No. 8922DC1382	Davidson (89CVD0850)	Appeal Dismissed
DIMOND v. CONDON No. 897DC855	Nash (88CVD1899)	The portions of the trial court's order requiring monthly support payments & medical coverage are—Affirmed. The portions of order requiring access to the beach condominium & country club membership are—Reversed.
DIXON v. BRINSON No. 894SC1123	Onslow (87CVS2385)	Reversed & Remanded
DOUGLAS v. HERTFORD, INC. No. 8926SC1097	Mecklenburg (88CVS2303)	Affirmed
DUKE UNIVERSITY v. HESTER No. 8914DC1334	Durham (86CVD01719)	Affirmed
FLOYD v. INTEGON GENERAL INS. CORP. No. 8927DC929	Gaston (89CVD09)	Affirmed
GLOVER v. N. C. FARM BUREAU MUTUAL INS. CO. No. 899SC1297	Granville (89CVS66)	Affirmed
HURST v. HURST No. 894DC1309	Onslow (87CVD1867)	Vacated & Remanded
IN RE BRITT No. 9016DC131	Robeson (89J0029)	Affirmed

IN RE LYLES No. 892SC1140	Beaufort (79J63)	Affirmed in part & remanded
JOHNSON v. JOHNSON No. 893DC1068	Craven (82CVD531)	Affirmed
JOHNSON v. STANDARD SUNCO, INC. No. 8910IC1144	Ind. Comm. (033019)	Remanded for further proceedings
KNIGHT v. TODD No. 8913SC1038	Bladen (89CVS37)	Affirmed
LOVE v. BOWERS No. 8917DC931	Surry (88CVD404)	Affirmed
MOORE v. N.C. DEPT. OF TRANSPORTATION No. 8910IC1041	Ind. Comm. (TA9566)	Affirmed
MORRIS v. CARTWRIGHT No. 891DC976	Perquimans (85CVD80)	Affirmed
MUNDEN v. MUNDEN No. 895DC819	New Hanover (87CVD0972)	Affirmed
NORVILLE v. NORVILLE No. 907DC18	Edgecombe (89CVD258)	No Error
PUHR v. HIGHLAND FARMS No. 8928SC1212	Buncombe (88CVS2936)	Affirmed
ROUSE v. ROUSE No. 898SC954	Lenoir (87CVS403)	Affirmed in part, vacated & remanded in part
SANDHILL ROOFING CO. v. J. F. ADKINS, INC. No. 8920DC721	Richmond (87CVD778) (87CVD779)	Affirmed
STATE v. ARMSTRONG No. 902SC38	Washington (89CRS312)	Remanded for new sentencing hearing
STATE v. CARTER No. 8916SC674	Robeson (87CRS12544) (87CRS12545) (87CRS12546) (87CRS12547)	No Error
STATE v. DEESE No. 8927SC834	Gaston (88CRS18085) (88CRS18086)	No Error

STATE v. GIBSON No. 8919SC1352	Rowan (89CRS3897)	No Error
STATE v. GURGANUS No. 908SC51	Wayne (88CRS12387)	No Error
STATE v. HAIRSTON No. 9021SC137	Forsyth (88CRS5191)	Affirmed
STATE v. HAMM No. 9014SC149	Durham (89CRS17564) (89CRS17565) (89CRS17566)	No Error
STATE v. HAUSER No. 8926SC1079	Mecklenburg (88CRS48089) (88CRS48090)	No Error
STATE v. HAWKINS No. 9018SC59	Guilford (88CRS61548)	Affirmed
STATE v. HOOVER No. 9026SC103	Mecklenburg (89CRS28030)	Affirmed
STATE v. HUNT No. 904SC40	Onslow (89CRS8229)	No Error
STATE v. JENKINS No. 8913SC850	Brunswick (88CRS5166) (88CRS5167) (88CRS5170) (88CRS5172) (88CRS5173) (88CRS5174)	No Error
STATE v. LANE No. 9026SC33	Mecklenburg (88CRS37003)	No Error
STATE v. LEGRANDE No. 8926SC1106	Mecklenburg (89CRS9196) (89CRS20577) (89CRS20580) (89CRS20581)	No Error
STATE v. McLENDON No. 8920SC1168	Anson (88CRS002801)	No Error
STATE v. PENNINGTON No. 8925SC1267	Caldwell (88CRS8444)	No Error
STATE v. SATTERFIELD No. 8915SC876	Alamance (88CRS14105) (88CRS14106)	No Error
STATE v. SAUNDERS No. 9020SC15	Moore (89CRS8499)	No Error

STATE v. SHOEMAKER No. 8915SC1104	Alamance (88CRS22211) (88CRS22212) (88CRS22213) (88CRS22214) (88CRS22215) (88CRS22216)	No Error
STATE v. SIMONDS No. 8930SC749	Haywood (88CRS2116) (88CRS2167)	No Error
STATE v. SIMPSON No. 8918SC1269	Guilford (88CRS58477) (88CRS58478)	Vacated & Remanded
STATE v. TRULL No. 8919SC1347	Cabarrus (89CRS4231)	No Error
STATE v. WALKER No. 8926SC769	Mecklenburg (88CRS66028)	No Error
STATE v. WHETSTINE No. 9018SC75	Guilford (89CRS32899)	No Error
SWAIN v. BLYTHE No. 8910SC951	Wake (89CVS00942)	Affirmed in part, reversed in part
TEAGUE v. PUTNAM No. 8925SC779	Catawba (88CVS1583)	Reversed & Remanded
WAKE COUNTY ex rel. SMITH v. MANN No. 8910DC879	Wake (88CVD9874)	Reversed & Remanded
WARREN v. TAFT No. 893SC934	Pitt (84CVS792)	No error as to liability; reversed & remanded for a new trial as to damages only.
WEST v. SOUKKAR No. 899SC399	Vance (87CVD630)	Affirmed

STATE OF NORTH CAROLINA v. GEORGIA JACKSON TORRES

No. 892SC510

(Filed 17 July 1990)

1. **Criminal Law § 75.7 (NCI3d)— defendant not in custody—no interrogation without benefit of counsel**

There was no merit to defendant's contention that she was in custody once officers transported her from her house to the sheriff's department and that officers interrogated her without the presence of counsel, since defendant was not in custody until she was advised of her Miranda rights, asked if she wanted an attorney present, and informed that she could stop answering questions whenever she desired, despite her assertions that she was under arrest when she was transported to the sheriff's department, during the time she waited in a conference room with her daughters and family friends, and during the time she asked if she needed an attorney present.

Am Jur 2d, Evidence §§ 555-557.

2. **Homicide § 28 (NCI3d)— imperfect self-defense—instruction not required**

The trial court in a second degree murder case did not err in failing to instruct on imperfect self-defense where the evidence tended to show that the victim was intoxicated at the time of the altercation, was unarmed, and posed no immediate harm to defendant or any member of her family.

Am Jur 2d, Homicide §§ 157, 519.

3. **Homicide § 21.7 (NCI3d)— second degree murder—sufficiency of evidence of malice**

There was sufficient evidence of malice in a second degree murder case where the evidence tended to show that defendant, without a justifiable excuse or mitigating factors, shot her husband five times at some distance away with a rifle.

Am Jur 2d, Homicide § 438.

4. **Homicide § 15.4 (NCI3d)— position of victim when shot—expert testimony admissible**

The trial court in a second degree murder case did not err in allowing the testimony of an expert in pathology that

one of the shots which entered the victim could have been fired while he was on the floor.

Am Jur 2d, Homicide § 397.

5. Criminal Law § 1166 (NCI4th)— sentencing—aggravating factor of victim's intoxication

Where the preponderance of the evidence showed that the victim was intoxicated and the defendant knew it, the trial court, in determining factors which would aggravate defendant's sentence, was required to find that the victim was mentally infirm at the time he was killed.

Am Jur 2d, Homicide §§ 552, 554.

6. Criminal Law § 1123 (NCI4th)— sentencing—aggravating factor of premeditation and deliberation

In a second degree murder prosecution the trial court properly found as an aggravating factor that defendant's actions were premeditated and deliberate, since the prosecutor's election to charge defendant with second degree murder rather than first degree murder did not prevent the court from finding that defendant acted with premeditation and deliberation, and the preponderance of the evidence established nothing less than premeditation and deliberation.

Am Jur 2d, Homicide §§ 552, 554.

7. Criminal Law § 1266 (NCI4th)— sentencing—mitigating factor of good standing in community—insufficient evidence

The trial court did not err in failing to find as a mitigating factor defendant's good standing in the community, though defendant's evidence of her good character and reputation was uncontradicted, since the evidence was not manifestly credible in that it consisted of testimony by defendant's acquaintances at work who had no knowledge of defendant's character and reputation in the community in which she lived, and the only defense witness who could express an opinion as to defendant's reputation in the community testified that defendant "enjoys having a good time." N.C.G.S. § 15A-1340.4(a)(2)m.

Am Jur 2d, Homicide §§ 552, 554.

8. Criminal Law § 1222 (NCI4th)— sentencing—mitigating factor of mental condition—court not required to find

Expert testimony concerning the battered wife syndrome did not require the sentencing judge to find as a mitigating factor for defendant's second degree murder of her husband that she suffered from a mental condition that significantly reduced her culpability, since failure to find a nonstatutory mitigating factor, even when it is supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent an abuse of discretion.

Am Jur 2d, Homicide §§ 552, 554.

Judge PARKER concurring in the result.

Judge GREENE dissenting.

APPEAL by defendant from judgment entered 14 October 1988 by *Judge James R. Strickland* in BEAUFORT County Superior Court. Heard in the Court of Appeals on 10 January 1990.

After a trial by jury, defendant was convicted of second-degree murder in violation of G.S. § 14-17. Upon conviction, the trial court imposed an active prison term of thirty years. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show that Sheriff Joe Sykes was called to the home of Tino and Georgia Torres at approximately 6:30 p.m. on 28 February 1988 to investigate a shooting. Upon arrival, Sheriff Sykes found the victim, Tino Torres, in the living room lying on his back. Shortly thereafter, the rescue squad arrived, placed Mr. Torres on a stretcher and transported him to the emergency room of the Beaufort County Hospital. Mr. Torres, however, died some time later.

Defendant, Georgia Torres, was transferred to the Sheriff's Department for purposes of investigation, but was not under arrest. When she asked whether she needed an attorney, she was told

that "she did not need one at that time." Defendant then awaited questioning in a conference room with two of her daughters and two family friends. Just prior to being questioned by the investigating officers, defendant was advised of her Miranda rights, as prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), asked if she wanted an attorney present and informed that she could stop answering questions whenever she desired. Defendant indicated that she understood her rights and that she did not want an attorney present. Irrespective of the fact that no promises or assurances were made, defendant made a statement. Georgia Torres was later charged with second-degree murder.

An autopsy subsequently performed by Dr. Stan Harris revealed that Mr. Torres had been shot five times. Gunshot entrances were observed to the left upper arm, the front left chest, the right chest, the left lower abdomen and just below the rib cage. Based upon the paths of the bullets, it was concluded that the bullet to the victim's left upper arm shattered a bone thereby making it doubtful that he (Mr. Torres) could have used his arm after receiving that particular gunshot wound and that the fatal shot could have been fired while Mr. Torres was on the floor. Since the autopsy did not reveal evidence of powder residue on the wounds, it was further concluded that the shots were fired some distance away from victim. The results of a blood alcohol test suggested that Mr. Torres was intoxicated during the altercation.

Defendant's account of the events of 28 February was wholly contradictory to that of the State's and tended to show the following. Defendant, after marrying Tino Torres in October, 1986, became a victim of his long history of drinking and abusive behavior. On the night prior to the shooting, defendant and Mr. Torres drove to a Beaufort County bar where the couple got into a verbal disagreement and physical fight. The police were summoned by the bartender and Mr. Torres went to a friend's house, leaving defendant at the bar.

On 28 February, Mr. Torres arrived at defendant's house at approximately 6:15 p.m. to pick up his belongings. Upon his arrival, an argument between defendant and Torres started and moments later a fight ensued. Defendant, allegedly concerned about her safety and the safety of her family, picked up a rifle and shot her husband three times. (Contrary to the defendant's assertion that she only shot her husband three times, medical reports conclusively establish that Mr. Torres was, in fact, shot five times.) Defendant

alleges that her actions were not premeditated and deliberated and that she shot her husband in self-defense.

[1] On appeal, defendant brings forth nine questions for this Court's review. By Assignment of Error number one, defendant contends that the trial court erroneously denied her motion to suppress statements that were obtained in violation of her constitutional rights. Defendant bases her contention on the fact that she believes that she was in custody once the officers transported her from her house to the Beaufort County Sheriff's Department and that the officers interrogated her without the presence of counsel. Following a careful review of the evidence, we conclude defendant's constitutional rights were not violated.

Unquestionably, a suspect in custody must be informed of his constitutional rights before being questioned by law enforcement officers. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Where "an accused requests the presence of counsel, he may not be subjected to further interrogation by the police until counsel has been made available to him, unless the accused himself initiates further communication with the officers." *State v. Ladd*, 308 N.C. 272, 285, 302 S.E.2d 164, 173 (1983). If, however, an accused merely makes an inquiry as to whether he needs an attorney, he has not invoked his constitutional privilege to counsel. *See State v. McQueen*, 324 N.C. 118, 377 S.E.2d 38 (1989) (Defendant plainly invoked the right to counsel when he unequivocally stated, "I want my lawyer."); *State v. Ladd, supra.* (Defendant undeniably invoked his right to counsel when he stated "I will tell you where the rest of the money is after I talk to my lawyer.") The warnings required by *Miranda v. Arizona, supra*, are not necessary where a person is not in custody or not being questioned. *State v. Braswell, supra.* On appeal, the reviewing court must first determine whether the person was in custody at the time of questioning and then whether the person was, in fact, interrogated for *Miranda* purposes. If it is concluded that the person was not in custody during the time of questioning, any confession made will be admissible. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). The reviewing court must utilize

> an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant

way or, to the contrary, would believe that he was free to go at will.

Id. at 410, 290 S.E.2d at 581. *See also Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

The record in the case *sub judice* indicates that: (1) a *voir dire* hearing was conducted on the admissibility of defendant's confession; (2) findings of fact and conclusions of law were made by the trial court; and (3) the motion to suppress defendant's statements was thereafter denied. If supported by competent evidence in the record, the trial court's findings of fact following a *voir dire* hearing on the voluntariness of a confession are conclusive on appeal and may not be modified or set aside by the reviewing court. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982).

Inasmuch as we are bound by the record, we are unable to adopt defendant's position that she would have been detained had she chosen to get up and leave the Sheriff's Department *prior* to the time she gave her statement. Testimonial evidence suggests that defendant would have only been detained *after* she was advised of her Miranda rights, asked if she wanted an attorney present and informed that she could stop answering questions whenever she desired. For it was at this point that she was considered "in custody," despite defendant's assertions that she was under arrest when she was transported to the Sheriff's Department; during the time she waited in the conference room with her daughters and family friends; and during the time she asked if she needed an attorney present. Furthermore, defendant's reliance upon *State v. Ladd, supra*, and *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983), is misplaced since in both instances the defendant clearly indicated his decision to invoke his right to counsel. Here, defendant merely inquired as to whether she needed an attorney present. Thus, defendant's constitutional rights were not violated and the trial court's findings of fact and conclusions of law on the voluntariness of defendant's statements were not in error. This assignment of error is overruled.

Defendant next contends that the second-degree murder conviction must be vacated since there was insufficient evidence of malice and since she acted in imperfect self-defense. We disagree.

[2] North Carolina recognizes that under certain circumstances, the right to kill becomes an inherent right of natural law, but that such recourse is only justifiable where there is a real or apparent necessity. It is further recognized that

> a defendant is entitled to have the jury consider acquittal by reason of *perfect* self-defense when the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing it appeared to the defendant and she believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm.

State v. Norman, 324 N.C. 253, 259, 378 S.E.2d 8, 12 (1989). However, if the defendant is the initial aggressor, but is without intent to kill or seriously injure the decedent, and the decedent intensifies the confrontation to the point where it is reasonable for the defendant to believe that she must kill the decedent to save herself from imminent death or great bodily harm, such defendant is not justified in the killing, but is guilty of a lesser charge. *Id.*

In the present case, no evidence was introduced necessitating a jury instruction on imperfect self-defense. The evidence instead tended to show that the victim was intoxicated at the time of the altercation, unarmed and posed no immediate harm to the defendant or any member of her family. Thus, the trial court's instruction to the jury on self-defense was proper.

[3] Second-degree murder is defined as the unlawful killing of a human being with malice, but without evidence of premeditation and deliberation. *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980). The element of malice may be either expressed or implied. As a general rule, malice exists as a matter of law whenever there has been an unlawful and intentional homicide without an excuse or mitigating factors. *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969). Malice, nonetheless, may be implied from the use of a deadly weapon, individual circumstances, or the actions of the defendant. *State v. Mapp*, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

In light of the fact that the evidence presented at the sentencing hearing shows defendant, without a justifiable excuse or mitigating factors, shot Mr. Torres five times at some distance away with a rifle, we remain unpersuaded that the defendant shot her husband with anything less than malice and therefore overrule this assignment of error.

[4] By Assignment of Error number three, defendant contends that the trial court erred by overruling her objections to the testimony of Dr. Harris, an expert in pathology, that one of the shots could have been fired while the victim was on the floor. Defendant argues that Dr. Harris expressed an opinion on issues to be decided by the jury. We disagree.

In considering defendant's contention, we must apply the general guidelines enunciated in *State v. Saunders*, 317 N.C. 308, 345 S.E.2d 212 (1986), and *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). As articulated in both cases, "[t]he admissibility of expert opinion depends not on whether it would invade the jury's province, but rather on 'whether the witness . . . is in a better position to have an opinion . . . than is the trier of fact.' " *State v. Saunders*, *supra* at 314, 345 S.E.2d at 216, *quoting State v. Wilkerson*, *supra* at 568-69, 247 S.E.2d at 911.

Here, Dr. Harris' testimony was properly admitted pursuant to G.S. § 8C-1, Rule 702 which provides that:

> 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.

His opinion as to the positioning and path of the bullets was based upon his examination of the bullet entrances during an autopsy. Clearly, as the pathologist who performed the autopsy of the victim, Dr. Harris was in the best position to assist the jury in understanding the characteristics of the victim's wounds and determining whether the defendant acted in self-defense when she shot her husband. Thus, the trial court did not err in allowing Dr. Harris to testify that in his opinion one of the shots could have entered the victim while the victim was on the floor. This assignment of error is overruled.

By Assignments of Error five and six, defendant challenges the trial court's consideration of premeditation, deliberation and the victim's mental state as aggravating factors in her sentencing.

[5] As previously stated by this Court and our Supreme Court,

> [t]he 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; *see also State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983), and *State v. Hough*, 61 N.C. App. 132, 300 S.E.2d 409 (1983). Where, as here, the preponderance of the evidence shows that the victim was intoxicated and the defendant knew it, the trial court must find that the victim was mentally infirmed at the time he was killed. *See 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).

[6] We do not believe that the prosecutor's election to charge defendant with second-degree murder rather than first-degree murder prevented the trial court from finding that the defendant acted with premeditation and deliberation. We also do not believe that the preponderance of the evidence establishes something less than premeditation and deliberation. Accordingly, the trial court properly found as aggravating factors that the defendant's actions were both premeditated and deliberated and that the victim was mentally infirmed at the time he was killed.

Defendant's next two Assignments of Error challenge the trial court's failure to find as mitigating factors defendant's good standing in the community and her alleged mental condition that significantly reduced her culpability.

[7] At a sentencing hearing, a defendant bears the burden of persuasion on the issue of mitigating factors. He, in essence, is asking the court to find that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn." *State v. Taylor*, 309 N.C. 570, 577, 308 S.E.2d 302, 307 (1983), *quoting North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395 (1979). As defined by statute, the mitigating factor of good character refers to the defendant's good character and reputation in the community in which he lives. *See* G.S. § 15A-1340.4(a)(2)m. We note that

> [d]etermining the credibility of evidence is at the heart of the fact-finding function. Nevertheless, . . . we must find the sentencing judge in error if he fails to find a statutory factor

when evidence of its existence is both uncontradicted and manifestly credible.

State v. Jones, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983).

In the case under discussion, defendant's evidence of her good character and reputation is uncontradicted, however, it is not manifestly credible. With the exclusion of one witness, the other witnesses were acquaintances from work and had no knowledge of defendant's character and reputation in the community in which she lived. The only defense witness that could express an opinion as to defendant's reputation in the community testified that defendant "enjoys having a good time." Such testimony is not overwhelmingly persuasive on the question of defendant's good character or good reputation in the community where she lives. We therefore conclude that the testimony is not manifestly credible.

[8] Defendant further contends that the testimony of Dr. Sharon Willingham concerning the "battered wife syndrome" required the sentencing judge to find, as a mitigating factor, that she suffered from a mental condition as provided in G.S. § 15A-1340.4(a)(2)d. While we note that the term "mental condition" pursuant to G.S. § 15A-1340.4(a)(2)d has been held to include the abused spouse syndrome, we also note that a "[f]ailure to find a nonstatutory mitigating factor, even when it is supported by uncontradicted, substantial, and manifestly credible evidence, will not be disturbed absent an abuse of that discretion." *State v. Holden*, 321 N.C. 689, 697, 365 S.E.2d 626, 630 (1988). We have reviewed the evidence, but detect no abuse of the trial judge's discretion.

Finally, we have considered, but find it unnecessary to discuss defendant's last Assignment of Error that the trial court erred by failing to find, as mitigating factors, that defendant acted under strong provocation or that her relationship with her husband was extenuating. Suffice it to say that "[u]ncontradicted, quantitatively substantial, and credible evidence may simply fail to establish, by a preponderance of the evidence, any given factor in aggravation or mitigation." *State v. Michael*, 311 N.C. 214, 219-20, 316 S.E.2d 276, 280 (1984), *quoting State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E.2d 783, 789 (1983). This assignment of error is overruled.

We conclude that defendant received a fair trial, free of prejudicial error, and that the sentence imposed on her conviction was proper.

No error.

Judge PARKER concurs in the result.

Judge GREENE dissents.

Judge PARKER concurring in the result.

I concur in the result only for the reason that in my opinion defendant was in custody while she was detained at the Sheriff's Department before questioning. Under the objective standard in *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982), the question is whether a reasonable person in the suspect's position would believe that he was in custody or free to leave. The sheriff's deputy testified that if defendant had attempted to leave, she would not have been allowed to do so. The record also reveals, however, that prior to any questioning by any law enforcement officials, defendant was not only read her constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), but she was specifically asked if she wanted a lawyer at that time. After consulting with a friend who was present, defendant responded that she did not. In view of this specific exchange concerning defendant's desire for counsel, defendant's earlier question in the patrol car as to whether she needed a lawyer and the response that she did not need a lawyer at that time were of no consequence. Unlike in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981), defendant did not make a specific request for counsel, and the question was asked and answered several hours before any interrogation took place. Defendant made no incriminating statements prior to being informed of her rights, and the evidence reveals no indication of pressure or coercion for her to talk. Defendant was obviously cognizant of the importance of counsel. She had several hours not only to consider but also to talk with friends and relatives who were in and out as to whether she should have a lawyer. Under these circumstances defendant, in my opinion, freely, voluntarily, and knowingly waived her right to remain silent and to have counsel present before being interrogated or giving her statement. For this reason the trial court did not err in denying the motion to suppress.

Judge GREENE dissenting.

The trial court entered the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

4. That on the evening of February 28th, 1988, the defendant, Georgia Jackson Torres, was at her residence, this being after the death of one Florentine Conteras Torres, and that several deputy sheriffs had arrived at said premises, Deputy Sheriff Joe Sykes being one of the early arrivals; that Deputy Sheriff Sykes made inquiry about what happened the night before and that subsequently Deputy Sheriff Joe Sykes transported the defendant, Georgin [sic] Ann Torres, along with the defendant's close friend, Brenda Purser, to the Sheriff's Department in the City of Washington.

5. That the defendant at that time was not under arrest.

6. That the defendant was placed in a conference room in the Sheriff's Department and that two of the defendant's daughters, along with Brenda Purser and Charles Purser, were at the Sheriff's Department.

7. That before the interview of the defendant by S.B.I. Agent Lewis Young and Deputy Sheriff Donald Deese, the defendant was in the conference room of the Sheriff's Department in the company of Deputy Sheriff Sykes and was subsequently in the office of Sheriff Sheppard.

8. That her children were in and out and at the point where the defendant made inquiry about an attorney she was advised that she did not need one at that time.

9. That the defendant had not been placed under arrest during any such inquiry.

. . . .

12. That while the defendant was in Sheriff Sheppard's office she was advised that Officer Donald Deese and S.B.I. Agent Lewis Young would question her and she asked if somebody could be with her stating that she wanted Charles Purser and Brenda Purser to be with her and that was arranged; that thereafter S.B.I. Agent Lewis Young and Deputy Sheriff Donald Deese went to Sheriff Sheppard's office to begin

the interview with the defendant, Georgia Jackson Torres, and that present with her throughout the complete interview that extended from 10:35 p.m., February 28, 1988 to 12:40 o'clock a.m. the next day were five individuals, to-wit: Young, Deese, Torres and Mr. and Mrs. Purser, with Charles Purser leaving only temporarily to obtain a soft drink for the defendant, Georgia Torres.

14. That the defendant prior to the commencement of the interview by S.B.I. Agent Young and Deputy Sheriff Deese was advised of her constitutional rights in conformity with the Miranda decision (*Miranda v. Arizona*, 384 U.S. 436).

CONCLUSIONS OF LAW

1. None of the constitutional rights, either federal or state, of the defendant were violated by her detention, interrogation or statements.

. . . .

4. That the defendant was in full understanding of her constitutional rights to remain silent and right to counsel and all other rights and that she freely, knowingly, intelligently and voluntarily waived each of those rights and thereupon made a statement to Officers Young and Deese.

5. That the statement made by the defendant to Officers Young and Deese on February 28, 1988 and February 29, 1988 was made freely, voluntarily and understandingly.

"The determination of whether an individual is 'in custody' during an interrogation so as to invoke the requirements of *Miranda* requires an application of fixed rules of law and results in a conclusion of law and not a finding of fact." *State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 583 (1982). Determination of custody is based "upon an objective test of what a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will." *Davis*, at 410, 290 S.E.2d at 581. Here, the trial court made no finding or conclusion concerning the issue of 'custody.' The findings of the trial court that the defendant was "not under arrest," while relevant to the issue of whether a person

is in custody, are not determinative of that issue. *See State v. Freeman*, 307 N.C. 357, 362, 298 S.E.2d 331, 334 (1983).

Nevertheless, the trial court's failure to enter a conclusion on the issue of whether the defendant was in 'custody' at any relevant time does not preclude this court from making a conclusion on the issue "whe[n] the historical facts are uncontroverted and clearly reflected in the record. . . ." *Davis*, 305 N.C. at 415, 290 S.E.2d at 583.

Combining the uncontradicted facts in the record with the findings of fact entered by the trial court, it is revealed that the defendant, at the request of Deputy Sheriff Sykes, traveled from her home in a sheriff's patrol car to a conference room at the sheriff's department. She was picked up at her home at 6:30 p.m. and arrived at the sheriff's department at approximately 7:00 p.m. She was placed in a conference room in the sheriff's department and remained in the presence of Deputy Sykes until 10:30 p.m., at which time two S.B.I. agents arrived and entered the room and remained in the room until 12:40 a.m. the following morning. Deputy Sykes, without advising the defendant of her *Miranda* rights, questioned the defendant "about what happened the night before." Sykes testified that if defendant had attempted to leave the conference room, he would have detained her. At some point between 7:00 p.m. and 10:30 p.m. the defendant made inquiry of either or both Deputy Sykes and Sheriff Nelson Sheppard as to whether she needed an attorney, and she was told that "she did not need one at that time." S.B.I. Agents Lewis Young and Donald Deese advised defendant of her *Miranda* rights at approximately 10:30 p.m. Specifically, Agent Young testified:

> Q. All right. Prior to the time of asking her any questions, was she advised of her Miranda warnings?
>
> A. Yes sir, she was.
>
> Q. What did you . . . what did you tell her and what was her response?
>
> A. I advised her she had the right to remain silent and not make any statement; that anything you say can be used against you in Court; you have the right to talk to a lawyer for advice before we ask you any questions and have him or anyone else with you during questioning. If you cannot afford to hire a lawyer one will be appointed to represent you before any

questioning if you wish one. Next I asked her if she wanted a lawyer now and . . .

Q. What . . . what did she tell you?

A. Well, at first she acted like she didn't know which . . . what she wanted to do and I indicated to her that that question meant did you want a lawyer right now in this very room while we talked; it doesn't mean you can't have a lawyer at another time or stop any time you want to, and she seemed hesitant as to what she wanted to do. She turned to the Pursers and they had some conversation about it and I told her all we needed was a "yes" or "no," that we could not advise her what to do. She ultimately answered "no," and then we went on and I advised her, if you decide to answer questions now without a lawyer present you have the right to stop answering them at any time. I asked her, "do you understand each of these rights I have explained to you?" she answered, "yes, I do." I asked her, "having these rights in mind, do you wish to talk to us and answer questions now." She answered, "yes, I will."

I believe these facts require the conclusion that the defendant was in custody and was subjected to interrogation not only when she was in the presence of the S.B.I. agents but also at the time she made her inquiry of Deputy Sykes as to whether she needed an attorney present at the time.[1] A deputy sheriff requested defendant to travel to the sheriff's department in a patrol car. She was placed in a conference room at the sheriff's department under the guard of a sheriff's deputy for almost six hours and was questioned by both Sykes and the two S.B.I. agents regarding the events of the homicide. The defendant was at no time advised that she did not have to travel to the sheriff's department with Deputy Sykes, nor was she ever told that she was free to leave the sheriff's department. In my opinion, a reasonable person in the defendant's position would have believed that she had been taken into custody and would not have believed that she was free

1. Assuming arguendo that the defendant was not subjected to custodial interrogation until the S.B.I. agents arrived, the defendant's assertion of a desire to speak with an attorney prior to their arrival was nonetheless a sufficient invocation of her right to counsel barring any police initiated interrogation. *See* LaFave & Israel, *Criminal Procedure* § 6.9, at 109 (Supp. 1990).

to go at will. In fact, the events occurring made a belief that she was not free to leave the more reasonable belief.

The Fifth and Fourteenth Amendments require that any custodial interrogation of defendant be preceded by advising the defendant that she has a right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L.Ed.2d 694, 726 (1966). Once a defendant invokes her right to have counsel present during the custodial interrogation, the defendant "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L.Ed.2d 378, 386 (1981). This is so even if defendant has been further advised of his *Miranda* rights and waived those rights. *Id.*

Here, the defendant did not specifically request a lawyer but instead inquired of a custodial law enforcement officer whether she needed a lawyer at the time. The officer responded in the negative. Because the State has the burden of establishing a valid waiver and all doubts must be resolved in favor of protecting constitutional claims, *Michigan v. Jackson*, 475 U.S. 625, 633, 89 L.Ed.2d 631, 640 (1986), "a broad, rather than a narrow, interpretation [must be given] to a defendant's request for counsel . . . ." *Id.; Connecticut v. Barrett*, 479 U.S. 523, 529, 93 L.Ed.2d 920, 928 (1987). In my opinion, when the custodial officer refused to seek clarification of whether the defendant specifically wanted a lawyer present prior to any questioning, the inquiry of the defendant regarding her need for a lawyer must be accepted as a request for a lawyer. *See Ruffin v. United States*, 524 A.2d 685, 700-01 (D.C. 1987), *cert. denied*, 486 U.S. 1057, 100 L.Ed.2d 927 (1988) (appropriate response to ambiguous assertion of right to counsel should be a request by police interrogators for clarification); *People v. Superior Court of Mono County*, 542 P.2d 1390, 1394-95 (1975), *cert. denied*, 429 U.S. 816, 50 L.Ed.2d 76 (1976) (when the accused asked interrogating officers "do you think we need an attorney," officers were required to cease questioning); *People v. Alexander*, 261 N.W.2d 63, 64 (1977), *cert. denied*, 436 U.S. 958, 57 L.Ed.2d 1123 (1978) (interrogation must stop when defendant asks interrogating officers whether they thought she needed an attorney); *People v. Fish*, 660 P.2d 505, 509 (1983) ("an ambiguous indication of an interest in having counsel requires cessation of police interrogation"); LaFave & Israel, *Criminal Procedure* § 6.9, at 532 (1984) ("an inquiry whether the police officer

could recommend an attorney" is an assertion of right to counsel by implication). Accordingly, all further police-"initiated custodial interrogation" should have ceased until such time as counsel was made available to the defendant or until such time as defendant initiated further conversation with the deputies or S.B.I. agents. *Edwards*, at 485, 68 L.Ed.2d at 387.

Since the confession was the result of police initiated custodial interrogation which occurred after the defendant had invoked her right to counsel, the confession was not admissible, and in my opinion the defendant is entitled to a new trial.

BILLIE M. HARTSELL, PLAINTIFF/APPELLEE v. GENE W. HARTSELL, DEFENDANT/APPELLANT

No. 8926DC551

(Filed 17 July 1990)

1. **Divorce and Alimony § 21.5 (NCI3d)— failure to comply with earlier consent decree—finding of contempt—sufficiency of evidence**

Evidence was sufficient to support the trial court's findings that defendant was fully capable at all times of complying with all provisions of the parties' prior consent judgment and that defendant had the present ability and continuing capability to comply with all remaining financial provisions of the court's decree, and such findings were sufficient to support the court's conclusion that defendant's conduct was willful and defendant was therefore in contempt, where plaintiff produced evidence that she had conveyed a house with at least $60,000 equity to defendant, and defendant had several items of personal property of value.

Am Jur 2d, Divorce and Separation §§ 811, 812.

2. **Divorce and Alimony § 21.5 (NCI3d)— failure to comply with earlier consent decree—knowledge of contents—sufficiency of evidence**

There was sufficient competent evidence to support the trial court's finding that defendant was fully aware of the contents of a consent judgment and fully understood it, since

both defendant and his counsel signed the consent judgment, and, absent evidence to the contrary, defendant was thus held to have understood and consented to the contents of that judgment.

Am Jur 2d, Divorce and Separation § 808.

3. **Divorce and Alimony § 21.5 (NCI3d); Constitutional Law § 74 (NCI3d)— civil contempt—protection of fifth amendment rights—no consideration on appeal**

Where the trial court ordered defendant incarcerated, gave defendant the opportunity to purge his contempt by complying with the prior consent order and paying certain sums for attorney's fees and damages, and imposed no other penalty, the relief granted was wholly civil in nature, and since defendant was not in fact subject to criminal penalties, the court on appeal was not required to examine whether defendant's fifth amendment rights were adequately protected during the contempt proceeding.

Am Jur 2d, Divorce and Separation § 815.

4. **Appeal and Error § 453 (NCI4th)— constitutionality of contempt statute—issue not raised in trial court—no consideration on appeal**

Defendant could not challenge on appeal the constitutionality of N.C.G.S. § 5A-23, which allows the court to find a person in both civil and criminal contempt for the same act, as applied to him, since defendant did not raise a constitutional challenge in the trial court.

Am Jur 2d, Appeal and Error § 545.

5. **Attorneys at Law § 64 (NCI4th)— attorney's fees awarded in contempt proceeding—no attorney's fees awarded for equitable distribution action**

There was no merit to defendant's contention that the trial court erred in awarding attorney's fees to plaintiff because this action involved an equitable distribution order and there was no statutory provision for attorney's fees in such actions, since the trial court awarded only such fees as were incurred in enforcing the original equitable distribution order by bringing defendant before the court for contempt; there was no award for fees incurred in obtaining the equitable distribution

order in the first instance; and the award was supported by the affidavit of plaintiff's attorney and proper findings of fact.

Am Jur 2d, Divorce and Separation §§ 589, 598.

6. **Contempt of Court § 7 (NCI3d); Divorce and Alimony § 21.5 (NCI3d)— contempt found—transfer of property to purge contempt proper—no authority of court to order compensatory damages**

Upon a finding of contempt in situations where the original order requires a transfer of property, including intangible property such as that represented by stock certificates, the trial court has authority to order the contemnor to transfer said property as a condition for purging the contempt, but the court does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order.

Am Jur 2d, Divorce and Separation § 815.

7. **Contempt of Court § 6.1 (NCI3d); Evidence § 13 (NCI3d)— testimony by attorney—no violation of attorney-client privilege**

There was no merit to defendant's contention that his former attorney's testimony at his contempt hearing violated his attorney-client privilege where the attorney testified about his correspondence with defendant concerning entry of the consent judgment and the transfer of deeds pursuant to that order, correspondence asking defendant to come to the attorney's office to sign the judgment and deeds, and correspondence with defendant to transmit letters from plaintiff's attorney demanding that defendant comply with the consent judgment, and the attorney therefore was not asked to testify to the substance of any client confidence communicated to him by defendant.

Am Jur 2d, Divorce and Separation § 806; Witnesses § 212.

Judge GREENE dissenting.

APPEAL by defendant from order entered 13 January 1989, *nunc pro tunc*, 13 December 1988 by *Judge Robert P. Johnston* in MECKLENBURG County District Court. Heard in the Court of Appeals 22 November 1989.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr. and Barbara J. Hellenschmidt, for plaintiff-appellee.

Business Legal Services, P.A., by Douglas E. Brafford and Stephen D. Kaylor, for defendant-appellant.

PARKER, Judge.

The parties were married 24 July 1954. On 6 February 1985 plaintiff filed a complaint seeking a divorce from bed and board, temporary and permanent alimony, and equitable distribution of the marital property. Following other proceedings in the matter, on 15 February 1988, the court entered judgment settling the distribution of the parties' property as consented to by the parties and their counsel. This judgment provided that the parties exchange certain real and personal property and transfer titles to said property, that defendant should pay to plaintiff the sum of $30,000.00 as a distributive award on or before 1 July 1988, and that each party was to retain all other property then possessed by each. As to the exchange of real property, plaintiff and defendant were to exchange residences, with plaintiff getting the home at 101 Pine Point, Lake Wylie, South Carolina, and defendant getting the home at 6425 Springfield Drive, Charlotte, North Carolina. This exchange was to occur within 30 days of the payment of the distributive award. Additionally, each party was to clean the residence in their possession prior to transfer and was to leave the residence in a "tidy condition." Personal property to be exchanged was to be left at the residences at the time of transfer or other arrangements were to be made for the exchange at the time of the transfer.

On 27 October 1988 plaintiff filed a motion alleging that defendant had at all times had the ability to comply with the consent judgment and had wilfully refused to comply with the terms of said judgment. Plaintiff requested that the court order defendant to show cause why he should not be held in contempt of the prior judgment. The court issued an order to show cause informing defendant that the court had probable cause to believe that defendant was in civil and/or criminal contempt of the prior consent judgment and directing defendant to appear before the court.

The show cause hearing was held 12 and 13 December 1988 and plaintiff presented evidence which tended to show that as of the date of the hearing defendant had not paid plaintiff the

$30,000.00 distributive award, defendant had abandoned the Lake Wylie residence, and when plaintiff took possession of the Lake Wylie residence it was a "wreck" in that the house was full of garbage, the water pipes had burst, flooding the inside, the yard was overgrown and full of weeds, and part of a bedroom floor was rotted out where rain had come in through an open window. Counsel for plaintiff then called defendant to the stand. After answering some preliminary questions, defendant refused to answer further questions and asserted his rights under the fifth amendment to the United States Constitution. Plaintiff also called as a witness defendant's former attorney, who had participated in the property settlement and had helped draft the judgment which defendant allegedly had disregarded.

Based on the evidence presented at the hearing, the court found defendant in civil contempt of the prior consent judgment and ordered defendant to be incarcerated until he purged his contempt by transferring title to the 1984 Datsun automobile to plaintiff, by transferring possession of certain named items of personal property to plaintiff, and by paying $35,961.00 representing $30,000.00 due 1 July 1988 under the consent decree, $1,376.00 ad valorem taxes, $338.00 moving costs, $1,247.00 in repairs and cleanup and $3,000.00 attorney's fees. From this order holding him in contempt defendant appeals.

Defendant brings forward numerous assignments of error on appeal. These assignments of error are grouped into five basic arguments. First, defendant contends that the court's order is erroneous in that various findings of fact are not supported by competent evidence. Second, defendant asserts that the court erroneously placed the burden of proof on defendant and followed a procedure which violated defendant's rights under the United States Constitution. Defendant next assigns error to the trial court's awarding attorney's fees to plaintiff. Fourth, defendant contends that the trial court erred in awarding compensatory damages to plaintiff. Finally, defendant asserts that the admission of testimony of defendant's former attorney at the contempt hearing violated defendant's attorney-client privilege.

I.

In a domestic relations action, a consent judgment which has been adopted by the court may be enforced by civil contempt. *Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E.2d 657 (1982),

aff'd, 307 N.C. 401, 298 S.E.2d 345 (1983). "Review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986) (citing *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971)). Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 394 (1966).

[1] In his first argument, defendant contends that there was no competent evidence to support the trial judge's findings of fact. Our careful review of the transcript and record on appeal reveals competent evidence to support each finding of fact. Therefore, we find no merit in defendant's contention.

In the present case the trial court found as fact that "[d]efendant ha[d] at all times been fully capable and able of complying with all provisions of the Court's decree" and that "[d]efendant ha[d] the present ability and continuing capability to comply with all remaining provisions of the Court's decree with which he ha[d] not heretofore complied." Based on these findings the court concluded that defendant's conduct was wilful and in direct disobedience of the judgment.

In order to support a finding of wilfulness in a civil contempt proceeding there must be evidence to establish as an affirmative fact that defendant possesses the current ability to comply with the order. *Adkins v. Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222; *Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985); *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E.2d 786 (1980). Although specific findings as to the contemnor's present means are preferable, this Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of wilfulness necessary to support a judgment of civil contempt. *Adkins v. Adkins*, 82 N.C. App. at 292-93, 346 S.E.2d at 222; *Plott v. Plott*, 74 N.C. App. at 84-85, 327 S.E.2d at 275.

In the present case these findings are supported by competent evidence. At trial plaintiff produced evidence that she had conveyed the house in Charlotte to defendant and that the equity in this house was at least $60,000.00. Additionally, defendant had several items of personal property of value. Although defendant contends

that plaintiff failed to affirmatively prove that he could have obtained at least $60,000.00 for the equity in the Charlotte house, in a similar case this Court has held that evidence that the contemnor owned three automobiles and at least three tractor-trailers in conjunction with his business was competent evidence of the contemnor's present ability to comply with court-ordered child support payments. *Adkins v. Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222. The present ability to comply includes the present ability to take reasonable measures that would enable him to comply. *Teachey v. Teachey*, 46 N.C. App. at 334-35, 264 S.E.2d at 787-88. Accordingly, we hold that the court's finding of present ability to comply was based on competent evidence.

Defendant further contends that he did not have the present ability to transfer various items of personal property to plaintiff. We have examined defendant's reasons in support of these contentions and find them without merit.

[2] Defendant also asserts that there was no competent evidence to support the court's finding that "[d]efendant at all times was fully aware of the contents of the Order and had full understanding of same." Both defendant and defendant's counsel signed the consent judgment and, thus, absent evidence to the contrary, defendant is held to have understood and consented to the contents of that judgment. *See Wachovia Bank v. Bounous*, 53 N.C. App. 700, 705-06, 281 S.E.2d 712, 715 (1981); *Nickels v. Nickels*, 51 N.C. App. 690, 693-94, 277 S.E.2d 577, 579, *disc. rev. denied*, 303 N.C. 545, 281 S.E.2d 392 (1981).

II.

[3] In his second argument defendant asserts that, because he was potentially subject to criminal penalties in this proceeding, by placing the burden of persuasion on defendant with respect to changed circumstances or justification for noncompliance with the consent judgment, the trial court denied him his right against self-incrimination as guaranteed by the fifth and fourteenth amendments to the United States Constitution, by the North Carolina Constitution, and by the North Carolina General Statutes. According to defendant, by virtue of the show cause order, which stated that the court had probable cause to believe that "civil and/or criminal contempt ha[d] occurred," defendant was subject to a proceeding whereby he was exposed not only to civil penalties but to criminal penalties as well.

Defendant asserts that although, under G.S. 5A-23, criminal contempt can be found in a civil contempt proceeding, different procedures are applicable and, since defendant was "accused" of criminal contempt, he was entitled to the benefits of all procedural and constitutional safeguards. Defendant contends that he was not aware that he was no longer subject to criminal penalties until the court announced its findings. Supposedly, as a result of this lack of knowledge, defendant lost the opportunity to defend against the charge of civil contempt by testifying and was thereby punished for exercising his constitutional right. Defendant argues that, where a person is subject to both civil and criminal contempt, requiring the person to choose between (a) giving up the right against self-incrimination and (b) meeting the burden of persuasion on the issue of civil contempt infringes on the person's right against self-incrimination.

In civil contempt the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril. In *Plott v. Plott, supra,* this Court stated the following:

> The statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent. Civil contempt proceedings are initiated by a party interested in enforcing the order by filing a motion in the cause. The motion must be based on a sworn statement or affidavit from which the court determines there is "probable cause to believe that there is civil contempt." G.S. 5A-23. The opposing party must then show cause why he should not be found in contempt. . . .
>
> The court here had already found probable cause to believe that there was civil contempt based on the verified allegations in defendant's motion. Plaintiff offered no evidence except a stipulation as to the amount of the arrearage. This was clearly not sufficient to refute the motion's allegations. Since plaintiff failed to carry her burden, the court was warranted in finding her in contempt.

74 N.C. App. at 85-86, 327 S.E.2d at 275.

In contrast, G.S. 5A-15(e) clearly states that a person charged with criminal contempt may not even be called to be a witness against himself. Additionally, the facts upon which the determina-

tion of criminal contempt is based must be established beyond a reasonable doubt. G.S. 5A-15(f).

In our opinion the present case is controlled by this Court's decision in *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988). In *Bishop*, the defendant appealed from a contempt order arising from his alleged failure to pay child support under a prior consent order. On appeal defendant contended that since he had been judged guilty of criminal contempt and since the court had failed to inquire into whether defendant needed legal representation, his constitutional right to counsel had been denied. Applying the analysis adopted by the United States Supreme Court in *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed. 2d 721 (1988), this Court held that since defendant was given an opportunity to purge himself of contempt the relief afforded by the proceeding should be characterized as civil in nature. Moreover, since no relief of a punitive nature was ordered, the trial court was not required to afford the defendant all procedural and evidentiary safeguards required for criminal contempt proceedings and this Court was not required to review whether the procedures actually used would have been adequate to support an order for criminal contempt. *Bishop v. Bishop*, 90 N.C. App. at 505-06, 369 S.E.2d at 109-10.

In the present case the trial court ordered defendant incarcerated, gave defendant the opportunity to purge his contempt by complying with the prior consent order and paying certain sums for attorney's fees and damages, and imposed no other penalty. In this respect the relief granted was wholly civil in nature. Since defendant was not, in fact, subject to criminal penalties, under the *Bishop* decision, we are not required to examine whether defendant's fifth amendment rights were adequately protected during the contempt proceeding.

[4] Defendant also contends that G.S. 5A-23, which allows the court to find a person in both civil and criminal contempt for the same act, is unconstitutional as applied to this case because it denies defendant substantial rights guaranteed by the United States Constitution by placing the burden of persuasion on defendant. Defendant contends that he was forced to choose between exercising his fifth amendment rights and the risk of conviction for civil contempt. Defendant challenges the "mixed" proceeding, saying that such proceeding necessarily "chills" the exercise of constitutional rights.

Our review of the transcript reveals that although defendant asserted his fifth amendment right against self-incrimination during the hearing, he never raised before the trial judge his contention that G.S. 5A-23(g) is unconstitutional as applied to him. Our appellate courts have repeatedly held that such constitutional challenges must be raised in the trial court in order to be presented for review at the appellate level. *See, e.g., Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 174, 381 S.E.2d 445, 446 (1989) (n.1). Accordingly, this assignment of error is overruled.

III.

[5] Defendant next asserts that the trial court erred in awarding attorney's fees to plaintiff because this action involved an equitable distribution order and the North Carolina General Statutes do not provide attorney's fees in such actions. Defendant cites *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 196 S.E.2d 598, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973), for the proposition that the court erred in awarding attorney's fees to plaintiff. In *Records* this Court affirmed the trial judge's determination that he lacked authority to award attorney's fees to plaintiff after holding defendant in civil contempt of a temporary restraining order. In so doing, the Court stated:

> Although provisions for the award of attorneys fees to the prevailing plaintiff exist in other jurisdictions, we have found no case law or statutory authority providing for such allowance in North Carolina. See 17 C.J.S., Contempt, § 96; 17 Am. Jur. 2d, Contempt, § 114; Annot., 43 A.L.R.3d 793; Annot., 55 A.L.R.2d 979. The case of *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970), is not authority for the plaintiffs' argument. Counsel fees may be awarded to a dependent spouse in an action for the support or custody of a minor child, by virtue of G.S. 50-13.6. And, where the petitioning spouse is no longer a dependent spouse, counsel fees in a proper case may be awarded by virtue of the court's authority to protect the interests of minor children in an action for the support or custody of a minor child. *Andrews v. Andrews*, 12 N.C. App. 410, 183 S.E.2d 843 (1971). In *Blair*, the lawful authority of the court to award counsel fees under the facts in that case was enforced by means of the court's contempt power. In the case

> before us, no such authority to award counsel fees arises on the facts.

Id. at 187, 196 S.E.2d at 602.

In the present case defendant contends that based on the rationale in *Records*, this Court should vacate the trial court's award of counsel fees because the equitable distribution statute, G.S. 50-20, does not specifically provide for attorney's fees. Be this as it may, in *Conrad v. Conrad*, 82 N.C. App. 758, 348 S.E.2d 349 (1986), this Court, relying on the decision in *Blair v. Blair*, 8 N.C. App. 61, 173 S.E.2d 513 (1970), held that the contempt power of the district court does include the authority to award attorney's fees as a condition of purging contempt for failure to comply with an equitable distribution order. *Conrad v. Conrad*, 82 N.C. App. at 759-60, 348 S.E.2d at 349-50.

Defendant also cites *Patterson v. Patterson*, 81 N.C. App. 255, 343 S.E.2d 595 (1986), for the proposition that attorney's fees are not recoverable in an equitable distribution action. *Id.* at 262, 343 S.E.2d at 600. The present case and *Conrad* are distinguishable from *Patterson*, however, because in *Patterson* the plaintiff sought attorney's fees in connection with obtaining an order of equitable distribution in the first instance as opposed to seeking attorney's fees incurred to enforce the order. In the present case the court awarded only such fees as were incurred in enforcing the original equitable distribution order by bringing defendant before the court for contempt; there was no award for fees incurred in obtaining the equitable distribution order in the first instance. Additionally, this award was supported by the affidavit of plaintiff's attorney and proper findings of fact; therefore, the assignment of error is overruled.

IV.

[6] Defendant next contends that the trial court erred in awarding compensatory damages to plaintiff because such an award is not properly within the scope of the contempt proceeding. We agree with this contention. In *Records v. Tape Corp. and Broadcasting System v. Tape Corp., supra*, plaintiffs presented on appeal the issue of whether a trial judge had authority to award compensatory relief to plaintiffs for damages resulting from defendant's wilful disobedience of a prior court order. In affirming the trial court's

denial of plaintiffs' motion for compensatory damages this Court stated the following:

> [C]ontempt in North Carolina is treated as an offense against "the majesty of the law," is essentially criminal in nature, and is superintended or controlled pursuant to statutory authority solely by means of punishment. Although it may be that the punishment differs for criminal and civil contempt, our statutory provisions for contempt embodied in G.S. 5-1, et seq., do not provide for any other means of enforcing the courts' power of contempt than by punishment, as befits the criminal nature of the proceedings. We hold that, by virtue of the criminal nature of contempt proceedings and the statutory provisions for enforcement of the contempt power by punishment only, a trial judge in North Carolina has no authority to award indemnifying fines or other compensation to a private plaintiff in a contempt proceeding.

Id. at 187, 196 S.E.2d at 601-02. Numerous other cases also hold that such relief is not available in a contempt proceeding. *See M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 101-02, 370 S.E.2d 431, 434 (1988); *Glesner v. Dembrosky*, 73 N.C. App. 594, 598-99, 327 S.E.2d 60, 63 (1985); *Elliott v. Burton*, 19 N.C. App. 291, 295, 198 S.E.2d 489, 491 (1973). Our courts have recognized that this position is contrary to that of the majority of states and to the federal position. *See Glesner v. Dembrosky*, 73 N.C. App. at 599, 327 S.E.2d at 63; Annotation, *Right of Injured Party to Award of Compensatory Damages or Fine in Contempt Proceedings*, 85 A.L.R.3d 895 (1978).

Plaintiff contends that this Court's decision in *Conrad v. Conrad, supra*, stands for the proposition that compensatory relief is available in civil contempt proceedings because the purpose of such proceedings is to place plaintiff in the same position as she would have been in had defendant complied with his obligations in the first place. In *Conrad*, this Court held that where the court's original equitable distribution order required defendant to transfer to plaintiff certain stock certificates and where the stock had split and dividends had accrued during the period in which defendant had wilfully refused to transfer the certificates, the trial court properly ordered defendant to pay plaintiff the present value of the stock as a condition of purging his contempt. *Conrad v. Conrad*, 82 N.C. App. at 760, 348 S.E.2d at 350. In our opinion this remedy was

no different than ordering that the defendant physically transfer the stock certificates to plaintiff because such a transfer, under the facts in *Conrad*, would necessarily have included the passive appreciation on the stocks.

In light of the strong precedent holding that the trial court generally cannot order the contemnor to pay compensatory damages, we decline to give an expansive reading to our decision in *Conrad*; rather, we hold that *Conrad* must be limited to its facts, *i.e.*, that upon a finding of contempt, in situations where the original order requires a transfer of property (including intangible property such as that represented by stock certificates), the trial court has authority to order the contemnor to transfer said property as a condition of purging the contempt, but does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. *See* G.S. 5A-22 and *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980).

In this regard, the award of $1,247.00 for repairs and cleanup and $338.00 for moving costs was improper. Defendant would, however, be required to pay the past due ad valorem taxes on the Lake Wylie property because he had been ordered to pay this amount in the original judgment and compliance with the prior order is not an award of compensatory damages.

V.

[7] Finally, defendant asserts that the testimony of defendant's former attorney at the contempt hearing violated defendant's attorney-client privilege. At the hearing defendant's former attorney was called as a witness by plaintiff. On the stand plaintiff elicited testimony from the attorney about his correspondence with defendant concerning the entry of the consent judgment and the transfer of deeds pursuant to that order; correspondence with defendant asking defendant to come to the attorney's office to sign the judgment and the deeds; and correspondence with defendant to transmit letters from plaintiff's attorney demanding that defendant comply with the consent judgment. Defendant's former attorney also testified that defendant met with him in his office following his receipt of the demand letter from plaintiff's attorney.

In *Dobias v. White*, 240 N.C. 680, 83 S.E.2d 785 (1954), our Supreme Court stated the general rule regarding the invocation of the attorney-client privilege as follows:

> It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents.
>
> But the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion. Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential, or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged.

Id. at 684-85, 83 S.E.2d at 788 (citations omitted). Similarly, although the substance of confidential communications is protected by the privilege, the fact that the communication occurred is not privileged. *See United States v. Kendrick*, 331 F.2d 110, 113 (4th Cir. 1964). In our opinion, in the present case defendant's former attorney was not asked to testify to the substance of any client confidence communicated to him by defendant. For this reason the trial court did not err in admitting this testimony over defendant's objections.

Our review of the transcript and record on appeal reveals both that defendant received a fair hearing free from prejudicial error and that the trial court made sufficient findings of fact based on competent evidence to conclude that defendant's failure to comply with the prior consent judgment was wilful and, thus, that defendant was in civil contempt of the court's order. With the exception of the award of compensatory damages for repairs made to the Lake Wylie home and moving costs, the order of the trial court is affirmed.

Affirmed in part and vacated in part.

Judge JOHNSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that "since no relief of a punitive nature was ordered, the trial court was not required

to afford the defendant all procedural and evidentiary safeguards required for criminal contempt proceedings . . . ." Procedural and evidentiary standards to be applied to the hearing determining contempt cannot be determined *ex post facto* according to the nature of the relief granted. Rather, they must be determined according to the notice received in the order to show cause.

In *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988), the case on which the majority relies, the only issue before that court was whether the trial court had made the necessary findings to support the order of contempt. Since the findings necessary to support contempt differ depending upon whether the contempt is civil or criminal, to ascertain the adequacy of the trial court's findings, it was necessary to first decide whether the order entered by the trial court was actually one for civil contempt or one for criminal contempt. The *Bishop* court did not address the issue now presented as to what procedural and evidentiary standards should apply in the trial of a contempt proceeding when the alleged contemnor has been served with an order to show cause which does not inform him whether he faces a determination of civil contempt or criminal contempt, or both. Here, the order to show cause states "there is probable cause to believe that a civil and/or criminal contempt has occurred and a hearing should be conducted upon these allegations."

Some of the procedural and evidentiary differences between civil contempt and criminal contempt include:

Civil Contempt

1. Except "in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness[,]" an indigent alleged contemnor is not entitled to court-appointed counsel. *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980).

2. The trial court must find that the alleged contemnor has the present ability to comply with the court order. *Adkins v. Adkins*, 82 N.C. App. 289, 293, 346 S.E.2d 220, 222 (1986); *but see Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985) (holding the burden is on the alleged contemnor to prove that he is not in contempt).

3. The alleged contemnor can, as in any civil case, be called as an adverse witness. N.C.G.S. § 1A-1, Rule 43(b) (1983).

4. The degree of proof is by the greater weight of the evidence, as in any civil action. *See* 2 H. Brandis, *Brandis on North Carolina Evidence* § 212 (1988).

Criminal Contempt

1. Alleged contemnor is entitled, if indigent, to appointment of counsel. *Hammock v. Bencini*, 98 N.C. App. 510, 512-13, 391 S.E.2d 210, 211 (1990).

2. Alleged contemnor cannot be compelled to be a witness against himself. N.C.G.S. § 5A-15(e) (Cum.Supp. 1989).

3. Proof must be beyond a reasonable doubt. N.C.G.S. § 5A-15(f) (Cum.Supp. 1989).

4. A movant has the burden of showing that the alleged contemnor had means to comply with the order "at any time" after its entry. *Lamm v. Lamm*, 229 N.C. 248, 250, 49 S.E.2d 403, 404 (1948).

Allowing movant or the trial court to choose between civil contempt or criminal contempt based on evidence adduced during the course of trial does not provide the alleged contemnor reasonable notice and does not give him an adequate opportunity to prepare and defend the action. Use of such procedure violates the very essence of due process recognized in our common law that requires reasonable notice and an adequate opportunity to defend. *See Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946) (alleged contemnor "is entitled to due notice of the nature of the proceeding against him—whether of criminal *or* civil contempt") (emphasis added).

Because of the substantially different procedural and evidentiary standards existing for criminal and civil contempt, the absence of pretrial notification to the alleged contemnor of whether the movant is proceeding specifically with criminal contempt or civil contempt or both,[1] requires that the alleged contemnor be provided all procedural and evidentiary standards appropriate to criminal contempt proceedings. *See Bishop*, at 505, 369 S.E.2d at 109; *see also United States v. United Mine Workers of America*, 330 U.S. 258, 298, 91 L.Ed. 884, 915 (1947) ("If the defendants were thus accorded all the rights and privileges owing to defendants in criminal

1. A person may be held in both civil *and* criminal contempt in the same proceeding. N.C.G.S. § 5A-12(d) (1986); N.C.G.S. § 5A-21(c) (1986).

contempt cases, [they cannot complain] . . . because their trial included proceedings in civil contempt").

This record does not reveal that the alleged contemnor, here defendant, was notified either before or during the trial of whether the proceeding was in criminal contempt or civil contempt or both. The notice he received, "civil and/or criminal contempt," informed him that he could face *either* civil contempt *or* criminal contempt *or* both. Therefore, defendant was entitled to the full protections of a criminal contempt proceeding. Here, defendant was not granted those protections. Specifically, the trial court allowed movant to call defendant as an adverse witness and noted as a finding in its order of contempt that defendant had "offered no evidence of justification or excuse as regards his failure to comply with the court's prior judgment." This reflects a proceeding in civil contempt in which the alleged contemnor can be called as a witness, and his failure to offer evidence arguably can be fatal to his defense. Furthermore, there is no finding in the order of contempt that the trial court entered its findings based on the evidence beyond a reasonable doubt, which is required in a criminal contempt proceeding.

Therefore, I would vacate the contempt order and remand for a new contempt hearing after proper notification.

KATHERINE LEARY SURRATT, PLAINTIFF v. JERRY L. NEWTON, JR., D/B/A JERRY'S REALTY SERVICE; AND PAUL JEFFREY NEWTON, D/B/A NEWTON BROTHERS, DEFENDANTS

No. 8921SC986

(Filed 17 July 1990)

1. Appeal and Error § 205 (NCI4th)— appeal filed 10 days after appeal filed by codefendant—appeal not timely

In a rent abatement action the trial court properly dismissed one defendant's appeal for his failure timely to file notice of appeal in compliance with N.C.G.S. § 1-279(c) and Rule 3 of the N. C. Rules of Appellate Procedure, and there was no merit to that defendant's contention that he had ten days to file his notice of appeal after the other defendant had filed his notice of appeal, since Rule 3 merely contemplates

an additional, extended time period for response only from other parties to that same appeal, but in this case the late defendant was not an original party to the action but was brought into the suit by counterclaim of plaintiff; defendants were charged with separate violations of the Residential Rental Agreements Act and the city housing code for separate time periods which each managed the property in which plaintiff lived; each defendant was represented by his own counsel; the trial court carefully separated each issue as it related to each defendant; and the jury rendered separate and distinct verdicts against each defendant.

Am Jur 2d, Appeal and Error §§ 292, 296.

2. Appeal and Error § 205 (NCI4th)— appeal not timely

Plaintiff's appeal of the trial court's failure to treble all damages and her appeal of the trial court's refusal to award attorney's fees was not timely, though filed within ten days of defendant's appeal, since defendant's appeal was untimely, and plaintiff therefore was not entitled to an additional ten days beyond that in which to file her appeal.

Am Jur 2d, Appeal and Error §§ 292, 296.

3. Landlord and Tenant §§ 8, 19 (NCI3d)— rent abatement action—defendant landlord as proper party

Defendant rental agent was a proper party in a rent abatement action where plaintiff presented evidence that defendant had actual authority to repair and keep the premises in a fit and habitable condition and had failed to do so during her tenancy, and, as landlord, defendant's violation of N.C.G.S. § 42-42(a) subjected him to liability for rent abatement.

Am Jur 2d, Landlord and Tenant §§ 61, 616, 647.

4. Landlord and Tenant §§ 8, 19 (NCI3d)— rent abatement action—written notice of needed repairs not required of tenant

There was no merit to defendant's contention in a rent abatement action that plaintiff could not recover for those defects enumerated in N.C.G.S. § 42-42(a)(4) unless written notice was given to the landlord, since the statute does not require written notice of the repairs if they are necessary to put the premises in a fit and habitable condition or if the conditions constitute an emergency, and the jury found that

the conditions here requiring repairs rendered the premises in an unfit and uninhabitable condition.

Am Jur 2d, Landlord and Tenant §§ 61, 616, 647.

5. **Landlord and Tenant § 19 (NCI3d)— rent abatement—agent's fee not limitation on amount of tenant's recovery**

The amount of defendant rental agent's fee is not a limitation on the amount of the recovery by plaintiff tenant from the agent, but the amount of rent paid is a limit on recovery from all parties in an action for rent abatement.

Am Jur 2d, Landlord and Tenant §§ 842, 844, 845.

6. **Landlord and Tenant § 19 (NCI3d)— rent abatement—no recovery for periods when rent not paid**

In an action for rent abatement plaintiff was precluded from recovering rent for the periods in which she paid none.

Am Jur 2d, Landlord and Tenant §§ 842, 844, 845.

7. **Landlord and Tenant § 19 (NCI3d)— rent abatement action—landlord as agent, not owner—amount of rent recoverable**

Plaintiff has a claim for rent abatement against a landlord for the amount of rent paid, and no lesser measure of damages is recoverable against a landlord, as defined by N.C.G.S. § 42-40(3), merely because he is not the owner but is an agent.

Am Jur 2d, Landlord and Tenant §§ 842, 844, 845.

8. **Landlord and Tenant § 19 (NCI3d)— rent abatement—plaintiff's "guess" at damages—plain error rule inapplicable**

The trial court in an action for rent abatement did not commit "plain error" in allowing plaintiff to guess the amount of money spent on repairs, since the plain error doctrine applied only in criminal cases, and any error by the court was of no consequence, as plaintiff guessed with respect to damages only as to the cost of fuses.

Am Jur 2d, Landlord and Tenant §§ 842, 844, 845.

9. **Landlord and Tenant § 19 (NCI3d)— rent abatement—sufficiency of evidence of fair rental value**

Evidence was sufficient to support an award for damages in an action for rent abatement where defendant testified that the fair rental value during the period he handled the property

was $600 a month because it was a fine house and it only rented for less because of the nature of the neighborhood and plaintiff testified that the rental value of the property in its then existing condition was between $100 and $150.

Am Jur 2d, Landlord and Tenant §§ 842, 844, 845.

10. Landlord and Tenant § 19 (NCI3d)— rent abatement action— previous settlement with owner—defendant landlord entitled to credit

In a rent abatement action against defendant landlord the trial court should have granted a credit against the damage award for sums received in settlement with the landowners, since there can be but one recovery for the same injury or damage.

Am Jur 2d, Landlord and Tenant §§ 842, 844, 845.

11. Trial § 13 (NCI3d)— rent abatement—jury viewing evidence during deliberation—no error

The trial court did not err in allowing the jury to view evidence during deliberation where the jurors viewed the exhibits in open court with no communication among them.

Am Jur 2d, Trial §§ 72, 79-81.

Judge GREENE concurring in the result.

APPEAL by defendants from judgment entered 17 April 1989 by *Judge James A. Beaty, Jr.* in FORSYTH County Superior Court. Plaintiff cross appeals as to defendant Paul Jeffrey Newton, d/b/a Newton Brothers. Heard in the Court of Appeals 15 March 1990.

This is an action seeking rent abatement and other damages associated with the rental of allegedly unfit and uninhabitable residential property. For about twelve years from 1974 or 1975 through February 1987, plaintiff, who was the defendant in the summary ejectment action, rented a house located on 1712 E. Third Street in Winston-Salem, N.C. Cleveland and Mildred Griffin, the owners of the property, are not parties to this lawsuit as a result of settlement. Plaintiff initially paid $250.00 per month in rent but during the last three years of her occupancy of the leased premises, the rent was increased to $270.00 per month.

Defendant Paul Jeffrey Newton, d/b/a Newton Brothers, was the agent/manager of the property from the time plaintiff moved in until approximately 31 December 1985. From approximately 1 January 1986 until plaintiff vacated the premises in February 1987, defendant Jerry Newton, d/b/a Jerry's Realty Service, was rental agent/manager of the property. The agents received ten percent of the rent as compensation for managing the property. Plaintiff allegedly had many problems with defects in the house and repairs which needed to be done from the time she began her tenancy until the time she moved out. Many of plaintiff's problems involved electrical failures, flooding of sewage and water into the house, rodent infestation, and other deteriorating conditions throughout the house. Plaintiff testified that many of her reports to defendants as to needed repairs were unanswered and ignored. At trial, plaintiff introduced evidence to show that defendants had actual or apparent authority to make those repairs necessary to put and keep the home in a fit and habitable condition throughout her tenancy. Plaintiff discontinued rent payments in November 1986 but did not move out of the house until late February or early March 1987.

On 9 January 1987 defendant Jerry Newton brought a summary ejectment action against plaintiff in magistrate's court and judgment was entered 19 January 1987. Plaintiff vacated the premises in late February or early March and appealed to the district court for trial *de novo*. On or about 28 March 1987, plaintiff filed an answer alleging that she owed Jerry Newton nothing and that she had no obligation to pay the rent since both the realtors and the owners had failed to "put and maintain the premises in a safe, fit, sanitary, and habitable condition as required by the law of North Carolina." Plaintiff also alleged that the property violated the Winston-Salem Housing Code. Plaintiff then moved to dismiss the summary ejectment action, and counterclaimed for rent abatement and other consequential damages, actual and punitive damages, refund of security deposit and reasonable attorney's fees. Plaintiff later amended her answer and counterclaim to strike her claim for punitive damages and to insert a claim under G.S. 75 *et seq.* seeking to treble her actual damages and obtain reasonable attorney's fees. Defendant Jerry Newton then moved to dismiss the counterclaims pursuant to Rule 12(b)(6). The trial court denied this motion. Defendant Jerry Newton then voluntarily dismissed the summary ejectment action without prejudice pursuant to Rule

41 of the North Carolina Rules of Civil Procedure. Defendants Paul Jeffrey Newton and Jerry Newton then moved for summary judgment as to plaintiff's counterclaims. The trial court denied both motions. Defendant Paul Jeffrey Newton gave notice of appeal from the denial of the summary judgment motion.

At the conclusion of the trial, the jury returned a verdict on all issues in favor of plaintiff. The jury awarded damages against each defendant. Plaintiff moved for attorney's fees against defendant Paul Jeffrey Newton pursuant to G.S. 75-16.1. The trial court denied this motion finding that there was no unwarranted refusal by the defendant to resolve plaintiff's claim. Defendants Paul Jeffrey Newton and Jerry Newton each moved for judgment notwithstanding the verdict on 8 March 1989 and 13 March 1989 respectively. The trial court denied both motions on 17 April 1989. Defendant Jerry Newton gave notice of appeal on 19 April 1989. Defendant Paul Jeffrey Newton gave notice of appeal 1 May 1989. Plaintiff moved to dismiss defendant Paul Jeffrey Newton's appeal on 5 June 1989 for his failure to comply with Rule 3 of the North Carolina Rules of App. Pro. The trial court granted this motion 3 July 1989 from which defendant Paul Jeffrey Newton now appeals. Plaintiff also filed notice of appeal as to defendant Paul Jeffrey Newton on 10 May 1989.

Legal Aid Society of Northwest North Carolina, Inc., by Joseph P. Henry and Ellen W. Gerber, for plaintiff-appellant.

Petree Stockton & Robinson, by R. Rand Tucker and Mark A. Stafford, for defendant-appellant Jerry L. Newton, Jr.

Offices of Hamilton C. Horton, Jr., by Hamilton C. Horton, Jr. and Thomas M. Roth, III, for defendant-appellant Paul Jeffrey Newton.

EAGLES, Judge.

I. DEFENDANT PAUL JEFFREY NEWTON'S APPEAL

[1] Defendant Paul Jeffrey Newton assigns as error the trial court's dismissal of his appeal for his failure to timely file notice of appeal in compliance with G.S. 1-279(c) and Rule 3 of the North Carolina Rules of App. Pro. Defendant Paul Jeffrey Newton contends that he had ten days to file his notice of appeal after defendant Jerry Newton filed his notice of appeal on 19 April 1989. We disagree.

Rule 3(c) of the Rules of App. Pro. provides that "[i]f a timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within 10 days after the first notice of appeal was served on such party." Rule 26(b) of the Rules of App. Pro. provides that "[c]opies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal."

In *Williams v. Carolina & Northwestern R.R.*, 144 N.C. 498, 57 S.E. 216 (1907), plaintiffs brought separate actions against defendant for damages resulting from defendant's failure to stop its train at a flag station to carry them to their destination. The two actions were tried together by consent and both plaintiffs appealed from a verdict against them. Our Supreme Court stated that there should have been separate appeals since "[t]he verdict was substantially separate as to each plaintiff, and the judgment and appeals should have corresponded, two cases being constituted here." *Id.* at 502, 57 S.E. at 218.

Here, defendant Paul Jeffrey Newton was not an original party to this action but brought into the suit by counterclaim of the plaintiff. Defendants Paul Jeffrey Newton and Jerry Newton were charged with separate violations for separate time periods that each managed the property. Each defendant was represented by his own counsel. The trial court carefully separated each issue as it related to each defendant and the jury rendered separate and distinct verdicts against each defendant. We hold that Rule 3(c) merely contemplates an additional, extended time period for a response only from other parties to that same appeal. Defendant Jerry Newton's appeal was totally unrelated and unaffected by the appeal of defendant Paul Jeffrey Newton. On 17 April 1989 the trial court entered an order in open court denying defendant Paul Jeffrey Newton's motion for JNOV and ordered the entry of the verdict in this action. Defendant Paul Jeffrey Newton did not file notice of appeal until 1 May 1989. This was clearly beyond the ten day period within which a party may file notice of appeal under Rule 3 (prior to its December 1988 amendment which became effective for judgments entered on and after 1 July 1989). Because the provisions of G.S. 1-279 and Rule 3(c) are jurisdictional, the appellate court acquires no jurisdiction of the appeal unless the statutes are complied with and the appeal must be dismissed. *First*

Union National Bank v. King, 63 N.C. App. 757, 759, 306 S.E.2d 508, 509 (1983).

Accordingly, we hold that the trial court correctly dismissed defendant Paul Jeffrey Newton's appeal for his failure to timely file notice of appeal.

II. PLAINTIFF'S APPEAL

[2] Plaintiff assigns as error the trial court's failure to treble all damages awarded by the jury against defendant Paul Jeffrey Newton. Plaintiff also assigns as error the trial court's refusal to award attorney's fees on the grounds that there was no unwarranted refusal by defendant Paul Jeffrey Newton to resolve plaintiff's claims.

We note that plaintiff moved to dismiss defendant Paul Jeffrey Newton's appeal for his failure to timely file notice of appeal. Here plaintiff appeals the award of damages as to defendant Paul Jeffrey Newton. Plaintiff gave notice of appeal on 10 May 1989. Final judgment in this action was entered in open court on 17 April 1989. Here plaintiff's appeal was within ten days of Paul Jeffrey Newton's purported appeal and pursuant to Rule 3(c) would have been timely; however, since Paul Jeffrey Newton's appeal was untimely, plaintiff is not entitled to an additional ten days in which to file her notice of appeal in the case against Paul Jeffrey Newton. Plaintiff's filing of her notice of appeal was clearly beyond the ten day period for filing notice of appeal as set out in Rule 3 of the Rules of App. Pro. in effect at that time. Plaintiff's appeal must also be dismissed for her failure to comply with Rule 3(c) of the Rules of App. Pro.

III. DEFENDANT JERRY NEWTON'S APPEAL

[3] Defendant first assigns as error the trial court's failure to grant directed verdict or judgment notwithstanding the verdict in his favor because he contends he was not a proper defendant for this rent abatement action. We disagree.

Initially we note that "[b]y the enactment in 1977 of the Residential Rental Agreements Act, N.C. Gen. Stat. Secs. 42-38 *et seq.*, our legislature implicitly adopted the rule, now followed in most jurisdictions, that a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provi-

sions of the Act." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d 189, 192 (1987). G.S. 42-38 provides that "[t]his Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State." G.S. 42-40(3) defines "landlord" as "any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article." G.S. 42-42(a) provides that

> (a) The landlord shall: (1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code; (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition; (3) Keep all common areas of the premises in safe condition; and (4) Maintain good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

G.S. 42-44(a) further provides that "[a]ny right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity." "Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with N.C.G.S. Sec. 42-42(a)." *Cotton v. Stanley*, 86 N.C. App. 534, 537, 358 S.E.2d 692, 694, *disc. rev. denied*, 321 N.C. 296, 362 S.E.2d 779 (1987).

Here defendant Jerry Newton argues that in *Collingwood v. General Electric Real Estate Equities, Inc.*, 89 N.C. App. 656, 659, 366 S.E.2d 901, 903 (1988), *rev'd in part on other grounds*, 324 N.C. 63, 376 S.E.2d 425 (1989), this court held that a manager was "merely managing" the property and could not be held liable under G.S. 42-42(a)(1) for design or construction defects. On the contrary, *Collingwood* merely held that a landlord who merely manages the property cannot be held liable for possible defects of design and construction if he complies with G.S. 42-42(a)(1).

On these facts, we hold that defendant Jerry Newton is a proper party for a rent abatement action. At trial plaintiff presented

evidence that defendant had actual authority to repair and keep the premises in a fit and habitable condition and had failed to do so during her tenancy. As landlord, defendant's violation of the statute subjects him to liability for rent abatement. Accordingly, this assignment of error must fail.

[4] Defendant next assigns as error the trial court's failure to grant a directed verdict or judgment notwithstanding the verdict in favor of defendant Jerry Newton because plaintiff produced no evidence of notice as required by the statute. Defendant argues that "[u]nder the Residential Rental Agreement Act, an action for rent abatement requires that the tenant give the landlord notice of any defects in the property and that the landlord have a reasonable opportunity to cure such defects." Defendant also argues that the trial court erred in giving the following jury instructions:

> [W]ith regard to any defects in electrical, plumbing, sanitary, heating and other facilities or appliances supplied or required to be supplied by the defendant—for the purpose of the first issue, you may consider any such defect in the specific items enumerated only to the extent that any condition of either the electrical, plumbing, sanitary, heating facilities—or heating facilities were in such a defective condition so as to render the house in violation of the local building code or was such—was of such defective condition, nothing else appearing, so as to make the house unfit or uninhabitable.

Defendant argues that plaintiff cannot recover for those defects enumerated in G.S. 42-42(a)(4) unless written notice was given to the landlord. We disagree.

While G.S. 42-42(a)(4) does require written notification of needed repairs involving electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord, the statute does not require written notification of these needed repairs if the repairs are necessary to put the premises in a fit and habitable condition or if the conditions constitute an emergency. Here the jury found that the conditions requiring repairs rendered the premises in an unfit and uninhabitable condition. Since the statute does not specifically require written notice of conditions of disrepair which render the premises in an unfit and uninhabitable condition, we conclude that where the conditions enumerated in G.S. 42-42(a)(4) are the

same conditions which render the premises unfit and uninhabitable no written notice is required under the statute.

Here plaintiff has introduced sufficient evidence of notice of the conditions required by law. During trial plaintiff testified that while she dealt primarily with Jeff Newton during most of her occupancy of the premises, she also talked with Jerry Newton who usually responded by sending someone out to the house. Plaintiff testified that she told defendant Jerry Newton that the house needed to be "fixed up, inspected and all." Whether plaintiff provided notice to defendant of needed repairs is an issue of fact to be resolved by the trier of fact. *See Miller, supra.* Here, the jury determined that plaintiff had given defendant the notice required by law and a reasonable opportunity to repair the conditions which violated the applicable building codes and the statute. Accordingly, this assignment of error must also fail.

[5] Next, defendant contends that the trial court erred in awarding damages against him. First, defendant argues alternatively that the lower court erred in permitting recovery in excess of the amount he received as commission for managing the property or the amount plaintiff paid in rent. In his brief, defendant argues that the amount awarded in damages in an action for rent abatement cannot exceed the amount actually paid in rent and as a result the trial court erred in not instructing the jury as to the maximum it could award and in entering judgment for an amount greater than the maximum which was permitted. We agree in part based on this court's opinion in *Miller*, 85 N.C. App. 362, 368, 355 S.E.2d 189, 192. The amount of the defendant-agent's fee is not a limitation on the amount of the recovery by plaintiff-tenant from the agent but the amount of rent paid is a limit on recovery from all parties in an action for rent abatement.

> [A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e. in full compliance with G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

Id. at 371, 355 S.E.2d at 194.

While we see nothing in the Act to preclude a tenant from recovering damages where she has withheld rent, damages for rent abatement can only include those amounts actually paid by plaintiff for substandard housing. "We construe these provisions to provide an affirmative cause of action to a tenant for recovery of *rent paid* [emphasis added] based on the landlord's noncompliance with G.S. 44-42(a). . . ." *Miller* at 368, 355 S.E.2d at 193.

[6] Secondly, defendant argues that the trial court's instruction that the jury could find defendant Jerry Newton liable for rent abatement from the period beginning 1 January 1986 to 2 February 1987 was in error since the plaintiff did not pay any rent from December 1986 through February 1987. Defendant contends that since the statute provides that the landlord and tenant obligations are mutually dependent and that a tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so, plaintiff is precluded from recovering rent for the periods which in fact she paid none. While we agree that plaintiff is precluded from recovering rent for the periods in which she paid none, our decision is not based upon whether plaintiff unilaterally withheld rent but on this court's opinion in *Miller*, *supra*.

[7] Thirdly, defendant argues that the trial court erred in permitting recovery against Jerry Newton in an amount greater than the money he actually received from his work as agent. We have held *supra* that defendant here is a proper party based upon the statutory definition of "landlord." That defendant kept only a percentage of the rent paid by plaintiff does not limit plaintiff's recovery. Plaintiff has a claim for rent abatement against a landlord for the amount of rent paid. *Miller*, *supra*. No lesser measure of damages is recoverable against a landlord (as defined by G.S. 42-40(3)) merely because he is not the owner but is an agent. We do recognize a limit on the aggregate amount of damages arising from a wrong. Accordingly, defendant's argument is not persuasive.

[8] Fourth, defendant argues that the trial court erred in allowing plaintiff to guess the amount of money spent on repairs and admitting that testimony into evidence. While defendant did object to the admission of this testimony during trial, on appeal defendant contends that "[p]ermitting recovery based on a guess was plain error." He cites no authority for his contention. The plain error doctrine obtains only in criminal cases and is not available to aid civil litigation appellants. *See Alston v. Monk*, 92 N.C. App. 59,

373 S.E. 2d 463 (1988), *disc. rev. denied*, 324 N.C. 246, 378 S.E.2d 420 (1989). Even so our review indicates that any error was *de minimis*. The record indicates that plaintiff "guessed" with respect to damages only during one portion of her testimony and the "guess" testimony related only to the cost of fuses. The trial court did not err in allowing the testimony.

[9] Fifth, defendant contends that the damages awarded were contrary to the evidence of fair market value produced at trial. Defendant argues that because plaintiff introduced no additional evidence of the unit's value other than the amount of rent charged, the damages awarded were excessive. We disagree.

In *Cotton, supra*, this court stated that "[d]irect evidence of fair rental value is an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property." 86 N.C. App. at 538, 358 S.E.2d at 695. "The fair rental value of property may be determined 'by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the premises may be determined.' " *Id.* at 539, 358 S.E.2d at 695.

Here plaintiff presented sufficient evidence of the value of the property as warranted and the value of the property in its "as is" condition. During trial, plaintiff introduced the deposition testimony of defendant himself who testified that the fair rental value of 1712 East Third Street during the period he handled the property was $600.00 a month because it was a fine house and it only rented for less because of the nature of the neighborhood. Plaintiff testified that the rental value of the property in its then existing condition was between $100 and $150. From this testimony, the jury could determine a damage award.

[10] Sixth, defendant argues that the trial court should have granted a credit against the damage award for sums received in settlement with the landowners since there can be but one recovery for the same injury or damage. We agree.

"All of the authorities are to the effect that where there are joint tort-feasors there can be but one recovery for the same injury or damage, and that settlement with one of the tort-feasors releases the others; and, further, that when merely a covenant not to sue, as distinguished from a release, is executed by the injured party

to one joint tort-feasor for a consideration, the amount paid for such covenant will be held as a credit on the total recovery in actions against the other joint tort-feasors." *Holland v. Southern Public Utilities Co.*, 208 N.C. 289, 291, 180 S.E. 592, 593 (1935). While plaintiff brought separate and distinct actions against each defendant, plaintiff's claim against defendants Cleveland and Mildred Griffin was based upon the fact that they were the owners of the property and as a result were also responsible for the damages that plaintiff suffered throughout her tenancy. Since the record indicates in the order of the final pre-trial conference that plaintiff had settled her claims against defendants Cleveland and Mildred Griffin, defendant is entitled to have the judgment against him reduced by a credit in the amount of the proceeds paid by the Griffins.

Since the pleadings here pray for relief in rent abatement and do not seek damages for breach of the covenant of habitability, we expressly decline to address here the issue of whether damages for the breach of a covenant of habitability are limited to the amount of rent paid. But *see Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 370, 355 S.E.2d 189, 194 (1987); Fillette, North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations, 56 N.C.L. Rev. 785 (1978).

[11] Finally, defendant assigns as error the trial court's denial of his motion for a new trial. Defendant first argues that the trial court erred in its admission of certain evidence and in allowing the jury to view evidence during deliberation. Defendant also argues that the trial court erred in refusing to permit evidence that no plumbing problems existed after plaintiff vacated the premises. We disagree.

"We find no authority, however, which prohibits the court from permitting the jury to view the exhibits in the courtroom in its presence and in the presence of the parties. In that setting, where subject to objections by the parties and supervision by the court, the viewing may aid the fact-finding process. This is statutorily permitted in criminal trials, see G.S. 15A-1233(a), and we see no reason for a different rule in civil trials." *Nelson v. Patrick*, 73 N.C. App. 1, 14, 326 S.E.2d 45, 53 (1985). Here the trial court allowed the jury to view the exhibits in open court with no communication among them. It appears that the trial court's ruling complies with *Nelson*. With respect to the other evidentiary rulings

complained of, the trial court's decision will not be overturned absent an abuse of discretion. On this record, we see no abuse.

Defendant also argues that the trial court erred in its framing of the second and third issues in a manner as to permit an award of rent abatement damages for alleged defects for which defendant had no notice. Since the jury found that defendant did in fact have notice of the alleged defects by its answer to Issue No. 2, this contention has no merit.

Finally, defendant argues that he is entitled to a new trial because plaintiff was allowed to recover for defective conditions caused by plaintiff herself. Defendant contends that plaintiff-tenant in fact breached her obligations under the statute. "The appellate court will not consider arguments based upon issues which were not presented or adjudicated by the trial tribunal." *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980). Since defendant failed to raise this defense during the trial, he cannot assert this as a basis for a new trial for the first time on appeal. Accordingly, this assignment of error is also overruled.

In summary, the appeals of both defendant Paul Jeffrey Newton and plaintiff are dismissed for failure to timely file notice of appeal. With respect to the appeal of defendant Jerry Newton we find no error in the lower court's decision with the exception of the award of rent abatement damages for the period in which plaintiff did not pay any rent and the failure to offset those damages against proceeds received in settlement with the owners of the property, Cleveland and Mildred Griffin. Accordingly, with respect to defendant Jerry Newton we remand this cause for amendment of judgment consistent with this opinion on the issue of damages only.

As to the appeal of defendant Paul Jeffrey Newton, dismissed.

As to the appeal of plaintiff Surratt, dismissed.

As to the appeal of defendant Jerry Newton, remand for amendment of judgment on the issue of damages only; no error in all other issues.

Judge WELLS concurs.

Judge GREENE concurs in the result.

Judge GREENE concurring in the result.

I

I disagree with any suggestion by the majority that an action in rent abatement somehow differs from an action for breach of warranty for habitability. Rent abatement is merely one of the remedies for breach of warranty of habitability. *See Miller v. C. W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 355 S.E.2d 189 (1987).

II

I agree that in an *affirmative* action (complaint or counterclaim) by a tenant for breach of warranty of habitability, the tenant who has paid no rent is not entitled to recover as damages the difference between the fair rental value of the premises as warranted and the fair rental value of the premises in unfit condition. Nonetheless, a non-paying tenant would be entitled to recover special and consequential damages, if the trier of fact determined that the landlord breached his statutory obligations under N.C.G.S. § 42-42(a) (1984). However, in *defense* of a summary ejectment action, a tenant who has defaulted in the payment of rent based on a landlord's breaches of his obligation to provide fit premises is entitled to an abatement of the rent due to the extent the agreed rent exceeds the fair rental value of the premises in their unfit condition.[1] I do not accept that in either situation, an affirmative or a defensive action by a tenant, that the tenant is barred by N.C.G.S. § 42-44(c) (1984) ("[t]he tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so"); *see Webster's Real Estate* § 69 ("a default in rent payments coupled with a statutory defense for that default is not the same thing as intentional rent withholding").

Here, the tenant proceeded affirmatively as plaintiff and did not object to the instructions to the jury which did not include special and consequential damages as an element of the damage award. Accordingly, I join with the majority in remanding this cause for amendment of the judgment to exclude any damages for that period of time for which plaintiff did not pay rent.

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1. "It is only after determining the amount of damages that the tenant has suffered because of the landlord's breach that a net amount of rent owed can be determined." P. Hetrick & J. McLaughlin, *Webster's Real Estate Law in North Carolina* § 70 n.41 (3d ed. Supp. 1989).

III

I agree with the majority that when "the conditions enumerated in G.S. 42-42(a)(4) are the same conditions which render the premises unfit and uninhabitable [pursuant to N.C.G.S. § 42-44(a)(2)] no written notice is required under the statute." *See Webster's Real Estate* § 67 (when a landlord has actual notice of defects under G.S. 42-42(a)(2), no written notice is required). Nonetheless, the tenant must prove that she has either given oral notice to the landlord of the defective condition of the premises or prove that the landlord was aware of the defective condition of the premises. *See Cotton v. Stanley*, 86 N.C. App. 534, 539, 358 S.E.2d 692, 696, *rev. denied*, 321 N.C. 296, 362 S.E.2d 779 (1987). As this court noted in the *Cotton* decision, the landlord's liability for damages does not arise until "after notice." *Id.* Here, I agree with the majority that there was sufficient evidence in the record to support a finding that the landlord had sufficient notice of the defective condition of the premises.

STATE OF NORTH CAROLINA v. CHARLIE JAMES JONES

No. 893SC1102

(Filed 17 July 1990)

1. Rape and Allied Offenses § 5 (NCI3d)— age of prosecutrix—sufficiency of evidence

Testimony by the prosecutrix in a rape case that she was forced to have intercourse with defendant on numerous occasions during her seventh grade school term, during a portion of which time she was 12, and her testimony that defendant raped her a few days after her great grandfather's death at which time she was 11 was sufficient evidence that the prosecutrix was under the age of 13 during the times of the alleged offenses to withstand defendant's motion to dismiss.

Am Jur 2d, Rape §§ 58, 88.

2. Rape and Allied Offenses § 4 (NCI3d); Criminal Law § 162 (NCI3d)— post traumatic stress disorder—child sexual abuse accommodation syndrome—failure to object to expert testimony—no challenge on appeal

Defendant waived his right to challenge on appeal the qualification of experts who testified concerning post traumatic

stress disorder and child sexual abuse accommodation syndrome, since he made no objection at trial; furthermore, each witness in this case testified at length regarding his credentials, and such evidence amply supported the trial court's decision to admit the testimony of the proffered experts.

Am Jur 2d, Appeal and Error §§ 545, 601.

3. **Rape and Allied Offenses § 4 (NCI3d)— post traumatic stress syndrome—admissibility of expert testimony**

The trial court in a rape case did not err in allowing expert testimony as to whether the prosecutrix was suffering from post traumatic stress syndrome.

Am Jur 2d, Rape § 68.5.

4. **Rape and Allied Offenses § 4 (NCI3d)— prosecutrix afflicted with mental disorder—expert testimony admissible**

The trial court in a rape case did not err in allowing the prosecutor to ask expert witnesses if they had opinions as to whether the prosecutrix was afflicted with a mental disorder which would cause her to fantasize about sexual assaults in general.

Am Jur 2d, Rape § 68.5.

5. **Criminal Law § 904 (NCI4th); Rape and Allied Offenses § 19 (NCI3d)— taking indecent liberties with child—instructions proper**

Defendant's right to a unanimous verdict was not violated by the trial court's instruction that an indecent liberty is an immoral or indecent touching when the jury could have found that either acts of intercourse or acts of fondling constituted a violation of the indecent liberties statute.

Am Jur 2d, Infants § 17.5; Rape § 108.

APPEAL by defendant from judgments entered 19 May 1989 by *Judge David E. Reid, Jr.*, in PITT County Superior Court. Heard in the Court of Appeals 30 May 1990.

Defendant was first indicted for three counts of taking indecent liberties and two counts of first-degree rape on 10 March 1986. He was tried on those charges on 27 October 1986 before the Honorable John B. Lewis, Jr. Defendant was convicted by a jury

at that time. On appeal, the Supreme Court of North Carolina reversed that conviction and ordered a new trial. *See State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988). Defendant was again tried on these charges before the Honorable G. K. Butterfield. Judge Butterfield declared a mistrial during that proceeding on 10 March 1988. This matter was then heard by the Honorable David E. Reid, Jr., on or about 15 May 1989 and defendant was convicted of all charges. He has been sentenced to two concurrent life sentences for the rape convictions and three consecutive five-year sentences for the three indecent liberties convictions.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Martha K. Walston, for the State.

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

ORR, Judge.

The State's evidence tended to show that the prosecutrix, who was born on 4 October 1971, had been living with her mother and her stepfather, the defendant, since August 1981. The prosecutrix testified, in part, that shortly after her mother and defendant married, defendant began to spend more time with her and her younger sister. She stated that not long after this period defendant began to fondle her in her breast and vaginal areas.

The prosecutrix testified that she informed her mother of these events and that defendant thereafter began to threaten to kill her. Also at this time defendant began to force the prosecutrix to engage in sexual intercourse with him. According to the prosecutrix, the acts of intercourse sometimes occurred as often as every day.

The prosecutrix further testified that on or about 21 October 1985, the evening after her mother agreed to let her move in with her natural father and his wife, defendant choked her for nearly two hours during which time he cut her across her throat with a pocketknife. On the following day, the prosecutrix told her natural father of this particular incident. She was later examined by a physician who observed swelling and scratches on her neck.

Sometime subsequent to this period, the prosecutrix told her natural father that she had been raped by defendant. Defendant

was later arrested and charged with three counts of taking indecent liberties with a minor and with two counts of first-degree rape.

I.

[1] The first issue raised by defendant is whether the trial court erred in denying his motion to dismiss the charge of rape in case number 86 CRS 4615. Defendant contends that the State failed to provide sufficient evidence as to whether the rape offenses occurred before the prosecutrix' thirteenth birthday. According to him, since there was no evidence that the offenses occurred while the prosecutrix was under the age of 13, the State failed in its duty to provide proof of each element of the crime with which he was charged. The State argues that although the prosecutrix was at times unsure as to her age when these events took place, there were references made to specific events which corresponded with the dates of the rapes. Since the prosecutrix' date of birth was known, it was simply a matter of the jury calculating her age at the times of the events which corresponded with the dates the rapes occurred.

A motion to dismiss should be granted when there is insufficient evidence of each element of an offense to support a conviction. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Upon a motion to dismiss, the court must evaluate the evidence in the light most favorable to the State and it must determine whether the State has presented substantial evidence of *every element of the offense with which defendant has been charged. Id.* Evidence is considered to be substantial if it is relevant and sufficient for a reasonable person to accept as adequate to support a conclusion. *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981).

In case number 86 CRS 4615, defendant was indicted for "unlawfully, willfully and feloniously . . . engag[ing] in vaginal intercourse with [prosecutrix], a child who was under the age of thirteen (13) years at the time." The dates of these offenses were stated to be 1 October 1983 through September 1984. Based upon this charge, the State was required to present substantial evidence on, among other elements, the prosecutrix' age at the time of the offenses.

The prosecutrix testified that her date of birth is 4 October 1971. She stated that her mother and defendant married in August 1981. She and her family moved into a home in the Emorywood

subdivision of Greenville one year later when she was about 11 and during her sixth grade school term. When asked how old she was when the sexual intercourse began, the prosecutrix replied that she may have been 12. She further stated that defendant had sex with her "a lot of times" when she attended A. G. Cox School and that she was in seventh grade during that time. The prosecutrix said that she was 12 in seventh grade until her thirteenth birthday in October. Under cross-examination, the prosecutrix testified that a few days after her great-grandfather died defendant forced her to engage in sexual intercourse with him. While testifying for the defendant, the prosecutrix' mother stated that her grandfather (the prosecutrix' great-grandfather) died in January 1983.

We find that this evidence is sufficient for withstanding a motion to dismiss on the ground that the State failed to present ample evidence of the prosecutrix' age at the times of the alleged incidents of rape. Taking the evidence in the light most favorable to the State, as the trial court was required to do, the prosecutrix' testimony that she was forced to have intercourse with defendant on numerous occasions during her seventh grade school term, during a portion of which time she was 12, and her testimony that defendant raped her a few days after her great-grandfather's death at which time she was 11, there is sufficient evidence regarding the age of the prosecutrix during the times of the alleged offenses charged in case number 86 CRS 4615. This assignment of error is overruled.

II.

Defendant next raises the related issue of whether the trial court erred in denying his objections to the State's question regarding what additional things had taken place when the prosecutrix was 12. Defendant argues that he was prejudiced by the State asking the prosecutrix what other events had taken place "when [she was] twelve" because this was assuming facts about her age which were not in evidence. He further contends that this unfairly suggested to the jury that the prosecutrix was 12 when the alleged incidents took place. The State argues that this contention is meritless because there was evidence of the prosecutrix' age at the time when the alleged rapes occurred.

Because defendant bases this argument on his previous contention that there was no evidence of the prosecutrix' age during the alleged rapes, and we have concluded that there was sufficient

evidence of record regarding her age, we conclude that defendant has not demonstrated that he was prejudiced by this line of questioning. This assignment of error is likewise overruled.

III.

The next issue raised by defendant is whether the trial court erred in allowing testimony that the prosecutrix displayed signs consistent with sexual abuse, that she did not have a mental condition which would cause her to fantasize about the alleged event, and that the prosecutrix was suffering from post-traumatic stress disorder and child sexual abuse accommodation syndrome.

Defendant argues that it was error for the court to allow witnesses to testify regarding the prosecutrix' credibility. He also argues that it was error to allow testimony about post-traumatic stress disorder and child sexual abuse accommodation syndrome because those are improper subjects for expert testimony and because the witnesses were not qualified to testify about such matters.

On the other hand, the State first contends that defendant waived his right to object to such testimony because he failed to object and set out any exceptions in the record. The State next argues that the witnesses were qualified to testify to these matters and North Carolina has not specifically rejected the use of this type of evidence in rape cases.

[2] Turning first to defendant's contention that the experts were not qualified to testify to these matters, we have carefully examined the record and transcript before us and we conclude that defendant did not object when the State offered Doctors Cleghorn and Durham as experts. Indeed, in both instances the trial judge noted that no objection was made by defendant and that the witnesses were experts in the field of clinical psychology. Therefore, defendant has waived his right to challenge this matter because he has failed to preserve this question for our review. N.C. R. App. P. 10(b) (1983). Furthermore, "[w]hether a witness has the requisite skill to qualify as an expert in a given area is chiefly 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). Therefore, "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to sup-

port it." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984) (citations omitted). Our review of the evidence demonstrates that each witness testified at length regarding their credentials. In the absence of a showing of an abuse of this discretion, we find that such evidence amply supports the trial court's decision.

[3] Next, we shall address defendant's contention that the courts of this state have not accepted this type of testimony in rape cases. Although defendant is correct that the Court did not reach this question in *Goodwin*, our Court has had at least two occasions since *Goodwin* to address the admissibility of similar testimony.

In the case of *State v. Strickland*, 96 N.C. App. 642, 387 S.E.2d 62, *disc. review denied*, 326 N.C. 486, 392 S.E.2d 100 (1990), this Court concluded that there was no error in allowing a psychologist to testify regarding her opinion that the prosecutrix was suffering from post-traumatic stress syndrome. There, a jury convicted defendant of, among other things, second-degree rape and second-degree sexual offense. Therefore, we must overrule defendant's challenge to the court's admission of this evidence on the basis of *Strickland*.

[4] Additionally, defendant argues that the witnesses impermissibly bolstered the credibility of the prosecutrix by testifying that she was not suffering from any mental disorders which would cause her to fantasize that these events had actually taken place. Defendant bases his contention on the Supreme Court's holding in *State v. Heath*, 316 N.C. 337, 341 S.E.2d 565 (1986).

In *Heath*, the expert witness gave an opinion as to whether the prosecutrix could have been suffering from " 'a mental condition which could or might have caused her to *make up a story* about *the* sexual assault.' " *Id.* at 341, 341 S.E.2d at 567 (emphases in original). There, the Court took exception to the prosecutor's use of the word "the" which the Court said referred to the particular incident in question. *Id.* The Court stated that it would have been a different situation if the prosecutor had asked the witness if "she had an opinion as to whether [the prosecutrix] was afflicted with any mental condition which might cause her to fantasize about sexual assaults in general . . . ." *Id.* at 341, 341 S.E.2d at 568.

Here, the prosecutor asked the witnesses if they had opinions as to whether the prosecutrix was afflicted with a mental disorder

which would cause her to fantasize about sexual assaults "in general." Based upon the Court's discussion in *Heath*, we find that this testimony was not violative of defendant's rights.

IV.

[5] Defendant's final argument concerns the trial court's instruction to the jury regarding the indecent liberties charge. He contends that it was error for the court to charge the jury that an indecent liberty is an immoral or indecent touching because there were three specific acts—intercourse, fondling, and acts of violence—which could have supported a conviction under the indecent liberties statute. Consequently, there is no way to know which single act, if any, was the basis of the guilty verdict. As a result, defendant argues that his right to a unanimous verdict was violated. The State contends that since the Legislature has not chosen to distinguish between the types of indecent liberties, the trial court's instructions were correct.

Our Supreme Court has just recently addressed this question in *State v. McCarty*, 326 N.C. 782, 392 S.E.2d 359 (1990), a case which is factually similar to the one at bar. There, the defendant had been convicted of second-degree rape, first-degree sexual offense, incest and taking indecent liberties with a child. *Id.* at 783, 392 S.E.2d at 359. In an unpublished opinion filed by this Court, defendant was given a new trial on the first-degree sexual offense charge and the indecent liberties charge. *Id.*

The facts in that case revealed that defendant had forced his daughter to have sexual intercourse with him. *Id.* He also performed digital penetration on her and made her perform fellatio on him. *Id.* As to the indecent liberties charge, the trial court had instructed the jury that an indecent liberty was an immoral or indecent touching by the defendant or an inducement by the defendant of an immoral or indecent touching by the child. *Id.* at 784, 392 S.E.2d at 360. This Court held that such instruction made it impossible to determine which one of the several acts referred to above supported defendant's conviction. *Id.* We concluded that defendant was entitled to a new trial.

However, the Supreme Court reviewed that decision and reversed our grant of a new trial on the basis of their holding in the case of *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). In *Hartness*, the facts tended to show that defendant had engaged

in various acts of sexual relations with his daughter and stepson. *Id.* at 563, 391 S.E.2d at 178. Defendant was convicted of taking indecent liberties with a child and felony child abuse. *Id.* at 562, 391 S.E.2d at 177.

In its holding, the *Hartness* Court first specifically rejected our holding in the case of *State v. Britt*, 93 N.C. App. 126, 377 S.E.2d 79 (1989), to the extent that we had relied on a drug trafficking case to award defendant a new trial on an indecent liberties conviction. *Id.* at 564, 391 S.E.2d at 179. The *Hartness* Court next pointed out that:

> N.C.G.S. § 14-202.1 proscribes simply 'any immoral, improper, or indecent liberties.' Even if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of 'any immoral, improper, or indecent liberties.'

Id. at 565, 391 S.E.2d at 179.

Therefore, in reliance on the Court's holding in *McCarty* and *Hartness*, we find that the trial court's instruction to the jury was not error. Those holdings make it clear that the risk of a nonunanimous verdict does not arise in cases such as the instant one where there was "sexual conduct within the ambit of any immoral, improper or indecent liberty." Furthermore, in light of the trial court's instruction to the jury that the testimony regarding the acts of violence was only relevant to the prosecutrix' delay in reporting her allegations of abuse, there is no merit in defendant's claim that the evidence of his violent behavior could have supported the jury's guilty verdict on this charge. Nor is there any merit to defendant's contention that he is entitled to a new trial on the basis of *Britt* and *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), due to the holdings in *Hartness* and *McCarty*.

Accordingly, we find that defendant was afforded a fair trial free of prejudicial error. The assignments of error raised by this appeal are overruled. The judgments and sentences imposed are affirmed.

No error.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. LARRY FREMONT MOROCCO

No. 8912SC1142

(Filed 17 July 1990)

1. Searches and Seizures § 9 (NCI3d)— trafficking in cocaine— traffic stop not pretextual

The findings in a cocaine trafficking prosecution supported the trial court's conclusion that a traffic stop on I-95 for not wearing a seat belt was not pretextual. In determining whether a traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer validly *could* do; the traffic court here concluded that a reasonable officer in the position of Trooper Lowry *would* have stopped defendant for a seat belt violation and there was competent evidence in the record to support the findings in that Trooper Lowry testified that he observed defendant riding without a seat belt, that he stopped defendant for that reason, and that it is the policy of North Carolina to enforce the seat belt law.

Am Jur 2d, Searches and Seizures § 39.

2. Searches and Seizures § 8 (NCI3d)— consent to search—given while in patrol car—no illegal seizure

A defendant in a cocaine trafficking prosecution was not illegally detained so that his consent to a search of his car was not rendered involuntary where the officer engaged defendant in polite conversation in his patrol car while writing a warning citation for not wearing a seat belt; after returning defendant his driver's license and vehicle identification papers as well as a citation, the officer requested permission to search defendant's vehicle for contraband; the findings show that defendant consented and waited three minutes while the officer prepared a consent form for him to sign; defendant was a six foot, 200 pound, thirty-eight-year-old man with prior military

service; and defendant's spoken consent carried with it an implied willingness to wait for the officer to fill out the consent form. Defendant briefly remained in the patrol car voluntarily in a spirit of apparent cooperation and was not illegally seized; however, voluntariness cannot be assumed in all cases where a driver is questioned while sitting in an officer's car.

Am Jur 2d, Searches and Seizures §§ 47, 48, 53.

3. Searches and Seizures § 14 (NCI3d)— cocaine trafficking—search of vehicle—consent

The trial court's conclusion in a cocaine trafficking prosecution that defendant consented to a search of his vehicle was supported by the findings and the findings were supported by competent evidence where the patrolman's testimony tended to show that in the course of polite conversation he merely asked whether defendant would consent to a search and the trial court rejected as incredible the defendant's testimony that the patrolman stated that he was going to search the vehicle one way or the other, if he had to bring his buddies in and get a search warrant. The trial court was in the best position to observe the demeanor of the witnesses and chose to believe the trooper.

Am Jur 2d, Searches and Seizures §§ 47, 48, 53.

4. Searches and Seizures § 38 (NCI3d)— cocaine trafficking—search of vehicle by consent—tote bag in vehicle

A highway patrolman did not exceed the scope of defendant's consent for the search of his vehicle by searching a tote bag found therein. The defendant's consent to search the automobile for contraband entitled the officer to conduct a reasonable search anywhere inside the automobile which might reasonably contain contraband, including the tote bag in the back seat. The trial court did not err as a matter of law in determining that defendant never withdrew his consent based on the ambiguous statement that the bag contained nude photographs of his wife.

Am Jur 2d, Searches and Seizures §§ 47, 48, 53.

5. Narcotics § 5 (NCI3d)— trafficking in cocaine—sentencing—assistance to law enforcement authorities not considered

The trial court judge did not abuse his discretion when sentencing defendant for trafficking in cocaine by finding that

defendant's evidence of substantial assistance to law enforcement authorities was insufficient under N.C.G.S. § 90-95(h)(5). A finding that a criminal defendant's aid amounts to substantial assistance is discretionary.

Am Jur 2d, Criminal Law § 599; Drugs, Narcotics, and Poisons § 48.

APPEAL by defendant from judgment entered 30 May 1989 by *Judge Wiley F. Bowen* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 1 June 1990.

Lacy H. Thornburg, Attorney General, by Clarence J. DelForge, III, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant-appellant.

GREENE, Judge.

The defendant, Larry Fremont Morocco, entered a plea of guilty to trafficking in cocaine by possession and to trafficking in cocaine by transportation, reserving his right to appeal the denial of his motion to suppress. Defendant now appeals that denial as well as matters concerning his sentencing.

After hearing testimony and arguments on defendant's motion to suppress, the trial court made the following findings of fact.

1. Trooper L.E. Lowry is a trooper with the North Carolina State Highway Patrol. He has been with the North Carolina State Highway Patrol for 14 years. He is trained in the detection and enforcement of the motor vehicle laws of North Carolina.

2. On June 28, 1988, at approximately 7:40 a.m., Trooper Lowry was on duty in the area of Interstate 95 and N.C. Highway 24. He had just finished an enforcement stop and was in the process of crossing the median on Interstate 95 to travel back to N.C. Highway 24. While waiting for traffic to pass, he observed a 4-door brown AMC vehicle operated by the defendant, Larry Fremont Morocco. The defendant appeared not to be wearing a properly fastened seatbelt. In North Carolina, this is an offense for which an officer may issue a citation.

3. Trooper Lowry drove onto Interstate 95 behind the defendant's vehicle and accelerated into the lefthand lane to the left side of the defendant's vehicle until his patrol vehicle was even with the defendant's vehicle. Trooper Lowry observed that the defendant was the only person in the vehicle and that he was operating the vehicle at approximately 65 miles per hour, within the posted speed limit. Trooper Lowry observed that the defendant was operating the brown AMC vehicle without a properly fastened seatbelt.

4. Trooper Lowry turned on his blue light and siren equipment, decelerated and drove behind the defendant's vehicle to indicate to the defendant to stop. The defendant's vehicle slowed down and pulled over to the right hand shoulder of the road.

5. Trooper Lowry walked up to the driver's side of the vehicle. He requested the defendant to produce a valid driver's license and vehicle registration. The defendant produced a Pennsylvania Driver's License bearing the name Larry Fremont Morocco, License Number 14761811, and identification papers for the vehicle. The vehicle bore a Pennsylvania registration plate number JPK-939. The defendant stated to Trooper Lowry that the car belonged to the defendant's brother.

6. Trooper Lowry told the defendant that he was stopped for a seatbelt violation and that he would give him a warning ticket. Trooper Lowry asked the defendant to step back to the patrol vehicle and sit in the front passenger seat so that he could issue the ticket. The defendant got out of his vehicle, walked back to the patrol vehicle and sat in the front passenger seat.

7. While Trooper Lowry was writing the warning ticket, he and the defendant had a conversation. Trooper Lowry asked the defendant about the vehicle and its registration. The defendant told him information about the vehicle registration and stated that he had been to Florida and was on his way back to Pennsylvania. Trooper Lowry's manner and speech were polite and non-hostile. Trooper Lowry handed the defendant the warning ticket, the Pennsylvania driver's license and the vehicle identification papers.

8. Trooper Lowry asked the defendant if he could search his vehicle. Trooper Lowry explained to the defendant that he wanted to search his vehicle for any illegal weapons, alcohol or contraband. The defendant understood Trooper Lowry's request to search. The defendant told Trooper Lowry that he could search his vehicle. Trooper Lowry filled out a Consent to Search Form and requested the defendant to read and sign the form. The defendant read the form and signed his name at the bottom of the form. Approximately three minutes passed between the time Trooper Lowry gave the defendant his warning ticket for the seatbelt violation and the time the defendant signed the Consent to Search Form. Trooper Lowry did not make any threats to the defendant in order to obtain the defendant's consent to search the brown AMC vehicle.

9. Trooper Lowry and the defendant got out of the patrol vehicle. Trooper Lowry briefly patted down the defendant for weapons. He found none. The defendant removed the vehicle's ignition keys from the ignition and opened the trunk for Trooper Lowry. Trooper Lowry searched the trunk area. The defendant used the keys to unlock the back passenger door for Trooper Lowry. Trooper Lowry found a tote bag on the back seat. [H]e searched the tote bag and found what he believed to be the controlled substance, cocaine.

10. During the search of the car, Trooper Lowry did not restrain the defendant's movement. At all times during the search, the defendant was in sole possession of the vehicle's keys, his driver's license and the vehicle identification papers. The defendant was free to leave.

11. The defendant never withdrew his consent to search.

12. The search of the defendant's vehicle was within the scope of the defendant's consent.

13. Trooper Lowry was the only officer at the scene. He never threatened the defendant. At all times, Trooper Lowry's weapon was in his holster.

14. The defendant, Larry Fremont Morocco, is a white male, 38 years old, six feet tall and weighs approximately 200 pounds. He has completed 12 years of school and has attended various trade schools for carpentry and kitchen cabinet work. The defendant speaks and understands the English

language. The defendant's contentions that the officer threatened him are not credible.

The court then concluded as a matter of law that:

1. The Defendant, Larry Fremont Morocco, was stopped by Trooper Lowry for a violation of the North Carolina seatbelt law. The stop of the defendant's vehicle was based on parobable [sic] cause that the defendant was violating the seatbelt law. *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Cortez*, 449 U.S. 411 (1981). In light of the facts and circumstances in this case, a reasonable officer in the position of Trooper Lowry would have stopped the defendant for a seatbelt violation.

2. After the traffic violation stop, the defendant gave Trooper Lowry consent to search the vehicle and its contents. The defendant spoke and understood the English Language. The defendant was free to leave at anytime. Trooper Lowry did not threaten or coerce the defendant to give consent. The consent was freely, intelligently and voluntarily given. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973).

3. None of the Defendant's rights under the United States Constitution or the North Carolina Constitution were violated.

At his sentencing hearing, defendant requested that the trial court find that he had rendered substantial assistance to law enforcement authorities based on his post-arrest statements to both the arresting trooper and State Bureau of Investigation personnel regarding the source of his cocaine and regarding assistance allegedly provided to law enforcement officials in Pennsylvania. The trial court refused defendant's request on the grounds that the defendant failed to assist "to the best of his knowledge."

The issues presented are: (I) whether the trial court erred in denying defendant's motion to suppress because (A) defendant was illegally seized, (B) the defendant did not consent to the search, or (C) the search exceeded the scope of the consent; and (II) whether the sentencing court erred in failing to find that defendant rendered substantial assistance to law enforcement authorities.

I

A

[1] The defendant argues the trial court erred in denying his motion to suppress because he was illegally seized. He first asserts that the traffic stop was pretextual. A police officer may conduct a brief investigative stop of a vehicle where justified by specific, articulable facts which give rise to a reasonable suspicion of illegal conduct. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 880, 45 L.Ed.2d 607, 616 (1975); *Terry v. Ohio*, 392 U.S. 1, 27, 20 L.Ed.2d 889, 909 (1968). However, police may not make *Terry*-stops merely on the pretext of a minor traffic violation. *United States v. Smith*, 799 F.2d 704, 710-11 (11th Cir. 1986).

In determining the traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer validly *could* do. *Id.* Applied to the case at hand, the question is whether a reasonable officer would have stopped the defendant for failure to wear a seat belt, not whether an officer could have done so.

The trial court made the required findings of fact and conclusions of law on this issue, and we are bound by the findings if they are supported by competent evidence. *State v. Crews*, 286 N.C. 41, 45, 209 S.E.2d 462, 465 (1974), *cert. denied*, 421 U.S. 987, 44 L.Ed.2d 477 (1975). However, in determining whether an individual is in custody or whether the stop was pretextual, we are not bound by the trial court's conclusion. *See State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 583 (1982). The trial court found that Trooper Lowry observed the defendant not wearing a properly fastened seat belt, "an offense for which an officer may issue a citation." The trial court concluded that "a reasonable officer in the position of Trooper Lowry *would* have stopped the defendant for a seat belt violation." (Emphasis added.) We find in the record competent evidence to support the findings. Trooper Lowry testified that he observed the defendant driving without a seat belt, that he stopped the defendant for that reason, and that it is the policy of North Carolina to enforce the seat belt law. Furthermore, we determine the findings support the trial court's conclusion.

[2] The defendant also argues that even if the stop was not pretextual, the trooper detained the defendant longer than necessary to issue a warning ticket. "The scope of the detention must be

carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 75 L.Ed.2d 229, 238 (1983). The trial court found that Trooper Lowry engaged the defendant in polite conversation while writing the warning citation. After returning to the defendant his driver's license and vehicle identification papers as well as the citation, Lowry requested permission to search the defendant's vehicle for contraband. The findings show the defendant consented and waited three minutes while Lowry prepared a consent form for him to sign.

The defendant argues that he was illegally detained for the three minutes. We find this case analogous to that addressed in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497, *reh'g denied*, 448 U.S. 908, 65 L.Ed.2d 1138 (1980). There police officers briefly questioned a traveler in an airport and then requested her to accompany them to their office for further questioning. The defendant acquiesced. The issue was whether the defendant was seized in violation of the Fourth Amendment when the officers asked her to accompany them such that the subsequent search of the defendant's person was infected by the violation. "The question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, expressed or implied, is to be determined by the totality of all the circumstances. . . ." *Id.*, at 557, 64 L.Ed.2d at 511. In that case the defendant was a twenty-two-year-old black female who had an eleventh-grade education. Furthermore, she:

> was not told that she had to go to the office, but was simply asked if she would accompany the officers. There were neither threats nor any show of force. The respondent had been questioned only briefly, and her ticket and identification were returned to her before she was asked to accompany the officers.

Id., at 557-58, 64 L.Ed.2d at 512. The Supreme Court concluded that the facts supported the trial court's finding that the defendant "accompanied the agent to the office 'voluntarily in a spirit of apparent cooperation.'" *Id.*, at 557, 64 L.Ed.2d at 511.

We determine that this trial court's findings likewise are supported by competent evidence. The defendant was a six-foot, 200-pound, thirty-eight-year-old man with prior military service. Trooper Lowry had returned all of the defendant's belongings and had issued the warning ticket. Furthermore, defendant's spoken consent carried with it an implied willingness to wait for Lowry

to fill out the consent form. Thus, we conclude the defendant briefly remained in the patrol car "voluntarily in a spirit of apparent cooperation." He was not illegally seized. We caution, however, that we do not hold that voluntariness can be assumed in all cases where a driver is questioned while sitting in an officer's car. Under some circumstances a reasonable person might feel compelled to acquiesce in a police officer's request that he remain in the police car.

B

[3] The defendant next argues that he did not consent to the search of his vehicle. When, as here, the State seeks to rely upon defendant's consent to support the validity of a search, it has the burden of proving that the consent was voluntary. *State v. Hunt*, 37 N.C. App. 315, 321, 246 S.E.2d 159, 163 (1978); *Schneckcloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854 (1973). Voluntariness is a question of fact to be determined from all of the surrounding circumstances. *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985). Again, we are bound by the trial court's findings of fact which are supported by competent evidence. *Id.*, at 345, 333 S.E.2d at 715. "However, the conclusions of law drawn from those findings are reviewable by the appellate courts." *Id.*, at 346, 333 S.E.2d at 715.

Competent evidence clearly exists to support the trial court's findings. Trooper Lowry's testimony tends to show that in the course of polite conversation he merely asked whether the defendant would consent to a search. The trial court rejected as incredible the defendant's testimony that Lowry stated, "I'm going to search your vehicle one way or the other, if I have to bring my buddies in, and I will get a search warrant." Indeed, such a ploy would be improper, but we must defer to the trial court since it was in the best position to observe the demeanor of the witness and chose instead to believe the trooper who denied making such a statement. *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934, 28 L.Ed.2d 715 (1971). We also hold that the findings support the trial court's conclusion of voluntary consent.

C

[4] The defendant next argues that even if he consented to Trooper Lowry's search of the vehicle, Lowry exceeded the scope of the consent by searching defendant's tote bag found therein. We disagree.

"When the State relies upon consent as a basis for a warrantless search, the police have no more authority than they have been given by the consent." *State v. Jolley*, 68 N.C. App. 33, 38, 314 S.E.2d 134, 137, *rev'd on other grounds*, 312 N.C. 296, 321 S.E.2d 883 (1984), *cert. denied*, 470 U.S. 1051, 84 L.Ed.2d 816 (1985). The defendant's consent to search the automobile for contraband entitled Lowry to conduct a reasonable search anywhere inside the automobile which reasonably might contain contraband including the tote bag in the back seat. *See State v. Belk*, 268 N.C. 320, 150 S.E.2d 481 (1966) (consent search of part of automobile beyond officer's vision reasonably included contents of paper bag between passenger's legs); *see also State v. Leonard*, 87 N.C. App. 448, 453, 361 S.E.2d 397, 400, *appeal dismissed, rev. denied*, 321 N.C. 746, 366 S.E.2d 867 (1987); LaFave & Israel, *Criminal Procedure* § 3.10 (1984).

Defendant also contends that he withdrew his consent for Lowry to search the tote bag by telling him the bag contained some nude photographs of his wife. That defendant made this statement is uncontested. However, we cannot say, as a matter of law, that the trial court erred in determining that the defendant never withdrew his consent based on such an ambiguous statement. We find no error in the trial court's denial of defendant's motion to suppress.

II

[5] Regarding his sentencing, the defendant argues that the trial court erred by declining to consider his evidence of substantial assistance to law enforcement authorities. We disagree.

> [T]he sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

N.C.G.S. § 90-95(h)(5) (Cum. Supp. 1989).

"[W]hether a trial court finds that a criminal defendant's 'aid' amounts to 'substantial assistance' is *discretionary.*" *State v. Hamad*,

92 N.C. App. 282, 289, 374 S.E.2d 410, 414 (1988), *aff'd per curiam*, 325 N.C. 544, 385 S.E.2d 144 (1989) (emphasis in original). The defendant presented evidence of what he considered were his efforts to provide substantial assistance. Contrary to the defendant's assertion on appeal, the trial court considered this evidence and found that "the evidence pertaining to the substantial assistance is insufficient to support a finding that the Defendant has in fact, in good faith, and to the best of his knowledge, rendered substantial assistance." We find nothing in the record to indicate the trial court abused its discretion in so finding. Here, we find no error in the trial court's exercise of its discretion.

No error.

Judges ORR and LEWIS concur.

CROWELL CONSTRUCTORS, INC. v. STATE OF NORTH CAROLINA EX REL. WILLIAM W. COBEY, JR., SECRETARY, DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 8912SC1057

(Filed 17 July 1990)

1. Administrative Law and Procedure § 67 (NCI4th)— Superior Court reversal of Mining Commission decision—appellate review—whole record test

Although appellate review of a Superior Court judgment is normally limited to whether the court committed any errors of law, the errors of law alleged here turn on the question of whether the trial court properly applied the judicial review standards of N.C.G.S. § 150B-51, so that the whole record must be considered in deciding whether the Superior Court judge was correct as a matter of law in holding that the Mining Commission's Final Decision was not supported by substantial evidence and was arbitrary and capricious.

Am Jur 2d, Administrative Law §§ 554, 555, 621, 650.

2. Mines and Minerals § 1 (NCI3d)— removal of old stockpiles of sand—mining

The Mining Commission's judgment that the removal of old stockpiles of sand was mining within the definition of N.C.G.S. § 74-49(7)b was supported by competent and substantial evidence and was not arbitrary or capricious where Cumberland Sand and Gravel had operated a sand and gravel pit between 1952 and 1960, leaving as by-product on the site stockpiles of coarse sand deposited above the original service soil; plaintiff purchased the tract of land in 1978 or 1979; plaintiff subsequently began removing the stockpiled sand and NRCD informed plaintiff that it was illegally mining and needed a permit to continue; and by 1986 the stockpiled sand was covered with varying densities of vegetation, including pine trees, and a brown band of material became obvious at the top of the stockpiles after the vegetation was cleared and the stockpiles were cut by a front end loader; and the brown band was the accumulation of second growth on the tract of leaves and pine straw that covered the stockpiles. Considering the type of material involved here, the amount of time that lapsed and the amount of revegetation that occurred at the site, the Mining Commission's determination that the stockpiled sand had become surface soil was neither arbitrary nor capricious.

Am Jur 2d, Mines and Minerals §§ 5, 7, 8, 175.

3. Mines and Minerals § 2 (NCI3d)— mining without permit

The Mining Commission had the authority to impose a civil penalty where, despite confusion over the dates on which plaintiff violated the statute, there was sufficient evidence in the record that plaintiff mined without a permit on three dates after receiving a 1984 notice, and on two dates after receiving a 1986 notice. N.C.G.S. § 74-64(a)(1)a.

Am Jur 2d, Mines and Minerals §§ 5, 7, 8, 175.

4. Mines and Minerals § 2 (NCI3d)— mining without permit—penalty—not arbitrary and capricious

A penalty for mining without a permit was not arbitrary and capricious even though the company had a good record of complying with the Mining Act where the evidence also

tended to show that about ten acres of land was involved, off-site sedimentation occurred as a result of the violations, plaintiff's restoration efforts were initially ineffective, plaintiff was found to be mining on two separate occasions after a notice was received, and plaintiff continued to mine for more than a month after receipt of the notice.

Am Jur 2d, Mines and Minerals § 176.

Judge LEWIS dissenting.

APPEAL by respondent from judgment entered by *Judge George R. Greene* in CUMBERLAND County Superior Court. Heard in the Court of Appeals on 10 April 1990.

In November 1987, Administrative Law Judge Thomas R. West heard this matter to determine whether the Department of Natural Resources and Community Development ("NRCD" (NRCD is the predecessor agency of the Department of Environment, Health and Natural Resources)) had the authority to issue a civil penalty against petitioner for violations of the N.C. Mining Act, N.C. Gen. Stat. §§ 74-46 to -88 (1985 & Supp. 1989), and whether the assessment of a $10,000 civil penalty by the agency was appropriate.

In March 1988, the A.L.J. concluded that mining, within the meaning of the Mining Act, had occurred and recommended that a penalty of only $2,000 be assessed against petitioner for violations that occurred on 19 February and 14 March 1986. Subsequently, the matter was heard before the N.C. Mining Commission for Final Agency Decision pursuant to N.C. Gen. Stat. § 150B-42 (1987). The Mining Commission modified the A.L.J.'s findings and conclusions and found that petitioner's activities constituted mining under all three definitions of the Act. The Commission also reinstated the $10,000 penalty.

Petitioner appealed the Final Agency Decision to Superior Court pursuant to N.C. Gen. Stat. § 150B-43 (1987). In August 1989, Judge Greene reversed the Mining Commission on the ground that no competent, material or substantial evidence supported a finding that mining had occurred. The Court found it unnecessary to consider the issue of the penalty. From that judgment, respondent appealed.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins and Kimbrell Kelly Tucker, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Mark Payne, for respondent appellant.

ARNOLD, Judge.

Evidence in the record indicates the following facts: Crowell Constructors, Inc. ("Crowell") is a North Carolina corporation doing business in the state. Sometime in 1978 or 1979 Crowell purchased a thirty-six acre tract of land located in Moore County. Between 1952 and 1960, Cumberland Sand and Gravel Corporation operated a sand and gravel pit on the property. Cumberland Sand and Gravel ceased operations in 1960, leaving as by-product on the site stockpiles of coarse sand. All of the stockpiled sand was deposited above the original surface soil.

Subsequent to its purchase of the property, Crowell began removing the stockpiled sand. After inspecting the property in 1984, NRCD sent Crowell a Notice of Violation informing the company it was illegally mining and needed a permit to continue. *See* N.C. Gen. Stat. § 74-64(a)(1)a (1985). Crowell contended the operation did not constitute mining. NRCD reviewed the situation and determined that Crowell's activities technically fit the statutory definition of mining, but the short-term nature of the project lent itself more to regulation under the Sedimentation Pollution Control Act. N.C. Gen. Stat. §§ 113A-50 to -66 (1989). NRCD understood that the removal of the sand would be completed within a few months.

Pursuant to these discussions, Crowell submitted a soil erosion and sedimentation control plan to NRCD, which was approved by NRCD in June 1984. However, Crowell continued removing sand from the tract during the wet-weather or winter months of 1985 and 1986. On 14 February 1986, NRCD sent petitioner another Notice of Violation informing petitioner it was violating the Mining Act by mining without a permit. The Notice stated that the company was subject to a civil penalty of up to $5,000 for each day of illegal operation. Crowell apparently misunderstood the 1984 discussions with NRCD, which had waived the mining permit only for a short-term operation. Nevertheless, removal of the stockpiled sand continued until 21 March 1986, more than a month after the February notification was received. On 27 March 1987, NRCD as-

sessed Crowell a fine of $10,000 for mining without a permit on 23 January and on 19 February 1986.

Judicial review of administrative agency decisions is governed by the North Carolina Administrative Procedure Act, codified at Chapter 150B of the General Statutes. A court reviewing an agency decision may reverse if it finds the decision: "[u]nsupported by substantial evidence . . . in view of the entire record as submitted; or . . . [a]rbitrary or capricious." N.C. Gen. Stat. § 150B-51(b)(5), (6) (1987). This standard of review is known as the "whole record" test. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thompson v. Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977). To determine whether substantial evidence exists, the reviewing court must consider not only the evidence supporting the agency result, but also contradictory evidence or evidence from which conflicting inferences may be drawn. *Id.* at 410, 233 S.E.2d at 541. The whole record test "properly takes into account the specialized expertise of the staff of an administrative agency. . . ." *High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 279, 276 S.E.2d 472, 475 (1981). Finally, a reviewing court should not substitute its judgment for that of the agency. *Id.*

This Court has also applied the phrase "arbitrary and capricious" to the review of agency decisions.

> The "arbitrary and capricious" standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are "patently in bad faith," (citation omitted) or "whimsical" in the sense that "they indicate a lack of care and careful consideration" or "fail to indicate 'any course of reasoning and the exercise of judgment' . . . ." (Citations omitted.)

Lewis v. N.C. Dept. of Human Resources, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). "[T]he reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Id.*

[1] When an appellate court, however, reviews the decision of a lower court as opposed to when it reviews an administrative agency's decision on a direct appeal, the scope of review to be

applied is the same as it is for other civil cases. *American National Insurance Co. v. Ingram*, 63 N.C. App. 38, 303 S.E.2d 649, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983). This rule normally limits our review of a superior court judgment to whether the court committed any errors of law. N.C. Gen. Stat. § 7A-27(b) (1989). Nevertheless, the errors of law alleged herein turn on the question of whether the trial court properly applied the judicial review standards of N.C. Gen. Stat. § 150B-51. Therefore, we must consider the whole record to determine whether the Superior Court judge was correct as a matter of law in holding that the Mining Commission's Final Decision was not supported by substantial evidence and was arbitrary and capricious.

[2] Respondent first assigns as error the Superior Court ruling that petitioner's activities did not constitute mining. After careful scrutiny of the record, and for the reasons we set out, we agree with respondent.

The Mining Act contains three definitions of "mining." Under the first, mining is "[t]he breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter . . . . " G.S. § 74-49(7)a. Sand is defined as a mineral. G.S. § 74-49(6). To find that mining has occurred under this subsection, it must be shown that Crowell broke the "surface soil."

A review of the evidence reveals that in 1960 the stockpiles of sand were as high as twenty-five feet, that some were conical in shape and others were in ridges. By 1986, conditions at the site had changed. The A.L.J. found:

> 44. The stockpiled sand is covered with varying densities of vegetation, including pine trees.
>
> 45. After the vegetation was cleared and the stockpiles cut by Crowell's front end loader, a brown band of material became obvious at the top of the stockpiles. This band is well illustrated in Respondent's [photographs of the site]. The brown band is the accumulation of the second growth on the tract of leaves and pine straw that covered the stockpiles.

Where the line is drawn to determine when a sandpile is still just a pile of sand and when it becomes the surface of the earth will turn on the particular facts of each case. Considering the type of material involved here, the amount of time that elapsed and

the amount of revegetation that occurred at the Crowell site, the Mining Commission's determination that the stockpiled sand had become the surface soil was neither arbitrary nor capricious. It is not unreasonable to define the surface as the layer of soil on which plants and trees are growing.

Our research uncovers only one other case that has ruled on the issue. Fifty years ago a federal court held that "mining" had not occurred where a company began to remill and retreat piles of crushed rock eight years after the gravel had been stockpiled. *Atlas Milling Co. v. Jones*, 115 F.2d 61 (1940). *Atlas*, however, is easily distinguishable because several factors previously mentioned are different in the two cases: the materials involved, the time that elapsed and the amount of revegetation that occurred. We therefore hold in the case *sub judice* that mining occurred under G.S. § 74-49(7)a.

Respondent also contends that the court erred in reversing the Mining Commission's finding that Crowell had engaged in mining under G.S. § 74-49(7)b. This subsection defines mining as "[a]ny activity or process constituting all or part of a process for the extraction or removal of minerals . . . from its original location. . . ." Petitioner contends that the sand extracted from the stockpiled areas was not in its original location and therefore its activities cannot constitute mining.

Our discussion above tends to invalidate this argument. Evidence that reasonably supports the finding that the stockpiled sand can be defined as the surface soil, also may support the determination that the sand was in its original location. Furthermore, this subsection applies to "all or part" of a mining process. Regardless of whether one determines the stockpiled sand was in its original location, petitioner's activities were part of a mining process. The A.L.J. found that the stockpiled sand originally was the by-product of a mining operation. About twenty years later Crowell began extracting the sand for use in making asphalt. Crowell's activities then reasonably can be defined as part of a mining process.

Mining is also defined in the Act as "[t]he preparation, washing, cleaning or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use." G.S. § 74-49(7)c. As noted above, Crowell excavated sand from the site and used it to make asphalt. Such activity reasonably can be defined as preparing a mineral for commercial use.

In sum, the record demonstrates substantial evidence to support the finding that Crowell's activities constituted mining within the meaning of the statute. Neither this Court, nor the trial court, should substitute its judgment for that of the Commission in the face of reasonable supporting evidence. *High Rock Lake Assoc.*, 51 N.C. App. 275, 276 S.E.2d 472. In view of the entire record, the Commission's judgment was supported by competent and substantial evidence, and was neither arbitrary nor capricious.

[3] Crowell also makes two cross-assignments of error related to the penalty imposed by the Mining Commission. Petitioner argues the Mining Commission did not have the authority to impose a civil penalty against the company before notice had been sent pursuant to G.S. § 74-64(a)(1)a. The statute provides that the NRCD may assess a penalty of up to $5,000 a day against a person who fails to secure a permit before mining, and then it states, "[n]o civil penalty shall be assessed until the operator has been given [written] notice of the violation . . . . " *Id.*

First, we note that part of the dispute concerning this penalty results from confusion over the dates on which Crowell violated the statute. According to the findings of fact made by the A.L.J., Crowell received one Notice of Violation on 15 February 1986. NRCD employees observed mining operations occurring on the property on 19 February and 14 March 1986. The A.L.J. also found that NRCD had assessed Crowell $10,000 for mining without a permit on 23 January 1986 and 19 February 1986. Crowell was penalized $5,000 per day for the two violations. The company argues that a penalty for the 23 January violation, which occurred before the date of notification, was improper. However, the Mining Commission also found as a fact that Crowell received a Notice of Violation on or about 8 February 1984, well before the three 1986 violations. Furthermore, even if some confusion surrounded the 1984 notification, the A.L.J. found that Crowell mined without a permit on 19 February and 14 March 1986, two dates after the 15 February 1986 Notice of Violation was received. To summarize, there was sufficient evidence in the record showing that Crowell mined without a permit on three dates after receiving the 1984 notice, and on two dates after receiving the 1986 notice. Therefore, this assignment of error is overruled.

[4] Finally, respondent contends that the penalty assessed by the director of the NRCD is arbitrary and capricious when examined

against the criteria for determining the amount of the penalty as set forth in 15 N.C. Admin. Code tit. 15, 5F.0007 (December 1989). Crowell argues that the evidence showed the company has a good record of complying with the Mining Act. However, the evidence also tended to show that about ten acres of land was involved in this violation, off-site sedimentation occurred as a result of the violations, and that Crowell's restoration efforts, at least initially, were ineffective. Further, Crowell was found to be mining on two separate occasions after the February 1986 notice was received, and continued to mine for more than a month after receipt of the notice. In light of this evidence, the assessment is justified and should not be disturbed.

The order of the trial court is

Reversed.

Judge DUNCAN concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent.

I agree with the majority that the standard of review is a whole record test. I believe the trial court judge made a proper consideration of relevant factors when he determined that the Mining Commission's final decision was not supported by substantial evidence and was arbitrary and capricious.

The issue is whether or not the removal of the stockpile of sand constituted breaking the surface and therefore was "mining" under the statute. The evidence showed that the densities of vegetation were some scrub pines on the extreme southern and western sides of the sand piles. I do not believe this constitutes a new "surface soil" as contemplated by the statute. It is impossible to tell from the photographs in the record whether the trees were existing prior to 1960 or after. The definition given in the record of scrub pines as being some ten feet tall would seem to exclude those trees existing which appear to be very much taller. Few, undefined number of scrub pines does not, to me, make a new

surface. The stockpile of sand was most assuredly not in its original location.

I believe that until the legislature makes a different determination, once a mineral has been removed from its original sub-surface location and stockpiled, it can never become a new surface nor be subject to mining regulations under the existing statutes. "Surface" to one can certainly mean one thing and something quite different to another. As former Chief Justice Branch is credited with saying, "to clean out a chicken house means one thing to a farmer but something quite different to a chicken thief." "Surface" may well be determined on a case by case basis according to the length of time the sand, gravel and other minerals are stockpiled. However, I believe under our current statutes and these circumstances, once extracted, the thing ceases to be subject to mining. For these reasons, I would affirm the trial court and thus respectfully dissent.

BLALOCK ELECTRIC CO., INC., PLAINTIFF v. GRASSY CREEK DEVELOPMENT CORPORATION, DEFENDANT

No. 8924DC730

(Filed 17 July 1990)

1. **Laborers' and Materialmen's Liens § 6 (NCI3d) — finding that additional work was done — no bearing on conclusion as to date of last furnishing of services**

In an action to recover on a materialman's lien, any error of the trial court in finding that plaintiff's employees did additional trim work in a condominium from May to August 1987 would not affect the trial court's conclusion that 3 February 1988 was the date of the last furnishing of services under the contract for the purpose of determining whether plaintiff's lien was timely filed.

Am Jur 2d, Mechanics' Liens §§ 192, 202.

2. Laborers' and Materialmen's Liens § 6 (NCI3d)— findings as to date of last furnishing of services—services not trivial—services performed in furtherance of contract—sufficiency of evidence

Evidence was sufficient to support the trial court's findings that three of plaintiff's employees and an employee of a supplier installed an exhaust fan and intercom/security system on 3 February 1988, that these services were not trivial in nature, and that they were performed in furtherance of the original contractual obligation where all four employees testified that they had performed the work on the indicated date and two of them submitted time sheets verifying this fact; the employees' testimony showed that the installations of the equipment were major undertakings requiring the four employees to work 5½ hours and requiring cutting through a block wall; and defendant's president admitted that the exhaust fan was specifically required by the blueprints and admitted that he had requested the installation of the intercom system.

Am Jur 2d, Mechanics' Liens §§ 192, 202.

3. Laborers' and Materialmen's Liens § 6 (NCI3d)— timeliness of filing of lien

Where defendant did not challenge on appeal the trial court's findings that plaintiff filed its materialman's lien 118 days after the last furnishing of materials and labor and filed its action to enforce its lien 175 days after the last furnishing, those findings were binding on appeal, and the court properly concluded that plaintiff's lien was timely filed.

Am Jur 2d, Mechanics' Liens §§ 192, 202.

4. Laborers' and Materialmen's Liens § 6 (NCI3d)— work done in furtherance of original contract—sufficiency of evidence

In an action to recover on a materialman's lien the evidence was sufficient to support the trial court's conclusion that work done on 3 February 1988 was in furtherance of the original contract, and there was no indication that the work was done for the purpose of extending the time for filing the lien.

Am Jur 2d, Mechanics' Liens §§ 192, 202.

APPEAL by defendant from judgment entered 21 March 1989 by *Judge Alexander Lyerly* in MITCHELL County District Court. Heard in the Court of Appeals 7 December 1989.

This action was brought by plaintiff to enforce a materialman's lien pursuant to G.S. 44A-7 *et seq.* and was tried before a judge, sitting without a jury. The evidence adduced at trial showed the following facts. In the summer of 1985 defendant corporation, by and through its President Edward L. Bryant, entered into an oral contract with Lewie M. Blalock, president of plaintiff corporation, whereby plaintiff was to provide electrical wiring and electrical service to condominiums to be constructed on land owned by defendant and located in Spruce Pine, North Carolina, for the approximate sum of $14,000.00 per building, payable upon the completion of each building. In July 1985 plaintiff first furnished labor and electrical supplies to defendant's property by beginning the "rough-in" work on Condominium No. One, a building consisting of four condominium units. Plaintiff was paid $7,000.00 upon completion of the electrical "rough-in" and was paid $7,040.48 on 3 December 1985 after completion of the trim work for a total of $14,040.48 for labor, materials and supplies furnished to Condominium No. One.

In the early part of 1986 Blalock and Bryant discussed the remainder of plaintiff's contract as it related to Condominium No. Two, a building also containing four condominium units, and agreed that the contract price would be approximately $14,000.00 assuming the wiring needs were the same as for Condominium No. One. On 1 March 1986 plaintiff began "rough-in" work on Condominium No. Two and discovered that the floor construction of that building differed from No. One, requiring additional labor and materials. On 1 April 1986 plaintiff's work passed the Rough-In Electrical Inspection conducted by the Mitchell County Department of Inspections (herein "the Department"). On 6 April 1986, defendant paid plaintiff $7,000.00 as a draw against the contract price for Condominium No. Two. In late May or early June 1986 plaintiff supplied labor and materials to provide electrical service to the elevator in No. Two. Plaintiff's work passed the 16 June 1986 Electrical Service Inspection and the 6 August 1986 Power for Elevator Inspection which were also conducted by the Department. From approximately July or August 1986 until May 1987 no construction work was done on Condominium No. Two because defendant was without funds to proceed with construction. In early May 1987 there was a potential sale for one unit in Condominium No. Two

and plaintiff installed light fixtures and completed the trim work in that unit. On 27 May 1987 plaintiff's work in No. Two passed the final Electrical Service Inspection, but the inspector testified that additional trim work, including the installation of receptacle cover plates, remained to be completed.

In the early summer of 1987 plaintiff ordered an intercom/security system for installation at No. Two from a local supply house, Mountain Heritage Lighting and Electric Supply of Newland, North Carolina (herein "Mountain Heritage"). Although the system was not part of the blueprints, it had been added to Condominium No. One at the request of E. L. Bryant, and Bryant and Blalock had agreed it would also be installed in Condominium No. Two. From May to August 1987 plaintiff provided additional labor and materials to complete the trim work in the remaining three units in No. Two, but was unable to complete the electrical work pursuant to the contract because the intercom/security system had not been delivered to Mountain Heritage. On 20 January 1988 one of plaintiff's employees spent two and one-half hours at Mountain Heritage helping their employees look for the "master unit" for the intercom system which supposedly had been misplaced. The unit was never found and had to be reordered. On 3 February 1988 Blalock and two other of plaintiff's employees picked up the unit from Mountain Heritage and, along with an employee from Mountain Heritage, went to Condominium No. Two to install it. While they were there they also installed an exhaust fan in the elevator room, which required cutting into block walls. This exhaust fan was specified in the blueprints and a similar fan had been installed in Condominium No. One. The four men worked for five and one-half hours installing these systems to complete the work specified by the contract between the parties.

On 4 February 1988 Blalock presented the final bill to E. L. Bryant who informed Blalock that because defendant corporation had been unable to sell the condominium units there were no funds with which to pay the remaining $8,288.28. E. L. Bryant suggested that Blalock contact H. G. Bryant, a director of defendant corporation, regarding payment of the outstanding balance. Blalock contacted H. G. Bryant who responded by letter to Blalock on 1 April 1988 assuring Blalock he would be paid as soon as a condominium was sold and requesting that plaintiff corporation not file a lien against the property. On 31 May 1988, 118 days after the 3 February 1988 furnishing of materials and labor to defendant's condominiums,

plaintiff filed a Notice of Claim of Lien against defendant corporation in the Mitchell County Office of the Clerk of Court pursuant to Chapter 44A of the North Carolina General Statutes. On 27 July 1988 plaintiff brought this action to enforce its lien and defendant's registered agent, E. L. Bryant, was served with notice of both the lien and the judicial action.

Based on this evidence the court made appropriate findings of fact and concluded that the "last furnishing of materials and labor," within the meaning of the statute, occurred on 3 February 1988. The court also concluded that plaintiff had filed its lien and brought the action to enforce its lien in timely fashion in accordance with G.S. 44A-12 and 44A-13. Based on these conclusions, the court ordered that the property be sold to satisfy the lien in accordance with the provisions of G.S. 44A-14. From this judgment defendant appeals.

Hemphill & Gavenus, by Kathryn G. Hemphill, for plaintiff-appellee.

Hal G. Harrison, P.A., by Hal G. Harrison, for defendant-appellant.

PARKER, Judge.

Defendant brings forward seven assignments of error on appeal. First, defendant contends that the court erred in finding that from May to August 1987 plaintiff's employees did additional trim work in Condominium No. Two because there was insufficient evidence to support such a finding. Second, defendant asserts that the court erred in finding that three of plaintiff's employees and an employee of Mountain Heritage installed the exhaust fan and intercom/security system at Condominium No. Two on 3 February 1988. Third, defendant contends that the court erred in finding that the labor and materials supplied by plaintiff on 3 February 1988 were not trivial in nature and were performed in furtherance of the original contractual obligation. Fourth, defendant argues that the trial court's findings of fact did not support its conclusion that plaintiff timely filed its claim of lien against defendant in accordance with G.S. 44A-12. Fifth, defendant asserts that the court's findings did not support its conclusion that the labor and materials furnished by plaintiff on 3 February 1988 were not trivial and were furnished in furtherance of the original contractual obligation. Next, defendant contends that the court's findings did not support

its conclusion that the property should be sold in accordance with the provisions of G.S. 44A-14. Finally, defendant argues that the court erred in ordering that the judgment should be a lien on the property as of 19 July 1985 because there were insufficient findings of fact and conclusions of law to support such order. We find no merit in defendant's arguments; therefore, we affirm.

Defendant's first three assignments of error are directed to specific facts found by the trial court. Defendant contends that the evidence presented at the trial does not support these findings. Where the trial court sits without a jury, the judge is required to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." G.S. 1A-1, Rule 52(a)(1). The findings of fact are binding if supported by competent evidence, even if there is evidence to the contrary. *In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984).

[1] Our review of the trial transcript reveals competent evidence supporting these findings. With regard to the additional trim work performed by plaintiff's employees in Condominium No. Two, Blalock testified on cross-examination that after working on the unit for which there was a potential sale in May or June 1987 there were several occasions where they came to the condominium to "see if the other units were ready to finish trimming out and where they had been painted or whatever, we would go ahead and put covers on or hang fixtures in that order." This testimony shows that work was done on the second building after May 1987. In any event, this finding does not affect the court's conclusion that 3 February 1988 was the date of the last furnishing of services under the contract for the purpose of determining whether plaintiff's lien was timely filed; therefore, any error with regard to this finding would not affect the court's judgment where other findings supported by competent evidence would be sufficient to support the judgment. *Wachovia Bank v. Bounous*, 53 N.C. App. 700, 281 S.E.2d 712 (1981).

[2] As to the finding that plaintiff's employees and an employee of Mountain Heritage installed the intercom and elevator room exhaust fan on 3 February 1988, all four employees testified that they had performed the work on that date and two of the employees submitted time sheets verifying this fact. Finally, the employees' testimony shows that the installation of the intercom and the exhaust fan were major undertakings requiring the four employees

to work five and one-half hours and, in the case of the exhaust fan, requiring cutting through a block wall. As to the finding that this work was performed in furtherance of the contractual obligation, E. L. Bryant admitted that the exhaust fan was specifically required by the blueprints and also admitted that he had requested the installation of the intercom system for both buildings. Therefore, we find no merit in defendant's assertions.

[3] By its fourth, fifth, and sixth assignments of error defendant challenges the court's conclusions that plaintiff's lien was timely filed, that the work performed on 3 February was in furtherance of the contractual obligation, and that the property to which the materialman's lien attached should be sold. The trial court found as fact that plaintiff had filed its lien 118 days after the last furnishing of materials and labor to the real property and had filed the action to enforce its lien 175 days after the last furnishing. Defendant has not challenged these findings in its assignments of error and, therefore, they are binding on appeal. *See Industries, Inc. v. Construction Co.*, 29 N.C. App. 270, 275, 224 S.E.2d 266, 269, *disc. rev. denied*, 290 N.C. 551, 226 S.E.2d 509 (1976). In order to be timely, a materialman's lien must be filed no later than "120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien." G.S. 44A-12(b). An action to enforce the lien must be brought no later than 180 days after the last furnishing of labor or materials. G.S. 44A-13(a). Based on these findings, therefore, the trial court's conclusion was correct.

[4] Defendant also argues that the court's conclusion that the work done on 3 February 1988 was in furtherance of the original contract conflicts with our Supreme Court's decision in *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E.2d 256 (1963). We disagree. *Priddy* was an action between the holder of a deed of trust and a lienor-judgment creditor to determine the priority of their liens. In that action the plaintiff, the holder of the deed of trust, alleged that the construction was completed on 2 November 1959 and that any subsequent supplying of materials by defendant, the Lumber Company, was a fraudulent effort to defeat plaintiff's liens. *Priddy*, 258 N.C. at 655, 129 S.E.2d at 259. In *Priddy*, the uncontradicted facts showed that on 14 May 1959 the party building the house entered into a contract with defendant to supply all the materials required for construction. Defendant supplied materials regularly until 2 November 1959. On 2 May 1960 defendant delivered storm

doors costing $71.00. The builder executed a deed of trust 19 October 1960 to secure a loan from plaintiff. On 24 October 1960 defendant delivered one set of medicine cabinet shelves worth fifty cents, which shelves were part of a medicine cabinet delivered on 2 November 1959 and which should have come with the cabinet. On 24 April 1961 defendant's president informed the builder that unless he purchased something else defendant would have to place a lien on his property. The builder purchased a gallon of paint on that date. On 15 June 1961, the builder executed a second deed of trust to secure an additional loan from plaintiff. On 25 September 1961, defendant filed his lien against the property. Subsequently, judgment was rendered in favor of defendant's lien and the property was sold to satisfy the judgment. On these facts the court enunciated the following criteria for determining when the materials were last furnished for purposes of filing a materialman's lien:

> (i) the work performed and materials furnished must be required by the contract
>
> (ii) in order that the date of the last item be taken as that from which limitation for filing notice of lien shall run, it is essential that the work or materials at different times be furnished under one continuous contract
>
> (iii) whatever is done must be done in good faith for the purpose of fully performing the obligations of the contract, and not for the mere purpose of extending the time for filing lien proceedings and, finally
>
> (iv) where the time allowed for filing has begun to run, the claimant cannot thereafter extend the time within which the lien may be filed by doing or furnishing small additional items for that purpose.

Id. at 657, 129 S.E.2d at 260.

In the present case the trial court found, and the evidence supports, that the exhaust fan and intercom system were in furtherance of the original contract and, hence, that they were required by the contract and the contract could not be considered completed until such items were provided. Moreover, unlike *Priddy*, in the present case there is no indication that the work done on 3 February 1988 was done for the purpose of extending the time for filing the lien. In our opinion, the findings of the trial court

meet the criteria of *Priddy* and support the conclusion that the work was done in furtherance of the original contract.

When the action to enforce the lien is filed within 180 days after the last furnishing of services, G.S. 44A-13 provides that the judgment enforcing the lien shall direct that the property subject to the lien be sold to satisfy the amount due. G.S. 44A-13(b). Therefore, this conclusion was proper.

Finally, defendant assigns error to the court ordering that the judgment should attach as a lien on the property and the property should be sold to satisfy the judgment. As discussed above, a judicial sale is the statutorily prescribed procedure whereby the lien creditor can collect the judgment.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

Judges EAGLES and ORR concur.

JOY ALICIA McMILLAN, BY AND THROUGH HER GUARDIAN AD LITEM TRUDY McMILLAN AND TRUDY McMILLAN, INDIVIDUALLY AND TOM McMILLAN, INDIVIDUALLY, PLAINTIFFS v. FRAN MAHONEY, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MINOR CHILD, JERRY GUILLOT AND HILDA COX, INDIVIDUALLY, AND AS GUARDIAN AD LITEM FOR MINOR CHILD ANTHONY COX, DEFENDANTS

No. 8928SC384

(Filed 17 July 1990)

1. **Torts § 2.1 (NCI3d)— injury from air rifle pellet—two defendants—concurrent negligence—alternative liability—acting in concert—sufficiency of complaint**

In an action to recover for damages sustained by the minor plaintiff and her parents when she was struck in the head by a pellet from an air rifle fired by only one of the two minor defendants, plaintiffs' complaint, though omitting the words "acting in concert," was sufficient to state a cause of action for concurrent negligence against the minor

defendants on the theory of alternative liability or acting in concert.

Am Jur 2d, Torts §§ 57, 61.

2. Parent and Child § 8 (NCI3d)— children's possession of air rifles—parents' negligence—sufficiency of complaint

In an action to recover for damages sustained by the minor plaintiff and her parents when she was struck in the head by a pellet from an air rifle, plaintiffs' complaint was marginally sufficient to survive defendant parents' motion to dismiss for failure to state a claim for relief where plaintiffs alleged that defendant parents gave the rifles and ammunition to the minor defendants; defendant parents should have reasonably foreseen the injuries which occurred; defendant parents were negligent "in permitting their children to possess and use air rifles based on all the circumstances existing at that time"; and such allegations gave notice that plaintiffs were proceeding on a theory that defendant parents were independently liable for failing properly to supervise their children's use of the air rifles.

Am Jur 2d, Parent and Child § 118.

APPEAL by plaintiffs from judgment entered 12 January 1989 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 17 October 1989.

C. David Gantt, P.A., by C. David Gantt, for plaintiff-appellants.

Robert G. McClure, Jr., P.A., by Robert G. McClure, Jr., for defendant-appellees Mahoney and Guillot.

Swain & Stevenson, P.A., by Joel B. Stevenson, for defendant-appellees Cox.

PARKER, Judge.

On 15 May 1986 plaintiff child Joy McMillan suffered permanent brain damage when she was struck by a pellet from an air rifle. This is an action for the damages suffered by plaintiffs in connection with this injury which was allegedly the result of negligence on behalf of both the minor and the adult defendants. Pursuant to a motion by defendants, the trial judge dismissed plain-

tiffs' complaint under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Plaintiffs appeal.

Since the trial judge dismissed under Rule 12(b)(6), we include the relevant portions of the complaint to aid in our analysis. In their complaint plaintiffs allege the following:

> 8. That on or about May 15, 1986, Defendant Guillot and Defendant Cox were shooting air rifles near the Plaintiffs' home.
>
> 9. That either Defendant Guillot or Defendant Cox fired his air rifle in a negligent, careless and reckless manner prior to seeing the Plaintiff was in a safe position.
>
> 10. That as a direct result of Defendant Guillot and Defendant Cox's action in shooting their air rifles, the Plaintiff was struck in her brain by a pellet from the guns, causing a permanent head injury and brain damage.
>
> 11. That as a direct result of Defendant Guillot and Defendant Cox's negligent actions, the Plaintiff's parents have incurred responsibility for medical expenses in excess of $10,000.00.
>
> SECOND CAUSE OF ACTION
>
> . . . .
>
> 13. That Defendant parents supplied to their respective minor children an air rifle and air rifle ammunition prior to May 15, 1986.
>
> 14. That upon information and belief, Defendant parents could or reasonably should have foreseen the injuries that occurred as a direct result of the presentation of the air rifle to their minor children.
>
> 15. That on May 15, 1986, the Defendant parents were negligent in permitting their children to possess and use air rifles based on all the circumstances existing at that time.
>
> 16. That as a direct result of Defendant parents' negligence, their minor children permanently injured the Plaintiff in an amount in excess of $10,000.00 by firing a pellet that pierced the Plaintiff's brain.

16. [sic] That the Plaintiffs are entitled to receive from the Defendant parents, jointly and severally, a sum in excess of $10,000.00 for the injuries suffered by the minor child Plaintiff.

The sole issue on appeal is whether the complaint is sufficient to state a cause of action for which plaintiffs are entitled to relief. Defendants argue that plaintiffs' complaint is fatally defective for two reasons. First, with regard to plaintiffs' claim against the minor defendants, defendants assert that the complaint is fatally defective in that it fails to allege concerted action and the facts as stated clearly indicate that only one of the minor defendants actually caused the injury for which plaintiffs seek recovery. Second, with regard to the claim against the defendant parents, defendants assert that the complaint is fatally defective because plaintiffs fail to allege notice to defendant parents that their children would misuse the air rifles and, thus, plaintiffs fail to allege an essential element of negligence—foreseeability. We address each of these contentions separately.

[1] Although our research discloses no prior North Carolina cases addressing the issue of liability for the negligent acts of multiple defendants where the plaintiff's injury is the result of only one act but the plaintiff is unable to prove whose act, plaintiffs' complaint in our judgment is sufficient to state a cause of action for concurrent negligence against the minor defendants. Our Supreme Court has held that joint tort-feasors are persons who act together in committing a wrong; they share a common intent to do the act which results in the injury. *Bost v. Metcalfe*, 219 N.C. 607, 611, 14 S.E.2d 648, 652 (1941).

The Restatement (Second) of Torts states:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . .
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Restatement (Second) of Torts § 876(b), (c) (1977). As an illustration of this principle the Restatement gives the following example: "A

and B are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal, which is negligent toward persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is subject to liability to C." Restatement (Second) of Torts § 876(b) Comment d, illustration 6 (1977). Professors Prosser and Keeton have labeled this theory "established double fault and alternative liability." *Prosser and Keeton on the Law of Torts*, § 41 (W. Keeton 5th ed. 1984). Numerous cases from other jurisdictions allow a plaintiff to recover either under this theory, under a theory of "acting in concert," or under some combination of the two. *See Mangino v. Todd*, 19 Ala. App. 486, 98 So. 323 (1923) (where three sheriff's deputies had unlawfully shot at and injured plaintiff, the court held that the deputies were engaged in a common enterprise and that all were equally responsible for the injury); *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1, 5 A.L.R.2d 91 (1948) (where the parties were members of a hunting group and plaintiff's eye was injured by a single shotgun pellet when defendants fired simultaneously in the direction where they knew plaintiff to be standing, the court viewed both defendants as negligent and shifted the burden of proof to the defendants to absolve themselves of liability); *Orser v. Vierra*, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708 (1967) (where three defendants were shooting at a mudhen in the direction of plaintiff's deceased, and the cause of death was determined to be a bullet fired from a pistol, applying the theories of "alternative liability" and "acting in concert," the court held that the trial court erred in granting summary judgment for defendants where two of the defendants were alternately taking turns shooting the pistol at the mudhen and a third defendant was simultaneously shooting a rifle at the mudhen); *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120 (1906) (where evidence showed three defendants were shooting at a target using the gun by turns, all defendants were acting in concert in a negligent manner and it was unnecessary for plaintiff to show that the shot which injured him was fired by a particular defendant); *Moore v. Foster*, 182 Miss. 15, 180 So. 73 (1938) (where two constables wrongly fired their guns, inflicting injury on plaintiff, the court concluded that each committed a negligent act in the commission of a common enterprise); *Oliver v. Miles*, 144 Miss. 852, 110 So. 666, 50 A.L.R. 357 (1926) (where the defendants both fired across a public highway during the course of a hunting expedition and a person on the highway was shot, the defendants were held to be jointly and severally liable); *Kuhn v. Bader*, 89 Ohio App. 203, 101 N.E.2d

322 (1951) (where the court held that parties engaged in target practice are jointly and severally liable for injury caused by ricochet even absent evidence of who fired the shot). *See also* Annotation, *Liability of Several Persons Guilty of Acts One of Which Alone Caused Injury, in Absence of Showing as to Whose Act was the Cause*, 5 A.L.R.2d 98 (1949), and Annotation, *Liability for Injury or Death in Shooting Contest or Target Practice*, 49 A.L.R.3d 762 (1973).

In their complaint, though inartfully pleaded, plaintiffs have alleged the following: (i) that the minor defendants were shooting air rifles near the plaintiffs' home on the day the minor plaintiff was injured; (ii) that one of the minor defendants fired his air rifle in a negligent, careless and reckless manner in that he failed to see that the minor plaintiff was in a safe position prior to firing; and (iii) as a result of the minor defendants shooting their air rifles, minor plaintiff was struck in her brain by a pellet and suffered permanent head injury and brain damage. Although the complaint does not contain the words "acting in concert," we believe that under the recognized tort theories discussed above the complaint alleges facts sufficient to give defendants notice of the theory under which plaintiffs are proceeding. Therefore, the trial court erred in dismissing the complaint against the minor defendants pursuant to a motion under Rule 12(b)(6).

[2] As to the sufficiency of the complaint to state a claim for negligence against defendant parents in giving the air rifles to their minor children, *Lane v. Chatham*, 251 N.C. 400, 111 S.E.2d 598 (1959), is instructive. In *Lane* the plaintiff sought damages for loss of his eye when defendants' son shot plaintiff with the child's air rifle. Plaintiff sought recovery from the child's parents based on the parents' alleged negligence in giving the child the air rifle and "in failing, after notice of prior misuse, to prohibit, restrict or supervise his further use thereof." *Id.* at 401, 111 S.E.2d at 600. Defendants moved for nonsuit, but this motion was denied by the trial judge. Defendants appealed from judgment for the plaintiff. The Court stated:

> To impose liability upon the parent for the wrongful act of his child (absent evidence of agency or of the parent's participation in the child's wrongful act), for which the child, if *sui juris*, would be liable, it must be shown that the parent

> was guilty of a breach of legal duty, which concurred with the wrongful act of the child in causing the injury.

Id. at 402, 111 S.E.2d at 601. The evidence presented at trial tended to show that defendants had given their son the air rifle for Christmas approximately eleven months prior to plaintiff's injury. Two days before plaintiff was shot, the child's mother had given him two boxes of BB shot. That same day the child had shot at plaintiff's older sister, hitting her on the hip and raising a blister. The girl had told the child's mother, who did not respond. There was additional evidence that several weeks before the incident in question defendants' son had chased another child while aiming his gun in the direction of the other child and had shot at yet another child hitting him on the arms and legs and "raising some marks." The mother also had knowledge of these incidents, but took no action. There was no evidence that the boy's father had any knowledge of his son's misuse of the gun. In affirming the judgment as to the mother and reversing as to the father, the Court explicitly held that:

> an air rifle is not a dangerous instrumentality *per se*. . . .
>
> It is noted that there was no evidence as to the make or power of Raymond's air rifle. Nothing else appearing, we assume it was of the type and kind given to plaintiff and his younger brother and used generally by boys of comparable age in the community. Although the evidence is not specific, the implication is that the Lanes and Chathams lived in a rural community or small settlement where it was customary for boys of Raymond's age to have and to use air rifles in the course of their outdoor activities.
>
> Evidence that defendants gave Raymond an air rifle at Christmas 1956, and permitted him to use it, is insufficient, standing alone, to support a jury finding that defendants are liable for Raymond's wrongful act.

Id. at 404-05, 111 S.E.2d at 602-03. In the Court's opinion the evidence showed that the mother breached her legal duty when, after learning of her son's misuse of the gun, she failed to exercise reasonable care to prohibit, restrict, or supervise his further use of the gun. *Id.* at 405, 111 S.E.2d at 603. *See also Moore v. Crumpton*, 306 N.C. 618, 295 S.E.2d 436 (1982) (where, in a suit to recover damages for personal injuries inflicted during rape of plaintiff by defendants'

son, the Court held that the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior only if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control); *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974) (where plaintiff sued to recover damages for personal injuries inflicted upon his minor son when he fell from, and was run over by, the forklift operated by defendants' minor son, the Court held that there was sufficient evidence of defendant father's independent negligence in entrusting the forklift to his minor son to take the issue of negligence to the jury, but insufficient evidence that defendant mother was negligent where the evidence showed that she was inside the house all day without knowledge of what went on outside); *Patterson v. Weatherspoon*, 29 N.C. App. 711, 225 S.E.2d 634, *disc. rev. denied*, 290 N.C. 662, 228 S.E.2d 453 (1976) (in an action to recover damages for personal injury to minor plaintiff when defendant's son struck minor plaintiff with the golf putter he was holding, this Court held that in the absence of evidence that defendant should, by the exercise of due care, have reasonably foreseen that his child was likely to use the golf putter in such a manner as to cause injury, his motion for a directed verdict should have been allowed).

In their complaint plaintiffs have alleged that: (i) defendant parents gave the rifles and ammunition to the minor defendants; (ii) defendant parents should have reasonably foreseen the injuries that occurred; and (iii) defendant parents were negligent "in permitting their children to possess and use air rifles *based on all the circumstances existing at that time*." (Emphasis added.) Read liberally this last allegation is sufficiently broad under our notice pleading to encompass the "prior notice" requirement enunciated in *Lane*.

Our Supreme Court has held that for liability to attach for negligent supervision, although the particular injury need not have been foreseeable, the parents must have expected consequences of a generally injurious nature. *Moore v. Crumpton*, 306 N.C. at 624, 295 S.E.2d at 440. Therefore, the parents' knowledge of prior misuse, or of other actions which would give notice of the need to supervise the children's use of the guns, goes to the question of foreseeability of injury to plaintiff child. This Court has held that in reviewing a demurrer to the pleadings, now a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), the Court is "not concerned with whether plaintiff can prove his factual allegations;

neither are we concerned with whether plaintiff can establish proximate cause, including foreseeability, at the trial. We are concerned only with whether the complaint alleges a cause of actionable negligence against the defendants." *Sutton v. Duke*, 7 N.C. App. 100, 106, 171 S.E.2d 343, 348 (1969), *aff'd*, 277 N.C. 94, 176 S.E.2d 161 (1970). Based on the foregoing, we hold that the complaint is marginally sufficient to survive defendants' motion to dismiss for failure to state a claim for relief in that the general allegations give notice that plaintiffs are proceeding on a theory that defendant parents were independently liable for failing to properly supervise their children's use of the air rifles.

In conclusion, we note that a motion for more definite statement or other discovery pursuant to G.S. 1A-1, Rule 12 would supply factual information not provided in the original complaint. *See Redevelopment Comm. v. Grimes*, 277 N.C. 634, 645-46, 178 S.E.2d 345, 352 (1971); *Sutton v. Duke*, 277 N.C. 94, 106, 176 S.E.2d 161, 168 (1970). In the words of our Supreme Court, "To dismiss the action now would be 'to go too fast too soon.'" *Sutton v. Duke*, 277 N.C. at 108, 176 S.E.2d at 169 (quoting *Barber v. Motor Vessel "Blue Cat,"* 372 F.2d 626, 629 (5th Cir. 1967)).

Reversed and remanded.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD DEAL

No. 891SC782

(Filed 17 July 1990)

Criminal Law § 146 (NCI4th)— armed robbery—withdrawal of guilty plea—not allowed—error

A sentence of fourteen years imprisonment based on a guilty plea to armed robbery was vacated and remanded in light of defendant's low intellectual abilities, sufficient credible evidence that he was laboring under a misunderstanding of the guilty plea process, and the State's lack of argument that its case against defendant would be prejudiced as a result of his being allowed to withdraw his plea. Although defendant

did not attempt to revoke his plea for over four months, this appears to be the result of erroneous expectations and lack of communication with his attorney.

Am Jur 2d, Criminal Law §§ 501, 502, 505.

APPEAL by defendant from judgment entered 12 October 1988 by *Judge Henry L. Stevens, III*, in DARE County Superior Court. Heard in the Court of Appeals 7 May 1990.

On 8 February 1988, defendant was indicted for robbery with a dangerous weapon. On 28 April 1988, he entered a plea of guilty to that offense before Judge I. Beverly Lake, Jr. Judge Lake accepted the defendant's plea. The court continued prayer for judgment and ordered a pre-sentence evaluation. On 11 August 1988, Judge Paul M. Wright entered an order allowing defendant's attorney, Charles D. Coppage of Manteo, to withdraw from the case. On 5 October 1988, defendant, through his new counsel, filed a motion to withdraw his plea of guilty to robbery with a dangerous weapon. On 11 October 1988, Judge Henry L. Stevens, III, denied defendant's motion and sentenced him to an active term of fourteen years' imprisonment. Defendant appeals the trial court's denial of his motion to withdraw his plea of guilty on the grounds that it was not the result of defendant's informed choice.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert E. Cansler, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender M. Patricia DeVine, for defendant-appellant.

JOHNSON, Judge.

On the evening of 5 December 1987, the employees of Hardee's of Kill Devil Hills had closed the restaurant and were going home. The night manager, Ms. Judy Keith, was carrying the bank deposit bag containing $586.61 in her purse. Roderick Whitfield, a co-defendant, who was also a Hardee's employee, approached Ms. Keith and told her to drop the money. He had a knife, and Ms. Keith did as instructed. There was a second man with a knife who thrust it about to keep bystanders at bay. The two men fled on foot.

Investigators had reason to believe that defendant was involved. He was apprehended in the State of Florida. Defendant

gave four different statements to authorities. He implicated five other people and indicated that the purpose of the robbery was to obtain money to buy cocaine.

In his motion to withdraw his guilty plea, defendant alleged, *inter alia*, that he had been advised by his former attorney, Charles Coppage, that in return for his guilty plea to the armed robbery charge and testimony against the other co-defendants, he would be allowed to withdraw his plea and plead guilty to the lesser offense of common law robbery. He also alleged that all the co-defendants had been permitted to plead guilty to common law robbery.

Defendant was nineteen years old at the time of his guilty plea. A diagnostic report prepared by the State Division of Prisons indicated that defendant dropped out of school in the eighth grade, that he had previously been diagnosed as learning disabled, and that he reads and spells at a second grade level.

At the hearing conducted on defendant's motion to withdraw, defendant testified that he had been advised by Attorney Coppage that "we were going to plead guilty and testify against everybody else after I got tested up at the Polk Youth Center, and then we were going to change the plea and try and get a plea bargain." Defendant testified that this conversation took place in the holding cell, and there were no witnesses to it.

Attorney Coppage, a witness for the State, testified that he had been appointed to represent defendant. He stated that defendant had wanted to plead guilty by reason of insanity because of his drug use, but that he had advised him that if he testified against the other co-defendants and had a pre-sentence diagnostic test introduced to the court, his sentence might be minimized. He also stated:

> My recollection, the only thing I ever told him is he was charged with Robbery with a Dangerous Weapon, or Armed Robbery, that the sentence for that carried a maximum of 40 years to life. That there was a mandatory minimum sentence of 14 years of which he had to serve seven years, no probation, no parole, no good time, that he was going to do 7 years, day for day. But that I felt that if he cooperated with the state, given the fact he had waived extradition to come up here, had made a voluntary statement relatively early in the

> criminal proceedings to a law enforcement officer, come into court and pleaded guilty to the criminal offense, had offered to give evidence against co-defendants, which he was not called upon to do, or in fact did give evidence against them, and with his family background, and so forth, I felt like I had a reasonably good chance of minimizing the active sentence which he was to receive for the offense.

He admitted telling defendant that he "could ask" the State if he could later withdraw his plea, but that he thought "the chances of it would never be better than slim to none." Coppage also stated that he was "highly perturbed" when he learned that other co-defendants had been allowed to plead guilty to common law robbery because he "did not feel Mr. Deal ha[d] the mental capacity to plan anything as extensive as this and that the real bad folks in this had been allowed to plead to a lesser offense while my client was having to take the full load." Coppage also stated that defendant "did not understand a lot of things," and that he would occasionally have to go over things several times. The attorney also confirmed that on the day defendant entered his plea, he answered "yes" to the question "Are you now under the influence of alcohol, drugs, narcotics, medicines, pills, or any other intoxicants?" Defendant was then taking a drug called Mellaril three times a day. The attorney could not remember what defendant had told him the drug was for, but stated it may have been "to stabilize his emotions or moods, or something like that."

At the guilty plea proceeding on 28 April 1988, Judge Lake concluded that defendant's plea was the result of an informed choice and freely and voluntarily made. At the hearing conducted on defendant's motion to withdraw, Judge Stevens held that "[r]egardless of the Defendant's low mentality, . . . there is no evidence of any kind that this Defendant did not make this plea as his voluntary and informed choice by which he made a choice which he was in his power to make." He also found that "[t]here is no reasonable foundation or basis for an opinion that there was an arrangement other than that which the Defendant advised Judge Lake and which he was cautioned about." Statements made at both these hearings are quoted below as necessary to the issues raised by defendant.

On appeal, defendant contends that the court erred in refusing to allow him to withdraw his guilty plea pursuant to G.S. §§ 15A-1022 and 1023 because the record shows that he was "motivated by

an ongoing and underlying misconception of the proceedings." Our Supreme Court recently addressed the question of withdrawal of guilty pleas in *State v. Handy*, 326 N.C. 532, 391 S.E.2d 159 (1990). The Court in *Handy* found the standards for granting permission to withdraw a guilty plea to differ depending on whether the request to withdraw was made before or after sentencing. "[A] presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *Id.* at 593, 391 S.E.2d at 162. The Court set forth with approval the distinction recognized by most courts:

> In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason.
>
> On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice.

Id. at 536, 391 S.E.2d at 161, *quoting State v. Olish*, 164 W. Va. 712, 715, 266 S.E.2d 134, 136 (1980).

In *Handy*, the defendant pleaded guilty to first-degree murder, and the following morning, before proceedings reconvened, he moved to withdraw his plea. He told the court that he had felt "under pressure under the circumstances" to plead guilty, and that after praying about it overnight and talking with his mother and attorneys, he believed that he was not actually guilty of first-degree murder and wanted to withdraw the plea. He believed the only proper guilty plea was to second-degree murder. The trial court denied the defendant's motion to withdraw on the basis that the plea had been made freely, voluntarily and understandingly; that a factual basis for the plea existed; and that defendant's evidence to the contrary was unbelievable. The trial court also stated that it was exercising its discretion in denying the motion to the extent that it had discretion. The Supreme Court in *Handy* reversed the trial court and found that the reasons stated above by defendant were sufficient to support the standard of granting permission to withdraw for "any fair and just reason."

The *Handy* Court also described some factors which favor withdrawal as "whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and

whether the accused has had competent counsel at all relevant times." *Id.* at 539, 391 S.E.2d at 163 (citation omitted). The Court went on to state that "[t]he State may refute the movant's showing by evidence of concrete prejudice to its case by reason of the withdrawal of the plea. Prejudice to the State is a germane factor against granting a motion to withdraw." *Id.* (citations omitted).

In the instant case we find sufficient evidence that defendant had a basic misunderstanding of what the result of his guilty plea would be, and that this misunderstanding constitutes a fair and just reason to permit him to withdraw his plea.

At the guilty plea proceeding, the following exchange took place:

THE COURT: All right. It appears to the Court that with respect to that portion of the transcript that the Defendant be allowed to offer testimony in other criminal trials in Dare County and will be given credit at sentencing for such testimony and offer of testimony. That the Defendant will be given a presentence evaluation. Mr. Deal, is that your understanding of the arrangement you have with the State at this time?

MR. DEAL: Yes, sir. *I thought you mean plea bargain with the D.A.*

THE COURT: Yes, sir.

MR. DEAL: *No.*

THE COURT: And do you fully approve of that arrangement?

MR. DEAL: Yes, sir.

At the hearing on defendant's motion to withdraw his guilty plea, he was questioned on direct regarding his prior plea:

Q: Did you enter a plea to Armed Robbery, or Robbery with a Dangerous Weapon on April 28, 1988?

A: Did I *enter a plea*?

Q: Yes.

A: *What do you mean*?

Q: Did you *plead guilty* in this court on April 28, 1988, of Robbery with a Dangerous Weapon?

A: Yes, sir.

Q: Was Attorney Charles Coppage your Attorney at that time?

A: Yes, sir.

Q: Can you tell the Court on what basis you entered that plea? Why did you enter that plea?

A: We were trying to . . .

Q: When you say we, who are you talking about?

A: Me and Charles Coppage. *We were trying to get the District Attorney to give us a plea bargain. The District Attorney put me on the stand against another client or with anybody having to do with that, then I could get a plea bargain for my testimony. Therefore, we would have to plead guilty at the time, and then after I testified against everybody we would change it back and go for a plea bargain.*

Q: And what were the terms of that plea bargain that you were going to be allowed to plead later?

A: It would be dropped down to Common Law Robbery.

Q: Is that the basis you entered the plea on on April 28, 1988?

A: Yes, sir.

On cross-examination, he persisted in his understanding of how things would work:

Q: Mr. Deal, you entered this plea pursuant to a written plea transcript, did you not, sir? You signed a plea transcript, did you not, that appears in the record in this case?

A: *In that I plead guilty,* yes.

Q: And the Judge asked you in open court, did he not, sir, if that was the plea arrangement that appeared on that transcript?

A: I was told by Charles Coppage that this was what we were going to have to do, so *we could go ahead and plead guilty* and sign this thing, and that is what I did.

Q: In open court, didn't the judge ask you, sir, if your signature appeared on that plea transcript?

A: Yes sir.

Q: And if you had read the plea transcript, and read the answers contained thereon?

A: Actually, sir, *I don't read that good and, I don't know.*

Q: He asked you if you and Mr. Coppage had gone over the plea transcript, is that not correct?

A: Yes sir.

Q: You swore that you were telling the truth when you told the Judge that was the plea that you were entering on that day, and you understood the terms of that plea?

A: Yes sir. But I was told to do so by my lawyer *so we could go about doing this and get the plea bargain.*

Q: But you did tell the court that was your plea arrangement, and those were the only terms of the plea arrangement that appeared on that document you signed, is that correct?

A: Yes sir, but that is not what I was led to believe by my lawyer.

Q: So you, but in open court you indicated that was your, that you wished to enter a plea of guilty at that time?

A: Being advised by Charles Coppage, yes.

Q: And you answered all of the questions posed to you by the Court that were involved in that plea arrangement, did you not, in that transcript of plea?

A: Yes, but I was advised on how to answer.

. . . .

Q: Now, who was a party to that agreement?

A: Charles Coppage.

Q: Was there anyone else that you had that agreement with?

A: No sir.

Q: Did anyone representing the State of North Carolina make any such agreement with you?

A: *Nobody else had talked to me, at the time I haven't [sic] been able to see Charles Coppage, and that is one the reasons we got him to resign.*

Q: Did I or any other person representing the State of North Carolina make any agreement with you that does not appear of record?

A: No sir, *I thought he would do that, I thought he had done that.*

Q: When was this conversation you had with Mr. Coppage concerning any arrangement that does not appear of record, when did that take place?

A: When we signed that.

Q: Was that here in open court, sir, or was that someplace else?

A: That was back in the holding cell. That was between me and him and nobody else was there.

(Emphases added.)

After independently reviewing the record (*see State v. Handy, supra*), we find that in light of defendant's low intellectual abilities, there is sufficient credible evidence that he was laboring under a basic misunderstanding of the guilty plea process. We therefore find that his plea of guilty was not the result of an informed choice. Although he did not attempt to revoke his plea for over four months, this appears to have resulted from his erroneous expectations and lack of communication with his attorney. The State has also not argued that its case against defendant would be prejudiced as a result of his being allowed to withdraw his plea. *See United States v. Savage*, 561 F.2d 554 (4th Cir. 1977). We conclude that defendant has met his burden of showing a fair and just reason for withdrawing his plea of guilty to robbery with a dangerous weapon. We therefore vacate the sentence based on that guilty plea and remand for proceedings based upon a new plea by defendant.

Sentence vacated; remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

DIANE KIRBY ELLIOTT, PLAINTIFF v. DR. KENNETH D. OWEN; KENNETH D. OWEN, P.A.; DR. W. JOSEPH PORTER; DR. ROBERT A. HERRIN; AND PORTER, BARTS, HERRIN AND KIRK, P.A., DEFENDANTS

No. 8926SC1072

(Filed 17 July 1990)

1. **Physicians, Surgeons, and Allied Professions § 17.4 (NCI3d)— dental malpractice—breach of standard of care—evidence insufficient**

Plaintiff in a dental malpractice action failed to show that a genuine issue of material fact existed concerning defendants' breach of the applicable standard of care where plaintiff alleged negligence in pre-operative orthodontic treatment, surgery to correct a malalignment of her jaws, and post-operative treatment; defendants submitted affidavits stating that they had conformed to the standard of care in their community; and plaintiff in response submitted an affidavit in which she alleged that defendant Dr. Porter failed to tell her that she needed immediate treatment to avoid movement of her teeth and an affidavit from the orthodonist who subsequently treated plaintiff which did not mention the standard of care with respect to this case. Plaintiff failed to show that a genuine issue of material fact exists concerning whether defendants had breached the applicable standard of care in their treatment of plaintiff, including post-operative care.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 312, 357.

2. **Physicians, Surgeons, and Allied Professions § 17.4 (NCI3d)— dental malpractice—res ipsa loquitur—summary judgment for defendant proper**

There were no significant issues of fact regarding the applicability of the doctrine of res ipsa loquitur in a dental malpractice action where there was ample evidence that relapse was an inherent risk of this type of surgery and that at the earliest detection of movement of her teeth plaintiff was urged to return to defendant Owen to treat the relapse and prevent further movement.

Am Jur 2d, Physicians, Surgeons, and Other Healers § 335.

3. Physicians, Surgeons, and Allied Professions § 17.4 (NCI3d) — dental malpractice — informed consent — failure to raise

A contention regarding plaintiff's informed consent in a dental malpractice action was not properly before the Court of Appeals where plaintiff failed to raise the contention either in her complaint or otherwise before the trial tribunal.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 187, 326.

Judge WELLS concurring.

APPEAL by plaintiff from order entered 19 June 1989 by *Judge Frank W. Snepp, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 10 April 1990.

This is a medical malpractice action brought against a dentist, Dr. Kenneth D. Owen, and two oral surgeons, Drs. W. Joseph Porter and Robert A. Herrin and their respective professional associations. This is the second action brought by plaintiff against defendants. Plaintiff dismissed the first action and subsequently filed this suit in September 1987.

Prior to 1 May 1981, plaintiff suffered from severe and chronic headaches and was advised by her physician to schedule an appointment with defendant Porter to determine if the headaches were related to her jaw or other orthodontic or maxillofacial problem. On or about 1 May 1981, plaintiff was examined by defendant Porter who informed her that she was suffering from mandible joint syndrome. Plaintiff had a Class III malocclusion which is a condition in which the lower teeth are too far forward in relation to the upper teeth. Also, the arc of plaintiff's upper teeth was not compatible with the arc of her lower teeth. During the meeting, defendant Porter informed plaintiff that she needed braces in order to properly position her teeth before he could operate to correct the malalignment of her jaw. Plaintiff was then referred to defendant Owen for the necessary orthodontic treatment. Plaintiff was treated by defendant Owen from May 1981 through October 1982. Owen had plaintiff wear orthodontic braces until the arc of her upper and lower teeth was sufficiently compatible and fit together properly enough to permit surgery.

On or about 18 October 1982, plaintiff was admitted to Presbyterian Hospital for surgery. Initially, surgery was planned

only on plaintiff's lower jaw but defendants Owen and Porter decided on the night prior to the scheduled surgery to operate on both jaws. Prior to surgery, plaintiff was informed that surgery would be done on the upper jaw as well. Dr. Owen prepared a surgical prescription which involved movement of both jaws, model surgery for movement of the lower jaw only and model surgery for movement of both the upper and lower jaws, and surgical splints. On or about 19 October 1982 defendant Porter and defendant Herrin acting allegedly at the direction of defendant Owen performed a maxillal three phase osteotomy and bilateral sagittal split osteotomy which involved moving plaintiff's lower jaw backward 7 to 10 millimeters and tilting plaintiff's upper teeth backward. Following surgery plaintiff's jaws were wired shut for approximately nine weeks.

After discharge from the hospital, plaintiff saw defendant Porter for several follow-up visits. During the initial visits, plaintiff's jaws were allegedly in the position called for by the surgical prescription. Defendant Porter began to notice some movement in plaintiff's jaws around 15 November 1982. Approximately 29 November 1982 defendant Porter referred plaintiff to defendant Owen for orthodontic treatment because there appeared to be some slight movement in her jaws. On or about 20 December 1982, after defendant Porter removed the surgical splint, both defendants Porter and Herrin noticed some movement of the maxilla in relation to the position of the mandible. Defendant Porter then gave plaintiff the surgical splint and directed her back to defendant Owen for his (Owen's) evaluation of whether continued use of the splint was advisable and whether orthodontic treatment could correct plaintiff's problem. At this time defendant Porter allegedly conferred with defendant Owen over the telephone concerning plaintiff's problem and indicated that plaintiff would be coming up to see defendant Owen. Defendant Porter saw plaintiff once again on 30 December 1982. At that time plaintiff did not have her splint in place.

On or about 7 January 1983, plaintiff saw defendant Owen who determined that the mandible had moved forward to within two millimeters of where it was originally and the upper jaw or maxilla had moved forward approximately five millimeters. Plaintiff received orthodontic treatment from defendant Owen through approximately 21 March 1983. On or about 11 March 1983 defendant Owen told plaintiff that she had the following three choices regarding her lower jaw: (1) remove the appliances; (2) remove two teeth

and bring the lower front teeth back; or (3) go through surgery again. On 21 March 1983, defendant Owen advised plaintiff that ideally she needed surgery on both the upper and lower jaws again. Plaintiff saw defendant Porter again on 11 April 1983. Defendant Porter recommended that plaintiff return to defendant Owen but plaintiff refused. Plaintiff was eventually treated orthodontically by Dr. John Edwards and underwent further surgery to correct the position of her jaws.

Plaintiff brought this action against defendants alleging in her complaint that "[a]s a direct and proximate result of the complications following the afore alleged surgery, Plaintiff was required to undergo additional orthodontic treatment which culminated in corrective surgery which was performed on or about August 20, 1984." Plaintiff further alleged that the subsequent treatment was a direct and proximate result of the joint and several negligence of defendants Owen, Porter and Herrin in rendering orthodontic and surgical treatment not in accordance with the "standards of practice among members of the same health care professions with similar training and experienced [sic] situated in the same or similar communities" in doing the following: (a) defendant Owen negligently advised unnecessary orthodontic treatment prior to surgery; (b) defendants Owen, Porter, and Herrin jointly and severally decided to do additional surgery on plaintiff's upper jaw without adequately planning and preparing for additional surgery; (c) defendant Owen negligently and incorrectly prepared a surgical splint to be used during surgery to position plaintiff's jaw; (d) defendant Owen negligently instructed operating physicians on the procedures to be performed on plaintiff; (e) defendants Porter and Herrin failed to adequately prepare for surgical procedures on plaintiff; (f) defendants Owen and Porter failed to provide adequate and proper follow-up care; (g) defendants Owen, Porter, and Herrin were otherwise careless and negligent. As a result, plaintiff sought compensatory damages, costs, and reasonable attorney's fees.

Defendants moved for summary judgment and the trial court granted their motions. Plaintiff appeals.

Collie and Wood, by James F. Wood, III, for plaintiff-appellant.

R. C. Carmichael, Jr. for defendant-appellees Kenneth D. Owen and Kenneth D. Owen, P.A.

Golding, Meekins, Holden, Cosper & Stiles, by John G. Golding, for defendant-appellees W. Joseph Porter, Robert A. Herrin and Porter, Barts, Herrin and Kirk, P.A.

EAGLES, Judge.

[1] Plaintiff assigns as error the trial court's findings of fact that there existed no genuine issues of material facts and that defendants are entitled to judgment as a matter of law and the trial court's entry of judgment in favor of defendants dismissing plaintiff's action with prejudice. Plaintiff contends that several genuine issues of material fact are established in the record. First, plaintiff contends that an issue of fact exists concerning whether defendants rendered sufficient post-surgical follow-up care. We disagree and affirm.

Initially we note that

> [i]n a medical malpractice action, the plaintiff must prove that the defendant breached the applicable standard of care and that the defendant's treatment proximately caused the injury. Summary judgment is rarely appropriate in negligence cases. On a motion for summary judgment, the moving party has the burden of establishing that no triable issue of fact exists and that he is entitled to judgment as a matter of law. Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper.

White v. Hunsinger, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988).

G.S. 90-21.12 provides that

> [i]n any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

"Our appellate courts have held that the standard of care adopted in G.S. 90-21.12 reflects the decisional law of our courts, and imposes a standard of care known as the 'same or similar community rule.' Usually, expert testimony is required to establish the standard, to show its negligent violation, and to show that such negligent violation was the proximate cause of the injury complained of." *Tice v. Hall*, 63 N.C. App. 27, 28, 303 S.E.2d 832, 833 (1983), *aff'd*, 310 N.C. 589, 313 S.E.2d 565 (1984).

Here, plaintiff cites *Starnes v. Taylor*, 272 N.C. 386, 158 S.E.2d 339 (1968), and *Dickens v. Everhart*, 284 N.C. 95, 199 S.E.2d 440 (1973), in support of her contention that a surgeon's duty to his patient does not terminate upon the completion of surgery but a surgeon also has the duty to provide follow-up care commensurate with the case and must exercise reasonable diligence in the application of his knowledge and skill giving the patient such attention as required. Plaintiff argues that "the post-surgical care rendered to Plaintiff by the Defendants was inadequate and not commensurate with the duty owed to the Plaintiff." Plaintiff argues that neither defendant Owen nor defendant Porter did anything to follow-up her condition after removing the surgical splint and discovering that additional treatment was necessary. In support of their respective motions for summary judgment, defendants submitted affidavits stating that they conformed to the standard of care in the practice of orthodontics in their community. Both defendants Porter and Herrin submitted affidavits expressing their opinion that their examinations, operative procedures, post-operative care, treatment and examination of plaintiff met acceptable standards in their community. Dr. Martin D. Barringer, an orthodontist, stated in an affidavit that he knew the standard of practice of orthodontics in Mecklenburg County in 1982 and 1983 and that "all of Dr. Owen's treatment, procedures, models and cephlometric x-rays were entirely consistent with and met the standard of care." Dr. David E. Kelly, also an orthodontist, stated in an affidavit that the "orthodontic set-up made by Dr. Owen in this case was entirely consistent with and met the standard of care."

In response plaintiff submitted an affidavit in which she alleged that Dr. Porter failed to tell her that she needed immediate treatment to avoid movement of her teeth. Plaintiff also submitted an affidavit from Dr. John G. Edwards, an orthodontist who treated plaintiff after defendants, which did not mention the standard of care with respect to this case. During deposition, Dr. Edwards

testified that he had reviewed defendant Owen's records concerning the diagnosis, treatment plan, and surgical prescription of plaintiff and that defendant Owen's treatment conformed with the standard of care in the practice of orthodontics in Mecklenburg County in 1981 and 1982. Dr. Edwards also testified that presurgery treatment and the surgery itself also conformed to the standard of care. Dr. Edwards further testified during deposition that he did not "expect to offer any expert testimony that either Dr. Owen or Dr. Porter breached any acceptable standard of care."

Here plaintiff has failed to show that a genuine issue of material fact exists concerning whether defendant had breached the applicable standard of care in their treatment of plaintiff including post-operative care. Accordingly, this contention has no merit.

[2] Secondly, plaintiff contends that there are significant issues of fact regarding the applicability of the doctrine of *res ipsa loquitur* to this case. We disagree.

> Generally, "[r]*es ipsa* applies when direct proof of the cause of an injury is not available, the instrumentality involved in the accident is under the defendant's control, and the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission." . . . [T]he North Carolina Supreme Court has long recognized that where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things. . . .

Parks v. Perry, 68 N.C. App. 202, 205-6, 314 S.E.2d 287, 289, *disc. rev. denied*, 311 N.C. 761, 321 S.E.2d 142; 311 N.C. 761, 321 S.E.2d 143 (1984). "The test of the applicability of *res ipsa loquitur* in medical malpractice cases is twofold: (1) the injurious result must rarely occur standing alone and (2) the result must not be an inherent risk of the operation." *Id.* at 206, 314 S.E.2d at 290.

Here, under the first prong of the *res ipsa* test plaintiff's own orthodontist, Dr. Edwards, testified during deposition that relapse was a known risk or possible result of the surgical procedure performed on plaintiff. Dr. Edwards testified that he did not think that plaintiff had suffered a relapse but he did not give

an opinion as to what had happened to plaintiff. Further, Dr. Barrington testified that while he did not know what happened in this particular case, relapse could in fact occur and that he had seen many of his own cases relapse. Dr. Barrington stated that one of his own patients returned to his office one or two weeks post-treatment and the patient's jaw was forward six millimeters and open six millimeters. He stated that the patient's condition was corrected within two weeks after wearing rubber bands. To explain why plaintiff's jaw was forward of its original position, defendant Owen testified that plaintiff's lower jaw had relapsed and dragged the upper jaw with it. Defendant Porter also testified that plaintiff's lower jaw had relapsed but he felt that plaintiff's problem could have been treated orthodontically. On this record there is ample evidence that relapse was an inherent risk of this type of surgery and that at the earliest detection of movement plaintiff was urged to return to defendant Owen to treat the relapse and prevent further movement. Accordingly, this contention must also fail.

[3] Finally, plaintiff contends that the record establishes genuine issues of material fact regarding whether defendants obtained plaintiff's informed consent prior to performing the surgery in question. At the outset we note that plaintiff has failed to raise this contention either in her complaint or otherwise before the trial tribunal. Accordingly, this contention is not properly before this court. *See In re Bruce*, 97 N.C. App. 138, 387 S.E.2d 82 (1990).

In summary, plaintiff has failed to produce a forecast of evidence that defendants were negligent in their treatment of her condition. Accordingly, the decision of the lower court is affirmed.

Affirmed.

Judges WELLS and GREENE concur.

Judge WELLS concurring.

As the opinions of our appellate courts have made clear, the battle of experts begins very early in the usual medical malpractice case. *See, e.g., Beaver v. Hancock*, 72 N.C. App. 306, 324 S.E.2d 294 (1985).

In this case, defendants, through their forecast, were able to show by expert witnesses that they had not violated any standard

of care owed by them to plaintiff. This forecast required plaintiff to forecast *through an expert witness* that defendants had violated such a duty, which plaintiff simply failed to do.

STATE OF NORTH CAROLINA v. BRENDA JOYCE NOBLES

No. 8918SC1241

(Filed 17 July 1990)

1. **Criminal Law § 174 (NCI4th)— defendant's competency to proceed to trial—sufficiency of evidence to support court's ruling**

The trial court did not err in ruling that defendant was competent to proceed to trial where the trial judge conducted an extensive voir dire hearing, properly considered the testimony of a general psychiatrist who had been appointed by the court to examine defendant regarding her competency to stand trial, and properly considered the reports of defendant's evaluation by a doctor at Dorothea Dix Hospital.

Am Jur 2d, Criminal Law §§ 67, 68.

2. **Jury § 6.3 (NCI3d)— voir dire examination of prospective jurors—defense counsel's questions disallowed—no error**

The trial court did not err by disallowing certain questions posed by defense counsel during the voir dire examination of prospective jurors.

Am Jur 2d, Jury §§ 200-202, 212.

3. **Kidnapping § 1.3 (NCI3d)— child abduction—requested instruction on scienter improper**

In a prosecution of defendant for child abduction the trial court was not required to give defendant's requested instruction on scienter, since that was not a correct statement of the law. N.C.G.S. § 14-41.

Am Jur 2d, Abduction and Kidnapping §§ 20, 21.

4. **Criminal Law § 1133 (NCI4th)— sentence for child abduction—aggravating factor of inducing another to participate—insufficiency of evidence**

In sentencing defendant for child abduction the trial court erred in finding as a factor in aggravation that defendant

induced another to participate as an accessory after the fact where there was evidence that defendant's daughter assisted her in caring for the child after defendant took him from the hospital, but the record was devoid of any evidence tending to show that defendant actually induced her daughter's participation in the offense after the fact; furthermore, there was no reasonable relationship between this finding in aggravation and the purpose of sentencing.

Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.

5. **Criminal Law § 1161 (NCI4th) — sentence for child abduction — victim only a few days old — youth improper aggravating circumstance**

The fact that the victim was only a few days old did not make defendant "more blameworthy" than she already was as a result of committing the offense of child abduction, and it was thus error for the trial judge to aggravate defendant's sentence because of the victim's extreme youth.

Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.

6. **Criminal Law § 1127 (NCI4th) — sentence for child abduction — aggravating circumstance of child's location in hospital improper**

In sentencing defendant for child abduction it was error for the trial judge to consider the location of the child in a hospital at the time of the abduction as a factor in aggravation, since the victim's vulnerability was increased by his mere presence in a place which was accessible to the general public, but this fact was in no way related to defendant's conduct or character.

Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.

7. **Criminal Law § 1108 (NCI4th) — sentence for child abduction — aggravating circumstance of defendant's mental condition improper**

In sentencing defendant for child abduction it was error for the trial judge to aggravate defendant's sentence on the ground that she suffered from an abnormal mental condition which made her significantly more dangerous to others, since

the crime for which defendant was convicted was not a violent one, nor was there any evidence that defendant had a history of violent, threatening, or psychotic behavior, and the evidence was thus insufficient to support the trial judge's finding of dangerousness.

Am Jur 2d, Abduction and Kidnapping § 34; Criminal Law §§ 598, 599.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 5 April 1989 in Superior Court, GUILFORD County. Heard in the Court of Appeals 6 June 1990.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred by ruling that defendant was competent to proceed to trial. In support of her contention, defendant argues "the state's evidence was both inadmissible and inadequate to support the judge's determination of competency." We disagree.

"In determining a defendant's capacity to stand trial, the test is whether he has capacity to comprehend his position, to understand the nature of the proceedings against him, to conduct his defense in a rational manner and to cooperate with his counsel so that any available defense may be interposed." *State v. Bundridge*, 294 N.C. 45, 49-50, 239 S.E.2d 811, 815 (1978). "The question of defendant's capacity is within the trial judge's discretion and his determination thereof, if supported by the evidence, is conclusive on appeal." *State v. Reid*, 38 N.C. App. 547, 548-49, 248 S.E.2d 390, 391 (1978), *disc. rev. denied*, 296 N.C. 588, 254 S.E.2d 31 (1979). In a hearing to determine defendant's capacity to stand trial, "the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider only that which tends properly to prove the facts to be found." *State v. Willard*, 292 N.C. 567, 574, 234 S.E.2d

587, 591 (1977). "Absent affirmative evidence to the contrary, this Court presumes that the trial judge disregarded incompetent evidence in arriving at his decision." *Id.*

In the present case, the trial judge conducted an extensive *voir dire* hearing to determine defendant's competency to stand trial as required by G.S. 15A-1002(b)(3). At the hearing, the State presented the testimony of Dr. Steven Sanders, a general psychiatrist practicing in High Point, North Carolina, who had been appointed by the Court to examine defendant regarding her competency to stand trial. Dr. Sanders testified that in his opinion defendant was "able to understand the nature and the proceedings against her, . . . to comprehend her own situation in reference to the proceedings against her, . . . and to assist in her defense in a reasonable and responsible manner." The State also introduced into evidence the reports of defendant's evaluation by Dr. Rollins at Dorothea Dix Hospital which were conducted in August and September of 1988 in which he concluded that defendant was competent to stand trial.

Defendant argues that Dr. Sanders' testimony should have been excluded because "[h]e lacked the necessary expertise to render an opinion as to defendant's competency, and that his opinion was based upon inadequate data." With respect to the hospital reports, defendant argues that the evidence should have been excluded because it was hearsay and too remote. We have reviewed the exceptions upon which defendant bases these arguments and find no error in the trial judge's rulings allowing the testimony of Dr. Sanders and the hospital reports to be admitted into evidence. Furthermore, the evidence presented by the State was clearly sufficient to support the trial judge's finding that defendant was competent to proceed to trial. This assignment of error is overruled.

[2] Next, defendant contends "[t]he trial court erred by disallowing certain questions posed by defense counsel during the *voir dire* examination of prospective jurors, thereby depriving defendant of her statutory and constitutional rights to make diligent inquiry into their fitness for service as jurors and to ensure selection of an impartial jury." We disagree.

It is well established that "counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision" and "[t]he regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion." *State v. Avery*, 315 N.C. 1, 20, 337 S.E.2d 786, 797 (1985). "[T]he

court should not permit counsel to question prospective jurors as to the kind of verdict they would render, or how they would be inclined to vote, under a given state of facts." *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975). On appeal, "[a] defendant seeking to establish . . . that the exercise of such discretion constitutes reversible error must show harmful prejudice as well as clear abuse of discretion." *State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975).

In the case *sub judice*, defendant maintains the trial judge erred in sustaining the State's objections to six questions posed by her counsel to the prospective jurors. We have examined each question challenged by this assignment of error and find no conceivable prejudice to defendant in the trial judge's rulings thereon.

[3] In her third contention, defendant asserts "[t]he trial court erred in its charge to the jury by failing to instruct on scienter as an element of the offense . . . ." Defendant argues that the trial court's failure to instruct the jury that "defendant must have abducted the child 'knowingly' and 'knowing that the victim was not her child,' " as requested by defendant, resulted in the imposition of strict liability for the offense in violation of state and federal requirements of due process, and violated the court's duty to declare and explain the law arising on the evidence. This contention is also without merit.

The trial judge is required to give a requested instruction only when it is a correct statement of the law and supported by the evidence. *See State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982). In the present case, defendant was charged with child abduction in violation of G.S. 14-41 which provides:

> If anyone shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be punished as a Class G felon.

There is nothing in this section which requires that the abduction should be with a particular intent. To support a conviction for this offense, it is only necessary to allege and prove that the child was abducted, or by any means induced to leave its custodian. *State v. Chisenhall*, 106 N.C. 676, 11 S.E. 518 (1890).

The record clearly indicates that the instructions given to the jury by the trial judge were supported by substantial evidence and were proper in all other respects. We hold the trial judge did not err in refusing to instruct the jury as duly requested by defendant because it was not a correct statement of the law. This assignment of error is overruled.

Finally, defendant contends that she is entitled to a new sentencing hearing because in sentencing her the trial court relied on three nonstatutory aggravating factors which were not supported by the evidence. For the reasons set forth below, we agree.

G.S. 15A-1340.4(b) provides in pertinent part:

> If the judge imposes a prison term for a felony that differs from the presumptive term provided . . . the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence.

G.S. 15A-1340.4(a) further provides:

> In imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein . . . .

In the present case, defendant was charged with child abduction in violation of G.S. 14-41. By statute, child abduction is classified as a Class G felony carrying with it a presumptive prison term of four and one-half years. G.S. 14-41; G.S. 15A-1340.4(f)(5). Defendant, however, was sentenced to twelve years imprisonment for this offense.

In sentencing defendant, Judge DeRamus found three nonstatutory aggravating factors which are set out in the record as follows:

> 1. The Court finds as an aggravating factor that the defendant induced another to participate as an accessory after the fact to the offense, or in the commission of the offense itself.
>
> 2. The Court finds that the victim, Jason Ray McClure, was not just very young, as the Statutory aggravating factor reads but was extremely young and because of such extreme youth

was very vulnerable by reason of physical and mental immaturity, and vulnerable by reason of location in a hospital at a young age, as a temporary residence, rather than a more permanent residence to which the public would not have as great an access, and as part of this finding, the Court is considering the fact that the defendant took advantage of this vulnerability.

3. As an additional finding in aggravation, nonstatutory, the Court finds that the defendant has suffered and continues to suffer from an abnormal mental condition or conditions that makes her significantly more dangerous to others than the great majority of the general public.

Based upon these findings, Judge DeRamus concluded that the factors in aggravation outweighed the factors in mitigation and sentenced defendant to a term of imprisonment in excess of the presumptive term for the crime charged. Our review of the record, however, reveals that the factors in aggravation found by the trial judge were not proven by a preponderance of the evidence, nor were they proper as a matter of law.

[4] First, we hold that the trial judge's finding that defendant "induced another to participate as an accessory after the fact" was not supported by substantial evidence in the record. In finding this factor in aggravation, the trial judge must focus on the role of defendant in "inducing" others to participate, not on the actions of the participants. *See State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984). In the present case, there is evidence in the record tending to show that defendant's daughter assisted her in caring for the child after defendant took the child from the hospital. However, the record is devoid of any evidence tending to show that defendant actually "induced" her daughter's participation in the offense after the fact. Furthermore, we perceive no reasonable relationship between this finding in aggravation and the purpose of sentencing.

[5] We also find error in the trial judge's finding in aggravation that the victim was vulnerable because of his extreme youth and location in a hospital at the time of his abduction. In *State v. Hines*, our Supreme Court stated:

One of the purposes of sentencing is to impose a punishment commensurate with the offender's culpability (citation omitted).

> Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her . . . .

314 N.C. 522, 525, 335 S.E.2d 6, 8 (1985). In *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986), the Court applied this principle and granted the defendant a new sentencing hearing where he was charged and convicted of taking indecent liberties with a minor, and the trial judge aggravated his sentence on the ground that the victim was very young. In that case, the Court noted, "the determination of vulnerability must be made in light of the crime committed" and "we cannot say that the victim's age made her more vulnerable to the offense of indecent liberties with a minor than other victims of the offense." *Id.* at 112-113, 347 S.E.2d at 402.

In the present case, defendant was charged with child abduction which, by statute, requires that the victim of the offense be under the age of fourteen. G.S. 14-41. We hold the fact that the victim was only a few days old does not make defendant "more blameworthy" than she already is as a result of committing the offense of child abduction, and it was thus error for the trial judge to aggravate defendant's sentence because of the victim's extreme youth.

[6] Likewise, it was error for the trial judge to consider the location of the child in a hospital at the time of the abduction as a factor in aggravation. It is well established that a factor considered in aggravation must relate to the character or conduct of the defendant. *See State v. Chatham*, 308 N.C. 169, 301 S.E.2d 71 (1983). Here, the victim's vulnerability was increased by his mere presence in a place which was accessible to the general public. We fail to see how this fact is in any way related to defendant's conduct or character, and therefore, it should not have been taken into account for the purpose of sentencing.

[7] Finally, it was error for the trial judge to aggravate defendant's sentence on the ground that she "ha[d] suffered and continues to suffer from an abnormal mental condition or conditions that makes her significantly more dangerous to others than the great majority of the general public." A mental or emotional disorder

may not be considered as an aggravating factor unless the evidence presented shows that "manifestations of that disorder involve . . . little hope of rehabilitation coupled with serious antisocial and criminal behavior. . . ." *State v. Todd*, 313 N.C. 110, 122, 326 S.E.2d 249, 256 (1985). Although the evidence in the present case does demonstrate that defendant had serious psychiatric problems, we find the evidence insufficient to support the trial judge's finding of dangerousness. The crime for which defendant was convicted was not a violent crime, nor was there any evidence presented that defendant had a history of violent, threatening, or psychotic behavior. Since the record fails to demonstrate that defendant's mental condition has "little hope of rehabilitation coupled with serious antisocial and criminal behavior," we hold the trial judge erred in considering defendant's mental condition as an aggravating factor.

Defendant received a fair trial free from prejudicial error, but for the reasons set forth above, the case is remanded to the Superior Court, Guilford County for resentencing.

No error in trial; remanded for resentencing.

Judges ARNOLD and GREENE concur.

GEORGE SHINN SPORTS, INC., PLAINTIFF v. BAHAKEL SPORTS, INC., DEFENDANT

No. 8926SC901

(Filed 17 July 1990)

Partnership § 3 (NCI3d)— agreement giving partner option to buy out other partner—partnership agreement not based on duress

In an action to enforce a letter agreement between the parties giving plaintiff the option to buy defendant's partnership interest, the trial court properly granted plaintiff's motion for judgment on the pleadings where defendant admitted signing the agreement and admitted refusing to perform but contended that such refusal was justified because the parties' partnership agreement was signed under duress; defendant alleged that it signed the partnership agreement and a rights

agreement, even though they were contrary to the parties' earlier oral agreement, because plaintiff threatened to breach their oral agreement and find another investor; mere breach or threat of breach of contract, without more, is insufficient to establish a claim or defense of duress; defendant did not allege circumstances sufficient to state a defense based on duress arising from breach of fiduciary duty; that defendant signed the partnership agreement because he feared he would incur public condemnation and legal liability to the NBA if the chance of bringing an NBA team to Charlotte were lost was not an allegation of coercion sufficient to state a defense of duress in avoidance of the parties' agreements; nor did defendant adequately state claims for economic duress, undue influence, breach of fiduciary duty, fraud, constructive fraud, negligent misrepresentation, false concealment, estoppel, unclean hands, and misappropriation of the partnership's assets.

Am Jur 2d, Partnership §§ 298, 391, 392.

APPEAL by defendant from Judgment of *Judge Frank W. Snepp, Jr.*, entered 3 August 1989 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 9 April 1990.

Petree Stockton and Robinson, by John T. Allred and Jackson N. Steele, for plaintiff appellee.

Bailey, Patterson, Caddell & Bailey, P.A., by Allen A. Bailey; and Poyner & Spruill, by J. Phil Carlton and Susan K. Nichols, for defendant appellant.

COZORT, Judge.

Defendant appeals from entry of judgment in favor of plaintiff on plaintiff's motion for judgment on the pleadings wherein defendant alleged duress and other matters in defense of plaintiff's claim for breach of an agreement giving plaintiff the option to purchase defendant's partnership interest. We affirm.

Plaintiff's complaint alleged the following: The parties, acting through their respective owners and agents, George Shinn for plaintiff, George Shinn Sports, Inc., and Cy Bahakel for defendant, Bahakel Sports, Inc., entered into a written Partnership Agreement on 16 June 1987 to form the Charlotte NBA Limited Partnership, which owns and operates the Charlotte Hornets basketball team. On that

same day, the Partnership and WCCB-TV entered into a written agreement (hereinafter "Rights Agreement") giving WCCB-TV certain rights to telecast and broadcast Hornets games. WCCB-TV is owned and operated by Bahakel. In October of 1987, Bahakel "threatened" plaintiff that defendant would not make its $4,812,500 capital contribution on or before 15 November 1987 as required by the 16 June Partnership Agreement, because Bahakel wanted a more favorable broadcast rights package for WCCB-TV. On 5 November 1987, the parties entered into an agreement by letter (hereinafter "Letter Agreement") giving WCCB-TV expanded rights to televise Hornets games and giving plaintiff an option to purchase defendant's interest in the Partnership at a stated value. Plaintiff alleged that defendant had been represented by counsel throughout the negotiations leading to the 16 June and 5 November 1987 agreements.

The complaint further alleged that, on 3 April 1989, plaintiff notified defendant in writing of its decision to exercise its option to purchase defendant's partnership interest; that, on 1 May 1989, plaintiff tendered to defendant the agreed upon purchase price; and that defendant refused to convey its interest in violation of the Letter Agreement. Plaintiff sought specific performance of the Letter Agreement.

Attached to plaintiff's complaint were copies of the 16 June 1987 Partnership Agreement, the 16 June 1987 Rights Agreement, the 5 November 1987 Letter Agreement, the 3 April 1989 letter and Notice of Exercise of Option, and a copy of the alleged tendered check in the amount of $6,890,363.82. The Partnership Agreement is a thirty-page, single-spaced document setting forth purposes of the partnership, duties and capital contributions of the partners, provisions for withdrawals, options, meetings, accounting, reports, elections, and other provisions. The Agreement provides that it "contains the entire agreement among the Partners." Plaintiff and defendant were named as general partners, with plaintiff also named as Managing General Partner with sole right to execute contracts on behalf of the partnership. The Letter Agreement, in the form of a letter from defendant, states that a previous letter written by plaintiff's counsel "is hereby withdrawn." The Letter Agreement contains provisions setting forth telecast rights granted to WCCB-TV, gives defendant the right, under certain circumstances, to require plaintiff to purchase defendant's interest, and gives plaintiff an option to purchase defendant's interest in the Partnership at

a stated value. The Agreement also states, "Except as herein provided, the Rights Agreement and Partnership Agreement shall remain in full force and effect."

Defendant filed Answer and Counterclaims in which it admitted signing all the documents attached to plaintiff's complaint, that it was represented by named counsel during "part" of the negotiations leading to execution of the agreements, that it made the capital contributions required by the Partnership Agreement, and that it "refused, and continues to refuse, to convey its partnership interest to Plaintiff." Defendant raised fifteen defenses and nineteen counterclaims. In addition to averring that plaintiff failed to state a claim upon which relief can be granted, defendant presented fourteen legal theories: breach of fiduciary duty, coercion, breach of a prior oral partnership agreement, lack of consideration for the 5 November Letter Agreement, duress, economic duress and business compulsion, undue influence, constructive fraud, fraud, negligent false representations, false concealments, estoppel, unclean hands, and misappropriation and conversion of partnership assets. Defendant also alleged that, even if the agreement is enforceable, plaintiff is not entitled to specific performance because an adequate remedy exists at law.

In support of these legal theories, defendant alleged the following: In March of 1987, the parties entered into an oral partnership the terms of which differed in several respects from the Partnership Agreement executed the following June. In particular, the parties orally agreed that they would, as general partners, share profits and losses in proportion to their respective capital contributions, would share equally in management of the partnership and in major decision making, and that the partnership would grant WCCB-TV exclusive broadcast and telecast rights to all Charlotte National Basketball Association ("NBA") games. Subsequent to the oral agreement, the parties communicated with the NBA and announced publicly that they were general partners in a partnership to acquire a Charlotte NBA franchise and basketball team. In April, the NBA awarded an NBA franchise to the partnership.

Defendant further alleged that, in May and June of 1987, plaintiff "demanded" that defendant sign the written Partnership Agreement which, contrary to their oral agreement, appointed plaintiff the Managing General Partner with primary responsibility for managing the business affairs of the partnership, gave plaintiff a 51 percent

controlling interest and defendant a 35 percent interest, provided that all contracts and other documents shall be executed only by plaintiff and that plaintiff shall make all decisions of the partnership, which decisions would be binding on defendant. Furthermore, defendant alleged that the Rights Agreement, contrary to the oral agreement, limited WCCB-TV's exclusive rights to the first NBA season and otherwise granted only contingent broadcast rights in the form of "rights of first refusal" and "opportunities to purchase." According to defendant, when Bahakel refused to sign these agreements, plaintiff "threatened" to sell defendant's interest to some other entity and to do the same to the telecast rights. As a result of these alleged threats, Bahakel "feared" that, if he refused to sign the agreements, he would "incur public condemnation and legal liability for breach of his commitment made in good faith to the NBA," that Charlotte would lose the franchise, that WCCB-TV would lose all broadcast and telecast rights, and that he "would be portrayed in the news media, and perceived publicly, as morally blameworthy and legally responsible for the failure to secure an NBA franchise for Charlotte, and the public image of Bahakel and WCCB-TV, Inc., therefore, would be severely damaged." Therefore, defendant, allegedly "induced and coerced by Plaintiff's misrepresentations, threats, and multiple breaches of fiduciary duties and provisions of said oral partnership agreement," signed the Partnership Agreement and the Rights Agreement.

Defendant admitted that, prior to signing the Letter Agreement, Bahakel had expressed "reservations" about making the $4,812,500 capital contribution due in November and that he had been motivated at least in part by his desire for a television package for WCCB-TV which "more fully accorded with Plaintiff's commitments in the oral partnership agreement" than did the Rights Agreement. Defendant alleged, however, that Bahakel signed the November Letter Agreement, made a total capital contribution of $6,002,500, and assisted plaintiff in incurring loans to the partnership in the amount of $22,000,000 "under the continuing inducement and coercion of Plaintiff's misrepresentations, threats, and multiple breaches of fiduciary duties and provisions of said oral partnership agreement." Defendant prayed that the court deny plaintiff the relief requested, construe and enforce the oral partnership agreement between the parties, and award compensatory and punitive damages on defendant's counterclaims.

Plaintiff's Reply to Counterclaims alleged that the Letter Agreement constituted an accord and satisfaction of any disagreement between the parties with respect to their earlier agreements. Plaintiff attached as an exhibit a copy of a memo, allegedly drafted by defendant's attorney, which stated, "We agreed to resolve our differences on the NBA Partnership Agreement and Rights Agreement" as set forth in the subsequent Letter Agreement. We note here that, for the purposes of a motion for judgment on the pleadings, the memo, which is not the subject of any admission, must be disregarded.

The matter thereafter came on for hearing before the trial court on plaintiff's motion for judgment on the pleadings, which was allowed on 3 August 1989. Defendant appealed, and the trial court subsequently allowed defendant's motion for stay of execution on judgment. We affirm the trial court's ruling in favor of plaintiff.

A motion for judgment on the pleadings is a summary procedure, authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure, which allows a trial court to enter judgment when all the material allegations of fact are admitted in the pleadings and only questions of law remain. N.C. Gen. Stat. § 1A-1, Rule 12(c); *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). "The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit." *Id.* " 'A motion for judgment on the pleadings is allowable only where the pleading of the opposite party is so fatally deficient in substance as to present no material issue of fact . . . A complaint is fatally deficient in substance, and subject to a motion by the defendant for judgment on the pleadings if it fails to state a good cause of action for plaintiff and against defendant . . . An answer is fatally deficient in substance and subject to a motion by the plaintiff for judgment on the pleadings if it admits every material averment in the complaint and fails to set up any defense or new matter sufficient in law to avoid or defeat the plaintiff's claim.' " *Dobias v. White*, 239 N.C. 409, 412, 80 S.E.2d 23, 26 (1954) (quoting *Erickson v. Starling*, 235 N.C. 643, 657, 71 S.E.2d 384, 394 (1952)). In ruling on a motion under Rule 12(c), the trial court must view the facts and all permissible inferences therefrom in the light most favorable to the nonmovant. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

Plaintiff sought enforcement of the Letter Agreement between the parties giving plaintiff the option to buy defendant's partnership interest. Defendant admitted signing the Agreement and that it refused and continues to refuse to perform, but contended that such refusal was justified because the Partnership Agreement was signed under duress. As duress is a defense which must be stated with particularity, N.C. Gen. Stat. § 1A-1, Rule 9(b), defendant further set forth the circumstances alleged to give rise to the defense of duress. Those same circumstances, defendant concedes, form the basis of all its defenses and counterclaims raised in its responsive pleading. Thus, judgment on the pleadings could have been granted in plaintiff's favor only if the circumstances alleged to constitute duress and the other defenses and various claims for relief, viewed in the light most favorable to defendant and giving defendant all permissible inferences to be drawn in its favor, were insufficient as a matter of law to allow avoidance of its Letter Agreement with plaintiff. We conclude that, even under this strict standard, defendant's claims and defenses must fail.

Defendant alleged that Bahakel signed the Partnership Agreement and Rights Agreement even though those agreements were contrary to the oral agreement of March 1987, because plaintiff threatened to breach their oral agreement and find another investor. However, mere breach or threat of breach of contract, without more, is insufficient to establish a claim or defense of duress. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 665, 194 S.E.2d 521, 536 (1973). Nor does defendant allege circumstances sufficient to state a defense based on duress arising from breach of fiduciary duty. *See Housing, Inc. v. Weaver*, 37 N.C. App. 284, 246 S.E.2d 219 (1978), *aff'd per curiam*, 296 N.C. 581, 251 S.E.2d 457 (1979). That defendant signed the Partnership Agreement because he feared he would incur public condemnation and legal liability to the NBA if the chance of bringing an NBA team to Charlotte were lost is not an allegation of coercion sufficient to state a defense of duress in avoidance of the parties' agreements, nor has defendant adequately stated claims for economic duress, undue influence, breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation. The similar claims of false concealment, estoppel, unclean hands, and misappropriation of the partnership's assets must also fail for the same reasons.

Furthermore, the pleadings clearly establish that the alleged duress arose from circumstances that existed only prior to the

execution of the Partnership Agreement, which was several months before the parties entered into the Letter Agreement that plaintiff seeks to enforce. The Letter Agreement on its face reaffirms the validity of the Partnership Agreement, and defendant has alleged no circumstances which would allow avoidance of that Agreement under a theory of "continuing duress." *See Housing, Inc.* Defendant has not, therefore, alleged facts which, if proved, would allow a trier of fact to conclude that Bahakel signed the Letter Agreement because plaintiff's wrongful acts " 'deprive[d] him of the exercise of free will.' " *Id.*, 37 N.C. App. at 294, 246 S.E.2d at 224 (quoting *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 704-05 (1971)).

Defendant's contention that there is an issue of fact with respect to whether the Letter Agreement was supported by consideration is also meritless. The face of the document reveals mutual promises and benefits accruing to the parties.

In sum, defendant admitted the material allegations of plaintiff's complaint and failed to allege any defense or new matter sufficient in law to avoid or defeat plaintiff's claim. We hold that the trial court properly granted judgment for plaintiff.

Affirmed.

Chief Judge HEDRICK and Judge PARKER concur.

IN RE FORECLOSURE OF GREENLEAF CORP.

[99 N.C. App. 489 (1990)]

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST AND SECURITY AGREEMENT/FINANCING STATEMENT EXECUTED BY GREENLEAF CORP., A TEXAS CORPORATION, DATED OCTOBER 9, 1985 AND RECORDED IN BOOK 3465, PAGE 1700, GUILFORD CO. REGISTRY, SAID LAND BEING KNOWN AS PROPERTY ON WEST FRIENDLY AVE., CONTAINING APPROXIMATELY 19.243 ACRES, MORE COMMONLY REFERRED TO AS FRIENDLY AVENUE APARTMENTS AS SHOWN IN PLAT BOOK 79, PAGE 40, GUILFORD COUNTY REGISTRY, UNDER FORECLOSURE BY OLIVER W. ALPHIN, SUBSTITUTE TRUSTEE

YATES CONSTRUCTION COMPANY, INC., PETITIONER v. GREENLEAF CORP.; OLIVER W. ALPHIN, SUBSTITUTE TRUSTEE; CHAMPION SAVINGS ASSOCIATION (SUCCESSOR TO FIRST SAVINGS ASSOCIATION OF ORANGE); GEORGE BANK; C & D CONCRETE CONTRACTORS; PROJECT LIGHTING, INC.; WSI DRYWALL COMPANY; EDWARD L. COUNCIL, JR., RESPONDENTS

YATES CONSTRUCTION COMPANY, INC., PLAINTIFF v. GREENLEAF CORP.; OLIVER W. ALPHIN, SUBSTITUTE TRUSTEE; CHAMPION SAVINGS ASSOCIATION (SUCCESSOR TO FIRST SAVINGS ASSOCIATION OF ORANGE); GEORGE BANK; C & D CONCRETE CONTRACTORS; PROJECT LIGHTING, INC.; WSI DRYWALL COMPANY; EDWARD L. COUNCIL, JR., DEFENDANTS, AND HEIGHTS OF TEXAS, F.S.B., INTERVENOR DEFENDANT

No. 8918SC852

(Filed 17 July 1990)

Mortgages and Deeds of Trust § 7 (NCI3d)— commercial mortgage —future advances—no written instrument

Summary judgment was properly granted for intervenor Heights of Texas F.S.B. in an action involving the surplus proceeds from a foreclosure where Greenleaf Corp. had received a loan from the predecessor of Champion Savings Association (the assets of which were later acquired by Heights) for the purpose of constructing an apartment complex; the loan was secured by a promissory note and deed of trust to cover an initial disbursement and certain additional disbursements; Greenleaf entered into a contract with plaintiff Yates Construction Company for certain goods and services but later allegedly refused to tender payment; Yates commenced a civil action to recover the indebtedness and caused an attachment lien to be filed on the project; the substitute trustee under the deed of trust instituted a foreclosure action for Greenleaf's alleged failure to make timely payments in compliance with the terms of the loan agreement; a foreclosure was conducted

at which the project was purchased by Champion and another savings and loan association for $8,300,000 with Champion later acquiring total interest in the property; Yates filed a claim and a special proceeding petition for the surplus proceeds which it claimed resulted from that foreclosure on the theory that only the first $1,589,655.98 was secured by the deed of trust on the project because the subsequent advances were not made in compliance with the specific terms of the agreement; plaintiff filed another action seeking a declaratory judgment to determine the priority of its lien under the deed of trust; plaintiff's actions were consolidated and both plaintiff and Heights, which had been admitted to the action as an intervenor, filed motions for summary judgment; and plaintiff's motion was denied and Heights' motion was granted. There was no genuine question of material fact regarding the terms of the parties' agreement and the purpose of the 1985 amendment to N.C.G.S. § 45-68 was to require a written instrument or notation for future obligations only when the parties agreed to require it. The parties' agreement to require other documents is not relevant.

Am Jur 2d, Mortgages §§ 114, 137-140, 156, 352.

APPEAL by plaintiff from judgment entered 9 March 1989 by *Judge Judson D. DeRamus* in GUILFORD County Superior Court. Heard in the Court of Appeals 6 March 1990.

Tuggle Duggins Meschan & Elrod, P.A., by David F. Meschan, for petitioner-appellant Yates Construction Company, Inc.

Osteen & Adams, by J. Patrick Adams; Honigman Miller Schwartz and Cohn, by Peter M. Alter and Antionette R. Raheem, for respondent-appellee Heights of Texas F.S.B.

JOHNSON, Judge.

This is an appeal by plaintiff of the grant of a motion of summary judgment in favor of Heights of Texas F.S.B. (Heights), a corporation which acquired the assets of Champion Savings Association through Champion's receiver.

On or about 9 October 1985, The Greenleaf Corporation (Greenleaf), a construction company, received a loan from First Savings Association of Orange which later became Champion Sav-

ings Association (Champion). The loan was made for the purpose of constructing the St. Croix apartment complex in Greensboro, North Carolina (the project).

This loan was secured by a promissory note and a deed of trust on the project which was executed by Greenleaf in favor of Champion. According to the plaintiff, the deed of trust was to cover the initial disbursement loan in the amount of $1,589,655.98, and certain additional disbursements made in compliance with the terms of the parties' contract.

During the course of the construction, Greenleaf entered into a contract with plaintiff Yates Construction Company, Incorporated (Yates) for plaintiff to provide certain goods and services. When Yates completed its work Greenleaf allegedly refused to tender payment. On 17 August 1987 plaintiff commenced a civil action to recover the amount of indebtedness it was owed by Greenleaf. Thereafter, on or about 6 August 1987, plaintiff caused an attachment lien to be filed on the project pursuant to G.S. § 1-440.3.

After eighteen advancements had been made to Greenleaf by Champion, the substitute trustee under the deed of trust instituted a foreclosure action for Greenleaf's alleged failure to make timely payments in compliance with the terms of the loan agreement. On 26 January 1988, a foreclosure was conducted at which time the project was purchased by Champion and another savings and loan association for $8,300,000.00. Champion later acquired total interest in the foreclosed property.

On 5 February 1988 and 8 February 1988, plaintiff filed a claim and a special proceeding petition for the surplus proceeds which it claimed resulted from that foreclosure. The essence of this claim is that only the first $1,589,655.98 was secured by the deed of trust on the project because the subsequent advances were not made in compliance with the specific terms of the agreement.

Both Champion and the substitute trustee filed motions to dismiss plaintiff's claims. These motions were each denied by order entered 26 May 1988. Thereafter, plaintiff filed another action seeking a declaratory judgment to determine the priority of its lien under the deed of trust.

On 4 January 1989, plaintiff's petition for a special proceeding, its request for a declaratory judgment and the foreclosure action were all consolidated. On 17 January 1989, plaintiff filed a motion

for summary judgment in the consolidated case. On 9 February 1989 Heights, which had been admitted to this action as an intervenor, also filed a motion for summary judgment. By order entered 9 March 1989 plaintiff's motion was denied and Heights' motion was granted. After plaintiff's motion for relief under G.S. § 1A-1, Rule 60 was denied, plaintiff entered this appeal.

Based upon the record before us we have determined that the single question which we must address is whether the trial court erred in granting Heights' motion for summary judgment. Under the often stated summary judgment rule, 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 a judgment in its favor, the motion for summary judgment should be granted. G.S. § 1A-1, Rule 56(c) (1983).

Plaintiff's argument is two-fold. First, it contends that G.S. § 45-68 (as amended, effective 24 June 1985) requires that when an obligor and an obligee agree to require any written notation regarding future advances, each future advance must be accompanied by a written instrument or notation which states that the advance will be secured by such instrument. Plaintiff argues that Greenleaf and Champion did not make the statutorily required notations when the advances were made; consequently, the sums advanced after the initial $1,500,000.00 do not have priority over its lien against the project. Irrespective of the statutory requirements, plaintiff also contends that Greenleaf and Champion failed to follow the terms of their own agreement which plaintiff argues called for future advances to be accompanied by writings or other notations which stated that they were secured by the original deed of trust. Plaintiff bases this argument on a sentence stating the requirement in an opinion letter written by the borrower's legal counsel. Therefore, plaintiff contends that its lien for $175,000.00 plus interest should be satisfied out of the proceeds of the foreclosure sale after the initial $1,500,000.00 is repaid to Champion since Champion does not have a legal entitlement to the entire $8,300,000.00 which resulted from the foreclosure.

Heights contends that there is no genuine issue of material fact regarding the meaning and requirements of amended G.S. § 45-68. It claims that this statute requires a notation signed by the obligor, evidencing the debtor's obligation and stipulating that the future advance is secured by the deed of trust only when

the parties agree in writing to impose such requirements. Here, there was no such agreement. In the absence of a clause in an agreement calling for the notation, or a statute imposing this requirement, Heights argues that the future advances must be given the priority which the parties agreed it would be given.

Turning first to the loan instruments, the promissory note states that Greenleaf promised to pay back to Champion (now Heights) $8,300,000.00 or so much thereof as may have been advanced along with interest. Such promise was secured by a deed of trust on the project under part four of the note. The relevant terms of the deed of trust state that it secures the indebtedness evidenced by the promissory note; that such note was for the "present and future obligations of Borrower to Lend . . ."; that such future advances were obligatory as that word is defined in "Section 45-70(a)"; that the present amount secured by the deed of trust was $1,589,655.98; and that the total principal amount secured by the deed is $8,300,000.00.

The actual loan agreement executed by the parties states in "Article IV" that the borrower had or would thereafter furnish certain "loan documents" to the lender. One of the items requested to be furnished was a "[l]egal opinion . . . of [b]orrower's and each [g]uarantor's counsel . . . affirmatively opining as to the enforceability of this [a]greement, [and] the [l]oan [d]ocuments listed above." The opinion letter which was furnished stated as an assumption that "[f]uture advances under the Loan may not be secured by the Deed of Trust unless a written instrument or notation is signed by the Borrower at the time of each advance stipulating that such advance is secured by the Deed of Trust."

Based upon the foregoing we find that there was no genuine question of material fact regarding the terms of the parties' agreement. Neither the promissory note nor the deed of trust affirmatively states that the parties contracted to require a writing or notation to accompany each advance in order for such disbursements to be given priority over subsequent liens. When the terms of a contract are clear and unambiguous, as the ones before us, there is no need to resort to extrinsic documents to construe the terms of that contract. *Salvation Army v. Welfare*, 63 N.C. App. 156, 303 S.E.2d 658 (1983). Furthermore, the issue of whether the opinion letter is properly considered part of the "loan documents" is not a genuine question of "material" fact as that term is defined. A

material fact is said to be one which may constitute a legal defense or may affect the result of the action, or whose resolution is essential to the party against whom it is resolved. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). Here even if the opinion letter becomes a part of the "loan documents," this letter merely states an assumption and not a term which can be imposed upon Greenleaf and Champion. Therefore, it is unnecessary to determine whether the opinion is a part of the contract. Such does not preclude the entry of summary judgment in this instance.

We now examine the statute on which plaintiff relies, G.S. § 45-68 (1989 Cum. Supp.), which sets out the requirements for instruments purporting to secure future obligations. That provision states, in pertinent part, the following:

> A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:
>
> . . . .
>
> obligation is evidenced by a *written instrument or notation*, signed by the obligor and stipulating that such obligation is secured by such security instrument; provided, however, that this subsection shall apply only if the obligor and obligee have contracted in writing that each future obligation shall be evidenced by a *written instrument or notation*; . . .

G.S. § 45-68 (1989 Cum. Supp.) (emphasis added).

Plaintiff's argument is that pursuant to this statute the parties' agreement to require *any* instrument or notation for future advances should trigger the provision that each future obligation be evidenced by "a written instrument or notation, signed by the obligor and stipulating that such obligation is secured by such instrument." Plaintiff points to the fact that the construction loan agreement entered into by Greenleaf and Champion required the borrower to provide certain documents, such as an AIA Document 702 and various supporting information including certain waivers and certificates. We do not believe that the requirement of supplying this information is the type of written agreement contemplated by the legislature as requiring the written instrument or notation described by the statute. We think that the more reasonable interpretation, and the one supported by legislative history, is that the requirement of subsection (2) comes into play when the parties

to an agreement actually agree in writing that future advances must be evidenced by a writing signed by the obligor and stating that the obligation is secured by a certain security instrument.

Prior to being amended in 1985, G.S. § 45-68 required in subsection (2) that *all* future obligations be evidenced by a written instrument or notation signed by the obligor and stipulating that the obligation is secured by a particular security instrument. This was required by the statute regardless of any agreement by the parties to do so. The purpose of the 1985 amendment was to require the written instrument or notation for future obligations *only* when the parties agreed to require it. The parties' agreement to require other documents is not relevant to the inquiry.

"While the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature, that intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied." *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967). We find our interpretation of subsection (2) as amended in accord with that given it by Mr. Terrence D. Sullivan, Legislative Committee Counsel, in his 29 May 1985 memorandum to the House Committee on Banks and Thrift Institutions. In reference to the proposed amendment of subsection (2), Mr. Sullivan wrote that "[t]his section would provide that this requirement [for a written instrument or notation] applies only if the parties have contracted in writing that each future obligation *will be so evidenced.*" (Emphasis added.)

Given our understanding of G.S. § 45-68, we conclude that Greenleaf's entire debt to Heights, including future advances, was secured by the deed of trust and superior to any claims of Yates. The trial court properly granted summary judgment in favor of Heights.

Affirmed.

Judge ORR concurs.

Judge ARNOLD concurs in the result.

STATE OF NORTH CAROLINA v. JIMMY ARNESS RICHARDSON

No. 896SC983

(Filed 17 July 1990)

Constitutional Law § 66 (NCI3d)— right to be present at trial— absence for medical reasons—new trial

A defendant in a cocaine prosecution was denied his constitutional right to be present at his trial where defendant was present for jury selection but did not return the following morning; when the trial court determined to continue with defendant's trial in his absence, defendant's counsel attempted to explain defendant's medical problems as a possible reason for defendant's absence and objected to the decision to continue the trial; the trial court overruled the objection and the jury was empaneled; defense counsel asked for a delay when a friend of the defendant telephoned the clerk of court to notify the court of defendant's medical problems; the court again continued with the trial; defendant telephoned the clerk during the noon recess to report that he was seeking medical treatment at a hospital; and another motion for continuance after the lunch break was denied. There was no evidence before the court that defendant's absence was either voluntary or unexplained, defendant at no time gave any indication that he waived his right to be present at his trial, there was no evidence before the appellate court that defendant's absence was a voluntary and unexplained waiver, and there was prejudice in that defendant was to testify in his own defense but was not present to do so, was unable to assist his counsel in cross-examination of the State's witnesses, the jury was unable to observe his demeanor throughout the trial, and his counsel was potentially hampered in presenting a complete and thorough defense.

Am Jur 2d, Criminal Law §§ 901-904, 908.

APPEAL by defendant from judgment entered 18 April 1989 by *Judge John R. Friday* in HALIFAX County Superior Court. Heard in the Court of Appeals 11 May 1990.

On 20 February 1989, the Halifax County Grand Jury indicted defendant for possession of more than one gram of cocaine; possession of cocaine with intent to sell or deliver; sale and delivery

of cocaine at 3:15 p.m.; possession of cocaine with intent to sell or deliver; sale and delivery of cocaine at 6:10 p.m.; and maintaining a dwelling for the purpose of selling cocaine. All of the offenses allegedly occurred on 2 December 1988.

The case was tried before a jury at the 17 April 1989 criminal session in Superior Court, Halifax County. On 18 April 1989, the jury returned guilty verdicts on all counts submitted to the jury. Defendant received consecutive prison terms totaling 11 years, to be served concurrently with additional sentences.

From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robin W. Smith and Assistant Attorney General Doris J. Holton, for the State.

Robin E. Hudson for defendant-appellant.

ORR, Judge.

Defendant argues two issues on appeal. For the reasons below, we reverse defendant's convictions and order a new trial.

Defendant first argues that the trial court denied defendant's constitutional right to be present at his trial. We agree.

The trial in this case began on 17 April 1989. Defendant was arraigned that morning, and the case was called for trial at 2:00 p.m. Defendant was not present when the case was called for trial but arrived within a few minutes. A jury was selected on this date and court adjourned until the following day at 9:30 a.m. On 18 April 1989, defendant did not return to court for his trial although his attorney, James Harris, was present and ready for trial. Mr. Harris informed the court at that time that he did not know where defendant was, but defendant had some medical problems and had been taking pain medication the day before for these problems. At 9:52 a.m., the trial court proceeded with the trial over Mr. Harris' objection.

Trial proceeded without defendant. At 10:10 a.m., the Clerk of the Court notified the trial court that a friend of defendant's telephoned and stated that he was taking defendant to the emergency room of the hospital to be treated for back problems. Mr. Harris requested a delay in the trial to confirm this information. The trial court denied this request on the basis that the information

received was "heresay [sic]." The court stated, "[t]he defendant had every opportunity to call you all night or call the Sheriff, the Clerk or any personnel and he didn't do that. And this morning 45 minutes after he was suppose [sic] to be here, here's a heresay [sic] statement so I really do not feel like I can grant that motion."

The trial court again proceeded with the State's evidence. At 2:03 p.m., Mr. Harris notified the court that the Clerk received another telephone call during the lunch recess in which defendant called her and informed her that he was at Halifax Memorial Hospital at that time waiting to be seen by a physician for a sciatic nerve problem. Mr. Harris acknowledged that defendant had not attempted to contact him to his knowledge.

The prosecutor then notified the court that he had police officers check defendant's situation earlier in the day, and that defendant reportedly had been seen in two different locations. The trial court issued an order for defendant's arrest for "playing tricks with the Court." Mr. Harris moved to continue the case, and this motion was denied.

At the close of the State's evidence, Mr. Harris stated that he would be unable to present evidence for defendant, because defendant was the only witness scheduled. The trial court gave the jury instructions. The jury retired for deliberations at 3:58 p.m. and returned in less than an hour. The jury found defendant guilty on all counts.

At 4:35 p.m., the court was notified that the Sheriff located defendant and brought him to court. Defendant was then present in court for the sentencing phase. Defendant brought with him information that he was treated that day (no time indicated) by a physician at Halifax Memorial Hospital for head injuries.

Defendant subsequently addressed the court concerning his absence from the trial and stated, "my cousin called this morning and we called all through the day trying to explain where I was. It wasn't that I wasn't trying . . . I was trying to get here but due to my physical condition I felt like it was best for me to go to a doctor . . . ." The trial court continued with sentencing and sentenced defendant to a total of 11 years in prison.

Article I, section 23 of the North Carolina Constitution states, "In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the

accusers and witnesses with other testimony, ..." The Sixth Amendment to the United States Constitution provides a defendant with similar protection. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The United States Supreme Court has held on numerous occasions that the confrontation clause of the United States Constitution guarantees a criminal defendant the fundamental right to be present at all critical stages of the trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 455, 78 L.Ed.2d 267, 272 (1983). Our state constitutional right of confrontation under Article I, section 23, has been interpreted in a broader scope, guaranteeing the right of every criminal defendant to be present at *every stage* of his trial. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989) (citations omitted) (emphasis in the original).

A defendant in a capital case receives even greater protection under the state constitution. A capital defendant has the right to be present at each stage of his trial and may not waive this right. *Id.*

The right of a defendant in a non-capital case to be present at each and every stage of his trial is not absolute. It is a personal right, one which a defendant may waive. *State v. Hayes*, 291 N.C. 293, 296-97, 230 S.E.2d 146, 148 (1976) (citations omitted). A defendant may waive this right expressly or by failure to assert it in a timely fashion. *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation omitted). A defendant's voluntary and unexplained absence from court after his trial begins may be considered a waiver of his right to be present. *State v. Wilson*, 31 N.C. App. 323, 327, 229 S.E.2d 314, 317 (1976).

In the case *sub judice*, there is no question that defendant was present when his trial began and the jury selected on 17 April 1989. When the trial court reconvened on 18 April 1989, it stated:

> Let the record show that it is now 9:37 [a.m.]. The defendant has not appeared this morning; that he was present in Court yesterday, and after the entire selection of the jury, he was informed by the Court to be back at 9:30 this morning. He is not present at this time and the Court is continuing this matter for a few minutes in order to give Counsel an opportunity to locate him. If he does not appear, we're going to continue with the trial. The Court cites these cases as on defendant

not showing up: 266 N.C. 606, 13 N.C. App. 287, 275 N.C. 198, 31 N.C. App. 326, 291 N.C. 296.

Defendant did not show up in court until after the jury returned a guilty verdict, although defendant and at least one other person contacted the Clerk of Court during the trial to explain defendant's absence.

The State contends that defendant's absence was a voluntary and unexplained absence from court, and defendant thereby waived his right to be present at trial. We disagree.

When the trial court determined to continue with defendant's trial in his absence, Mr. Harris attempted to explain defendant's medical problems as a possible reason for defendant's absence and objected to the court's decision to continue with trial. The trial court overruled the objection, and the jury was empaneled at 9:52 a.m.

Mr. Harris asked for a delay in the trial at 10:10 a.m., when a friend of the defendant telephoned the Clerk to notify the court of defendant's medical problems. Again, the trial court continued with the trial.

During the noon recess, defendant telephoned the Clerk to report that he was seeking medical treatment at a hospital. After the lunch break, Mr. Harris moved for a continuance due to defendant's absence. The court denied the motion.

Granting or denying a motion to continue is within the sound discretion of the trial court, and his decision will not be disturbed on appeal absent an abuse of discretion or a showing that the defendant did not receive a fair trial. *State v. Ferebee*, 266 N.C. 606, 609, 146 S.E.2d 666, 668 (1966) (citations omitted). Denial of a motion to continue when the motion raises a constitutional question may be grounds for a new trial only when defendant shows that the denial was erroneous and that his case was prejudiced thereby. *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982) (citation omitted).

Keeping these principles and the evidence in mind, we now turn to whether the trial court abused its discretion or defendant was denied a fair trial. On the evidence before this Court, we find that the trial court erred in denying defendant's motion to continue and that defendant's case was prejudiced thereby.

First, there was no evidence before the trial court that defendant's absence from court on 18 April 1989 was either voluntary or unexplained. Although defendant made no attempt to contact his attorney concerning his absence, by 10:10 a.m. defendant's friend (or cousin; the record is unclear) telephoned the Clerk to notify the court of defendant's absence due to medical problems. The Clerk received another message of the same kind during the lunch recess from the defendant himself. There is nothing in the record to reflect that the trial court determined that this was a voluntary or unexplained absence from trial. In all of the pertinent cases cited above by the trial court as authority for continuing the trial, the trial courts in those cases concluded in the records that the defendant's absence was voluntary or unexplained. For example, in *State v. Wilson*, 31 N.C. App. 323, 229 S.E.2d 314 (1976), the defendant failed to attend the second day of his trial, and his attorney moved for a continuance. The trial court noted that the attorney offered no explanation for the defendant's absence and made proper conclusions that the defendant's absence "constituted a voluntary waiver of his right to be present throughout his trial." *Id.* at 327, 229 S.E.2d at 317. Here, the trial court made no such determination, either before or after it was notified that defendant might be receiving medical treatment.

Second, defendant was present for the sentencing phase of his trial, and produced some evidence of receiving medical treatment on 18 April 1989 for a head injury. At no time did defendant give any indication at all that he waived his right to be present at his trial. In fact, his two attempts to contact the Clerk of the Court may be considered evidence to the contrary.

There is no evidence before us that defendant's absence from court during his trial was a voluntary and unexplained waiver as required by *Wilson* and the cases cited therein. Therefore, we hold that the trial court erred in denying defendant's motion to continue. At the very least, the trial court could have permitted a continuance or recess for such length of time to determine if defendant was, in fact, receiving medical treatment.

Moreover, we hold that defendant has shown that his case was prejudiced by this error. The evidence indicates that defendant was to testify in his own defense. He was not present to do so. Because of defendant's absence, he was unable to assist his counsel in cross-examination of the State's witnesses, the jury was unable

to observe his demeanor throughout the trial and his counsel was potentially hampered in presenting a complete and thorough defense. We find sufficient prejudice in this case to order a new trial.

We take note of the State's argument that permitting unexplained absences of a defendant from criminal trials may compromise the dignity of the trial court, hamper the administration of justice and encourage guilty parties to escape. *See State v. Cherry*, 154 N.C. 624, 70 S.E. 294 (1911). We agree with this argument; however, that is not the situation in the case at bar.

Here, the evidence indicates that defendant's absence from his trial on 18 April 1989 may have been legitimate. The trial court did not determine whether or not this absence was legitimate after being notified that defendant was absent due to a medical condition. Determining the legitimacy of defendant's excuse should not have resulted in a lengthy delay of trial. In this case, the trial court should have made such determination before proceeding with trial in order to protect defendant's right to be present at his trial, absent an express waiver or a voluntary *and unexplained* absence from court. In addition, we note that a trial judge is vested with adequate means to assure a defendant's presence for trial if necessary.

Because we order a new trial in this case, it is not necessary to reach defendant's remaining assignment of error.

New trial.

Judges GREENE and LEWIS concur.

STATE OF NORTH CAROLINA v. EARL WHITTED, JR.

No. 898SC886

(Filed 17 July 1990)

1. Embezzlement § 5 (NCI3d) — attorney — embezzlement of client funds — evidence of other offenses

The trial court did not err in the prosecution of an attorney for embezzlement of client funds by admitting evidence of misapplication of funds of another client. The evidence was

admissible to prove defendant's knowledge, intent and lack of mistake. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Embezzlement §§ 49, 52.

2. Searches and Seizures § 15 (NCI3d)— bank records—no reasonable expectation of privacy

The fourth amendment rights of an attorney charged with embezzlement were not violated when the State obtained records from a bank account because defendant failed to establish that he had a reasonable expectation of privacy as to the bank records. Moreover, N.C.G.S. § 53B-4 authorizes financial institutions maintaining accounts in defendant's name to make them available to the State.

Am Jur 2d, Searches and Seizures §§ 27, 104.

3. Criminal Law § 73.2 (NCI3d)— hearsay—admissible under catch-all exception

The trial court did not err in an embezzlement prosecution by admitting a statement by the deceased victim through her twin sister where the State presented defendant with notice of intent to introduce the evidence prior to trial; the evidence was offered for the purpose of proving that the victim had thought about how the money should be used prior to her death and expressed her desire to her sister and parents, thus negating defendant's contention that the victim authorized him to hold and spend her money; and the declarant's statements possessed guarantees of trustworthiness in light of the fact that the declarant and the witness enjoyed a sisterhood of closeness, confidentiality and trust. N.C.G.S. § 8C-1, Rule 804(b)(5).

Am Jur 2d, Evidence § 496.

APPEAL by defendant from judgment entered 27 January 1989 by *Judge Wiley F. Bowen* in WAYNE County Superior Court. Heard in the Court of Appeals 14 February 1990.

Defendant was tried and convicted of embezzlement in violation of G.S. § 14-90. The trial court, having considered the evidence, arguments of counsel and statements of defendant, sentenced defendant to three years imprisonment. The sentence was, however, suspended and defendant was placed on supervised probation for

five years. As an additional condition of the suspended sentence, defendant was ordered to serve an active term of ninety days in prison, disbarred from the practice of law in North Carolina and fined $3,000.00. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Patrick Murphy, for the State.

Braswell & Taylor, by Roland C. Braswell, for defendant-appellant.

JOHNSON, Judge.

The State's evidence tended to show, *inter alia*, that some time during 1977, the victim, Alma Howard, fell and broke her leg while walking in the City of New York. She and her husband, Seaborne, hired the law firm of Morris J. Eisen, P. C. ("Eisen firm") to represent them in a personal injury action against the City. Prior to the final disposition of the lawsuit, however, the Howards moved to Mount Olive, North Carolina.

In June, 1981, Alma received a correspondence from the Eisen firm informing her the lawsuit could be settled for $10,000.00. Defendant was then hired as an intermediary between Alma and the Eisen firm.

Over the next year, Alma and her sister, Edna Pearsall, went several times to see defendant about the case. Each time they visited defendant, he informed them that he was still working on the case. Alma and Edna last visited defendant in April, 1982. Alma died 26 June 1982.

The evidence further showed that defendant maintained several bank accounts at various institutions. He had an account at First Citizens Bank which was designated as a "Trust Account." The records to that account revealed that a transaction dated 11 March 1982 resulted in a deposit of $4,197.60 to the account. Furthermore, the account had a checkline reserve feature of $1,000.00 whereby if the account was overdrawn the bank would advance funds up to the reserve limit. As of 11 March 1982, defendant owed the bank $975.48 on that account.

Prior to 11 March 1982, defendant received a check from the Eisen firm in the amount of $5,697.60. He deposited $4,197.60 and "cashed-out" $1,500.00. According to bank records, between 11

March and 19 April, defendant made the following transactions to the account in question: (1) check number 1138 payable to Earl Whitted, Jr. in the amount of $1,000.00 was drawn on the account and deposited into defendant's Branch Banking and Trust ("B B & T") account in order to cover an outstanding check defendant had written to American Express in the amount of $590.53; (2) checks number 1139 and 1140 for $186.74 and $100.00 were written to City Finance Company and Service Motor Co., respectively; (3) check number 1141 was written to American Savings and Loan in the amount of $1,545.80 to cover two months of defendant's mortgage on his house; (4) check number 1142 was drawn on the account in the amount of $490.00 and designated payroll.

Between June, 1982 and September, 1985, Edna visited defendant's office approximately 15 times asking about her sister's lawsuit. Defendant's continued response was that "he hadn't heard anything [and that] he was still working on it." Finally, in September, 1985, Edna went to defendant's office demanding the lawsuit papers because she wanted to go to New York to visit the Eisen firm. Defendant responded by saying that he no longer had the papers.

On 5 September 1985 Edna and her husband Leslie went to the Eisen firm and discovered that the case was settled for $10,000.00 and a check for $5,697.60 was mailed to defendant on 4 March 1982. Upon returning to Mount Olive, they contacted the State Bureau of Investigation ("SBI").

On 27 September 1985, defendant contacted Edna and told her that he had the money and that she could come pick it up. Defendant was informed, however, that she had contacted the SBI.

On 28 September 1985, Edna and her parents went to defendant's office where he tendered to each a check drawn on a B B & T account. Edna's check was issued for $2,136.60 while her parents each received a check for $1,068.30.

The records of defendant's B B & T account indicates that defendant transferred $4,300.00 from an account he had with Merrill Lynch to cover the checks written to Edna and her parents. The money in the Merrill Lynch account was the proceeds from a $36,406.00 deposit of a check into the account designated as the estate account of Vera Adams.

Defendant's evidence tended to show that he took the $1,500.00 cash from the Eisen check, put it into a folder along with other cash he had in his office and had held on to the money for three years.

By this appeal, defendant brings forth forty-seven Assignments of Error in which he challenges virtually every aspect of the trial. After a careful review of the record in the case at bar, we conclude that defendant received a fair trial free of prejudicial error. While we have considered all of defendant's assignments of error, we find it unnecessary to address all forty-seven. We shall restrict our discussion to the legal questions we believe to be decisive.

[1] By Assignment of Error number two, defendant contends that the trial court erred in admitting evidence of his misapplication of funds of another client pursuant to G.S. § 8C-1, Rule 404(b). In particular, defendant contends that the trial court improperly admitted evidence of his handling of a wrongful death action for his client Evelyn M. Goodman in 1984. We disagree.

As a general rule, extrinsic evidence of another offense is inadmissible to show character or propensity of the defendant to commit the crime for which he is charged. *State v. Searles*, 304 N.C. 149, 282 S.E.2d 430 (1981). Such evidence is admissible, however, to show *inter alia*, motive, intent, opportunity, plan or identity. G.S. § 8C-1, Rule 404. *See also State v. Allen*, 92 N.C. App. 168, 374 S.E.2d 119 (1988), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989). Where specific mental intent or state of mind is an essential element of the offense charged, evidence of similar acts are admissible to prove defendant's intent or state of mind. *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250 (1987). Here, the Goodman evidence was offered to prove defendant's knowledge, intent and lack of mistake. We hold that it was properly admitted for those purposes.

[2] By Assignment of Error number eight, defendant contends that the trial court improperly denied his motion to suppress and for sanctions. Defendant, in essence, contends that his rights under the Fourth Amendment of the U.S. Constitution were violated when the State obtained records from his B B & T bank account. We disagree.

Any person seeking the protection of the Fourth Amendment has the burden of establishing that his personal rights were violated by the State's search and seizure of records. *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980). The Fourth Amendment

only protects individuals having a reasonable expectation of privacy in the searched premises. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *see also State v. Melvin*, 86 N.C. App. 291, 357 S.E.2d 379 (1987).

Since defendant failed to establish that he had a reasonable expectation of privacy as to the bank records of Alma Howard and the estate account of Vera Adams and since G.S. § 53B-4 authorizes financial institutions maintaining accounts in the defendant's name to make them available to the State, we find that the trial court correctly denied defendant's motion to suppress the bank records. Defendant's contention lacks merit.

[3] By Assignment of Error number sixteen, defendant contends that the trial court erred in allowing the State to introduce a statement by Alma Howard through her twin sister, Edna Pearsall, pursuant to G.S. § 8C-1, Rule 804(b)(5). We disagree.

G.S. § 8C-1, Rule 804 in pertinent part provides that:

> (b) Hearsay Exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with fair opportunity to prepare to meet the statement.

G.S. § 8C-1, Rule 804(b)(5).

Our Supreme Court has articulated guidelines for the admissibility of hearsay testimony under the "catchall" hearsay exceptions

established by Rules 804(b)(5) and 803(24). Because the residual nature of the above-mentioned rules are virtually identical, our Courts have adopted parallel guidelines for the admission of hearsay testimony. *See State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986). The trial judge must engage in a six-part test as prescribed in *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Initially, however, the trial judge must find that the declarant is unavailable before applying the *Smith* test. *State v. Triplett, supra, citing United States v. Thomas*, 705 F.2d 709 (4th Cir.), *cert. denied*, 464 U.S. 890, 104 S.Ct. 232, 78 L.Ed.2d 225 (1983). Rule 804(a)(4) defines "unavailability as a witness" as situations where the declarant "[i]s unable to be present or to testify at the hearing because of death . . . ." In the instant case, the trial judge made a finding that the declarant, Alma Howard, was dead.

Once the trial judge deems the declarant as unavailable, he must apply the six-part *Smith* test. The trial judge must first make the determination that the proponent of the hearsay statements gave proper notice to the adverse party of his intent to offer it and the particulars. Detailed findings of fact are not necessary. Second, the trial judge must determine that the hearsay statements are covered by any of the four exceptions listed in Rule 804(b). While detailed findings are not necessary, the trial judge must nonetheless enter his conclusions in the record. Third, the trial judge must make a finding as to the trustworthiness of the statements offered pursuant to Rule 804(b)(5). If, in examining the circumstances, the trial judge determines that the hearsay statements meet the trustworthiness requirement, he must include in the record his findings of fact and conclusions of law. Fourth, the trial judge must determine and include in the record a statement that the hearsay statements are being offered as evidence of a material fact. Fifth, the trial judge must determine, make findings of fact and conclusions of law as to whether the proffered statements are more probative on the issue for which it is offered than any other evidence which the proponent can procure through reasonable efforts. The sixth and final prong of the *Smith* test is the determination of whether "the general purposes of [the] rules [of evidence] and the interests of justice will best be served by admission of the statements into evidence." G.S. § 8C-1, Rule 804(b)(5). The trial judge need only state his conclusions. *State v. Smith, supra.*

In applying the requirements adopted herein, we hold that the trial court properly admitted the hearsay testimony of Edna

Pearsall under Rule 804(b)(5). In considering the notice requirement, we note that prior to the trial, the State presented defendant with a notice of intent to introduce evidence by Alma Howard, pursuant to Rule 804(b)(5). Defendant thereafter filed for a *motion in limine* as to statements made by Mrs. Howard to Mrs. Pearsall. Clearly, the record shows that defendant had a sufficient amount of time to prepare for the State's intended offer.

In considering whether the proffered statements were material and probative, we recognize that the statements of Mrs. Howard were offered for the purpose of proving that Mrs. Howard had thought about how the money should be used prior to her death and expressed her desire to her sister and parents, thus negating defendant's contention that Mrs. Howard authorized him to hold and spend her money. Defendant argues, however, that the statements made by the victim did not possess circumstantial guarantees of trustworthiness and that the testimony of Mrs. Pearsall was hostile and biased. We do not agree.

In weighing the "circumstantial guarantees of trustworthiness" of a hearsay statement, the trial judge must consider: "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *State v. Triplett, supra* at 10-11, 340 S.E.2d at 742. In addition, the trial judge must consider the nature and character of the statements and the relationship of the parties. *State v. Triplett, supra, citing Herdman v. Smith*, 707 F.2d 839 (5th Cir. 1983).

Testifying on *voir dire*, Edna Pearsall stated that she and her sister, Alma Howard, were close and shared a confidential and trusting relationship. She also testified that she had assisted her sister in her move to North Carolina; co-signed as a surety so that her sister and brother-in-law could obtain financing for a mobile home; made the down payment on the mobile home; attended to her sister's medical needs; and opened her home to her sister prior to the time the mobile home was purchased as well as when Mrs. Howard's husband died. Further, Mrs. Pearsall testified that her sister expressed her intentions concerning what should be done with the proceeds of the lawsuit should it ever arrive.

In light of the fact that the declarant and Mrs. Pearsall enjoyed a sisterhood of closeness, confidentiality and trust, we believe that the declarant's expression of her intentions concerning the proceeds of the lawsuit to her sister were honest. Thus, the declarant's statements to Mrs. Pearsall possessed guarantees of trustworthiness.

We conclude that the trial judge made detailed findings of fact that sufficiently supported his holding that the hearsay statements were admissible under the purview of the catchall Rule 804(b)(5).

For all the aforementioned reasons, we find that defendant had a fair trial free of prejudicial error.

No error.

Judges ARNOLD and ORR concur.

ZOLLIE SPENCER, ALLEGED EMPLOYEE, PLAINTIFF v. JOHNSON & JOHNSON SEAFOOD, INC., EMPLOYER, DEFENDANT

No. 8910IC1112

(Filed 17 July 1990)

Master and Servant § 50 (NCI3d) — workers' compensation — scallop shucker as independent contractor — no coverage under Act

Plaintiff was an independent contractor and not an employee and therefore could not recover under the Workers' Compensation Act for injuries sustained while she was working for defendant as a scallop shucker where plaintiff went to defendant only when she heard work was available; she was free to work for any other fish houses depending on availability of work; plaintiff received no training from defendant nor was she instructed on how to shuck scallops; she used her own equipment; plaintiff did piece work; plaintiff testified that no one was hired for the job, but people instead wrote their names and social security numbers on a piece of paper and began work; the only supervision plaintiff and other workers

had was when weighing scallops; and plaintiff set her own work hours and was free to work whenever she pleased.

Am Jur 2d, Workmen's Compensation §§ 167-170, 173.

Judge WELLS dissenting.

APPEAL by defendant from opinion and award entered 27 April 1989 by Chairman William H. Stephenson before the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 11 April 1990.

This is an action for workers' compensation benefits. At a hearing Deputy Commissioner John Charles Rush found the following facts: At the time of the hearing plaintiff was a thirty year old female who was employed as a cook at Harris Steak House and also worked a second job as a scallop shucker for defendant beginning about May 1987 through 3 August 1987. Defendant is a corporation engaged in the preparation of seafood such as scallops, crabs and fish and the sale of the prepared seafood to wholesalers. Alvin K. Johnson solely operated the business and Evin Johnson owned the business. The scallop season lasts from about May to September and defendant is engaged in the crab and fish business for the rest of the year.

The hearing commissioner also found that Sandra Hayes, who was the daughter of Alvin Johnson, worked for defendant in the office for at least three to four days a week during the scallop season and about one day a week during the rest of the year. She received hourly wages and social security and income taxes were withheld from her wages. Terry Riggins also worked for defendant throughout the calendar year. His job usually included weighing the scallops after they were shucked by workers and working as supervisor when Alvin Johnson was not present. Riggins received a salary and social security and income taxes were withheld from his pay. The hearing commissioner further found that from about September to about May defendant employed three or four additional people to pack crabs and fish. These people were paid by the hour and social security and income taxes were withheld from their payroll checks. They were hired by both Alvin Johnson and Terry Riggins. Defendant also hired several men to work during scallop season. Their duties included unloading scallops from the boats, putting scallops on tables, removing shells and

cleaning the fish house. These men were paid by the hour and social security and income taxes were withheld from their pay.

The hearing commissioner found that during the scallop season defendant also employed an average of thirty-five women to work as scallop shuckers. Upon finding out that work was available, these women would go to defendant's office, place their name and social security number on a sheet of paper and then begin work in the fish house. These women usually provided their own equipment; however, defendant provided knives, gloves and aprons for any of the workers who needed them and buckets for the scallops. The women did not work set hours and were free to come and go as they pleased. The women were also free to work for other fish houses. The scallop shuckers were paid based on their production $.40 for every pound of scallops they shucked. No monies were withheld from their weekly pay. Notation on the face of their checks stated that the work was "contract labor" and at the end of the year the women received 1099 Forms, which were "non-employee compensation" report forms for income tax purposes. The hearing commissioner found that the women were not instructed on how to perform their work. Riggins merely told the women not to pile the scallops in order to comply with health regulations. Riggins also weighed the scallops and kept a record of each pound shucked for each individual worker.

On 3 August 1987, a tote of scallops from a stack of approximately seven totes fell on plaintiff's neck and back while she was shucking scallops. Each tote is approximately 14 inches by 36 inches by 18 inches wide. Plaintiff reported her accident to Alvin K. Johnson and went home. Plaintiff was treated for her injuries by several physicians and was hospitalized for her injuries. Plaintiff discontinued employment with defendant as of 3 August 1987. Plaintiff did not work at Harris Steak House from 2 August 1987 until 7 September 1987.

As a result of his findings the hearing commissioner made the following conclusions of law:

> 1. Prior to and on August 3, 1987, the defendant employer regularly employed four or more employees in the same business or establishment. GS 97-2(1).
>
> 2. Prior to and on August 3, 1987, the employer-employee relationship existed between the plaintiff and the defendant employer. GS 97-2 (1) (2) (3).

3. Prior to and on August 3, 1987, the plaintiff and the defendant employer were subject to and bound by the provisions of the Workers' Compensation Act. GS 97-2 (1) (2) (3), GS 97-5.

4. The plaintiff's average weekly wage was $105.95. G.S. 97-2(5).

5. The plaintiff sustained an injury by accident arising out of and in the course of her employment with the defendant employer on August 3, 1987. G.S. 97-2(6).

6. As a result of the injury by accident giving rise hereto the plaintiff was out of work and temporarily totally disabled for August 3, 1987 to September 7, 1987. She is entitled to compensation at the rate of $70.64 per week for said period of time. G.S. 97-29.

Plaintiff was then awarded compensation at a rate of $70.64 per week from 3 August 1987 to 7 September 1987 and defendant was also ordered to pay medical and hospital expenses and costs incurred as a result of the accident.

Defendant gave notice of appeal to the Full Commission on the grounds that no employer-employee relationship existed between defendant and plaintiff and as a result the Commission had no jurisdiction to hear the matter or make an award under the North Carolina Workers' Compensation Act. After carefully considering the record the Full Commission determined that plaintiff worked for defendant on a quantitative basis and that defendant had the right to control the manner and method of doing the work and that the fact that plaintiff was paid by piece work as opposed to by the hour was insignificant. The Full Commission further determined that "the work of the employer was contingent on completion of the services rendered by the employee and those in a similar capacity. They were not engaged in an independent business or occupation but were an integral part of the employer's operation." The Full Commission then adopted as its own the opinion and award of the hearing commissioner. Defendant appeals.

Zollie Spencer appearing pro se.

Geo. Thomas Davis, Jr. for defendant appellant.

EAGLES, Judge.

Defendant assigns as error the Commission's findings that an employer-employee relationship existed between plaintiff and de-

fendant. "Defendant contends that the Plaintiff has failed to show that an employer-employee relationship existed between the parties and that the Industrial Commission had no jurisdiction to make an award to the Plaintiff in this matter." Defendant argues that when applying the factors articulated in *Hayes v. Board of Trustees Elon College*, 224 N.C. 11, 29 S.E.2d 137 (1944), plaintiff has not carried the burden of showing that she was an employee of Johnson & Johnson Seafood, Inc. Defendant contends that the evidence is clear that plaintiff was an independent contractor and not an employee or servant. We agree.

> It is well established that in order for a claimant to recover under the Workers' Compensation Act, the employer-employee relationship must exist at the time of the claimant's injury. The Industrial Commission's determination that this relationship did not exist in the instant case is a jurisdictional fact and is therefore not conclusive on appeal. This Court has the duty to examine the entire record and make independent findings concerning the existence of the employer-employee relationship. The burden of proof on the issue falls on the claimant.

Ramey v. Sherwin-Williams Co., 92 N.C. App. 341, 342, 374 S.E.2d 472, 473 (1988).

"G.S. sec. 97-2(2) defines an 'employee' as 'every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, . . . but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer. . . .' " *Id.*

> The distinction between employee and an independent contractor for purposes of the Workers' Compensation Act must turn on the particular facts of the case. Our Supreme Court has stated that the 'vital test' to be answered in distinguishing between the two is whether 'the employer has or has not retained the right of control or superintendence over the contractor or employee as to details.' *Hayes v. Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944). As a guide to determining what degree of independence a worker has retained, the Court in *Hayes* outlined a number of factors which, if found, point towards a worker's being considered to be an independent contractor:

> The person employed (a) is engaged in an independent business, calling, or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.
>
> The presence of no particular one of these *indicia* is controlling. Nor is the presence of all required.

Id., *quoting* 224 N.C. at 16, 29 S.E.2d at 140 (citations omitted).

After carefully reviewing the record in light of the factors articulated in *Hayes*, we conclude that plaintiff has failed to carry her burden of proof establishing the existence of an employer-employee relationship at the time of her injury by accident and may not avail herself of the Workers' Compensation Act.

We find the following facts to be controlling in this case. First, plaintiff went to defendant only when she heard work was available. She was free to work for any other fish houses depending on the availability of work. As a matter of fact, plaintiff also worked for Meekins Seafood during the same time she worked for defendant.

Second, plaintiff received no training from defendant nor was she instructed on how to shuck the scallops. Plaintiff used her own knife, gloves and apron. At the hearing, plaintiff even testified that most workers used their own equipment even though defendant did have equipment available for those who needed it.

Third, plaintiff did piece work. She was paid $.40 per pound of scallops shucked. She did not receive a salary or hourly wages. Plaintiff's pay was dependent upon the pounds of scallops shucked.

Fourth, plaintiff further testified at the hearing that defendant did not give any instructions on what to do or how to shuck the scallops. Plaintiff testified that no one was terminated because he/she did not do his/her job correctly.

Fifth, plaintiff testified that no one was hired for the job. The workers just found out usually by word of mouth about the

availability of work, put their name and social security number on a piece of paper and began work. Plaintiff testified that she received a check from defendant on Friday or Saturday of each week that she worked and neither income taxes nor social security taxes were withheld from her pay. Plaintiff further testified that the check from defendant had "contract labor" written on it. During the hearing one of plaintiff's witnesses, who was also a scallop shucker for defendant, testified that she received a 1099 Form at the end of the year for income tax purposes. Alvin Johnson also testified that the "boats paid for the shuckers" since the money paid to the shucker-workers was deducted from the money defendant paid to the boat operators for the scallops.

Sixth, plaintiff testified that the only supervision the workers had was when weighing the scallops and at that time workers were merely told not to let the scallops sit beyond a certain time period before weighing them.

Seventh, plaintiff testified that she set her own work hours and was free to work whenever she pleased.

Here the evidence conclusively indicates that plaintiff was an independent contractor and not an employee of defendant for purposes of the Workers' Compensation Act. Accordingly, the Commission was without jurisdiction to render an award under the Workers' Compensation Act.

Reversed and remanded.

Judge GREENE concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The facts of this case reflect an informal, relaxed, casual work environment and work relationship, under which plaintiff (and other scallop shuckers) were allowed to work pretty much as they pleased, being paid according to their production. This reflects to me a friendly and convenient arrangement for both the workers and the operators of the seafood company. I cannot, however, agree that these circumstances and conditions establish that plaintiff was an independent contractor. She was hired to do piece work, not

a piece of work—a vital distinction under our Workers' Compensation Act.

I would hold that the Commission correctly found and concluded that the relationship of employer-employee existed between plaintiff and defendant, and I would therefore affirm the Commission's award.

IN RE DENIAL OF REQUEST FOR DECLARATORY RULING BY TOTAL CARE, INC.

TOTAL CARE, INC., PETITIONER-PLAINTIFF v. DEPARTMENT OF HUMAN RESOURCES, STATE OF NORTH CAROLINA, RESPONDENT-DEFENDANT

No. 8926SC245

(Filed 17 July 1990)

Hospitals § 2.1 (NCI3d)— established home health agency—opening of branch offices—no certificate of need required

The opening of branch offices by an established home health agency within its current service area is not the construction, development or other establishment of a new health service facility under N.C.G.S. § 131E-176(16)(a), and such home health agency is therefore not required to obtain a certificate of need pursuant to N.C.G.S. § 131E-178 before opening such branch offices.

Am Jur 2d, Hospitals and Asylums §§ 4, 6.

APPEAL by defendant from judgment entered 1 December 1988 by *Judge Frank W. Snepp, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 13 October 1989.

Moore & Van Allen, by Julia V. Jones, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Richard A. Hinnant, Jr., for defendant-appellant.

Jordan, Price, Wall, Gray & Jones, by William R. Shenton and Steven Mansfield Shaber, for the North Carolina Association for Home Care, Inc., amicus curiae.

PARKER, Judge.

The sole issue presented by defendant Department of Human Resources' appeal is whether the trial court erred in concluding that a home health agency seeking to open branch offices in counties where it already provides health services to patients is not required to obtain a Certificate of Need (CON) pursuant to G.S. 131E-178 before opening such branch offices.

Plaintiff, Total Care, is a private corporation providing home health care. Total Care's principal office is in Charlotte, North Carolina. Total Care also has offices in Salisbury, Statesville, and Gastonia, North Carolina and provides home health care services in the following counties: Alexander, Anson, Cabarrus, Catawba, Cleveland, Davidson, Davie, Gaston, Iredell, Lincoln, Mecklenburg, Rowan, Stanly, Union, and Wilkes. Plaintiff seeks to open additional offices within its current service area.

Plaintiff requested defendant, the North Carolina Department of Human Resources, to issue a declaratory ruling as to whether Total Care was required to obtain a CON before opening additional offices in its geographic service area. Defendant issued a ruling that Total Care was required to obtain a CON to open any additional offices. Plaintiff then filed a petition for judicial review and complaint for declaratory judgment pursuant to G.S. 150B-17 and G.S. 1-253. The trial court granted summary judgment for plaintiff, concluding that a CON is required, pursuant to the "new institutional health service" provision of the CON law, for a home health agency when a new health service agency or organization is to be developed, but not when an existing agency seeks merely to open new offices for the existing agency. Although the standard of review from a Department ruling is the whole record test, in the case before the Court, the facts are undisputed and the issue for resolution is one of law.

Initially, we note that from what appears of record defendant's argument concerning the interrelationship of the Health Agency Licensure Act and the CON statutes was neither pled nor argued in the court below nor was it a basis of defendant's ruling. Accordingly, we do not address this question raised for the first time on appeal.

North Carolina's CON law was adopted because of the legislature's concern:

> [t]hat the general welfare and protection of lives, health, and property of the people of this State require that new institutional health services to be offered within this State be subject to review and evaluation as to need, cost of service, accessibility to services, quality of care, feasibility, and other criteria as determined by provisions of this Article or by the North Carolina Department of Human Resources pursuant to provisions of this Article prior to such services being offered or developed in order that only appropriate and needed institutional health services are made available in the area to be served.

G.S. 131E-175(7). To this end the legislature designated the Department of Human Resources as the State Health Planning and Development Agency for the State of North Carolina and charged the Department with implementing the CON law, determining the need for health service facilities, and developing a State Health Plan (now known as the State Medical Facilities Plan). G.S. 131E-177. Under G.S. 131E-178(a), a CON is required prior to offering or developing a "new institutional health service." In G.S. 131E-176, the definition section of the CON law, the term "new institutional health service" is defined to include "[t]he construction, development, or other establishment of a new health service facility." G.S. 131E-176(16)(a). In the same definition section a "health service facility" is defined as:

> a hospital; psychiatric facility; rehabilitation facility; long term care facility; kidney disease treatment center, including free-standing hemodialysis units; intermediate care facility for the mentally retarded; *home health agency*; chemical dependency treatment facility; and ambulatory surgical facility.

G.S. 131E-176(9b) (emphasis added). A "home health agency" is defined as "a private organization or public agency, whether owned or operated by one or more persons or legal entities, which furnishes or offers to furnish home health services." G.S. 131E-176(12).

In his order reversing the Department's declaratory ruling that in order to establish branch offices a home health agency is required to obtain a CON for such offices, the trial judge concluded that under the statutory definitions of the CON law the home health agency itself, and not the service that the agency provides, is the "health service facility" governed by section 131E-176 of the CON law.

Where the language of a statute is clear and unambiguous the courts must give such language its plain and definite meaning. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Although where an issue of statutory construction arises the construction adopted by the agency charged with implementing the statute may be considered, such an issue only arises where an ambiguity exists. *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952). Additionally, there is a presumption that the legislature "comprehended the import of the words it employed to express its intent." *State v. Baker*, 229 N.C. 73, 77, 48 S.E.2d 61, 65 (1948), *quoted in Housing Authority v. Farabee*, 284 N.C. 242, 245, 200 S.E.2d 12, 15 (1973).

Applying these rules of statutory construction, we conclude that the legislature intended that only the home health care agency be subject to this provision of the CON law. The statute specifically defines "home health agency" as an "organization." Normally, the fact that an organization has two offices does not transform it into two organizations. Although the nature of home health services is such that the patient is treated in the temporary or permanent residence used as the patient's home, rather than at a clinic site such as a hospital or ambulatory surgery facility, if the legislature had intended to require a CON for each office used by the home health agency in providing home health services it could have specified this in the statute. The legislature did not so specify, and the term "home health agency" is unambiguous. Hence by defining a health service facility for purposes of home health care as the "home health agency" the legislature, in our view, intended to require a CON prior to the establishment of a new home health agency not merely to the opening of additional offices for administrative purposes.

Moreover, although the Department has issued a declaratory ruling that new offices of an existing home health care agency are subject to CON review, the ruling is contrary to the position taken by the Department in the 1989 State Medical Facilities Plan (herein "SMFP").

The SMFP is prepared by the Health Resources Development Section of the Division of Facility Services of the Department of Human Resources. The plan is developed under the direction of the North Carolina Health Coordinating Council and approved by

the Governor pursuant to G.S. 131E-176(24) and (25). Under G.S. 131E-177 the legislature has delegated all health services planning and development of need projections to the Department. The SMFP is the official statement of projected need for health services. The SMFP methodology for projecting need for home health agencies is basically the same today as when it was first employed in 1983. SMFP at 70. The key to the methodology is that there is no limit placed upon the number of patients served by existing home health agencies, there is merely a limit upon the number of new home health agencies allowed to be established. *Id.* A basic assumption underlying the projection of need for home health agencies is that "[a] new agency is needed if unmet need in a single county is 150 patients or more, or if such need in contiguous counties is 200 patients or more." *Id.*

In addition to this standard allocation methodology, the 1989 SMFP sets out an alternative methodology to "permit entry of another provider [of home health services]." *Id.* at 28. The alternative methodology provides:

> In the *1991 State Medical Facilities Plan*, if application of the standard need determination methodology fails to do so, that Plan will establish need for an additional home health agency in those counties:
>
> > with an estimated 1988 age 65 > population of 5000 or more, and
> >
> > which on July 1, 1989 had only one home health agency with an established office and telephone number located in the county, and
> >
> > whose proportion of the 65 > population who were home health patients in 1988 and 1989 was 10% below the State average in each of those years.

Id. This proposed policy is based on the observation of apparent underservice of home health care in larger counties with only one locally-based home health agency. The Department perceives that such underservice may be a result of inadequate presentation by the existing home health agency to the public and referral agencies of information regarding the availability of the services. In such cases the SMFP alternative methodology is designed to allow the presence of another provider that may stimulate service to more persons without jeopardizing the viability of the existing agency.

Id. These methodologies used to calculate the need projections upon which CON's are granted suggest that the Department is only concerned with granting CON's, and those to new agencies or providers, when the existing home health care agency is unable to meet the need for home health care services.

In the present case, plaintiff began its operations in 1978 and has been providing service continuously since that time. In plaintiff's request for the declaratory ruling, plaintiff stated that it was granted a license under the grandfather provisions of the CON law when the law was enacted, and that it had offices in four counties and operated in 15 counties. The Department admitted in its answer that plaintiff has provided services "in at least fourteen (14) counties as shown in its licensure application for 1988 on file with the Department." This 14 county area block is equivalent to a geographic service area under a CON. SMFP at 27 and N.C. Admin. Code tit. 10, r. 3R.2002 (October 1989).

Defendant and *amicus curiae*, the North Carolina Association for Home Care, Inc., are concerned that if plaintiff is allowed to open offices within its current service area without first obtaining a CON for those offices there will be nothing to prevent plaintiff from offering home health services and opening offices in leapfrog fashion across the State without obtaining a CON for such services and offices. Their concern is that an interpretation of the CON statute which defines a health service facility as the home health agency will impair the legislature's intent for central planning for health care resources distribution to control costs, assure efficient utilization, and provide for equal access to such resources.

In its request for Declaratory Ruling and in its brief to this Court, plaintiff represented its intention to open additional offices only in its existing geographical service area and without substantial change in its services. The ruling of the trial court and the ruling of this Court are premised on this undisputed fact. Hence, although we hold that the opening of branch offices by an established home health agency within its current service area is not the construction, development, or other establishment of a new health service facility under G.S. 131E-176(16)(a), this opinion is limited to the facts of this particular appeal and does not determine the question whether extension of home health services to patients in counties outside an agency's current service area, or the expansion of branch offices of an established home health agency outside

the agency's current service area, would trigger the CON requirement under G.S. 131E-176.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

Judges EAGLES and GREENE concur.

IN THE MATTER OF: JOHNATHAN MURRY MOSSER

No. 8913DC1248

(Filed 17 July 1990)

Infants § 20 (NCI3d) — juvenile delinquent — dispositional alternatives — unsuccessful or inappropriate — insufficiency of evidence to support findings — needs of juvenile — insufficient inquiry

Evidence was insufficient to support the trial court's findings of fact that alternatives to commitment were unsuccessfully attempted or inappropriate, and the trial court therefore erred in committing juvenile appellant to confinement for thirty days with the Division of Youth Services, where commitment to the Division of Youth Services would require that the juvenile drop out of his summer school program and repeat his grade, that the juvenile cease treatment for his alcoholism by the Columbus County Mental Health Clinic, and that the juvenile not participate in a community service program at the local police department; furthermore, the record did not reveal a genuine inquiry into the nature of the needs of the juvenile where the court found as a fact that the juvenile was "manic-depressive," but this finding was not supported by any medical evidence, only by a statement made to the trial court by the mother of the juvenile.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 32, 55.

APPEAL by juvenile from order entered 21 June 1989 by *Judge David G. Wall* in COLUMBUS County District Court. Heard in the Court of Appeals 6 June 1990.

Lacy H. Thornburg, Attorney General, by Debra K. Gilchrist, Assistant Attorney General, for the State.

Fred C. Meekins, Jr. for juvenile-appellant.

GREENE, Judge.

Johnathan Mosser (juvenile) appeals the trial judge's disposition and order committing juvenile to confinement for thirty days with the Division of Youth Services.

The record reveals that in May, 1989, juvenile was a thirteen-year-old male who resided at the Lake Waccamaw Boys and Girls Home of North Carolina ("Home"). A juvenile petition dated 30 May 1989 alleged that the juvenile, along with two other juveniles, did "unlawfully and willfully . . . ass[au]lt and strike Johnathan Lamont Garner by slapping in the face with his hands, hitting him with a belt on his back and buttocks, forcing him to drink water with cigarette tobacco in it and shoving his head into a commode filled with urine." The juvenile admitted to striking Johnathan Lamont Garner with his hand and a belt and did not deny that he took part in the other actions. Based on the juvenile's admissions, the trial court adjudicated him a delinquent juvenile on 21 June 1989.

At the dispositional hearing, the following evidence was presented to the trial court: the juvenile was placed on probation in Wake County on 8 August 1988 for a period of nine months for breaking and entering, to be terminated in May 1989; the juvenile was voluntarily admitted by his mother to the Home in August 1988, and that other than the assault on Garner, juvenile had committed no substantial rule violations; the juvenile had been diagnosed as "manic-depressive" and was being treated with the drug lithium; juvenile was an admitted adolescent alcoholic, had been "doing drugs and alcohol for some length of time" and was being treated by the Columbus County Mental Health Clinic and was attending Alcoholic Anonymous meetings. The juvenile intake counselor opined that the juvenile could benefit from remaining at Boys Home and being placed on supervised probation. The substance abuse counselor at the Columbus County Mental Health Clinic, who had a bachelor's degree in social work, expressed the opinion that "it would be more beneficial [for the juvenile to be placed on] probation and continue him on with the meetings and the therapy [offered by the mental health clinic]." The juvenile's

mother indicated that her son had improved since being placed in the home and that she "would like to see him stay at least another year." The juvenile court counselor informed the court that the local police department had informed her that they "would be willing to use [the juvenile] . . . at the Police Department . . . like in a community service program to give [him] a chance to spend some time [with officers at the police department.]" The social worker for the Home recommended to the court that the juvenile be placed on probation and that as a condition of probation that the juvenile remain at the Home for another period of time.

The trial court ordered that the juvenile be committed to the Division of Youth Services for a period of thirty days and included in its order the following pertinent findings of fact and conclusions of law:

After considering the evidence, the Court finds:

The Court adopts and incorporates herein the Findings of Fact as set out in the Juvenile Adjudication Order.

1. That the Juvenile, JOHNATHAN MURRY MOSSER, has been diagnosed as manic depressive and is currently being treated by the resident Psychiatrist at the Columbus County Mental Health Center, and is taking the drug Lithiu[m], to treat illness.

2. That the Juvenile is presently being counseled by ROBERT HORST of the Columbus County Mental Health Center.

3. That the Juvenile participated with two other Juveniles, to-wit: SANDY LEE COLEMAN and ERIC JACKSON RANDALL in additional acts of violence against JOHNATHAN LAMONT GARNER, by acting in concert and aiding and abetting SANDY COLEMAN in forcing LAMONT GARNER to drink water which contained cigarette tobacco and shoving his head into a commode filled with urine.

4. That the assault and other acts took place while all of the Juveniles, including the victim, were residents of the Boys & Girls Home of North Carolina, and said incidents took place during the night time and early morning hours over a three hour period in the bathroom of one of the cottages located at the Boys Home. The Court further finds that at the time of the incident, the Juveniles were not properly supervised.

5. Due to the nature of the allegations involved and other findings set forth herein, the Court finds as a fact that . . . community based resources as alternative dispositions are inappropriate for the Juvenile.

6. That the Court finds that the best interest of the Juvenile would be served if he were committed to the Department of Human Resources, Division of Youth Services, for a period of thirty days.

The Court further finds that the juvenile meets each of the following criteri[um] for commitment to the Division of Youth Services, Department of Human Resources, specifically that:

(1) The juvenile is delinquent and is ten years of age or older;

(2) The juvenile has not or would not adjust in his own home on probation or while other services are being provided;

(3) Community residential care has already been utilized or would not be successful or is not available;

(4) The juvenile's behavior constitutes some threat to persons or property in the community;

(5) The alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate.

The Court concludes as a Matter of Law:

1. That it would be in the best interest of the Juvenile, JOHNATHAN MURRY MOSSER, that he be committed to the Department of Human Resources, Division of Youth Services, for a period of thirty (30) days, to be served in a local confinement facility.

2. That during the period of his confinement, the Juvenile shall be given access to Mr. Robert Horst of the Columbus County Mental Health Center for counseling sessions.

After the dispositional order was entered, the juvenile's attorney informed the court that commitment of the juvenile to the Division of Youth Services would make it impossible for the juvenile to continue counseling by the Columbus County Mental Health Clinic, since the child would be committed to an institution approximately 300 miles from Columbus County. The juvenile's attorney

also notified the court that the juvenile was scheduled to begin summer school and that commitment to the Division of Youth Services would prevent completion of his summer school requirements, thus requiring the juvenile to repeat his grade. The court denied the juvenile's motion to modify the commitment order.

The issue is whether record evidence supports the trial court's findings of fact that alternatives to commitment were unsuccessfully attempted or inappropriate.

To support a juvenile's commitment to the Division of Youth Services, the trial judge must make a determination that:

> the alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community.

N.C.G.S. § 7A-652(a) (Cum. Supp. 1989).

The *statutory* alternatives to commitment to the Division of Youth Services, which must be considered by the trial court, include those in N.C.G.S. § 7A-649 (Cum. Supp. 1989) (a suspended imposition of a more severe disposition, restitution, fine, supervised community service, a supervised day program, a community-based program of academic or vocational education, a professional residential or nonresidential treatment program, intermittent confinement in a detention facility, supervised probation, forfeiture of privileges to operate a motor vehicle); in N.C.G.S. § 7A-647(2)(c) (Cum. Supp. 1989) (placement of the juvenile in the custody of the Department of Social Services which may be required to provide "psychiatric, psychological, educational, or other remedial evaluations or treatment for the juvenile"); in N.C.G.S. § 7A-647(3) (Cum. Supp. 1989) (when the trial judge believes or finds evidence that the juvenile is mentally ill or mentally retarded "the judge shall refer him to the area mental health, mental retardation, and substance abuse director," who shall be "responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet his needs"); and in N.C.G.S. § 7A-648(1) (Cum. Supp. 1989) (allows the family to meet the needs of the juvenile "through placement in a private or specialized school or agency").

Additionally, prior to committing a juvenile to the Division of Youth Services, the court must consider any reasonable and

available *nonstatutory* community-level alternatives. *See In re Bullabough*, 89 N.C. App. 171, 365 S.E.2d 642 (1988) (the trial court must consider "community-level resources" not included in N.C.G.S. § 7A-649) (citations omitted); *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981) (commitment to training school is an option reserved only "when there is no reasonable [community-level] alternative open to the court . . ."); *In re Groves*, 93 N.C. App. 34, 376 S.E.2d 481 (1989); N.C.G.S. § 7A-646 (Cum. Supp. 1989) ("a juvenile should not be committed to training school . . . if he can be helped through community-level resources").

The needs of the juvenile, which must first be determined by the trial court prior to any disposition, must govern the trial court's selection of appropriate community-level resources. *Bullabough*, at 185, 365 S.E.2d at 650.

Here, the trial court made the necessary findings of fact, but for two distinct reasons, our review of the record does not disclose evidence to support the findings. *See In re Khork*, 71 N.C. App. 151, 321 S.E.2d 487 (1984) (the court's findings must be supported by evidence in the record).

First, there is no evidence to support the trial court's findings that community-based resources were inappropriate for the juvenile or that it was in the best interest of the juvenile to be committed to the Division of Youth Services. To the contrary, all the evidence supports conclusions that it was not in the best interest of the juvenile to be committed to the Division of Youth Services and that the community-based resources considered by the trial court were appropriate for the juvenile.

Second, the record does not reflect a genuine inquiry into the nature of the needs of the juvenile, as required by our *Bullabough* decision. The court found as a fact that the juvenile was "manic-depressive." This finding was supported only by a statement made to the trial court by the mother of the juvenile. This evidence of mental illness compels further inquiry by the trial court prior to entry of any final disposition. While the trial court had the authority to order a psychiatric examination of the juvenile and gain the advice of a medical specialist, he failed to utilize this community resource and such failure precludes commitment to the Division of Youth Services. *See* N.C.G.S. § 7A-647(3); *In re Groves*, at 39, 376 S.E.2d at 484 (trial court has "an affirmative obligation to inquire into and to seriously consider the merits of alternative

dispositions"). As we noted in the *Groves* decision, "it may not be necessary to seek medical or psychiatric input in every juvenile case . . ." *Id.*, at 40, 376 S.E.2d at 485. However, this case presents another compelling example of when such inquiry is required.

Accordingly, the commitment of the juvenile to the Division of Youth Services is vacated and the matter is remanded for a dispositional order.

Vacated and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

JOYCE McKINNEY v. AVERY JOURNAL, INC., BERTIE CANTRELL AND JUDY BENFIELD

No. 8924SC1087

(Filed 17 July 1990)

1. **Libel and Slander § 16 (NCI3d)— articles published in paper— no negligence or fault—summary judgment proper**

Summary judgment was proper for defendants on plaintiff's libel claim where plaintiff failed to show that defendants were at fault or negligent in publishing two articles about her in the local newspaper, since defendant editor relied on wire service stories published in leading newspapers in the state to get information for the stories in question; as a matter of law, defendant's reliance on the wire service stories could not constitute negligence on her part; and defendant was not negligent in relying on the sheriff to gain information regarding plaintiff's being listed on Interpol or as to the status of warrants sworn out against plaintiff.

Am Jur 2d, Libel and Slander §§ 184, 251, 252.

2. **Trespass § 2 (NCI3d)— newspaper articles about plaintiff's involvement in rape—no intentional infliction of emotional distress**

Publication of articles about plaintiff's past involvement in a kidnapping and sexual offense in Europe, based on articles previously printed in reputable newspapers and information

provided by the sheriff, did not constitute intentional infliction of emotional distress, and the trial court properly entered summary judgment for defendants, where plaintiff failed to show outrageous conduct along with intent to cause distress.

Am Jur 2d, Negligence §§ 257, 258; Trespass §§ 6, 8.

APPEAL by plaintiff and cross-appeal by defendants from order entered 15 May 1989 by *Judge Robert W. Kirby* in AVERY County Superior Court. Heard in the Court of Appeals 30 April 1990.

Plaintiff instituted this civil action on 28 July 1988, seeking compensatory and punitive damages from defendants for libel and defamation, invasion of privacy, intentional infliction of emotional distress, unfair and deceptive trade practices, and civil conspiracy. After a hearing and review of all the documents filed by the parties, the trial court entered an order, *inter alia*, granting defendants' summary judgment motion as to the libel cause of action, and dismissing all the other claims. Costs were taxed against the plaintiff. Plaintiff appeals these aspects of the order. The court also denied defendants' motion for sanctions pursuant to G.S. § 1A-1, Rule 11. Defendants appeal this portion of the order.

C. Gary Triggs, P.A., by C. Gary Triggs, for plaintiff-appellant.

Everett, Hancock & Stevens, by Hugh Stevens, for defendants-appellees.

JOHNSON, Judge.

This dispute arose from an altercation between plaintiff and her neighbor, defendant Benfield, in August, 1986, in which plaintiff complained that she was being disturbed by the barking of Mrs. Benfield's dogs. As a result, the women swore out warrants against each other. The *Avery Journal* published two articles about the charges on 14 and 21 August 1986. Plaintiff complains about three statements published:

Ms. McKinney made international headlines several years ago for allegedly kidnapping and raping a Mormon missionary in London, England. Ms. McKinney fled Europe before the trial was over and is still listed in Interpol although authorities in England have made no attempt to extradite her.

> Ms. McKinney could not be reached for comment . . . Avery County Sheriff's Department has been unable to locate Ms. McKinney.
>
> Joy McKinney never came in to have the warrant served and make bond and has apparently left the county in an attempt to avoid arrest.

This case has a long procedural history which, along with certain evidence, we shall describe below as needed to address questions raised by the parties.

By her first Assignment of Error, plaintiff contends that the trial court erred in allowing defendants' motion pursuant to G.S. § 1A-1, Rule 36, that the defendants' first request for admissions be deemed admitted by plaintiff. We believe that there was sufficient evidence before the trial court to support its granting of summary judgment for defendants without relying on any admissions by plaintiff. The requested admissions were also not needed to dispose of plaintiff's other claims. Since the determination of the Rule 36 question would not have any effect on the outcome of this action, we find it unnecessary to address the issue.

[1] By her second Assignment of Error, plaintiff argues that the trial court erred in granting defendants' summary judgment motion as to her libel claim. We find no error.

The landmark case of *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964), established that a public official could not recover damages for a defamatory statement relating to his conduct in office absent a showing that the statement was made with "actual malice," that is, with knowledge that the statement was false or with reckless disregard for its veracity. In the absence of actual malice, such statement is protected by the First Amendment. *Id.; Cline v. Brown*, 24 N.C. App. 209, 210 S.E.2d 446 (1974), *cert. denied*, 286 N.C. 412, 211 S.E.2d 793 (1975). This rule was later extended to apply also to "public figures." *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 18 L.Ed.2d 1094 (1967). In the case of "private" individuals, persons who have not invited public attention, a lesser showing of fault rather than actual malice is required to recover damages for "actual injury" arising from defamatory statements. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789 (1974).

On the basis of the uncontradicted evidence before this Court, we find that the trial court did not err in granting summary judgment for defendants. For purposes of this appeal and on the basis of the record, we conclude that plaintiff is a private individual. She has, however, failed to forecast evidence which would meet even the lesser requirement that defendants were at fault or negligent in publishing the two articles about her. *Gertz, supra; Walters v. Sanford Herald*, 31 N.C. App. 233, 228 S.E.2d 766 (1976).

The editor of the *Avery Journal* stated in detail in her affidavit and deposition that most of the information in the statements quoted above was taken from wire service stories published in such newspapers as *The Charlotte Observer, The Winston-Salem Journal, The Asheville Citizen, The Greensboro Daily News*, and *The News and Observer*. One of these articles was an Associated Press dispatch published in the *Charlotte Observer* on 24 November 1977 which reported the sworn courtroom testimony of Kirk Anderson, the Mormon missionary plaintiff was charged in England with kidnapping. The graphic testimony charges that plaintiff and an accomplice abducted Anderson and chained him to a bed, at which time plaintiff performed oral sex upon him and, having stimulated him against his will, proceeded to have sexual intercourse with Anderson against his will.

Defendant Cantrell relied on reputable wire services and daily newspapers in writing the first part of her summary quoted above. The articles in the *Avery Journal* also were substantially in accord with the contents of the stories relied upon. As a matter of law, we do not think that Cantrell's reliance on the articles could constitute negligence on her part. *See Nelson v. Associated Press, Inc.*, 667 F. Supp. 1468 (S.D.Fla. 1987); *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 478 N.E.2d 721 (1985). There was nothing inconsistent or improbable in the articles upon which Cantrell relied which should have prompted her to investigate the reliability of the stories. *Id.* This is a case in which application of what has been termed the "wire service" defense in other jurisdictions is appropriate. *Id.* The sources relied upon by defendant Cantrell are known for their accuracy and are regularly relied upon by local newspapers without independent verification.

Defendant Cantrell also was not negligent in relying on Sheriff Phillips to gain information regarding plaintiff's being listed on Interpol or as to the status of warrants sworn out against plaintiff.

In fact, consulting a law enforcement agency may have been the only avenue for obtaining this information.

Plaintiff has failed to present any forecast of evidence of an element necessary to her claim, that is, that defendants were negligent in publishing the articles about her. Therefore, summary judgment was proper.

By her third Assignment of Error, plaintiff contends that the trial court erred in dismissing the second, third, fourth, fifth, and sixth claims for relief in her complaint. She fails to advance any specific argument in support of her contention that dismissal was improper as to the second, fifth, and sixth causes of action. Pursuant to Rule 28(a) of the N.C. Rules of Appellate Procedure, we therefore deem these arguments abandoned and do not address them. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

[2] We turn now to plaintiff's argument that publication of the above quoted articles constituted intentional infliction of emotional distress, and that dismissal was improper. We disagree.

When matters outside the pleadings are presented and not excluded by the trial court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment. *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 325 S.E.2d 223 (1985). It appears to us that in ruling on defendants' motion to dismiss plaintiff's emotional distress claim, the able trial judge undoubtedly considered the affidavits, depositions, and other evidence properly before the court and relevant to the emotional distress claim. We therefore find that this portion of the order should be treated by us as the granting of summary judgment in favor of defendants on the emotional distress claim. *Id.* We find summary judgment to be appropriate on this issue.

Viewing the evidence in the light most favorable to plaintiff, we find that no genuine issue of material fact exists as to the emotional distress claim, and defendants are entitled to judgment as a matter of law. *See Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 333 S.E.2d 299 (1985). The tort of intentional infliction of emotional distress requires that the complainant show that the defendant engaged in (1) extreme or outrageous conduct, (2) which was intended to cause and did cause, (3) severe emotional distress to another. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). Our review of the record shows that much of what defendant Can-

trell published was no more than a fairly innocuous condensation of numerous articles which had been published previously about plaintiff by reputable newspapers. The rest was information given to her by Sheriff Phillips. This conduct simply does not rise to the level of behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985), *citing Restatement (Second) of Torts* § 46, Comment d. Although the stories may well have been upsetting to plaintiff, that reaction alone does not create a cause of action absent the requisite outrageous conduct along with intent to cause distress. Since we conclude that summary judgment was correct for this cause of action, we accordingly find no merit to plaintiff's assertion that the defendants conspired to cause her emotional distress.

As to defendants' cross-assignment of error that sanctions should have been imposed pursuant to G.S. § 1A-1, Rule 11, we remand this case to the trial court for findings of fact to support its conclusion of law that sanctions are inappropriate. *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989).

We find no error in the trial court's taxing the costs of this action against plaintiff.

Affirmed in part and remanded with instructions.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL TOWNSEND

No. 8912SC1167

(Filed 17 July 1990)

1. **Criminal Law § 169.3 (NCI3d) — objection to evidence — identical evidence subsequently offered by defendant — objection waived**

Defendant waived the benefit of his objection to testimony concerning the connection between a phone number provided to law officers by defendant and a trailer used for keeping

and selling controlled substances where defendant subsequently took the stand and testified to identical facts establishing the nexus between himself, the drugs, and the trailer, and further attempted to justify his action.

Am Jur 2d, Trial § 174.

2. **Criminal Law § 687 (NCI4th)— requested jury instructions given in substance**

The trial court did not err in failing to give defendant's requested jury instructions that guilt could not be inferred from his mere presence at the scene, that the number of witnesses called and the amount of evidence introduced was not determinative of guilt, and that the testimony of a law officer is not necessarily deserving of more consideration or greater weight, since the requested instructions were given in substance.

Am Jur 2d, Trial §§ 832, 854.

3. **Criminal Law § 1042 (NCI4th)— defendant convicted of misdemeanor—judgment showing conviction of felony—judgment remanded for correction**

Where the verdict was returned convicting defendant of a misdemeanor of maintaining a dwelling house for keeping and selling controlled substances, but the judgment incorrectly reflected a conviction for a felony, the case was remanded to the trial court for correction of the judgment to make it consistent with the verdict.

Am Jur 2d, Trial § 1208.

APPEAL by defendant from judgment entered 2 August 1989 in CUMBERLAND County Superior Court by *Judge George R. Greene.* Heard in the Court of Appeals 5 June 1990.

Defendant was charged by proper indictments with intentionally maintaining a dwelling house for keeping and selling controlled substances in violation of G.S. § 90-108(a)(7), possession with intent to sell and deliver more than one gram of cocaine in violation of G.S. § 90-95(a)(1), and possession with intent to sell and deliver more than one-half ounce of marijuana, also in violation of G.S. § 90-95(a)(1). The State's evidence at trial tended to establish that on 1 July 1988, officers with the Cumberland County Sheriff's Depart-

ment, pursuant to a valid search warrant, entered and searched a house trailer located at 626 Deep Creek Road, lot 3A. The officers discovered within the house trailer large quantities of both marijuana and cocaine. Defendant, Flora Strickland, Larry Ray, and three other persons not pertinent to this appeal were in the house trailer at the time of the search. Papers taken from Flora Strickland's purse included a rent receipt made out to defendant and signed by the landlord of the house trailer. Subsequent to his arrest, defendant gave the officers a telephone number that, according to telephone company records, belonged to a telephone located at the house trailer and listed in defendant's name.

The jury found defendant guilty of maintaining a dwelling house for keeping and selling controlled substances and of possession with intent to sell and deliver more than one gram of cocaine, but returned a verdict of not guilty on the charge of possession with intent to sell and deliver more than one-half ounce of marijuana. The trial court consolidated the convictions for sentencing and imposed sentence of five years' imprisonment, suspended, five years' supervised conditional probation, and a fine of $1,000.00.

From the judgment entered on the jury's verdicts of guilty, defendant appeals.

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

James R. Parish for defendant-appellant.

WELLS, Judge.

Defendant brings forward five assignments of error challenging the trial court's admission of certain hearsay testimony, the trial court's refusal to give requested jury instructions, and a variance between the jury's verdict and the judgment entered thereon respecting the charge of feloniously maintaining a dwelling house for the keeping and selling of controlled substances. We find no error in the trial, but we remand the judgment for correction to make it consistent with the verdict.

[1] By his first argument, defendant challenges the trial court's admitting testimony of Agent John Ridgen of the Cumberland County Sheriff's Department that he was able to verify, by contacting Carolina Telephone and Telegraph Company, that a phone number provided to him by defendant belonged to a telephone located at

the house trailer and listed in defendant's name. Defendant contends that this testimony was impermissible hearsay, not within a hearsay exception, which prejudiced him by improperly establishing a nexus between defendant, the drugs, and the trailer used to keep and sell the drugs. We need not, however, reach this question, for we conclude that defendant has waived the benefit of his objection.

The settled law of this State, unchanged by the adoption of the North Carolina Rules of Evidence, is that "[w]here evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Brooks*, 83 N.C. App. 179, 349 S.E.2d 630 (1986) (*quoting State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984)). Under the equally well-established exception to the waiver rule, a timely objection is not waived when the objecting party later offers evidence "for the purpose of impeaching the credibility or establishing the incompetency of the testimony in question." *State v. Wills*, 293 N.C. 546, 240 S.E.2d 328 (1977) (*quoting State v. Aldridge*, 254 N.C. 297, 118 S.E.2d 766 (1961)). Nevertheless, an objection will not be preserved under this exception where the subsequent offer by the objecting party "simply produc[es] the same and additional evidence of the facts that had already been testified to over his objection." *Id.; see generally 1 Brandis on North Carolina Evidence* (3d ed.) § 30.

The record indicates that although defendant seasonably objected to Agent Ridgen's testimony and made a motion to strike, defendant later took the stand and testified on direct examination that he ordered the telephone to be placed at the trailer and listed in his name. It is true that defendant further testified that, in so doing, he acted at the behest of Flora Strickland and Larry Ray. Such testimony does not, however, bring defendant within the exception to the waiver rule. A defendant is not permitted, as a means of avoiding the application of the waiver rule, to take the stand, testify to the same facts shown by the objectionable evidence, "and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct." *State v. Wills, supra* (*quoting State v. McDaniel*, 274 N.C. 574, 164 S.E.2d 469 (1968)). Defendant himself testified to the identical facts admitted over his objection establishing the nexus between defendant, the drugs, and the trailer. No attempt was made by defendant to attack either the credibility or competency of Agent

Ridgen's testimony. The benefit of defendant's objection to that testimony is therefore waived.

[2] Defendant next brings forward three assignments of error challenging the trial court's refusal to give certain requested jury instructions. Because the resolution of the merits of these assignments of error turns on but a single issue, we consolidate them for purposes of our discussion.

Defendant requested instructions that guilt could not be inferred from his mere presence at the scene; that the number of witnesses called and amount of evidence introduced is not determinative of guilt; and that the testimony of a law enforcement officer is not necessarily deserving of more consideration or greater weight. He contends, either outright or implicitly, that the trial court did not give these instructions in substance. We disagree.

It is well established that if a request is made for a specific instruction which is correct in law and supported by the evidence, the trial judge must give the instruction. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976); *see also State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986). It is equally well established, however, that the trial court is not required to give a requested instruction in the exact language of the request, so long as the instruction is given in substance. *Id.*

With respect to defendant's request for an instruction on "mere presence," the record shows that the trial court instructed the jury that in order to convict, it had to find beyond a reasonable doubt that defendant, "acting either by himself or acting together with other persons did possess cocaine and marijuana for the purpose of delivery and sale, and did operate a dwelling house for the purpose of selling the illegal substance[.]" With respect to the remaining instructions requested by defendant, the record discloses that the trial court gave the pattern instructions pertaining to the weight of the evidence and credibility of the witnesses. The instructions given by the trial court, considered as a whole, sufficiently state the substance of defendant's requested instructions to comport with the above requirements. The trial court therefore did not err in declining to give the instructions requested by defendant.

[3] Finally, defendant argues that the judgment must be remanded for correction to make it consistent with the verdict rendered.

The record reflects that defendant was charged pursuant to G.S. § 90-108(a)(7). That statute makes it unlawful for any person "[t]o knowingly keep or maintain any . . . dwelling house . . . which is used for the keeping and selling of [controlled substances]." G.S. § 90-108(b) further provides that:

> Any person who violates this section shall be guilty of a misdemeanor. Provided, that if the criminal pleading alleges that the violation was committed intentionally, *and upon trial it is specifically found that the violation was committed intentionally*, such violations shall be a Class I felony. (Emphasis added.)

The indictment charging defendant with a violation of G.S. § 90-108(a)(7) alleged that such violation was committed intentionally. The verdict returned by the jury, however, did not specifically find that the violation was committed intentionally. By the plain language of the statute, defendant is therefore guilty of a misdemeanor pursuant to his conviction on this charge. Nevertheless, the judgment entered reflects a conviction for a felony. Where a verdict is returned convicting a defendant of a misdemeanor, but the judgment incorrectly reflects a conviction for a felony, the case must be remanded "to correct the judgment and make it consistent with the verdict." *State v. Durham*, 74 N.C. App. 121, 327 S.E.2d 312 (1985) (*citing State v. Williams*, 31 N.C. App. 111, 228 S.E.2d 668, *disc. rev. denied*, 291 N.C. 450, 230 S.E.2d 767 (1976)). This case must therefore be remanded to the Cumberland County Superior Court to correct the judgment and make it consistent with the verdict.

No error in the trial.

Remanded for correction of judgment.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. PERRY ANGELO SHERRILL

No. 8926SC1095

(Filed 17 July 1990)

1. **Criminal Law § 73 (NCI3d)— impressions of eyewitness told to investigator—investigator's testimony inadmissible hearsay**

Testimony by an investigator with the district attorney's office as to the impressions or "feeling" of an eyewitness that defendant was a victim rather than a perpetrator of the crime was inadmissible hearsay testimony.

Am Jur 2d, Evidence § 500.

2. **Criminal Law § 73 (NCI3d)— statement by investigator inadmissible hearsay—no prior consistent statement of defendant**

The trial court did not err in failing to allow an investigator with the district attorney's office to provide hearsay testimony as to an eyewitness's relation of statements made to the eyewitness by defendant, which defendant argued tended to corroborate defendant's testimony at trial, since the hearsay testimony of the investigator offered in corroboration of defendant was not a prior consistent statement of defendant, but rather was a hearsay statement of the eyewitness.

Am Jur 2d, Witnesses § 653.

3. **Appeal and Error § 447 (NCI4th)— issue raised first on appeal—issue not considered by court**

Defendant could not argue on appeal that the trial court erred in allowing into evidence an officer's testimony that defendant had been involved in an unrelated drug transaction "because admission of such evidence violated the prohibition of Rule 608 against proving specific instances of misconduct by extrinsic evidence," since defendant did not raise that issue in the trial court, and the issue which he did raise in the trial court he abandoned by not raising it on appeal.

Am Jur 2d, Appeal and Error §§ 601, 602.

APPEAL by defendant from judgment entered 11 April 1989 by *Judge W. Terry Sherrill* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 30 May 1990.

Lacy H. Thornburg, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Marc D. Towler, Assistant Public Defender, for the defendant-appellant.

GREENE, Judge.

The defendant, Perry Angelo Sherrill, was convicted at a jury trial of three counts of robbery with a dangerous weapon. Defendant appeals.

The State's evidence tends to show that on 28 July 1988 at approximately 9:30 p.m. William Lindsey, Eric Bush and James Staton went to Earle Village housing development to meet some girls by arrangement with an acquaintance, Jody Wright. Two men approached the three young visitors as they stood by their car in the Village parking lot waiting for Wright's return. The defendant approached first and asked the men if they had cigarettes or rolling papers. The second man, identity still unknown, then pulled a gun and pointed it at the visitors, demanding their valuables. The defendant then walked around them and stated: "We're going to show you what Earle Village is about." The defendant then took a substantial amount of gold jewelry from the visitors, put some in his pocket and held some in his hand. The gunman then told the three visitors to run away without looking back. They ran, but two of them looked back and saw the defendant and the gunman walking away together between some apartment buildings.

The defendant testified that he was a resident of Earle Village, and on the evening of 28 July 1988 he and Jody Wright discussed a drug deal. The defendant stated, "we was waiting on Eric Bush, his beeper code name is Sterling, and we beeped him to bring us a package [of cocaine]." The defendant waited alone in the Village parking lot for about thirty minutes. A car containing three young men and Jody Wright arrived, and Wright approached the defendant and told him to wait. Wright left the scene. A few minutes later the unknown gunman arrived and robbed the defendant of $110.00. The gunman then instructed the defendant to go toward the three visitors. The defendant tried to get their attention by asking for cigarettes, and then the gunman shoved him toward them and said "everybody give them up." On the gunman's instructions, the defendant took from the visitors jewelry, two bags of cocaine and a beeper, and gave all of it to the gunman. The defend-

ant ran away when the gunman told him and the visitors to do so. The defendant did not report the robbery.

The trial court allowed the defendant to introduce hearsay testimony through Bruce McDonald, an investigator with the district attorney's office, relating to portions of a telephone conversation he had with a Benny Whitney a week before trial. The defendant had subpoenaed Mr. Whitney, but Whitney did not appear. The trial court allowed McDonald to relate to the jury that Whitney claimed to have witnessed the incident in the Earle Village parking lot. Whitney said he saw the defendant and an unidentified man with a gun approach the three black males. Whitney saw the defendant hand the gunman some items taken from the three men, and then the defendant ran off in a different direction from that of the gunman. However, the trial court did not allow McDonald to provide hearsay testimony on Whitney's opinion, rising from an intangible "feeling," that the defendant was a victim rather than a perpetrator of the robbery.

The trial court also refused to admit McDonald's hearsay testimony of Whitney's statement that the defendant had told Whitney that he thought the gunman would shoot him.

During cross-examination of the defendant, the district attorney asked the defendant:

Q. Have you sold anything that looks like cocaine?

A. No, sir.

On rebuttal, the prosecution called Officer E. L. Kirtchen, who testified that on 14 September 1988, over a month after the offense at issue, defendant attempted to sell him a substance purported to be cocaine, which in fact was not cocaine. The defendant objected to Officer Kirtchen's testimony, arguing that the testimony was not admissible because he had been asked: "did you ever sell anything that looked like cocaine, not did you ever attempt to sell anything that looked like cocaine."

The issues presented are (I) whether the trial court erred in failing to admit hearsay testimony of a robbery witness's impression or "feeling" that the defendant was a victim rather than perpetrator of the crime; (II) whether the trial court erred in failing to admit hearsay testimony relating to an alleged prior consistent

statement of the defendant; and (III) whether the trial court erred in admitting extrinsic evidence of specific conduct of the defendant to attack his credibility.

I

[1] The defendant argues that the trial court erred in failing to allow McDonald's testimony as to Whitney's impression or feeling about the defendant's role in the robbery. The defendant asserts that Whitney's opinion, albeit based on an intangible feeling or impression, was admissible by N.C.G.S. § 8C-1, Rule 701, which allows non-expert testimony as to certain opinions or inferences. Rule 701 may allow such testimony by Whitney. *See State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987) (impressions sometimes admitted as shorthand statements of fact).

However, the trial court here was faced with the issue of whether Whitney's opinion should be allowed as hearsay testimony from McDonald. Rule 701 does not allow hearsay testimony, and the defendant does not assert any other grounds for admissibility either in his assignment of error or in his brief. Therefore, this assignment of error is overruled.

While we do not reach the issue, we note the trial court failed to make required findings to support the exclusion of this hearsay testimony. *See State v. Purdie*, 93 N.C. App. 269, 278, 377 S.E.2d 789, 794 (1989) (findings required before admitting or excluding evidence under both Rules 803 or 804).

II

[2] The defendant next argues that the trial court erred in failing to allow McDonald to provide hearsay testimony as to Whitney's relation of statements made to Whitney by the defendant which the defendant argues tended to corroborate the defendant's testimony at trial. The defendant supposedly told Whitney that he was afraid the gunman would shoot him (defendant). Later in the trial the defendant in essence testified that he participated in the robbery only because he was compelled at gunpoint. *See Gregg v. Mallett*, 111 N.C. 74, 77, 15 S.E. 936, 937 (1892) (trial court may admit corroboration in *anticipation* of contradiction of the witness). However, the hearsay testimony offered by McDonald in corroboration of the defendant was not a prior consistent statement of the defendant, but rather was a hearsay statement of Whitney. This statement is not admissible since it is an " 'extra-judicial declaration

of someone [Whitney] other than the witness [defendant] purportedly being corroborated.' " *State v. Freeman*, 93 N.C. App. 380, 387, 378 S.E.2d 545, 550, *disc. rev. denied*, 325 N.C. 229, 381 S.E.2d 787 (1989) (quoting 1 H. Brandis, *Brandis on North Carolina Evidence* § 52, at 243 (3d ed. 1988)); *see also State v. McAdoo*, 35 N.C. App. 364, 367, 241 S.E.2d 336, 338, *disc. rev. denied*, 295 N.C. 93, 244 S.E.2d 262 (1978).

Because the defendant has not assigned as error any failure to admit this testimony as an exception to the hearsay rule, we overrule this assignment of error.

III

[3] The defendant last argues that the trial court erred in allowing into evidence Officer Kirtchen's testimony that defendant had been involved in an unrelated drug transaction "because admission of such evidence violated the prohibition of Rule 608 against proving specific instances of misconduct by extrinsic evidence."

At trial, defendant argued only that Officer Kirtchen's testimony was not proper rebuttal evidence since it did not contradict the defendant's testimony on cross-examination. Since defendant does not now raise that issue on appeal, that issue is deemed abandoned. N.C.R. App. P. 28(b)(5) (exceptions deemed abandoned when "no reasonable argument is stated or authority cited"). Neither do we address the merits of defendant's Rule 608 argument since he did not raise this issue at trial. Rule 103(a)(1) of the Rules of Evidence requires that to preserve an error for appeal, the alleged error must be "clearly presented" to the trial court. N.C.G.S. § 8C-1, Rule 103(a)(1) (1986). The purpose of the rule is to "alert [the trial court] to the proper course of action and enable opposing counsel to take proper corrective measures." Rule 103, Commentary; *see State v. West*, 317 N.C. 219, 228, n.2, 345 S.E.2d 186, 192 (1986). Accordingly, defendant's specific objection at trial was ineffective to support an argument on appeal that the evidence was inadmissible under Rule 608. In any event, assuming admission of the evidence was error, given the strength of the State's evidence, we do not believe the error was prejudicial.

No error.

Judges ORR and LEWIS concur.

LINDA MESSICK BURGESS v. JAMES ALLEN VESTAL AND FOOD LION, INC.

No. 8918SC1214

(Filed 17 July 1990)

1. **Appeal and Error § 140 (NCI4th)— new trial on issue of damages—order immediately appealable**

The trial court's grant of a new trial on the issue of damages only was immediately appealable where damages was the only contested issue at trial, and the trial judge's order therefore granted a complete, or total, new trial, not a partial new trial.

Am Jur 2d, Appeal and Error § 123.

2. **Rules of Civil Procedure § 59 (NCI3d)— new trial granted in discretion of trial court**

There was no merit to plaintiff's contention that, despite the trial court's specific words granting defendants' motion for new trial "in its discretion," the court's decision was based on matters of law, since the trial court's order clearly specified three of the discretionary grounds for setting aside the verdict formalized in N.C.G.S. § 1A-1, Rule 59, none of which were matters of law.

Am Jur 2d, New Trial §§ 84, 394.

3. **Rules of Civil Procedure § 59 (NCI3d)— damages verdict set aside—no abuse of discretion**

Plaintiff failed to show an abuse of discretion by the trial court in setting aside the jury's verdict as to damages where none of the court's reasons for setting aside the verdict showed unfairness or partiality, and none worked an injustice on plaintiff.

Am Jur 2d, New Trial §§ 84, 394.

APPEAL by plaintiff from order filed 16 June 1989 by *Judge Joseph R. John* in GUILFORD County Superior Court. Heard in the Court of Appeals 9 May 1990.

Arthur J. Donaldson for plaintiff-appellant.

Henson Henson Bayliss & Sue, by Perry C. Henson, Jr. and Lawrence J. D'Amelio, III, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals the trial judge's order setting aside the damage portion of a jury verdict.

Plaintiff was driving her automobile when it collided with a tractor-trailer truck driven by defendant Vestal and owned by corporate defendant Food Lion. Plaintiff instituted suit, alleging negligent operation of the truck, and requesting damages in excess of $10,000.00. Defendants admitted negligent operation of the truck, in violation of N.C.G.S. § 20-141(m), for failure to reduce the truck's speed to the extent necessary to avoid a collision. The parties consented to jury trial on the issue of damages only. Plaintiff herself testified, and presented witnesses who testified to plaintiff's injuries.

After evidence was adduced, the following issue was submitted and answered by the jury:

> What amount, if any, is the plaintiff Linda Messick Burgess entitled to recover from the defendants Food Lion, Inc., and James Allen Vestal as damages for personal injuries proximately caused by the motor vehicle collision occuring [sic] on April 1, 1985?
>
> ANSWER: $300,000.00

Defendants moved the court to set aside the jury verdict, for new trial on the issue of damages pursuant to N.C.G.S. § 1A-1, Rule 59(a)(5), (6) and (7), and submitted an offer of judgment of $100,000.00, as provided by N.C.G.S. § 1A-1, Rule 68(a). Plaintiff objected to the offer of judgment and defendants withdrew it. After hearing arguments concerning the motions, the trial court entered its order, containing the following:

> AND IT APPEARING TO THE COURT IN ITS DISCRETION as follows:
>
> (i) That the damages awarded by the jury in the verdict in the amount of $300,000.00 were excessive and appeared to have been awarded under influence of passion or prejudice, and that the motion of the defendants filed pursuant to Rule 59(a)(6) of the North Carolina Rules of Civil Procedure for a new trial on that ground should be allowed, in the *discretion* of the Court;

(ii) That the evidence offered at the trial was insufficient to justify the verdict of the jury awarding damages in the amount of $300,000.00 and that the verdict of the jury in that amount is contrary to law, and that the motion of the defendants filed pursuant to Rule 59(a)(7) of the North Carolina Rules of Civil Procedure for a new trial on that ground should be allowed, in the *discretion* of the Court; and

(iii) That the amount of the verdict showed that there was a manifest disregard by the jury of the instructions of the Court in regard to the issue of damages and that the motion of the defendants filed pursuant to Rule 59(a)(5) of the North Carolina Rules of Civil Procedure for a new trial on that ground should be allowed, in the *discretion* of the Court;

AND IT FURTHER APPEARING TO THE COURT that each of the foregoing reasons, standing alone as well as collectively, each provide sufficient basis for granting the motion of the defendants to set aside the verdict of the jury and to grant a new trial; AND IT FURTHER APPEARING TO THE COURT that the motion of the defendants for new trial on all other grounds should be denied, in the *discretion* of the Court.

NOW, THEREFORE, IN THE DISCRETION OF THE COURT, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the motion of the defendants for a new trial filed pursuant to Rule 59(a)(5), Rule 59(a)(6), and Rule 59(a)(7) of the North Carolina Rules of Civil Procedure shall be and the same is hereby granted.

2. That the motion of the defendants for a new trial on all other grounds is denied.

3. That the verdict of the jury on the single issue of damages in this case and as answered by the jury is hereby set aside and a new trial is granted to the defendants on the issue of damages.

Emphases added.

The issues are: (I) whether grant of new trial on the issue of damages is immediately appealable and (II) whether the trial court's order (A) was discretionary and (B) an abuse of discretion.

I

[1] Although neither party raises the issue, we first determine whether grant of a new trial on damages only is immediately appealable.

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court . . . which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C.G.S. § 1-277(a) (Cum. Supp. 1989).

"[A]n order granting a new trial solely as to the issue of damages . . . is interlocutory and there is no immediate right of appeal . . . [because] an order granting only a *partial* new trial is not subject to immediate appellate review." *Johnson v. Garwood*, 49 N.C. App. 462, 463, 271 S.E.2d 544, 544-45 (1980) (citations omitted) (emphasis added).

We determine that because damages was the only contested issue at trial, the judge's order granted complete, or total, new trial and not 'partial new trial,' which was the determinative factor in this Court's denial of immediate review in the *Johnson* decision. Therefore, plaintiff may obtain immediate appellate review of the trial court's order, pursuant to N.C.G.S. § 1-277(a).

II

Plaintiff argues that (A) the court's discretionary grant of new trial was actually based on matters of law and that (B) the court either erred as a matter of law or alternately abused its discretion in granting new trial on damages. We disagree.

A

[2] Plaintiff argues that despite the court's specific words granting defendants' motion "in its discretion," we must construe the court's decision to be based on matters of law. We disagree.

"[T]he trial judge's traditionally discretionary authority to set aside a verdict . . . was merely formalized in [N.C.] G.S. [§] 1A-1, Rule 59, which lists eight specific grounds and one 'catch-all' ground on which the judgment may grant a new trial." *Britt v. Allen*,

291 N.C. 630, 635, 231 S.E.2d 607, 611-12, *appeal after remand on other grounds*, 37 N.C. App. 732, 247 S.E.2d 17 (1978).

> The trial judge is "vested with the discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony." Since such a motion requires his appraisal of the testimony, it necessarily invokes the exercise of his discretion. *It raises no question of law*, and his ruling thereon is irreviewable in the absence of manifest abuse of discretion.

Id., at 634-35, 231 S.E.2d at 611 (emphasis added) (citations omitted).

"Although a motion for a new trial is normally addressed to the sound discretion of the trial judge, whe[n] the trial judge acts based on an error in law, his decision is reviewable." *Chandler v. U-Line Corp.*, 91 N.C. App. 315, 321, 371 S.E.2d 717, 721, *temp. stay allowed*, 323 N.C. 475, 373 S.E.2d 877, *review denied, stay dissolved*, 323 N.C. 623, 374 S.E.2d 583 (1988) (citations omitted) ("[w]hether evidence of the jury foreman's error in writing down the verdict was excluded by Rule 606(b) is a question of law"); *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988) (whether a will was properly interpreted is a matter of law).

If the trial judge sets aside a verdict, specifying that he is exercising his "inherent" discretion because the verdict was 'contrary to the evidence' and also because of unspecified errors of law, the "unspecified errors of law [detract] not one whit from the effect of his discretionary order setting aside the verdict. . . . [The unspecified errors are] mere surplusage and did not make [the] order appealable." *Britt*, at 635, 231 S.E.2d at 612 (citations omitted). "A contention based on a question of law is not presented by an exception to the court's discretionary order setting aside a verdict." *Id.*, at 636, 231 S.E.2d at 612 (citation omitted).

We determine that plaintiff neither shows, nor do we perceive, that the trial court set aside the damages verdict based on matters of law. The trial court's order clearly specifies three of the discretionary grounds for setting aside the verdict formalized in Rule 59, none of which are matters of law. Therefore, we review the order only to determine whether it complies with the appropriate standard of review set out below.

B

[3] Plaintiff argues that the trial court abused its discretion to such an extent that it amounted to a substantial miscarriage of justice. We disagree.

" '[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.' " *Id.*, citing *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982). "[T]he party alleging the existence of an abuse bear[s] that heavy burden of proof." *Worthington*, at 484-85, 290 S.E.2d at 604. In making our evaluation, we review the record from a subjective perspective to determine whether the judge "clearly abused *his* discretion . . ." *Id.*, at 486, 290 S.E.2d at 604 (emphasis in original). During review, we accord "great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for new trial." *Id.*, at 487, 290 S.E.2d at 605.

We note that plaintiff failed to cite any instance of discretionary abuse and thus failed to carry her heavy burden of proof of showing abuse. We also determine from the record that the judge's ruling did not amount to a 'substantial miscarriage of justice.' None of the court's reasons for setting aside the verdict show unfairness, partiality, nor worked an injustice on plaintiff.

Plaintiff also argues that our courts' failure to adduce an "appreciable standard upon which to judge the discretionary actions of the trial court in setting aside a verdict" deprives her of North Carolina constitutional rights. However, because plaintiff failed to raise this issue at trial, we do not address this argument. *See Sutton v. Major Prod. Co.*, 91 N.C. App. 610, 615, 372 S.E.2d 897, 900 (1988).

Affirmed; remanded for new trial on damages.

Judges ORR and LEWIS concur.

MARY SWILLING, PLAINTIFF v. WILLARD SWILLING, DEFENDANT

No. 8928DC1105

(Filed 17 July 1990)

1. **Divorce and Alimony § 30 (NCI3d)— equitable distribution award—reduction by amount of alimony paid—error**

The trial court erred in reducing plaintiff's equitable distribution award by $6,000 in alimony previously paid by defendant in violation of N.C.G.S. § 50-20(f).

Am Jur 2d, Divorce and Separation §§ 870, 872, 925.

2. **Divorce and Alimony § 30 (NCI3d)— equal division of property not equitable—failure to make findings**

The trial court erred in concluding that an equal division of marital property would not be equitable where the court did not make any findings of fact enumerated under N.C.G.S. § 50-20(c).

Am Jur 2d, Divorce and Separation §§ 870, 872, 925.

3. **Evidence § 47 (NCI3d)— court's appointment of expert witness—error**

The trial court erred in appointing and determining that a witness was an expert, since the trial judge did not enter an order to show cause why the expert witness should not be appointed. N.C.G.S. § 8C-1, Rule 706(a).

Am Jur 2d, Expert and Opinion Evidence §§ 55, 60-62.

4. **Witnesses § 10 (NCI3d)— expert witness improperly appointed—fee assessed against both parties**

Though the trial court erred in appointing an expert witness, it would be inequitable to deny the witness his fee, and assessing each party, neither of whom was at fault, a pro rata portion of the witness's fee was equitable.

Am Jur 2d, Expert and Opinion Evidence §§ 19, 23.

APPEAL by defendant from judgment entered 2 June 1989 in BUNCOMBE County District Court by *Judge Peter L. Roda.* Heard in the Court of Appeals 11 April 1990.

Bruce B. Briggs for plaintiff-appellant.

Riddle, Kelly & Cagle, P.A., by Robert E. Riddle, E. Glenn Kelly and Rebekah W. Davis, for defendant-appellant.

Riddle, Kelly & Cagle, P.A., by Robert E. Riddle, E. Glenn Kelly and Rebekah W. Davis, for defendant-appellee.

DUNCAN, Judge.

In this appeal, plaintiff, Mary Swilling ("Mrs. Swilling"), seeks to overturn the order of equitable distribution. Willard Swilling ("Mr. Swilling") also seeks to overturn the trial judge's order. For the reasons which follow, we reverse the decision of the trial judge.

I

Mr. and Mrs. Swilling were married in 1954. During the course of their marriage, they accrued several items of personalty and realty. They were subsequently divorced in 1988 and a hearing was held in 1989 to determine the distribution of the marital property. Among other things, the trial judge concluded that an equal distribution of the property would not be equitable. From that order the parties appeal. Other facts will be supplied in this opinion as necessary. We turn now to the issues in this case.

II

We note first that the plaintiff's brief is written in violation of N.C. R. App. P. 28(b) (1990), which requires that briefs submitted to this court be in the form required by Rule 26(g). N.C. R. App. P. 26(g) (1990) requires all printed matter submitted to this court to be presented with double spacing between each line of text.

The parties agree on three issues: 1) that the trial judge improperly considered $6,000 in alimony paid by the defendant in reducing plaintiff's award, 2) that the trial judge made mathematical errors in computing the parties' distribution of property, and 3) that the trial judge erred in entering judgment when the findings of fact and conclusions of law do not support it. We agree with the parties and reverse the order of the trial judge.

[1] With respect to the alimony paid by the defendant, N.C. Gen. Stat. § 50-20(f) (1987) states, "The court shall provide for an equitable distribution without regard to alimony for either party . . . ." Furthermore, this court has stated, ". . . equitable distribution

in this state is accomplished without regard to alimony previously awarded." *In re Foreclosure of Cooper*, 81 N.C. App. 27, 37, 344 S.E.2d 27, 34 (1986). In this case, the trial judge found that Mr. Swilling had paid $6,000 in alimony to Mrs. Swilling and reduced the amount of collected rental and pension monies to be paid to Mrs. Swilling by including the alimony in the items for which Mr. Swilling was credited. That was improper and we thus overturn that portion of the judge's equitable distribution order.

With respect to the mathematical errors, we point out that the need for accuracy in computing the amounts due to each of the parties is of particular importance where the marital estate is as large and complex as that of the parties in this case. First, the judge improperly deducted the alimony paid to Mrs. Swilling as a credit to Mr. Swilling. Then, it appears that the judge deducted the same item twice from the amount that would have gone to Mrs. Swilling. This was improper and is, therefore, reversed.

With respect to the findings of fact and conclusions of law, we find that the conclusions of law are not supported by the findings of fact.

[2] N.C. Gen. Stat. § 50-20(c)(1-12) and (j) provide for an equal division of the marital property unless the court determines that an equal division would not be equitable. The statute sets out twelve factors which the court may consider and requires the court to make and set forth in the order findings of fact which support the determination that the marital property has been divided equitably. Our Supreme Court stated that:

> the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* unless the Court determines that an equal division is not equitable[;] . . . if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally. (emphases original)

White v. White, 312 N.C. 770, 776, 324 S.E.2d 829, 832-33 (1983). In this case, the trial judge concluded that an equal division of the marital property would not be equitable but did not make any findings of fact enumerated under G.S. § 50-20(c). Mr. Swilling contends that there were favorable tax consequences which were included with awarding the marital home to Mrs. Swilling and

that he should have been given credit for those consequences. While it is not the province of this court to determine which party should be given certain property, G.S. § 50-20(c)(11) does provide for consideration of favorable tax consequences in making an equitable distribution. Thus, the conclusion of law that an equal distribution would be inequitable was without support and is reversed.

III

[3] The only other issue which merits consideration is that of the court-appointed witness. The defendant assigns error to the trial judge appointing and determining that the witness, Byerly, was an expert. He also contends that the trial judge erred in assessing the witness' $5,750.00 fee against the parties. For the following reasons we find the trial court erred.

N.C. R. Evid. 706(a) (1988) provides:

> The court may on its own motion or on motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint any expert witnesses of its own selection.

Our Supreme Court has held that a court may of its own motion appoint an expert witness. *State v. Horne*, 171 N.C. 787, 788, 88 S.E.2d 433, 433 (1916). Rule 706 provides the procedure for appointing such a witness. In the case at bar, the trial judge did not enter an order to show cause why the expert witness should not be appointed. Thus, the testimony of the witness must be excluded.

[4] The defendant also assigns error to the assessing of one-half of the witness' fee against him. While there is no precise statutory or common law remedy in such an instance, we note that the witness is a third party in this matter and should not be held responsible for the errors of the trial judge. An expert witness cannot be expected to forecast when he will not be qualified to render an opinion in a case. Thus, it would be inequitable to deny the witness his fee. Since neither party is at fault in this instance we find that assessing each party a pro rata portion of the witness' fee is equitable.

The plaintiff's and defendant's additional assignments of error are subsumed under the issues discussed here. They should be

addressed on remand and thus we find that they do not merit discussion here.

IV

For the foregoing reasons, the order of equitable distribution is

Reversed.

Judges ARNOLD and LEWIS concur.

ELTON BRITT, PLAINTIFF v. LARRY SHARPE, INDIVIDUALLY, AND AS AGENT FOR CAROLINA POWER & LIGHT COMPANY, DEFENDANTS

No. 8916SC1320

(Filed 17 July 1990)

1. **Electricity § 7.1 (NCI3d)— negligence in connecting electric cables to unsecured roof trusses—sufficiency of evidence**

Evidence offered at trial was sufficient to permit the jury to find that defendant acted negligently in attaching electrical service cables and a come-along, a device used to connect and tighten the service cables, to the first truss on one end of a building on which plaintiff was installing a new sloped roof, thereby precipitating the collapse of the truss system and causing injury to plaintiff.

Am Jur 2d, Electricity, Gas, and Steam §§ 51, 93.

2. **Electricity § 8 (NCI3d)— negligent installation of electric cables—no contributory negligence of plaintiff**

In an action to recover for injuries sustained by plaintiff when trusses of a new roof collapsed, the trial court did not err in refusing to instruct the jury on defendants' contention that plaintiff was contributorily negligent in failing to warn defendant of the dangerous condition of the trusses, since plaintiff was under no duty to anticipate that defendant or anyone else would attach a heavy cable to the truss system which would exert such pressure as to cause the system to collapse.

Am Jur 2d, Electricity, Gas, and Steam §§ 51, 93.

APPEAL by defendants from *Ellis (B. Craig), Judge*. Judgment entered 31 August 1989 in Superior Court, ROBESON County. Heard in the Court of Appeals 6 June 1990.

This is a civil action wherein plaintiff seeks to recover damages for personal injury allegedly resulting from the negligence of defendant Larry Sharpe, employed by defendant Carolina Power and Light Company, in a construction accident on 7 August 1985.

The evidence at trial tends to show the following: Plaintiff was employed as a superintendent of Cape Fear Construction Company, hired to construct a new sloped roof on top of an existing flat roof. On the date and time of the accident, twenty-four prefabricated trusses had been erected on the roof. The first truss at the north end of the building was stabilized with an exterior brace anchoring it to the ground. There were eight interior braces securing the trusses to the flat roof. Additionally, each truss was connected to the truss in front and in back of it. The twenty-third truss could not be placed properly because of an air conditioning duct, and therefore its peak was propped against the top of the twenty-second truss and fastened with one nail.

Approximately fifteen to twenty minutes after the twenty-third truss was placed, the entire truss system collapsed northward. Plaintiff was walking on the roof through the center of the truss system at the time. Several trusses landed on him causing the injuries complained of.

On the date of the accident, defendant Sharpe was employed by defendant Carolina Power and Light Company to reconnect electrical service to the building. This entailed extending electrical cable from a utility pole approximately forty feet away to a pole on the roof of the building. Having climbed a ladder to the roof, defendant Sharpe hooked the service cable and a "come-along" (a device used to connect and tighten the service cable) to the first truss on the north end of the building. The pressure exerted on the first truss by the cable and "come-along" was estimated to be about seventy pounds with the sag of the cable one foot off the ground (about one hundred pounds at seven feet) and increased as cable and "come-along" were raised. Within one to two minutes of the attachment of the cable and "come-along" to the truss by defendant, the truss system collapsed.

From the judgment entered on the verdict, defendants appealed.

Musselwhite, Musselwhite & McIntyre, by W. Edward Musselwhite, for plaintiff, appellee.

Robert W. Kaylor and Robert S. Gillam for defendant, appellant Carolina Power and Light Company.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for defendant, appellant Larry Sharpe.

HEDRICK, Chief Judge.

[1] Defendants assign as error the denial of their motions for directed verdict and judgment notwithstanding the verdict. Defendants argue that the evidence simply was not sufficient to permit the jury to find that defendants were negligent in any way and that such negligence was a proximate cause of the collapse of the truss system and the resulting injuries to plaintiff.

Defendants maintain that the evidence, even when viewed in the light most favorable to plaintiff, fails to show that defendant Sharpe committed any negligent act. Assuming that defendant Sharpe did attach the cables to the first truss, defendants deny that the pressure exerted on the truss system by the cables was sufficient to cause its collapse and point out other possible causes, including the number of people working on the roof at the time of the accident. Defendants also contend that even if the collapse was caused by the attachment of cables to the truss, this act was not necessarily negligent on the part of defendant Sharpe. They maintain that since defendant Sharpe was not a carpenter, he had no way of knowing and was not warned that the unfinished structure was insecure and in danger of collapse with the application of pressure. Defendants argue that because defendant Sharpe, as a layman, could not tell that the truss system was unstable, his action cannot be considered negligent.

The evidence offered at trial is sufficient to permit the jury to find that defendant Sharpe acted negligently in attaching the service cables and "come-along" to the first truss on the north end of the building, thereby precipitating the collapse of the truss system and causing injury to plaintiff. The testimony of expert witnesses on issues such as the sufficiency of the bracing of the trusses, the amount of pressure actually exerted on the truss system by the service cables and "come-along," and the dynamics of the falling trusses is evidence to be considered by the jury in determin-

ing proximate cause. Additionally, defendant Sharpe's conflicting depositional and trial testimony as to whether he attached the cables to the truss itself or some other part of the roof is to be considered by the jury in determining negligence and causation. The question of whether Sharpe acted prematurely, and therefore negligently, in starting to reconnect electrical service to the unfinished roof is a question for the jury. Likewise, whether he knew or should have known that his acts might cause the trusses to fall was a question to be determined by the jury from the evidence presented. In short, we hold the evidence was sufficient to require submission of the issues to the jury and to support its verdict and the judge's order denying defendants' motion for judgment notwithstanding the verdict.

[2] Defendants' second assignment of error is that the court erred in refusing to instruct the jury on defendants' fifth contention "that plaintiff was contributorily negligent in failing to warn defendant Sharpe of the dangerous condition of the trusses." Defendants maintain that since plaintiff was supervising the carpentry work, he was bound by "ordinary care" to warn anyone approaching the roof of the potentially dangerous condition of the trusses. As supervisor, plaintiff was aware that the trusses were unstable and that other people would be on the roof; and therefore, defendants argue the fact that plaintiff did not see Sharpe climb onto the roof with the cables does not relieve him of fault in not warning Sharpe of the danger of collapse. Defendants contend that the trial court's refusal to instruct on this fifth contention does not amount to harmless error even though the court did instruct the jury on defendants' four other contentions of contributory negligence.

It is well established that a person has no duty to anticipate negligent acts or omissions of others. *Weavil v. Myers*, 243 N.C. 386, 90 S.E.2d 733 (1956). *See also Troxler v. Central Motor Lines*, 240 N.C. 420, 82 S.E.2d 342 (1954). Under the circumstances here presented, plaintiff was under no duty to anticipate that Sharpe or anyone else would attach a heavy cable to the truss system which would exert such pressure as to cause the system to collapse, and the trial judge did not err in instructing the jury as to defendants' fifth contention. The error assigned is without merit.

No error.

Judges ARNOLD and GREENE concur.

SYLVESTER BALDWIN v. LITITZ MUTUAL INSURANCE COMPANY AND LLOYD BATTEN T/A LLOYD BATTEN INSURANCE COMPANY

No. 8913SC874

(Filed 17 July 1990)

Insurance § 2.2 (NCI3d)— builder's risk policy—no coverage on house after completion—no failure of agent to procure insurance

In an action to recover for negligent failure to procure or maintain insurance on a house constructed by plaintiff, the evidence was insufficient as a matter of law to support a verdict in plaintiff's favor where plaintiff's evidence tended to show that he requested a builder's risk policy from defendant; such a policy was provided and by its express terms covered loss during the time that the dwelling was under construction; plaintiff misunderstood the policy and thought that he was covered until the house was sold; defendant contacted plaintiff to find out whether construction was completed but did not specifically remind plaintiff that coverage would lapse as of the date of completion of construction; the damage occurred after that date; and defendant thus assumed the duty of procuring builder's risk insurance which would cover the house during the construction period and he fulfilled that duty.

Am Jur 2d, Insurance §§ 139, 140, 244.

APPEAL by defendant Lloyd Batten from Judgment of *Judge Coy E. Brewer, Jr.*, entered 15 March 1989 in COLUMBUS County Superior Court. Heard in the Court of Appeals 2 April 1990.

Williamson & Walton, by C. Greg Williamson, for plaintiff appellee.

Anderson, Cox, Collier & Ennis, by Clay A. Collier, for defendant appellant, Lloyd Batten, t/a Lloyd Batten Insurance Company.

COZORT, Judge.

Insurance agent appeals from a jury verdict finding that he negligently failed to procure or maintain insurance on a house constructed by plaintiff and assessing damages in the amount of $18,781.77. We reverse.

Plaintiff and his brother, Tillman Baldwin, had been in the business of constructing residential houses for approximately fifteen years. During that time, they had built five or six hundred homes, most of which were constructed pursuant to a contract with a buyer, but a few were "speculation" homes, or homes constructed, at least initially, without a specific buyer. Plaintiff had obtained "builder's risk" insurance through defendant Lloyd Batten's company, Lloyd Batten Insurance Company, "more than a hundred [times] almost." Policies were purchased with a stated term of one year, although plaintiff usually completed construction in three or four months. After construction of a house, the builder's risk insurance would be cancelled, the homeowner would procure insurance, and defendant would send plaintiff a refund of any "unearned premium."

In March of 1985, defendant issued a builder's risk policy, through Lititz Mutual Insurance Company (Lititz), covering a speculation house that plaintiff was building on Jewel Street in Whiteville. The stated term of the policy was from 27 March 1985 to 27 March 1986. Under the terms of the policy, insurance was provided only to the dwelling "while under construction" and required plaintiff to "advise us when construction is completed." Tillman Baldwin testified that he was the one who applied for insurance coverage from defendant and that he specifically requested a builder's risk policy but did not read the policy prior to incurring damages. The house was completed sometime in June or July of 1985.

In early August of 1985, Lititz contacted the Lloyd Batten Agency and requested information regarding the status of the construction. On 13 August 1985, Teresa Stephens, an employee at the Batten Agency, telephoned Tillman Baldwin, who informed her that construction had been completed. Stephens testified that she advised Mr. Baldwin that there would be no insurance coverage on the house if it were completed and unoccupied and that plaintiff should get in touch with Mr. Batten about obtaining other coverage. Tillman Baldwin testified that he was asked whether construction was completed but was not told that coverage had ended and that other arrangements would have to be made. On 16 August, Mr. Baldwin informed defendant that there had been a fire and that the house had been damaged. According to Stephens' testimony, she said, "Well, you know you don't have insurance on that house," and Baldwin stated in response that "he knew he was probably up the creek without a paddle."

Lititz denied coverage under the policy because the loss was incurred after construction was completed and thus the policy was "null and void." Plaintiff filed the instant civil action against Lititz and Lloyd Batten. Lititz was dismissed from the suit on its motion for summary judgment. That ruling by the trial court is not before this Court. At trial, defendant's motions for directed verdict at the close of plaintiff's evidence and after presentation of all the evidence were denied. The jury returned a verdict finding that plaintiff suffered a loss of $18,781.77 as a result of defendant's negligent failure to procure or maintain insurance for plaintiff. Defendant's motion for judgment notwithstanding the verdict was thereafter denied. Defendant appealed.

The relationship between insurance agent and an insured is fiduciary as well as contractual. *R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 303 S.E.2d 573 (1983). As a general rule, when an insurance agent undertakes to procure insurance for a customer to afford protection against a designated risk, the law imposes upon the agent the duty to exercise reasonable care in performing that undertaking, and the agent will be liable for loss attributable to the negligent performance or default of that duty. *Wiles v. Mullinax*, 267 N.C. 392, 395, 148 S.E.2d 229, 231-32 (1966). If the agent is unable to procure the insurance he has undertaken to provide, then he has the further duty to give timely notice to his customer so that the customer may secure the insurance elsewhere or take other steps to protect his interests. *Id.*, 148 S.E.2d at 232. The agent's duty may extend to an obligation to renew an existing policy. *Barnett v. Security Ins. Co. of Hartford*, 84 N.C. App. 376, 352 S.E.2d 855 (1987). This State has also recognized a cause of action against an insurance agent for "negligent advice." *R-Anell Homes*. But it is equally well established that an insurance agent is not obligated to assume the duty of procuring a policy of insurance for a customer. *Alford v. Tudor Hall & Assoc.*, 75 N.C. App. 279, 281-82, 330 S.E.2d 830, 832, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 855 (1985). In determining whether an agent has undertaken to procure insurance for a customer, the court must consider the conduct of the parties and the communications between them tending to show that the agent accepted an obligation to provide insurance. *Id.* at 282, 330 S.E.2d at 832.

Viewing the evidence in the light most favorable to plaintiff, as we must in considering defendant's motion for judgment notwithstanding the verdict, we hold that the evidence was insufficient

as a matter of law to support a verdict in plaintiff's favor. Plaintiff's evidence shows that plaintiff requested a builder's risk policy from defendant, that such a policy was provided and by its express terms covered loss during the time that the dwelling was under construction, that plaintiff misunderstood the policy and thought that he was covered until the house was sold, that defendant contacted plaintiff to find out whether construction was completed but did not specifically remind plaintiff that coverage would lapse as of date of completion of construction, and that the damage occurred after that date. Thus, defendant assumed the duty of procuring builder's risk insurance which would cover the house during the construction period, and he fulfilled that duty.

While there is an issue of fact with respect to whether defendant informed plaintiff of the need to take additional steps to protect his property and whether plaintiff understood that coverage had terminated, resolving those factual disputes in favor of plaintiff is of no avail to his case. There is no evidence that plaintiff expected, or could have reasonably expected, defendant to procure coverage on the property past completion of construction. Nor was there evidence that defendant misled plaintiff, incorrectly explained the policy, or knew that plaintiff misunderstood the coverage requested and provided. Defendant had always provided only builder's risk insurance to plaintiff and had never "converted" any previous builder's risk policy into some other type of policy. He cannot be charged with that responsibility now. Defendant's motion for judgment notwithstanding the verdict should have been allowed.

Reversed.

Chief Judge HEDRICK and Judge PARKER concur.

ELEANOR KAY LABARRE, PLAINTIFF v. DUKE UNIVERSITY AND PRIVATE DIAGNOSTIC CLINIC, DEFENDANTS

No. 8914SC1044

(Filed 17 July 1990)

1. **Contracts § 4.2 (NCI3d); Physicians, Surgeons, and Allied Professions § 12 (NCI3d)— anesthesiologist's promise to administer anesthetic—no consideration—no breach of contract**

In an action to recover damages for injuries sustained by plaintiff while under defendants' care during delivery of her child, the trial court properly granted summary judgment for defendant on plaintiff's breach of contract claim where plaintiff claimed to have requested and received an anesthesiologist's assurance that, if an epidural became necessary during delivery, only he or another fully trained faculty anesthesiologist would administer it, but this promise was not supported by consideration and was consequently unenforceable.

Am Jur 2d, Contracts § 397; Physicians, Surgeons, and Other Healers §§ 202, 311.

2. **Physicians, Surgeons, and Allied Professions § 12 (NCI3d)— malpractice of anesthesiologist—failure to keep promise personally to administer anesthetic—summary judgment for defendant proper**

The trial court properly allowed defendants' motions for summary judgment as to the issue of medical negligence where plaintiff did not allege that the resident physician who placed the catheter was negligent, but instead argued that the anesthesiologist's alleged failure to keep a promise as to who would administer the anesthetic was a breach of his duty of care owed to plaintiff, since North Carolina does not provide a remedy in tort where a promisor negligently fails to keep a contractual promise.

Am Jur 2d, Contracts § 397; Physicians, Surgeons, and Other Healers §§ 202, 311.

APPEAL by plaintiff from *Currin (Samuel T.), Judge*. Judgment entered 25 July 1989 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 April 1990.

In this civil action, plaintiff seeks to recover damages for injuries she sustained while under defendants' care during the delivery of her third child. Plaintiff alleges in her complaint that she and her husband had a meeting with Dr. Lloyd F. Redick, Director of Obstetrical Anesthesia at Duke Hospital and member of defendant Private Diagnostic Clinic, approximately two months before her baby was due. In that meeting, according to plaintiff, she and her husband asked for and received Dr. Redick's assurance that if she needed an epidural anesthetic at the time of delivery, only Dr. Redick himself or another fully trained anesthesiologist would place the catheter.

According to the record on appeal, the following facts are undisputed:

1. On 10 April 1984, plaintiff was admitted to defendant hospital as a private patient of physicians who are members of defendant Private Diagnostic Clinic.

2. Prior to delivery of her baby, plaintiff was given an epidural anesthetic block, placed by catheter, to the epidural space of the spinal cord.

3. Placement of the catheter was performed by Dr. John V. Parham, a resident physician at defendant hospital.

4. Dr. Parham's first attempt to make the epidural insertion resulted in a "wet tap", a term used when the epidural needle is inserted beyond the epidural space and punctures the dura (one of the layers covering the spinal cord) resulting in the escape of cerebrospinal fluid. On his second attempt, Dr. Parham inserted the needle into a blood vessel. On his third attempt, Dr. Parham successfully inserted the needle and achieved an epidural block.

5. After delivery of her baby, plaintiff began experiencing headaches, neck pain, stiffness and other problems which were attributed to misplacement of the catheter and leakage of cerebrospinal fluid during her labor.

In a complaint filed 10 April 1987, plaintiff alleges that "[a]s a direct and proximate result of the negligence of the defendants, plaintiff Eleanor Kay LaBarre suffered injury including neurologic sequelae, neurologic deficits, muscular weakness and injury, pain and mental anguish." She further claims that these problems have

diminished her capacity to earn wages and income. In addition, plaintiff seeks reimbursement for all medical and rehabilitative expenses incurred as a consequence of her injuries.

From a judgment entered 25 July 1989, allowing defendants' motions for summary judgment, plaintiff appealed.

Grover C. McCain, Jr., and Ada F. Most for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Charles F. Vance, Jr., Guy F. Driver, Jr., and David A. Shirlen, for defendant, appellee Duke University.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson, and William H. Moss, for defendant, appellee Private Diagnostic Clinic.

HEDRICK, Chief Judge.

In her only assignment of error, plaintiff contends the trial court erred by allowing defendants' summary judgment motions with respect to her claims for breach of contract and for negligence. She argues that genuine issues of material fact exist, and defendants were therefore not entitled to judgment as a matter of law. We disagree.

A. BREACH OF CONTRACT

[1] Summary judgment is a drastic remedy which should be used with caution. *Bradshaw v. McElroy*, 62 N.C. App. 515, 302 S.E.2d 908 (1983). Nevertheless, summary judgment is appropriate if the moving party meets the burden of proving that an essential element of the nonmoving party's claim is nonexistent. *Anderson v. Canipe*, 69 N.C. App. 534, 317 S.E.2d 44 (1984). It is well established that in an action for breach of contract, defendant's promise must be supported by consideration for it to be enforceable. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972). This rule also applies where plaintiff attempts to modify an existing contractual agreement. Any new promise by defendant must also be supported by additional consideration. *Lee v. Paragon Group Contractors*, 78 N.C. App. 334, 337 S.E.2d 132 (1985), *disc. rev. denied*, 316 N.C. 195, 345 S.E.2d 383 (1986).

In the present case, plaintiff claims to have requested and received Dr. Redick's assurance that if an epidural anesthetic became necessary during her delivery, only he or another fully-trained

faculty anesthesiologist would administer it. This promise, however, was not supported by consideration. It was merely gratuitous and, consequently, unenforceable. We therefore conclude that the trial judge properly allowed summary judgment on the issue of breach of contract.

B. NEGLIGENCE

[2] Plaintiff also claims the trial court erred by allowing defendants' motions for summary judgment as to the issue of medical negligence. Although plaintiff does not contend the resident physician who placed the catheter was negligent, she does argue that Dr. Redick's alleged failure to keep a promise as to who would administer the anesthetic was a breach of his duty of care owed to plaintiff. Such breach, according to plaintiff, was the proximate cause of her injuries.

This court has previously stated that "an action in tort must [ordinarily] be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties." *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 342, 303 S.E.2d 365, 373 (1983). Moreover, "[a] tort action does not lie against a promisor 'for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill.' " *Holland v. Edgerton*, 85 N.C. App. 567, 572, 355 S.E.2d 514, 518 (1987) (*quoting Ports Authority v. Roofing Co.*, 294 N.C. 73, 83, 240 S.E.2d 345, 351 (1978)).

Dr. Redick's alleged failure to keep his promise to plaintiff and her husband did not violate any duty of care imposed on him by law. Only Dr. Parham, the senior resident who placed the catheter, owed her a duty of care with respect to administering the anesthesia. Clearly, the only right arguably infringed as a result of Dr. Redick's alleged breach of promise was a contractual one. Even this right, however, was unenforceable due to a lack of consideration as previously discussed. Because North Carolina does not provide a remedy in tort where a promisor negligently fails to keep a contractual promise, a cause of action for medical negligence is not available to plaintiff. Thus, the trial court properly allowed defendants' motions for summary judgment as to plaintiff's negligence claim.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

Judges PARKER and COZORT concur.

PAMELA COLLINS, PLAINTIFF v. THE LIFE INSURANCE COMPANY OF VIRGINIA, A CORPORATION, DEFENDANT

No. 8926SC952

(Filed 17 July 1990)

Insurance § 46 (NCI3d)— accident insurance—voluntary intoxication—slipping, falling, and drowning as cause of death—recovery under policy proper

Plaintiff was entitled to recover as a matter of law under an accidental death policy where she presented evidence from which it could only be reasonably inferred that, although decedent voluntarily became intoxicated, his slipping and falling into a creek one foot deep and drowning was some additional, unexpected, and unforeseeable mishap which caused his death.

Am Jur 2d, Insurance §§ 581, 627.

APPEAL by defendant from Order of *Judge Frank W. Snepp, Jr.*, entered 7 July 1989 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 7 March 1990.

Paul J. Williams for plaintiff appellee.

Ruff Bond Cobb Wade & McNair, by Robert S. Adden, Jr., and William H. McNair, for defendant appellant.

COZORT, Judge.

Plaintiff instituted a civil action to recover as beneficiary under an insurance policy issued by defendant in the sum of $35,000 to be paid if the death of the insured, plaintiff's deceased husband, was the result of accidental means. The trial court entered summary judgment in favor of plaintiff. We affirm.

The evidence before the trial court was as follows: The body of plaintiff's husband, the insured party, was found lying face down in a creek in water approximately one foot deep. Decedent's clothing had soil stains over the back of the jacket and the seat of the pants. Law enforcement officers at the scene observed what appeared to be slide marks on the bank of the creek. The Report of Investigation by the Mecklenburg County Medical Examiner, Dr. J. M. Sullivan, states that the cause of death was drowning and notes that acute ethanol intoxication (a blood alcohol level of 280 mg. percent, or .28 on the Breathalyzer scale) was a "contributing factor." In the autopsy report, Dr. Sullivan also noted "minor blunt trauma injuries," including abrasions on decedent's forehead and face, hands, and lower legs. The autopsy report lists "drowning" as the cause of death. In his deposition, Dr. Sullivan stated that there was no evidence of any incapacitating trauma such as a skull fracture or brain contusion. He further stated that he found intoxication to be a contributing factor because a person with that blood alcohol level would "have a tendency to fall down, would have gross physical incoordination," but that a person with that level of intoxication who fell into a creek "could certainly get up out of the creek probably" and that, in his opinion, the intoxication did not contribute to decedent's inability to raise himself out of the creek. Dr. Sullivan found no evidence of suicide or criminal conduct. Other evidence established that decedent had been at work earlier in the day but had been drinking on the evening in question.

The accidental death benefit rider to the policy in question provides benefits for death resulting from "accidental bodily injuries effected solely through external violent and accidental means." The policy contains no exclusion relating to intoxication. Defendant contends that the trial court erred in entering summary judgment for plaintiff, arguing there was evidence from which a jury could find that decedent's voluntary act of becoming intoxicated was a direct cause of his death, and, therefore, that his death was not solely caused by "accidental means." We do not agree.

This jurisdiction recognizes a distinction between "accidental" death or injury and death or injury by "accidental means" in that, although the results of an intentional act may be "accidental," the act itself, which is the cause of death or injury, if intended, is not an "accidental means." *Henderson v. Hartford Acc. & Indem. Co.*, 268 N.C. 129, 132, 150 S.E.2d 17, 19 (1966). The rule has been

stated as follows: Even though an unusual or unexpected result occurs by reason of an insured's intentional act, with no mischance, slip or mishap occurring in the doing of that act, the ensuing death is not caused by "accidental means." *Id.* But " 'if, in the act which precedes the injury, something unforeseen, unexpected, [or] unusual occurs which produces the injury, then the injury has resulted through accidental means.' " *Mehaffey v. Provident Life & Acc. Ins. Co.*, 205 N.C. 701, 704, 172 S.E. 331, 333 (1934) (quoting *United States Mut. Acc. Ass'n v. Barry*, 131 U.S. 100, 121, 33 L. Ed. 60, 67, 9 S.Ct. 755, 762 (1889)). In other words, a death which is the natural and probable consequence of a voluntary act or course of conduct is not accidental nor produced by accidental means, because the insured either actually intended the result or is held to have intended it. *Allred v. Prudential Ins. Co.*, 247 N.C. 105, 100 S.E.2d 226 (1957). But a death which is not the natural and probable consequence of a voluntary act is not caused by the voluntary act but results from accidental means. *See* 45 C.J.S. Insurance § 753 (1946 & Supp. 1990).

In *Allred v. Prudential Ins. Co.*, the insured voluntarily lay down in the middle of a highway and was killed when an automobile struck him. Our Supreme Court held that the insured's death was " 'the natural and probable consequence of an ordinary act in which he voluntarily engaged,' " and thus denied recovery. 247 N.C. at 111, 100 S.E.2d at 231 (quoting *Mehaffey*, 205 N.C. at 705, 172 S.E. at 333). It cannot be reasonably said, however, that plaintiff's decedent in the case before us intentionally engaged in any act or course of conduct the natural and probable consequence of which was falling in a creek and drowning in a foot of water.

Rather, the evidence shows that decedent was walking home after voluntarily becoming intoxicated, that he fell down the bank of the creek, that he was found face down in a foot of water, and that the cause of death was drowning. The evidence also shows that a person with a .28 blood alcohol level would be likely to stumble and fall, but that such a person would not be so intoxicated as to be unable to lift himself out of a foot of water. Plaintiff thus presented evidence from which it could only be reasonably inferred that, although decedent voluntarily became intoxicated, some additional, unexpected, and unforeseeable mishap occurred which caused his death. Defendant has forecast no evidence to the contrary. As the evidence established that decedent's death

was by accidental means, the trial court correctly ruled in plaintiff's favor on her motion for summary judgment.

Defendant's reliance on *Mozingo v. Mid-South Ins. Co.*, 29 N.C. App. 352, 224 S.E.2d 208 (1976), is misplaced. In that case, the insured was found dead inside a truck which had crashed into a tree. There was evidence that the insured had been driving at an excessive rate of speed and while intoxicated. The court held that on those facts a jury could find that the death was by accidental means and that, accordingly, the trial court did not err in denying the *insurer's* motion for directed verdict. The question of whether an intoxicated driver who operated a motor vehicle at a high rate of speed, and who was killed when the vehicle crashed into a tree, died as a result of accidental means is hardly comparable to the question of whether a man traveling on foot while intoxicated, and who subsequently drowns after falling into a creek one foot deep, has suffered death by accidental means.

We hold plaintiff was entitled to recover as a matter of law.

Summary judgment for plaintiff is

Affirmed.

Judges WELLS and LEWIS concur.

STANLEY N. KAPLAN, HARRIET A. KAPLAN, SARAH M. TORRENCE, TRUSTEES OF THE LIQUIDATING TRUST AGREEMENT OF SIS RADIO, INC., PLAINTIFFS v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA, DEFENDANT AND THIRD-PARTY PLAINTIFFS v. STANLEY N. KAPLAN AND HARRIET A. KAPLAN, INDIVIDUALLY, THIRD-PARTY DEFENDANTS

No. 8926SC1037

(Filed 17 July 1990)

Banks and Other Financial Institutions § 52 (NCI4th); Trusts § 7 (NCI3d)— investment agency agreement—allegedly negligent investment—no duty to ascertain if investment authorized by trust agreement

In an action to recover losses sustained from an allegedly negligent investment of funds deposited by plaintiff trustees

of a liquidating trust in defendant bank pursuant to an investment agency agreement, the trial court properly entered summary judgment for defendant bank where defendant had no duty to ascertain whether the bond investments it made were authorized by the liquidating trust agreement; the evidence was uncontradicted that plaintiff trustees did not inform defendant of any limitations on investments until some time after the investments in question had been made; and under N.C.G.S. § 32-20(a) defendant had no duty to inquire about plaintiff trustees' authority.

Am Jur 2d, Banks §§ 291, 520.

APPEAL by plaintiffs from judgment entered 31 May 1989 by *Judge Robert W. Kirby* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 5 April 1990.

This action stems from an allegedly negligent investment. Plaintiffs are trustees of the SIS Radio, Inc. Liquidating Trust (liquidating trust). Plaintiffs deposited monies from the liquidating trust into First Union National Bank of North Carolina (FUNB) pursuant to an investment agency agreement. Plaintiffs allege that FUNB, contrary to the wishes of the trustees and the terms of the Liquidating Trust Agreement of SIS Radio, Inc. (liquidating trust agreement), invested in two to five year treasury bonds and that the bonds were redeemed at a substantial loss to the trust. Plaintiffs allege that the investment in these bonds was not at their direction and was contrary to the authority given FUNB. FUNB denied that its investments were negligently made. FUNB also filed a third party action against Stanley N. Kaplan and Harriet A. Kaplan (the Kaplans) in their individual capacities, alleging that FUNB had no knowledge of any restrictions in the liquidating trust agreement and that FUNB's actions were in full compliance with the investment agency agreement. Additionally, FUNB alleged that the Kaplans acquiesced in the investment and therefore should be personally liable for any loss suffered. The trial court granted summary judgment in favor of FUNB on plaintiff trustees' action and plaintiffs appeal.

Manning, Fulton & Skinner, by Howard E. Manning and Charles E. Nichols, Jr., for plaintiff-appellants Stanley N. Kaplan and Harriet A. Kaplan.

Robinson, Bradshaw & Hinson, by Robin L. Hinson, A. Ward McKeithen and Allain C. Andry IV, for defendant-appellee.

EAGLES, Judge.

We note that only plaintiffs Stanley N. Kaplan and Harriet A. Kaplan have filed an appellate brief in this matter; no brief has been filed on behalf of plaintiff Sarah M. Torrence. Accordingly, Torrence's appeal is dismissed. App. R. 14(d)(2). Therefore, any reference to "plaintiffs" in this opinion refers only to Stanley N. Kaplan and Harriet A. Kaplan.

The sole issue on appeal is whether the trial court erred in granting summary judgment in favor of defendant, dismissing plaintiffs' claims. Plaintiffs argue that whether FUNB exercised due care in making certain investments is a disputed question of fact. Plaintiffs assert that there is an issue of fact regarding the date on which FUNB obtained a copy of the liquidating trust agreement. Additionally, plaintiffs assert that FUNB had a duty to ascertain which investments were authorized by the liquidating trust agreement and that FUNB's failure to determine which investments were authorized by the liquidating trust agreement, prior to purchasing the bonds, was a breach of its fiduciary duty. We disagree with plaintiffs' argument that FUNB had a duty to ascertain whether the bond investments were authorized by the liquidating trust agreement. We also note that the evidence is uncontradicted that plaintiffs did not inform FUNB of any limitations on investments until some time after the investments in question had been made. Accordingly, we affirm the entry of summary judgment in favor of FUNB.

Summary judgment is proper when there is "no genuine issue as to any material fact. . . ." G.S. 1A-1, Rule 56(c). Additionally, the court must find that on the undisputed facts the party given summary judgment is entitled to judgment as a matter of law. Our courts have repeatedly stated that summary judgment is rarely proper in negligence cases because "it ordinarily remains the province of the jury to apply the reasonable person standard." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E.2d 436, 441 (1982). With these tenets in mind we hold that summary judgment was appropriate here.

Plaintiffs assert that there is an issue of fact whether FUNB's choice of investments, which were allegedly made contrary to the terms of the liquidating trust agreement, constituted negligence. Plaintiffs argue that FUNB possessed a copy of the liquidating trust agreement, that FUNB should have determined if the liq-

uidating trust agreement contained restrictions on investments and that FUNB was negligent in investing in two to five year bonds for an account that was to be liquidated within one year.

Plaintiffs have failed to raise a genuine issue regarding FUNB's actual knowledge of the terms of the liquidating trust agreement. Plaintiffs admitted in their depositions that they did not provide FUNB with a copy of the agreement until some time in May of 1987, five months after the original investments had been made and four months after plaintiffs learned of the investments in treasury bonds. Plaintiffs also argue that an inference of FUNB's actual knowledge of the contents of the liquidating trust agreement at the time of the investment arises from the fact that an unsigned copy of the agreement was found in FUNB's file at some time in May. Plaintiffs' argument is without merit.

Plaintiffs also argue that FUNB had constructive notice of the contents and restrictions found in the agreement. "[I]mplicit in the principles that underlie the doctrine of constructive notice is the concept that before one is affected with notice of whatever reasonable inquiry would disclose, the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry." *Perkins v. Langdon*, 237 N.C. 159, 168, 74 S.E.2d 634, 642 (1953). Plaintiffs argue that FUNB had a duty to inquire about the trustees' authority. We disagree.

> At common law a person who deals with another whom he knows to be a trustee is put upon inquiry as to the extent of the trustee's powers and charged with knowledge of the facts which a reasonable investigation would disclose. . . . The third party must examine the trust instrument and look to other sources of information in order to satisfy himself that the trustee has authority to enter into the transaction which he is seeking to consummate.

Bogert, *Trusts and Trustees*, § 565, pp. 273-74 (revised 2d ed. 1980). On the facts of this case the common law rule of inquiry has been superseded by statute. G.S. 32-20(a) provides, in pertinent part, that:

> No person who participates in the acquisition . . . of a security by . . . a fiduciary . . . is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves such a breach unless it is shown that he acted with actual knowledge that the proceeds of the trans-

action were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

As stated previously, plaintiffs have made no forecast of evidence that FUNB had actual knowledge that the investments made were in breach of the trustees' (plaintiffs') duties.

For the reasons stated, the judgment is affirmed.

Affirmed.

Judges WELLS and GREENE concur.

MIRIAM VAUGHN, PLAINTIFF-APPELLEE v. JOHN H. VAUGHN, DEFENDANT-APPELLANT

No. 8918DC1219

(Filed 17 July 1990)

Contempt of Court § 8 (NCI3d); Rules of Civil Procedure § 60.2 (NCI3d)— contempt order not void—motion to set aside—inappropriate method to rectify alleged error

Where the trial court had jurisdiction and authority to enter a contempt order, the order was not void; therefore an N.C.G.S. § 1A-1, Rule 60(b)(4) motion was an inappropriate means to rectify the court's alleged error in failing to appoint an attorney for defendant at the contempt hearing, and the trial court did not abuse its discretion in denying defendant's motion.

Am Jur 2d, Contempt §§ 92, 115.

APPEAL by defendant from order entered 5 October 1989 by *Judge Joseph E. Turner* in GUILFORD County District Court. Heard in the Court of Appeals 9 May 1990.

Defendant appeals the denial of his Rule 60(b) motion. This litigation commenced when defendant was summoned to show cause why he should not be held in contempt for failure to pay court ordered child support. Defendant was not represented by counsel

at the show cause hearing and did not request that the court appoint an attorney for him. The court's commitment order states that defendant represented that he was presently unemployed and living with his parents. The trial court found that defendant had received unemployment compensation for the period between 1 February 1989 and 26 June 1989 and that defendant failed to apply any of this money to his support obligation. The trial court found defendant in contempt and sentenced him to 29 days. The order did not provide for defendant's release prior to the expiration of 29 days. Defendant did not appeal to superior court pursuant to G.S. 5A-17 but instead filed a Rule 60(b)(4) motion, asserting that the contempt order was void because no attorney had been appointed for him. The Rule 60(b)(4) motion was denied and defendant appeals.

Gregory L. Gorham for plaintiff-appellee.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for defendant-appellant.

EAGLES, Judge.

G.S. 1A-1, Rule 60(b) provides in pertinent part that

> [o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (4) The judgment is void[.]

"[A] motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the Court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

Notwithstanding the parties' arguments regarding the requirement that the court appoint counsel for defendant in this case, the principal question here is whether the contempt order is void or whether it is merely voidable. Defendant argues that the contempt order is void because counsel was not appointed to represent him at the show cause hearing. We disagree and find no abuse of discretion in the denial of defendant's Rule 60(b)(4) motion.

> "If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class, it acts in excess of jurisdiction." On the other hand, the Supreme Court has said that a judgment is not void where the court which renders it "has authority to hear and determine the questions in dispute and control over the parties to the controversy. . . ." In such case, the judgment is not void even though it may be contrary to law; it is voidable, but is binding on the parties until vacated or corrected in the proper manner.

Allred v. Tucci, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294, *disc. rev. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987) (citations omitted). Stated otherwise, a judgment is not void if "the court had jurisdiction over the parties and the subject matter and had authority to render the judgment entered." *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974).

Here, defendant does not contend that the trial court was without jurisdiction or authority to enter the contempt order. He contends, instead, that the court committed an error of law by not appointing counsel for him. Assuming *arguendo* that defendant was entitled to appointed counsel at the show cause hearing, defendant has confused what constitutes an erroneous judgment with a void one. Because the court had jurisdiction and authority to enter the contempt order, the order is not void. *Id.* Therefore, a Rule 60(b)(4) motion is an inappropriate means to rectify the alleged error. The trial court did not abuse its discretion in denying defendant's motion.

For the reasons stated, we find no error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

CAROLINA-ATLANTIC DISTRIBUTORS, INC. v. BOYCE INSULATION COMPANY, INC. AND HARRY P. ROSE, INDIVIDUALLY

No. 8911SC1188

(Filed 17 July 1990)

Guaranty § 2 (NCI3d)— signature as president of company or as individual—genuine issue of fact—summary judgment improper

In an action to recover on an open account and an "Agreement of Guarantee," the trial court erred in entering summary judgment for defendant where there was a genuine issue of material fact as to whether the individual defendant, who signed the agreement, "Harry P. Rose Pres.," intended to sign only as president of defendant corporation or whether he intended to be personally liable.

Am Jur 2d, Guaranty § 28.

APPEAL by plaintiff from *Herring (Darius B., Jr.), Judge*. Judgment entered 28 July 1989 in Superior Court, LEE County. Heard in the Court of Appeals 4 June 1990.

This is a civil action wherein plaintiff seeks to recover $72,663.41 allegedly owed by defendants pursuant to a contract for the sale of goods and an accompanying "Agreement of Guarantee." The record discloses the following uncontroverted facts: On 17 July 1978, defendant Harry P. Rose executed an "Agreement of Guarantee" with plaintiff for the extension of credit to defendant Boyce Insulation Co., Inc. (hereinafter "Boyce"). The "Agreement of Guarantee" contains the following language:

> I/we, the undersigned Harry P. Rose hereby personally guarantee payment to you at Sanford, North Carolina immediately upon a default of all present and future balances of account due from the said purchaser (Boyce Insulation Co., Inc.) to you, and of all notes, checks or other evidence of indebtedness given by said purchaser to you for or on account of such balance.
>
> THE UNDERSIGNED FURTHER AGREES that the liability of the undersigned on this guarantee shall be immediate and shall not be contingent upon the exercise or enforcement by you of whatever other remedies that you may have against anyone relative to this account.

Defendant Harry P. Rose signed the "Agreement of Guarantee" "Harry P. Rose Pres."

Boyce became indebted to plaintiff for goods sold and delivered upon an open account in the amount of $72,663.41. Boyce defaulted on the account, and on 1 February 1988, plaintiff instituted this action against Boyce and Harry P. Rose individually to recover the amount of the debt.

Boyce failed to file an answer in response to plaintiff's complaint, and default was entered against it by the Clerk of Superior Court, Lee County on 16 March 1988. Plaintiff filed a motion entitled "Motion for Judgment on the Pleadings" pursuant to Rule 12(c) against the individual defendant Harry P. Rose on 3 January 1989. Plaintiff also filed a "Motion to Interpret Contract" on 16 January 1989 asking the court to enter an order to have the "construction, meaning and legal effect of the parties contract . . . entitled 'Agreement of Guarantee' . . . determined as a matter of law by the Court." By stipulation and consent of the parties, Judge Herring heard plaintiff's "Motion to Interpret Contract" and treated it as a "Motion for Summary Judgment" pursuant to Rule 56 against defendant Harry P. Rose, individually. On 28 July 1989, Judge Herring entered an order denying plaintiff's "Motion for Summary Judgment" and granting summary judgment in favor of defendant Harry P. Rose, individually, dismissing the action against him. Plaintiff appealed.

Stephenson & Stephenson, P.A., by Michael L. Stephenson, for plaintiff, appellant.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by Charles T. L. Anderson, for defendant Harry P. Rose, appellee.

HEDRICK, Chief Judge.

Plaintiff contends the trial court erred in denying its "Motion for Summary Judgment" and in entering summary judgment dismissing plaintiff's claim against defendant, Harry P. Rose, individually. Since the individual defendant signed the "Agreement of Guarantee" "Harry P. Rose Pres.," we cannot say as a matter of law that he intended to be personally bound, and the trial court correctly denied plaintiff's "Motion for Summary Judgment." On the other hand, we cannot say, as did the trial judge, that the individual defendant did not intend to be personally liable on the "Agreement

of Guarantee," and the trial judge erred in dismissing plaintiff's claim against the individual defendant.

Generally, summary judgment is not appropriate when motive, intent, or other subjective feelings are at issue, or when the evidence presented is susceptible to more than one interpretation. *Smith v. Currie*, 40 N.C. App. 739, 253 S.E.2d 645, *disc. rev. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). In the present case, whether defendant Harry P. Rose intended to sign the guarantee only as president of the defendant corporation or whether he intended to be personally liable is a genuine issue of material fact to be decided by the jury. Therefore, the order denying plaintiff's "Motion for Summary Judgment" will be affirmed, the order granting summary judgment for defendant Harry P. Rose will be reversed, and the cause will be remanded to the Superior Court, Lee County for further proceedings.

Affirmed in part; reversed in part.

Judges ARNOLD and GREENE concur.

IN RE TRUEMAN, A MINOR CHILD

No. 8930DC671

(Filed 17 July 1990)

Process § 9.1 (NCI3d)— nonresident individual—insufficient contacts with N. C.

Respondent in a proceeding to terminate parental rights had insufficient contacts with N. C. to justify the court's exercise of jurisdiction over him where respondent's only contact with the state was that his child was brought here by his former wife and was in her custody here and support payments which he made under a Wisconsin court order were sent to N. C. by the court.

Am Jur 2d, Divorce and Separation §§ 964, 1004; Process § 12.

APPEAL by respondent Richard Thomas Trueman from order entered 23 January 1989 by *Judge Steven J. Bryant* in JACKSON County District Court. Heard in the Court of Appeals 9 January 1990.

In 1979 petitioner, Leigh Anne Zullo, and respondent, Richard Thomas Trueman, were married in Wisconsin, where they lived together until they separated on 6 February 1982. In June of 1984 petitioner and their child, Derek Kenneth Trueman, born in 1980, moved to Jackson County, North Carolina, where they still reside. In June, 1985 the Jackson County District Court entered a judgment which awarded petitioner custody of the minor child and an absolute divorce from respondent. In that action, though duly served in Wisconsin, respondent neither appeared nor contested the relief sought. In the same court petitioner thereafter initiated an action for child support against respondent under the Uniform Reciprocal Enforcement of Support Act (U.R.E.S.A.), which was transferred to Wisconsin where respondent continued to reside. In that proceeding a modified order was entered by the Wisconsin court on 6 October 1986 directing respondent to make weekly child support payments in the amount of $46. On 9 September 1988 petitioner initiated this action to terminate respondent's parental rights. The ground asserted, authorized by G.S. 7A-289.32(5), is that for more than a year preceding the filing of the petition respondent had willfully, without justification, failed to make the support payments ordered by the Wisconsin Court. After being duly served in Wisconsin by certified mail respondent moved to dismiss the petition under Rule 12(b)(2), N.C. Rules of Civil Procedure, for lack of jurisdiction over his person. In denying the motion the trial court found facts substantially as stated above and concluded as a matter of law that the action is *in rem*.

Gary E. Kirby for petitioner appellee.

Graham Duls for respondent appellant.

PHILLIPS, Judge.

That under the provisions of G.S. 7A-289.23 and G.S. 50A-3 the District Court of Jackson County has jurisdiction over this proceeding to terminate respondent's parental rights to the subject child—which is a resident of that county and in the custody of his mother there pursuant to a decree of that court—is manifest and not contested. It is also clear that the action is *in rem*, as the court ruled. For the parent-child relationship is a status, as

is that of husband and wife, Restatement (Second) of Conflict of Laws Secs. 69-79 (1971), and under G.S. 1-75.3(c) a suit to adjudicate a "status" is an *in rem* proceeding. But that an action is *in rem* does not dispense with the constitutional requirement that a state's exercise of jurisdiction over a nonresident must be consistent with due process under the standard established by *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945). *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed.2d 683 (1977); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E.2d 164 (1978). *See* Note, *Miller v. Kite: Should Domestic Disputes Require the Maximum of Minimum Contacts?*, 64 N.C.L. Rev. 825 (1986). The first requirement of that long-established standard statutory authority to exert jurisdiction is clearly present in this instance; but the other requirement, that the person sued has had enough minimum contacts with the state to satisfy due process standards if required to defend the action here, is not. Respondent's only contact with this state, according to the record, is that his child was brought here by his former wife, is in her custody here, and such support payments as he has made under the Wisconsin court order have been sent here by the court. In *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985), the defendant, whose contacts with the state greatly exceeded those of the respondent and included several visits to the child here, was deemed not to be subject to the jurisdiction of our courts. In view of that decision, we are obliged to hold that the meager contacts this respondent has had with the state are insufficient to support the exercise of jurisdiction over him in this proceeding, and therefore reverse the order appealed from.

Reversed.

Judges EAGLES and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 JULY 1990

BADILLA v. BADILLA No. 9012DC45	Cumberland (85CVD861)	Affirmed
BOONE v. BOONE No. 8914DC1198	Durham (85CVD2391)	Dismissed
CARDWELL v. FORSYTH COUNTY No. 8921SC586	Forsyth (88CVS4376)	Affirmed
CARTER v. PERKINS No. 895DC1299	New Hanover (87CVD3203)	Affirmed
CRATER v. CRATER No. 8921DC1303	Forsyth (83CVD3674)	Affirmed
DEPT. OF TRANSPORTATION v. WARD No. 8930SC1137	Jackson (87CVS277)	Affirmed
FELTON v. WOOD No. 8910SC1153	Wake (88CVS10622)	Affirmed
FEREBEE v. HIATT No. 893SC1381	Craven (89CVS355)	Affirmed
GRIFFITHS v. STERLING No. 9014SC56	Durham (88CVS4029)	Affirmed
HARRINGTON v. A. G. BOONE CO. No. 8926SC356	Mecklenburg (87CVS1731)	The decision of the trial judge is reversed & a new trial ordered on the issue of damages
HAUGHN v. FIRST-CITIZENS BANK & TRUST CO. No. 8910SC1054	Wake (87CVS5345)	Appeal Dismissed
HUGGINS v. CRUTCHFIELD PLUMBING & HEATING CO. No. 8918SC1160	Guilford (87CVS5645)	Affirmed
IN RE CORBETT No. 8920DC1229	Union (89J036)	Reversed & Remanded
INTERSTATE CASUALTY INS. CO. v. HUGGINS No. 898SC1047	Lenoir (87CVS61)	Affirmed

JACKSON v. RYDER TRUCK RENTALS No. 8914SC552	Durham (88CVS55)	Affirmed
LLOYD v. ZURICK AMERICAN INS. CO. No. 894SC1326	Onslow (89CVS211)	Appeal Dismissed
MONROE v. JONES No. 8926DC1244	Mecklenburg (88CVD15895)	Affirmed in part; reversed in part & remanded
MOORE v. ACME MILLS No. 8910IC1319	Ind. Comm. (665756)	Affirmed
NICHOLS v. WILSON WILSON v. NICHOLS No. 897SC1071	Wilson (84SP246) (88CVS823)	Appeal Dismissed
OMNI INVESTMENTS, INC. v. MILLER No. 8928SC877	Buncombe (89CVS754)	Affirmed
PIERCE v. ALLEN CONSTRUCTION No. 8910SC1159	Wake (87CVS7412)	Affirmed
ROSE v. ROSE No. 907SC44	Wilson (87CVD313)	Affirmed
SHAVER v. SHAVER No. 8928DC642	Buncombe (87CVD1122)	Affirmed in part; vacated & remanded in part
ST. JAMES INN v. LANIER No. 895SC915	Pender (89CVS246)	Affirmed
STATE v. ALLEN STATE v. GOUSSE No. 898SC1083	Lenoir (88CRS7230) (88CRS7231) (88CRS7235) (88CRS7236)	No Error
STATE v. BAGLEY No. 8914SC1316	Durham (88CRS19909) (88CRS19910) (88CRS20064)	No Error
STATE v. CARTER No. 902SC70	Beaufort (88CRS6790)	Affirmed
STATE v. CATOE No. 9021SC134	Forsyth (89CRS13236)	No Error

STATE v. CLARK No. 894SC1024	Onslow (87CRS1846)	Remanded for resentencing
STATE v. COX No. 8924SC1395	Mitchell (88CRS1546)	No Error
STATE v. DAIL No. 898SC894	Wayne (88CRS4171)	Defendant received a fair trial free of prejudicial error
STATE v. DIECK No. 901SC21	Dare (89CRS3146)	No Error
STATE v. FOWLER No. 8928SC1266	Buncombe (88CRS17354)	No Error
STATE v. GLENN No. 8926SC902	Mecklenburg (88CRS75871)	Reversed
STATE v. GRANT No. 8926SC582	Mecklenburg (88CRS63902)	No Error
STATE v. GREEN No. 892SC1393	Beaufort (89CRS182)	No Error
STATE v. HARPER No. 895SC1376	New Hanover (88CRS22120) (88CRS22121)	No Error
STATE v. HOLMES No. 8925SC1369	Caldwell (89CRS270)	Judgment Arrested
STATE v. HOLT No. 8927SC1237	Gaston (88CRS022641) (88CRS022647)	No Error
STATE v. JACKSON No. 8925SC1310	Caldwell (89CRS271)	Arrested
STATE v. JOLLY No. 8925SC826	Catawba (81CRS1714)	No Error
STATE v. KENNY No. 8918SC1355	Guilford (89CRS37471) (89CRS37473) (89CRS38515) (89CRS37472)	No Error
STATE v. LASSITER No. 9020SC28	Richmond (89CRS325) (89CRS326)	No Error

STATE v. LOCKLEAR No. 9016SC86	Robeson (89CRS13596) (89CRS13597)	No Error
STATE v. McMILLAN No. 8920SC1187	Moore (89CRS2158)	No error in defendant's conviction for sale of cocaine. Felony possession judgment is vacated & remanded for entry of judgment for misdemeanor possession of cocaine and for resentencing on that judgment.
STATE v. MARINO No. 8912SC880	Cumberland (88CRS27535)	No Error
STATE v. MULLINS No. 9026SC35	Mecklenburg (89CRS16465) (89CRS16468)	No Error
STATE v. OXENDINE No. 8916SC1292	Robeson (88CRS16418) (88CRS16419) (88CRS16535) (88CRS16536)	No Error
STATE v. PETERSON No. 896SC589	Northampton (87CRS2309) (88CRS67)	No Error
STATE v. ROBEY No. 8919SC1378	Randolph (85CRS5641)	No Error
STATE v. SEABERRY No. 9010SC54	Wake (88CRS14775)	No Error
STATE v. SEABERRY No. 9010SC55	Wake (88CRS20663)	No Error
STATE v. SHORT No. 8929SC1343	McDowell (89CRS223)	No Error
STATE v. SHUMATE No. 9023SC43	Ashe (87CRS1277) (87CRS1278)	No Error
STATE v. SMITH No. 9018SC112	Guilford (89CRS20569)	No Error

STATE v. WATERS No. 8925SC784	Caldwell (88CRS4933)	No Error
STATE v. WILLIAMS No. 9011SC49	Johnston (88CRS2446) (88CRS2447)	No Error
STATE v. WILLIAMS No. 897SC1034	Wilson (87CRS10591)	No Error
TERRY v. DRADY No. 8921SC1317	Forsyth (89CVS297)	Dismissed as being interlocutory
WARD v. N. C. DEPT. OF ADMINISTRATION No. 8810IC942	Ind. Comm. (TA-8691)	Vacated and Remanded
WATERS v. MURPHY FARMS, INC. No. 8913SC633	Bladen (88CVS275)	Affirmed

ERNEST T. FORBES, III, DAVID J. DRUM AND WIFE, DOROTHY H. DRUM, H. B. STROUP, JR. AND WIFE, LOUISE P. STROUP, STEVE WOOLARD AND WIFE, HAZEL JEAN WOOLARD, THOMAS H. HARDER AND WIFE, ROSEMARY HARDER, CHARLES PATTON AND WIFE, MADELINE H. PATTON, WILLIAM F. HIGGS, JR., RUSSELL DUFFNER, JOHN SRONCE, WILLIAM BRANKO AND WIFE, SONIA B. BRANKO, JEFFREY J. MILLER AND WIFE, SUSAN B. MILLER, A. G. G. McWILLIAM AND WIFE, MARILYN McWILLIAM, NICHOLAS GILIBERTI, DR. MYRON L. GOTTFRIED, GARY D. McKINNEY, STEVE ZEBOS, MICHAEL MONTAPERTO AND WIFE, HORTENCIA L. MONTAPERTO, ROBERT E. HILL, KENNETH H. HENSON, DALE A. DEINES AND WIFE, JEANNE E. DEINES v. THE PAR TEN GROUP, INC., THE PROPERTY SHOP, INC., JAN C. MANSSON, WILLIAM R. LEWIS, DOUGLAS R. BEBBER, GEORGE W. MATHEWS

No. 8928SC993

(Filed 7 August 1990)

1. Fraud § 3.3 (NCI3d)— sale of property—escrow account—summary judgment for defendants proper

The trial court properly granted summary judgment for defendants on the issue of fraud arising from the misuse of funds from the sale of lots and memberships in a resort golf course community where plaintiffs contended that defendants had a duty to disclose and did not disclose improper escrow practices, but defendants' evidence shows that these defendants did not know that defendant Manson failed to establish escrow accounts. Before defendants have any duty to disclose information, they must possess that information; even assuming that defendants were culpably ignorant in not questioning Manson or the bank, plaintiffs failed to carry their burden of showing evidence raising a material issue of fact concerning defendants' intent to deceive them with the information.

Am Jur 2d, Fraud and Deceit § 217.

2. Fraud § 4 (NCI3d)— real estate sales—escrow information—negligent misrepresentation

Summary judgment was properly entered between some plaintiffs and defendants, and improperly entered between others, in an action arising from the misapplication of deposits from the sale of lots and memberships in a resort golf course community where all the record evidence reflects that the individual defendants, acting as agents for the corporate defendant, communicated false information that the escrow monies would be held in an interest-bearing account; none of these

defendants made any investigation to determine whether the monies were actually placed in an escrow account; there were material issues of fact concerning misrepresentations to certain plaintiffs; and other plaintiffs showed no misrepresentations to them by defendants.

Am Jur 2d, Fraud and Deceit § 217.

3. **Negligence § 13 (NCI3d)— negligent misrepresentation—contributory negligence—not pled—not present as a matter of law**

Defendants' failure to plead plaintiffs' contributory negligence was a bar to the issue being raised on appeal in an action arising from the misapplication of escrow funds from the sale of golf course resort property and, in any event, the record does not reveal contributory negligence as a matter of law and could not support summary judgment for defendants.

Am Jur 2d, Fraud and Deceit §§ 251, 264.

4. **Fiduciaries § 2 (NCI3d)— sale of resort property—misapplication of escrow deposits—sales agents as fiduciaries**

Summary judgment was properly granted for defendant sales agents on a claim of breach of fiduciary duty in an action arising from misapplication of deposits from the sale of resort property where plaintiffs contended that each defendant was a dual agent, acting for both sellers and buyers, who breached his fiduciary duty to plaintiffs, but defendants offered evidence that they did not agree to represent plaintiffs in the sales transactions, that defendants represented only the Par Ten Group, Inc. in offering the properties for sale, and plaintiffs failed to adduce evidence in response raising a material issue of fact regarding this cause of action. Plaintiffs Drum attempted to show that defendant Mathews was their agent by proffering Mathews' out-of-court statement showing that he agreed to assist plaintiffs in arranging financing for their purchase, but this evidence was insufficient as a matter of law to show Mathews' agency absent other evidence.

Am Jur 2d, Brokers § 84.

5. **Unfair Competition § 1 (NCI3d)— resort property sale—misapplication of deposit—unfair and deceptive trade practices**

Summary judgment was proper for some plaintiffs and improper for others on an unfair and deceptive trade practices

claim in an action arising from the misapplication of deposits from the sale of real estate where the evidence raised material issues of fact concerning negligent misrepresentations as to some plaintiffs but not as to others. That defendants may have made misrepresentations negligently but in good faith and without intent to mislead affords no defense to an action under N.C.G.S. § 75-1.1.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

APPEAL by plaintiffs from orders entered 30 May 1989 and 8 June 1989 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 March 1990.

Shuford, Best, Rowe, Brondyke & Walcott, by James Gary Rowe and Patricia L. Arcuri, for plaintiff-appellants.

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

GREENE, Judge.

Plaintiffs appeal the trial court's entry of summary judgment for defendants The Property Shop, Inc., William R. Lewis, Douglas R. Bebber and George W. Mathews.

The record shows that the defendants were involved in marketing a resort golf course community. Plaintiffs were purchasers of lots and memberships in the community. Defendants Lewis, Bebber and Mathews were sales agents for defendant Property Shop, Inc. ("Shop"), a real estate brokerage firm. Bebber also was president and sole stockholder of Shop. Defendant Mansson is a Swedish resort property developer, who approached Lewis in 1984 about purchasing a tract of land on which to develop the resort community for a soon-to-be-formed development corporation, defendant Par Ten Group, Inc. ("Group"). On 2 October 1984, Mansson bought the property.

In December, 1984, Group and Shop executed an agreement granting Shop the exclusive rights to market and arrange sales of the resort property lots, which lasted until approximately May, 1985, after which Shop was one of several marketing agents for the community.

As part of the marketing of the property, Shop mailed an informational brochure to prospective buyers which included the following provision:

> 2. Deposit. The deposit mentioned under (1) shall be held in an interest[-]bearing escrow account with a local bank and will be applied to the purchase price at closing. Interest from said escrow account shall be payable to the PAR TEN GROUP, INC.

The contract for purchase of resort property included this provision:

> 2. Deposit: The said deposit shall be held in an interest[-]bearing escrow account in Asheville Federal S & L Bank (Seller will be entitled to the interest therefrom) and will be applied to the purchase price at closing. . . .

The money received as a deposit on the properties was paid to Mansson, who transferred the money into his personal checking account to pay his salary, Group's bills, and to develop other projects. Eventually, Mansson depleted most of the funds in the alleged escrow account and confessed his acts in mid-July, 1985.

Defendant Lewis signed agreements on behalf of Group with plaintiff Forbes on 28 May 1985, plaintiffs Harder on 23 November 1984, plaintiffs Patton on 25 May 1985, plaintiff Higgs on 19 January 1985, which defendant Bebber arranged, plaintiffs Branko on 11 July 1985, plaintiffs Montaperto on 14 November 1984, plaintiffs Deines on 30 May 1985, plaintiff Henson on 3 January 1985, plaintiff Hill on 3 January 1985, and plaintiffs McWilliam on 1 April 1985. Additionally, defendant Lewis informed plaintiffs Woolard that their deposit would be held in escrow in Asheville Federal, and they executed an agreement with Group on 12 January 1985, signed by Mansson and witnessed by Lewis.

Defendant Bebber dealt with plaintiff Higgs before he signed his agreement with Group, and represented to plaintiff Forbes that his deposit would be safely held in escrow in Asheville Federal. Defendant Bebber may have also dealt with plaintiffs Hill and Henson by selling them property, facts unclear from Lewis's affidavit.

Defendant Mathews sold lots to plaintiffs Drum, Stroup and Sronce. Plaintiff Drum executed an agreement signed by Mansson on 23 April 1985. Plaintiffs Stroup executed an agreement on 5 January 1989.

Mansson apparently signed agreements between Group and: plaintiff Giliberti on 10 December 1984, which Shop's sales agent Arlene Schandler arranged, plaintiff Zebos on 5 June 1985, plaintiff McKinney on 17 May 1985, and plaintiffs Gottfried on an undesignated date.

Plaintiffs Miller signed an agreement with Group on 25 June 1985, which shows no signature by a Group representative or other person. Plaintiff Duffner signed an agreement on 4 November 1984, which shows no signature by a Group representative or other person, but which Bebber averred had been executed with Shop on 28 November 1984.

Plaintiffs brought suit to recover the deposit money from defendants, alleging that defendants committed fraudulent misrepresentation, negligent misrepresentation, unfair and deceptive trade practices, and breach of fiduciary duty in failing to comply with escrow requirements for the payments.

Defendants Lewis, Shop, Bebber and Mathews answered, denying plaintiffs' allegations. Neither defendant Mansson nor defendant Group answered. Mansson allegedly fled the country, and Group allegedly is insolvent.

In support of their motion for summary judgment, these defendants offered various affidavits, all to the effect that they at no time had any knowledge that the deposit monies were not placed in an escrow account.

In support of defendants' motion for summary judgment, defendant Bebber introduced his affidavit, averring that:

> the following are the only Contracts of Sale of [resort] property obtained by . . . Shop and its associates:

Purchaser	Date of Contract or Sale	Associate
Ernest T. Forbes, III	5/28/85	Walter McGuire —The Property Shop
David Drum and wife	4/23/85	George Mathews —The Property Shop
H. B. Stroupe [sic] and wife	1/5/85	George Mathews —The Property Shop

Purchaser	Date of Contract or Sale	Associate
Steve Woolard and wife	1/12/85	Ron Lewis —The Property Shop
Thomas Harder and wife	11/23/84	Arlene Schandler —The Property Shop
William F. Higgs, Jr.	1/19/85	Douglas Bebber —The Property Shop
Russell Duffner	11/28/84	Beatrice Pollock —The Property Shop
John Sronce	Early 1985, prior to May	George Mathews —The Property Shop
A. G. G. McWilliam and wife	4/1/85	Charles Baskerville —The Property Shop
Nicholas Giliberti	12/10/84	Arlene Schandler —The Property Shop
Michael Montaperto and wife	11/14/84	Ron Lewis —The Property Shop
Robert E. Hill	1/3/85	Ron Lewis —The Property Shop

Plaintiffs countered with evidence of the sales brochure and the contract for purchase, both of which contained specific language that the deposit would be held in an interest-bearing escrow account in a local bank and applied to the purchase price at closing. Several plaintiffs testified that some defendants, in addition to the written information contained in the contract and brochure, orally told them that the deposit would be held in an escrow account until closing on the property.

Plaintiff Drum offered an affidavit including this averment: "Mathews . . . told me . . . that [a] deposit would be held in an escrow account until closing on the property . . . He also offered to act on our behalf in completing this transaction." The record includes a letter to Drum, in which Mathews stated:

> I'll be happy to draw for your particular parcel or Nancy could do it when the time for the drawing arrives. Or, if possible, you might want to come pick your lot personally. If you are to require some financing I will be happy to help with the

arrangements. Whatever is convenient with you I will endeavor to accomplish.

On 30 May 1989, the trial court entered summary judgment for Shop, Bebber and Mathews, certifying that there was no just reason for delaying appeal of judgment for these defendants pursuant to N.C.G.S. § 1A-1, Rule 54(b). On 8 June 1989, the trial court entered summary judgment for Lewis, also certifying that there was no just reason for delaying the appeal.

The issues are: whether the trial court properly granted summary judgment for defendants on plaintiffs' allegations of (I) false misrepresentation; (II) negligent misrepresentation; (III) breach of fiduciary duty; and (IV) unfair and deceptive trade practices.

> 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. . . . An issue is material when the facts on which it is based would constitute a legal defense which would prevent a non-movant from prevailing. . . . To entitle one to summary judgment, the movant must conclusively establish 'a complete defense or legal bar to the non-movant's claim.' 'The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence. . . . When movant is the defendant, this rule placing the burden on the movant reverses the usual trial burdens.

Cheek v. Poole, 98 N.C. App. 158, 162, 390 S.E.2d 455, 458 (1990) (citations omitted). "If, however, the movant carries its burden, the opposing party must respond with specific facts showing there is a genuine issue for trial or with an excuse for not doing so." *Weeks v. N.C. Dept. of Natural Resources*, 97 N.C. App. 215, 224, 388 S.E.2d 228, 233 (1990).

I

False misrepresentation

[1] Plaintiffs contend that they presented evidence showing defendants committed fraud because defendants had a duty to disclose and did not disclose improper escrow practices to plaintiffs. We disagree.

"To withstand a motion for summary judgment on a fraud claim, the forecast of the evidence must present a genuine issue

of material fact as to each element of fraud." *Bolton Corp. v. T. A. Loving Co.*, 94 N.C. App. 392, 409, 380 S.E.2d 796, 807, *review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989) (citation omitted).

> The essential elements of actionable fraud are:
>
> (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that [the misrepresentation] resulted in damage to the injured party.

Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 189-90, 374 S.E.2d 135, 137 (1988). Elements three and four comprise "scienter," both of which are required to show fraud. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391, *reh. denied*, 324 N.C. 117, 377 S.E.2d 235 (1989) (overruling cases in which fraud is based solely on a statement made with reckless indifference to its truth without a showing of defendant's intent to deceive plaintiff).

> For actionable fraud to exist, the defendant must have known the representation to be false when making it, or the defendant must have made the representation recklessly without any knowledge of its truth and as a positive assertion. . . . This determination of truth or falsity must be made at the time of the representation.

Fulton v. Vickery, 73 N.C. App. 382, 388, 326 S.E.2d 354, 358, *review denied*, 313 N.C. 599, 332 S.E.2d 178 (1985) (citations omitted).

A defendant cannot "be liable for concealing a fact of which it was unaware." *Ramsey*, at 190, 374 S.E.2d at 137. If a defendant presents evidence that it did not know of the fact in issue, "the burden shifts to plaintiff to prove that defendant knew or had reason to know" the fact. *Ramsey*, at 191, 374 S.E.2d at 137.

Defendants' evidence shows that these defendants did not know that Mansson failed to establish escrow accounts at Asheville Federal. Before defendants have any duty to disclose information, they must possess the information. Plaintiffs' evidence does not refute defendants' evidence to show that these defendants knew of Mansson's

defalcations earlier in time than plaintiffs knew. In his affidavit, plaintiff McKinney stated that in December, 1985, Lewis admitted knowledge that Mansson improperly set up the escrow accounts. However, because this evidence does not show *when* Lewis had the knowledge, it raises no material issue of fact about the time period from October, 1984, when Mansson established the accounts, until July, 1985, when Investment Ringen members relayed the information it discovered and Mansson confessed his defalcations. This evidence also does not show that Lewis or another defendant knew or had reason to know that Mansson misrepresented the type of bank accounts he had opened and was withdrawing from the accounts.

Plaintiffs also contend that defendants were culpably ignorant of Mansson's acts. We determine that, assuming *arguendo* that defendants were culpably ignorant in not questioning Mansson or the bank, plaintiffs failed to carry their burden of showing evidence raising a material issue of fact concerning defendants' intent to deceive them with the information.

II

Negligent misrepresentation

[2] Plaintiffs next argue that they raised material issues of fact concerning defendants' negligent misrepresentation of the escrow information. We agree.

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement of the Law 2d, *Torts* § 552 (1977); *see also Fulton*, at 388, 326 S.E.2d at 358.

> What is reasonable is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors. The question is

> one for the jury, unless the facts are so clear as to permit only one conclusion.
>
> The particulars in which the recipient of information supplied by another is entitled to expect the exercise of care and competence depend upon the character of the information that is supplied. When the information concerns a fact not known to the recipient, he is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which, therefore, the supplier professes to have by engaging it. Thus[,] *the recipient is entitled to expect that such investigations as are necessary will be carefully made and that his informant will have normal business or professional competence to form an intelligent judgment upon the data obtained.*

Id., comment (e) (emphasis added).

A corporation may be liable for negligence through the doctrine of respondeat superior if its agents are negligent. *Blanton v. Moses H. Cone Mem. Hosp., Inc.*, 319 N.C. 372, 374-75, 354 S.E.2d 455, 457 (1987). "[A] corporation is liable for the torts and wrongful acts or omissions of its agents or employees acting within the scope of their authority or the course of their employment." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 205, 130 S.E.2d 281, 285 (1963). When corporate officers or agents commit torts, the injured person " 'may hold either liable, and generally he may hold both [liable] as joint tort[-]feasors . . .' " *Palomino Mills, Inc. v. Davidson Mills Corp.*, 230 N.C. 286, 292, 52 S.E.2d 915, 919 (1949) (plaintiff purchaser may sue either a corporate seller of personal property or its officer for the tort of fraudulent misrepresentations in a contract of sale).

Negligence cases " '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.' " *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990) (citation omitted).

All record evidence reflects that Lewis, Bebber and Mathews, individually and acting as agents for Shop, communicated false information, that the escrow monies would be held in an interest-bearing account, and that none of these defendants made any investigation to determine whether the monies were actually placed

in an escrow account. These circumstances raise a jury issue as to whether these defendants exercised reasonable care in failing to obtain correct information regarding the escrow account and in communicating false information to plaintiffs; whether plaintiffs were reasonably entitled to rely on defendants' information; and whether plaintiffs actually and justifiably relied on the information. *See Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981).

The evidence does not permit the single conclusion which is necessary to support summary judgment for defendants, that defendants acted reasonably or that defendants could not reasonably expect that plaintiffs would rely on the representations or that plaintiffs did not actually and justifiably rely on the information.

Although plaintiffs make a blanket assertion regarding these defendants' liability to all plaintiffs for allegedly negligent acts, the doctrine of negligent misrepresentation requires that we determine from the record which defendant represented information to which plaintiff to determine the reasonableness of each plaintiff's and defendant's actions.

As to defendant Lewis, record evidence raises a material issue of fact concerning Lewis's alleged negligence in making misrepresentations by brochure, statements or Group's contract to plaintiffs Forbes, Woolard, Harder, Patton, Higgs, Branko, McWilliam, Montaperto, Hill, Henson and Deines, rendering summary judgment improper. This evidence also raises a material issue of fact concerning Shop's respondeat superior liability to these plaintiffs because of Lewis's alleged negligence.

As to defendant Mathews, record evidence raises a material issue of fact concerning Mathews's alleged negligence in making misrepresentations to plaintiffs Drum, Stroup, and Sronce, so that summary judgment against these plaintiffs was improper. This evidence also raises a material issue of fact concerning Shop's respondeat superior liability to these plaintiffs because of Mathews's alleged negligence.

As to defendant Bebber, record evidence raises a material issue of fact concerning Bebber's alleged negligence in making misrepresentations to plaintiffs Forbes, Higgs, Hill and Henson. This evidence also raises a material issue of fact concerning Shop's respondeat superior liability to these plaintiffs because of Bebber's alleged negligence.

Summary judgment was properly entered for all these defendants against plaintiffs Miller, Gottfried, McKinney, and Zebos because these plaintiffs showed no misrepresentations to them by these defendants.

Summary judgment was properly entered for defendants Bebber, Mathews and Lewis against plaintiff Giliberti because plaintiff showed no misrepresentations that these defendants made to him. Summary judgment for Shop against plaintiffs Giliberti and Duffner was improper because record evidence raises a material issue of fact concerning Shop's respondeat superior liability resulting from the actions of its agents, Schandler and Pollock, who were Shop's employees not named as defendants.

Summary judgment was properly entered for defendants Bebber and Mathews against plaintiffs Woolard, Harder, Patton, Branko, McWilliam, Montaperto and Deines because they raised no material issue of fact to show any misrepresentations to them by these defendants. Summary judgment was properly entered for defendant Mathews against plaintiffs Forbes, Higgs, Hill and Henson because these plaintiffs raised no material issue of fact to show any misrepresentations to them by this defendant. Summary judgment was properly entered for defendants Lewis and Bebber against plaintiffs Drum, Stroup and Sronce because they raised no material issue of fact to show any misrepresentations to them by these defendants.

[3] All defendants contend in the alternative that all evidence supports a finding that each plaintiff was contributorily negligent as a matter of law. We recognize that "[t]he recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying." *Rest. of the Law* 2d, *Torts* § 552A. "This means that the plaintiff is held to the standard of care, knowledge, intelligence and judgment of a reasonable man, even though he does not possess the qualities necessary to enable him to conform to that standard." *Id.*, comment (a).

However, defendants' failure to plead plaintiffs' contributory negligence in this case is a bar to this issue being raised on appeal. N.C.G.S. § 1A-1, Rule 8(c) (1983) (contributory negligence is an affirmative defense which must be pled). In any event, record evidence does not reveal contributory negligence as a matter of law, and therefore, it could not support summary judgment for

defendants. *See Perkins v. Langdon*, 237 N.C. 159, 168, 74 S.E.2d 634, 642 (1953) ("the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry").

III

Breach of fiduciary duty

[4] Each plaintiff contends that each defendant was a "dual agent," acting for both Group-sellers and plaintiff-buyers, who breached his fiduciary duty to plaintiffs. Plaintiffs Drum specifically contend that defendant Mathews was their agent for purchasing property from Shop. We disagree.

"[A] broker representing a purchaser or seller in the purchase or sale of property owes a fiduciary duty to his client based upon the agency relationship itself." *Kim v. Professional Business Brokers Ltd.*, 74 N.C. App. 48, 51-52, 328 S.E.2d 296, 299 (1985) (citation omitted).

A principal-agent relationship arises upon two essential elements: "(1) [a]uthority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Colony Assos. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637, 300 S.E.2d 37, 39 (1983). "An agency can be proved 'generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy. . . .'" *Id.*, at 638, 300 S.E.2d at 39 (citation omitted). "[N]either the fact nor the extent of an agency relationship can be proved by the out-of-court statements of an alleged agent." *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 399, 331 S.E.2d 148, 156, *review denied*, 314 N.C. 664, 336 S.E.2d 399 (1985) (citations omitted). "[S]uch statements may be considered as evidence on the question of agency when (1) the fact of agency appears from other evidence *and* (2) the statements were within the agent's actual or apparent authority." *Id.* (emphasis added).

"Whether a principal-agent relationship exists is a question of fact for the jury when there is evidence tending to prove it; it is a question of law for the court if only one inference can be drawn from the facts. *Smock v. Brantley*, 76 N.C. App. 73, 75, 331 S.E.2d 714, 716, *review denied*, 315 N.C. 590, 341 S.E.2d 30 (1986).

Defendants offered evidence that they did not agree to represent plaintiffs in the sales transactions and that defendants represented only Group in offering the properties for sale. In response to this evidence, plaintiffs failed to adduce evidence raising a material issue of fact regarding this cause of action. Only plaintiffs Drum attempted to show that defendant Mathews was their agent. Plaintiffs Drum proffered Mathews's out-of-court statement showing that Mathews agreed to 'assist' plaintiffs in arranging financing for their purchase. As a matter of law, this evidence is insufficient to show Mathews's agency absent other evidence tending to show the fact of agency. No other evidence tends to show that Mathews was plaintiffs' agent.

IV

Unfair and deceptive trade practices

[5] Plaintiffs contend that they raised a material issue of fact that defendants' alleged acts of fraud possessed the tendency or capacity to mislead plaintiffs, or created the likelihood of deception. We agree.

> 'Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . . [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. . . . [T]he consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception . . .'

Love v. Keith, 95 N.C. App. 549, 554, 383 S.E.2d 674, 677 (1989) (citation omitted); N.C.G.S. § 75-16. "In essence, '[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position.' " *Warfield v. Hicks*, 91 N.C. App. 1, 8, 370 S.E.2d 689, 693, *review denied*, 323 N.C. 629, 374 S.E.2d 602 (1988). Whether defendants committed the alleged acts " 'is a question of fact for the jury' " and, if so, whether the " 'proven facts constitute an unfair or deceptive trade practice' " is a question of law for the court. *Love*, at 554, 383 S.E.2d at 677 (citation omitted).

That defendants may have made these misrepresentations negligently and in good faith, in ignorance of their falsity, and without intent to mislead, affords no defense to an action under N.C.G.S. § 75-1.1. *See generally Marshall v. Miller*, 302 N.C. 539, 276 S.E.2d 397 (1981); *see also Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 314 S.E.2d 582, *review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984); *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986) ("[e]ven a truthful statement may be deceptive if it has the capacity or tendency to deceive"). Furthermore, we note that any alleged contributory negligence by plaintiffs is irrelevant in an action governing conduct subject to Chapter 75. *Winston Realty Co., Inc. v. G.H.G., Inc.*, 314 N.C. 90, 94-95, 331 S.E.2d 677, 680 (1985). Recovery according to Chapter 75 is limited to those situations when a plaintiff can show that plaintiff detrimentally relied upon a statement or misrepresentation and he or she "suffered actual injury as a proximate result of defendant's deceptive statement or misrepresentation." *Pearce*, at 471, 343 S.E.2d at 180.

Therefore, since the evidence raises material issues of fact concerning negligent misrepresentation, the jury determines whether defendants committed the alleged acts, and if so, the trial court determines whether the proven facts constitute unfair or deceptive trade practices.

Because plaintiffs alleged that the unfair and deceptive acts are defendants' alleged negligent misrepresentations, our determinations concerning the court's entry of summary judgment set out in the negligent misrepresentation cause of action, section II above, also apply to this cause of action.

In summary, we affirm the trial court's grant of summary judgment on the issues of fraudulent misrepresentation and breach of fiduciary duty for each defendant.

We affirm the court's grant of summary judgment on plaintiffs' claims of negligent misrepresentation and unfair or deceptive trade acts (1) for each defendant against plaintiffs Miller, Gottfried, McKinney and Zebos; (2) for defendants Bebber, Mathews and Lewis against plaintiffs Giliberti; (3) for defendants Bebber and Mathews against plaintiffs Woolard, Montaperto, Harder, Patton, Branko, McWilliam and Deines; (4) for defendant Mathews against plaintiffs Forbes, Hill, Higgs and Henson; (5) for defendants Lewis and Bebber against plaintiffs Drum, Stroup and Sronce.

We vacate entry of summary judgment on the issues of negligent misrepresentation and unfair and deceptive trade practices (1) against plaintiffs Woolard, Harder, Patton, Branko, McWilliam, Montaperto and Deines for defendants Shop and Lewis, (2) against plaintiffs Forbes, Hill, Higgs, and Henson for defendants Shop, Bebber and Lewis, (3) against plaintiffs Drum, Stroup and Sronce for defendants Shop and Mathews, (4) and against plaintiffs Giliberti and Duffner for defendant Shop, and remand this case for trial on these issues.

Affirmed in part, vacated and remanded in part.

Judges WELLS and EAGLES concur.

NORTH CAROLINA DEPARTMENT OF CORRECTION v. EDWARD EARL HODGE

No. 8910SC655

(Filed 7 August 1990)

1. **Master and Servant § 7.5 (NCI3d) — correctional officer promotion decision — discrimination alleged — appropriate evidentiary standards and legal principles applied**

The State Personnel Commission, in making an award in favor of respondent employee for racial discrimination in a Central Prison correctional officer employment promotion decision, used the appropriate evidentiary standards and legal principles in evaluating the evidence of discrimination where the Commission used the "disparate treatment" test; according to this analysis the employee has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination, which respondent in this case did; the employer then had the opportunity to rebut the employee's prima facie showing; and the employee then had the opportunity to demonstrate that the employer's proffered reasons for its decision were not its true reasons.

Am Jur 2d, Job Discrimination §§ 57, 1974, 2003.

2. Master and Servant § 7.5 (NCI3d) — correctional officer promotion decision — nondiscriminatory reason as pretext for racial discrimination — sufficiency of evidence

Evidence was sufficient to support the finding by the State Personnel Commission that respondent correctional officer was in fact better qualified for a captain's position than the promoted employee and that the State's nondiscriminatory reason for promoting the other employee was therefore a pretext for racial discrimination where the evidence tended to show that respondent was black and the promoted employee was white; excluding interview evaluations in comparing respondent to the promoted employee, respondent scored 9% higher on the eligibility examination, showed that he had 50% more experience in years working at Central Prison, and 100% more experience in years serving as a correctional lieutenant; the interview committee's rankings contradicted respondent's achievements on objective tests evaluating his knowledge of the same subjects tested in the interview; the State's use of the interview as the sole criteria for not promoting respondent contravened its own system of promotion, in that the State allowed the interview to carry more weight than all of the other items of evaluation combined; the eleven point difference in the promoted employee's score on the interview and respondent's score was in fact minimal in light of the fact that three interviewers evaluated the candidates on five categories, giving rise to fifteen possible scores, and respondent's scores were within one point of the promoted employee's scores on fourteen of the fifteen individual scores; and there was no conclusive showing that the next candidate in line, a black, would have automatically received the position if the recommended candidate had not filled it.

Am Jur 2d, Job Discrimination §§ 57, 1974, 2003.

APPEAL by the North Carolina Department of Correction from order entered 24 April 1989 by *Judge A. Leon Stanback* in WAKE County Superior Court. Heard in the Court of Appeals 9 January 1990.

Lacy H. Thornburg, Attorney General, by Valerie L. Bateman, Associate Attorney General, for the State.

Adams, McCullough & Beard, by Abraham Penn Jones, for respondent-appellee.

GREENE, Judge.

The State appeals the superior court's order affirming the award of the State Personnel Commission ("Commission") in favor of employee Edward Earl Hodge ("Hodge") for racial discrimination in a Central Prison correctional officer employment promotion decision.

The record shows that the North Carolina Department of Correction, Division of Prisons, employed Hodge, who is black, as a lieutenant correctional officer at Central Prison. In March, 1987, a black correctional officer transferred from his captain's position, leaving a vacancy, for which Hodge applied. At the time Hodge applied for the position, he had been a Central Prison correctional officer for eighteen years, occupying the rank of lieutenant for eleven of the years. Six other lieutenants also applied for the promotion, of whom two were black. A three-member prison employment commission, appointed by the prison warden, interviewed Hodge for the position, but recommended that the warden promote another correctional lieutenant, who is white. The three commission members included the deputy warden, personnel director and chief of prison operations, all of whom are white. The record shows that each of the three interviewers rated the candidates in five categories: interview behavior, job knowledge, policy and procedures, leadership ability, and judgment. The interview evaluation provided each candidate with fifteen individual scores of up to five points each, for a possible total of 75 points. The interviewers scored the promoted employee with a cumulative total of 71 points and Hodge with a cumulative total of 60 points. Based on the commission's recommendation derived from the interview scores, the Central Prison warden promoted the white lieutenant to the position. Hodge filed a grievance, alleging racial discrimination and requesting review of the promotion by a Commission Administrative Law Judge (ALJ).

At the ALJ hearing, Hodge offered evidence showing that he had been tested for promotion to captain, achieving a score of 96 of 100 points, the highest applicant score on the correctional captain permanent-employment eligibility list. Hodge also introduced evidence that he had more experience as acting temporary shift commander than any other applicant, and that his employment performance appraisal for the two years preceding his application included excellent ratings and high recommendations. Hodge had

taught prison policy, procedure and operations to other correctional officers for approximately 10 years. Upon the former correctional captain's departure, the outgoing captain appointed Hodge temporary acting captain during the interim period preceding selection of the permanent appointee. He also offered evidence showing that of the six current Central Prison captains, only one was a member of a racial minority. At the hearing, Hodge questioned and the personnel director on the interview board testified as follows:

> Q. As far as seniority goes and rank as a lieutenant, is there any preference that is given to people that have seniority and rank?
>
> A. It is explained to the candidate before the interview that we take all of these things into consideration, but no one item will carry more weight than the other.
>
> . . .
>
> A. We [Central Prison staff] have made a good attempt to promote those people [minorities]. We often are criticized. I have personally been criticized by the majority in that the next person promoted is going to be black.
>
> . . .
>
> [ALJ] Q. But that would influence you to make sure that it was white, then, right, if they criticized you to that extent?
>
> A. I think they were criticizing me to the fact that they say we promote minorities.
>
> . . .
>
> Q. You stated that you had been criticized by the majority—and I would assume that whites are the majority—to the fact that the next promotion would probably be a black one?
>
> A. That is true.
>
> . . .
>
> Q. If there were to be a promotion tomorrow to captain, would the number two person automatically get it, or would there be a whole new interview?
>
> A. For correctional captain, we would probably hold another interview.

Q. So, in essence, if you came in second, you have profited none?

A. You have to put them in priority order.

At the hearing, the prison warden who promoted the white lieutenant testified that he would have promoted a black if the promotee could not serve.

The State put on no evidence, contending that "although he [Hodge] is an eminently qualified correctional lieutenant, [he] was not as qualified for the position of correctional captain as the person who was selected for the position." The ALJ determined in favor of Hodge that the State's decision was racially discriminatory. The State appealed the ALJ's recommendations and opinion to the full Commission, pursuant to N.C.G.S. § 150B-36(a).

The Commission made the following Conclusions:

1. Mr. Edward Earl Hodge . . . is a permanent State employee who has worked at Central Prison since 1969 and served as Lieutenant for more than twelve years. Because [Hodge] has alleged racial discrimination as the reason he was not promoted to Captain, the Office of Administrative Hearings has jurisdiction to hear the matter and submit a recommendation to the State Personnel Commission which shall make a final decision in the matter. North Carolina General Statutes 126-16, 126-36, 126-37 and 150B-23.

2. Whe[n] discrimination is an issue, [Hodge] bears the ultimate burden of proof and must establish a prima facie case of discrimination by providing sufficient facts in order to raise an inference of discrimination. In his effort to establish a prima facie case of discrimination, [Hodge] has shown the following: That he is a member of a protected class/group (minority); that he applied for a position which he qualified for; that the position was previously held by a Black; that the three persons who interviewed applicants and recommended a White employee for the position were White; that one member of his interviewing committee is not sure he understands affirmative action; that shortly before his interview, he was the subject of an unusual counseling session involving two committee members; that a member of

the committee penalized him for allegedly making statements about Central employees involved in executions and later posed for a newspaper photo in the gas chamber; that the majority of other personnel interviewing committees at his institution included a minority member; that the person who appointed the interviewing committee and followed its recommendation was White; that all three committee members gave him 20 of 25 points[,] which gives the appearance of being prearranged; that at least two members of the committee based their decisions partly on hearsay or uncorroborated allegations from two White Males; that the decision resulted in Central Prison having five White Captains and one Black Captain with 44% of the custody staff and 50% or more of inmates being Black; that he scored much higher on the Captain's Eligibility Exam than the successful applicant; that his 1985 and 1986 job performance evaluations had been excellent, but he received negative comments from a committee member in his 1987 evaluation which followed his appeal of this matter; and, that he had several more years of service as a Lieutenant and more experience as acting shift commander than the successful applicant.

Thus, [Hodge] has established a prima facie case of racial discrimination.

3. [The State], on the other hand, has given nondiscriminatory reasons for its decision to promote Lieutenant Sherwood McCabe rather than [Hodge]. McCabe received the highest ranking by the interviewing committee; he met the minimum qualifications for the position; he is well respected by inmates and staff; he has a reputation for fairness, maturity, self-control, deliberation and evaluation before acting. The members of the committee, while recognizing [Hodge]'s capabilities, were concerned by allegations that his manner at times had intimidated those under his supervision. [Hodge]'s outspokenness on issues such as smoking and executions at Central Prison has also aggravated some of his fellow employees and superiors. Thus, [the State] has rebutted [Hodge]'s prima facie case of racial discrimination.

4. While [the State] has advanced what it contends to be non-discriminatory reasons for not selecting [Hodge], [Hodge] has rebutted this evidence and has shown that [the State]'s reasons were in fact a pretext for intentional discrimination. [Hodge]'s evidence has shown that in addition to having more general experience than the successful applicant, [Hodge] specifically had more first shift experience. [Hodge] had been placed in charge of the first shift in an acting supervisory capacity by the previous Captain. Additionally, [Hodge] scored the highest score of all applicants on the objective test and had previously received the rating of "Exceeds Expectations" on his WPPRs.

Absent a direct admission by [the State] that the decision not to select [Hodge] was based, even in part on the impermissible consideration of his race, evidence of discrimination must be gleaned from the existing facts and circumstances. In the present case, [Hodge]'s 18 years experience with [the State] during which he received high ratings on his performance evaluations, had been apparently incident free. Yet, this service and unusually high performance ratings were not considered; based on the evidence, it appears that the scores derived from the interviews were the sole ranking factors used in making a recommendation for the promotion. The incident chosen by the [State] as a factor in not selecting him, had not previously been considered significant enough to merit even an oral warning or to be documented officially until three months after the event. But, this incident was apparently significant to be one of the bases for denying this promotion to [Hodge]. One other complaint which [the State] found significant about [Hodge] was that he had irritated other employees at his unit because of his insistence that prison policy be strictly followed and because he had instigated unpopular policy changes which prohibited smoking in closed areas. The lack of significance of these two matters, in the context of eighteen years of above-average service, prompts the conclusion that these reasons were, indeed, only a pretext for racial discrimination.

> [Hodge] has met and carried his burden of showing that he was discriminated against on the basis of his race by [the State]'s failure to select him for the Captain's position.

The Commission ordered the State to promote Hodge to the next captain's vacancy, pay Hodge "back and front pay," and pay Hodge's reasonable attorney fees.

The State petitioned the superior court for judicial review according to N.C.G.S. § 150B-43, alleging that the Commission's order was affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious. The State also submitted to the court a motion to stay operation of the Commission's order.

After conducting a hearing, the superior court judge entered an order affirming the Commission's decision, based on its determination that the decision was not affected by errors of law, not contrary to presented evidence, not arbitrary and capricious, and was supported by substantial evidence in view of the entire record. The order also denied the State's motion to stay operation of the Commission's order.

The issues are whether the Commission's findings and conclusions are (I) (A) affected by an error of law or (B) unsupported by substantial admissible evidence; (II) whether the Administrative Law Judge erred in allowing Hodge to introduce evidence after hearing of the matter; and (III) whether the trial court erred in denying the State's motion to stay operation of the order in favor of Hodge.

I

"Our review of an administrative agency's decision is governed by the Administrative Procedure Act, and we may reverse or modify the [agency's] decision only if it violates one of five statutory grounds." *Cowan v. N.C. Private Protective Services Bd.*, 98 N.C. App. 498, 502, 391 S.E.2d 217, 219 (1990) (citation omitted); N.C.G.S. § 150B-51 (1987). Generally, our review is also limited by properly presented assignments of error and exceptions. N.C.R. App. P. 10 (amended 1989).

Based on the assignment of error, we determine if "the agency's findings, inferences, conclusions, or decisions are . . . [a]ffected

by . . . error of law [or] [u]nsupported by substantial evidence admissible under G. S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted . . ." N.C.G.S. § 150B-51(b)(4) and (5).

We apply the "whole record" test in determining whether the agency's findings and conclusions are supported by substantial evidence. *Cowan*, at 502, 391 S.E.2d at 219 (citations omitted). As a reviewing court utilizing the 'whole record' test, we take 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.* (citations omitted). In applying this test, we do not substitute our own judgment for the Commission's judgment " 'as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before [us] *de novo.*' " *Thompson v. Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citation omitted). We merely "determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

A

[1] The State contends that the Commission erred as a matter of law by applying erroneous evidentiary standards and legal principles in evaluating Hodge's claim of discrimination. We disagree.

In determining what test the Commission must apply, we "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." *N.C. Dept. of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

> It is the policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race . . . by employers which regularly employ 15 or more employees.

N.C.G.S. § 143-422.2 (1987).

> Any State employee . . . who has reason to believe that . . . promotion . . . was denied him . . . because of his

> . . . race . . . shall have the right to appeal directly to the State Personnel Commission.

N.C.G.S. § 126-36 (1989). The purpose of N.C.G.S. §§ 126-36 and 143-422.2 is the elimination of discriminatory practices in employment, the same purpose as federal Title VII, 42 U.S.C. 2000e *et seq. Gibson*, at 141, 301 S.E.2d at 85.

When reviewing "hiring and promotion decisions that were based on the exercise of personal judgment or the application of inherently subjective criteria," a court may employ either or both a 'disparate treatment' test and a 'disparate impact' test. *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 101 L.Ed.2d 827, 841-43 (1988) (citation omitted) (determining that both tests may be applied to employers using objective tests and subjective interview evaluations); *Mallory v. Booth Refrigeration Supply Co., Inc.*, 882 F.2d 908 (4th Cir. 1989) (applying both tests). When an employee alleges that the employer treated him or her in particular less favorably than other employees, the employee raises a claim of 'disparate treatment.' *Watson*, 101 L.Ed.2d at 839. Here, Hodge alleged both types of discrimination, but offered evidence only of the State's disparate treatment form of discrimination.

According to the 'disparate treatment' analysis, the employee "has the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination." *Patterson v. McLean Credit Union*, 491 U.S. ---, 105 L.Ed.2d 132, 157 (1989) (citation omitted). The employee meets this burden by proving that:

> [1] [he] applied for and was qualified for an available position, [2] that [he] was rejected, and that [3] after [he] was rejected [the employer] . . . filled the position with a white employee. . . . Once the [employee] establishes a prima facie case, an inference of discrimination arises . . . to rebut this inference, the employer must present evidence that the [employee] was rejected, or the other applicant was chosen, for a legitimate, nondiscriminatory reason. . . . employee retains the final burden of persuading the jury of intentional discrimination.

Id. (citations omitted).

A legitimate nondiscriminatory reason is an employer's promotion of a better-qualified employee than complainant. *Id.*

After the employer rebuts the employee's prima facie showing, the employee has "the opportunity to demonstrate that [the employer's] proffered reasons for its decision were not its true reasons." *Id.; cf. Price Waterhouse v. Hopkins*, 490 U.S. ---, 104 L.Ed.2d 268, 281 (1989) (describing employee's burden of proof in a "mixed motive" case, when the employer admits to using both a nondiscriminatory motive and a questionable motive).

The whole record shows that the Commission used the appropriate evidentiary standards and legal principles to evaluate this evidence. The Commission's findings and conclusions clearly set out the elements of each step delineated above, including Hodge's prima facie case, the State's rebuttal and Hodge's showing of pretext, as well as the shifting burdens of production and Hodge's burdens of proof for showing racial discrimination.

B

[2] The State asserts that record evidence is insufficient to support the Commission's findings and conclusions that Hodge was in fact better qualified for the position than the promoted employee and that therefore, the State's nondiscriminatory reason was a pretext for racial discrimination. We disagree.

In support of the Commission's decision, the Commission first concluded as a matter of law that Hodge met his burden by showing by a preponderance of the evidence a prima facie case of discrimination. The parties stipulated that Hodge is a member of a minority race, that he was qualified for the position, and that the State rejected his application and promoted a white lieutenant.

The Commission next concluded as a matter of law that the State rebutted Hodge's prima facie showing by setting forth a nondiscriminatory reason for the State's decision not to promote Hodge, that the promoted lieutenant was better qualified than Hodge. In support of this reason, the State proffered evidence of the interview committee's ranking of Hodge fourth out of eight candidates, its ranking of the promoted employee first of eight candidates, and the Warden's heavy reliance on the committee's recommendation.

The ranking is some evidence that the promotion selection committee scored the promoted employee as higher qualified than Hodge in the categories of judgment and leadership.

Finally, the Commission concluded as a matter of law that the State's qualification reason was a pretext for racial discrimination.

An employee may use "various" forms of evidence to demonstrate that the State's proffered reason was not its true reason. *Patterson*, 105 L.Ed.2d at 158. An employee "might seek to demonstrate that [the employer's] claim to have promoted a better-qualified applicant was pretextual by showing that [he] was in fact better qualified than the person chosen for the position. . . . [Employee] may not be forced to pursue any particular means of demonstrating that [the employer's] stated reasons are pretextual." *Id.*

The whole record contains substantial evidence that Hodge was in fact better qualified for the job by the criteria advanced by the State for judging applicants. The Commission had a 'rational basis in the evidence' for deciding that the State's decision was pretextual in light of cumulative evidence that the interviewers were sensitive to criticisms that a black would be in line for the next correctional captain position and that the State disregarded the strength of Hodge's achievement in meeting the State's criteria for promotion. Excluding the interview evaluations in comparing Hodge to the promoted employee, Hodge scored 9% higher on the eligibility examination and showed that he had 50% more experience in years working at Central Prison, and 100% more experience in years serving as a correctional lieutenant.

The committee's interview was the only part of the application process in which Hodge was rated less qualified than another candidate, and its rankings contradict Hodge's achievements on objective tests evaluating his knowledge of the same subjects tested in the interview. The State's use of the interview as the sole criteria for not promoting Hodge contravened its own system of promotion, in which the State used the interview as one item that carried more weight than all of the other items of evaluation combined. In any event, although cumulative scoring of the interview categories yields an eleven-point difference between the promoted applicant's score of 71 of 75 points and Hodge's grade of 60, closer evaluation of the interview scores makes insignificant this differential and shows the comparable rankings of the candidates. Each of the three interviewers evaluated Hodge on five categories, giving rise to fifteen possible scores. Hodge's scores were within one point of the promoted employee's score on fourteen of the fifteen individual

scores, in several of which Hodge scored higher. On the remaining score, one interviewer rated Hodge two points lower than the promoted employee, another interviewer rated Hodge equal to the promoted employee, and the third interviewer rated Hodge one point below the promoted employee. Thus, the apparent significant downgrading of Hodge's qualifications compared to the promoted employee's qualifications evaporates in light of these slight numerical differentials and Hodge's achievements compared to the promoted employee's achievements.

The State contends that Hodge cannot show pretext because the interview committee rated a black applicant second most qualified for the promotion and a black would have been promoted if the white promotee did not fill the position. We disagree.

The evidence conflicts on whether Hodge would not have been promoted if the white promotee were removed from the position. The Central Prison personnel director testified that because of the importance of the position, the State would have conducted a new interview process if the recommended candidate had not filled the position. Such testimony does not show conclusively that the next candidate in line, a black, would have automatically received the position. Additionally, to assume automatic promotion for the employee ranked second in the interview portion of the evaluation would unduly weight the interview in contravention of the State's policy of considering all factors for promotion. The evidence reveals that the candidate rated second in the interview and eight points higher than Hodge on the fifteen interview score areas, had seven less years of experience at Central Prison than Hodge, eight less years of lieutenant experience, a 13-point lower score on the captain's eligibility test, and less favorable yearly employment appraisals.

II

The State contends that it was prejudiced by the ALJ's decision to allow Hodge to submit additional evidence after holding formal hearing. Because we did not consider the additional evidence for purposes of this appeal, we discern no prejudice to the State and do not address this issue.

III

The State argues finally that the superior court erred in denying its motion to stay operation of the court's judgment for Hodge.

Because we determine that the court and the Commission properly ruled in Hodge's favor, we need not address this issue.

Affirmed.

Judges JOHNSON and PARKER concur.

STATE OF NORTH CAROLINA v. RONALD JUNIOR COTTON

No. 8815SC1152

(Filed 7 August 1990)

1. **Criminal Law § 85.3 (NCI3d)— rape—evidence of sexual harassment at work—admissible**

The trial court did not err in a prosecution for first degree rape, first degree sexual offense, and first degree burglary by admitting evidence that defendant had touched female employees in a sexually offensive manner and had made sexually offensive comments to female employees. Although the State would have not been allowed to introduce this evidence in the first instance, the trial court did not err in allowing the State to rebut defendant's evidence of a good employment record.

Am Jur 2d, Evidence § 321; Rape §§ 71, 75.

2. **Criminal Law § 85.3 (NCI3d)— rape—sexually offensive conduct at work—victims at work similar to rape victims—no prejudice**

There was no prejudice in a prosecution for first degree rape, first degree sexual offense, and first degree burglary from the admission of testimony that the victims here were of the same race and of similar ages of waitresses at defendant's place of employment who had been the victims of defendant's offensive touching and offensive language. Although the ages and race of the female employees were not relevant to rebutting the defendant's evidence that he was a good employee, there was no reasonable possibility that exclusion of the ques-

tioned evidence would have caused the jury to reach a different verdict.

Am Jur 2d, Evidence § 321; Rape §§ 71, 75.

3. **Criminal Law §§ 50, 66.1 (NCI3d)— identification—expert testimony excluded—no error**

The trial court did not err in a prosecution for first degree rape, first degree sexual offense, and first degree burglary by excluding defendant's expert witness on identification where the court found that the evidence was relevant but of no more than minimal value to the jury and that admission of the evidence would be unduly prejudicial in defendant's favor. Moreover, the court charged the jury that it should consider many factors such as stress, lighting, and race which the expert witness included in his voir dire testimony. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Expert and Opinion Evidence § 278.

Judge JOHNSON dissenting.

APPEAL by defendant from Judgment of *Judge D. Marsh McLelland* entered 25 November 1987 in ALAMANCE County Superior Court. Heard in the Court of Appeals 11 May 1989.

Attorney General Lacy H. Thornburg, by Associate Attorney General Debra C. Graves, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey, for defendant appellant.

COZORT, Judge.

The primary question presented by this appeal is whether the trial court committed reversible error when it allowed the State to introduce testimony from the defendant's employer that the defendant, who was on trial for rape and other offenses, had touched female employees in a sexually offensive manner and had made sexually offensive comments to the female employees. Under the particular facts of this case, we find no reversible error.

The defendant was charged with two counts of first-degree rape, two counts of first-degree sex offense and two counts of first-degree burglary. The names of the victims are not necessary

for the resolution of this appeal; they shall be referred to as the first victim and the second victim. The crimes for which the defendant was charged occurred in the early morning hours of 29 July 1984. In January of 1985, the defendant was tried for and convicted of one count each of first-degree burglary, first-degree rape and first-degree sex offense involving the first victim. On appeal to the North Carolina Supreme Court, the defendant was awarded a new trial. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). The matter came on for trial again at the 9 November 1987 session of Alamance Superior Court, where the defendant was tried for the offenses involving both victims.

The State offered evidence tending to show that at approximately 3:00 to 3:30 a.m. on Saturday, 29 July 1984, the first victim was awakened by an intruder in her bedroom. The intruder jumped on her, put his hand over her mouth and held a knife to her throat. The intruder pulled the first victim's underwear off, held her legs down and performed oral sex on her. The intruder sucked her breasts, tried to kiss her, and penetrated her vagina with his penis four or five times. The intruder stayed in the first victim's apartment for about 30 minutes. She was able to escape by running out the back door and running to a nearby apartment.

Two days later, the first victim went to the police station where she viewed a photographic lineup containing six photos. She identified the defendant as her assailant. On 8 August 1984, the first victim participated in a live lineup where she again selected the defendant as her assailant.

The second victim testified that she was asleep on the couch in her den during the early morning hours of 29 July 1984 when she was awakened at about 5:00 a.m. by a draft on her feet. She looked up and saw a man in her house. When she sat up, the man fondled her breasts. The man went out the back door and around the house. The second victim went over to close a window, but the man reached through the window and pulled down the top of the garment she was wearing. She tried to use the phone, but it went dead. The man crashed through the front door and grabbed the second victim. The man pushed her down the hall to a bedroom, pulled off her clothes, threw her on the bed and sucked on her breasts. He licked her stomach and her vagina, and then crawled on top of her, putting his penis in her vagina. The man then left through the front door, after having been in

the second victim's house for 20 to 30 minutes. The second victim then ran out of her house to a neighbor's house.

Two days later the second victim was shown a photographic lineup containing six photographs of black men. She was unable to pick out her assailant. The defendant's photograph was included in the array shown to the second victim. On 8 August 1984, the second victim participated in a live lineup, viewing seven black males. She wrote down the number of the man standing next to the defendant. The second victim testified she recognized the defendant as her assailant; however, she wrote down the wrong number because she was scared that the defendant, who could see her during the lineup, would get loose and kill her if she identified him. In court, she identified the defendant as her assailant.

The defendant relied on mistaken identification and alibi. Both victims were cross-examined extensively about their ability to see well enough in the reduced light to identify the assailant. The defendant produced witnesses who testified that defendant was at his mother's house asleep on the sofa on the morning of 29 July 1984. The defendant testified that he went to sleep on the sofa at his mother's house at about 3:00 a.m. on 29 July 1984 and did not get up until around noon the next day. The defendant testified that he had a prior conviction of assault on a female with intent to commit rape and a prior conviction of breaking and entering.

Defendant was convicted of one count of first-degree rape, one count of first-degree sex offense, one count of second-degree rape, one count of second-degree sex offense, and two counts of first-degree burglary. Defendant was sentenced to a total term of imprisonment of life plus 54 years at expiration. Defendant appealed.

[1] In his first assignment of error, the defendant contends the trial court erred by allowing testimony from the defendant's employer that the defendant touched waitresses "on their shoulders, and their bodies, and their rears," and talked to two of the waitresses "about sex." The witness further testified that the waitresses were white and that the two to whom the defendant talked about sex were 18 and 47. The defendant contends the admission of the evidence was prejudicial error, especially when considering that the first victim was a white 22-year-old female and the second victim was

a white 41-year-old female, and the defendant is black. We find no reversible error.

The defendant's employer, a restaurant manager, testified for the State that defendant, a dishwasher at the restaurant, had worn clothes the same as or similar to the clothes worn by the man who committed the crimes against both victims on 29 July 1984. On cross-examination, defendant's counsel asked: "Was Mr. Cotton a good employee for you, sir?" The witness answered: "Yes." On redirect, over defendant's objection and after a voir dire, the witness was allowed to testify: "[The defendant] was always messing with the waitresses . . . touching them . . . on their shoulders, and their bodies and their rears, and telling dirty jokes." The witness testified that the defendant directed his comments "about sex" to two white waitresses, ages 18 and 47.

The defendant contends that the evidence was not admissible under N.C. Gen. Stat. § 8C-1, Rule 404(a)(1). The defendant further argues that, even if the evidence did have some probative value, it should have been excluded under Rule 403 because the danger of unfair prejudice to the defendant substantially outweighed any probative value of the evidence. We do not agree.

Rule 404(a)(1) provides for the admission of character evidence of the accused when the testimony concerns "evidence of a pertinent character trait of his character offered by an accused, or by the prosecution to rebut the same." In *State v. Squire*, the North Carolina Supreme Court held that "pertinent" was tantamount to "relevant," making the key determination "whether the trait in question is relevant; i.e., whether it would 'make the existence of any fact that is of consequence to the determination of the action' more or less probable than it would be without evidence of the trait. N.C.G.S. § 8C-1, Rule 401." 321 N.C. 541, 547-48, 364 S.E.2d 354, 358 (1988). Character evidence must be tailored to those pertinent traits which are "relevant in the context of the crime charged." *Id.*

Defendant was charged with two counts of burglary, two counts of rape and two counts of sex offense. His employment record had no relevance to any of those offenses. Thus, neither the defendant's evidence that he was a good employee nor the State's rebuttal evidence of his bad conduct toward fellow employees was admissible under Rule 404(a)(1). Nonetheless, "[o]ur courts will allow the State to introduce evidence, even when it is not otherwise admis-

sible, if it is 'offered to explain or rebut evidence elicited by the defendant himself.' " *State v. Fultz*, 92 N.C. App. 80, 85, 373 S.E.2d 445, 448 (1988) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)). Therefore, while the State would not have been allowed to introduce, in the first instance, evidence of the defendant's bad conduct toward fellow employees, we hold that the trial court did not err in allowing the State to rebut the defendant's evidence of a good employment record.

[2] Our next inquiry is whether the trial court went too far, however, in permitting the State to elicit testimony that the offensive touching and offensive language was directed toward waitresses of the same race and similar ages of the victims who testified. We agree with the defendant that the ages and race of the female employees in question was not relevant to rebutting the defendant's evidence that he was a good employee. Not every evidentiary error, however, entitles the defendant to a new trial. The defendant must show that the error was prejudicial, i.e., he must show there is 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 contends the error was prejudicial because the similarity between the ages and race of the victims and that of the waitresses invited the jury to infer guilt based on improper inferences and appealed to "the still pervasive and deeply ingrained prejudices that permeate the subject of interracial sexual interactions." We do not agree. First, the first victim's identification of the defendant as her assailant was certain and largely unimpeached under extensive cross-examination. Second, the second victim's identification, while not as strong as that of the first victim, was nonetheless substantial evidence which pointed to the defendant as her assailant. The defendant's alibi witnesses gave inconsistent accounts of the defendant's whereabouts at the crucial times, and the defendant's initial statement to investigators concerning his activities on the days in question was totally inconsistent with his trial testimony concerning his activities on those days. Furthermore, defendant testified that he pled guilty in 1980 to assault on a female with intent to commit rape and that he pled guilty in 1983 to breaking and entering. Upon review of these factors and the remainder of the record in this case, we conclude that the admission of the evidence of the ages and race of the waitresses was not prejudicial error. We are not of the opinion that there

is a reasonable possibility that exclusion of the questioned evidence would have caused the jury to reach a different result. The defendant's first assignment of error is overruled.

[3] In his second assignment of error defendant contends the trial court erred in excluding testimony from an expert witness on identification. The defendant offered the testimony of Dr. Reed Hunt, a professor of psychology engaged in research in human memory. Upon the State's objection, the trial court conducted a voir dire, during which Dr. Hunt testified that he had studied the testimony of the two victims and other portions of the trial transcript and the record. Dr. Hunt testified that it was his opinion that there were certain factors present which affected the eyewitness identification. He listed lighting, stress, cross-racial identification, priming of memory, unconscious transfer, and loss of memory over time as factors affecting the identification. At the conclusion of the voir dire, the trial court sustained the State's objection to Dr. Hunt's testimony. We find no error.

This court has held that the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 of the Rules of Evidence. *State v. Knox*, 78 N.C. App. 493, 495-96, 337 S.E.2d 154, 156 (1985). In ruling to exclude the proffered testimony below, the trial court stated:

> The court is of the opinion that the factors effecting [*sic*] eyewitness identification of one accused of a violent crime . . . are commonly recognized as relevant and are not so uncontroverted and misapprehended by lay persons as to make expert testimony concerning their application of more than minimal value and assistance to a jury.
>
> Emphasis on the frailty of human perception presented by an unbiased expert in such matters, in itself, constitutes an argument of potentially substantial weight in favor of the accused. This court is of the opinion that the proposed evidence is relevant but that its admission would be unduly prejudicial in the defendant's favor and the objection to admission is, therefore, sustained.

The trial court's statement indicates that the court found the evidence to be relevant; however, the court also found the evidence

to be of no more than minimal value and assistance to the jury. The court then found that the admission of the evidence would be unduly prejudicial in the defendant's favor. We find that the trial court properly appraised the probative and prejudicial value of the evidence, and we hold that the court, in the exercise of its discretion under Rule 403, could exclude Dr. Hunt's testimony. We also observe that, in its charge to the jury, the trial court instructed the jury that, in making a determination as to the validity of an identification, the jury should consider many factors, including stress, lighting, whether it is more difficult to identify one who is a member of another race, and some of the other factors Dr. Hunt included in his voir dire testimony.

In summary we find the defendant's trial to be free of prejudicial error.

No error.

Judge GREENE concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority's opinion that the erroneous admission of evidence of the race and ages of waitresses defendant directed offensive touching and language toward was nonprejudicial. The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction. *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981).

The complained of evidence was introduced during the following colloquy. For the sake of brevity, defendant's objections and the court's rulings have been omitted.

Q. Mr. Byrum, Mr. Moseley asked you previously about whether or not Mr. Cotton was a good employee of yours; is that correct?

A. Yes, sir.

Q. Now, during the time Mr. Cotton was in your employ, did you have occasion to personally witness any problems with Mr. Cotton, while he was working for you?

A. Well, the one problem was with the waitress [sic]; it wasn't with doing his job.

Q. What kind of problem was it with the waitresses Mr. Byrum?

A. He was always messing with them.

Q. How do you mean, "messing with them," Mr. Byrum?

A. Touching them.

Q. Touching them where?

A. On their shoulders, and their bodies, and their rears, and telling dirty jokes.

Q. The shoulders, the bodies, and rear?

A. Yes, sir; different places.

Q. And how often did this go on, Mr. Byrum?

A. He touched about every Friday and Saturday night.

Q. And he only worked on Friday and Saturday nights; is that correct?

A. Yes, sir; unless I called him in on Thursday nights.

Q. All right; and how old were the waitresses, Mr. Byrum?

A. They usually run like high school; up to 50, 55.

Q. So, well, in particular, at the time that he was working for you, you had waitresses there between the ages of what, would you say?

A. 18 and 55.

Q. And, in particular, the waitresses that you—that he was touching on the rear end and touching on the shoulder; how old were they?

A. Between the same ages; it was not just—

A. It was not just one waitress; it was just about all of 'em [sic].

Q. And, other than the touching them on the rear, and on the body, did he do anything else with respect to those waitresses? [sic]

A. I said, "No," sir.

Q. Did he say anything to these waitresses?

A. Yes, sir.

Q. And what kind of things were they? [sic]

A. Usually about sex; I don't remember, you now [sic], word for word what it was; but it was always pertaining to that subject.

Q. And did that also pertain to all of the waitresses, and not just one or two?

A. Well, it was two, more than anybody else.

Q. All right, and do you recall the ages of those two waitresses?

A. One was like 18; and one was 47, I believe.

. . . .

Q. What was the race of these waitresses?

A. White.

The threshold question in the case was one of identity. The evidence presented by the State was far from overwhelming. The only evidence presented by the State that had strong probative weight was the identification testimony of the two victims. The force of that evidence was significantly impugned, particularly by other evidence of record not set out in the facts of the majority opinion.

First, as to victim one, the evidence also tended to show that she was nearsighted and was not wearing her glasses during the attack upon her, and the only illumination in the room was from a street lamp filtering through her blinds; that during the time her assailant was in her presence he made efforts to keep her from seeing his face; that upon viewing a photographic lineup on 31 July containing six photos, one of which was of defendant, she initially chose two pictures from the array, one of which depicted defendant. After examining those two pictures for a number of minutes, she told the investigating officer that defendant's photo "looks most like him." On 8 August, she viewed a physical lineup consisting of seven men. Defendant was the only participant whose picture had been among those in the photographic array. Again, the victim was instructed to choose the one that looked the most like her assailant. After viewing the participants for a while, she

told the officer that it was between participants numbers four and five. She then stated that number five, defendant, "looks the most like him."

As to the second victim, the evidence also tended to show that on the two occasions that the assailant entered her house he directed the beam of a flashlight in her face; that other than the flashlight beam the only source of light in the house was from a television set which was not on when her attacker entered the second time. On 31 July, the second victim viewed the same photographic lineup of six photos, including defendant's photo, that the first victim had viewed. Likewise, she was told to pick out the photo of the individual who most resembled her assailant. She failed to pick out anyone from this array. When she viewed the physical lineup on 8 August 1984, and picked out a Kenneth Watkins as her attacker, she thereafter asked the officer conducting the lineup if she had picked out the right person. On cross-examination she stated that she tried to pick out the right man, but had made a mistake.

The majority opinion points out that defendant's alibi witnesses gave conflicting and inconsistent testimony and that defendant's initial statement to investigators was inconsistent with his alibi testimony at trial concerning his activities on the days in question. While defendant's alibi evidence was not unassailable, this evidence was not without probative force.

This was not a racially motivated trial. On the contrary, it was a trial in which two women who were brutally attacked, terrorized and raped sought relief through the criminal justice system. However, the injection of the complained of evidence which the majority agrees was erroneously admitted, invited the jury, whether intentionally or unintentionally, to reach a verdict based upon this contamination.

It seems clear that from all of the probative evidence of record that there was a serious and legitimate question as to identity, and I believe that the totality of the circumstances establishes a reasonable possibility that the complained of evidence induced the jury to substitute emotional and racial prejudices in reaching a verdict and contributed to defendant's conviction. I would therefore vote for a new trial.

CHERRY BEKAERT & HOLLAND, A NORTH CAROLINA GENERAL PARTNERSHIP
v. J. CHARLES BROWN

No. 8926SC1074

(Filed 7 August 1990)

1. Process § 9 (NCI3d)— nonresident individual—monies sent from N.C. to defendant—long-arm statute applicable

Because defendant, who withdrew from plaintiff partnership, directed plaintiff to send his monies to him in Alabama, and plaintiff distributed the money from N.C., the money paid was "shipped from this State by the plaintiff to defendant on his order or direction" within the meaning of the long-arm statute, N.C.G.S. § 1-75.4(5)(d); moreover, the present controversy over amounts owed by defendant to plaintiff for advising plaintiff's clients after defendant withdrew from the partnership was sufficiently related to previous payments by plaintiff in N.C. to defendant for his monthly draws and his capital account to merit long-arm jurisdiction.

Am Jur 2d, Process §§ 175, 178, 185.

2. Process § 9.1 (NCI3d)— nonresident defendant—sufficiency of contacts with N.C.—exercise of in personam jurisdiction proper

Defendant's contacts with N.C. were sufficient to allow in personam jurisdiction over him in this breach of contract action where the parties executed and conducted business pursuant to an N.C. partnership contract; the agreement existed for several years; pursuant to the agreement defendant received monthly and annual disbursements of earnings as well as his share of capital assets from N.C.; defendant obtained and renewed a CPA license from N.C. and used the license to provide accounting services for N.C. residents; defendant voluntarily associated with a business venture, whose primary place of business was N.C., to derive profitable business from N.C. and participated in the venture by serving Alabama and N.C. clients; N.C. thus had a specific interest in exercising personal jurisdiction over defendant to determine whether his actions damaged plaintiff; defendant returned to N.C. for yearly corporate meetings, participated in partnership management decisions as managing partner of the Mobile office, and consulted by telephone and corresponded with plaintiff in N.C.

concerning business matters on a continuous and prolonged basis; defendant received benefits from the partnership contract and could have enforced the contract against plaintiff in N.C. courts; and location of witnesses and evidence in N.C. did not suggest that defendant would be unfairly inconvenienced by litigating this claim in N.C.

Am Jur 2d, Process §§ 186-190.

APPEAL by defendant from order entered 2 August 1989 by *Judge Frank W. Snepp, Jr.* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 10 April 1990.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins III and Frank A. Hirsch, Jr., for plaintiff-appellee.

Moore & Van Allen, by Randel E. Phillips and Sharon L. Moylan, for defendant-appellant.

GREENE, Judge.

Defendant appeals the trial court's denial of his Rule 12(b)(2) motion to dismiss plaintiff's breach of contract suit for lack of personal jurisdiction.

The record shows that defendant J. Charles Brown is a certified public accountant who now resides in Alabama. Plaintiff Cherry, Bekaert & Holland is a North Carolina partnership of certified public accountants with its principal place of business in Charlotte, North Carolina, since approximately 1974. Plaintiff first employed defendant in 1975 as a salaried accountant in Goldsboro, North Carolina. Defendant moved to plaintiff's Alabama office in 1977, where he drew a salary until 1979. In 1979, defendant became an "income partner" with plaintiff partnership and in 1981, became an "equity partner." Defendant signed the "equity partner" agreement on 9 January 1981, in Mobile, Alabama, and plaintiff's managing partner accepted and signed the agreement on behalf of the partnership on 14 January 1981, in Mecklenburg County, North Carolina. The "equity partnership" agreement provided in pertinent part:

> 15.7 . . . The withdrawing or expelled Partner's cash basis capital account shall be paid to him within ninety (90) days following the effective date of withdrawal or expulsion.
>
> . . .

> 15.9 . . . said withdrawing or expelled Partner shall pay to the Partnership, for the purchase of any client served . . . by said Partner within a three[-] (3) year period following the termination of his relationship with the Partnership, an amount not less than one hundred and fifty percent (150%) of the fees charged said client by the Partnership during the last twelve[-] (12) month period during which the Partnership served said client prior to said client being served by the said Partner plus an amount representing the excess, if any, of the fees charged by the said Partner for the twelve[-] (12) month period commencing with the time said Partner first served said client over the fees charged by the Partnership referred to above.
>
> . . .
>
> 18.1 This agreement is made in Charlotte, North Carolina, and its validity, construction and effect shall be governed by and construed under the laws of the State of North Carolina.

Defendant gave notice that he was resigning from plaintiff's partnership effective 31 December 1987. After defendant's resignation from the partnership, he received his interest in the capital account from the partnership. Defendant continued to advise plaintiff's clients after his withdrawal from the partnership, and pursuant to section 15.9 of the partnership agreement plaintiff seeks monetary damages from defendant "for each client [defendant] serves within a three[-] (3) year period following his withdrawal from [plaintiff], an amount not less than one hundred fifty percent (150%) of the fees charged to the client by [plaintiff] during the last twelve (12) months during which [plaintiff] served with client." Defendant was personally served with process in Mobile, Alabama, and moved to dismiss this complaint in North Carolina according to N.C.G.S. § 1A-1, Rule 12(b)(2) (1983).

In summary form, the evidence adduced at the hearing of defendant's motion to dismiss indicates that during defendant's relationship with plaintiff partnership, the partnership held meetings which defendant attended in Charlotte, North Carolina. The North Carolina Association of Certified Public Accountants listed defendant as a "non-resident" accountant and he paid dues to the North Carolina Association based on his nonresident status. Defendant maintained a public accounting license in the State of North Carolina as well as in the State of Alabama. Defendant provided accounting and tax services to some clients in North Carolina from his office

in Alabama. He regularly received his "base-draw and his year-end draw" from plaintiff's earnings and profits, which were distributed from funds deposited in a North Carolina bank. Plaintiff's payments of these funds were regularly processed out of plaintiff's computer center located in Gastonia, North Carolina, and mailed to defendant in Alabama. As a partner in the partnership, defendant traveled to North Carolina "from time to time" to report on the progress of the Mobile, Alabama, office, was involved in telephone conference calls from Alabama with other partners or employees of plaintiff in Charlotte, North Carolina, and regularly corresponded with the Charlotte office "regarding the management and administrative concerns" of plaintiff. In denying defendant's motion to dismiss, the trial court entered an order which provided in pertinent part:

> IT APPEARING TO THE COURT from the facts set forth in the Motion of the defendant, and in the opposition papers filed by the plaintiffs[,] including the affidavits and exhibits attached thereto and the pleadings and papers filed herein, that the defendant's . . . [motion] should be denied . . .

The issues are whether the trial court should have denied defendant's motion to dismiss plaintiff's complaint for lack of personal jurisdiction because (I) statutory "long-arm" jurisdiction (A) did not exist since defendant did not order or direct plaintiff to send him from North Carolina a 'thing of value' and (B) plaintiff's action does not relate to the 'thing of value' sent from North Carolina; and (II) defendant did not have the required minimum contacts with North Carolina.

Although neither party states the basis for jurisdiction of this appeal, we note that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . ." N.C.G.S. § 1-277(b) (1983).

We make a two-part inquiry to determine whether *in personam* jurisdiction exists. *Tompkins v. Tompkins*, 98 N.C. App. 299, 301, 390 S.E.2d 766, 767 (1990). "First, the transaction must fall within the language of the State's 'long arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). "[When] jurisdiction is challenged,

plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists." *Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987) (citation omitted). "[T]he 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." *Tompkins*, at 304, 390 S.E.2d at 769 (citation omitted).

We note that the trial court did not make any findings of fact to support his ruling denying defendant's motion to dismiss. However, when there is no request of the trial court to make such findings, "we presume that the judge found facts sufficient to support the judgment. . . ." *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989). "[If the] presumed findings are supported by competent evidence in the record, [they] are conclusive on appeal, notwithstanding other evidence in the record to the contrary." *Id.*, at 289-90, 380 S.E.2d at 169.

I

Long-Arm Statute

> A court has jurisdiction over a person:
>
> served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances: . . . (5) Local Services, Goods or Contracts.—In any action which: . . . d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to defendant on his order or direction . . .

N.C.G.S. § 1-75.4 (1983).

A

[1] Defendant concedes that he received 'a thing of value,' money, while in Alabama and that the money came from plaintiff's checking account in North Carolina. *See Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978) (within the meaning of the long-arm statute, a money payment is a 'thing of value'). However, defendant contends that plaintiff "could have maintained checking accounts in each of its many locales, [but t]here is no showing that [plaintiff] chose instead to process those checks [from North Carolina] because of any 'order or direction' [by defendant]." We disagree.

Record evidence shows that when defendant withdrew from partnership, demanding payment of the sums, plaintiff actually paid such sums to defendant from its North Carolina account, facts which fulfill the statutory requirements for long-arm jurisdiction. Defendant argues a strict interpretation of N.C.G.S. § 1-75.4(5)(d) which would require personal jurisdiction only if defendant's 'order or direction' specifies that plaintiff *ship from this state* a thing of value. Defendant's argument is untenable in light of our courts' policy of liberally and broadly construing statutory jurisdictional requirements in favor of finding personal jurisdiction. *See Church*, at 290, 380 S.E.2d at 169. Because defendant directed plaintiff to send his monies to him in Alabama and plaintiff distributed the money from North Carolina, the money paid is 'shipped from this State by the plaintiff to defendant on his order or direction.'

B

Defendant also argues that long-arm jurisdiction does not exist because this action does not "relate" to plaintiff's payments to defendant of his monthly and yearly draws from the earnings and profits of the partnership and to the distribution by plaintiff to defendant of his capital account. We disagree.

Admittedly, this action for breach of contract does not "arise out of" any dispute regarding payment by plaintiff to defendant of his monthly draws and his capital account, as these terms are used in N.C.G.S. § 1-75.4(5)(a-c) and N.C.G.S. § 1-75.4(6). There is no present controversy relating to these previous payments. However, both the present controversy and plaintiff's previous payments to defendant arise from a single contract into which these parties entered, and liberally construed, the present controversy is sufficiently related to the previous payments 'shipped from this State by the plaintiff to the defendant on his order or direction' to merit long-arm jurisdiction.

II

Due Process Requirements

[2] Defendant contends that while he did have contact with North Carolina, the contacts are so attenuated that maintaining the suit offends traditional notions of fair play and substantial justice. We disagree.

> To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice. . . .'" In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law . . . This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there."

Tom Togs, Inc., at 365, 348 S.E.2d at 786 (citations omitted). The forum state may exercise jurisdiction over a defendant if there are "sufficient 'continuous and systematic' contacts between the defendant and the forum state." *Williams*, at 427, 355 S.E.2d at 181 (citation omitted).

Factors for determining existence of minimum contacts include " '(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.' " *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159, *affirmed per curiam*, 326 N.C. 480, 390 S.E.2d 137 (1990) (citations omitted). In each case, it is essential that defendant purposely act to avail himself of "the privilege of conducting activities within the forum State, thus invoking the protections and benefits of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298, *reh'g denied*, 358 U.S. 858, 3 L.Ed.2d 92 (1958). Additionally, defendant's contacts with the forum state must be such that he or she "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed.2d 490, 501 (1980).

Defendant's contacts with North Carolina are numerous and more than adequate for jurisdictional purposes, as set out below.

First, the parties' execution of and conduct of business pursuant to a North Carolina partnership contract is sufficient for *in personam* jurisdiction.

"[A] single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this state . . . [and] [u]nder North Carolina law, a contract is made in the place where the last act necessary to make it binding oc-

curred." *Tom Togs, Inc.*, at 365, 367, 348 S.E.2d at 785, 786. A 'substantial connection' occurs when the parties have a "long[-] standing agreement" whose "payment arrangements" include the transfer of funds between the nonresident and the forum state. *Park v. Sleepy Creek Turkeys, Inc.*, 60 N.C. App. 545, 549, 299 S.E.2d 670, 672 (1983). "[A] continuing contractual business relationship, not one or two isolated transactions," is sufficient to establish *in personam* jurisdiction. *Harrelson Rubber Co. v. Layne*, 69 N.C. App. 577, 583, 317 S.E.2d 737, 741 (1984).

Here, the parties entered into the partnership agreement executed in North Carolina, which has a substantial connection to this state because the agreement existed for several years, pursuant to which plaintiff transferred funds to defendant. Defendant received monthly and annual disbursements of earnings as well as his share of capital assets from North Carolina.

Second, defendant purposefully availed himself of the privilege of conducting business in this state. Entering into a contract made in this state which has a substantial connection with this state constitutes a defendant's purposeful act in availing himself of the privilege of conducting activities in North Carolina. *Tom Togs, Inc.*, at 367, 348 S.E.2d at 787. Defendant's affirmative efforts to obtain and renew a certified public accountant's license from North Carolina and using the license to provide accounting services for North Carolina residents show defendant's purposeful acts obtaining and using this privilege.

Third, North Carolina has a specific interest in exercising personal jurisdiction over defendant to determine whether his actions damaged plaintiff.

"[A] state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Id.* (taking judicial notice that "textile manufacturing is an important industry in North Carolina, giving North Carolina a special interest in [the] litigation"). When the state takes a 'special interest' in a particular subject of litigation, "North Carolina law would be the law to be applied." *Id.*, at 368, 348 S.E.2d at 787.

> 'North Carolina has a legitimate interest in the establishment and *operation of enterprises* and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the state for that purpose.'

Harrelson Rubber Co., at 586, 317 S.E.2d at 743 (citation omitted) (emphasis added). An "enterprise" is "[a] *venture* or undertaking[,] especially one involving financial commitment." Black's Law Dictionary 476 (5th ed. 1976) (emphasis added). "A partnership is a combination of two or more persons, their property, labor, or skill in a common business or *venture* under an agreement to share profits or losses, [in which] each party is an agent to the other and the business. *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110, 362 S.E.2d 807, 810 (1987) (emphasis added); N.C.G.S. § 59-36 (1989). North Carolina regulates the practice of certified public accounting in N.C.G.S. Chapter 93, §§ 93-1—13 (1985), and partnerships in the Uniform Partnership Act, N.C.G.S. §§ 59-31—59-73 (1989).

Defendant voluntarily associated with a business venture whose primary place of business is North Carolina, to derive profitable business from North Carolina, and participated in the venture by serving Alabama and North Carolina clients.

Fourth, defendant had a quantity of other 'systematic and continuous' contacts with North Carolina sufficient to show general jurisdiction. *Johnston v. Gilley*, 50 N.C. App. 274, 278, 273 S.E.2d 513, 516 (1981) (defendant's participation in management of a resident business entity is a factor that shows that defendant's contacts with the forum state are continuous, purposeful and systematic). Defendant returned to North Carolina for yearly corporate meetings, participated in partnership management decisions as managing partner of the Mobile office, consulted by telephone and corresponded with plaintiff in North Carolina concerning business matters on a continuous and prolonged basis. Each of these circumstances also illustrates that defendant sought, obtained and exercised the 'privilege of conducting activities in this state.'

Fifth, defendant received benefits from the partnership contract, and could have enforced the contract against plaintiff in North Carolina courts. If defendant derives benefits from the agreement and could have enforced the agreement in forum courts, personal jurisdiction is proper. *Harrelson Rubber Co.*, at 585, 317 S.E.2d at 742.

Sixth, location of witnesses and evidence in North Carolina does not suggest that defendant will be unfairly inconvenienced by litigating this claim in North Carolina.

"Litigation on interstate business transactions inevitably involves inconvenience to one of the parties." *Id.*, at 587, 317 S.E.2d at 743. When "[t]he inconvenience to defendant of litigating in North Carolina is no greater than would be the inconvenience of plaintiff of litigating in [defendant's state] . . . no convenience factors . . . are determinative of the jurisdictional issue." *Id.* "[T]he location of crucial witnesses and material evidence . . . [are prohibitive concerns against granting jurisdiction in the forum state, but if nothing in the record] necessitates litigating this action in [defendant's home state there is] no untoward inconvenience on defendant. . . ." *Church*, at 293, 380 S.E.2d at 171.

Finally, defendant could reasonably foresee that partnership agreement disputes between plaintiff and him would be resolved in North Carolina courts, and it is fair to each party to resolve them in North Carolina.

The "crucial" foreseeability of being subject to litigation in the forum court is whether defendant could reasonably anticipate being haled into court. *Miller v. Kite*, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985). "In making this determination, the interests of, and fairness to, both the plaintiff and the defendant must be considered and weighed." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 678, 231 S.E.2d 629, 632 (1977).

A factor in determining fairness concerning a breach of contract cause of action is whether the contract expressly provides that the law of the forum state would apply to actions arising out of the contract. *See Marion v. Long*, 72 N.C. App. 585, 589, 325 S.E.2d 300, 304, *review denied, appeal dismissed*, 313 N.C. 604, 330 S.E.2d 612 (1985) (citation omitted). This partnership agreement specifically provides that North Carolina law governs the agreement.

In summary, we determine that competent record evidence supports the necessary presumed findings of fact sufficient to warrant the trial judge's denial of defendant's motion to dismiss for lack of personal jurisdiction.

Affirmed.

Judges WELLS and EAGLES concur.

HARVEY H. ALLEN, PLAINTIFF v. WARNELL SIMMONS, DEFENDANT

No. 8921DC1155

(Filed 7 August 1990)

1. **Landlord and Tenant § 19.1 (NCI3d)— rent abatement—directed verdict for landlord—error**

The trial court should not have granted a directed verdict against defendant tenant, who had counterclaimed for rent abatement, where there was sufficient evidence to go to the jury on whether the house was uninhabitable during the period in which defendant did in fact pay rent and there was evidence of the value of the premises in a fit condition and its value in an uninhabitable state. Nothing in the Residential Rental Agreements Act precludes the tenant from recovering damages for breach of the covenant of habitability where she has withheld rent; however, damages for rent abatement could only include those amounts actually paid for substandard housing. N.C.G.S. § 42-38 *et seq.*

Am Jur 2d, Landlord and Tenant §§ 614-616.

2. **Fraud § 4 (NCI3d)— landlord—representations concerning repairs—directed verdict for landlord**

The trial court properly entered directed verdict on a claim for fraud where defendant alleged in a counterclaim that plaintiff fraudulently induced defendant to rent unfit premises by promising to make needed repairs; defendant's evidence shows that plaintiff's agent did in fact make the repairs, albeit not to the satisfaction of defendant; and there is no evidence that at the time of his promise plaintiff intended not to make the repairs.

Am Jur 2d, Landlord and Tenant § 791.

3. **Unfair Competition § 1 (NCI3d)— landlord—substandard housing—unfair trade practice**

A jury could find on the record that plaintiff committed an unfair trade practice and the trial court erred in not submitting factual issues to the jury where defendant has shown that, as a lessee of a residential dwelling, she is a member of the consuming public; there is evidence that plaintiff had made an arrangement with Scott Realty to act as his agent

in leasing this particular house; Scott Realty was in fact engaged in the business of selling and leasing real estate; defendant has presented evidence that the house contained numerous defects which existed throughout her tenancy and rendered the house unfit and uninhabitable; plaintiff received numerous notices about the unfit and uninhabitable state of the house but failed to respond; Scott Realty attempted to collect rent after defendant discontinued payments and plaintiff even went to defendant's house in an effort to collect past due rent; as a result of the unfit conditions defendant suffered additional expenses associated with the house; and plaintiff's behavior can be considered immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Am Jur 2d, Landlord and Tenant § 791; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

4. **Trespass § 2 (NCI3d)— landlord—substandard housing—intentional infliction of emotional distress—not shown**

Defendant's claim for intentional infliction of emotional distress arising from the condition of housing which she rented from plaintiff failed because she did not produce evidence that she suffered serious mental distress or any bodily harm resulting from mental distress.

Am Jur 2d, Landlord and Tenant §§ 791, 793.

5. **Damages § 17.7 (NCI3d)— landlord—intentional infliction of mental distress not shown—no punitive damages**

The trial court did not err in not submitting punitive damages arising from the leasing of substandard housing where plaintiff failed to present evidence of intentional infliction of mental distress.

Am Jur 2d, Damages § 259.

6. **Evidence § 28 (NCI3d)— landlord—public records—admissible**

The trial court erred in a rent abatement action by refusing to allow the Housing Conservation Administrator to testify about public records already admitted and their significance; however, there was no prejudice in refusing the witness permission to read from the records because the records themselves had already been admitted into evidence.

Am Jur 2d, Evidence §§ 991, 999.

APPEAL by defendant from judgment entered 12 June 1989 by *Judge Abner Alexander* in FORSYTH County District Court. Heard in the Court of Appeals 2 May 1990.

This is an action seeking rent abatement and damages resulting from fraudulent representations, intentional infliction of emotional distress, unfair and deceptive trade practices and punitive damages. Defendant and her deceased husband rented property located at 1803 North Liberty Street, Winston-Salem, North Carolina from plaintiff through his agent Scott Realty. Prior to moving into the house, defendant visited the house with a man from Scott Realty. On this initial visit defendant found and pointed out several defects in the property. The defects included: holes in some of the walls; a damaged faucet on the kitchen sink; electrical problems, plumbing that leaked in the bathroom and in the basement; a damaged commode; a damaged hot water heater; fleas; broken glass; and no furnace. Scott Realty, acting as plaintiff's agent, allegedly promised to make the needed repairs before defendant moved into the house. Defendant agreed to pay two hundred dollars per month rent and moved into the house in November 1985. Defendant discontinued rent payments after the August 1986 payment. She vacated the premises in July 1987. Plaintiff initiated a summary ejectment action against defendant in magistrate's court on 10 March 1987. Defendant filed an Answer and Counterclaim on 23 March 1987. On 8 April 1987 plaintiff prevailed in the summary ejectment action. Defendant gave notice of appeal to the district court on 5 June 1987.

During trial, defendant testified that even when she first moved into the premises many of the needed repairs had not been done. Defendant further testified that every time she paid rent, she orally informed Scott Realty "about the holes, the furnace and everything else that was wrong with the house." She testified that she even "wrote down what was wrong with the house and carried it" to Scott Realty. Defendant testified that after she moved in, plaintiff installed a hot water heater in the house and sent someone out to see about the lights, to fix the electric plugs in the wall, to put a spigot in the bathroom and to fix the commode, but except for the hot water heater, many of the attempted repairs did not correct the problems. She stated that plaintiff did not install a furnace until the last day before she moved out in July 1987. Defendant testified that the holes in the wall and the hole under the kitchen sink were never fixed. She stated that big rats that "[l]ooked like little kittens" would come through the holes in her

walls. Defendant further testified that Mr. Wilson did in fact send someone out to put a piece of "plyboard" over the hole under the sink but the rats would cut through it again. Defendant further testified that she had problems with her pipes bursting the first winter she lived in the house because the house had no heat other than the wood stove that she had installed. She stated that the wood stove only heated the front room and the back bedroom, leaving the rest of the house cold. Defendant testified that she would leave her "cook stove oven" on and that she eventually bought an "oil circulator" but still could not heat the entire house. Defendant testified that during her tenancy, the house caught on fire from defective electrical wires. She stated that she did not see plaintiff for the first time until after the fire. She testified that plaintiff returned once again in February 1987 to demand two hundred dollars for rent. Defendant testified that she stopped paying rent after August 1986 because plaintiff did not fulfill his promise to fix the house.

During trial, Darwin Hudler, the Housing Conservation Administrator for the City of Winston-Salem Housing Services Department, testified that the house had been declared unfit for human habitation as early as 12 July 1983; however, those conditions were corrected and the house was deemed fit for human habitation on 4 June 1984. Hudler further testified that from October of 1985 through August of 1986, defendant had not complained to the City of Winston-Salem concerning the fitness of the property for habitation. On 5 September 1986, while defendant was still an occupant of the premises, the house was declared unfit by city officials. The following deficiencies requiring attention were listed on the Housing Inspection Report: "Replace broken window panes; Install door knobs; Repair plumbing leak under structure; Install non-absorbent material on toilet room floor; Repair commode; Repair sink fixtures; Replace [heating] 'thimble'; Repair defective light fixtures; Install loose floor covering in kitchen; Paint or treat exterior wood with protective coating; Repair holes in walls and ceilings; Replace loose wall and ceiling materials; Repair or replace steps at interior; Repair or replace handrail at interior steps; Maintain floors, walls, ceilings and fixtures in clean and sanitary condition; Clean yard of rubbish, trash and garbage; Remove heavy undergrowths; Have structure exterminated of insects, rodents and other pests; Ceiling insulation is now required in all dwellings."

At the close of all the evidence, the trial court entered directed verdict against defendant on her counterclaims seeking damages for fraud, retroactive rent abatement and other damages including excessive utility costs, damages for intentional infliction of emotional distress, unfair and deceptive trade practice damages, and punitive damages. Plaintiff's motion to dismiss his action without prejudice was then allowed. Defendant appeals.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Hazel M. Mack, for defendant-appellant.

EAGLES, Judge.

[1] Defendant assigns as error the trial court's entry of directed verdict against her. Defendant argues that when the evidence is considered in the light most favorable to defendant, it is sufficient to justify submission of her counterclaims to the jury. Defendant argues that "the evidence that the premises never met city code standard was sufficient to allow the jury to decide whether defendant is entitled to rent abatement." We agree.

Initially we note that

> [i]n reviewing the grant of a directed verdict on appeal, we "must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff." "[T]he evidence in favor of the nonmovant 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."

Kuykendall v. Turner, 61 N.C. App. 638, 641, 301 S.E.2d 715, 718 (1983). (Citations omitted.)

"By the enactment in 1977 of the Residential Rental Agreements Act, N.C. Gen. Stat. Secs. 42-38 *et seq.*, our legislature implicitly adopted the rule, now followed in most jurisdictions, that a landlord impliedly warrants to the tenant that rented or leased residential premises are fit for human habitation. The implied warranty of habitability is co-extensive with the provisions of the Act." *Miller v. C.W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 366, 355 S.E.2d

189, 192 (1987). G.S. 42-38 provides that "[t]his Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State." G.S. 42-40(3) defines "landlord" as "any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article." G.S. 42-42(a) provides that

> (a) The landlord shall: (1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code; (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition; (3) Keep all common areas of the premises in safe condition; and (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

G.S. 42-44(a) further provides that "[a]ny right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity." Tenants may bring an action seeking damages for breach of the implied warranty of habitability and may also seek rent abatement for their landlord's breach of the statute. *See Surratt v. Newton*, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

> [A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

Miller at 371, 355 S.E.2d at 194.

In his brief, plaintiff argues that by unilaterally withholding rent prior to a "judicial determination," under G.S. 42-44(c) defend-

ant waived her right to bring any action which arose out of her tenancy. Nothing in the Act precludes a tenant from recovering damages for breach of the covenant of habitability where she has withheld rent; however, damages for rent abatement can only include those amounts *actually paid* by defendant for substandard housing. *See Surratt, supra.* "We construe these provisions to provide an affirmative cause of action to a tenant for recovery of rent paid based on the landlord's noncompliance with G.S. 44-42(a). . . ." *Miller* at 368, 355 S.E.2d at 193.

During trial, defendant testified that many of the conditions found to be in violation of the Winston-Salem Housing Code existed at the time she moved in the house and that plaintiff's attempts at correcting those conditions were either unsuccessful or temporary. On these facts there is sufficient evidence to go to the jury on whether the house was uninhabitable during the period in which plaintiff did in fact pay rent. There is evidence of the value of the premises in a fit condition and its value in its uninhabitable state. On this record there is sufficient evidence for the jury to determine whether defendant was entitled to rent abatement.

[2] Secondly, defendant contends that there is evidence from which a jury could find that plaintiff fraudulently induced defendant to rent unfit premises by promising to make needed repairs. Defendant contends that plaintiff falsely promised to repair the property "knowing that he had no intent of making the investment necessary to repair the property properly." We disagree.

"The 'constituent elements' which must be established to prove actual fraud are: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Shreve v. Combs*, 54 N.C. App. 18, 21, 252 S.E.2d 568, 571 (1981). "In order for a promissory representation to be the basis of an action for fraud, facts must be alleged from which a court and jury may reasonably infer that the defendant did not intend to carry out such representations when they were made. This amounts to a misrepresentation of an existing fact." *Whitley v. O'Neal*, 5 N.C. App. 136, 139, 168 S.E.2d 6, 8 (1969). A principal is liable for the acts of its agent acting within the range of the agent's employment, even if not expressly author-

ized by the agent. *See Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224 (1937).

Defendant has presented a forecast of evidence that Scott Realty was an agent of plaintiff acting within the scope of its agency during the time that employees of Scott Realty were showing defendant the rental property. Prior to defendant's agreement to rent the house plaintiff's agent represented that he would make the needed repairs. Here, however, during trial defendant testified that Scott Realty had made repairs to the premises although she felt that they (repairs) "didn't do no good." Defendant's evidence shows that plaintiff's agent did in fact make the repairs albeit not to the satisfaction of defendant. We find no evidence that at the time of his promise plaintiff intended not to make the repairs he was promising to make. Accordingly, the trial court properly entered directed verdict on the issue of fraud.

[3] Next, defendant contends that the evidence was sufficient to permit factual findings by the jury that the plaintiff committed an unfair trade practice. Defendant contends that the house was "deplorable" at the time she rented the property. Defendant argues that plaintiff was aware of the needed repairs but did not honor his promise to correct the deficiencies. Defendant further argues that the premises were unfit for human habitation, but plaintiff himself visited the premises to demand rent for unfit premises in February 1987. Defendant contends that the conditions complained of throughout her tenancy were the same unfit conditions identified by the City in the September 1986 inspection report. Defendant contends that "the plaintiff's behavior is at the very least unfair and fits all the definitions that the courts have used in determining the types of acts prohibited by Chapter 75." We agree.

The purpose of G.S. Chapter 75 is "to provide means of maintaining 'ethical standards of dealings . . . between persons engaged in business and the consuming public' and to promote 'good faith and fair dealings between buyers and sellers. . . .' " *Love v. Pressley*, 34 N.C. App. 503, 517, 239 S.E.2d 574, 583 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially in-

> jurious to consumers. As also noted in *Johnson*, under Section 5 of the FTC Act, a practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. Consistent with federal interpretations of deception under Section 5, state courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act.
>
> If unfairness and deception are gauged by consideration of the effect of the practice on the marketplace, it follows that the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public. Consequently, good faith is not a defense to an alleged violation of G.S. 75-1.1.

Mosley & Mosley Builders, Inc. v. Landin Ltd., 97 N.C. App. 511, 517, 389 S.E.2d 576, *disc. rev. denied*, 326 N.C. 801, 393 S.E.2d 898 (1990), *quoting Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "As an essential element of a cause of action under G.S. 75-16, plaintiff must prove not only that defendants violated G.S. 75-1.1, but also that plaintiff has suffered actual injury as a proximate result of defendants' misrepresentation." *Bailey v. LeBeau*, 79 N.C. App. 345, 352, 339 S.E.2d 460, 464 (1986), *decision affirmed as modified by* 318 N.C. 411, 348 S.E.2d 524 (1986). The conduct must be fraudulent or deceptive. *Coble v. Richardson Corp.*, 71 N.C. App. 511, 322 S.E.2d 817 (1984). "[T]he rental of residential housing is 'trade or commerce' under G.S. 75-1.1." *Love* at 516, 239 S.E.2d at 583.

Here defendant has shown that as lessee of a residential dwelling she is a member of the consuming public. In this record there is evidence that plaintiff had made an arrangement with Scott Realty to act as his agent in leasing this particular house. By Mr. Alfred Scott's own admission during trial, Scott Realty was in fact engaged in the business of selling and leasing real estate. Defendant has presented evidence that the house contained numerous defects which existed throughout her tenancy and rendered the house unfit and uninhabitable. Here plaintiff had received numerous notices including notices dated 13 October 1986, 14 January 1987 and 23 March 1987 about the unfit and uninhabitable state of the house but plaintiff failed to respond to any of them. Despite the

unfit conditions of the house, Scott Realty attempted to collect rent after defendant discontinued payments and plaintiff even went to defendant's house in February 1987 in an effort to collect past due rent for the unfit house. That behavior can be considered "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *See Mosley, supra.* As a result of the unfit conditions defendant suffered additional expenses associated with the house. We hold on this record that a jury could find that plaintiff committed an unfair trade practice and the trial court erred in not submitting the factual issues to the jury.

[4] Defendant next contends that the trial court erred in failing to submit to the jury the issue of intentional infliction of emotional distress damages. Defendant argues that plaintiff's conduct exceeded the bounds of decent society which are set out in the Winston-Salem City Code and G.S. 42 *et seq.* Defendant further argues that since plaintiff was "trapped in [a] situation with malfunctioning plumbing, no heat, rats and dangerously defective wiring," a jury could find that she suffered emotional distress. Defendant contends that plaintiff's intent to cause emotional distress can be inferred from continuing to demand rent while ignoring three city orders that condemned the property.

> The tort of intentional infliction of mental or emotional distress was formally recognized in North Carolina by the decisions of our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). The claim exists "when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.' " *Id.* at 196, 254 S.E.2d at 622, *quoting* Prosser, The Law of Torts, § 12, p. 56 (4th Ed. 1971). The elements of the tort consist of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. *Dickens v. Puryear, supra.*
>
> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself. *Id.* at 452-53, 276 S.E.2d at 335.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119-20, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140, 346 S.E.2d 141 (1986).

Here, defendant's claim fails because on this record she has not produced evidence that she suffered "mental distress of a serious kind" or any other bodily harm resulting from mental distress. Accordingly, this contention is without merit.

[5] Next defendant contends that the trial court erred in failing to submit the issue of punitive damages to the jury. Defendant contends that she has a claim under Chapter 42 as well as an identifiable tort, the intentional infliction of emotional distress. Defendant argues that the tort itself does not justify an award of punitive damages but the plaintiff's willful refusal to provide the defendant with fit and habitable conditions justifies an award of punitive damages. We disagree.

As we have previously determined, defendant has failed to present evidence of intentional infliction of emotional distress, which she contends is an identifiable tort required for an award of punitive damages. Accordingly, the trial court did not err in declining to submit this issue to the jury. *See Oestreicher v. American National Stores, Inc.*, 290 N.C. 118, 225 S.E.2d 797 (1976).

[6] Finally, defendant assigns as error the trial court's refusal to allow defendant's witness, Darwin Hudler, to testify concerning his personal knowledge about documents already admitted into evidence and to read from those documents already admitted into evidence. Defendant contends that "[u]nder the rules of evidence, Mr. Hudler 'can testify about the records so long as the records themselves were admissible under the business record (sic) exception [or any other exception] to the hearsay rule' " and the witness is familiar with the system in which the records were made and maintained, citing *U.S. Leasing Corp. v. Everett, Creech, Hancock & Herzig*, 88 N.C. App. 418, 363 S.E.2d 665, *disc. rev. denied*, 322 N.C. 329, 369 S.E.2d 364 (1988). We agree.

Here the witness testified that the records were public, kept in the ordinary course of business and prepared under his personal supervision at or near the time of the inspections. Under the rationale of *U.S. Leasing, supra*, the witness should have been permitted to testify about the records and their significance. In her brief defendant also argues that the trial court erred in refusing to

allow the witness to read from the official record already admitted into evidence. Here, since the records themselves were admitted into evidence, any error in refusing the witness permission to read from the records is not prejudicial to defendant.

Defendant has failed to address assignments of error numbers 7 and 8 in her brief. Pursuant to Rule 28 they are deemed abandoned.

In summary, with respect to defendant's claims for rent abatement and unfair and deceptive trade practices, we remand this cause for a new trial. With respect to the issues concerning alleged fraud, intentional infliction of emotional distress and punitive damages, we affirm the trial court.

Affirmed in part; reversed in part and remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. MICHAEL BRIAN CHURCH

No. 8927SC637

(Filed 7 August 1990)

1. Criminal Law § 293 (NCI4th)— separate indictments charging child abuse—offenses similar—consolidation proper

The trial court did not err in consolidating for trial separate indictments against defendant for child abuse where the victim was burned about the mouth on 11 August and on the buttocks on 26 August; both burns were circumscribed and discrete, indicating that the victim was immersed in the burning agent; both injuries were sustained at the same place, the family residence; both injuries were inflicted while defendant was taking care of his wife's sons; in neither instance did defendant seek medical treatment for the victim, though urged to do so by other family members; and there was thus ample evidence of similarities of the crimes constituting a fingerprint of the perpetrator.

Am Jur 2d, Indictments and Informations §§ 221, 223, 224.

2. Criminal Law § 34.4 (NCI3d)— child abuse charged—evidence of wife abuse—any error corrected by court's instruction

In a prosecution of defendant for child abuse the trial court did not err in allowing defendant's wife to testify about assaults committed upon her by defendant, since the testimony was given to explain why the mother did nothing when she saw burns on her child; the trial court *sua sponte* instructed the jury that the evidence of defendant's assaults on his wife was offered only to show why the witness did not take any action; the court further instructed the jury that they were not to consider the testimony as evidence of the bad character of defendant and that the evidence was not offered to show that on the occasions alleged in the bills of indictment defendant acted toward the victim in conformity with his conduct toward his wife; and defendant failed to show a reasonable possibility that a different result would have been reached at trial had the evidence been excluded.

Am Jur 2d, Evidence § 321.

3. Parent and Child § 2.2 (NCI3d)— misdemeanor child abuse—child burned about the mouth—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for misdemeanor child abuse where the evidence tended to show that the child's face was burned while he was under defendant's supervision and no other adults were present; the facial burn was perfectly round, indicating that the child had been immersed in hot liquid; and the child suffered from battered child syndrome. N.C.G.S. § 14-318.2.

Am Jur 2d, Infants § 16.

4. Parent and Child § 2.2 (NCI3d)— felonious child abuse—second degree burns on buttocks—sufficiency of evidence of serious injury

There was no merit to defendant's contention that the trial court erred in refusing to dismiss the charge of felonious child abuse in the absence of evidence that the child suffered serious injury, since evidence tended to show that the child suffered second degree burns on his buttocks; second degree burns, which cause a layer of skin to peel, are very painful; if left untreated, they cause permanent disfigurement; and the child's second degree burns were several days old before

they received professional medical treatment in the hospital. N.C.G.S. § 14-318.4.

Am Jur 2d, Infants § 16.

5. **Criminal Law § 1110 (NCI4th) — child abuse — aggravating factor of desertion from Army — finding proper**

The trial court in a prosecution for child abuse did not err in finding as a factor in aggravation that defendant had violated the military code of justice and deserted from the armed forces where defendant admitted that he was AWOL from the U. S. Army; the evidence showed that this fact dictated the family's secretive life style and was directly related to defendant's child care responsibilities and opportunity for abuse of the child; and defendant's desertion therefore increased his culpability.

Am Jur 2d, Criminal Law § 599; Evidence §§ 321, 328.

6. **Criminal Law § 1114 (NCI4th) — child abuse — aggravating factor of failure to render aid to child victim — finding proper**

The trial court in a child abuse case did not err in finding as a factor in aggravation that defendant failed to render aid to a helpless 17-month-old child who was in defendant's custody and care for three days, during which time the child was suffering from painful second degree burns.

Am Jur 2d, Criminal Law § 599; Evidence §§ 321, 328.

7. **Criminal Law § 1214 (NCI4th) — child abuse — mitigating factor that defendant was abused child — insufficiency of evidence**

The trial court in a child abuse case did not err in declining to find as a factor in mitigation that defendant was himself the victim of child abuse, since testimony by defendant and his sister, who admitted bias against their mother, that the mother had abused them was not manifestly credible.

Am Jur 2d, Criminal Law § 599; Evidence §§ 321, 328.

APPEAL by defendant from judgment entered 25 January 1989 by *Judge Robert E. Gaines* in CLEVELAND County Superior Court. Heard in the Court of Appeals 18 January 1990.

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

Brenda S. McLain for defendant-appellant.

PARKER, Judge.

Three indictments were returned against defendant. The first alleged that on 11 August 1988 he committed the felonies of assault with a deadly weapon with intent to kill inflicting serious injury, maiming, and child abuse. The victim's injury in this indictment was a second-degree burn around his mouth. A second indictment alleged that on 26 August 1988 the defendant committed felonious child abuse. In this instance the victim's injury was a second-degree burn on his buttocks. The third indictment alleged the felonies of assault with a deadly weapon inflicting serious injury and child abuse. The victim's injuries consisted of brain damage and skull fractures.

The jury found defendant guilty of misdemeanor child abuse based on the 11 August incident, the scalding of the victim's face. Defendant was also found guilty of felonious child abuse based on the 26 August 1988 injury, the burning of the victim's buttocks. Defendant was found not guilty of assault with a deadly weapon inflicting serious injury based on the head trauma.

At sentencing on the charge of felonious child abuse, the trial court found two factors in aggravation and two factors in mitigation, ruled that the factors in aggravation outweighed those in mitigation, and sentenced defendant to an eight-year term of imprisonment, the presumptive sentence being three years. On appeal we find no error.

In the summer of 1988 defendant Michael Brian Church, his wife, Sandra, and two of her children lived together in a trailer in rural Cleveland County. Defendant had recently moved his family from their home in Kentucky for the purpose of escaping his military service commitment. To avoid being found by United States Army authorities, defendant was not working outside the home. His wife worked and he kept her two sons; he described himself as a house-husband. Defendant owned a car which he would not let his wife drive. Driving on back roads to escape notice, defendant drove his wife to work and picked her up. Sandra Church's children rode

along on these trips. Defendant knew the area well because he had grown up there and his extended family lived in the area.

On the morning of 11 August defendant drove his wife to her job. He returned home and fixed oatmeal for himself and the two boys. Defendant testified at trial that he set a bowl of steaming hot oatmeal on the kitchen table. While his back was turned, the younger of his stepsons, Travis, age 17 months, took the bowl off the table and stuck his face in it. When defendant turned around and perceived what had happened, he immediately took a cloth and wiped off the hot cereal. He applied ointment to Travis' face. Later that morning defendant's mother and stepfather, Diane and Roger Rains, noticed the burn and suggested Travis needed medical attention. Defendant would not take Travis to a doctor but allowed Mrs. Rains to apply a cream containing aloe vera to Travis' face.

Medical experts at trial testified that Travis' facial burn was circumscribed, or perfectly round, which indicated the victim's face had been immersed in the burning agent and held there. In an accidental scalding the burn mark is irregular, on account of movement of the burning agent, such as splashing, running, or dripping, or some avoidance movement of the victim, such as turning away from or wiping at the burning agent. Travis sustained a second-degree burn to his face.

On the evening of 26 August, defendant, intending to bathe Travis, put him in the bathtub and turned on the water. The child defecated in the water, so defendant let the water out of the tub. The hot water was turned on while Travis was still lying in the bathtub, burning his buttocks. At trial defendant testified that his wife had burned Travis in the bath water. Sandra Church testified that the incident happened when she was at work. Upon discovering the burns when she returned, she took both children and left the trailer on foot, to seek medical treatment for Travis. Defendant followed her in his car and tried to run her and the children down. When both Mr. and Mrs. Rains later suggested to defendant that Travis needed medical attention, he ignored them. He dressed Travis in clothes which concealed the burn marks.

Again, the medical testimony indicated that Travis' burns were well circumscribed. These burns were second-degree burns.

On 30 August 1988 defendant was apprehended by Cleveland County Sheriff's deputies acting on information that defendant was

wanted for desertion from the United States Army. Sandra Church and her two sons were in the car with defendant. Travis appeared to be unconscious and was taken to Cleveland Memorial Hospital for treatment. On 31 August 1988 he was transferred to Charlotte Memorial Hospital for further treatment.

[1] Defendant brings forward seven assignments of error. Defendant first argues the trial court erred in allowing the separate indictments against him to be joined for trial. He contends the two events were distinct in that the facial burn and the burn to the buttocks occurred too far apart in time, and there were not other similarities between the two such as to constitute a fingerprint of the perpetrator. We disagree.

Two or more offenses may be joined for trial when they are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. G.S. 15A-926(a). The North Carolina Supreme Court has held that in deciding whether to allow joinder

> [t]he test to be applied is whether the offenses are so separate in time and place and so distinct in circumstances as to render consolidation unjust and prejudicial to the defendant. In so doing we must look to whether defendant was hindered or deprived of his ability to defend one or more of the charges.

State v. Corbett, 309 N.C. 382, 389, 307 S.E.2d 139, 144 (1983) (citation omitted). This Court has held that to be joined the crimes must be transactionally related either as part of a single conspiracy, because they are closely related in time, or because similarities of the crime constitute a fingerprint of the perpetrator. *State v. Williams*, 74 N.C. App. 695, 697, 329 S.E.2d 705, 707 (1985).

The record shows that the burns were not distinct. Both burns were circumscribed and discrete, indicating that the victim was immersed in the burning agent. Both injuries were sustained at the same place, the family residence. There was evidence that both injuries were inflicted while defendant was taking care of his wife's sons. In neither instance did the defendant seek medical treatment for the victim, though urged to do so by other family members. We conclude there was ample evidence of similarities of the crimes constituting a fingerprint of the perpetrator.

This Court has also held that absent a showing that the defendant has been deprived of a fair trial, exercise of the trial court's

discretion in the matter of joinder will not be disturbed. *State v. Foster*, 33 N.C. App. 145, 149, 234 S.E.2d 443, 446, *cert. denied*, 293 N.C. 255, 237 S.E.2d 537 (1977). Defendant has made no such showing, and thus we decline to disturb the exercise of the trial court's discretion.

[2] Defendant next contends that the trial court erred in allowing Sandra Church to testify about assaults committed upon her by the defendant. Defendant argues that this evidence was inadmissible under Rule 404(b) of the N.C. Rules of Evidence, because its only logical relevancy was to suggest that the defendant's behavior towards his wife showed his propensity or predisposition to burn her minor child. Defendant further argues that even if relevant, the evidence was so prejudicial that it should have been excluded pursuant to Rule 403.

Rule 404, a blanket prohibition against the admission of character evidence for the purpose of proving conduct in conformity therewith, provides an exception for evidence of other crimes, wrongs, or acts when proffered as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Rule 404(b), N.C. Rules Evid. This list of proper purposes is neither exclusive nor exhaustive. *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 n.2 (1986). In *Young* the Court stated:

> Rule 404(b) codifies the longstanding rule in this jurisdiction that evidence of other offenses is inadmissible on the issue of guilt if its *only* relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact, it will not be excluded merely because it also shows him to have been guilty of an independent crime. The defendant's general objection to the victim's response is ineffective unless there is no proper purpose for which the evidence is admissible.

Id. (citations omitted) (footnote omitted).

Sandra Church, asked on direct examination why she said and did nothing upon first seeing the burns on Travis' buttocks, replied that she was afraid of her husband. When the prosecutor asked her why she was afraid, defendant made a general objection, which was overruled, and the witness was allowed to testify as to various assaults upon her by him. The trial court *sua sponte* instructed

the jury that the evidence of defendant's assaults on his wife was offered only to show why the witness did not take any action. The court further instructed the jury that they were not to consider the testimony as evidence of the bad character of the defendant and that the evidence was not offered to show that on the occasions alleged in the bills of indictment the defendant acted towards Travis in conformity with his conduct towards his wife. Defendant's defense was that Sandra Church had committed the crimes against Travis. Thus, her testimony about the assaults tended to prove another relevant fact, namely, that she failed to act because she was afraid defendant would assault her again.

Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, N.C. Rules Evid. " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. Cameron*, 83 N.C. App. 69, 75, 349 S.E.2d 327, 331 (1986) (quoting *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986)). If there is error in the admission of evidence, defendant has the burden of showing a reasonable possibility that a different result would have been reached at trial had the evidence been excluded. G.S. 15A-1443(a). "Absent such a showing, any possible error is considered harmless and does not entitle defendant to a new trial." *State v. Cameron*, 83 N.C. App. at 75, 349 S.E.2d at 332. Here defendant has failed to make the requisite showing and is therefore not entitled to a new trial on this issue.

[3] Defendant's third contention is that the trial court erred in refusing to dismiss the charge of misdemeanor child abuse. Defendant argues that an essential element of proof under the statute is a showing that the injuries were inflicted by other than accidental means, that there was no evidence defendant immersed Travis' face in the hot cereal, and that evidence as to whether Travis' injuries were accidentally or intentionally inflicted was so speculative and conjectural as to justify the granting of defendant's motion to dismiss. We disagree.

Proof of misdemeanor child abuse requires proof of infliction of injury by other than accidental means:

> Any parent of a child less than 16 years of age, or any person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be

> inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child *by other than accidental means* is guilty of the misdemeanor of child abuse.

G.S. 14-318.2(a) (emphasis added). On a motion for nonsuit in a criminal action, all the evidence favorable to the State, whether competent or incompetent, must be deemed true and considered in the light most favorable to the State, and the State is entitled to every inference of fact that may be reasonably deduced therefrom. *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977). The North Carolina Supreme Court has said that evidence that a victim suffers from battered child syndrome raises an inference that his injuries were not accidentally inflicted. *State v. Campbell*, 316 N.C. 168, 174, 340 S.E.2d 474, 478 (1986). When examined in the light most favorable to the State, the evidence in this case was sufficient to take the charge to the jury.

That Travis' face was burned while he was under defendant's supervision and no other adults were present is uncontroverted. Competent medical evidence at trial was that Travis' facial burn was well circumscribed, or perfectly round. The burn looked like the child's face had been immersed in a bowl or cup of liquid. There were not any areas that looked as though there had been dripping, running, or motion. Instead, it appeared that something had been placed or held against the child's face. The medical evidence also included an opinion that Travis suffered from battered child syndrome and an opinion that he had been abused.

Defendant argues the evidence is equally consistent with the defendant's immersing Travis' face in the bowl of steaming hot oatmeal or Travis' immersing his own face in the bowl. Since the State was entitled to every reasonable inference that the burn was not accidental, the trial court properly denied defendant's motion to dismiss. We note the illogic of a seventeen-month-old child's purposely dipping his face into a bowl of steaming oatmeal. Even if he had done so and oatmeal had stuck to his face, as defendant contended, Travis would most likely have touched or rubbed at his face. Thus, if the burn had occurred accidentally, its contours would have been jagged and irregular instead of well circumscribed.

[4] Defendant next contends the trial court erred in refusing to dismiss the charge of felonious child abuse. Defendant argues that under G.S. 14-318.4 serious physical injury must be proved and

that the State failed to prove the burns on Travis' buttocks were serious.

Injuries are serious as a matter of law when the evidence is not conflicting and is such that reasonable minds could not differ on the serious nature of the injuries inflicted. *State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E.2d 389, 392 (1982) (reviewing conviction of assault with a deadly weapon with intent to kill inflicting serious injury). "Factors our courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work." *State v. Owens*, 65 N.C. App. 107, 111, 308 S.E.2d 494, 498 (1983).

At trial the medical evidence was that second-degree burns, which cause a layer of skin to peel, are very painful. If not treated, they cause permanent disfigurement. If over a joint, the scars left by such burns permanently impede movement of the joint. Travis' second-degree burns were several days old before they received professional medical treatment in the hospital. Under the applicable test, the State is entitled to every reasonable inference that this burn was a serious physical injury. We hold the trial court did not err in refusing to dismiss the charge of felonious child abuse.

Defendant's final three assignments of error relate to the finding at sentencing of factors in aggravation and mitigation. The trial court found as factors in aggravation that defendant was a deserter from the United States Army and that he failed to seek medical treatment for Travis at a reasonable time after the child was injured. The court declined to find as a factor in mitigation that defendant was himself the victim of child abuse.

[5] Defendant first contends the trial court erred when it found as a factor in aggravation that defendant had violated the military code of justice and deserted from the armed forces. Defendant argues that he had not been convicted of desertion, and the court, therefore, could not find the aggravating factor. We disagree. As defendant acknowledges, G.S. 15A-1340.4 does not limit a trial judge to the aggravating and mitigating factors enumerated in the statute. The criteria are that the factor be supported by the preponderance of the evidence and be reasonably related to the purposes of sentencing. G.S. 15A-1340.4(a). In the present case defendant admitted that he was AWOL from the U.S. Army and the evidence showed that this fact dictated the family's secretive life style and was

directly related to defendant's child care responsibilities and opportunity for abuse of the child. Hence, defendant's desertion increased his culpability, and the trial court did not err in finding this factor in aggravation.

[6] Defendant also attacks the finding of the second factor in aggravation, that he failed to provide Travis with medical treatment at a reasonable time after his injury. Defendant contends that under *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, *disc. rev. denied*, 318 N.C. 285, 347 S.E.2d 466 (1986), this factor in aggravation cannot properly be found. We disagree.

Rendering aid to a victim is not a statutory mitigating factor; therefore a finding of this mitigating factor is in the exercise of the trial judge's sound discretion. *State v. Spears*, 314 N.C. 319, 323, 333 S.E.2d 242, 245 (1985). For this reason, the trial judge in proper circumstances should not be precluded from finding the omission of an act to be an aggravating factor when in other circumstances the performance of that act might be a nonstatutory mitigating factor. In *Coleman, supra*, relied on by defendant, the factor at issue was remorse, which is a statutory mitigating factor. In the present case, defendant failed to render aid to the helpless seventeen-month-old child who was in defendant's custody and care for three days, during which time the child was suffering from painful second-degree burns. Such conduct increased the injury to the child and clearly increased defendant's culpability.

[7] Finally, we consider defendant's contention that the trial court erred in declining to find as a factor in mitigation that he was himself the victim of child abuse. When a defendant argues that his evidence is such as to compel the finding of a mitigating factor, "his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983), *aff'd*, 314 N.C. 644, 336 S.E.2d 385 (1985) (quoting *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979)). Where a proposed mitigating factor is nonstatutory, the trial court's failure to consider such a factor will not be disturbed absent a showing of abuse of discretion. *State v. Cameron*, 314 N.C. 516, 519, 335 S.E.2d 9, 11 (1985). Such is the case even when the factor is proven

by uncontradicted, substantial, and manifestly credible evidence. *Id.* at 519, 335 S.E.2d at 10.

Defendant's evidence on the proposed nonstatutory factor in mitigation was not manifestly credible. It consisted of his testimony that his mother had abused him and similar testimony by his sister, who admitted bias against their mother. The court had the opportunity to observe the demeanor of these two witnesses and was capable of making its own determination as to whether their testimony was credible. Even if credible, the relevance of this factor to defendant's acts as a stepfather was not established. We conclude the trial court did not abuse its discretion by declining to find the proposed factor in mitigation.

No error.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA v. BARNEY K. HUANG

No. 8910SC577

(Filed 7 August 1990)

Rape and Allied Offenses § 4 (NCI3d) — assault on a female — post-traumatic stress disorder — not admissible

The trial court erred in a prosecution for assault on a female and attempted second degree rape by admitting a psychologist's testimony concerning post-traumatic stress disorder where the probative value was outweighed by the danger of unfair prejudice in that the testimony not only directly implicated defendant, but also encouraged the jury's outrage about the injustice of defendant's alleged act. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Rape § 68.5.

APPEAL by defendant from judgment entered 9 December 1988 by *Judge J. B. Allen, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 16 January 1990.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, for the State.

John T. Barrett for defendant-appellant.

GREENE, Judge.

Defendant Barney K. Huang was tried by jury on charges of attempted second-degree rape and assault on a female. The jury acquitted him of attempted second-degree rape, but found him guilty of assault on a female, in violation of N.C.G.S. 14-33(b)(2) (1986). The trial court imposed a two-year sentence.

Defendant and the prosecutrix Grace Lee Wang (Ms. Wang) gave conflicting testimony about the incident giving rise to this prosecution. Each claimed to be the victim of the other's sexual attack.

Defendant testified that at the time of trial he was fifty-eight years old and that he held a Ph.D. in Agricultural Engineering. He had worked at North Carolina State University for over twenty-five years and had been a full professor since 1973. Defendant is about 5'3" and weighs 135 pounds. Defendant's ties to Ms. Wang's family extend back thirty years to when defendant knew her father. Defendant has known Ms. Wang since she was about five years old. In 1971, Ms. Wang married one of defendant's co-workers at N.C. State University. The Wang and Huang families were close friends. The two families socialized together about once a month.

On the morning of Sunday, 19 June 1988, the two families attended a conference of the Chinese Scholar Association for the Southeastern United States. The Huangs invited the Wangs to their home afterward so that their young boys, ages seven and nine, could play together. Due to conference obligations, Mr. Wang was unable to accept the invitation, but Ms. Wang and her son arrived at defendant's house after three o'clock that afternoon. Later in the afternoon, defendant's wife left the Huang residence to take friends to the airport, about a thirty-minute drive. Ms. Wang and defendant stayed at the Huangs' house while the two boys swam in the indoor pool.

At this point, defendant and prosecutrix's recollection of events diverge. Defendant testified that Ms. Wang asked to see his Persian rugs. After having viewed several downstairs rugs, she asked to see the upstairs rugs. She and defendant climbed a spiral stair-

case to the den located directly above the swimming pool. From there, they could hear the boys playing in the pool because the house's interior was open. After examining the rugs in the den, Ms. Wang walked through the upstairs area to look at other rugs with defendant following her. According to defendant, she walked into a bedroom which had no rug and requested to see the other rugs. Defendant retrieved a rug, brought it into the bedroom and put it over the bed for her examination. She examined two rugs in this manner and asked to see another. Defendant responded that he had no more and then requested that she return to the hallway. Defendant testified that he was concerned about the children in the pool and about his wife's return. As they retreated down the hallway, defendant suggested that they go downstairs to check on the children. At that point, Ms. Wang thanked him for showing her the rugs and hugged him very tightly. Defendant testified that her show of affection was powerful and that it caught him off guard, resulting in a loss of balance and their fall to the floor. Defendant believed their ankles crossed during the fall. While on the floor, defendant testified that Ms. Wang nibbled on his right ear lobe. They then went downstairs where the boys were still playing in the pool. Defendant testified that a scream or yell from the upstairs area would have been discernible to anyone in the swimming pool area. Defendant testified that Ms. Wang was upset following the hallway incident, and she asked him not to tell anyone about it. Defendant testified that he did not assault Ms. Wang in any manner.

Ms. Wang testified that after defendant's wife left, he came out to the pool and began talking about some carpets. He insisted that she accompany him upstairs to see the carpets. She did so and first viewed carpets in the den and upstairs hallway. Defendant then led her into one of the bedrooms to see "the very best rug he had." The rug was draped across the bed, and defendant asked her to sit on the rug. Ms. Wang decided to return to the pool area but as she walked down the hallway, defendant grabbed her from behind and would not let her go. In terror, she struggled vigorously to escape while defendant laughed. She and defendant struggled down the hallway and eventually he pushed her to the floor and pinned her there by pressing his ankles against her ankles with great force. As she continued to struggle, defendant dragged her onto a bed. She testified that he then fondled her breasts and would not release her until she bit him very hard on the

ear. She testified that he backed away and then pulled her off the bed and dragged her back into the hall. He again pushed her to the floor and pinned her there while she yelled two or three times for her son. Defendant complained a few minutes about his wife and then released Ms. Wang. Ms. Wang further testified that she retrieved her son from the pool and waited for defendant to return a video tape of hers. She testified that she incurred physical injuries as a result of the 19 June incident, including bruises on the inside of her right arm, her ankle and her back. The State introduced into evidence photographs of the various bruises described by Ms. Wang.

That evening, Ms. Wang told her husband that defendant had tried to rape her. Also that evening, she called the Rape Crisis Center. The following day, Ms. Wang and her husband decided that they would speak with defendant's wife and Ms. Wang reported the incident to the police.

The trial court admitted the expert testimony of Susan Roth, Ph.D., into evidence over defendant's objection. Dr. Roth's doctorate degree is in psychology. She is a member of the American Psychological Association and of the Society for Traumatic Stress Studies. Among other qualifications, she is on the editorial board of the Journal of Traumatic Stress, and has served as consultant for The National Stress Foundation. She has directly treated approximately 20 patients for sexual abuse, supervised the treatment of approximately 15 more, and has interviewed approximately 25 patients for research purposes. She testified that her area of expertise includes rape victims' behavior and their coping mechanisms for trauma and stress. Defendant did not object to the trial court's qualifying her as a clinical psychology expert on the behavior and treatment of sexual assault victims.

Dr. Roth testified that she first treated Ms. Wang in early July 1988, and has met with her nineteen times. She stated that Ms. Wang related to her essentially the same account of the 19 June occurrence at defendant's house as the account to which Ms. Wang had earlier testified. Dr. Roth repeated this history in summary fashion.

Dr. Roth then defined Post Traumatic Stress Disorder (PTSD) for the jury, using four criteria from the diagnostic manual of the American Psychiatric Association. In brief, she described these categories as (1) the experience of an event outside the range

of usual experience; (2) psychological re-experience of the event or circumstance; (3) avoidance of the event or circumstances; and (4) increased psychological arousal.

Dr. Roth testified in detail about the symptoms Ms. Wang exhibited which correlated with the PTSD symptoms. These included "recurrent and intrusive distressing recollections of the event," nightmares, efforts to avoid thoughts or feelings about the event, diminished interest in significant activities, emotional and social withdrawal, insomnia, irritability, hypervigilance and lack of concentration. At no time did Dr. Roth explicitly state that Ms. Wang suffered from PTSD.

For the jury's understanding, Dr. Roth discussed at length the "psychological process that underlies the symptoms," in which she explained traumatic psychological experience in general and Ms. Wang's traumatic experience in particular. She stated in part:

> In Grace's case in particular, she became very fearful both of *Mr. Huang* and also just more generally, she felt very vulnerable in the world. She also had a sense of real loss about the relationship with *Mr. Huang's* wife. . . . One does not expect a *friend* to attack you, to violate your integrity, to violate your space. . . . So, when it happens at the hands of a *friend*, it violates the sense of trust even more. I think *in terms of justice* what is very important to understand is that Grace spent a lot of time trying to understand how could this have happened, *how could something this unjust* have happened and this again is all part of the psychological process you see in response to a traumatic event.

(Emphases added.)

Last, Dr. Roth testified that Ms. Wang had not told her of any events which occurred at approximately the same time as defendant's alleged attack which could account for the symptoms she observed.

The dispositive issue is whether Dr. Roth's testimony on Post Traumatic Stress Disorder was properly admitted into evidence during defendant's trial for the offenses of attempted second-degree rape and assault on a female.

There are several relevant rules for the admissibility of expert testimony. (1) The witness's qualifications include "knowledge, skill, experience, training, or education. . . ." N.C.G.S. 8C-1, Rule 702 (1986). "It is enough that through study or experience the expert is better qualified than the jury to render the opinion regarding the particular subject." *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 604 (1985), *review denied, appeal dismissed*, 316 N.C. 198, 341 S.E.2d 581 (1986). Whether the "witness qualifies as an expert is exclusively within the discretion of the trial judge. . . ." *Id.*, 337 S.E.2d at 603. Absent a specific request, the trial court is "not required to make specific findings of fact" concerning the expert's qualifications. *State v. Bullard*, 312 N.C. 129, 144, 322 S.E.2d 370, 378 (1984). (2) The testimony of the expert must be helpful to the jury. *In re Wheeler*, 87 N.C. App. 189, 196, 360 S.E.2d 458, 462 (1987); *see also* 3 H. Brandis, *Brandis on Evidence* 134 (1988). (3) The expert's scientific technique on which he bases his opinion must be such that its "accuracy and reliability has become established and recognized." *State v. Temple*, 302 N.C. 1, 12, 273 S.E.2d 273, 280 (1981). However, the focus is on the reliability of the scientific method "rather than 'its establishment and recognition.' " *Bullard*, 312 N.C. at 149, 322 S.E.2d at 381. (4) The evidence must be relevant. N.C.G.S. 8C-1, Rule 401 (1986). Evidence is relevant if it "has any logical tendency[,] however slight[,] to prove the fact at issue in the case." *State v. Pratt*, 306 N.C. 673, 678, 295 S.E.2d 462, 466 (1982). It is relevant if it can assist the jury in "understanding the evidence." *State v. Kennedy*, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987). (5) The probative value of the evidence must not be "outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. 8C-1, Rule 403 (1986). (6) The witness may offer testimony "in the form of an opinion or inference . . ." even though it may embrace the ultimate issue to be decided by the jury. N.C.G.S. 8C-1, Rule 704 (1986). However, the expert may not testify that "such a particular legal conclusion or standard has or has not been met. . . ." *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985). (7) "[E]xpert testimony of the credibility of a witness is not admissible." *State v. Hall*, 98 N.C. App. 1, 11, 390 S.E.2d 169, 174 (1990); *see* N.C.G.S. 8C-1, Rule 405(a) (1986); N.C.G.S. 8C-1, Rule 608, Commentary (1986) ("the reference to Rule 405(a) [in Rule 608] is to make it clear that expert testimony on the credibility of a witness is not admissible").

Defendant argues that Dr. Roth's testimony on PTSD was not helpful to the jury, constituted expert testimony about the prosecuting witness's credibility, was irrelevant, was unfairly prejudicial, and utilized a fact-finding technique which had not gained general acceptance.

This court has determined that "evidence on PTSD would be admissible in North Carolina courts" when defendant was charged with second-degree rape, second-degree sexual offense, assault on a female and first-degree kidnapping. *State v. Strickland*, 96 N.C. App. 642, 648, 387 S.E.2d 62, 66, *rev. denied*, 326 N.C. 486, 392 S.E.2d 100 (1990). In *Strickland*, the expert apparently offered her testimony to rebut defendant's testimony that prosecutrix consented to intercourse. Specifically, the expert testified "that the prosecuting witness's symptoms were consistent with sexual abuse and inconsistent with *consensual* sexual activity" (emphasis added). In a more recent case, this court determined that testimony regarding PTSD was properly admitted "to help the jury determine if a rape had in fact occurred" when defendant was charged with second-degree rape and sexual activity by a substitute parent in violation of N.C.G.S. 14-27.7. *State v. Hall*, 98 N.C. App. 1, 8, 390 S.E.2d 169, 173 (1990). In *Hall*, the expert simply "testified that the prosecutrix had been diagnosed as suffering from PTSD," and nothing in the opinion suggests that the expert offered this testimony in rebuttal. *Id.*, at 7, 390 S.E.2d at 172.

The *Strickland* decision is consistent with decisions in other jurisdictions that allowed PTSD testimony into evidence to rebut defendant's testimony that sexual touching occurred with the prosecuting witness's consent. *E.g.*, *State v. Jackson*, 383 S.E.2d 79, 83 (W.Va. 1989). The *Hall* decision extends this court's decision in *Strickland* to allow PTSD testimony in rape cases to assist the jury in determining if the rape actually occurred, and expands the use of the testimony beyond that of rebutting defendant's contention that the prosecuting witness consented to intercourse.

Here, the State adduced Dr. Roth's testimony in its case-in-chief to show that PTSD is a medically-recognized disorder, that the disorder has specific recognized symptoms and that Ms. Wang's symptoms were consistent with PTSD.

We review this evidence to determine whether the evidence is admissible, consistent with the rules set out above. We find no abuse of discretion in the trial court's determination that Dr.

Roth was qualified as an expert. If believed, her testimony could be helpful to the jury in understanding the behavioral patterns of sexual assault victims. *See Kennedy*, at 32, 357 S.E.2d at 366 (the court allowed an expert to testify that "symptoms exhibited by the victim were consistent with sexual or physical abuse"). This court and courts of other jurisdictions have recognized the reliability of PTSD testimony in sexual assault cases. *See* Cling, *Rape Trauma Syndrome: Medical Evidence of Non-Consent*, 10 Women's Rights Law Reporter 243 (1988); *see also* Note, *Expert Testimony on RTS*, 63 Wash. L.Rev. 1063 (1988); *People v. Taylor*, 552 N.Y.S.2d 883 (1990). Reliability of this testimony is also substantiated by the American Psychiatric Association's recognition of PTSD and its result from trauma such as rape and assault. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 309.89 (3d ed., rev. 1987). While Dr. Roth's testimony tends to support the victim's credibility, its general effect does not render it inadmissible. *Kennedy*, at 32, 357 S.E.2d at 367. In summary, we determine that Dr. Roth was qualified, that her testimony was helpful to the jury, that it was based on a reliable scientific method, that it was relevant, and that it did not violate the rule prohibiting expert testimony on a witness's credibility.

However, Dr. Roth's testimony violates one of the rules regarding admissibility of expert testimony. The probative value of Dr. Roth's testimony was outweighed by the danger of unfair prejudice and therefore its admission violated Rule 403. As the Supreme Court of Maryland stated in reference to this issue:

> When a trial judge admits PTSD evidence because he believes that the existence of the disorder coupled with the absence of any triggering trauma, other than the evidence of rape, will aid the jury the ruling necessarily carries certain baggage with it. Cross-examination can include not only cross-examining the expert about PTSD in general, but also cross-examining the expert and the prosecutrix about possible causes of the disorder other than the assault charged in the criminal case. In addition, we can foresee cases where the defendant will seek to counter the state's PTSD evidence with his own expert testimony. That can, in turn, lead to issues concerning compulsory psychiatric examination of the complainant by an expert for the defense. Lurking in the background is the nice question of whether the absence of PTSD is provable by the

> accused in defense of a rape charge, as tending to prove that there was consent. . . . When ruling on whether to receive state proffered evidence of PTSD a trial judge will have to weigh the benefit of the evidence not only against the potential unfair prejudice, but also against the complexity of possibly accompanying issues and against the time required to properly try the expanded case.

State v. Allewalt, 517 A.2d 741, 751-52 (Md. 1986) (citations omitted). Because of the real danger of prejudice to the defendant and because of the possibility that the jury will give the expert's opinion inappropriate weight as " 'a stamp of scientific legitimacy to the truth of the complaining witness's factual testimony,' " such testimony should be admitted cautiously. *State v. Saldana*, 324 N.W.2d 227, 231 (Minn. 1982) (citation omitted).

Here, Dr. Roth explicitly implicated defendant in her testimony regarding the effects of the alleged sexual assault on Ms. Wang. In her testimony, she specifically named defendant twice and repeatedly implicated him as the "friend" who caused Ms. Wang's PTSD by his unexpected and "unjust" attack. This testimony not only directly implicated defendant, but also encouraged the jury's outrage about the injustice of defendant's alleged act. This testimony was erroneously admitted and clearly prejudiced the defendant. *See Wilkinson*, at 570, 247 S.E.2d at 911; *see also State v. Taylor*, 633 S.W.2d 235, 240 (Mo. 1984) (the expert "went too far in explaining his opinion that the victim suffered rape trauma syndrome as a consequence of the incident with the defendant . . .").

Since we determine that the trial court's erroneous admission of the psychologist's PTSD testimony requires a new trial for assault on a female, we do not address defendant's other assignments of error.

New trial.

Judges JOHNSON and PARKER concur.

FIRST AMERICAN BANK OF VIRGINIA v. CARLEY CAPITAL GROUP, JAMES E. CARLEY AND L. DAVID CARLEY

No. 8926SC989

(Filed 7 August 1990)

1. **Appeal and Error § 204 (NCI4th)— Rule 11 sanctions—notice of appeal—sufficient**

An attorney's notice of appeal was sufficient to put plaintiff on notice that both the 25 May 1989 order determining that sanctions were appropriate under N.C.G.S. § 1A-1, Rule 11 and the 16 June 1989 order determining the type and amount of sanctions were being appealed.

Am Jur 2d, Appeal and Error § 319.

2. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions—not warranted**

Defenses asserted to an action to enforce a Virginia judgment on a note were not so outside the bounds of reasonableness as to warrant sanctions under Rule 11 where defendants' attorney, Williams, asserted various defenses on three grounds: the interest rate and attorney fees allowed under the Virginia judgment were in violation of North Carolina's public policy; the lack of personal jurisdiction, asserted upon a reasonable factual basis; and plaintiff's failure to register with the Secretary of State's office.

Am Jur 2d, Judgments §§ 965, 1236; Pleadings §§ 55, 130.

Judge GREENE dissenting.

APPEAL by defendants' counsel Neil C. Williams from orders entered 25 May 1989 and 16 June 1989 by *Judge Frank W. Snepp* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 15 March 1990.

This case began as an action to enforce a judgment entered against defendants in Virginia but this appeal is from orders sanctioning counsel for defendants pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Defendants are a Wisconsin general partnership and two of its partners that own property in Mecklenburg County, North Carolina. Attorney Neil C. Williams answered plaintiff's complaint on defendants' behalf and asserted

the defenses of lack of personal jurisdiction, lack of subject matter jurisdiction, failure to state a claim upon which relief could be granted and contravention of public policy if North Carolina accorded the Virginia judgment full faith and credit.

On 28 February 1989 the trial court granted plaintiff's motion for summary judgment. On its own initiative the trial court entered an order in which it stated that counsel for defendants "is hereby ordered and notified to appear on April 5, 1989 at 9:00 a.m. . . . and show cause as to why he should not be sanctioned pursuant to Rule 11(a) of the North Carolina Rules of Civil Procedure for signing and filing the Answers of the Defendants that contain defenses to the Plaintiff's claim that do not appear to be well grounded in law." After the April hearing the trial court entered a memorandum opinion on 25 May 1989 in which it found counsel did not make a reasonable inquiry to determine that the defenses asserted were well grounded in fact and warranted by existing law or a good faith argument for its extension, modification or reversal. The trial court found that the appropriate sanction was payment of plaintiff's expenses incurred because of the filing of the pleadings. The trial court set the matter to be heard during the week of 12 June 1989 to determine plaintiff's reasonable expenses. After the June hearing defendants' counsel was ordered to pay plaintiff $1,250.00 as sanction for violation of Rule 11. Defendants' counsel, through their attorney, gave oral notice of appeal.

John J. Parker, III for plaintiff-appellee.

J. J. Wade, Jr. for appellant Neil C. Williams.

EAGLES, Judge.

This appeal presents two issues for review. First, whether Williams' oral notice of appeal was sufficient to appeal from both the order entered 25 May 1989 and the order entered 16 June 1989. Second, whether the imposition of sanctions under Rule 11 was appropriate in this case. We find that this appeal presents both the 25 May and 16 June 1989 orders for review and that the trial court erred in imposing sanctions on Williams. Therefore, we vacate the 25 May and 16 June 1989 orders.

I. Notice of Appeal.

[1] Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil

> action or special proceeding during a session of court may take appeal by . . . [g]iving oral notice of appeal at trial . . . .

G.S. 1-279(a)(1) (repealed effective 1 July 1989); App. R. 3(a)(1) (amended 1988, quoted version effective for all orders and judgments entered before 1 July 1989). "It is apparent that a notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised[.]" *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979). We find that Williams' notice of appeal was sufficient to put plaintiff on notice that both the 25 May 1989 order determining that sanctions were appropriate and the 16 June 1989 order determining the type and amount of sanction being imposed were being appealed.

The record reflects that Williams made a motion under Rule 59 for reconsideration of the 25 May 1989 order imposing the Rule 11 sanctions and the trial court denied the motion at the June hearing. There the court examined the plaintiff's attorney's affidavit regarding the amount of time spent preparing a response to the answer and the hourly rate plaintiff's attorney charged. The following exchange occurred in open court.

> THE COURT: . . . I think what happened, you were confronted with what we all used to be confronted with, a fellow sued on a Note and to get some time you just entered a general denial. Well, Rule 11 doesn't let lawyers do that anymore and there is a reason for it. The public just got fed up with things like that and the time it takes with useless litigation and so the Legislature, following the rules of the Federal Government[,] adopted Rule 11. And every lawyer has got to make reasonable investigation as to the law and the facts before he files any paper containing any allegation at all. And I don't want to punish you, but I do want to give a clear signal, and I know lawyers that I don't expect them to know much better than that, but I've got to send a signal to lawyers that I've got a great deal of respect for. I'm sorry you turned out to be the one.
>
> I find that the labor occasioned by the violation of Rule 11 on the part of [sic] the reasonable time would be ten (10) hours and a reasonable fee of $125.00 an hour and IT IS

> ORDERED that that be paid to the Plaintiff, Counsel for the Defendant, within thirty (30) days—total sum of $1250.00[ ] as partial reimbursement for the expense of defending this Motion for Summary Judgment [sic].
>
> MR. WADE: Your honor, Mr. Williams, through me, would not offend Your Honor if we gave Notice of Appeal, would he?
>
> THE COURT: No.
>
> * * *
>
> MR. WADE: Your Honor, we, on behalf of Mr. Williams do give Notice of Appeal.

Plaintiff does not argue that Williams' notice of appeal did not put it on notice that Williams was appealing the imposition of Rule 11 sanctions as well as the amount of the sanctions. We find Williams' notice sufficient to appeal both orders.

Parenthetically, we note that effective for judgments entered on or after 1 July 1989, notice of appeal in civil cases must be in writing and must specify the party or parties appealing, the judgment or order from which appeal is taken and the court to which appeal is taken. App. R. 3(c). The question presented by Williams' oral notice of appeal is not likely to occur again.

II. Imposition of Sanctions.

[2] G.S. 1A-1, Rule 11(a) provides, in part, that:

> The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

A decision by the trial court to impose or not to impose sanctions under Rule 11 is reviewable *de novo* by this court. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

> In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judg-

> ment 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.

Id. We find insufficient evidence in the record to support the trial court's findings of fact and therefore vacate the orders entered 25 May and 16 June 1989.

With respect to defendants' defense of lack of subject matter jurisdiction, the court found that Williams made no attempt to find any legal authority to support the defense. However, the transcript reveals that Williams researched whether public policy of North Carolina would be a defense to the full faith and credit action. Williams was concerned that the amount of interest allowed under the Virginia judgment and the attorney fees allowed there would be contrary to the public policy of North Carolina as expressed in G.S. 6-21.2 (attorney fees not in excess of 15% of outstanding balance) and G.S. 24-1 (interest on judgments at 8%). Williams also found cases in which the court stated that it would not entertain suits from other states that contravene the public policy of North Carolina. Although admittedly none of those cases were factually similar to the case here, the cases were arguably supportive of arguments for the extension of existing law. The trial court's finding is not supported by a sufficiency of the evidence.

Williams also excepted to the following finding of fact:

> With respect to Carley's 12(b)(2) motion, Mr. Williams admitted under oath that the transaction of business by Carley in, and contacts with Mecklenburg County, was such as to be common knowledge.

Apparently the trial court determined that defendants' defense of lack of personal jurisdiction was baseless. Williams testified that he asserted the defense of lack of personal jurisdiction based

> on the fact that no defendant is a resident of North Carolina. They were not served in North Carolina. They owned property here. There is a case, the Georgia Railroad Bank case, that says owning property in North Carolina is not sufficient. And that's the case I was looking at at the time. Now, Mr. Parker [plaintiff's attorney] came along later after I interposed that defense, and said that they're involved in a great deal more activity than that.

Thereafter the court stated that "[a]nybody who reads the newspaper in this city knows that Carley Capital Group is doing business in the city of Charlotte, don't they?" The record before us does not support the finding that Williams "admitted under oath" that defendants' transactions and contacts with Mecklenburg County were common knowledge. The trial court's finding of an admission is not supported by the evidence.

The trial court also found that Williams had failed to make any investigation to determine whether plaintiff "was subject to the provisions of N.C.G.S. 55-154(a) by 'transacting business' in North Carolina under G.S. 55-131." Williams testified that he asserted the defense based on his investigation which revealed that plaintiff was not registered with the North Carolina Secretary of State's office to transact business in North Carolina. Williams testified that from the complaint he inferred that plaintiff loaned money to others and those facts could qualify as "transacting business" in North Carolina. Williams also testified that he planned to question plaintiff during discovery to determine the amount of business, if any, it transacted in North Carolina. We find that Williams' actions in this regard were sufficient to comply with the statutory requirements of Rule 11.

The trial court also found that:

> Mr. Williams did not make any investigation with respect to Carley's 12(b)(6) motion, and Bank's Complaint on its face conclusively shows that a claim for relief was stated.

There is no basis in the record for the finding that Williams did not make any investigation to support this defense. From this record it appears that the basis for the Rule 12(b)(6) defense was not inquired into during the June hearing. This finding of fact is not supported by sufficient evidence.

It is clear from the record before us that Williams asserted the various defenses based on three distinct grounds. One has been termed "public policy" by the trial court and the parties. Williams asserted that the interest rate and attorney fees allowed under the Virginia judgment would not be enforced by a North Carolina court because they were in violation of this State's public policy. Williams also asserted the lack of personal jurisdiction defense on a reasonable factual basis. Finally, Williams asserted a defense based on plaintiff's failure to register with the Secretary of State's

office. We cannot say that these defenses were so outside the bounds of reasonableness as to warrant sanctions under Rule 11.

Accordingly, the 25 May and 16 June 1989 orders are vacated.

Vacated.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the majority's conclusion that "this appeal presents both the 25 May and 16 June 1989 orders for review . . ." Because I believe plaintiff appealed only the 16 June 1989 order, I would not address the merits of the assignments of error relating to the 25 May 1989 order.

I

Notice of Appeal

First, there is no dispute that Williams was the proper party to appeal the court's sanction orders. *See Carawan v. Tate*, 304 N.C. 696, 700, 286 S.E.2d 99, 101 (1982) (only an aggrieved real party in interest may appeal a judgment); *DeLuca v. Long Island Lighting Co., Inc.*, 862 F.2d 427, 429 (2d Cir. 1988) (the sanctioned attorney is the party in interest and must appeal in his or her name).

Williams gave only oral notice of appeal after the court's entry of its 16 June 1989 order, and oral notice of appeal "is by its nature limited to the issues dealt with in the *judgment announced* . . ." *Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 706, 318 S.E.2d 348, 352 (1984) (emphasis added). This strict construction of oral notice of appeal is in contrast with the "liberal construction of rules governing *written* notice of appeal." *Id.*, at 707, 318 S.E.2d at 352 (emphasis in original). The distinction between appellate construction of oral and written notice of appeal is illustrated by close analysis of the *Smith* decision, upon which the majority relies in 'deeming sufficient' Williams's oral notice. *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 258 S.E.2d 864 (1979). In the *Smith* decision, plaintiff gave *written* notice of appeal which did not specifically designate "the judgment, order or part thereof appealed from," as required by N.C.R. App. P. 3(d). *Id.*, at 274,

258 S.E.2d at 867. N.C.R. App. P. 3(d) applies only to *written* notices of appeal, and the drafting committee's commentary on subdivision 3(d) refers to Federal Rule of Appellate Procedure 3(c), which allows *only written* notice of appeal. *Id.*, at 273-74, 258 S.E.2d at 867. According to the *Smith* decision and appellate practice, 'designation' in written appeal is subject to liberal interpretation, but according to this court's *Brooks* decision, oral notice of appeal is not.

Moreover, it is irrelevant that the majority opinion points out that "Williams made a motion under Rule 59 for reconsideration of the 25 May 1989 order imposing the Rule 11 sanctions and the trial court denied the motion at the [16] June [1989] hearing" because Williams did not appeal the court's denial of his Rule 59 motion. Even had Williams included appeal of the denial of his Rule 59 motion in his oral notice of appeal, notice of appeal from the court's denial of the post-verdict motion would not be an appeal of the underlying order which was the subject of the motion. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422, 424 (1990) ("notice of appeal from denial of a [Rule 60] motion to set aside a judgment [or Rule 59 motion to reconsider] which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review"), citing *Chapparal Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985).

Assuming *arguendo* that oral notice is subject to liberal construction, "we may liberally construe a [written] notice of appeal in one of two ways to determine whether it provides jurisdiction . . . [f]irst, [if there has been] 'a mistake in designating the judgment' . . . [and s]econd, if a party technically fails to comply with procedural requirements . . . [but] accomplishes the 'functional equivalent' of the requirement." *Von Ramm*, 392 S.E.2d at 424 (citations omitted) (emphasis deleted). Here, there is no indication or argument that Williams was *mistaken* in designating the judgment from which he gave notice of appeal, or that he *technically* failed to comply with procedural requirements, and thus we have no basis for liberally construing his notice of appeal.

Finally, although the 1989 amendment of N.C.R. App. P. 3 eliminates oral notice of appeal, and this "question is not likely to occur again," the unlikelihood of recurrence is an insufficient reason for changing the rules for construing oral and written notice.

Therefore, I believe that this court has no jurisdiction for review of the 25 May 1989 order in which the court decided to impose and selected the form of the sanction. This court has jurisdiction only for appeal of the 16 June 1989 order determining the reasonable amount of plaintiff's attorney fees.

II

16 June 1989 Order

Upon limited review of Williams's appeal of the 16 June 1989 order, I would vote to vacate and remand the court's determination of the amount of Rule 11 sanction, because the court did not make necessary findings of fact to support the order.

Rule 11 provides in pertinent part:

> If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the *reasonable* expenses incurred because of the filing of the pleading, motion, or other paper, including a *reasonable* attorney's fee.

N.C.G.S. § 1A-1, Rule 11(a) (1989). Because the award must be 'reasonable,' the record must contain findings of fact to support the award for this court to determine if the award of attorney fees is 'reasonable.' *See Morris v. Bailey*, 86 N.C. App. 378, 387, 358 S.E.2d 120, 125 (1987).

Factors used to determine whether an attorney fee is reasonable include: "time and labor expended, the skill required to perform the legal services rendered, the customary fee for like work, or the experience and ability of the attorney." *Id.*, at 387, 358 S.E.2d at 126.

Here, the court's findings of fact are silent on the customary fee for like work, plaintiff's attorney's experience and ability, and the amount of time and labor expended.

GARNER MAHAFFEY AND WIFE, BARBARA T. MAHAFFEY, PLAINTIFFS v. FORSYTH COUNTY; JAMES N. ZIGLAR, JR.; RICHARD V. LINVILLE, FORREST E. CONRAD, WAYNE G. WILLIARD, AND JOHN S. HOLLEMAN, JR., MEMBERS OF THE BOARD OF COMMISSIONERS OF FORSYTH COUNTY; BEREAN BAPTIST CHURCH; HAROLD GIBSON; TIM MYERS, EARL EATON, BILL KIZER, AND JIM TALBERT, TRUSTEES OF BEREAN BAPTIST CHURCH; AND CLADIE GRAY DENNY, DEFENDANTS

No. 8921SC1215

(Filed 7 August 1990)

1. **Limitation of Actions § 8 (NCI3d); Municipal Corporations § 31 (NCI3d)— challenge to rezoning—barred by statute of limitations—equitable arguments**

An action challenging a 1979 zoning amendment was barred by the statute of limitations where the claim was brought after the nine-month period had lapsed because the trial court correctly allowed the affirmative defense of the statute of limitations to be pled by some of the defendants on behalf of all of the defendants; plaintiffs may be barred by their own inaction from asserting violations of constitutional rights; the zoning classification has remained in effect regardless of its nonuse by the property owners; and the invalidation of a 1988 rezoning of the same property merely leaves the zoning ordinance as it would have been prior to that ordinance and does not create a new cause of action with regard to the 1979 rezoning. N.C.G.S. § 1-54.1.

Am Jur 2d, Zoning and Planning § 341.

2. **Municipal Corporations § 30.9 (NCI3d)— rezoning—spot zoning—invalid**

A 1988 rezoning constituted invalid spot zoning where adjacent property was originally rezoned in 1979 from R-6, Suburban Residential, to B-3-S, Highway Business-Special Use; the property was rezoned in 1988 from B-3-S to B-2-S, General Business-Special Use; the tract in question here was rezoned in 1988 from R-6 to B-2-S; the tract rezoned in 1979 is wholly contained within the perimeter of the property rezoned in 1988, so that there is no property adjoining the tract rezoned in 1988 which has a zoning classification other than R-5 and R-6; the area in question is 700 feet from an area zoned B-3, General Business Use, which is an isolated pocket of business

zoning surrounded by R-5 and R-6 zoning; the tract of land in this case consists of .576 acres surrounded by many acres that are zoned R-5 and R-6 Residential; the trial court correctly held that the rezoning is contrary to the Forsyth County Long Range Planning Guide; the detriment to the community outweighs any alleged benefits; and the difference between the use of the rezoned property as an auto parts store and the surrounding rural residential neighborhood would be significant.

Am Jur 2d, Zoning and Planning §§ 76, 77.

Judge GREENE concurring in part and dissenting in part.

APPEAL by defendants and cross-appeal by plaintiffs from a judgment and order entered 10 July 1989 by *Judge W. Steven Allen, Sr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 9 May 1990.

Plaintiffs claim that rezoning amendments approved by the Forsyth County Board of Commissioners ("the County") in 1979 and 1988 are invalid. Approximately .21 acres of property owned by Berean Baptist Church ("the Church") which had been zoned R-6, Suburban-Residential, was rezoned to B-3-S, Highway Business-Special Use, in 1979. Use of the property was limited to the sale of automobiles and pick-up trucks. The 1988 rezoning borders the tract rezoned in 1979. Approximately .366 acres of the Church's property was rezoned from R-6, Suburban-Residential, to B-2-S, General Business-Special Use. At the same time, the .21-acre tract rezoned in 1979 was rezoned again from B-3-S to B-2-S. The 1988 rezoning restricted the use of the property to the sale of new automotive parts and prohibited the sale of alcoholic beverages. Also, a portion of the property was to be dedicated for a right-of-way to realign the intersection of N.C. 109 and Williard Road. In both instances when the rezonings took place, the County Planning Board recommended denial of the petitions but the County Commissioners approved them. The court granted summary judgment to the plaintiffs with respect to the 1988 rezoning, and to defendants with respect to the 1979 rezoning. Defendants appeal the invalidation of the 1988 rezoning. Plaintiffs cross-appeal, challenging the validity of the 1979 rezoning.

Wolfe and Collins, P.A., by A.L. Collins and John G. Wolfe, III, for plaintiffs/cross-appellants.

Womble Carlyle Sandridge & Rice, by Anthony H. Brett and Dale E. Nimmo, for defendants-appellants Forsyth County and Members of the Board of Commissioners of Forsyth County.

Thomas M. King for defendants-appellants Berean Baptist Church, Trustees of Berean Baptist Church, and Cladie Gray Denny.

LEWIS, Judge.

This appeal addresses two separate zoning amendments. The assignments of error for each of those rezonings are discussed separately below.

I: 1979 Rezoning.

[1] Plaintiffs submit a cross-appeal which addresses the 1979 zoning amendment only. They contend that "this amendment constitutes an illegal spot zoning and therefore is invalid and void *ab initio*." Defendants allege that plaintiffs are barred from challenging the 1979 rezoning by the Statute of Limitations. We affirm the holding of the trial court "[t]hat the Plaintiffs are barred by the Statute of Limitations from challenging the rezoning of the property contained in [the 1979] Petition. . . ."

Section 1-54.1 of the North Carolina General Statutes which states the time "limitations" for commencing civil actions includes the following provision for zoning ordinances:

> Within nine months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county. . . .

Plaintiffs concede that this claim is brought after the nine-month period has lapsed, but they assert four equitable arguments in favor of their position that their action is not barred by the Statute of Limitations.

(1) Forsyth County and the members of the Board of Commissioners of Forsyth County pled the Statute of Limitations as an affirmative defense in their answer to plaintiffs' complaint. However, the other defendants in the case at bar failed to include this affirmative defense in their answers to plaintiffs' complaint. The trial court imputed the county defendants' assertion of the defense to

the other defendants. Plaintiffs state that the trial court erred since this defense must be "timely pleaded or it is deemed waived." *Gragg v. W.M. Harris & Son*, 54 N.C. App. 607, 610, 284 S.E.2d 183, 185 (1981). We affirm the holding of the trial court that allows this affirmative defense to be pled by some of the defendants on behalf of all of the defendants. The same result is obtained whether the statute is asserted by only one or all of these defendants.

(2) Plaintiffs contend that the 1979 rezoning "is a present and ongoing violation of Plaintiffs' due process and equal protection rights" under the Constitutions of the United States and of North Carolina. They allege that "[t]he passing of a statute of limitations should not have the legal effect of . . . [making] legal the illegal acts of a zoning authority." The United States Supreme Court has rejected this argument in *Block v. North Dakota, ex rel. Board of University and School Lands*: "A constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." 461 U.S. 273, 292, 75 L.Ed. 2d 840, 857 (1983). (Citations omitted.) The North Carolina Supreme Court has held that plaintiffs may be barred by their own inaction from asserting violations of constitutional rights. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976). In that case, plaintiff was barred by his inaction from pursuing his constitutional claim regarding a zoning ordinance. Plaintiffs in the case at bar must live with the consequences of their inaction arising from their failure to challenge the 1979 zoning amendment during the requisite time period.

(3) Plaintiffs allege that defendants abandoned the specific use of the property which was set forth in the rezoning petition since the property was used for approximately six months as an automobile sales lot and has been vacant since that time. However, abandonment of a permitted use within a zoning classification does not invalidate the classification and the property owner may elect to later resume the permitted use of that land. The zoning classification has remained in effect regardless of its non-use by the property owners.

(4) The trial court invalidated the 1988 rezoning which, according to plaintiffs' allegations, constituted a change in the zoning classification for the part of that property which had been rezoned in 1979, thereby creating a new cause of action for plaintiffs. In fact, that invalidation merely leaves the zoning ordinance as it

would have been prior to that ordinance. Courts have no authority to rezone property from one classification to another but, instead, may rule on the validity of an existing zoning ordinance. When such a decision is made by the courts to invalidate an ordinance, that action "does not remove the designated area from the effect of the comprehensive zoning ordinance previously enacted." *Zopfi v. City of Wilmington*, 273 N.C. 430, 437, 160 S.E.2d 325, 333 (1968). Thus, the invalidation of the 1988 zoning amendment does not create a new cause of action with respect to the 1979 rezoning.

We find that the trial court correctly applied the Statute of Limitations with respect to the 1979 rezoning.

II: 1988 Rezoning.

[2] Defendants contend that the trial court erred in its determination that the 1988 rezoning is invalid. The trial court ruled that "the rezoning of the property contained in Petition F-888 by Forsyth County Board of Commissioners on July 11, 1988 constituted an illegal spot zoning and is invalid." A recent North Carolina Supreme Court decision set forth the standard for determining whether or not a rezoning constitutes an illegal spot zoning.

> [I]n any spot zoning case in North Carolina Courts, two questions must be addressed by the finder of fact: (1) did the zoning activity in the case constitute spot zoning as our Courts have defined the term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning.

Chrismon v. Guilford County, 322 N.C. 611, 627, 370 S.E.2d 579, 589 (1988). This discussion will follow these questions presented by *Chrismon*.

A. *Was the rezoning a "spot zoning"?*

Spot zoning is "an attempt to *wrench* a single small lot from its environment and give it a new rating *which disturbs the tenor of the neighborhood." Id.* at 631, 370 S.E.2d at 591 (1988). (Emphasis original.) "Spot zoning" was defined specifically in *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

> In North Carolina
>
> a zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so

> as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

Id. at 549, 187 S.E.2d at 45.

Defendants contend that the 1988 rezoning is not a spot zoning for two reasons. (1) The property rezoned in 1988, according to defendants, "was zoned in conformity with adjoining land," referring to the tract rezoned in 1979. In fact, the tract rezoned in 1979 is wholly contained within the perimeter of the property rezoned in 1988. There is no property adjoining the tract rezoned in 1988 which has a zoning classification other than R-5, Single Family Residential, and R-6, Suburban Residential. (2) Defendants state that "the rezoning was not inconsistent with surrounding uses" since that property "was only a short distance down the road from property zoned for business purposes in the B-3 general use zoning classification." The area zoned B-3 is approximately 700 feet from the property in question and is an isolated pocket of business zoning surrounded by R-5 and R-6 zoning. The City-County Planning Board of Forsyth County and Winston-Salem, N.C. noted the existence of this area zoned B-3 and stated that the presence of this "small business district" was a major factor in deciding *not* to grant the petition. The Planning Board noted that the B-3 district "has three parcels of vacant land, totaling 4.2 acres, more or less" and found that "[t]he existing B-3 area provides ample room to meet the highway business needs of this area." They made the additional "finding" that "granting the rezoning would encourage the rezoning of the property between the case site and the existing B-3 area and encourage the growth of a commercial strip on [the highway]."

The property in question is uniformly surrounded by R-5 and R-6 zoning and as B-3-S is a "spot zone" as defined by the North Carolina courts.

B. *Did the County Commissioners make a clear showing of a reasonable basis for the rezoning?*

The Court in *Chrismon* established two classifications of spot zoning: illegal spot zoning and legal spot zoning. In order for a zoning classification to constitute a legal spot zone, the zoning authority must make a clear showing of a reasonable basis for

the rezoning. 322 N.C. at 625, 370 S.E.2d at 587. The *Chrismon* Court then enunciated several factors which are to be considered in determining whether a reasonable basis for a zoning amendment exists.

> Among the factors relevant to this judicial balancing are the size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Id. at 628, 370 S.E.2d at 589.

1. *Size of the tract in question.* Defendants address this factor by stating: "Since the tracts at issue in this appeal are located only a few blocks from property zoned for general business purposes, they should not be considered separate and apart from the other property in the immediate area which is zoned for business uses." The tract of land in this case consists of .576 acres surrounded by many acres that are zoned R-5 and R-6 Residential. The tract must be examined relative to the vast majority of the land immediately around it, not just a small tract 700 feet down the highway.

2. *Compatibility with an existing zoning plan.* Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purpose of the enabling statute. *Alderman v. Chatham County*, 89 N.C. App. 610, 366 S.E.2d 885, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 103 (1988). The North Carolina General Statute which addresses this issue states in pertinent part:

> Zoning regulations shall be made in accordance with a comprehensive plan. . . . The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county.

N.C.G.S. § 153A-341. In the case at bar, the applicable comprehensive zoning plan is entitled *Vision 2005: A Comprehensive Plan*

for Forsyth County, North Carolina. The tract at issue is designated in that plan as an area which is "predominantly rural with some subdivisions adjacent to farms." The objectives set forth in the Plan for this area require that commercial development be allowed only in conjunction with the development of "clustered commercial service areas." Defendants assert that the rezoning is consistent with *Vision 2005* based on the sentence in that report which states that "rural serving retail establishments" should be "encouraged." However, that statement is not relevant to the facts in this case where the County Planning Board and Planning Board Staff, made up of professionals who are entrusted with the development of and adherence to the comprehensive plan, recommended denial of the petition. The trial court held "[t]hat the rezoning by the Forsyth County Board of Commissioners . . . is found by the Court to be . . . contrary to the Forsyth County Long Range Planning Guide (Vision 2005). . . ." We believe the findings of the Planning Board and the trial court are correct.

3. *Benefits and detriments.* The *Chrismon* court defined the standard for examining the balance of benefits and detriments of a zoning action.

> The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and political unit. That which makes for the exclusive and preferential benefit of such particular landowner, with no relation to the community as a whole, is not a valid exercise of this sovereign power.

322 N.C. at 629, 370 S.E.2d at 590, *citing Mansfield & Swett, Inc. v. West Orange*, 120 N.J.L. 145, 150, 198 A. 225, 233 (1938). (Emphasis omitted.) Defendants allege that "an auto parts store is certainly beneficial to a rural community where the automobile is virtually the only mode of transportation available to residents." However, auto parts are a common and easily obtainable product and, if such a retail establishment were said to be "beneficial to a rural community," then virtually any type of business could be similarly classified. Defendants further contend that "[t]he restrictions placed on the property as a condition for the issuance of the special use rezoning prevent its use from being a detriment to surrounding residential areas." Those "restrictions" did not mitigate the concern of the Planning Board that "granting the rezoning would encourage . . . the growth of a commercial strip

on [the highway]." Also, numerous property owners opposed the rezoning because of their concern over the possibility of a traffic hazard which would be created by the retail establishment, the potential for a decrease in property values, the potential "eyesore," and their desire to preserve the current character of the rural residential area. We agree that the detriment to the community outweighs any alleged benefit.

4. *Relationship between uses.* The final consideration listed by the *Chrismon* court in determining whether or not a reasonable basis exists for a spot zoning focuses on the "compatibility of the uses [of the property in question] envisioned in the rezoned tract with the uses already present in surrounding areas." *Id.* at 631, 370 S.E.2d at 591. As discussed above, the difference between the use of the rezoned property, as an auto parts store, and the use of the surrounding property, a rural residential neighborhood, would be significant. The effect of the requested rezoning would be the creation of a business usage of the property in a location where no business has operated for eight years and which is surrounded by residential property. Defendants' contention that "[t]he property at issue is located only a few blocks from property zoned for business purposes" has no merit and does not support defendants' position that "the difference in uses is . . . minor." In fact, as noted above, the location of this other commercial property is detrimental to defendants' allegation. Defendants' allegation that the size of the tract is important ("a small auto parts store" in contrast to "a large commercial complex") has no basis in law and is irrelevant in the case at bar. It is also irrelevant in an examination of this particular factor, "relationship between uses," that a portion of the property had been zoned for a business purpose in 1979.

For the foregoing reasons, the entry of summary judgment for the plaintiffs invalidating the 1988 rezoning is affirmed. The zoning classification of the property at issue reverts to the last legal classification of R-6 and B-3-S as defined by the Forsyth County Code.

Affirmed.

Judge ORR concurs.

Judge GREENE concurs in part and dissents in part.

Judge GREENE concurring in part, dissenting in part.

I agree with the majority that the statute of limitation bars plaintiffs' claim regarding the county's 1979 rezoning. However, I do not agree that the 1988 rezoning is spot zoning. The tract of land contained in the 1988 rezoning ("Highway Business") is contiguous to and actually includes the property rezoned in 1979 as "General Business," and, therefore, I agree with defendants that the 1988 tract of land is "not a small lot singled out for special treatment." Had this court determined that the 1979 zoning was unlawful, I would agree with plaintiffs' argument that the 1988 rezoning was spot zoning, but that potential argument is now irrelevant.

STATE OF NORTH CAROLINA v. JAMES DARRELL FAIRCLOTH

No. 8912SC1085

(Filed 7 August 1990)

1. Rape and Allied Offenses § 4.1 (NCI3d) — other offenses committed by defendant — admissibility of evidence

In a prosecution of defendant for first degree rape and taking indecent liberties with a child the trial court did not err in admitting testimony by the victim concerning two incidents of alleged sexual assault by defendant upon her prior to the incident giving rise to the charges here, since all three episodes involved sexual conduct by defendant upon the victim; all three involved the victim's being alone or under the sole supervision of defendant; all three occurred when the victim was in bed; all occurred within a 28-month period; and the prior incidents were thus sufficiently similar to the charged crime and were sufficiently near in time to it so that N.C.G.S. § 8C-1, Rule 403 did not require the judge to exclude the evidence. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 321, 324-326.

2. Rape and Allied Offenses § 4 (NCI3d); Criminal Law § 68 (NCI3d)— expert testimony concerning hair—admissibility—failure to assign error to objectionable portion of answer—objection waived

Testimony by an expert in forensic hair identification that hairs found on the victim and on a sheet of the victim's bed could have originated from defendant was relevant and admissible in this prosecution for first degree rape and taking indecent liberties with a child. Although further testimony by the witness that "it would be improbable that these hairs would have originated from another individual" was based on nonscientific considerations and constituted an expression of opinion as to defendant's guilt in violation of N.C.G.S. § 8C-1, Rules 405(a), 608(a) and 702, defendant waived his right to assert such error on appeal where the testimony was given in response to a proper question and defendant made no motion to strike the objectionable portion of the witness's answer.

Am Jur 2d, Expert and Opinion Evidence §§ 278, 301; Rape § 68.

APPEAL by defendant from judgment entered 14 June 1989 in CUMBERLAND County Superior Court by *Judge Joe Freeman Britt.* Heard in the Court of Appeals 30 May 1990.

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

Beaver, Thompson, Holt, and Richardson, P.A., by H. Gerald Beaver, for defendant-appellant.

DUNCAN, Judge.

A jury convicted the defendant, James Darrell Faircloth, of one count of first-degree rape and one count of taking indecent liberties with a child. The judge sentenced defendant to a term of life imprisonment for the rape conviction and to a consecutive term of three years for the indecent liberties conviction. On appeal, defendant challenges the admission of testimony about alleged prior sexual assaults by him upon the victim and the admission of expert testimony concerning the origin of hair samples found at the crime scene. We hold that the judge properly allowed the jury to hear evidence of the prior sexual acts, and we hold that defendant has waived his right to assign error to the expert testimony.

I

The prosecuting witness, to whom we shall refer as "A.G.," is the stepdaughter of defendant. At the time of trial, A.G. was 13 years old. The State presented evidence showing that on 1 April 1988, A.G. and her mother were living at the Holiday Motel in Fayetteville, North Carolina. A.G.'s natural father was visiting from Florida that day and was staying in the room next to A.G.'s room. Defendant and A.G.'s mother had separated from each other prior to 1 April, and A.G. had not seen defendant for several days.

On the evening of 1 April, A.G. and her father went to a movie. When they returned to the motel at 10:00 P.M., A.G.'s mother was not there. A.G. went to her room alone and fell asleep, with the lights in the room turned on, while watching television.

A.G. awoke around 3:30 A.M. when she felt someone holding her by the waist. When she attempted to get up, she could not. A.G. testified that she looked to see who was holding her and saw that it was defendant. Defendant was not wearing clothing. He asked A.G. where her mother was and, when A.G. said she didn't know, defendant said "Well, fine, then. I've got plenty of time." Defendant then raped A.G.

Dr. William Barrington testified that he examined A.G. at the Cape Fear Valley Hospital emergency room on 2 April. A.G. told Dr. Barrington that she had been raped and had been struck on the jaw. The examination showed her jaw to be tender, but there was no evidence of any bruising nor of any kind of abrasion. Dr. Barrington also performed a pelvic exam on A.G. and found no evidence of external trauma, nor was there any evidence of lacerations or abrasions on the vagina and cervix, and the opening of the uterus appeared normal.

Brenda Bissette, of the State Bureau of Investigation, testified that she examined underwear and vaginal smears and swabs from A.G.'s rape kit. Additionally, she analyzed blood samples from A.G. and from defendant and testified that both defendant and A.G. secrete type O blood, a type shared by 36% of the population. Agent Bissette found semen present in the underwear, smears and swabs and found the semen to be from a person who secreted type O blood.

Defendant's evidence showed that as of 1 April 1988 he had been residing with his aunt, Penny Marie McKay, for approximately

two months. Ms. McKay testified that, on the night and morning in question, defendant was at her home, having returned there at 1:45 A.M. on the morning of 2 April. Defendant was coughing, had a cold, and went into the bathroom, coughing and vomiting. Ms. McKay testified that she heard defendant vomiting at 2:30 A.M., and that between the hours of 3:00 and 4:00 A.M. she could hear defendant snoring. Cecilia McKay, defendant's cousin and Penny McKay's daughter, corroborated her mother's testimony.

A.G.'s father testified as a defense witness and stated that he heard no noises coming from A.G.'s room during the early hours of 2 April. He first learned of the rape at 7:30 that morning.

Additional facts relevant to the questions on appeal are set out below.

II

[1] Defendant first assigns error to the admission of testimony by A.G. concerning two incidents of alleged sexual assault by defendant upon her prior to the 2 April incident.

Over objection, the judge permitted A.G. to testify that, on or about 1 January 1986, she was at home alone with defendant. A.G. fell asleep on the top bunk of a set of bunk beds in her room. A.G. awakened later on the bottom bunk. When she turned over to go back to sleep, defendant pulled her back over. Defendant told her "It's too hot in here for you to have your shorts on," and he removed A.G.'s shorts and panties. He then performed cunnilingus on her.

Over further objection, A.G. testified that, one night when she and defendant were at home alone, defendant came into her room. Defendant turned off the lamp, telling A.G. she was too big to sleep with a light on. Defendant then went into the bathroom and remained there for a long time. When defendant emerged, he was not wearing clothes. Defendant lay beside A.G. on the bed and told her to rub his chest. A.G. refused. Defendant then grabbed A.G.'s hand and started to rub his chest with it. A.G. snatched her hand away. Defendant got up and went back into the bathroom. When A.G. was half asleep, defendant got back into her bed and started to pull at her shorts. A.G. began to scream. Defendant told A.G. to hush, and, when she would not, defendant left her. A.G. testified she was not certain as to the date of this incident, but believed it had occurred in 1987.

Defendant argues that the admission of A.G.'s testimony about the two incidents was improper under Rule 404(b) of the North Carolina Rules of Evidence because the evidence was irrelevant to the question of defendant's guilt for the 2 April rape. He contends that A.G.'s testimony met none of the "statutorily set forth exceptions to the rule of exclusion for prior bad acts" and was offered only as evidence of defendant's character. This issue, a familiar one in sexual-offense cases, was recently addressed by our Supreme Court in *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

Discussing whether Rule 404(b) operates as a "general rule of exclusion," *see* 1 Brandis on North Carolina Evidence § 91 (3d ed. 1988) (one line of pre-Rule cases stated general rule of exclusion and list of exceptions), the Court said that a careful reading of the Rule "clearly shows [that] evidence of other offenses is *admissible* so long as it is *relevant to any fact or issue other than* the character of the accused." *Id.* at 278, 389 S.E.2d at 54 (emphasis supplied; citations omitted). The "clear general rule," the Court said, is that Rule 404(b) is one of "*inclusion* of relevant evidence of other crimes . . . subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.* at 278-79, 389 S.E.2d at 54 (emphasis supplied). We must determine, therefore, whether A.G.'s testimony was relevant to any issue other than defendant's character.

As is frequently noted, "North Carolina is quite liberal in admitting evidence of other sex offenses" committed upon the victim of the crime for which the defendant is on trial. *State v. Miller*, 321 N.C. 445, 454, 364 S.E.2d 387, 392 (1988) (citations omitted). Such evidence is often viewed as showing a "common scheme or plan" by the defendant to sexually abuse the victim. *See State v. Shamsid-Deen*, 324 N.C. 437, 444, 379 S.E.2d 842, 847 (1989). The State here contends that A.G.'s testimony was relevant to show, among other things, defendant's plan to abuse her when she was asleep and in her mother's absence. We agree with the State that the evidence was relevant under the precedent to this date. We thus hold that the evidence was not exclusively directed at defendant's character so as to run afoul of Rule 404(b).

To be admissible, evidence of prior sexual abuse must relate to incidents sufficiently similar and not so remote in time that

they are more probative than prejudicial under the balancing test of N.C. Gen. Stat. § 8C-1, R. Evid. 403 (1988). *E.g., State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). Defendant argues that the two alleged incidents occurring over a 28-month period prior to the charged offense, and the separation of defendant from A.G.'s mother in the interim, caused any probative value of the evidence to be outweighed by its prejudicial effect. He further contends that A.G.'s testimony placed him in the untenable position of having to rebut uncorroborated evidence of uncharged misconduct.

However, under the applicable precedent, the prior incidents about which A.G. testified were sufficiently similar to the charged crime and were sufficiently near in time to it that Rule 403 did not require the judge to exclude the evidence. All three episodes involved sexual conduct by defendant upon A.G., all three involved A.G.'s being either alone or under the sole supervision of defendant, and all three occurred when A.G. was in bed. That the episodes occurred over some 28 months, moreover, did not make the evidence impermissibly remote. In *State v. Roberson*, we held that a lapse of nearly five years between events involving the defendant and two witnesses did not "diminish the similarities between the acts," especially in light of testimony that the defendant's daughter had been similarly touched in the year before trial. 93 N.C. App. 83, 85, 376 S.E.2d 486, 487-88, *disc. review denied*, 324 N.C. 435, 379 S.E.2d 247 (1989). Although the latter criterion is not met here, this case involves three instances of similar conduct against the same victim within a 28-month span. We do not believe, on these facts, that the time period is so great as to erode the relevance of the first two incidents to the charged offense. We hold, therefore, that the judge did not abuse his discretion under the balancing test of Rule 403, *see Boyd*, 321 N.C. at 578, 364 S.E.2d at 120, and that A.G.'s testimony was properly admitted under that Rule.

Holding that A.G.'s testimony was permissible under Rules 403 and 404(b), we overrule this assignment of error.

III

[2] Defendant next assigns error to testimony by State Bureau of Investigation Technician Scott Worsham, a forensic chemist who testified at trial as an expert in the field of forensic hair examination and identification. Agent Worsham stated that he compared pubic-hair samples taken from defendant with samples obtained from a pubic-hair combing of A.G. and obtained from the bottom

bed sheet of A.G.'s bed at the Holiday Motel. According to Agent Worsham, microscopic comparison showed the samples taken from defendant to be consistent with one pubic hair taken from the combing and with one pubic hair taken from the bed sheet. Subsequent to that testimony, this exchange occurred:

> [The State]: Mr. Worsham, based upon your training and expertise, do you have an opinion as to what conclusions can be drawn from hairs that are found to be microscopically consistent, sir?
>
> [Defense Lawyer Davis]: Objection.
>
> The Court: Overruled.
>
> A: Yes, it would be my opinion that, based on consistencies which I found in the internal characteristics of the hair and pubic hair combings, as well as the hair on the sheet, that both of these pubic hairs could have originated from James Faircloth, and it is my opinion that it would be improbable that these hairs would have originated from another individual.

On cross-examination, which immediately followed this answer, Agent Worsham elaborated:

> Q: You're saying [the hairs] could have originated from Darrell Faircloth? It is also possible that [they] could have originated from somebody else, isn't it?
>
> A: That's correct. It is always possible that there exists another individual or other individuals in the population who might have a pubic hair that is microscopically consistent with the pubic hairs which I observed in this case. However, that person would have had to have been in contact with both the bed sheet and also the pubic area of [A.G.] and, as I stated, in my opinion, that would be impossible for another person to achieve that.

Defendant argues that the judge erred by overruling his objection in that the State's question solicited testimony that exceeded the boundaries of Agent Worsham's expertise. Although we disagree that the question was improper, we do agree with defendant's contention that Agent Worsham's testimony went beyond acceptable bounds. However, defendant did not move to strike the objectionable responses by Agent Worsham, and thus he has waived his right to assign this error on appeal.

Hair-analysis evidence is admissible if relevant. *State v. Hannah*, 312 N.C. 286, 294, 322 S.E.2d 148, 154 (1984). Relevant evidence is that having any logical tendency, however slight, to prove a fact at issue in the case. N.C. Gen. Stat. § 8C-1, R. Evid. 401 (1988); *see also id.* Agent Worsham's testimony as to the consistency of the hair samples tended to support A.G.'s account of the events of 2 April, and thus that portion of Agent Worsham's answer that the hairs "could have originated from James Faircloth" was relevant and admissible. *See State v. Pratt*, 306 N.C. 673, 678-79, 295 S.E.2d 462, 466 (1982); *see also State v. Stallings*, 77 N.C. App. 189, 191, 334 S.E.2d 485, 486 (1985), *disc. review denied*, 315 N.C. 596, 341 S.E.2d 36 (1986) (when combined with "other substantial evidence," comparative-microscopy evidence may carry case to jury).

Unlike fingerprints, however, comparative microscopy of hair is not accepted as reliable evidence to positively identify a person. *Stallings*, 77 N.C. App. at 191, 334 S.E.2d at 486. "Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *Id.* (citations omitted); *accord, State v. Johnson*, 78 N.C. App. 729, 734, 338 S.E.2d 584, 587, *disc. review denied*, 316 N.C. 382, 342 S.E.2d 902 (1986). Agent Worsham's testimony that "it would be improbable that these hairs would have originated from another individual" was, effectively, a positive identification of defendant derived from the hair evidence.

Compounding the problem, it is apparent from the agent's answer on cross-examination that his opinion about the "improbability" of the hair originating from a source other than defendant was based on non-scientific considerations. Agent Worsham, as an expert in hair examination and identification, was no better qualified than the jury to determine that it would have been "impossible" for another person to have been in contact with the bed sheet and A.G.'s pubic area. *See State v. Marshall*, 92 N.C. App. 398, 404, 374 S.E.2d 874, 877 (1988). Agent Worsham's opinion addressed the credibility of other witnesses and was an expression of opinion as to defendant's guilt and thus violated Rules 405(a), 608(a) and 702 of the North Carolina Rules of Evidence. *See State v. Heath*, 316 N.C. 337, 340-43, 341 S.E.2d 565, 567-69 (1986).

The trial transcript, however, is devoid of any motion on the part of defendant to strike the objectionable answers given by Agent Worsham. By failing to move that the testimony be stricken, defendant has waived his right now to assert error on appeal.

N.C. Gen. Stat. §§ 8C-1, R. Evid. 103(a)(1) (1988), 15A-1446(b) (1988); N.C. R. App. P. 10(b)(1) (1990); 1 Brandis at § 27 (when inadmissibility indicated by some feature of answer, objection should be in form of motion to strike as soon as inadmissibility becomes known). We therefore overrule this assignment of error.

IV

We find no error by the trial judge in permitting A.G. to testify about prior incidents of sexual abuse by defendant. Additionally, we hold that the judge did not err by overruling defendant's objection to the State's question to Agent Worsham and that defendant has waived his right to assign error to the objectionable portions of Agent Worsham's answers. We hold, consequently, that defendant is not entitled to a new trial.

No error.

Judges WELLS and PARKER concur.

DAVID CHARLES RADFORD HARE v. PATRICIA BUTLER; JEANETTE MURRAY; AND BOB PERSON, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS SOCIAL WORKERS OF THE MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES; PESULA FAULKNER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS PROTECTIVE SERVICES INVESTIGATION SUPERVISOR FOR THE MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES; KATHERINE WILSON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS PROGRAM ADMINISTRATOR FOR CHILD AND FAMILY SERVICES OF THE MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES; MERLENE WALL, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSISTANT DIRECTOR OF THE MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES; EDWIN H. CHAPIN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES; MECKLENBURG COUNTY DEPARTMENT OF SOCIAL SERVICES; MECKLENBURG COUNTY, NORTH CAROLINA; AND CAROLE LYNN PETERSON-HARE

No. 8926SC965

(Filed 7 August 1990)

1. Appeal and Error § 117 (NCI4th)— judgment not final as to all claims and parties—right of immediate appeal

A judgment dismissing part of plaintiff's claims for failure to state claims for relief was immediately appealable because

plaintiff has a substantial right to have all of his claims tried at the same time before the same judge and jury.

Am Jur 2d, Appeal and Error §§ 53, 54.

2. **Counties § 9.1 (NCI3d)— liability for torts of employees— purchase of liability insurance**

Traditionally, a county was immune from liability for torts committed by an employee carrying out a governmental function but was liable for torts committed by an employee engaged in a proprietary function. However, N.C.G.S. § 153A-435(a) authorizes counties to waive the defense of immunity for negligent actions that occur in the performance of governmental functions through the purchase of liability insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 38, 39.

3. **Counties § 9.1 (NCI3d)— claims against county and DSS employees—official capacities—failure to allege liability insurance**

Claims against a county, the county DSS and employees of the DSS in their official capacities for negligence in investigating allegations against defendant of child sexual abuse involved a governmental function and were properly dismissed where the complaint failed to allege that the county or the DSS had purchased liability insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 38, 39.

4. **Public Officers § 9 (NCI3d)— DSS employees—personal liability for negligence**

The Protective Services Investigation Supervisor for a county DSS, the Program Administrator for DSS, and the Assistant Director of DSS are public employees rather than public officers and may be held personally liable for the negligent performance of their duties which proximately caused foreseeable injury to plaintiff.

Am Jur 2d, Public Officers and Employees §§ 358, 359.

5. Public Officers § 9 (NCI3d)— Director of DSS—public officer—immunity

The Director of a county DSS is a public officer and is immune from liability in his individual capacity for alleged negligence in failing properly to train and supervise DSS employees.

Am Jur 2d, Public Officers and Employees § 377.

6. State § 4.1 (NCI3d)— sovereign immunity—action against government personnel

An action against government personnel in their official capacities is one against the State for the purpose of applying the doctrine of sovereign immunity.

Am Jur 2d, Public Officers and Employees §§ 358-360, 372.

7. Public Officers § 9 (NCI3d)— public employees and officers—liability for acts outside duties—punitive damages—statement of claim

Both public employees and public officers are liable for damages proximately caused by actions which are corrupt or malicious or outside and beyond the scope of their duties. Therefore, plaintiff's complaint was sufficient to allege claims for punitive damages against the Director and various employees of a county DSS in their individual capacities where it alleged that the actions of all defendants with respect to an investigation of allegations against defendant of child abuse were "intentional, willful, wrongful, deliberate and malicious."

Am Jur 2d, Public Officers and Employees §§ 364, 373.

APPEAL by plaintiff from an order entered on 6 July 1989 by *Judge Frank Snepp, Jr.*, in MECKLENBURG County Superior Court. Heard in the Court of Appeals 14 March 1990.

We must decide here if plaintiff's claim is legally sufficient to state a cause of action for negligence against a County department of social services, the County itself and four employees of the agency for alleged negligent and intentional actions arising out of their failure to properly train and supervise three department social workers who previously investigated allegations of child sexual abuse against plaintiff. Furthermore, plaintiff seeks punitive damages for malicious acts against all seven employees of the agen-

cy, the agency itself and the County. We note at the outset that the 12(b)(6) motion on appeal here was not converted at the motions hearing into one for summary judgment; therefore, we offer no opinion on the meritorious nature of plaintiff's claim. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b) (1983).

A 12(b)(6) motion to dismiss is proper when the complaint on its face reveals that no law supports the plaintiff's claim, that some fact essential to the plaintiff's claim is missing or when some fact disclosed in the complaint defeats the plaintiff's claim. *Scholoss Outdoor Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 272 S.E.2d 920 (1980). Moreover, under a 12(b)(6) motion the factual allegations of plaintiff's complaint are assumed to be true.

According to plaintiff's complaint, the facts are as follows: David Hare, the plaintiff, and Carole Lynn Peterson-Hare were married in August 1978. Two children, Jonathan and Jeremy, were born of the marriage. In the spring of 1985, the Hares began experiencing marital difficulties. In December 1985 Ms. Hare, in a statement to a physician, accused Mr. Hare of sexually abusing Jonathan. She also reported this allegation to Patricia Butler, a social worker at the Mecklenburg County Department of Social Services ("the DSS"). On 10 December 1985, Butler interviewed Jonathan in the presence of his mother. At that time Ms. Hare admitted that "she felt that maybe the whole matter was just in her mind and that if the marriage could be worked out that everything would be okay." On 11 December, Ms. Butler videotaped an interview with Jonathan. The next day a Mecklenburg County police officer interviewed Ms. Hare and Jonathan with Ms. Butler present. In this interview Jonathan allegedly described a "father-son neighborhood sex ring." Ms. Butler contacted Jonathan's physician, who informed her that he had not observed any unusual behavior as regards Mr. Hare and Jonathan.

The Mecklenburg County Police Department obtained arrest warrants for plaintiff. After being informed of the warrants, plaintiff turned himself in. He was incarcerated for four days. The warrants charged plaintiff with first degree sexual offense in violation of N.C. Gen. Stat. § 14-27.4 (1986) and taking indecent liberties with children in violation of N.C. Gen. Stat. § 14-202.1 (1986).

On 17 December 1985, Ms. Hare had Jonathan and Jeremy evaluated by another physician. The physician found no evidence of sexually related abuse or disease and recommended only family

counseling. On 30 December, Ms. Butler and Ms. Hare had their last recorded interview and the DSS closed its file on the matter. The Department never filed a juvenile petition alleging that the child was abused.

Mr. Hare was brought to trial on 27 January 1987. He entered a plea of not guilty. In preparation for his trial, plaintiff's attorney sought a copy of the videotape Ms. Butler had made of her interview with Jonathan. Before the videotape was turned over, however, Ms. Butler destroyed it. At the trial, the State presented its evidence including the testimony of the child Jonathan Hare. Plaintiff's attorney made a motion to dismiss at the close of the State's evidence. After commenting in open court that "the victim in this case was David Hare," the trial judge dismissed the State's case for insufficient evidence.

On 22 December 1988, plaintiff filed a complaint alleging various causes of action against his ex-wife, seven personnel of the DSS, the DSS itself and Mecklenburg County. Specifically pertinent to this appeal, plaintiff alleges negligence against defendants Mecklenburg County, the Mecklenburg County DSS, Edwin Chapin, Merlene Wall, Katherine Wilson and Pesula Faulkner for failing to properly supervise and adequately train three social workers, Patricia Butler, Jeanette Murray and Bob Person, who were directly involved in the child sexual abuse investigation. Plaintiff's complaint does not allege mere negligence against Ms. Butler, Ms. Murray or Mr. Person. However, plaintiff's complaint does seek to recover punitive damages against all defendants on the theory that their conduct was intentional, willful, wrongful, deliberate, malicious and evidenced a reckless disregard of his rights. The agency staff members were sued both individually and in their official capacities. Ms. Hare is not a party to this appeal.

Plaintiff alleges that as a direct and proximate cause of defendants' negligent and willful conduct he has suffered anxiety and distress caused by the separation from his children, and embarrassment and humiliation in his community caused by the investigation and false accusations. He also claims damages due to the time he spent away from his work defending himself against the charges. He seeks compensation in excess of $10,000 and punitive damages.

Prior to filing an answer, defendants filed motions to dismiss all claims pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1983). Following a hearing, the court denied defendants' motions to dismiss

with respect to all claims except the claims for negligence and punitive damages. From the portion of the order dismissing these claims, plaintiff appeals.

James, McElroy & Diehl, by John S. Arrowood, for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by Wayne P. Huckel and Michelle C. Landers; Golding, Meekins, Holden, Cosper & Stiles, by Fred C. Meekins and Martha R. Holmes; and Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris, for defendant appellees.

ARNOLD, Judge.

[1] Initially, we must decide if this appeal is interlocutory and therefore inappropriate at this time. *See* N.C. Gen. Stat. § 1A-1, Rule 54(b) (1983). The judgment below is not final as to all claims and parties. However, we find that plaintiff has a substantial right to have all of his claims for relief tried at the same time before the same judge and jury, and therefore allow this appeal. *Shelton v. Fairley*, 86 N.C. App. 147, 356 S.E.2d 917, *cert. denied*, 320 N.C. 634, 360 S.E.2d 94 (1987); *see Nance v. Robertson*, 91 N.C. App. 121, 370 S.E.2d 283, *disc. rev. denied*, 323 N.C. 477, 373 S.E.2d 865 (1988).

[2] A county's liability for the torts of its officers and employees depends on whether the activity involved is "governmental" or "proprietary" in nature. Traditionally, a county was immune from torts committed by an employee carrying out a governmental function, but was liable for torts committed while engaged in a proprietary function. The North Carolina Supreme Court has distinguished between the two as follows:

> Any activity . . . which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than to itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942). Often making this distinction proves difficult. Certain activities are clearly governmental such as law enforcement operations and the operation of jails, public libraries, county fire departments, public parks and city garbage services. *See County Government*

in North Carolina, 40-41 (A. F. Bell II, 3d ed. 1989). Non-traditional governmental activities such as the operation of a golf course or an airport are usually characterized as proprietary functions. Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary. *Id.* at 41-42.

Investigations by a social service agency of allegations of child sexual abuse are in the nature of governmental functions. Such activities are performed for the public good. Thus a county normally would be immune from liability for injuries caused by negligent social services employees working in the course of their duties. The General Assembly, however, has authorized counties through a statute to waive the defense of immunity for negligent actions that occur in the performance of governmental functions through the purchase of liability insurance. N.C. Gen. Stat. § 153A-435(a) (1987). Under this law, Mecklenburg County; the DSS, as a County agency; and the County employees may be liable for negligent or intentional actions carried out in the performance of their social services duties. *McNeill v. Durham County ABC Board*, 87 N.C. App. 50, 359 S.E.2d 500 (1987), *modified on other ground*, 322 N.C. 425, 368 S.E.2d 619, *reh'g denied*, 322 N.C. 838, 371 S.E.2d 278 (1988).

[3] Nevertheless, in the case *sub judice* dismissal of the negligence claim against Mecklenburg County was proper because plaintiff failed to allege negligence against the County in his complaint. Further, plaintiff's complaint does not allege or provide any evidence that Mecklenburg County or the DSS has purchased liability insurance, thus failing to show that these entities or their employees have waived governmental immunity. *Baucom's Nursery Co. v. Mecklenburg County*, 89 N.C. App. 542, 366 S.E.2d 558, *review denied*, 322 N.C. 834, 371 S.E.2d 274 (1988). We therefore uphold the court order dismissing the negligence claims against the County, the DSS and Ms. Faulkner, Ms. Wilson, Ms. Wall and Mr. Chapin for any acts committed in their official capacities. *See id.* Again, we note that plaintiff's complaint did not allege negligence against the three social workers, Ms. Butler, Ms. Murray and Mr. Person.

Defendants, Ms. Faulkner, Ms. Wilson, Ms. Wall and Mr. Chapin, however, have also been sued individually for negligence. When a governmental worker is sued individually, or in his or her personal capacity, our courts distinguish between public employees and public officers in determining negligence liability. *Harwood*

v. Johnson, 92 N.C. App. 306, 309, 374 S.E.2d 401, 404 (1988). A public officer sued individually is normally immune from liability for "mere negligence." *Id.* An employee, on the other hand, is personally liable for negligence in the performance of his or her duties proximately causing an injury. *Id.; Givens v. Sellars*, 273 N.C. 44, 159 S.E.2d 530 (1968).

A public officer is someone whose position is created by the constitution or statutes of the sovereign. *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). "An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of sovereign power." *Id.* Officers exercise a certain amount of discretion, while employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment; duties are ministerial when they are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Jensen v. S.C. Dept. of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (1988).

[4] In this case, Ms. Faulkner is the Protective Services Investigation Supervisor for the DSS; Ms. Wilson, the Program Administrator for Child and Family Services for the DSS; and Ms. Wall, the Assistant Director of the DSS. These three defendants are employees of the County agency, not public officers. It does not appear that their positions are created by statute nor that they exercise any sovereign power. *See Harwood*, 92 N.C. App. 306, 374 S.E.2d 401. Therefore, Ms. Faulkner, Ms. Wilson and Ms. Wall may be personally liable for the negligent performance of their duties that proximately caused foreseeable injury to plaintiff, and the claims against these three individuals were improperly dismissed.

[5] Mr. Chapin's position as director of the County DSS is created by statute. At least some of his duties are imposed by law and as director he exercises a substantial amount of discretionary authority. *See* N.C. Gen. Stat. § 108A-12 (1988). He is a public officer, and therefore normally immune from liability for negligent conduct. Duties of a public officer, however, are classified as either discretionary or ministerial. Public officers are absolutely immune from liability for discretionary acts when taken without bad faith or malicious intent. *Pigott v. City of Wilmington*, 50 N.C. App. 401, 402, 273 S.E.2d 752, 753-54, *cert. denied*, 303 N.C. 181, 280 S.E.2d 401 (1981). Plaintiff here alleges Chapin was negligent for his part

in failing to properly train and supervise agency employees. We believe such activities are discretionary in nature and hold therefore that Mr. Chapin is immune from the negligence claim brought against him in his individual capacity.

[6] Plaintiff also contends that the trial court erred in dismissing his claim for punitive damages against the defendants. Plaintiff now concedes that the trial court properly dismissed the punitive damages claim against Mecklenburg County and the DSS. *See Long v. City of Charlotte*, 306 N.C. 187, 208, 293 S.E.2d 101, 115 (1982). Furthermore, an action against government personnel in their official capacities is one against the State for the purpose of applying the doctrine of sovereign immunity. *Harwood*, 92 N.C. App. at 309, 374 S.E.2d at 404. Dismissal of the punitive damages claim against the personnel in their official capacities was proper.

[7] The trial court, however, erroneously dismissed the punitive damages claims against the seven agency personnel in their individual capacities. Punitive damages are awarded where a defendant's conduct reaches a level higher than mere negligence and amounts to willful, wanton, malicious, or reckless indifference to foreseeable consequences. *Nance*, 91 N.C. at 123, 370 S.E.2d at 284. While personal liability for mere negligence turns on the question of whether the individual is a public officer or an employee, this distinction is immaterial if the individual's actions are "corrupt or malicious" or are "outside and beyond the scope of his duties." *Harwood*, at 309, 374 S.E.2d at 404. Both employees and public officers are liable for damages proximately caused by such actions. In paragraph 130 of his complaint, plaintiff alleges that the conduct of all defendants was "intentional, willful, wrongful, deliberate and malicious." We hold the complaint sufficiently states a cause of action to survive a 12(b)(6) motion against defendants Ms. Butler, Ms. Murray, Mr. Person, Mr. Chapin, Ms. Wall, Ms. Wilson and Ms. Faulkner personally for any malicious acts that proximately caused the plaintiff foreseeable injury. This claim would allow for the recovery of punitive damages. The trial court's order concerning this aspect of the complaint was improperly dismissed.

In summary the Order is reversed as against Mr. Chapin in his individual capacity for any malicious actions directed at the plaintiff and for possible punitive damages related to that claim. The Order is reversed against Ms. Faulkner, Ms. Wilson and Ms. Wall in their individual capacities for any negligent or malicious

acts that caused plaintiff injury and for punitive damages for any proven malicious behavior. The Order also is reversed against Ms. Butler, Ms. Murray and Mr. Person for malicious acts that caused plaintiff injury and for punitive damages related to the claim of malicious behavior.

The remainder of the Order is affirmed.

Judges LEWIS and DUNCAN concur.

GERALD DONNELLY, PETITIONER v. BOARD OF ADJUSTMENT OF THE VILLAGE OF PINEHURST, RESPONDENT

No. 8920SC607

(Filed 7 August 1990)

1. **Municipal Corporations § 30.6 (NCI3d)— zoning variance— privacy fence—through lot**

Both the Board of Adjustment and the trial court correctly determined that petitioner's lot is a "through lot" under the Pinehurst zoning ordinances, so that a variance was required for a fence over three feet six inches in height, because the language of the ordinance clearly indicates that an interior lot bordered by a lane and a highway is a through lot; the spirit of the ordinance is to preserve the appearance of the town with particular regard to the fact that Pinehurst greatly profits from maintaining the golf and vacation trade; regardless of whether petitioner has direct access to his lot from Highway 211, the highway abuts his property and the public has visual access to his lot from both the highway and from Travis Lane; moreover, petitioner's fence was more than six feet in height and violated a section of the ordinance applicable to any lot which limits rear yard fences to six feet in height.

Am Jur 2d, Zoning and Planning §§ 41, 90, 91, 123.

2. **Municipal Corporations § 30.6 (NCI3d)— zoning variance— privacy fence—definition of fence type**

A petitioner should not be required to obtain a variance from a Pinehurst zoning ordinance on the ground that he erected

a nonconforming type of fence without a more specific definition in the zoning ordinance as to what constitutes picket and stockade fences. Words are to be given their ordinary meaning and significance when interpeting zoning ordinances and the language of the ordinances is to be construed narrowly against the governing authority.

Am Jur 2d, Zoning and Planning §§ 41, 90, 91, 123.

3. Municipal Corporations § 30.6 (NCI3d)— zoning variance— findings and conclusions—not required

The Village of Pinehurst Board of Adjustment had no duty to make findings and conclusions on the merits of petitioner's request for a variance for a privacy fence where the requested variance would be directly contrary to the zoning ordinance and the Board had no authority to grant petitioner's request.

Am Jur 2d, Zoning and Planning §§ 41, 90, 91, 123.

Judge EAGLES dissenting.

APPEAL by petitioner from judgment entered 31 March 1989 by *Judge Thomas W. Seay* in MOORE County Superior Court. Heard in the Court of Appeals 14 November 1989.

Douglas R. Gill for petitioner-appellant.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by W. Lamont Brown, for respondent-appellee.

PARKER, Judge.

This appeal involves the Board of Adjustment of the Village of Pinehurst's denial of a variance to allow petitioner to maintain a fence across the rear of his lot in violation of local zoning ordinances. Petitioner owns Lot 109, Travis Lane in Pinehurst, North Carolina. The lot fronts on Travis Lane and abuts State Highway 211 on the rear. Highway 211 separates Pinehurst from Taylortown, a recently incorporated municipality. The highway is a heavily traveled road. The property across the highway from petitioner's property is zoned commercial and includes an electric power substation and an electric supply store. Sometime prior to 27 April 1988 petitioner built a fence across the rear of this lot to screen it from Highway 211 and the commercial properties. The fence was

approximately six feet high and it was placed on a one- to two-foot earth berm, yielding a fence approximately seven feet higher than the normal level of the surrounding ground. The fence was constructed of closely spaced, narrow, wooden slats, with each slat shaped at the top. The slats were affixed to horizontal members. Petitioner built the fence without applying for, or receiving, a building permit in advance. Sometime after he had finished construction of the fence, petitioner requested a variance from the building and zoning inspector for the Village. The inspector denied the variance and petitioner appealed to the Board of Adjustment of the Village of Pinehurst (herein "the Board"). On appeal to the Board, petitioner argued that the fence was permitted under the zoning ordinance and, in the alternative, that a variance should be granted. The Board denied the appeal on the grounds that the fence violated the zoning ordinance.

Donnelly then petitioned the Superior Court for a writ of certiorari. The writ was granted, and the trial court affirmed the denial of the variance.

Petitioner brings forward three assignments of error. First, petitioner assigns error to the court's conclusion that petitioner's lot was a "through lot" under the ordinance, requiring a variance for a rear fence higher than 3½ feet. Second, petitioner contends that the trial court erred in determining that the fence was a "stockade fence" rather than a "picket fence" as defined by the ordinance. Finally, petitioner asserts that the court erred in failing to remand to the Board of Adjustment because petitioner contends that the Board failed to make findings or conclusions to support the denial of the variance.

The grant or denial of a variance is the exercise of the board's quasi-judicial power. In exercising this power the board investigates the facts. *See In re Markham*, 259 N.C. 566, 131 S.E.2d 329, *cert. denied*, 375 U.S. 931, 84 S.Ct. 332, 11 L.Ed.2d 263 (1963). General Statute 160A-388 states that "[e]very decision of the board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." G.S. 160A-388(e). In reviewing the decision of the board under this statute, the Superior Court sits as an appellate court. *See Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980).

[1] As to his first assignment of error, petitioner contends that, under the definitions contained in the Pinehurst Zoning Ordinance,

his lot was not a "through lot"; therefore, his construction of a six-foot fence across the rear of the lot was not a violation of the zoning ordinance, and he should not have been required to apply for a variance before a building permit was issued to him. The Pinehurst Zoning Ordinance provides:

> 6.10.1(a) Fences and walls or similar structures not over three feet six inches (3'6") may project into or may enclose any front or side yard, and fences or walls, or similar structures enclosing rear yards may be six feet (6') high. If a property owner's rear lot line borders on the side lot line of another property owner, the side yard height limitation of three feet six inches (3'6") applies to any fence erected on such property line for the length contiguous to said side yard.
>
> . . . .
>
> 6.10.6 Fences or walls or similar structures on through lots are to be limited to three feet six inches (3'6") in height.

The ordinance defines a "through lot" as "[a]n interior lot having frontage on two streets." A "street" is defined as "[a] thoroughfare which affords the principal means of access to abutting property, including avenue, place, way, drive, lane, boulevard, *highway*, road and any other thoroughfare, except an alley." (Emphasis added.) Petitioner concedes that his lot fronts on Travis Lane and abuts State Highway 211 on the rear. There was also evidence that Highway 211 connects with Travis Lane, giving petitioner indirect access to his property by way of Highway 211. Petitioner argues, however, that Highway 211 is not a "street" within the definition of the ordinance because Highway 211 is a restricted access highway, he cannot gain direct access from Highway 211, and his only access to the lot is from Travis Lane.

"A zoning ordinance, like any other legislative enactment, must be construed so as to ascertain and effectuate the intent of the legislative body." *In re Application of Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (citing *Bryan v. Wilson*, 259 N.C. 107, 130 S.E.2d 68 (1963)). Our Supreme Court has held that, with regard to zoning ordinances, "[t]he best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." *Concrete Co. v. Board of Commissioners*, 299 N.C. at 629, 265 S.E.2d at 385.

Given these indicia of legislative intent, both the Board and the trial court, in our opinion, were correct in determining that petitioner's lot was a "through lot" as defined by the ordinance and that a variance would be required for petitioner to maintain a fence greater than three feet six inches in height across the rear of the lot. The language of the ordinance clearly indicates that an interior lot bordered by a lane and a highway is a "through lot." The spirit of the ordinance is to preserve the appearance of the town with particular regard to the fact that Pinehurst greatly profits from maintaining the golf and vacation trade. This spirit is apparent throughout the ordinance. In addition to the section governing the height of fences on "through lots" (6.10.6), there are also sections promoting the use of hedges, shrubs and trees in lieu of fences and walls (6.10.5), restricting fences or walls on lots abutting lakes or golf courses (6.10.2 and 6.10.3), and requiring extensive screening of visually offensive structures such as commercial fencing (6.10.7), residential vehicular parking (6.12), and outdoor spas (6.13). We recognize that "through lots" are highly visible lots since they border on two thoroughfares. With regard to "through lots" the goal of the ordinance is to regulate not only the fences on these lots, but also to require mandatory front, rear and side yards and to prohibit any encroachment of architectural features into these yards. Pinehurst Zoning Ordinance § 6.5. Regardless of whether petitioner has direct access to his lot from Highway 211, the highway abuts his property and the public has "visual access" to his lot from both the highway and from Travis Lane. Petitioner was, therefore, properly required to seek a variance for his fence.

Moreover, as the evidence before the Board showed, petitioner's fence was in excess of six feet in height and also violated 6.10.1(a) which is applicable to any lot and limits rear yard fences to six feet in height.

[2] Second, petitioner assigns error to the trial court's determination that his fence was a "stockade fence" rather than a "picket fence." The Pinehurst Zoning Ordinance permits only the following types of fences on individual residential lots: picket, post and rail, wrought iron, brick, and stone. Sections 5.3.9 and 6.10.1(b). The ordinance provides that "[t]he purpose of [the section designating acceptable types of fencing] is to allow fences within districts which are architecturally compatible with each other, preserving the flex-

ibility of fences in the rural areas." Section 6.10.1(b). The types of fences are not further defined by the ordinance.

Petitioner contends that his fence is a "picket fence" because it is comprised of numerous, narrow, vertical boards, "dog-eared at the top" and affixed to horizontal members. In support of his contention petitioner points to the following definition of "picket fence" and "picket" appearing in *Webster's New World Dictionary*:

> *picket fence*, a fence made of upright pales or stakes.
>
> *picket*, a stake or slat usually pointed, used as an upright in a fence.

Petitioner contrasts this definition with that for "stockade"—"a barrier of stakes driven into the ground side by side for defense against attack [or] any similar enclosure." Webster's New World Dictionary (College Ed. 1968). The evidence presented to the Board showed a fence of closely-spaced, narrow, wooden slats, flat at the top with slanted sides.

When interpreting zoning ordinances, words are given their ordinary meaning and significance. *Penny v. Durham*, 249 N.C. 596, 600, 107 S.E.2d 72, 76 (1959). The language of the ordinance is also construed narrowly against the governing authority. *See id.* at 601, 107 S.E.2d at 76. Based on the foregoing rules of construction, without a more specific definition in the zoning ordinance as to what constitutes picket and stockade fences, petitioner should not be required to obtain a variance on the ground that he erected a non-conforming type of fence.

[3] Finally, petitioner assigns as error the trial court's failure to remand to the Board for proper findings and conclusions to support the denial of the variance. We note that petitioner has not argued on appeal that he was entitled to a variance; he has merely argued that he was not required to obtain a variance or, alternatively, that the Board's denial of the variance should be overturned because the Board failed to properly support the denial with findings and conclusions. We have already determined that petitioner was required to obtain a variance. Petitioner's contention that the Board's denial of the variance cannot be upheld because the Board failed to make findings and conclusions is without merit.

General Statute 160A-388 states:

> When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall have the power, in passing upon appeals, to vary or modify any of the regulations or provisions of the ordinance relating to the use, construction or alteration of buildings or structures or the use of the land, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done.

G.S. 160A-388(d). Our Courts have read this statute to require the petitioner to demonstrate that he would suffer "unnecessary hardship" in order to qualify for a variance. *In re Markham*, 259 N.C. at 572, 131 S.E.2d at 334; *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128, 168 A.L.R. 1 (1946). The board, however, has the power to grant a variance only where it can do so within the spirit of the zoning ordinance; the board is prohibited from authorizing a structure which conflicts with the general purpose of the ordinance, "for to do so would be an amendment of the law and not a variance of its regulations." *Lee v. Board of Adjustment*, 226 N.C. at 112, 37 S.E.2d at 132, 168 A.L.R. at 6.

As discussed above, the spirit and goal of this ordinance are to preserve the appearance of the town by strictly regulating, on the most visible portions of properties, *e.g.*, the areas abutting streets, golf courses, and lakes, those structures identified as visually undesirable. Read as a whole, the ordinance is clearly intended to exclude tall privacy fences, other than live fences, from highly visible locations. In the words of the Board during the hearing on petitioner's request for the variance, "[we] just don't like to see a wall city." The requested variance would be directly contrary to the zoning ordinance and, therefore, the Board had no authority to grant petitioner's request. *Id.; Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 648, 334 S.E.2d 103, 104 (1985). In such a situation this Court has held that the board of adjustment has no duty to make findings and conclusions on the merits of the request. *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. at 648, 334 S.E.2d at 104.

The judgment of the trial court is affirmed.

Affirmed.

Judge ORR concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. As the majority notes, when interpreting zoning ordinances, we should give words their ordinary meaning and significance. *Penny v. Durham*, 249 N.C. 596, 600, 107 S.E.2d 72, 76 (1959). The ordinary meaning and significance of "access to abutting property" as used in the ordinance's definition of a "street" is not satisfied by mere "visual access or being able to *look* at or onto the property." In this context "access" means the right to ingress and egress without restriction. *Dept. of Transportation v. Craine*, 89 N.C. App. 223, 229, 365 S.E.2d 694, 699, *dismissal allowed and disc. rev. denied*, 322 N.C. 479, 370 S.E.2d 221 (1988).

"In real property law, the term 'access' denotes the right vested in the owner of land which adjoins a road or other highway to go and return from his own land to the highway without obstruction." Black's Law Dictionary 13 (5th edition 1979); *see also Dept. of Transportation v. Craine*, 89 N.C. App. 223, 365 S.E.2d 694 (1988).

Here, because "street" is defined by the ordinance as "[a] thoroughfare which affords the principal means of access to abutting property, including avenue, place, way, drive, lane, boulevard, highway, road and any other thoroughfare, except an alley" and "through lot" is defined by ordinance as an "interior lot having frontage on two streets," I conclude that petitioner's lot is not a through lot because it does not have frontage on two streets. Since there is no vehicular access from Highway 211 to petitioner's lot, his lot is not a through lot as defined by the ordinance. Accordingly his rear fence is subject to a six foot height limitation and the order of the Board of Adjustment was erroneously entered. The superior court erred when it affirmed the Board's order.

I am sensitive to the aesthetic concerns which motivate the Village of Pinehurst Board of Adjustment in construing their fence ordinance. However, our courts have consistently held that when municipalities restrict the rights of private citizens in the use of their own property, our municipal ordinances must be construed narrowly against the municipality. *Penny v. Durham*, 249 N.C. 596, 601, 107 S.E.2d 72, 76 (1959).

SHIRLEY S. STALLINGS v. JERRY M. GUNTER, JERRY M. GUNTER, D.D.S., P.A., A PROFESSIONAL CORPORATION, ROY WILLIAM KELLY, JR., ROY WILLIAM KELLY, JR., D.D.S., P.A., A PROFESSIONAL CORPORATION

No. 8927SC1251

(Filed 7 August 1990)

1. **Physicians, Surgeons, and Allied Professions § 13 (NCI3d)— professional malpractice — statute of repose — continuing course of treatment doctrine**

The "continuing course of treatment" doctrine may be used in determining the starting date for the professional malpractice statute of repose set forth in N.C.G.S. § 1-15(c).

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 320-322.

2. **Physicians, Surgeons, and Allied Professions § 13 (NCI3d)— malpractice by dentist — continuing course of treatment — start of statute of repose**

In a malpractice action against a dentist based on his alleged failure to inform plaintiff of possible injuries from orthodontic treatment and to monitor her periodontal condition, the continuing course of treatment doctrine did not postpone the starting point for the statute of repose after 6 February 1985, the date defendant informed plaintiff of her injuries and the last date of any acts or omissions by defendant related to plaintiff's allegations of negligence. Accordingly, plaintiff's failure to file her action within four years after 6 February 1985 was fatal to her action. N.C.G.S. § 1-15(c).

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 320-322.

3. **Limitation of Actions § 8.1 (NCI3d); Physicians, Surgeons, and Allied Professions § 13 (NCI3d)— medical malpractice — statute of repose — fraudulent concealment**

Fraudulent concealment cannot toll the running of the statute of repose after a medical malpractice claim has accrued.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 320-322.

APPEAL by plaintiff from order entered 20 June 1989 by *Judge Kenneth A. Griffin* in GASTON County Superior Court. Heard in the Court of Appeals 11 May 1990.

Kelso & Ferguson, by Lloyd T. Kelso, for plaintiff-appellant.

Kennedy Covington Lobdell & Hickman, by James P. Cooney III, for defendant-appellees Roy William Kelly, Jr. and Roy William Kelly, Jr., D.D.S., P.A.

GREENE, Judge.

Plaintiff appeals the trial court's grant of defendant's Rule 56 motion to dismiss her complaint based on the statute of repose for professional malpractice suits, N.C.G.S. § 1-15(c) (1983).

The record shows that plaintiff Shirley S. Stallings was a dental patient of defendants prior to the time of suit. Defendant Dr. Roy W. Kelly ("Kelly"), a general dentist, provided dental treatment to plaintiff beginning in March, 1976. In 1981, plaintiff consulted with defendant Dr. Jerry M. Gunter ("Gunter"), an orthodontist, about applying braces to plaintiff's teeth. Gunter applied the braces, and while plaintiff was wearing braces, Kelly provided dental treatment to plaintiff on 12 November 1982, 3 October 1983, 7 May 1984, and 17 July 1984. Gunter removed plaintiff's braces on 23 January 1985. On 25 January 1985, a dental hygienist in Kelly's office cleaned plaintiff's teeth and took bite-wing radiographic (x-ray) photographs. On 6 February 1985, Kelly had a full series of x-rays of plaintiff's teeth taken and developed, which showed "significant resorption or dissolving of the roots" of plaintiff's teeth. Kelly immediately informed plaintiff of the damage and referred her to a dental specialist, Dr. Evangelo Vagianos, for treatment of the root problems, who provided further dental treatment. Plaintiff continued to receive dental treatment from Kelly on these dates: 10 April 1985 (Kelly filled a tooth cavity in plaintiff's teeth); 19 March 1986 (Kelly examined plaintiff's teeth when she presented herself without appointment); 17 July 1986 (Kelly examined plaintiff's teeth); and 12 November 1986 (Kelly "splinted" plaintiff's front teeth at the request of Dr. Vagianos).

On 30 December 1987, plaintiff filed suit against Gunter and his professional corporation. Gunter answered, denying plaintiff's allegations and asserting statutes of limitation and repose in bar of plaintiff's suit.

Plaintiff deposed Kelly on 20 January 1989, producing these questions and answers:

> Q. Do you consider it to be any part of your responsibility to ascertain the level of Mrs. Stallings' periodontal disease during the course of orthodontic treatment, to ascertain whether her overall dental picture was being aggravated or affected as a result of her ongoing orthodontic treatment?
>
> A. Yes.
>
> Q. Do you feel that anything that you did or failed to do, or anything that you saw or failed to see, in association with any of the evaluations that you conducted of her during the time that orthodontic treatment was being rendered, was a departure from standards of care applicable to your practice?
>
> A. Yes.

On 10 March 1989, plaintiff moved to amend her complaint to add Kelly and his professional corporation as defendants. The court allowed plaintiff's motion the same day and she filed an amended complaint on 10 March 1989, alleging that defendant's careless, negligent and reckless "fail[ure] to inform the plaintiff [of the possible injuries associated with orthodontic treatment], . . . fail[ure] to monitor the plaintiff's peridontal condition . . . to consult with . . . Gunter or refer the plaintiff or to provide appropriate treatment" from approximately December, 1981 until 30 July 1985, caused "severe damage" to her teeth, as well as pain and suffering and monetary damages.

Defendant Kelly and his corporate defendant moved to dismiss plaintiff's complaint according to Rule 12(b)(6), asserting that the "last act" allegedly causing plaintiff's damage occurred on 17 July 1984, so that N.C.G.S. § 1-15(c) required plaintiff to file suit against Kelly within four years of that date, 17 July 1988, and her failure to do so barred her suit against these defendants.

The trial court received and considered "materials outside of the pleadings in this cause" including plaintiff's affidavit, and depositions by defendant Kelly and plaintiff's dental specialist. Because it considered these materials, the court heard defendants' motion as one for summary judgment according to Rule 56. The court concluded that the "last act of the Kelly defendants which gave

rise to the plaintiff's cause of action occurred no later than January 25, 1985 . . ." The court further concluded that plaintiff's action was barred by operation of G.S. § 1-15(c) "from maintaining an action against the Kelly defendants after January 25, 1989, or four years from the last act of the Kelly defendants which gave rise to the plaintiff's cause of action."

After plaintiff gave notice of appeal, plaintiff settled her causes of action against defendants Gunter and Gunter's professional corporation.

The issues are: (I) whether the professional malpractice statute of repose bars plaintiff's suit because plaintiff failed to bring suit within four years of defendant's 'last act' of malpractice; and (II) whether the statute of repose was tolled because of defendant's alleged concealment of his alleged negligent acts.

This appeal presents only issues related to the statute of repose, since the trial court found "genuine issues of material fact as to whether the action is barred by the statute of limitations . . ." The 'statute of repose,' as it has become known, provides in part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of occurrence of the last act of the defendant giving rise to the cause of action . . . [p]rovided further, that in no event shall an action be commenced more than four years from *the last act of the defendant giving rise to the cause of action* . . .

N.C.G.S. § 1-15(c) (emphasis added).

I

Plaintiff argues that the "continuing course of treatment" doctrine applies to the statute of repose and that pursuant to the doctrine, the statute of repose began running on 12 November 1986, the last time defendant treated plaintiff. Because plaintiff filed her action against Kelly on 10 March 1989, well within four years of 12 November 1986, plaintiff contends that the statute of repose does not bar the action. In opposition, defendant Kelly argues that the statute of repose began to run no later than 25

January 1985, and since plaintiff filed her action more than four years after 25 January 1985, the statute of repose bars the action.

N.C.G.S. § 1-15(c) is a " 'hybrid' " statute having both a substantive and procedural effect. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 367, 293 S.E.2d 415, 418 (1982) (citation omitted). The substantive component of the statute is known as a statute of repose and provides that "in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action . . ." N.C.G.S. § 1-15(c). The procedural component of § 1-15(c) is known as the statute of limitation and provides that a cause of action for malpractice is "deemed to accrue with the time of occurrence of the last act of the defendant giving rise to the cause of action . . ." *Id.*

Traditionally, statutes of repose begin " 'to run at a time unrelated to the traditional accrual of the cause of action.' " *Bolick*, at 366, 293 S.E.2d at 418 (citation omitted). Application of this traditional rule led to the not uncommon result that the statute of repose barred plaintiff's cause of action before the cause of action had accrued for purposes of the statute of limitation. *See Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985). However, after the North Carolina legislature amended § 1-15(c), the starting date for running of the statute of repose became the same date as that for accrual of the cause of action, "the last act of the defendant giving rise to the cause of action." Therefore, pursuant to § 1-15(c), the current statute of repose cannot expire before accrual of the action.

The "continuing course of treatment" doctrine has been accepted as an exception to the rule that "the action accrues at the time of the defendant's negligence." *Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978). According to this doctrine, the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action. *Id.; see generally*, Comment, *The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York*, 49 Albany L.Rev. 64, 65 (1984) (hereafter "Comment"). It is not necessary under this doctrine that the treatment rendered subsequent to the negligent act itself be negligent, if the physician continued to treat the patient for the particular disease or condition created by the original act

of negligence. *Callahan v. Rogers*, 89 N.C. App. 250, 255, 365 S.E.2d 717, 719 (1988) (treatment "after" the negligent act is within the 'continuing course of treatment' doctrine); *see Grubbs v. Rawls*, 235 Va. 607, 613, 369 S.E.2d 683, 687 (1988) (plaintiff could wait until the end of treatment "to complain of any negligence which occurred *during* that treatment") (emphasis in original); *see also Holdridge v. Heyer-Schulte Corp.*, 440 F.Supp. 1088, 1098 (1977) (the 'continuing course of treatment' doctrine is applicable "even if there are no further acts of malpractice in the continued treatment"); *Comment*, at 77, n.51 (the "subsequent treatment does not have to be negligent").

To take advantage of the 'continuing course of treatment' doctrine, plaintiff must "show the existence of a *continuing* relationship with his physician, and . . . that he received *subsequent* treatment from that physician." *Id.*, at 72 (emphases added). Mere continuity of the general physician-patient relationship is insufficient to permit one to take advantage of the continuing course of treatment doctrine. *Callahan*, at 255, 365 S.E.2d at 720. Subsequent treatment must consist of "either an affirmative act or an omission, [which] must be related to the original act, omission, or failure which gave rise to the cause of action." *Comment*, at 76-77; *see Callahan*, at 255, 365 S.E.2d at 720 (the treatment must be "for the same injury"); *see also* 1 D. Louisell & H. Williams, *Medical Malpractice* § 13.08 (1981) (the statute is tolled as long as the patient receives treatment from the doctor "for the particular disease or condition" created by the negligent act). However, plaintiff is not entitled to the benefits of the 'continuing course of treatment' doctrine if during the course of the treatment plaintiff knew or should have known of his or her injuries. *Ballenger*, at 60, 247 S.E.2d at 294; Louisell & Williams, at § 13.08.

[1] Because the 'continuing course of treatment' doctrine affects determination of the accrual date, and the accrual date under § 1-15(c) is the starting date for the running of the statute of limitation and statute of repose, it is correct to use the 'continuing course of treatment' doctrine to determine the start date for running of the statute of repose. It is only by using the doctrine that a court can determine defendant's relevant 'last act.'

[2] Having determined that it is correct to apply the 'continuing course of treatment' doctrine to determine the starting point for the statute of repose, we also determine that plaintiff does not

have the benefit of the 'continuing course of treatment' doctrine after 6 February 1985, because on 6 February 1985, defendant informed plaintiff of her problems with her teeth and gums. Therefore, that is the date that plaintiff knew of her injuries and she no longer had the benefit of the doctrine. Even if we applied the doctrine, 6 February 1985 was the last date of defendant Kelly's treatment acts or omissions related in any manner to defendant Kelly's alleged original negligent acts of failing to inform plaintiff of the "numerous problems that could result and did result from orthodontic treatment in her case when he knew that she was going to undergo orthodontic treatment." Since plaintiff filed suit on 10 March 1989, defendant Kelly's 'last act' had to occur no earlier than 10 March 1985 for plaintiff to bring suit within the four-year statute of repose time limit, but its occurrence on 6 February 1985 bars her action. Accordingly, the statute of repose began to run no later than 6 February 1985, and plaintiff's failure to file her action within four years of that date is fatal to her cause of action.

II

[3] Plaintiff argues in the alternative that the statute of repose should be tolled by defendant Kelly's alleged fraudulent concealment of his negligent acts. We disagree.

Fraudulent concealment can operate to toll the running of the statute of limitation after the action has accrued. *Connor v. Schenck*, 240 N.C. 794, 795, 84 S.E.2d 175, 176 (1954). However, whether fraudulent concealment can toll the running of the statute of repose after accrual of the action presents a different question. Substantive rights, such as those created by the statute of repose are not subject to tolling. *See* Restatement of Law 2d, *Torts* § 899, Comment g (1979). Accordingly, fraudulent concealment, which is an affirmative defense not pled in this case, cannot operate to toll the running of the statute of repose.

Affirmed.

Judges ORR and LEWIS concur.

WIMPHREY W. JENKINS, PEGGY JOHNSON, RUBY J. BASKERVILLE, AND EMMA CLEMONS v. RICHMOND COUNTY, NORTH CAROLINA; LAT PURSER AND ASSOCIATES, INC.; CORNERSTONE DEVELOPMENT COMPANY; FOOD LION, INC.; AND JOHN ALDEN LIFE INSURANCE COMPANY; AND CHARLES L. FULTON, TRUSTEE

No. 8920SC1220

(Filed 7 August 1990)

1. Taxation § 39.2 (NCI3d)— tax foreclosure sale—insufficient notice

The trial court properly refused to grant defendants' motion for a directed verdict at the conclusion of plaintiffs' evidence in an action to remove a cloud upon title arising from a tax foreclosure sale where the deed through which plaintiffs were conveyed the disputed lot lists the names of Peggy Johnson, Ruby Baskerville, and Emma Clemons along with Wimphrey Jenkins; the only tax notice sent by Richmond County concerning the property in question was sent to "Wimphrey Jenkins, et al, Charlotte Street, Hamlet"; the county made no effort to determine the location of or to send a tax notice to the other three plaintiffs, all current owners listed on the deed; the failure of the county to attempt to send mailed notices to each individual taxpayer rendered the subsequent execution sale invalid; and the record also contains competent evidence that the county did not exercise due diligence in attempting to locate the current mailing address of any of the owners.

Am Jur 2d, State and Local Taxation §§ 921-923, 927, 932.

2. Equity § 2.2 (NCI3d)— tax foreclosure—insufficient notice—laches not applicable

An action to remove a cloud on title arising from a tax foreclosure sale was not appropriate for the application of the laches doctrine where the county's failure to properly notify plaintiffs rendered the judgment void but a full examination of equities in this case reveals that all the parties here must share in the blame for this predicament. Moreover, the better view is not to apply the doctrine to a void tax foreclosure judgment.

Am Jur 2d, State and Local Taxation §§ 1050, 1056.

3. Betterments or Improvements to Real Property § 20 (NCI4th) — tax foreclosure — sale to third party — shopping center — remand for application of betterments statutes

An action to remove a cloud on title arising from a tax foreclosure was remanded for application of North Carolina's betterments statute where the lot was subsequently sold and became part of a shopping center. While plaintiffs are the rightful owners of the lot, they must compensate defendants for the improvements; plaintiffs may opt to relinquish their estate to defendants, who must pay plaintiffs the value of the property in its unimproved condition. Plaintiffs are also entitled to the rents and profits from the property in its unimproved condition for the period of defendants' possession. If plaintiffs fail to exercise one of these options, the value of the improvements becomes a lien and, if not paid, a sale of the premises will be ordered. N.C.G.S. § 1-347.

Am Jur 2d, State and Local Taxation §§ 1042, 1043, 1045, 1048, 1049.

APPEAL by plaintiffs from judgment entered 21 June 1989 by *Judge W. Freeman* in RICHMOND County Superior Court. Heard in the Court of Appeals 10 May 1990.

Plaintiffs filed their initial pleading in this matter on 4 December 1987 seeking to remove a cloud on their title to a tract of property located in Hamlet, North Carolina. Subsequently, plaintiffs twice amended their complaint to add additional defendants. Defendants filed answers to each complaint denying plaintiffs' allegations and seeking dismissal of the action. Plaintiffs twice filed a motion for summary judgment. Both motions were denied prior to trial.

The trial of this action commenced on 12 June 1989 and the issues of whether the County complied with the notice requirements of N.C. Gen. Stat. § 105-375 (1989), whether plaintiffs were barred by laches and whether defendants were entitled to betterments were submitted to the jury. The jury found that defendant County did not exercise reasonable diligence in notifying plaintiffs of the impending tax foreclosure action, but that plaintiffs were barred by laches from claiming ownership to the property in question. The jury did not reach the issue of betterments. From this judgment, plaintiffs appealed.

The facts from the record and briefs indicate that this dispute is over the ownership of a small tract described as "Lot #50 on Charlotte Street in Block C of Circlewood Subdivision," located within the city limits of Hamlet in the county of Richmond. In late 1987, defendant Cornerstone Development Company ("Cornerstone") constructed a building that forms part of a shopping center on this lot and adjacent lands. The building is currently leased to defendant Food Lion, Inc. The disputed land and the remainder of the shopping center real estate are subject to the lien of a deed of trust to defendant Charles L. Fulton, trustee for John Alden Life Insurance Company. Cornerstone acquired title to the property by warranty deed from defendant Lat Purser & Associates, Inc. ("Lat Purser"), which in turn acquired title by quitclaim deed from Richmond County.

Plaintiffs acquired their interest in Lot #50 through a deed recorded 3 April 1978, which was conveyed from their aunt. The deed listed plaintiffs' addresses only as the "State of New Jersey." No further information concerning the location of plaintiffs appears on the recorded deed. In 1978, plaintiffs entered into a written agreement in which they agreed that plaintiff Wimphrey Jenkins would be in charge of the property.

Subsequent to their purchase of the lot, plaintiffs listed the property with the Hamlet City Tax Department, providing the department with a current mailing address of Wimphrey Jenkins, and thereafter paid their city property taxes. Plaintiffs, however, were unaware of their dual listing obligation and so failed to list their property with the Richmond County Tax Office. Upon plaintiffs' failure to list the property in 1979, Richmond County tax officials, by checking the Register of Deeds, listed the property in the name of Wimphrey Jenkins and used the physical location of the lot as the owner's address. The County then sent a tax bill to that address. Plaintiffs never maintained a residence in Hamlet. The mailed tax bill was returned undelivered, marked "Addressee Unknown." Plaintiffs, accordingly, never paid their *ad valorem* county taxes due on the property. A lien attached and Richmond County proceeded in the *in rem* method of foreclosure. See G.S. § 105-375. The lien was sold to Richmond County for $90.22, the amount of the 1979 taxes plus penalties, interest and costs. The property was subsequently conveyed to Richmond County by deed dated 12 May 1982. On 2 December 1986, Richmond County sold the lot in question at public auction to Lat Purser for $402.50.

Plaintiffs first learned their property had been sold when a relative telephoned them on 30 October 1987 after construction on the property had begun.

Clayton and Clayton, by Theaoseus T. Clayton, Jr., for plaintiff appellants.

Leath, Bynum, Kitchin & Neal, by Stephan R. Futrell and Fred W. Bynum, Jr., for all defendant appellees except Richmond County; and Page, Page & Webb, by John T. Page, Jr., for defendant appellee Richmond County.

ARNOLD, Judge.

[1] First we review defendants' cross-assignment of error that the trial judge erroneously failed to grant their motion for directed verdict made at the conclusion of plaintiffs' evidence. Defendants argue that the evidence establishes Richmond County complied with the *in rem* foreclosure statute and that this issue was improperly submitted to the jury.

The deed through which plaintiffs were conveyed the disputed lot lists the names of Peggy Johnson, Ruby Baskerville, Emma Clemons along with Wimphrey Jenkins. G.S. § 105-375(c) provides in part:

> A notice stating that the judgment will be docketed and that execution will be issued thereon shall also be mailed by certified or registered mail, return receipt requested, to the current owner of the property (if different from the listing owner) if: (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 deeds . . . and, (ii) the tax collector can obtain the current owner's mailing address through the exercise of due diligence.

The only tax notice sent by Richmond County concerning the property in question was sent to "Wimphrey Jenkins, et al, Charlotte Street, Hamlet." The County made no effort to determine the location of or to send a tax notice to the other three plaintiffs, all current owners, who were listed on the deed. This failure of the County to attempt to send mailed notices to each individual taxpayer rendered the subsequent execution sale invalid. *See Henderson County v. Osteen*, 292 N.C. 692, 235 S.E.2d 166 (1977).

The record also contains competent evidence that the County did not exercise due diligence in attempting to locate the current mailing address of any of the owners. Lot #50 is located within the city limits of Hamlet, and as of 25 January 1980, the Hamlet City Tax Office had a record of Wimphrey Jenkins' current address in Vauxhall, New Jersey. It is axiomatic that prior to an action affecting property, the State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 873 (1950). A telephone call by Richmond County tax officials to their counterparts in the Hamlet City Tax Department to determine if anyone was paying the city taxes on Lot #50 would have revealed the current address of Wimphrey Jenkins. In light of these facts, we cannot say Richmond County exercised due diligence in locating the owners.

[2] Next we examine plaintiffs' contention that the trial court erred in submitting the issue of laches to the jury. First, we point out that Richmond County's failure to properly notify plaintiffs rendered the judgment entered for the tax foreclosure sale void. "Notice and an opportunity to be heard are prerequisites of jurisdiction . . . and jurisdiction is a prerequisite of a valid judgment." *Commissioners of Roxboro v. Bumpass*, 233 N.C. 190, 195, 63 S.E.2d 144, 147 (1951). Thus, the question at this juncture is whether the doctrine of laches can be used to estop plaintiffs from attacking the void judgment.

Laches is an equitable doctrine and ordinarily should not be a defense to a motion to open a judgment that is void. 46 Am. Jur. 2d *Judgments* § 752 (1969). In *Powell v. Turpin*, 224 N.C. 67, 29 S.E.2d 26 (1944), plaintiff sought to have a tax foreclosure sale declared invalid for want of proper service of process. In deciding for the plaintiff, the court stated, "It is likewise elementary that unless one named as a defendant has been brought into court in some way sanctioned by law . . . , the court has no jurisdiction of the person and judgment rendered against him is void." *Id.* at 70, 71, 29 S.E.2d at 28. The court in *Powell* also examined whether such a judgment was subject to a collateral attack. "No statute of limitations runs against the plaintiffs' action by reason of the judgment of foreclosure, and laches, if any appeared, is no defense." *Id.* at 71, 29 S.E.2d at 29; *see Page v. Miller and Page v. Hynds*, 252 N.C. 23, 113 S.E.2d 52 (1960). "The passage

of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid." *Monroe v. Niven*, 221 N.C. 362, 365, 20 S.E.2d 311, 313 (1942). "A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exception." *Id.* (citations omitted).

Defendants, however, argue that these cases are inapplicable because they were not decided under G.S. § 105-375. This statute was enacted as an alternative to N.C. Gen. Stat. § 105-374 (1989), which authorizes tax foreclosures by actions in the nature of an action to foreclose a mortgage. G.S. § 105-375 is intended to be "a simple and inexpensive method of enforcing payment of taxes . . . ." G.S. § 105-375(a). Furthermore, we recognize that the rule that laches cannot be applied to a motion to vacate a void judgment is not absolute. Laches may attach where during an unnecessary delay, the interests of a third person who innocently relied on the judgment changed his position and suffered some injury. 27 Am. Jur. 2d *Equity* § 169 (1966). An injury may be shown where, as here, defendants expended money or improved property. *Id.* at § 171; *Ford v. Willits*, 237 Kan. 13, 697 P. 2d 834 (1985).

Defendants claim plaintiffs' failure to properly list Lot #50 for taxes led them to believe they held legal title to the property. Plaintiffs served their papers on defendant Cornerstone, the project contractor, on 29 December 1987. The Food Lion building was about seventy-five percent complete at that point. The estimated value of the improvements situated on Lot #50 at that time was $225,000. Defendants chose to finish the shopping center even after receiving the papers, pushing the value of the improvements even higher.

Despite this expenditure, we are not persuaded that this situation is appropriate for the application of the laches doctrine. We take this position for several reasons. While some jurisdictions have allowed laches to breathe life into a void judgment, we believe the better view is not to apply the doctrine to a void tax foreclosure judgment. 7 J. Moore, *Moore's Federal Practice* § 60.25[4] at 240-41 (2d ed. 1990). We are wary of any result that allows for the enforcement of a void judgment.

Second, a full examination of the equities in this case reveals that all the parties here must share in the blame for this predicament. While defendants clearly hold a colorable title to Lot #50, we cannot view these defendants as innocent third parties. Lat Purser bought Lot #50 for $402.50 from Richmond County at a

tax foreclosure sale by quitclaim deed. Purser and the other parties, therefore, were on notice that the title to the lot was suspect at best. We would think it incumbent of anyone planning to erect $225,000 worth of improvements on a lot to include in their title search a check of *all* pertinent records, including those in the Hamlet City Tax Department which revealed at the time that Wimphrey Jenkins was paying the property taxes on Lot #50.

[3] Finally, the most equitable resolution to this problem is to apply our State's betterment statutes. In their Answer, defendants other than Richmond County requested compensation for their improvements to the property in the event plaintiffs were determined to be the true owners of the property. This issue was submitted to the jury, but not reached. Furthermore, on appeal defendants requested that we remand on the issue of betterments if we found plaintiffs were owners of Lot #50.

Our betterment statutes allow defendants who in good faith and under colorable title enter into possession of land under a mistaken belief that their title is good and who are subsequently ejected by the true owners to petition the court for compensation for the improvements they placed on the land. N.C. Gen. Stat. §§ 1-340 to -351 (1983); *Commissioners of Roxboro*, 237 N.C. 143, 74 S.E.2d 436 (1953); *see* Dickson Commissioners, *Mistaken Improvers of Real Estate*, 64 N.C.L. Rev. 37 (1985). A deed issued at a tax foreclosure is color of title for the purpose of asserting betterments. *Harrison v. Darden*, 223 N.C. 364, 26 S.E.2d 860 (1943). Thus, while we find that plaintiffs are the rightful owners of Lot #50, they must compensate defendants for the improvements. Recognizing that this alternative is perhaps impractical, we point out that plaintiffs may opt to relinquish their estate to defendants, who in turn must pay plaintiffs the value of the property in its unimproved condition. G.S. § 1-347; *Barker v. Owen*, 93 N.C. 198 (1885). Plaintiffs are also entitled to the rents and profits from the property in its unimproved condition for the period of defendants' possession. G.S. § 1-341; *Harrison*, 223 N.C. 364, 26 S.E.2d 860. If plaintiffs fail to exercise one of these options, the value of the improvements becomes a lien and if not paid, a sale of the premises will be ordered. G.S. § 1-347; *Barker*, 93 N.C. 198.

We have examined defendants' other cross-assignments of error and found them to be without merit.

Thus, we remand this action to determine the value of the improvements made by defendants, the value of plaintiffs' property in its unimproved state and the rental value and profits derived from the property in its unimproved condition during the time of defendants' occupation.

Affirmed in part and reversed in part.

Judges PHILLIPS and COZORT concur.

WAYNE CARSON, PLAINTIFF v. C. R. MOODY, JIMMY BERRY, AND W. C. NELSON, JR., D/B/A NELSON TRACTOR CO., DEFENDANTS

No. 8930SC1328

(Filed 7 August 1990)

1. **Malicious Prosecution § 13.3 (NCI3d)— collateral purpose— showing of malice and absence of probable cause**

Material issues of fact existed as to whether defendant law officers acted maliciously and without probable cause in obtaining a warrant charging defendant with felonious possession of a stolen tractor where plaintiff's forecast of evidence tended to show that the prosecution was instituted for the collateral purpose of exerting pressure on plaintiff in order to obtain possession of the tractor.

Am Jur 2d, Malicious Prosecution §§ 8, 45, 74.

2. **Process § 19 (NCI3d)— abuse of process—misuse of warrant for ulterior motive—sufficient forecast of evidence**

Material issues of fact existed as to whether defendant law officers willfully misused a warrant they obtained charging defendant with felonious possession of a stolen tractor for the ulterior motive of obtaining payment of a civil claim where plaintiff's forecast of evidence showed that one defendant stated that they wanted the money or the tractor; neither defendant attempted to determine whether the tractor had been on consignment when purchased by plaintiff as plaintiff had told them or whether it had been stolen; and one defendant admit-

ted that the arrest warrant was used as leverage to recover the tractor.

Am Jur 2d, Abuse of Process §§ 10, 12.

3. Conspiracy § 2.1 (NCI3d) — civil conspiracy — insufficient forecast of evidence

Summary judgment was properly entered for defendants on plaintiff's claim for civil conspiracy in violation of 42 U.S.C. § 1983 where plaintiff failed to show that defendants had a "meeting of the minds" and thus reached an understanding to achieve the conspiracy's objective, that is, to inflict injury upon plaintiff.

Am Jur 2d, Civil Rights § 21.

APPEAL by plaintiff from an order entered 5 September 1989 by *Judge James R. Strickland* in Superior Court, CHEROKEE County. Heard in the Court of Appeals 7 June 1990.

Plaintiff appeals the entry of summary judgment in favor of all defendants on all of his claims. Plaintiff's forecast of the evidence is as follows:

During July of 1986 plaintiff was doing business in Robbinsville, North Carolina as Wayne's Auto Sales. On 21 July 1986, plaintiff purchased a 1979 Yanmar Lawn Tractor from Robbinsville Tractor and Service by trading in his Massey Ferguson Model 1655 tractor and accessories and paying an additional $500.00 in cash to Jim Shelton, one of the owners of Robbinsville Tractor and Service. On 24 July 1986, Gerald Orr, also a partner in Robbinsville Tractor and Service, called the plaintiff and told him that the tractor plaintiff had purchased from his store was owned by a W.C. Nelson who had placed the tractors there on consignment. Orr also said that Nelson's tractors were his responsibility and that he needed to get back the tractor that the plaintiff had purchased. The plaintiff informed Orr that he would trade back with him if Orr would refund his $500.00 and return his tractor.

On 25 July 1986, Orr went to Wayne's Auto Sales and told Carson that Shelton was working for him, that he had sent him to Robbinsville to run Robbinsville Tractor and that this arrangement was not working out. Carson also received a phone call from Nelson who said that he had allowed Orr and Shelton to bring six tractors to Robbinsville to sell on consignment and that four

tractors had been sold. Carson had received one of the two remaining tractors in trade. Carson told Nelson that he would only return the tractor if his money and the Massey Ferguson tractor he traded in were returned to him at the same time Nelson picked up the Yanmar tractor.

On the following Saturday after the telephone conversation between plaintiff and Nelson, Nelson sent a truck from Blairsville, Georgia to pick up the tractor. However, Nelson did not get the tractor at that time.

On 8 August 1986, Nelson had a criminal warrant drawn against Shelton. On 18 September 1986, a Graham County Deputy Sheriff came to Carson's business and said that he wanted to take the tractor because it had been reported stolen. The deputy had an N.C.I.C. printout which showed that a 1979 Yanmar Tractor was registered to a Leonard C. Hall of Crandall, Georgia and a warrant claiming that Jim Shelton took the tractor without the owner's permission. At the same time, District Attorney Roy Patton and Sheriff A.J. Peterson looked at the tractor and told Carson to hold the tractor for thirty days and if no disposition was taken within that time, plaintiff was free to dispose of the tractor. Plaintiff was given a receipt for the tractor.

On 3 March 1987, S.B.I. Agent Moody visited plaintiff's business, wrote down the serial number of the tractor, and informed plaintiff that he was investigating a stolen tractor. On 18 June 1987, Georgia Bureau Investigator Berry and Agent Moody again went to plaintiff's business and demanded either the tractor or forty-five hundred dollars. Berry stated that he was there to recover a tractor that belonged to Nelson. Moody told plaintiff that if he would produce the tractor or a check in the amount of forty-five hundred dollars, no action would be taken in the case; if not, they would get a warrant against plaintiff for possession of stolen property. Plaintiff again refused to return the tractor and the two investigators drew a criminal warrant against plaintiff, alleging that Carson feloniously possessed a 1979 Yanmar Tractor, the personal property of Nelson Tractor Company, knowing and having reasonable grounds to believe the property had been stolen, taken and carried away. The record remains unclear as to the lawful ownership of the tractor.

Carson was arrested at his business and later released on bond. The case came on for hearing on 23 September 1987 and

a dismissal was entered. No attempt was made by officials to locate the tractor.

Plaintiff alleges that as a result of these events his business declined and he was forced to relocate to Murphy, North Carolina. Thereafter, on 11 May 1988, a true bill was returned charging plaintiff with the same offense for which he was charged in Graham County. The witness before the grand jury was Moody. Plaintiff was again arrested and required to post a nine thousand dollar secured bond.

At trial Judge James U. Downs entered a dismissal of the action after Nelson testified that Orr had paid for the tractor.

Plaintiff filed civil suit against defendants Moody, Berry, and Nelson alleging malicious prosecution, abuse of process and a conspiracy to falsely arrest and deprive him of his constitutional rights. Summary judgment was entered in favor of defendants and against plaintiff. Plaintiff appeals.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David F. Hoke, for defendant-appellee C.R. Moody.

Haire, Bridgers & Spiro, P.A., by R. Phillip Haire, for defendant-appellee W.C. Nelson.

No brief was filed on behalf of defendant-appellee Berry.

LEWIS, Judge.

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendants. Plaintiff has alleged three causes of action (1) malicious prosecution, (2) abuse of process and (3) violation of the plaintiff's constitutional rights as protected under 42 U.S.C. § 1983.

I. Malicious Prosecution

In order for the plaintiff to succeed in an action for malicious prosecution, the plaintiff must show:

1. The defendant initiated the earlier proceeding against the plaintiff;

2. The defendant acted maliciously;

3. There was no probable cause to initiate the prior proceeding; and

4. The proceeding ended in plaintiff's favor.

Stanback v. Stanback, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979).

[1] Having established the first element, plaintiff must show that defendants acted with either "legal" or "constructive" malice. Malice is found when one acts with reckless disregard of the rights of others in instituting prosecution without probable cause. *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966). Proof that the prosecution was instituted to accomplish some collateral purpose, or to forward some private interest can show the absence of probable cause and it creates an inference of malice. *Dickerson v. Atlantic Refining Co.*, 201 N.C. 90, 95, 159 S.E. 446, 449 (1931).

In the present case, the evidence in the light most favorable to the plaintiff tends to show that defendants Moody and Berry had a collateral purpose in obtaining an arrest warrant for plaintiff. In his deposition, Moody admitted that he "tried to recover the tractor the best way [he] knew how." Moody also stated that he asked plaintiff to release the tractor "and he was later arrested for it for refusing to do so." Moody also admitted that he did not know if plaintiff still had possession of the tractor or exactly where the tractor was located at the time of plaintiff's arrest. Plaintiff's evidence tends to show that Moody and Berry's motive in arresting plaintiff was to exert pressure on Carson to secure possession of the tractor.

> Evidence that the chief aim of the prosecution was to accomplish some collateral purpose, or to forward some private interest, i.e., to obtain possession of property, or to enforce collection of a debt and the like, is admissible both to show the absence of probable cause and to create an inference of malice and such evidence is sufficient to establish a prima facie want of probable cause. . . .

Id. We find that plaintiff has shown that material issues of fact exist as to whether the proceeding was instituted for a malicious purpose and lacked probable cause.

Plaintiff must also show that the prior proceedings were terminated favorably "to the plaintiff." *Stanback v. Stanback*, 297 N.C. 181, 203, 254 S.E.2d 611, 626 (1979). "The requirement that

the former proceeding has been terminated favorably to the Plaintiff in a malicious prosecution action is satisfied in many instances by a disposition of the proceeding prior to consideration of the merits." *Id.*

In the present case, both proceedings instituted against the plaintiff were dismissed. We find that for purposes of withstanding summary judgment, plaintiff has sufficiently demonstrated that the proceedings against him were terminated in his favor.

The trial court improperly entered summary judgment in favor of defendants Moody and Berry on the claim for malicious prosecution. Defendant Nelson had nothing to do with obtaining the warrants against plaintiff. Therefore, summary judgment on this issue in favor of defendant Nelson was proper.

II. Abuse Of Process

[2] In order to establish a cause of action for abuse of process, the plaintiff must show (1) the issuance of valid process; (2) which was willfully misapplied or misused by the defendant; (3) for some purpose other than for which the process was designed and motivated by bad intent or ulterior motive. *Stanback, supra*, at 200, 254 S.E.2d 624. Having met the first element, we hold that material issues of fact exist as to whether defendants Moody and Berry misused the summons for an ulterior motive. Plaintiff's testimony shows that defendants stated that they either wanted the money or the tractor. No effort was made by either defendant Moody or Berry to ascertain whether Carson in fact had possession of the tractor at the time the arrests were made. No search warrant was obtained and the premises were never searched. Moody also admits that he used the summons as secondary leverage to recover the tractor. Neither Moody nor Berry attempted to fully determine whether the tractor had in fact been on consignment as plaintiff had told them or whether it had been stolen. Use of process to obtain payment of a civil claim meets the second prong of the test. *Id.* at 201, *1 Am. Jur. 2d*, Abuse of Process § 15. We find that summary judgment as to this issue was improper as to defendants Moody and Berry; proper as to defendant Nelson for the reasons stated in I. above.

III. Civil Conspiracy

[3] Finally, plaintiff has alleged a third cause of action for civil conspiracy in violation of 42 U.S.C. § 1983.

> A civil conspiracy is a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means, the principal element of which is an agreement . . . 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.'

Hampton v. Hanrahan, 600 F.2d 600, 620 (Seventh Cir. 1979). We find that the plaintiff has failed to show that defendants Moody, Berry and Nelson had a "meeting of the minds" and thus reached an understanding to achieve the conspiracy's objectives, that is, to inflict injury upon him. Summary judgment as to this claim was proper as to all three defendants.

IV. Conclusion

We reverse the entry of summary judgment in favor of defendants Moody and Berry as to plaintiff's claims for malicious prosecution and abuse of process. We affirm the entry of summary judgment as to all claims in favor of defendant Nelson. We affirm entry of summary judgment in favor of all defendants as to plaintiff's claim for civil conspiracy pursuant to 42 U.S.C. § 1983.

Affirmed in part, reversed in part and remanded.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA, PLAINTIFF-APPELLEE v. ROBERT DEWITT SMART, DEFENDANT-APPELLANT

No. 8921SC1052

(Filed 7 August 1990)

1. Homicide § 21.7 (NCI3d); Criminal Law § 60.5 (NCI3d) — murder prosecution — fingerprint — evidence sufficient

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss for lack of substantial evidence where the evidence presented at trial showed that defendant's fingerprint could have been impressed on the victim's drinking glass in her home only between 11:00 a.m. on 20 July 1987 and 10:00 a.m. on 21 July 1987; the victim was murdered between 8:30 p.m. on 20 July 1987 and midnight

on the same day; the evidence showing that the victim was a meticulous housekeeper tends to eliminate other theories about when the fingerprint was placed on the glass; the victim's automobile, stolen the night of the homicide, was recovered the next day eight miles from the victim's home but less than one thousand feet from defendant's residence; and a watch, identified as belonging to the victim, was found in defendant's automobile.

Am Jur 2d, Homicide §§ 288, 425, 426, 450.

2. Criminal Law § 794 (NCI4th)— murder—acting in concert—instruction—supported by evidence

The submission of an instruction on acting in concert in a murder prosecution was supported by an unidentified latent fingerprint where the fingerprint was lifted from a lamp shade found in the spare bedroom where the struggle occurred; the police never identified the person to whom the print belonged; and a detective testified that the lamp shade was attached to one of the weapons used to assault and murder the victim, that whoever put the print on the lamp shade was present at the time the crime was committed, and that if he knew the identity of that person he would arrest him or her for the murder.

Am Jur 2d, Homicide §§ 28, 29, 288.

3. Criminal Law § 1148 (NCI4th)— second degree murder—especially heinous, atrocious or cruel—evidence sufficient

The trial court did not err when sentencing defendant for second degree murder by finding as an aggravating factor that the offense was especially heinous, atrocious or cruel where the evidence showed that the homicide involved a violent struggle in which the victim's scalp was torn away from her skull; her torso, head and face were severely bruised from the blows she received; she lost a tremendous amount of blood; her body and the floor around her body were covered with blood and blood was splattered on the walls of the room; her lungs and trachea were full of blood; the victim was beaten and stabbed so many times that it was not entirely clear whether a blow or a knife wound was the actual cause of death; and there was evidence that the victim was sexually molested. N.C.G.S. § 15A-1340.4(a)(1)f.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Appeal and Error § 425 (NCI4th)— murder—assignment of error to introduction of evidence—no supporting authorities—abandoned

An assignment of error to the introduction of evidence in a murder prosecution was not supported by any citation of authorities and was deemed abandoned.

Am Jur 2d, Appeal and Error §§ 693, 700.

APPEAL by defendant from judgment entered 5 May 1989 by *Judge Lester P. Martin* in FORSYTH County Superior Court. Heard in the Court of Appeals 29 May 1990.

Defendant Robert DeWitt Smart was indicted for first degree murder in June 1988. His case came on for hearing in May 1989. Upon trial of the matter, the jury returned a verdict finding defendant guilty of second degree murder. From this judgment and a sentence of fifty years imprisonment, defendant appeals.

The facts pertinent to this case are as follows:

The victim, Brenda Charslina Howse, lived at 1211 Pleasant Street in Winston-Salem, North Carolina. She was last seen alive on the evening of 20 July 1987 at approximately 8:30 p.m. in a store near her home. During the early morning hours of 21 July 1987, a neighbor of the victim observed that her Buick automobile was not in its customary location in her driveway.

At about 10:00 a.m. on 21 July 1987, the victim's son and his wife entered the house on Pleasant Street and found the victim's body on the floor of a spare bedroom. The body was covered with a blanket, and a knife was lodged in the victim's throat. The knife was buried to its hilt in the right side of the victim's neck below and to the rear of her ear. There was a tremendous amount of blood on the victim's face and neck area and around the body. The victim had bled a large amount of blood into her trachea and lungs. The knife wound was believed to be the primary cause of death.

Ms. Howse also suffered multiple blows to her face and head, which produced lacerations of her scalp, much bruising and swelling and may have contributed to her death. There were also bruises about her torso. The victim received five or six superficial stab

wounds on her neck, one on the upper right side of her back and one on the back of her right arm. Ms. Howse received a human bite to her left shoulder before she died.

The victim was wearing a cotton nightshirt pulled up to her mid-chest area at the time her body was discovered. She was nude down to her ankles. She had on socks and tennis shoes. A pair of ladies underpants was found lying on the floor near her. There was evidence she had been sexually molested.

The spare bedroom where the body was found was in mass disarray and showed evidence of an intense struggle. A small table had been broken in half and a lamp also was broken. Three framed photographs were lying under Ms. Howse's body with their glass covers shattered. A plant stand was turned over and had blood-stains on the feet of the stand. There was a shattered glass vase on the floor. One unbroken portion of the vase was filled with blood. There was blood on the walls.

On 22 July 1987, the victim's automobile was located at the Treetops Apartments on the west side of Winston-Salem about eight miles from her residence. The automobile was found about one thousand feet from defendant's residence who was then living in the Bridges Apartments.

According to testimony from the victim's son, Ms. Howse had been a neat and meticulous housekeeper. During the course of the investigation, two glasses were discovered on the counter in the kitchen. Investigators obtained a latent print from one of the glasses on the countertop, and it was positively identified as being the right index finger of defendant. A latent fingerprint was obtained from a lamp shade in the spare bedroom. It did not match the fingerprints of the defendant and was never identified.

During the summer of 1988, an inoperable automobile registered to defendant was towed from the parking lot of the Bridges Apartments. Sometime earlier, two young boys who lived nearby had removed a radio and a watch from the automobile. The watch was recovered and identified as belonging to the victim. No direct evidence was presented showing that the watch had been in the victim's possession or in her home at the time of the homicide. The victim's son, however, had been unable to locate the watch when he inventoried the victim's property after the homicide. Although evidence was presented showing that three months before

the murder the victim's home had been burglarized, the victim had not listed the watch as one of the items stolen.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ralph B. Strickland, Jr., for the State.

David F. Tamer for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first assignment of error is that the trial court improperly denied his motion to dismiss the charge for lack of substantial evidence. Of course when considering a motion to dismiss, the trial judge must consider the evidence in the light most favorable to the State, and the evidence must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. *State v. Thomas*, 65 N.C. App. 539, 309 S.E.2d 564 (1983). Specifically, defendant argues that the State's case rests on the evidence that defendant's fingerprint was found on a glass left in the victim's kitchen, and that the State failed to provide substantial evidence that the fingerprint could have been impressed only at the time of the crime. *See State v. Bass*, 303 N.C. 267, 278 S.E.2d 209 (1981).

We disagree with defendant's contention here. The evidence presented at trial showed that defendant's fingerprint could have been impressed on the victim's drinking glass in her home only between 11:00 a.m. on 20 July 1987 and 10:00 a.m. on 21 July 1987. The victim was murdered between 8:30 p.m. on 20 July 1987 and midnight of the same day. Furthermore, the evidence presented showing the victim was a meticulous housekeeper tends to eliminate other theories about when the fingerprint was placed on the glass. Had defendant broken into victim's home earlier in the day on 20 July and stopped for a drink before he left, the victim would have noticed the glasses upon her return and either washed the glasses and put them away or, even more likely, told someone of the break-in. Ms. Howse's home had been burglarized only three months earlier and she had promptly reported that break-in and provided police with a list of the items stolen. Had defendant broken into the house after the murder, it is not likely that he would have stopped in the kitchen for a casual drink.

Moreover, other substantial evidence was presented. The victim's automobile, stolen the night of the homicide, was recovered

the next day eight miles from the victim's home, but less than one thousand feet from defendant's residence. And a watch, identified as belonging to the victim, was found in defendant's automobile. We hold the evidence in this case was sufficient to survive the motion to dismiss.

[2] Next, defendant contends no evidence was presented to support the trial court's instruction to the jury on the theory of acting in concert. Defendant argues that such instruction allowed the jury to return a verdict of guilty on a theory unsupported by any evidence presented. Only jury instructions based on a fact or facts presented by a reasonable view of the evidence should be given. *State v. Harrill*, 289 N.C. 186, 221 S.E.2d 325, *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211 (1976). To determine whether an instruction should be given, the court must consider whether there is any fact to convict the defendant of the offense. *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, *cert. denied*, 315 N.C. 188, 337 S.E.2d 862 (1985).

To secure a conviction on the theory of acting in concert, the State must show defendant was present at the scene of the crime and that he acted together with another individual who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the offense. *State v. Williams*, 299 N.C. 652, 263 S.E.2d 774 (1980). The State's evidence supporting the instruction on acting in concert came from a latent fingerprint lifted from a lamp shade found in the spare bedroom where the struggle occurred. The police never identified the person to whom the print belonged. Detective K. W. Bishop of the Winston-Salem Police Department testified that the lamp shade was attached to one of the weapons used to assault and murder Ms. Howse. Furthermore, Detective Bishop was convinced that whoever put the print on the lamp shade was present at the time the crime was committed, and he stated that if he knew the identity of that person he would arrest him or her for the murder of Brenda Howse. We hold that the evidence of the unidentified latent fingerprint supported the jury instruction concerning the theory of acting in concert.

[3] Next, defendant contends that the trial judge erred in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel pursuant to N.C. Gen. Stat. § 15A-1340.4(a)(1)f (1988). The trial judge relied on this aggravating factor and also the

finding that defendant had a prior conviction pursuant to G.S. § 15A-1340.4(a)(1)o to sentence defendant to a prison term in excess of the presumptive. To find that an offense meets the standard for G.S. § 15A-1340.4(a)(1)f, the facts must show excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that type of offense. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), *cert. denied*, 318 N.C. 699, 351 S.E.2d 756 (1987).

Here the evidence showed that the homicide involved a violent struggle in which the victim's scalp was torn away from her skull; her torso, head and face were severely bruised from the blows she received; and she lost a tremendous amount of blood. Her body and the floor around her body were covered with blood, and blood was splattered on the walls of the room. Her lungs and trachea were full of blood. The victim was beaten and stabbed so many times it is not entirely clear whether a blow or the knife wound was the actual cause of death. Multiple injuries such as those found here may demonstrate that a crime was committed in an especially heinous, atrocious or cruel manner. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983). There was also evidence that the victim was sexually molested. Clearly, the evidence was sufficient to establish this aggravating factor.

[4] Finally, defendant asserts that the trial court erred in overruling his objection to the introduction into evidence of the victim's watch. Defendant, however, has completely failed to provide the Court with any citation of authority for his position. Therefore, we deem this assignment of error abandoned. *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987); *S.J. Groves & Sons & Co. v. State*, 50 N.C. App. 1, 273 S.E.2d 465 (1980), *cert. denied*, 302 N.C. 396, 279 S.E.2d 353 (1981).

We hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges PHILLIPS and COZORT concur.

FIDELITY NATIONAL TITLE INSURANCE COMPANY OF TENNESSEE, A TENNESSEE CORPORATION v. WARREN KIDD; W. K. ASSOCIATES, INC., A NORTH CAROLINA CORPORATION; AND H. CHRISTOPHER SEARS, JOINTLY AND SEVERALLY

No. 8918SC1189

(Filed 7 August 1990)

Insurance § 148 (NCI3d)— title insurance—defense provided voluntarily—no recovery

Summary judgment was properly entered for defendants in an action by a title insurance company to recover defense and settlement funds where the policy required that the insureds must suffer an actual loss and the purchaser gave the seller a promissory note which conditioned payment on final clearance of title. Based upon the novel factual aspects of this case, no challenge to the title could give rise to the title insurer's liability since it would always fall under the exclusion; the title insurance company voluntarily provided a defense and settlement funds for the purchaser and seller, and thus the defendants' actions could not have caused the title insurance company's expense.

Am Jur 2d, Insurance §§ 525-527.

APPEAL by plaintiff from orders entered 7 July 1989 by *Judge Lester P. Martin* in GUILFORD County Superior Court. Heard in the Court of Appeals 4 May 1990.

Booth, Harrington, Johns & Campbell, by E. Jackson Harrington, Jr. and David B. Puryear, Jr., for plaintiff-appellant.

Adams Kleemeier Hagan Hannah & Fouts, by Thomas W. Brawner and James W. Bryan, for defendant-appellees Warren Kidd and W. K. Associates, Inc.

Tuggle Duggins Meschan & Elrod, P.A., by Robert C. Cone, for defendant-appellee H. Christopher Sears.

GREENE, Judge.

The plaintiff, Fidelity National Title Insurance Company of Tennessee (formerly "Southern Title Insurance Company"), brought an action in negligence and contract against the defendants Warren

Kidd; W. K. Associates, Inc.; and H. Christopher Sears. Plaintiff appeals from summary judgment entered for defendants.

Warren Kidd through his company W. K. Associates, Inc. (Kidd), performed title abstract services for attorneys. Kidd also was Fidelity National Title Insurance Company's (National) agent for purposes of selling title insurance policies. Christopher Sears (Sears) was an attorney specializing in property matters. Sears regularly hired Kidd as his title abstractor.

On 14 March 1985, International Associates (IA) closed a purchase of property sold by Arnetta C. Gortman. At closing, IA paid no cash. Rather, it gave Gortman a promissory note for $650,000.00 "or such proportionate amount as her ultimate interest in property may bear to 100% with such payment to occur upon final clearing of title." This note was secured by a deed of trust to the property having no warranties of title.

The day following closing, IA's representative contacted Sears about doing title work on the property. Sears hired Kidd to do a title search and abstract. Kidd conducted the search, and Sears reviewed and approved the abstract. On 20 March 1985, Kidd, now acting as National's agent, provided a title insurance policy, based on the title report signed by Sears, to IA as owner and Gortman as "mortgagee." However, Kidd and Sears neglected to mention some outstanding liens or encumbrances on the property which proved to be clouds on the title.

The title insurance policy provided in pertinent part:

> SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, SOUTHERN TITLE INSURANCE COMPANY, OF KNOXVILLE, TENNESSEE, A TENNESSEE CORPORATION, herein called the Company, insures, as of Date of Policy shown in Schedule A, against *loss or damage*, not exceeding the amount of insurance stated in Schedule A, and costs, attorneys' fees and expenses which the Company may become obligated to pay hereunder, *sustained or incurred by the insured* by reason of:
>
> 1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
>
> 2. Any defect in or lien or encumbrance on such title;

3. Lack of a right of access to and from the land; or

4. Unmarketability of such title.

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy:

. . .

3. Defects, liens, encumbrances, adverse claims, or other matters (a) created, suffered, assumed or agreed to by the insured claimant; (b) not known to the Company and not shown by the public records but known to the insured claimant either at Date of Policy or at the date such claimant acquired an estate or interest insured by this policy and not disclosed in writing by the insured claimant to the Company prior to the date such insured claimant became an insured hereunder; (c) *resulting in no loss or damage to the insured claimant*; (d) attaching or created subsequent to Date of Policy; or (e) resulting in loss or damage which would have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

(Emphases added).

When IA later found itself faced with litigation on the title of the property, it called National to defend. National initially refused, but it later provided defense and settlement funds. It is undisputed that National was aware of the conditional promissory note at the time it chose to defend IA's and Gortman's interests. Eventually, all of the litigation was settled or otherwise terminated leaving IA with clear title to the property, but not before National, IA and Gortman each had expended substantial settlement funds.

National sued Sears alleging his negligent title search resulted in its expenses in defending IA and Gortman's interests. It sued Kidd alleging breach of contract, negligent title search, and negligent performance of agent's duties. The trial court granted defendants' motions for summary judgment.

The issue presented is whether National's cause of action against the defendants should fail because of a lack of proximate causation between defendants' alleged negligence or breach of contract and

National's damages if National had no obligation to provide a defense or pay any loss to IA or Gortman under the terms of the policy.

Defendants argue that even if they were negligent or breached a contractual duty to National, they have no liability to National because National had no liability to pay or defend its insureds because the matters raised by the insureds were excluded from coverage. If we determine, taking the evidence in the light most favorable to National, that the matters raised by the insureds were excluded from coverage, then National provided a defense and settlement funds to the insureds voluntarily, and the trial court correctly granted defendants' motion for summary judgment. If National was not obligated to defend the insureds, then any negligence of the defendants could not have proximately caused National any harm.

Generally, title insurance is considered an indemnification agreement for title. D. Burke, *Law of Title Insurance* § 2.2 (1986); *see also* 9 J. Appleman, *Insurance Law and Practice* § 5201 (1981). However, some courts regard a title insurance policy as a guarantee by the insurer as to the state of the title. *Id.; see also Burke*, § 1.3.1, at 21 (title policy considered as "a warranty that the state of the title is as reflected on the face of the policy"). We need not resolve the issue of whether this title policy was an indemnification agreement or a guarantee as to the state of the title, since under either construction, the insureds must have suffered an actual loss.

If treated as an indemnity agreement, the policy provides in both the insuring section and the exclusion section that the insureds must suffer an actual loss. The insuring language of the policy provides that the company insures against "loss or damage . . . sustained or incurred by the insured. . . ." This language has generally been interpreted to require that the insured suffer an actual loss. *See Burke*, § 1.3.1, at 20. One of the policy exclusions provides that there is no coverage for "[d]efects, liens, encumbrances, adverse claims, or other matters . . . resulting in no loss or damage to the insured claimant." If the policy is treated as a guaranty of the state of the title, the same exclusion clause is applicable.

Here, IA gave Gortman a promissory note which conditioned payment on final clearance of title. IA had not paid Gortman for any interest in the property, and it would not be obligated to pay Gortman for any interest which could be harmed by any challenges to its title since it would pay Gortman only for that

which Gortman had to sell. IA could never suffer a loss or damage. National argues that IA would have lost the benefit of its bargain had National not provided a defense. However, all IA bargained for here was to receive and pay for whatever property Gortman had clear title to sell. Therefore, IA suffered no actual loss.

Gortman's policy with National protecting it as the purported "mortgagee" contained the same insuring and exclusion language. Gortman accepted a promissory note which specified conditional payment and a deed of trust without warranty of title. By these instruments, IA would only pay Gortman to the extent the title of the property proved clear. Gortman bargained only for such payment, and thus any diminution in title could not have been a loss. Therefore, Gortman suffered no loss.

Based upon the novel factual aspects of this case, i.e., the conditional nature of the promissory note, no challenge to the title could give rise to National's liability since it would always fall under the exclusion. National's officers admitted their knowledge of the promissory note at the time IA demanded a defense, but they inexplicably ignored it. National voluntarily provided a defense and settlement funds for IA and Gortman, and thus the defendants' actions could not have caused National's expense in so providing.

Affirmed.

Judges WELLS and ORR concur.

CONTINENTAL TELEPHONE COMPANY OF NORTH CAROLINA, A CORPORATION, PLAINTIFF v. CARLYLE GUNTER, D/B/A CARLYLE GUNTER BULLDOZING, DEFENDANT

No. 8930DC916

(Filed 7 August 1990)

1. Telecommunications § 3 (NCI3d) — parking lot excavation — severing of telephone cable — admissibility of Underground Damage Prevention Act

The trial court erred in a negligence action arising from the severing of a telephone cable during the removal of old asphalt from a parking lot by not admitting into evidence

portions of the Underground Damage Prevention Act, which requires a person planning to excavate to notify each utility owner having underground utilities located in the proposed area. The language of the act is mandatory; the activities defendant undertook do not fall within the exceptions listed in the Act; defendant contracted to improve the parking lot of a private property owner and his performance of that contract was not road maintenance; and the Act is relevant to the issue of negligence. N.C.G.S. § 87-102(a), N.C.G.S. § 87-106, N.C.G.S. § 20-4.01(13), N.C.G.S. § 8-1.

Am Jur 2d, Electricity, Gas and Steam § 222; Telecommunications § 36.

2. **Telecommunications § 3 (NCI3d)— construction—severing of telephone cable—negligence action**

The trial court erred in a negligence action arising from the severing of a telephone cable during the removal of old asphalt from a parking lot by granting a directed verdict for defendant where the Underground Damage Prevention Act, which plaintiffs sought to read into evidence, established a duty owed by defendant to plaintiff; plaintiff brought forward evidence that he had complied with the recording requirements of the Act; and defendant conceded at trial that he did not notify plaintiff that he was going to excavate on a highway right of way before he began work.

Am Jur 2d, Electricity, Gas and Steam § 222; Telecommunications § 36.

APPEAL by plaintiff from Judgment of *Judge John J. Snow, Jr.*, entered 23 May 1989 in JACKSON County District Court. Heard in the Court of Appeals 12 March 1990.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry C. Harris, Jr. and Mark A. Pinkston for plaintiff appellant.

Haire and Bridgers, P.A., by R. Phillip Haire, for defendant appellee.

COZORT, Judge.

The plaintiff sued to recover damages caused by the defendant's alleged negligence in severing underground telephone cables.

On appeal the plaintiff contends that the trial court erred in directing a verdict for the defendant. We agree.

The defendant, Carlyle Gunter, contracted with the Frontier Trading Post to raise the level of its parking lot, which necessitated removal of the old asphalt. On 2 May 1986, one of Gunter's employees was operating a bulldozer with a ripper attachment. While working in the west entrance of the parking lot, where it adjoins U.S. Highway 441, he severed and pulled from the ground plaintiff's fiberoptic cable.

On 11 February 1987, the plaintiff filed a complaint, alleging that the defendant "knew or should have known of the location of the Plaintiff's cable" and seeking $7,030.60 in damages. The defendant denied liability. At trial plaintiff sought to read to the jury the provisions of the Underground Damage Prevention Act (the Act). The defendant's objection to the admission of the Act was sustained; no basis for the objection or rationale for the trial court's ruling appears in the transcript. At the close of the plaintiff's evidence, the defendant moved for a directed verdict on the grounds that the plaintiff failed to produce sufficient evidence that the defendant had breached a duty owed to the plaintiff. The trial court granted that motion.

[1] On appeal the plaintiff first assigns as error the trial court's refusal to allow portions of the Act to be read in evidence. "When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community from which it is negligence to deviate." Prosser and Keeton on the Law of Torts § 36 (5th ed. 1984); see also *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955); and *Jackson v. Housing Authority of High Point*, 73 N.C. App. 363, 368, 326 S.E.2d 295, 298, *disc. review denied*, 313 N.C. 603, 330 S.E.2d 610 (1985), *aff'd*, 316 N.C. 259, 341 S.E.2d 523 (1986). Statutes are admissible, if relevant. *C.C.T. Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 286, 123 S.E.2d 802, 809 (1962). They "may be read in evidence from the printed statute books." N.C. Gen. Stat. § 8-1 (1989).

The Underground Damage Prevention Act provides in part as follows:

> (a) Except as provided in G.S. 87-106, *before commencing any excavations in highways*, public spaces or in private ease-

ments of a utility owner, a person planning to excavate shall notify each utility owner having underground utilities located in the proposed area to be excavated, either orally or in writing, not less than two nor more than 10 working days prior to starting, of his intent to excavate.

N.C. Gen. Stat. § 87-102 (1989) (emphasis added).

(a) Except as provided in G.S. 87-106, *no person may excavate in a highway, a public space, or a private easement of a utility owner without first having given the notice required* in G.S. 87-102 to the utility owners.

(b) In addition to the notification requirements, each person excavating shall:

(1) Plan the excavation to avoid damage and to minimize interference with underground utilities in and near the construction area, to the best of his abilities; . . .

N.C. Gen. Stat. § 87-104 (1989) (emphasis added).

An association [sponsored by utility owners] shall record with the Register of Deeds of each county in which participating utility owners own or operate underground utilities, a notarized document providing the telephone number and address of the association, a description of the geographical area served by the association, and a list of the names and addresses of the utility owners receiving these services from the association.

N.C. Gen. Stat. § 87-109 (1989).

(a) Each utility owner having underground utilities in North Carolina shall record a notarized document containing the name of the utility owner and the title, address, and telephone number of its representatives designated to receive the written or oral notice of intent to excavate, with the Register of Deeds of each county in which the utility owner owns or operates underground facilities.

N.C. Gen. Stat. § 87-110 (1989). We conclude that the Act is relevant to the issue of negligence in the case below and that pertinent portions of it should have been admitted in evidence.

Defendant contends that the Act is irrelevant to the case below. He argues, on one hand, that the Act adds nothing to the common law duty to exercise ordinary care, and, on the other, that, if

the Act does establish a duty owed by all excavators to utility owners, defendant's activities were not "excavation" within the meaning of the Act. We reject both arguments.

The language of the Act is mandatory: "[A] person planning to excavate *shall* notify each utility owner having underground utilities located in the proposed area to be excavated . . . ." N.C. Gen. Stat. § 87-102(a) (1989) (emphasis added). The activities defendant undertook do not fall within the exceptions listed in § 87-106 of the Act, which exempts agricultural tilling, certain excavations by the State or utility owners, some pole replacements, and certain emergency work. Finally, N.C. Gen. Stat. § 20-4.01(13) defines highway as the "entire width between property or right-of-way lines," and the defendant conceded at trial that his employee "was working in the highway right-of-way."

N.C. Gen. Stat. § 87-101(3) defines excavation as "an operation for the purpose of the movement or removal of earth . . . in or on the ground by use of equipment operated by means of mechanical power." Defendant correctly notes that "road maintenance" is excluded from the definition of "excavation" found in § 87-101(3). The defendant contends that his "work was repair and resurfacing" and thus "road maintenance." That argument is disingenuous. The defendant contracted to improve the parking lot of a private property owner. His performance of that contract was not road maintenance as defined by N.C. Gen. Stat. § 87-101(10): "preservation, including repairs and resurfacing of a highway."

[2] Thus, the trial court erred in directing a verdict for the defendant. The Act, which plaintiff sought to read in evidence, established a duty owed by defendant to plaintiff. At trial plaintiff brought forward evidence that it had complied with the recording requirements of the Act (§§ 87-109 and -110). The defendant conceded at trial that he did not notify the plaintiff that he was "going to excavate on a highway right-of-way at the Frontier Trading Post" before he began work. A directed verdict for the defendant "may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict" for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 583, 201 S.E.2d 897, 902 (1974). The proffered evidence in the case below showed a duty owed to plaintiff, and defendant concedes he did not comply with that duty. That evidence is sufficient to justify a verdict for plaintiff.

For the reasons stated above the trial court's Judgment of directed verdict is reversed and the case is remanded for a new trial.

Reversed and remanded for new trial.

Chief Judge HEDRICK and Judge PARKER concur.

RANDOLPH COUNTY, PLAINTIFF v. DAREL EUGENE COEN, ROBERT DANIEL BREWER, INDIVIDUALLY, AND T/D/B/A COEN EQUIPMENT SALES, AND CAROLYN C. COEN, DEFENDANTS

No. 8919DC1287

(Filed 7 August 1990)

Municipal Corporations § 30.15 (NCI3d)— truck sales business— "existing use"—nonconforming use

Defendants established an "existing use" in the operation of their truck sales business prior to the effective date of plaintiff county's zoning ordinance which prohibited such a business at defendants' location, and the business therefore qualified as a permitted nonconforming use, where, prior to 6 July 1987, the effective date of the ordinance, defendants had finished preparing the site for operations, met the requirements for and obtained the requisite license to operate, had vehicles available for sale, and were in fact open for business.

Am Jur 2d, Zoning and Planning §§ 184, 186, 266-269.

APPEAL by defendants from a judgment entered 8 September 1989 by *Judge William Neely* in RANDOLPH County District Court. Heard in the Court of Appeals 31 May 1990.

Plaintiff filed this action against defendants in August 1988, alleging that defendants violated the Randolph County Zoning Ordinance ("the Ordinance"). Defendants answered, denying the allegation and asserting the affirmative defense that their truck sales business was a permitted nonconforming use in accordance with Article 11 of the Ordinance. In a non-jury trial, plaintiff was awarded a permanent injunction prohibiting defendants from operating their business on the subject property. Defendants appealed.

The evidence indicates that on 6 July 1987 the Randolph County Board of Commissioners adopted a unified land development ordinance, including a county-wide, comprehensive zoning ordinance, which became effective the date of its adoption. At that time, defendant Carolyn Coen owned approximately five acres of undeveloped land within an area zoned Residential-Agricultural under the Ordinance. This property is located on the west side of S.R. 1936 near the intersection of U.S. 220. It is not disputed that the Residential-Agricultural classification of the Randolph County Zoning Ordinance prohibits the operation of storage yards or used truck sales lots, which, as defined under the Ordinance, cover the type of business that defendants Darel Coen and Robert Brewer operate on Carolyn Coen's property. Further, there is no question that prior to the enactment of the Ordinance use of the land as a motor vehicle sales lot was lawful. Finally, the trial court found that defendants acted in good faith in establishing the business and without knowledge that any ordinance existed to prohibit such activity.

In May or June 1987, Darel Coen and Robert Brewer formed a partnership and entered into business as Coen Equipment Sales for the purpose of selling used heavy trucks and other equipment. In early June, Coen and Brewer contacted R. L. Thompson, an inspector for the Division of Motor Vehicles, to determine the prerequisites for obtaining a motor vehicle dealer's license. Thompson informed defendants of the requirements and told the two men that to his knowledge no zoning ordinance pertained to the lot location. Defendants did not become aware of the county zoning restrictions until March 1988.

Coen and Brewer took several steps in June 1987 to prepare the site for their business operations. They cleared shrubs and brush from the property. They graded and put down sand rock for a driveway and hauled trash away from the site several times. They had a small, utility-type building placed on the site at a cost of $75, and they put up a mailbox and a business sign.

Inspector Thompson visited the site on 17 June 1987 and determined that defendants had met the requirements to obtain a dealer's license. Defendants received two licenses, one allowing the wholesale of vehicles anywhere in the state, and the other authorizing them to engage in retail sales on the disputed site. The retail license

authorized defendants to place vehicles on the lot no earlier than 1 July 1987.

At trial Coen testified he put vehicles on the lot shortly after 1 July 1987, but could not be sure vehicles were there prior to 6 July. He also testified that he had vehicles available for sale when his licenses became effective on 1 July. Brewer testified that trucks were on the lot within a week of 1 July. The first sale of a vehicle from the lot occurred on 27 July 1987.

Defendants operated the business by sometimes placing used trucks on the lot with a telephone number on the windshield. No attendant remained at the lot. Primarily, the trucks were bought and sold at public auctions away from the dealership location. Coen would visit the lot once every day or two. The inventory on the lot varied from zero up to fifteen vehicles.

Randolph County Planning Officers first became aware of the commercial operation on 23 May 1988 when defendants began removing some trees and leveling a bank to make the site more visible from the highway. On 4 August 1988, plaintiff served a complaint on defendants praying for a temporary restraining order directing defendants to desist in operating their business, a permanent injunction to enjoin them from operating the business and to assess defendants a penalty of $50 per day for each day they operated after the complaint had been filed.

W. Ed Gavin for plaintiff appellee.

Edwards and Stamey, by Gregory S. Curka, Michael C. Stamey and Billy Edwards, for defendant appellant.

ARNOLD, Judge.

The issue before us is whether or not defendants established an "existing use" in the operation of their business prior to the effective date of Randolph County's Zoning Ordinance. The Ordinance prohibits the operation of defendants' sales lot at its present location, but the business qualifies as a permitted nonconforming use if it was operational prior to the effective date of the Ordinance. The law protects nonconforming users who, acting in good faith, make a "substantial beginning" toward the intended use of their land. *In Re Campsites Unlimited*, 287 N.C. 493, 501, 215 S.E.2d 73, 78 (1975); *Sunderhaus v. Board of Adjustment of Biltmore Forest*, 94 N.C. App. 324, 380 S.E.2d 132 (1989).

The district court made the following finding: "[defendants'] expenditures did not constitute a significant expenditure of *money* so as to vest the defendants with the right to continue to use said property as a permitted non-conforming use . . ." (emphasis added). This finding, however, constitutes a mistake of law. Our case law does not support the idea that only the expenditure of money constitutes a substantial beginning. A significant expenditure of labor or energy may also demonstrate a substantial beginning. *Sunderhaus*, 94 N.C. App. 324, 380 S.E.2d 132.

Also, the term "substantial" does not refer only to the absolute amount of money or labor expended on a project, but rather reflects the amount expended relative to the size of the overall project. *Id.* In *Sunderhaus*, a homeowner dug a trench in his yard and placed PVC pipe in the trench in preparation for erecting a satellite-dish television antennae. The effective date of a zoning ordinance prohibiting such antennae then passed. We held that when the overall size of the project was considered, the work completed prior to the effective date of the ordinance constituted a substantial beginning. *Sunderhaus*, at 327, 380 S.E.2d at 134; *see also City of Sanford v. Dandy Signs, Inc.*, 62 N.C. App. 568, 303 S.E.2d 228 (1983).

The evidence in the case *sub judice* shows that defendants expended a significant amount of labor and money relative to the amount of work necessary to set up their business prior to the effective date of the Ordinance. Although not a crucial factor, we also note that prior to 6 July, Coen had furnished a security bond of $15,000. *See* N.C. Gen. Stat. § 20-288(e) (1989). While the trial court determined that no vehicles were placed on the lot until after 6 July 1987, this finding is not determinative in deciding whether or not defendants had substantially begun their operations prior to the effective date of the Ordinance. The nature of this business was that often no vehicles were on the business site. We focus instead on the fact that prior to the effective date of the Ordinance, defendants had finished preparing the site for operations, met the requirements for and obtained the requisite licenses to operate and had vehicles available for sale. On 1 July 1987, defendants were in fact open for business. The decision of the district court, therefore, is reversed.

Finally, although the issue is not properly before us at this time, we note that in general nonconforming uses cannot be expand-

ed. The underlying policy of any zoning plan is to restrict and ultimately abolish nonconforming uses.

Reversed.

Judges PHILLIPS and COZORT concur.

M. A. BHATTI, PLAINTIFF-APPELLANT v. CARL D. BUCKLAND, DEFENDANT-APPELLEE

No. 8915SC1148

(Filed 7 August 1990)

Unfair Competition § 1 (NCI3d)— sale of residence—public auction —individual's fraud not unfair trade practice

Fraud by an individual in the sale of a residence through a realtor at a public auction did not constitute an unfair trade practice in violation of N.C.G.S. § 75-1.1 since the individual defendant's actions were not "in or affecting commerce."

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 735.

Judge GREENE dissenting.

APPEAL by plaintiff from an Order entered 18 August 1989 by *Judge George M. Fountain* denying plaintiff's motion to amend judgment to treble damages and award attorney's fees. Heard in the Court of Appeals 2 May 1990.

Defendant owned real property on Williamson Avenue in Elon College, North Carolina. He offered this property for sale at public auction on 27 June 1987. Defendant employed Teague Auction and Realty, Inc. ("Teague") as his agent and it advertised the auction through flyers, circulars and newspaper advertisements.

The plaintiff was the highest bidder at the auction, bidding $105,000.00. As required by the terms of the sale, he deposited $10,500.00 with Teague. Shortly after the auction, plaintiff discovered that the property was not as advertised. He immediately notified

defendant and Teague that he was rescinding and revoking his bid and demanded return of his deposit. Defendant refused.

On 12 August 1987, plaintiff filed an action for breach of contract, fraud, treble damages and attorney's fees pursuant to G.S. Chapter 75. Fraud and damages were found by the jury in the amount of $10,500.00. The trial court refused to award treble damages pursuant to G.S. Chapter 75. Plaintiff appeals.

Latham, Wood, Eagles & Hawkins, by B.F. Wood and William A. Eagles, for plaintiff-appellant.

Douglas R. Hoy for defendant-appellee.

LEWIS, Judge.

Plaintiff appeals the denial of treble damages and attorney's fees pursuant to G.S. Chapter 75. G.S. § 75-1.1 makes it unlawful to engage in "unfair or deceptive acts or practices in or affecting commerce." G.S. § 75-16 and § 75-16.1 provide for the award of treble damages and attorney's fees for violations of Chapter 75. Defendant has violated Chapter 75. "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts. . . ." *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975); *Rosenthal v. Perkins*, 42 N.C. App. 449, 455, 257 S.E.2d 63, 67 (1979). Therefore, the issue before us is whether appellee Buckland's activities were "in or affecting commerce." G.S. § 75-1.1.

Defendant argues that because he is a private individual, his actions were not "in or affecting commerce." In support of this proposition he cites *Rosenthal v. Perkins, supra*, and *Robertson v. Boyd*, 88 N.C. App. 437, 363 S.E.2d 672 (1988). Both of these cases dealt with private individuals who engaged realtors to sell their residences. The Court, in *Rosenthal*, stated "The defendants Goldberg [individuals] were not engaged in trade or commerce. They did not by the sale of their residence on this one occasion become realtors. It is clear from the cases involving violation of the Unfair Trade Practices Act that the alleged violators must be engaged in a business, a commercial or industrial establishment or enterprise." 42 N.C. App. at 454, 257 S.E.2d 67 (citations omitted). The Court went on to find that the defendants' realtor was engaged in commerce within the meaning of G.S. § 75-1.1. *Id.* Similarly, in *Robertson*, the Court stated, "Defendants Boyd, being private parties engaged in the sale of a residence, were not involved in

trade or commerce and cannot be held liable under the statute." 88 N.C. App. 443, 363 S.E.2d 676. The Court found the realtors to be within the meaning of the statute and reversed dismissal of the plaintiff's claims against the realtors. *Id.* In the present case the defendant was a private individual who engaged a realtor to auction a residence on his behalf. There is no evidence in the record that defendant was in the business of buying and selling residential real estate. *See Wilder v. Squires*, 68 N.C. App. 310, 315 S.E.2d 63, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984) (substantial evidence in record that sale of residential real estate was a business activity). *Rosenthal* and *Robertson* control our decision in this case. Accordingly, we do not find that his actions were in or affecting commerce for purposes of G.S. § 75-1.1.

Affirmed.

Judge ORR concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

The majority determines that the *Rosenthal* and *Robertson* decisions dictate the holding that the trial court correctly found that defendant's sale of a residence was not "in or affecting commerce." I disagree.

I read the *Rosenthal* and *Robertson* decisions to exempt only individual homeowners selling their own homes from operation of the Unfair and Deceptive Trade Practices Act. This court noted that for defendants in the *Rosenthal* decision, the "sale of their own home was an isolated transaction." *Wilder v. Squires*, 68 N.C. App. 310, 314, 315 S.E.2d 63, 66, *disc. rev. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984). For defendant to take advantage of the homeowners exception created by *Rosenthal* and *Robertson*, he must raise and prove as an affirmative defense his status as a homeowner selling his own home in an isolated transaction. Here, no record evidence supports a finding that defendant was a homeowner selling his own home. On the contrary, defendant's pleadings indicate that the property in question was not his home. Therefore, I would reverse the trial court's denial of treble damages, and remand for trebling of the damages. *See Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981). I would also remand

for the court's reconsideration of plaintiff's plea for attorney fees according to N.C.G.S. § 75-16.1.

Even if this defendant were a homeowner selling his home, no language in N.C.G.S. § 75-1.1 indicates that the legislature intended to insulate from liability homeowners who engage in unfair and deceptive acts, since a house sale always is 'in commerce' or 'affects commerce.' *See Johnson v. Beverly-Hanks & Associates*, 97 N.C. App. 335, 350-52, 388 S.E.2d 584, 592-93 (1990) (Greene, J., concurring in part and dissenting in part).

ANTHONY MAURICE BEATTY, BY AND THROUGH HIS GUARDIAN AD LITEM, NANCY BEATTY, PLAINTIFF v. CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, BILLY CHEEK AND THOMAS BRIDGES, DEFENDANTS

No. 8926SC1043

(Filed 7 August 1990)

Schools § 11.1 (NCI3d)— school board—negligent design of school bus route and stop—general liability insurance—no waiver of governmental immunity

Defendant board of education's purchase of general liability insurance did not waive its governmental immunity with respect to a claim for injuries to a student who was struck by a car based on alleged negligence by the board in the design of a school bus route and stop since the student's injuries were excluded from coverage under the liability policy by a provision excluding coverage for injuries arising out of "the ownership, maintenance, operation, use, loading or unloading of any . . . automobile" owned or hired by the board to transport pupils to and from schools.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 59, 60, 577, 584, 586.

APPEAL by plaintiff from order entered 14 August 1989 in MECKLENBURG County Superior Court by *Judge Frank W. Snepp*. Heard in the Court of Appeals 5 April 1990.

On the morning of 1 December 1986 plaintiff, then 11 years old, attempted to cross Delta Road, a busy, four-lane road in

Charlotte, to reach his assigned school bus stop. Before he could reach the waiting bus, plaintiff was struck by a truck driven by defendant Billy Cheek. Plaintiff suffered a serious head injury and is permanently disabled.

Through his mother and guardian ad litem, plaintiff brought a negligence action against the Charlotte-Mecklenburg Board of Education (the Board), Thomas Bridges, principal of plaintiff's elementary school, and Billy Cheek, driver of the truck. The defendants Board of Education and Thomas Bridges answered, cross-claimed, and moved to dismiss. The defendants moved to dismiss the action pursuant to Rules 12(b)(1), (2) and (6) of the North Carolina Rules of Civil Procedure. The Rule 12(b)(6) motion was based on the grounds of governmental immunity. A hearing was held on defendants' Board of Education and Bridges motions. After hearing arguments of counsel and reviewing the Board's liability insurance policy, thereby treating the motions to dismiss as a motion for summary judgment, the trial court ordered that plaintiff's claims against these two defendants be dismissed. Plaintiff appeals.

C. Murphy Archibald and Seth H. Langson for plaintiff-appellant.

Weinstein & Sturges, P.A., by Hugh B. Campbell, Jr. and Judith A. Starrett, for defendant-appellees Charlotte-Mecklenburg Board of Education and Thomas Bridges.

WELLS, Judge.

We first note that the order in the present case addresses only two of the three defendants in this cause of action. An order which does not adjudicate the rights and liabilities of all of the parties is interlocutory and not generally subject to appeal. *Smith v. Nationwide Mutual Fire Ins. Co.*, 96 N.C. App. 215, 385 S.E.2d 152 (1989), *disc. rev. denied*, 326 N.C. 365, 389 S.E.2d 816 (1990). However, the trial court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1983), expressly certified that there was no just reason for delay of this appeal. We therefore proceed to address the merits of plaintiff's appeal.

The issue on appeal is whether the trial court erred in dismissing plaintiff's claims against defendants the Board and Bridges based on the defense of governmental immunity. Plaintiff maintains that his claim asserting negligent design of school bus route and stop location is a legally sufficient cause of action and the exclu-

sionary language in the Board's liability insurance policy does not preclude coverage for his injuries. For the reasons which follow, we disagree.

A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority. *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 348 S.E.2d 524 (1986), and cases cited therein. Pursuant to N.C. Gen. Stat. § 115C-42 (1987), any local board of education is authorized to waive its governmental immunity from liability by securing liability insurance as provided for in the statute. The primary purpose of the statute is to encourage local school boards to waive immunity by obtaining insurance protection while, at the same time, giving such boards the discretion to determine whether and to what extent to waive immunity. *Overcash, supra.* The statute makes clear that unless the negligence or tort is covered by the insurance policy, sovereign immunity has not been waived by the Board or its agents. In pertinent part the statute provides:

> . . . [I]mmunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

G.S. § 115C-42. Furthermore, state statutes waiving sovereign immunity must be strictly construed. *Overcash, supra.*

At the time of plaintiff's accident the Board's general liability coverage was provided by a self-funded risk management program. However, prior to the Board's implementation of the self-insurance program, it had purchased a commercial general liability insurance policy issued by Nationwide Mutual Insurance Company. For purposes of this action the Board stipulated that the self-funded risk management program provides general liability coverage for the same risks and to the same extent as had been provided by the commercial policy. The Board further stipulated that to the extent the commercial policy provides coverage, it had waived its governmental immunity pursuant to G.S. § 115C-42. Pursuant to these stipulations, the Nationwide policy is the only insurance policy relevant to the determination of whether the Board had waived its governmental immunity for the type of negligence alleged by plaintiff. That policy includes the following pertinent exclusion:

4. Transportation of Pupils: With respect to the transportation of students or pupils, exclusions (b) and (e) of the policy are replaced by the following:

> The insurance does not apply to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft, automobile or watercraft owned, operated or hired by or for the insured or any officer, employee or member of the teaching, supervisory or administrative staff thereof. For the purpose of this exclusion the word "hired" shall be deemed to include any contract to furnish transportation of pupils to and from schools.

Plaintifff asserts that this exclusionary language does not apply to his negligence claims against these two defendants because he was not hit by a school bus. He contends that his injuries occurred as a result of negligent design of the bus route and stop location, which required him to cross a busy four-lane road in the dark, and his assignment to that route and bus stop. Plaintiff urges us to reject defendants' argument that his injuries "[arose] . . . out of the ownership, maintenance, operation, use, loading or unloading of any . . . automobile . . ." owned or hired by the Board to transport pupils. We find plaintiff's arguments unpersuasive on these facts.

In *Overcash, supra*, this Court followed and applied the rule of strict construction of waiver of governmental immunity in cases involving waiver by purchase of liability insurance. Strictly construing the exclusionary clause in this case, it is inconceivable to us that defendant Board intended to exclude liability for injuries suffered by pupils while being transported by a school bus or in the process of boarding or disembarking from a school bus, but intended to waive immunity for injuries associated with the design of a bus route or the location of a bus stop.

For the reasons stated, we hold that defendant Board has not waived its immunity from liability for the claim for relief asserted by plaintiff in this case, and that summary judgment was therefore properly granted.

Affirmed.

Judges EAGLES and GREENE concur.

JONES COOLING & HEATING, INC. v. DAVID A. BOOTH, INDIVIDUALLY AND PARTNER, AND THOMAS D. CODY, INDIVIDUALLY AND PARTNER

No. 8910DC1108

(Filed 7 August 1990)

Subrogation § 1 (NCI3d)— subcontractor not paid by contractor— claim against owners—summary judgment for defendants

The trial court properly granted summary judgment for defendants in an action in which plaintiff sought to recover payment for installation of a heating and air-conditioning system from the owners of the building even though plaintiff had no contract with the owners. Although plaintiff contended that it was entitled to use the doctrine of equitable subrogation as a basis for its claim for unjust enrichment, plaintiff concedes that it had an adequate legal remedy in the form of a statutory lien against defendants pursuant to N.C.G.S. § 44A-18, but did not exercise it in a timely manner. Plaintiff's failure to timely assert the remedy is not a circumstance that renders the statutory remedy inadequate.

Am Jur 2d, Mechanics' Liens § 357; Subrogation § 4.

APPEAL by plaintiff from judgment entered 29 June 1989 by *Judge Fred M. Morelock* in WAKE County District Court. Heard in the Court of Appeals 11 April 1990.

Farris & Farris, P.A., by Thomas J. Farris and Carl E. Gaddy, Jr., for plaintiff-appellant.

Bode, Call & Green, by S. Todd Hemphill, for defendant-appellee David A. Booth.

Wyrick, Robbins, Yates & Ponton, by Emily R. Copeland, for defendant-appellee Thomas D. Cody.

GREENE, Judge.

Plaintiff appeals the trial court's order granting summary judgment for defendants in plaintiff's civil suit to recover payment for installation of an air-conditioning system.

Record evidence shows that plaintiff is a North Carolina corporation engaged in the business of supplying and installing heating and air-conditioning equipment. At the time of these events, defend-

ants were partners who leased shopping center space to be developed into a restaurant.

On 18 November 1985, defendants entered into a written contract with Growth Builders, a business name for a company comprising individuals George Rowe and Mike Van Pelt. Pursuant to the contract, Growth Builders was general contractor for building the restaurant. The contract included these provisions:

> 1.1 The Contractor shall perform all the Work required by the Contract Documents for "A restaurant fit[-]up [sic] . . . 6.1.3 Payments made by the Contractor to Subcontractors for Work performed pursuant to subcontracts under this Agreement. 11.2 Nothing contained in the Contract Documents shall create any contractual relationship between Owner . . . and any Subcontractor or Sub-subcontractor.

On 30 December 1985, plaintiff submitted to Growth Builders a proposal to install heating and air-conditioning equipment in defendants' restaurant for $12,711.00. Growth Builders accepted the proposal offer and plaintiff installed the equipment. Growth Builders paid plaintiff $2,500.00, leaving an unpaid balance of $10,211.00. Plaintiff received no other payments from Growth Builders. Plaintiff subsequently discovered that Growth Builders was not a state-licensed contractor. Plaintiff then demanded payment from defendants, who refused, based on the contract provisions above.

Plaintiff instituted suit, alleging its right to recovery based on defendants' unjust enrichment. Defendants submitted separate answers denying plaintiff's allegations. Plaintiff did not perfect a subcontractor's lien, as provided by N.C.G.S. § 44A-18 (1989).

Each defendant and plaintiff moved for summary judgment, offering their respective affidavits in support of their motions. After a hearing on the motions, the court entered summary judgment for each defendant and denied plaintiff's motion.

The sole issue is whether a subcontractor who has no contract with the owners is subrogated to the general contractor's claim against the owners for services rendered.

> 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. . . . To entitle one to summary

> judgment, the movant must conclusively establish 'a complete defense or legal bar to the non-movant's claim.'

Cheek v. Poole, 98 N.C. App. 158, 162, 390 S.E.2d 455, 458 (1990); N.C.G.S. § 1A-1, Rule 56 (1983).

Plaintiff contends that summary disposition was inappropriate because it was entitled to use the doctrine of equitable subrogation as a basis for its claim of unjust enrichment. We disagree.

"'A person who has been unjustly enriched at the expense of another is required to make restitution to the other.'" *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555-56, *reh. denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). "A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Id.*, at 567, 369 S.E.2d at 556.

"Subrogation is an equitable remedy in which one steps into the place of another and takes over the right to claim monetary damages to the extent that the other could have . . ." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 11, 362 S.E.2d 812, 818 (1987). "While subrogation is not founded on contract, there must, in every case, whe[n] the doctrine is invoked, in addition to the inherent justice of the case, concur therewith some principle of equity jurisprudence as recognized and enforced by courts of equity." *Journal Publishing Co. v. Barber*, 165 N.C. 478, 488, 81 S.E. 694, 698 (1914).

> Equity supplements the law. . . . Its character as the complement merely of legal jurisdiction rests in the fact that it seeks to reach and do complete justice where courts of law, through the inflexibility of their rules and want of power to adapt their judgments to the special circumstances of the case, are incompetent to do. It was never intended that it should, and it will never be permitted to, override or set at naught a positive statutory provision. . . .

Zebulon v. Dawson, 216 N.C. 520, 522, 5 S.E.2d 535, 537 (1939) (plaintiffs could not use any equitable theory to reduce a statutory interest rate, to set-off a bond against a street assessment, to delay foreclosure for nonpayment of taxes, or to assess the prevailing party with court costs).

"Equity will not lend its aid in any case whe[n] the party seeking it has a full and complete remedy at law." *Centre Develop-*

ment Co. v. County of Wilson, 44 N.C. App. 469, 470, 261 S.E.2d 275, 276, *review denied, appeal dismissed*, 299 N.C. 735, 267 S.E.2d 660 (1980) (citation omitted) (plaintiff could not use an injunction to prevent the county's use of eminent domain when plaintiff had a statutory remedy); *Hawks v. Brindle*, 51 N.C. App. 19, 25, 275 S.E.2d 277, 282 (1981) (plaintiff could not use an equitable restitution claim when plaintiff had a legal remedy for breach of the covenant against encumbrances); *see also Johnson v. Stevenson*, 269 N.C. 200, 152 S.E.2d 214 (1967) (plaintiff cannot invoke a constructive trust on property disposed of by will when a direct attack by will caveat "gave her a full and complete remedy at law"); *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 34 S.E.2d 430 (1945) (plaintiff could not use a restitution theory for recovering the balance of a promissory note secured by a deed of trust when plaintiff had the legal remedy of foreclosure).

Plaintiff concedes that it had an adequate legal remedy in the form of a statutory lien against defendants pursuant to N.C.G.S. § 44A-18, but did not exercise it in a timely manner. *See Zickgraf Enterprises, Inc. v. Younce*, 63 N.C. App. 166, 303 S.E.2d 852 (1983) (a subcontractor has the right to enforce a N.C.G.S. § 44A-18 lien against the property owner, based on a valid contract between an unlicensed general contractor and the property owner). We do not consider plaintiff's failure to timely assert the remedy a circumstance that renders the statutory remedy 'inadequate,' because to do so would allow a party to circumvent the equitable principle set out above. Therefore, the existence of a legal remedy acts as a legal bar to plaintiff's subrogation claim, and the trial court properly granted summary judgment for defendants.

Affirmed.

Judges WELLS and EAGLES concur.

RALEIGH FEDERAL SAVINGS BANK, PLAINTIFF v. BRENT GODWIN AND DENISE B. GODWIN, DEFENDANTS

No. 8910SC1327

(Filed 7 August 1990)

Mortgages and Deeds of Trust § 32 (NCI3d)— foreclosure sale— purchase by lender—deficiency judgment—value of secured property—absence of interest in property

Where mortgaged property was purchased at the foreclosure sale by the lender, defendants who were liable on the underlying note but held no interest in the secured property could not assert the N.C.G.S. § 45-21.36 defense to the lender's action for a deficiency judgment that the property was worth the amount of the debt secured by it.

Am Jur 2d, Mortgages § 922.

APPEAL by defendants from judgment entered 22 September 1989 in WAKE County Superior Court by *Judge James H. Pou Bailey*. Heard in the Court of Appeals 7 June 1990.

Plaintiff loaned defendants and Smithfield Wholesale Building Supply, Inc. (Smithfield Wholesale) $368,000. As security for the loan, Smithfield Wholesale gave a deed of trust on real property it owned in Johnston County. Defendants and Smithfield Wholesale executed a one-year ARM note.

Smithfield Wholesale and defendants defaulted on the note and plaintiff foreclosed on the property under the power of sale in the deed of trust. Plaintiff purchased the property at the foreclosure sale for $237,500 and brought this action against defendants for the balance remaining on the promissory note. In its complaint, plaintiff alleged that defendants executed the note and that they had defaulted in payment. Defendants answered, admitted that they had executed the note and defaulted in payment, but asserted as a defense to plaintiff's claim that the property sold at the foreclosure sale was "fairly worth the amount of the debt secured by it. . . ."

From the trial court's grant of plaintiff's motion for summary judgment, defendants appeal.

Manning, Fulton & Skinner, by Michael T. Medford and Anna R. Hayes, for plaintiff-appellee.

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

WELLS, Judge.

The primary issue on appeal is whether the trial court properly granted summary judgment in favor of plaintiff. Summary judgment is proper when the pleadings, together with any depositions, interrogatories, admissions on file, and supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 (1983). Once the moving party has met its burden of proof, the burden shifts to the nonmoving party to establish specific facts showing that there is a genuine issue for trial. *Quality Inns International, Inc. v. Booth, Fish, Simpson, Harrison & Hall*, 58 N.C. App. 1, 292 S.E.2d 755 (1982) (citations omitted). Because defendants admitted executing the note and subsequently defaulting, nothing else appearing, plaintiff was entitled to judgment as a matter of law. *See, e.g., Carroll v. Brown*, 228 N.C. 636, 46 S.E.2d 715 (1948). Defendants, however, relying on the defense of N.C. Gen. Stat. § 45-21.36 (1984), contend that the trial court erred in granting plaintiff's motion for summary judgment because there was a genuine issue of fact concerning the value of the property at the time of foreclosure. Defendants contend that pursuant to G.S. § 45-21.36 they were entitled to show that the property sold was worth the amount of the debt secured by it or that the amount bid was substantially less than its true value.

Upon foreclosure under a deed of trust, where the mortgaged property is purchased by the mortgagee, the provisions of G.S. § 45-21.36 allow a mortgagor to show, as a defense to an action by the mortgagee for a deficiency, that the purchase price was less than the land's fair market value. *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), *disc. rev. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). The protection of this section, however, is limited by the express terms of the statute to persons who hold a property interest in the mortgaged property. *Id.* The statute explicitly limits the defense to situations in which the mortgagee sues "to recover a deficiency judgment against the

mortgagor, trustor, or other maker of any such obligation whose property has been so purchased." *Id.* (emphasis omitted).

Defendants in the present case did not own the property covered by the deed of trust. The property was owned by Smithfield Wholesale and it was the mortgagor under the deed of trust. The General Assembly's intention to limit the protection of the statute to those who hold a property interest in the mortgaged property is clear; the protection of G.S. § 45-21.36 is not applicable to other parties who may be liable on the underlying debt. *Martin, supra.* Defendants, as other parties liable on the underlying debt, but who hold no property interest in the mortgaged property, cannot assert the defense of G.S. § 45-21.36.

The only fact disputed by defendants was the value of Smithfield Wholesale's property at the time of foreclosure. Because that fact is material only under G.S. § 45-21.36, which is not applicable to these defendants, the trial court's grant of summary judgment was correct.

In their second assignment of error defendants contend that the trial court erred in awarding attorney's fees to plaintiff because plaintiff failed to comply with the notice provision of N.C. Gen. Stat. § 6-21.2 (1986) which allows recovery of attorney's fees incurred in the collection of a note subject to certain conditions. The notice provision provides that notice must be given to the maker of the note before attorney's fees may be recovered. G.S. § 6-21.2(5).

A provision in the note sued upon in this case provided for the payment of the noteholder's costs and expenses in enforcing the note if the makers failed to pay as required. These costs and expenses specifically include "reasonable" attorney's fees. However, there was no evidence before the trial court that plaintiff notified defendants of its intention to collect attorney's fees pursuant to G.S. § 6-21.2. Plaintiff concedes as much in its brief. We therefore conclude that the award of attorney's fees was in error and we direct that the judgment be modified accordingly.

Modified and affirmed.

Judges ORR and LEWIS concur.

TERESA M. P. JONES AND LOUISE BLANCHARD JONES, CO-ADMINISTRATRIXES OF THE ESTATE OF KIM BLANCHARD JONES, DECEASED v. FOSTER McCASKILL, III

No. 8915SC1117

(Filed 7 August 1990)

Death § 7 (NCI3d)— wrongful death—separate issues of compensatory and punitive damages

In a wrongful death action the trial court should submit to the jury separate issues for compensatory and punitive damages when the evidence supports submission of these issues.

Am Jur 2d, Death §§ 526, 527.

APPEAL by plaintiffs from judgment entered 20 July 1989 by *Judge F. Gordon Battle* in ORANGE County Superior Court. Heard in the Court of Appeals 11 April 1990.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Alexander H. Barnes and Mark A. Scruggs, and H. Wood Vann, for plaintiff-appellants.

Reynolds, Bryant and Patterson, P.A., by Lee A. Patterson, II, for defendant-appellee.

GREENE, Judge.

Plaintiffs appeal and assign error to the trial court's submission to the jury the issue of punitive damages as a separate issue in this wrongful death suit.

Plaintiffs are co-administratrixes of the estate of Kim Jones, who died on 16 August 1986. Record evidence shows that Jones was driving a motor vehicle which collided with defendant's motor vehicle. Jones died after suffering injuries in the collision.

Plaintiffs filed suit, alleging that defendant's "willful, wanton and gross" negligence caused Jones's wrongful death. Plaintiffs prayed recovery of compensatory and punitive damages as permitted by N.C.G.S. § 28A-18-2.

After admission of evidence during trial and before the issues were submitted to the jury, plaintiffs objected and excepted to

the trial court's submission of a punitive damages issue separate from the compensatory damages issue.

The court submitted, and the jury answered, these issues:

1. Was Kim Blanchard Jones killed by negligence on the part of the Defendant Foster McCaskill, III?

ANSWER: Yes.

2. What amount of damages are Teresa M. P. Jones and Louise Blanchard Jones, Co-Administratrixes of the Estate of Kim Blanchard Jones, deceased, entitled to recover by reason of the death of Kim Blanchard Jones?

ANSWER: $25,538.89.

3. What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiffs?

ANSWER: $75,000.00.

The sole issue is whether the trial court erred in submitting a separate issue on punitive damages.

Plaintiffs contend that our wrongful death statute embodies the legislature's intent to require the court to submit only one damage issue to the jury. We disagree.

"Damages recoverable for death by wrongful act include . . . [s]uch punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence . . ." N.C.G.S. § 28A-18-2(b)(5) (1985).

In 1969, our legislature amended N.C.G.S. § 28A-18-2 to add punitive damages as an item of recoverable damage. *See Bowen v. Constructors Equip. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973) (discussing revision of the statute). Before and after this amendment, "[t]he approved practice is to submit *separately* [to the jury] the issues [of] compensatory damages and [of] punitive damages." *Hinson v. Dawson*, 244 N.C. 23, 26, 92 S.E.2d 393, 395 (1956) (citation omitted) (wrongful death action); *see also* North Carolina Pattern Jury Instruction 106.55 (1986) (listing a separate issue for punitive damages). " 'If the pleadings and evidence so warrant, an issue as to punitive damages should be submitted to

the jury.' " *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964), citing *Hinson; Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E.2d 130, *review denied*, 318 N.C. 281, 347 S.E.2d 462 (1986) (a separate issue for punitive damages was properly submitted to the jury, based on evidence of gross negligence).

We determine that in a wrongful death action, the trial court should submit to the jury separate issues for compensatory and punitive damages when the evidence supports submission of these issues.

Punitive damages differ significantly from compensatory damages. Punitive damages require different proof and serve different purposes than compensatory damages. *See Mazza v. Huffaker*, 61 N.C. App. 170, 300 S.E.2d 833, *review denied*, 309 N.C. 192, 305 S.E.2d 734, *reconsid. denied*, 313 S.E.2d 160 (1984) (punitive damages serve the purposes of punishment and deterrence); *Burns v. Forsyth County Hosp. Auth., Inc.*, 81 N.C. App. 556, 344 S.E.2d 839 (1986) (punitive damages are available upon proof of the underlying tort *and* an element of aggravation); *cf. Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843, *cert. denied*, 306 N.C. 744, 295 S.E.2d 480 (1982) (the purpose of wrongful death compensatory damages is to restore the beneficiaries to the position they would have occupied had there been no death).

Furthermore, there exist other sound reasons for separating punitive and compensatory damage issues. *See Bowen*, at 421, 196 S.E.2d at 807 (the issues of punitive damages, compensatory damages for decedent's care, treatment and hospitalization prior to death, and compensatory damages for decedent's pain and suffering prior to death should be separate issues to show "whether the recovery for these items would constitute general assets of the estate"); J. Stein, *Damages and Recovery, Personal Injury and Death Actions* § 120 (1972) (an insurer may not be liable for punitive damages, based on insurance contract language).

Plaintiffs rely on the *Bowen* decision as authority for their argument that "the language of the [wrongful death] statute evinces a legislative intent that all elements permitted be combined into one sum as damages 'for death by wrongful act,' " which we find unpersuasive in light of our Supreme Court's decision in favor of separating the issues. *See Bowen.*

The trial court properly submitted separate issues of punitive and compensatory damage to the jury.

No error.

Judges WELLS and EAGLES concur.

KATHRYN N. BEAM, EMPLOYEE, PLAINTIFF v. FLOYD'S CREEK BAPTIST CHURCH, EMPLOYER; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANT

No. 8910IC1174

(Filed 7 August 1990)

Master and Servant § 99 (NCI3d)— workers' compensation—defense without reasonable grounds—attorney fees

The evidence supported a finding that defendants had no reasonable basis for concluding that a workers' compensation claim was not compensable where both claimant, a church secretary, and the church's pastor informed defendants that claimant suffered back pain the day after she helped carry a heavy, unwieldy spotlight up a flight of steps while walking backwards and bent over at the waist, plaintiff is a fifty-seven-year-old woman who performed secretarial tasks for her employer, this activity was clearly not within her normal work routine, and the fact that claimant did not experience pain contemporaneously with the incident does not by itself justify defendants' decision to contest the claim. Moreover, the matter was remanded to the Industrial Commission for an assessment of reasonable attorney's fees incurred since the appeal from the Deputy Commissioner's Order and Award. N.C.G.S. § 97-88.1.

Am Jur 2d, Workmen's Compensation §§ 289, 644, 646, 647.

APPEAL by defendants from the Opinion and Award of the Industrial Commission entered 28 June 1989. Heard in the Court of Appeals 3 May 1990.

M. Leonard Lowe for plaintiff appellee.

Young, Moore, Henderson & Alvis, P.A., by J. D. Prather, for defendant appellants.

COZORT, Judge.

Defendants appeal from an order of the Industrial Commission affirming an award of attorney's fees based on the Commissioner's finding that the claim was defended without reasonable grounds. We affirm.

On 11 December 1987, claimant Kathryn Beam, aged 57, was employed as a secretary for defendant Floyd's Creek Baptist Church. Her duties included bookkeeping and preparing the weekly bulletin and payroll. On that date, the church's pastor, The Reverend James C. Diehl, asked claimant to help him carry a three-foot-long, 75-pound spotlight up a flight of stairs to a balcony. Claimant and Reverend Diehl carried the spotlight up the stairs with claimant walking backwards while bent over at the waist. Claimant did not stumble or trip, or twist or turn, while carrying the spotlight. Claimant suffered back pain when she awoke the next morning, and she immediately notified Reverend Diehl and the Chairman of the Board of Deacons and sought medical attention.

The Deputy Commissioner, Morgan S. Chapman, concluded that claimant suffered an "injury by accident arising out of and in the course of her employment," N.C. Gen. Stat. § 97-2(6) (1989), and awarded compensation. The Deputy Commissioner also assessed a $500.00 attorney's fee against defendants based on a finding that the case was defended without reasonable grounds. The Commission affirmed. On appeal, defendants contest only the award of attorney's fees.

N.C. Gen. Stat. § 97-88.1 provides, "If the Industrial Commission shall determine that any hearing has been . . . defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for . . . plaintiff's attorney upon the party who has . . . defended them." The purpose of that section is to prevent "stubborn, unfounded litigiousness" which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees. *Sparks v. Mountain Breeze Restaurant & Fish House, Inc.*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982).

Defendant contends that its denial of coverage was reasonable because it was justified in concluding that there was no "specific traumatic incident," N.C. Gen. Stat. § 97-2(6), and because claimant did not feel back pain until she awoke the next morning and thus

causation was at issue. We do not agree. Both claimant and Reverend Diehl informed defendants that claimant, a 57-year-old woman who performed secretarial tasks for her employer, suffered back pain the day after she helped carry a heavy, unwieldy spotlight up a flight of steps while walking backwards and bent over at the waist. Clearly, that activity was not within her normal work routine. This evidence established that claimant's injury resulted from a specific traumatic incident that "occurred at a cognizable time." *Bradley v. E.B. Sportswear, Inc.*, 77 N.C. App. 450, 452, 335 S.E.2d 52, 53 (1985). The fact that claimant did not experience pain contemporaneously with that incident does not, by itself, justify defendant's decision to contest this claim. We hold that the evidence supported a finding that defendant had no reasonable basis for concluding that this claim was not compensable.

In response to claimant's Motion filed with this Court, we remand this cause to the Commission for an assessment of reasonable attorney's fees incurred since the appeal from Deputy Commissioner Chapman's Order and Award. *See* N.C. Gen. Stat. § 97-88 (1989); *Taylor v. J. P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983).

Affirmed and remanded for assessment of attorney's fees.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. SHERRIE LYNN TREADWELL (WILKINS)

No. 8926SC1196

(Filed 7 August 1990)

1. Obscenity § 3 (NCI3d) — disseminating obscenity — community standard — exclusion of expert testimony

The trial court in an obscenity prosecution did not err in excluding expert testimony as to the proper community standard for obscenity in Mecklenburg County based on studies conducted in that county.

Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 7, 34.

2. Obscenity § 3 (NCI3d)— disseminating obscenity—rental of comparable materials—evidence excluded

The trial court in a prosecution for disseminating obscenity did not abuse its discretion in ruling that the danger of misleading the jury outweighed the probative value of evidence that "comparable materials" had been rented from the same store by more than one percent of the population of the county.

Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 7, 34.

3. Indictment and Warrant § 7 (NCI3d)— grand jury—elements of crime—instruction not required

The trial court was not required to instruct the indicting grand jury on the elements of the crime in question. Art. I, § 22 of the N. C. Constitution.

Am Jur 2d, Grand Jury § 19.

APPEAL by defendant from judgment entered 13 June 1989 by *Judge Marvin K. Gray* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 5 June 1990.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Harold M. White, Jr., for the State.

James F. Wyatt, III for defendant appellant.

PHILLIPS, Judge.

Defendant was convicted of two charges of disseminating obscenity in violation of G.S. 14-190.1. One of the convictions was arrested, and she was sentenced on the other one. Defendant's sole defense at trial consisted of opinion testimony by five purported expert witnesses which the court excluded. The testimony was based upon a number of studies conducted to ascertain Charlotte's contemporary community standards relating to explicit sexual material. Defendant contends that the trial court's rejection of that evidence, along with some comparable materials evidence, entitles her to a new trial and that the court's failure to instruct the grand jury on the elements of obscenity entitled her to a dismissal of the indictments. Neither contention has merit.

[1] As defendant stated in moving to consolidate her appeal with that of Cinema Blue of Charlotte, Inc., the expert opinion testimony that she offered is identical to that offered in that case in which

the store where defendant Treadwell worked, as well as some other store employees, was convicted of disseminating obscenity. In determining that appeal another panel of this Court affirmed the trial judge's exclusion of the expert opinion testimony. *State v. Cinema Blue of Charlotte, Inc.*, 98 N.C. App. 628, 392 S.E.2d 136 (1990). For the reasons stated therein we do likewise.

[2] As to the comparable materials evidence exclusion, it is well established that "[e]vidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance." *State v. Mayes*, 323 N.C. 159, 169, 371 S.E.2d 476, 482 (1988), *cert. denied*, 488 U.S. 1009, 102 L.Ed.2d 784 (1989); *see also Hamling v. United States*, 418 U.S. 87, 125-26, 41 L.Ed.2d 590, 625-26, *reh'g denied*, 419 U.S. 885, 42 L.Ed.2d 129 (1974); *State v. Anderson*, 322 N.C. 22, 32-33, 366 S.E.2d 459, 466, *cert. denied*, 488 U.S. 975, 102 L.Ed.2d 548 (1988). Here, defendant attempted to introduce testimony that "comparable materials" had been rented from the same store by barely more than one percent of the Mecklenburg County population and argued therefrom that the sexually explicit materials in issue enjoyed a reasonable degree of community acceptance and were not obscene. The court's ruling that the probative value of the evidence was outweighed by the danger of confusing the issues or misleading the jury does not appear to be either erroneous or an abuse of discretion.

[3] The last issue that defendant presents is whether the court's failure to instruct the indicting grand jury on the elements of the crime in question violated Article I, Section 22 of our Constitution which provides that: "Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." So far as we have been able to ascertain, this issue is novel to our jurisprudence and no North Carolina statute requires such an instruction. *See* G.S. 15A-641 *et seq.* Though this utter absence of authority is admitted, defendant argues that "[t]he jurisprudential lacuna left open by the present status of North Carolina law must be filled with a requirement that instructions concerning the crime in question be given to the grand jury in order for Article 22 [sic] to faithfully fulfill its historical purpose." We decline to establish any such requirement, being of the opinion that it is beyond our province.

No error.

Judges JOHNSON and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 AUGUST 1990

BRADLEY LUMBER CO. v. HARRIS-TEETER SUPERMARKETS No. 8929SC1184	McDowell (87CVS372)	New Trial
BRADY v. LAWSON No. 9022SC125	Davidson (87CVS1280)	Dismissed
BRITT v. BRITT No. 8915SC563	Orange (83CVS321)	Affirmed in part, reversed in part & remanded
CARVER v. SMART No. 8925DC1169	Catawba (87CVD337)	No Error
GILMORE v. MOEBES No. 8918SC1093	Guilford (88CVS6048)	Vacated & remanded for trial
GRAHAM NEVILLE & ASSOCIATES v. PARRISH No. 8911DC1177	Johnston (89CVD741)	Affirmed
GURGANUS v. GURGANUS No. 904DC82	Onslow (86CVD278)	Dismissed
HUTCHENS v. HILL No. 8923DC1261	Yadkin (88CVD282)	Affirmed
IN RE FORECLOSURE OF GREEN No. 894SC926 No. 894SC927 No. 894SC928	Jones (87SP24) (87SP25) (87SP26)	Dismissed
IN RE GOLDEN RULE INS. CO. v. N. C. DEPT. OF INSURANCE No. 8910SC863	Wake (89CVS2722)	Reversed
LUPTON v. CITY OF GOLDSBORO No. 9010IC271	Ind. Comm. (853100)	Reversed & Remanded
PLESS v. ARTIS No. 8919SC1231	Cabarrus (87CVS1601)	New Trial
ROGERS v. INSUL PLUS CORP. No. 9010IC114	Ind. Comm. (552271)	Affirmed

SETZER v. BABAOFF No. 8925SC439	Catawba (87CVS1081)	No Error
SINGH v. HILL ENTERTAINMENT CORP. No. 8914SC1331	Durham (89CVS00457)	Affirmed
SPIVEY v. HULL No. 897SC1262	Edgecombe (87CVS910)	Reversed & Remanded
STATE v. CREEF No. 901SC357	Dare (89CRS10246)	No Error
STATE v. CROOKS No. 8927SC475	Gaston (88CRS2557) (88CRS2558) (88CRS2559) (88CRS2560)	No Error
STATE v. HIBBARD No. 899SC1129	Granville (89CRS889) (89CRS890)	No Error
STATE v. JAMES No. 9021SC155	Forsyth (87CRS27148)	Affirmed
STATE v. JENKINS No. 8926SC1265	Mecklenburg (89CRS657)	Def. had a fair trial free of prejudicial error
STATE v. JOHNS No. 9026SC163	Mecklenburg (87CRS18039)	Affirmed
STATE v. LEE No. 9026SC189	Mecklenburg (88CRS88170)	No Error
STATE v. LEGGETT No. 9018SC311	Guilford (89CRS35990) (89CRS35991) (89CRS35992)	No Error
STATE v. LUCK No. 8918SC1245	Guilford (86CRS86033) (86CRS86034) (86CRS86515)	No Error
STATE v. McCRAE No. 9021SC275	Forsyth (89CRS1554)	No Error
STATE v. McKNIGHT No. 9026SC167	Mecklenburg (89CRS50242)	Affirmed
STATE v. OWENS No. 8912SC956	Cumberland (88CRS16207)	No Error

STATE v. POPE No. 9019SC309	Rowan (89CRS11527)	Remanded for Resentencing
STATE v. POWELL No. 891SC1028	Chowan (88CRS1003)	No Error
STATE v. PRESLAR No. 9020SC224	Union (88CRS6920)	Appeal Dismissed
STATE v. RAGIN No. 9026SC268	Mecklenburg (87CRS43242) (87CRS69940)	Affirmed
STATE v. ROBERSON No. 894SC1191	Onslow (89CRS3120) (89CRS3124) (89CRS3125) (89CRS3126) (89CRS3127)	No Error
STATE v. ROSEMON No. 894SC936	Onslow (88CRS19225) (88CRS19226) (89CRS19227)	No Error
STATE v. SARAUW No. 8928SC1145	Buncombe (88CRS7224) (88CRS7210)	No Error
STATE v. SCRIVEN No. 908SC136	Wayne (88CRS6077)	Dismissed
STATE v. SELLERS No. 8930SC1120	Graham (88CRS434) (88CRS437) (88CRS438) (88CRS439)	In def. Delk's trial, we find, No Error. In def. Sellers' trial, we find, No Error.
STATE v. STEWART No. 895SC1151	Pender (87CRS2728)	New Trial
STATE v. WHITE No. 905SC106	New Hanover (89CRS1958)	No Error
STATE v. WILLIAMS No. 8923SC516	Yadkin (88CRS1478)	No Error
STATE ex rel. CHAMBLIN v. CHAMBLIN No. 9026DC76	Mecklenburg (87CVD13691-RB)	Vacated & Remanded

STREETER v. SHEPARD No. 898SC966	Greene (87CVS112)	Affirmed
WARD v. WESTFELDT No. 9028SC156	Buncombe (89CVS01846)	Reversed & Remanded
WATKINS v. HUNT No. 8926SC410	Mecklenburg (87CVS4600)	No Error
WEISENHORN v. CITY OF GASTONIA No. 8927SC1170	Gaston (88CVS3203)	Affirmed
WILLIAMS BRANCH CEMETERY ASSN. v. ABSALOM DILLINGHAM CEMETERY No. 8928SC1075	Buncombe (88CVS3135)	Affirmed

APPENDIXES

ORDER ADOPTING AMENDMENT TO GENERAL
RULES OF PRACTICE FOR
SUPERIOR AND DISTRICT COURTS

ORDER ADOPTING AMENDMENTS TO
RULES OF APPELLATE PROCEDURE

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to authority of N.C.G.S. § 7A-34, the General Rules of Practice for the Superior and District Courts are amended by the adoption of a new Rule 7.1, to read as follows:

> When any person is charged with a crime wherein the victim is a minor, or a minor is a potential witness to such crime, the court may appoint an attorney, from a list of *pro bono* attorneys approved by the Chief District Court Judge, as guardian ad litem for such minor victim or witness.

Adopted by the Court in Conference this 26th day of July, 1990. This amendment shall be effective 1 October 1990, and 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 30th day of July, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Rules 6, 7, 9, 11, 16, 17, 18, 26, 27, 28, and 29, and Appendixes A, C, and F of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. All amendments shall be effective 1 October 1990.

Adopted by the Court in Conference this 26th day of July, 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 30th day of July, 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

Rule 6

SECURITY FOR COSTS ON APPEAL

(a) **In Regular Course.** Except in pauper appeals an appellant in a civil action must provide adequate security for the costs of appeal in accordance with the provisions of G.S. 1-285 and 1-286.

(b) **In Forma Pauperis Appeals.** An appellant in a civil action may be allowed to prosecute an appeal in forma pauperis without providing security for costs in accordance with the provisions of G.S. 1-288.

(c) **Filed with Record on Appeal.** When security for costs is required, the appellant shall file with the record on appeal a certified copy of the appeal bond or a cash deposit made in lieu of bond.

(d) **Dismissal for Failure to File or Defect in Security.** For failure of the appellant to provide security as required by subdivision (a) or to file evidence thereof as required by subdivision (c), or for a substantial defect or irregularity in any security provided, the appeal may on motion of an appellee be dismissed by the appellate court where docketed, unless for good cause shown the court permits the security to be provided or the filing to be made out of time, or the defect or irregularity to be corrected. A motion to dismiss on these grounds shall be made and determined in accordance with Rule 37 of these rules. When the motion to dismiss is made on the grounds of a defect or irregularity, the appellant may as a matter of right correct the defect or irregularity by filing a proper bond or making proper deposit with the clerk of the appellate court within 10 days after service of the motion upon him or before the case is called for argument, whichever first occurs.

(e) **No Security for Costs in Criminal Appeals.** Pursuant to G.S. 15A-1449, no security for costs is required upon appeal of criminal cases to the appellate division.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—6(e)—effective 1 February 1985;
26 July 1990—6(c)—effective 1 October 1990.

Rule 7

PREPARATION OF THE TRANSCRIPT; COURT REPORTER'S DUTIES

(a) **Ordering the Transcript.**

(1) **Civil Cases.** Within 10 days after filing the notice of appeal the appellant shall contract, in writing, with the court reporter for production of a transcript of such parts of the proceedings not already on file as he deems necessary. The appellant shall file a copy of the contract with the clerk of the trial tribunal. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall file with the record a transcript of all evidence relevant to such finding or conclusion. Unless the entire transcript is to be filed, an appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to file with the record and a statement of the issues he intends to present on the appeal. If an appellee deems a transcript of other parts of the proceedings to be necessary he shall, within 10 days after the service of the statement of the appellant, file and serve on the appellant a copy of the contract ordering any additional parts of the transcript. As a part of the contract ordering the transcript, the ordering party shall provide such deposit toward payment of the cost of the transcript as the court reporter may require.

(2) **Criminal Cases.** In criminal cases where there is an order establishing the indigency of the defendant for the appeal, unless the trial judge's appeal entries specify or the parties stipulate that parts of the proceedings need not be transcribed, the clerk of the trial tribunal shall order from the court reporter a transcript of the proceedings by forwarding a copy of the appeal entries signed by the judge and a statement of the portions of transcript requested; the number of copies required; the name, address and telephone number of appellant's counsel; and the trial court's order establishing indigency for the appeal, if any. In criminal cases where there is no order establishing indigency, the defendant shall

contract with the court reporter for production of the transcript, as in civil cases.

(b) **Production and Delivery of Transcript.**

(1) From the date of the reporter's receipt of a contract for production of a transcript, the reporter shall have 60 days to produce and deliver the transcript in civil cases and non-capital criminal cases and shall have 120 days to produce and deliver the transcript in capitally tried cases. The trial tribunal, in its discretion, and for good cause shown by the reporter or by a party on behalf of the reporter may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.

(2) The court reporter shall deliver the completed transcript to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The reporter shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original of the transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

REPEALED: July 1, 1978.
(See note following Rule 17.)

Re-adopted: 8 December 1988—effective for all judgments of the trial tribunal entered on or after 1 July 1989.

Amended: 8 June 1989—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

26 July 1990—7(a)(1), (a)(2), and (b)(1)—effective 1 October 1990.

Rule 9

THE RECORD ON APPEAL

(a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal and the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule 9.

(1) **Composition of the Record in Civil Actions and Special Proceedings.** The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over person or property, or a statement showing same;

d. copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

k. assignments of error set out in the manner provided in Rule 10.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies.** The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing or other papers showing jurisdiction of the board or agency over the persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all errors assigned;

f. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

g. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3); and

h. assignments of error to the actions of the superior court, set out in the manner provided in Rule 10.

(3) **Composition of the Record in Criminal Actions.** The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken;

and in capitally tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary for an understanding of all errors assigned, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2); and

j. assignments of error set out in the manner provided in Rule 10.

(b) **Form of Record; Amendments.** The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement.** The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty.** It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers.** Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other deter-

mination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified.** The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p ____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal.** On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the docketing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(c) **Presentation of Testimonial Evidence and Other Proceedings.** Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal.

(1) **When Testimonial Evidence Narrated—How Set Out in Record.** Where error is assigned with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence required to be included in the record on appeal by Rule 9(a) shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to

seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. To this end, counsel may object to particular narration that it does not accurately reflect the true sense of testimony received; or to particular question and answer portions that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, he shall settle the form in the course of his general settlement of the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.** Appellant may designate in the record that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs.** Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled, verbatim transcript to be filed, contemporaneously with the record on

appeal, with the clerk of the appellate court in which the appeal is docketed;

c. in criminal appeals, the district attorney, upon settlement of the record, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials.** Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances where discovery materials are considered by the trial tribunal, other than as evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to questions raised on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(d) **Models, Diagrams, and Exhibits of Material.**

(1) **Exhibits.** Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal.

(2) **Transmitting Exhibits.** Three legible copies of each documentary exhibit offered in evidence and required for understanding of errors assigned shall be filed in the appellate court; the original documentary exhibit need not be filed with the appellate court. When an original, non-documentary exhibit has been settled as

a necessary part of the record on appeal, any party may within 10 days after settlement of the record on appeal in writing request the clerk of superior court to transmit the exhibit directly to the clerk of the appellate court. The clerk shall thereupon promptly identify and transmit the exhibit as directed by the party. Upon receipt of the exhibit, the clerk of the appellate court shall make prompt written acknowledgment thereof to the transmitting clerk and the exhibit shall be included as part of the records in the appellate court. Portions of the record on appeal in either appellate court which are not suitable for reproduction may be designated by the Clerk of the Supreme Court to be exhibits. Counsel may then be required to submit three additional copies of those designated materials.

(3) **Removal of Exhibits from Appellate Court.** All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to him may seem best.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 10 June 1981—9(c)(1)—applicable to all appeals docketed on or after 1 October 1981;
12 January 1982—9(c)(1)—applicable to all appeals docketed after 15 March 1982;
27 November 1984—applicable to all appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—9(a), (c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
8 June 1989—9(a)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;

26 July 1990—9(a)(3)h and 9(d)(2)—effective 1 October 1990.

Rule 11

SETTLING THE RECORD ON APPEAL

(a) **By Agreement.** Within 35 days after the reporter's certification of delivery of the transcript, if such was ordered (70 days in capitally tried cases), or 35 days after filing of the notice of appeal if no transcript was ordered, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within 21 days (35 days in capitally tried cases) after service of the proposed record on appeal upon him an appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Judicial Order or Appellant's Failure to Request Judicial Settlement.** Within 21 days (35 days in capitally tried cases) after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the

request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed, and no other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal.** When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and related to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **RESERVED.**

(f) **Extensions of Time.** The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 November 1984—11(a), (c), (e), and (f)—applicable to appeals in which the notice of appeal is filed on or after 1 February 1985;
8 December 1988—11(a), (b), (c), (e), and (f)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—11(b), (c), and (d)—effective 1 October 1990.

Note: Paragraph (e) formerly contained the requirement that the settled record on appeal be certified by the clerk of the trial tribunal. The 27 November 1984 amendments deleted that step in the process. Under the present version of the rules, once the record is settled by the parties, by agreement or by judicial settlement, the appellant has 15 days to file the settled record with the appropriate appellate court.

Rule 16

SCOPE OF REVIEW OF DECISIONS OF COURT OF APPEALS

(a) **How Determined.** Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except where the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the questions stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

(b) **Scope of Review in Appeal Based Solely Upon Dissent.** Where the sole ground of the appeal of right is the existence

of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs required by Rule 14(d)(1) to be filed in the Supreme Court. Other questions in the case may properly be presented to the Supreme Court through a petition for discretionary review, pursuant to Rule 15, or by petition for writ of certiorari, pursuant to Rule 21.

(c) **Appellant, Appellee Defined.** As used in this Rule 16, the terms "appellant" and "appellee" have the following meanings when applied to discretionary review:

(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, "appellant" means the petitioner, "appellee" means the respondent.

(2) With respect to Supreme Court review upon the Court's own initiative, "appellant" means the party aggrieved by the decision of the Court of Appeals; "appellee" means the opposing party. Provided that in its order of certification the Supreme Court may designate either party "appellant" or "appellee" for purposes of proceeding under this Rule 16.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 3 November 1983—16(a) and (b)—applicable to all notices of appeal filed in the Supreme Court on and after 1 January 1984;
30 June 1988—16(a) and (b)—effective 1 September 1988;
26 July 1990—16(a)—effective 1 October 1990.

Rule 17

APPEAL BOND IN APPEALS UNDER G.S. 7A-30, 7A-31

(a) **Appeal of Right.** In all appeals of right from the Court of Appeals to the Supreme Court in civil cases, the party who takes appeal shall, upon filing the notice of appeal in the Supreme Court, file with the Clerk of that Court a written undertaking,

with good and sufficient surety in the sum of $250, or deposit cash in lieu thereof, to the effect that he will pay all costs awarded against him on the appeal to the Supreme Court.

(b) **Discretionary Review of Court of Appeals Determination.** When the Supreme Court on petition of a party certifies a civil case for review of a determination of the Court of Appeals, the petitioner shall file an undertaking for costs in the form provided in subdivision (a). When the Supreme Court on its own initiative certifies a case for review of a determination of the Court of Appeals, no undertaking for costs shall be required of any party.

(c) **Discretionary Review by Supreme Court Before Court of Appeals Determination.** When a civil case is certified for review by the Supreme Court before being determined by the Court of Appeals, the undertaking on appeal initially filed in the Court of Appeals shall stand for the payment of all costs incurred in either the Court of Appeals or the Supreme Court and awarded against the party appealing.

(d) **Appeals in Forma Pauperis.** No undertakings for costs are required of a party appealing in forma pauperis.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 19 June 1978, effective 1 July 1978;
26 July 1990—17(a)—effective 1 October 1990.

Note to 1 July 1978 Amendment.

Repeal of Rule 7 and limiting Rule 17's application to civil cases are to conform the Rules of Appellate Procedure to Chap. 711, 1977 Session Laws, particularly that portion of Chap. 711 codified as G.S. 15A-1449 which provides, "In criminal cases no security for costs is required upon appeal to the appellate division." Section 33 of Chap. 711 repealed, among other statutes, G.S. 15-180 and 15-181 upon which Rule 7 was based. Chap. 711 becomes effective 1 July 1978. While G.S. 15A-1449, strictly construed, does not apply to cost bonds in appeals from or petitions for further review of decisions of the Court of Appeals, the Supreme Court believes the legislature intended to eliminate the giving of security for costs in criminal cases on appeal or on petition to the Supreme Court from the Court of Appeals. The Court has, therefore, amended Rule 17 to comply with what it believes to be the legislative intent in this area.

Rule 18

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(a) **General.** Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) **Time and Method for Taking Appeals.**

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made by the agency as part of the process leading up to the final agency determination, the appealing party may contract with the reporter for production of such parts of the proceedings not already on file as he deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any agency shall contain:

(1) an index of the contents of the record, which shall appear as the first page thereof;

(2) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(3) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed with the agency to present and define the matter for determination;

(4) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(5) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(6) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(7) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(8) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(9) assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference or Agency Order; Failure to Request Settlement.** If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or

settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and a time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time.** The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985;
26 July 1990—18(b)(3), (d)(1) and (d)(2)—effective 1 October 1990.

Rule 26

FILING AND SERVICE

(a) **Filing.** Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court.

(1) 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, except that motions, responses to petitions, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service, if first class mail is utilized.

(2) Filing in the appellate courts may be accomplished by electronic means only as hereinafter provided.

In any case, responses and motions may be filed by electronic means, but only if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court upon a showing of good cause.

In all cases where a document has been filed by electronic means pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission: the original signed document, the electronic transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission and neither they nor the electronic transmission fee may be recovered as costs of the appeal.

"Electronic means" means any method of transmission of information between two machines designed for the purpose of sending and receiving such transmissions, and which results in the fixation of the information transmitted in a tangible medium of expression.

(b) **Service of All Papers Required.** Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service.** Service may be made in the manner provided for service and return of process in Rule 4 of the N. C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.

(d) **Proof of Service.** Papers presented for filing shall contain an acknowledgement of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees.** Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately.** When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties

designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11″) with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14″). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 5 May 1981—26(g)—effective for all appeals arising from cases filed in the court of original jurisdiction after 1 July 1982;
11 February 1982—26(c);
7 December 1982—26(g)—effective for documents filed on and after 1 March 1983;
27 November 1984—26(a)—effective for documents filed on and after 1 February 1985;
30 June 1988—26(a) and (g)—effective 1 September 1988;
26 July 1990—26(a)—effective 1 October 1990.

Rule 27

COMPUTATION AND EXTENSION OF TIME

(a) **Computation of Time.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday.

(b) **Additional Time After Service by Mail.** Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.

(1) **Motions for Extension of Time in the Trial Division.** The trial tribunal for good cause shown by the appellant may extend once for no more than 30 days the time permitted by Rule 11 or Rule 18 for the service of the proposed record on appeal.

Motions for extensions of time made to a trial tribunal may be made orally or in writing and without notice to other parties and may be determined at any time or place within the state.

Motions made under this Rule 27 to a court of the trial divisions may be heard and determined by any of those judges of the particular court specified in Rule 36 of these rules. Such motions made to a commission may be heard and determined by the chairman of the commission; or if to a commissioner, then by that commissioner.

(2) **Motions for Extension of Time in the Appellate Division.** All motions for extensions of time other than those specifically enumerated in Rule 27(c)(1) may only be made to the appellate court to which appeal has been taken.

(d) **Motions for Extension of Time; How Determined.** Motions for extension of time made in any court may be determined ex parte, but the moving party shall promptly serve on all other parties to the appeal a copy of any order extending time. Provided that motions made after the expiration of the time allowed in these rules for the action sought to be extended must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 7 March 1978—27(c);
4 October 1978—27(c)—effective 1 January 1979;
27 November 1984—27(a) and (c)—effective 1 February 1985;
8 December 1988—27(c)—effective for all judgments of the trial tribunal entered on or after 1 July 1989;
26 July 1990—27(c) and (d)—effective 1 October 1990.

Rule 28

BRIEFS: FUNCTION AND CONTENT

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

(b) **Content of Appellant's Brief.** An appellant's brief in any appeal shall contain, under appropriate headings, and in the form

prescribed by Rule 26(g) and the Appendixes to these rules, in the following order:

(1) A cover page, followed by a table of contents and table of authorities required by Rule 26(g).

(2) A statement of the questions presented for review.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(5) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

The body of the argument shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the question presented may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal or the transcript of proceedings, or the exhibits.

(6) A short conclusion stating the precise relief sought.

(7) Identification of counsel by signature, typed name, office address and telephone number.

(8) The proof of service required by Rule 26(d).

(9) The appendix required by Rule 28(d).

(c) **Content of Appellee's Brief; Presentation of Additional Questions.** An appellee's brief in any appeal shall contain a table of contents and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need contain no statement of the questions presented, statement of the procedural history of the case, or statement of the facts, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant.

Without having taken appeal, an appellee may present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d). Without having taken appeal or made cross-assignments of error, an appellee may present the question, by statement and argument in his brief, whether a new trial should be granted to the appellee rather than a judgment n.o.v. awarded to the appellant when the latter relief is sought on appeal by the appellant.

If the appellee is entitled to present questions in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new questions supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate.

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine questions presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an assignment of error:

a. whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand a question presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript as if he were the appellant with respect to each such new or additional question.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages which have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to assignments of error shall be by their numbers and to the pages of the printed record on appeal or of the transcript of proceedings, or both, as the case may be, at which they appear. Reference to parts of the printed record on appeal and to the verbatim transcript or documentary exhibits shall be to the pages where the parts appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief although they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing his brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs nor in such a memorandum may not be cited and discussed in oral argument.

Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and 14 copies of the memorandum.

(h) **Reply Briefs.** Unless the court, upon its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court, except as herein provided:

(1) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(2) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(1).

(i) **Amicus Curiae Briefs.** A brief of an *amicus curiae* may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an *amicus curiae* brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases. The motion shall state concisely the nature of the applicant's interest, the reasons why an *amicus curiae* brief is believed desirable, the questions of law to be addressed in the *amicus curiae* brief and the applicant's position on those questions. The proposed *amicus curiae* brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the *amicus curiae* shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Reply briefs of the parties to an *amicus curiae* brief will be limited to points or authorities presented in the *amicus curiae* brief which are not presented in the main briefs of the parties. No reply brief of an *amicus curiae* will be received.

A motion of an *amicus curiae* to participate in oral argument will be allowed only for extraordinary reasons.

(j) **Page Limitations Applicable to Briefs Filed in the Court of Appeals.** Principal briefs filed in the North Carolina Court of Appeals, whether filed by appellant, appellee, or *amicus curiae*, formatted according to Rule 26 and the Appendixes to these Rules, shall be limited to 35 pages of text, exclusive of tables of contents, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 27 January 1981—repeal 28(d)—effective 1 July 1981;
10 June 1981—28(b) and (c)—effective 1 October 1981;

12 January 1982—28(b)(4)—effective 15 March 1982;
7 December 1982—28(i)—effective 1 January 1983;
27 November 1984—28(b), (c), (d), (e), (g), and (h)—effective 1 February 1985;
30 June 1988—28(a), (b), (c), (d), (e), (h), and (i)—effective 1 September 1988;
8 June 1989—28(h) and (j)—effective 1 September 1989;
26 July 1990—28(h)(2)—effective 1 October 1990.

Rule 29

SESSIONS OF COURTS; CALENDAR OF HEARINGS

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Unless otherwise scheduled by the Court, hearings in appeals will be held during the week beginning the second Monday in the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than 30 days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by mailing a copy of the calendar.

ADMINISTRATIVE HISTORY

Adopted: 13 June 1975.

Amended: 3 March 1982—29(a)(1);
3 September 1987—29(a)(1);
26 July 1990—29(b)—effective 1 October 1990.

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THE RULES OF APPELLATE PROCEDURE

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (civil)	30	entry of judgment (unless tolled)	3(c)
Taking Appeal (agency)	30	final agency determination (unless statutes provide otherwise)	18(b)(2)
Taking Appeal (crim.)	10	entry of judgment (unless tolled)	4(a)
Ordering Transcript (civil) (agency)	10	filing notice of appeal	7(a)(1) 18(b)(3)
Ordering Transcript (criminal indigent)	—	order filed by clerk of superior court	7(a)(2)
Ordering Transcript (criminal)	10	filing notice of appeal	7(a)(2)
Preparing & delivering transcript (civil, non-capital criminal)	60	receipt of order for transcript	7(b)(1)
(capital criminal)	120		
Serving proposed record on appeal (civil, non-capital criminal)	35	notice of appeal (no transcript) or reporter's certificate	11(b)
(agency)	35	of delivery of transcript	18(d)
Serving proposed record on appeal (capital)	70	reporter's certificate of delivery	11(b)
Serving objections or proposed alternative record on appeal (civil, non-capital criminal)	21	service of proposed record	11(c)
(capital criminal)	35		

Action	*Time (Days)*	*From date of*	*Rule Ref.*
(agency)	30	service of proposed record	18(d)(2)
Requesting judicial settlement of record	10	last day within which an appellee served could file objections, etc.	11(c) 18(d)(3)
Judicial settlement of record	20	service on judge of request for settlement	11(c) 18(d)(3)
Filing Record on Appeal in appellate court	15	settlement of record on appeal	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis (60 days in Death Cases)	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief (60 days in Death Cases)	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THE APPELLATE RULES

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a) 15(b)

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record or from docketing record in civil appeals in forma pauperis	14(d) 15(g)
Filing appellee's brief (or mailing brief under Rule 26(a))	30	service of appellant's brief	14(d) 15(g)
Oral Argument	30	filing appellant's brief (usual minimum time)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27 has been amended and now grants the trial tribunal the authority to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in the rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c))

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(a) in the particular case should be included in the record. See Rule 9(b)(2) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(1)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(1)b.
4. Statement of record items showing jurisdiction, per Rule 9(a)(1)c.
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order
*10. Plaintiff's evidence, with any evidentiary rulings assigned as error
*11. Motion for directed verdict, with ruling thereon
*12. Defendant's evidence, with any evidentiary rulings assigned as error
*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error
14. Issues tendered by parties
15. Issues submitted by court
16. Court's instructions to jury, per Rule 9(a)(1)f.
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment
20. Items required by Rule 9(a)(1)i.
21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 10
23. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(2)a.
3. Statement of organization of superior court, per Rule 9(a)(2)b.
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(a)(2)c.

5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all pertinent items from administrative proceeding filed for review in superior court, including evidence
*8. Evidence taken in superior court, in order received
9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Items required by Rule 9(a)(2)g.
11. Entries showing settlement of record on appeal, extension of time, etc.
12. Assignments of error, per Rule 9(a)(2)h.
13. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(a)(3)a.
3. Statement of organization of trial tribunal, per Rule 9(a)(3)b.
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors
*10. State's evidence, with any evidentiary rulings assigned as error
11. Motions at close of state's evidence, with rulings thereon (* if oral)
*12. Defendant's evidence, with any evidentiary rulings assigned as error
13. Motions at close of defendant's evidence, with rulings thereon (* if oral)
*14. State's rebuttal evidence, with any evidentiary rulings assigned as error
15. Motions at close of all evidence, with rulings thereon (* if oral)
16. Court's instructions to jury, per Rules 9(a)(3)f., 10(b)(2)
17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries

21. Entries showing settlement of record on appeal, extension of time, etc.
22. Assignments of error, per Rule 9(a)(3)j.
23. Names, office addresses and telephone numbers of counsel for all parties to appeal

Table 4

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

   Record, p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

   Record, p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ.P. 35, on the ground that on the record before the court, good cause for the examination was shown.

   Transcript, vol. 1, p. 137, lines 17-20.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was not genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

   Record, p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

Transcript, vol. 1, p. 295, line 5, through p. 297, line 12.
Transcript, vol. 1, p. 299, lines 1-8.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

Record, p. 45.

3. The court's instructions to the jury, Record pp. 50-51, as bracketed, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

4. The court's instructions to the jury, Record pp. 53-54, as bracketed, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

Record, p. 80; Transcript, vol. 3, p. 764, lines 8-23.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

Record, p. 20.

2. The court's Finding of Fact No. 10, on the ground that there was insufficient evidence to support it.

Record, p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

Record, p. 27.

FEES AND COSTS

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, i.e.: docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of a judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $250.00 is required in civil cases per Appellate Rules 6 and 17. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $2.00 per printed page where the Clerk determines that the document is in proper format and can be printed from the original, and $5.00 per printed page where the document must be retyped and printed. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00, plus the cost of copies of the opinion to each party filing a brief, and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Photocopying charges are $.20 per page. The electronic transmission fee for documents sent from the clerk's office, which is in addition to standard photocopying charges, is $5.00 for the first 25 pages and $.20 for each page thereafter. The electronic transmission fee for documents received by the clerk's office for filing pursuant to Rule 26(a)(2) is $10.00 per document filed.

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 or superseding titles and sections in N.C. Index 4th, as indicated.

TOPICS COVERED IN THIS INDEX

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS
ADMINISTRATIVE LAW AND PROCEDURE
APPEAL AND ERROR
ARBITRATION AND AWARD
ARREST AND BAIL
ASSAULT AND BATTERY
ATTORNEYS AT LAW
AUTOMOBILES

BANKRUPTCY AND INSOLVENCY
BANKS
BETTERMENTS OR IMPROVEMENTS TO REAL PROPERTY
BIGAMY
BURGLARY AND UNLAWFUL BREAKINGS

CONSPIRACY
CONSTITUTIONAL LAW
CONTEMPT OF COURT
CONTRACTS
COUNTIES
COURTS
CRIMINAL LAW

DAMAGES
DEATH
DIVORCE AND ALIMONY

EASEMENTS
ELECTRICITY
EMBEZZLEMENT
EQUITY
EVIDENCE

FALSE PRETENSE
FIDUCIARIES
FRAUD

GAS
GUARANTY

HOMICIDE
HOSPITALS

INDICTMENT AND WARRANT
INFANTS
INJUNCTIONS
INSURANCE

JURY

KIDNAPPING

LABORERS' AND MATERIALMEN'S LIENS
LANDLORD AND TENANT
LARCENY
LIBEL AND SLANDER
LIMITATION OF ACTIONS

MALICIOUS PROSECUTION
MASTER AND SERVANT

MINES AND MINERALS
MORTGAGES AND DEEDS OF TRUST
MUNICIPAL CORPORATIONS

NARCOTICS
NEGLIGENCE

OBSCENITY

PARENT AND CHILD
PARTNERSHIP
PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS
PROCESS
PUBLIC OFFICERS

RAPE AND ALLIED OFFENSES
RULES OF CIVIL PROCEDURE

SALES
SCHOOLS
SEARCHES AND SEIZURES
STATE
SUBROGATION

TAXATION
TELECOMMUNICATIONS
TORTS
TRESPASS
TRIAL
TRUSTS

UNFAIR COMPETITION
UTILITIES COMMISSION

VENUE

WILLS
WITNESSES

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS

§ 3 (NCI4th). Abatement on ground of pendency of prior action generally

Entry of an order under G.S. 1-75.12 is a matter within the discretion of the trial judge and there was no abuse of discretion in granting a stay of a North Carolina action where there was a prior pending action in the federal courts of New Jersey. *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 322.

ADMINISTRATIVE LAW AND PROCEDURE

§ 37 (NCI4th). Powers of administrative law judge

An administrative law judge did not abuse his discretion by denying petitioner's motion for a continuance. *Alexander v. Wilkerson*, 340.

§ 55 (NCI4th). Who are "aggrieved" persons entitled to judicial review; injury required

The operator of a hospital providing substance abuse and psychiatric services to adolescents and adults in Buncombe County had no right of direct appeal to the Court of Appeals from the denial of its motion to intervene in two certificate of need cases. *HCA Crossroads Residential Centers v. N.C. Dept. of Human Resources*, 203.

§ 67 (NCI4th). Applicability of whole record test

Although appellate review of a Superior Court judgment is normally limited to whether the court committed any errors of law, the errors of law alleged here turn on the question of whether the trial court properly applied the judicial review standards of G.S. 150B-51, so that the whole record must be considered. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 431.

APPEAL AND ERROR

§ 117 (NCI4th). Orders granting motion to dismiss; appeal allowed

A judgment dismissing part of plaintiff's claims for failure to state claims for relief was immediately appealable because plaintiff has a substantial right to have all of his claims tried at the same time. *Hare v. Butler*, 693.

§ 126 (NCI4th). Change of venue; order of transfer

The grant of defendant's motion for a change of venue was immediately appealable. *Snow v. Yates*, 317.

§ 140 (NCI4th). Appealability of order granting or refusing new trial

The trial court's grant of a new trial on the issue of damages only was immediately appealable where the amount of damages was the only contested issue at trial. *Burgess v. Vestal*, 545.

§ 175 (NCI4th). Mootness of other particular questions

An appeal from an order requiring defendants to provide an index of the documents in issue is dismissed as moot where plaintiffs proceeded with the merits of their action without the ordered index and the trial court issued a final order determining that the documents sought by plaintiffs were public records. *News and Observer Publishing Co. v. Poole*, 352.

APPEAL AND ERROR — Continued

§ 204 (NCI4th). Notice of appeal; prior law

An attorneys' notice of appeal was sufficient to put plaintiff on notice that both an order determining that sanctions were appropriate and an order determining the type and amount of sanctions were being appealed. *First American Bank of Va. v. Carley Capital Group*, 667.

§ 205 (NCI4th). Time for appeal in civil actions

One defendant in a rent abatement action did not have ten days to file his notice of appeal after the other defendant had filed his notice. *Surratt v. Newton*, 396.

Plaintiff's appeal of the trial court's failure to treble damages and to award attorney fees was not timely though filed within ten days of defendant's appeal where defendant's appeal was not timely. *Ibid.*

§ 425 (NCI4th). Form and content of brief; citation of cases

An assignment of error to the introduction of evidence in a murder prosecution was not supported by any citation of authorities and was deemed abandoned. *S. v. Smart*, 730.

§ 447 (NCI4th). Issues first raised on appeal

Defendant in a rape case could not raise for the first time on appeal the constitutional issue of double jeopardy as a ground for excluding evidence of a prior rape for which he had been acquitted. *S. v. Scott*, 113.

The appellate court will not consider an issue not raised in the trial court but raised for the first time on appeal. *S. v. Sherrill*, 540.

§ 450 (NCI4th). Agreements and stipulations of parties

A stipulation by the parties that notice of appeal from two judgments was "timely and proper" could not confer jurisdiction on the Court of Appeals to review one judgment for which no proper notice of appeal was given. *Von Ramm v. Von Ramm*, 153.

§ 453 (NCI4th). Constitutional issues generally

Defendant could not challenge on appeal the constitutionality of a statute as applied to him where he did not raise the constitutional issue in the trial court. *Hartsell v. Hartsell*, 380.

ARBITRATION AND AWARD

§ 17 (NCI4th). Waiver of right to arbitration generally

Defendant stockbroker did not impliedly waive his right to compel arbitration by participating in two earlier litigation and arbitration proceedings. *Sturm v. Schamens*, 207.

ARREST AND BAIL

§ 144 (NCI4th). Impaired driving

A DWI defendant's pretrial release rights were not violated. *S. v. Blackwell*, 359.

§ 197 (NCI4th). Modification of bail during trial

The trial court did not err in denying defendant's motion for a mistrial after the court revoked bail during trial and failed to impose new conditions for bail as required by G.S. 15A-534(f). *S. v. Nicholson*, 143.

ASSAULT AND BATTERY

§ 27 (NCI4th). Sufficiency of evidence where weapon is a knife or similar weapon

Evidence of intent to kill was sufficient to be submitted to the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendant stabbed the six-year-old victim in the neck with a knife. *S. v. Robbins*, 75.

ATTORNEYS AT LAW

§ 5.1 (NCI3d). Liability for malpractice

The trial court properly entered summary judgment for defendant attorneys on plaintiff's claim of negligence in the settlement of a marital estate based on a computational error made early in the settlement process but later corrected and not reflected in the final separation agreement. *Lowry v. Lowry*, 246.

Plaintiff ratified a separation agreement and was estopped from claiming that her attorneys were negligent in agreeing to settle for an amount which she did not authorize when she signed the agreement, had it incorporated into a consent judgment, and received the benefits of the agreement for almost three years. *Ibid.*

The trial court properly entered summary judgment for defendant attorneys on plaintiff's claims of constructive fraud and breach of fiduciary duty in their representation of plaintiff in the settlement of a marital estate. *Ibid.*

§ 7.7 (NCI3d). Sanctions

The trial court erred in denying defendants' motion for sanctions without making any findings of fact or conclusions of law as to whether defendants were entitled to attorney fees. *Lowry v. Lowry*, 246.

§ 64 (NCI4th). Power of court; fee in absence of agreement

The trial court could properly award to plaintiff attorney's fees incurred in enforcing an equitable distribution order by bringing defendant before the court for contempt. *Hartsell v. Hartsell*, 380.

AUTOMOBILES

§ 87.8 (NCI3d). When negligence of one tortfeasor does not insulate other tortfeasor

Negligence of defendant car dealership and defendant employee in allowing the attachment of dealer tags to a personal use vehicle was not superseded by the negligence of defendant driver of the vehicle. *Johnson v. Skinner*, 1.

§ 89.1 (NCI3d). Cases where evidence of last clear chance was sufficient

The trial court erred in failing to submit an issue of last clear chance to the jury in a pedestrian's action against the driver of a car which struck him. *VanCamp v. Burgner*, 102.

§ 90.1 (NCI3d). Instruction applying law to facts; violation of safety statutes

It was proper for the trial court to instruct the jury that a violation of the statute prohibiting the attachment of dealer tags to a vehicle in personal use could be a proximate cause of the accident in question. *Johnson v. Skinner*, 1.

§ 141 (NCI3d). Licensing of vehicles

The statute prohibiting a manufacturer or dealer from attaching dealer tags to vehicles in personal use applied to defendant mechanic who worked for defendant car dealership, and a violation of the statute constituted negligence per se. *Johnson v. Skinner*, 1.

BANKRUPTCY AND INSOLVENCY

§ 4 (NCI3d). Effect of bankruptcy on executory contracts and unexpired leases

Summary judgment should not have been granted for plaintiff and should have been granted for defendant in an action in which plaintiff sought to recover from defendant sums owed plaintiff by its insolvent insurer pursuant to a residual value insurance policy on leased automobiles. *BarclaysAmerican/Leasing, Inc. v. N.C. Ins. Guaranty Assn.*, 290.

BANKS

§ 4 (NCI3d). Joint accounts

Testator's widow was not the legal owner of the entire amount of a certificate of deposit where only testator had signed the survivorship agreement. *In re Estate of Heffner*, 327.

§ 52 (NCI4th). Trust deposits

The trial court properly entered summary judgment for defendant bank in an action to recover losses sustained from an allegedly negligent investment of funds deposited by plaintiff trustees of a liquidating trust in defendant bank pursuant to an investment agency agreement. *Kaplan v. First Union National Bank*, 570.

BETTERMENTS OR IMPROVEMENTS TO REAL PROPERTY

§ 20 (NCI4th). Owners' election that improver take premises

An action to remove a cloud on title arising from a tax foreclosure was remanded for application of the betterments statute where the lot was subsequently sold and became part of a shopping center. *Jenkins v. Richmond County*, 717.

BIGAMY

§ 2.1 (NCI3d). Competency, relevancy and sufficiency of evidence

A marriage performed by an assistant pastor of a church was sufficient to support a charge of bigamy although the assistant pastor was not an ordained minister. *S. v. Woodruff*, 107.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.1 (NCI3d). Sufficiency of evidence of identification of defendant as perpetrator; fingerprints

Fingerprint evidence was sufficient to be submitted to the jury in a prosecution for breaking and entering and larceny. *S. v. Evans*, 88.

§ 5.6 (NCI3d). Sufficiency of evidence of breaking or entering where target felony is thwarted

The State's evidence was sufficient to support an inference that defendant intended to commit the felony of larceny when he broke into an apartment. *S. v. Evans*, 88.

§ 5.11 (NCI3d). Sufficiency of evidence of breaking and entering and robbery, rape, assault or kidnapping

The evidence in a first degree burglary prosecution was sufficient to show that defendant entered the victim's home with the intent to commit rape. *S. v. Robbins*, 75.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 6.3 (NCI3d). Instructions on felony attempted or committed during burglary

The trial court's error in failing to define rape was not "plain error" in a prosecution for first degree burglary based on the theory that defendant intended to commit the underlying felony of rape at the time of a break-in. *S. v. Robbins*, 75.

CONSPIRACY

§ 2.1 (NCI3d). Sufficiency of evidence in actions for civil conspiracy

Summary judgment was properly entered for defendants on plaintiff's claim for civil conspiracy in violation of 42 U.S.C. § 1983 where plaintiff failed to show that defendants had a meeting of the minds. *Carson v. Moody*, 724.

CONSTITUTIONAL LAW

§ 66 (NCI3d). Presence of defendant at proceedings

A defendant in a cocaine prosecution was denied his constitutional right to be present at his trial where the defendant was absent from the second day of trial for medical reasons but the trial continued over defense counsel's objection. *S. v. Richardson*, 496.

§ 70 (NCI3d). Cross-examination of witnesses

There was no constitutional error per se in refusing to permit defense counsel to ask a witness for the State his home address and place of employment. *S. v. McNeil*, 235.

§ 74 (NCI3d). Self-incrimination generally

The appellate court was not required to examine whether defendant's fifth amendment rights were adequately protected during a contempt proceeding where defendant was incarcerated with an opportunity to purge his contempt and the relief granted was thus wholly civil in nature. *Hartsell v. Hartsell*, 380.

CONTEMPT OF COURT

§ 6.1 (NCI3d). Admissibility of evidence

Testimony by defendant's former attorney about correspondence with defendant did not violate the attorney-client privilege. *Hartsell v. Hartsell*, 380.

§ 7 (NCI3d). Punishment for contempt

Upon a finding of contempt where the original order requires a transfer of property, the trial court has authority to order the contemnor to transfer the property as a condition for purging the contempt, but the court does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. *Hartsell v. Hartsell*, 380.

§ 8 (NCI3d). Appeal and review

Where the trial court had jurisdiction and authority to enter a contempt order, the order was not void, and a Rule 60(b)(4) motion was not an appropriate means to rectify the court's alleged error in failing to appoint an attorney for defendant at the contempt hearing. *Vaughn v. Vaughn*, 574.

CONTRACTS

§ 4.2 (NCI3d). Circumstances where there was no consideration

An anesthesiologist's assurance that, if an epidural became necessary during the delivery of plaintiff's child, only he or another fully trained faculty anesthesiologist would administer it was not supported by consideration and was thus unenforceable. *LaBarre v. Duke University*, 563.

§ 21.2 (NCI3d). Breach of building and construction contracts

The trial court did not err in concluding that defendant breached a contract with plaintiffs to correct a problem with water accumulation under a house built by defendant and sold to plaintiffs. *Rucker v. Huffman*, 137.

§ 29.2 (NCI3d). Calculation of compensatory damages

The trial court's unchallenged finding as to cost of repair was sufficient to support its conclusion as to an award of damages for breach of contract to correct a water accumulation problem under a house built by defendant and sold to plaintiffs. *Rucker v. Huffman*, 137.

§ 33 (NCI3d). Sufficiency of plaintiff's allegations

Plaintiff's allegations that three of its salesmen, hired by defendant and placed in their former territories, solicited plaintiff's customers, and that defendant induced the salesmen to interfere with plaintiff's existing accounts were sufficient to support a claim for malicious interference with contract. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

§ 34 (NCI3d). Interference with contractual rights by third persons; sufficiency of evidence

Defendant district attorney's requirement that plaintiff attorney negotiate directly with defendant rather than with assistant district attorneys did not constitute intentional interference with plaintiff's contractual relations with his clients. *Clark v. Brown*, 255.

§ 36 (NCI3d). Damages for malicious interference with contract

Plaintiff was entitled to show evidence of its lost profits by comparing its past history of profits with gross sales of plaintiff's former salesmen while working for defendant. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

COUNTIES

§ 9.1 (NCI3d). Waiver of governmental immunity by purchase of insurance

Claims against a county, the county DSS and employees of the DSS in their official capacities for negligence in investigating allegations against defendant of child sexual abuse involved a governmental function and were properly dismissed where the complaint failed to allege that the county or the DSS had purchased liability insurance. *Hare v. Butler*, 693.

COURTS

§ 1 (NCI3d). Nature and function of courts in general

G.S. 1-75.12 does not violate the North Carolina Constitution's open courts provision because the statute does not deny litigants access to the courts, but merely postpones litigation pending the resolution of the same matter in another court. *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 322.

COURTS — Continued

§ 4 (NCI3d). Minimum amount within original jurisdiction of superior court

The trial court erred in dismissing an action to collect a $20,000 debt for lack of subject matter jurisdiction where neither party resides in North Carolina. *Schall v. Jennings*, 343.

§ 16 (NCI3d). Jurisdiction to determine custody of children

The Bladen County District Court erred in transferring custody of a minor child from Bladen County DSS to Cumberland County DSS and in transferring the entire action to Cumberland County District Court where the child's legal residence when the proceeding was initiated was Bladen County, the county of her parents' residence, and neither the parents' incarceration outside Bladen County nor the child's hospitalization in Cumberland County affected her legal residence. *In re Phillips*, 159.

CRIMINAL LAW

§ 34.4 (NCI3d). Admissibility of evidence of other offenses generally

Testimony by the mother of an alleged child abuse victim about assaults committed upon her by defendant was admissible to explain why the mother did nothing when she saw burns on her child. *S. v. Church*, 647.

§ 34.7 (NCI3d). Admissibility of evidence of other offenses to show knowledge or intent, motive, malice, premeditation or deliberation

Evidence concerning other allegedly false applications submitted by defendant insurance agent in order to obtain an advance of the annual commission was properly admitted in a prosecution for obtaining property by false pretenses to show opportunity, intent, preparation and plan. *S. v. Melvin*, 16.

§ 41 (NCI3d). Circumstantial evidence in general

There was no error in admitting testimony that defendant fought with law officers when they arrested him. *S. v. McNeil*, 235.

§ 55.1 (NCI3d). Other tests

There was no error in a prosecution for rape by limiting defendant's cross-examination of the State's blood and semen expert concerning DNA testing where DNA testing was not done in this case. *S. v. McNeil*, 235.

§ 57 (NCI3d). Evidence in regard to firearms

Testimony that three guns were found on the premises at the time of defendants' arrests was relevant in a prosecution for various narcotics offenses. *S. v. Smith*, 67.

§ 66.1 (NCI3d). Evidence of identity by sight; competency of witness

The trial court did not err in a prosecution for first degree rape and other offenses by excluding defendant's expert witness on identification. *S. v. Cotton*, 615.

§ 66.11 (NCI3d). Identification; confrontation at scene of crime or arrest

There was no error in admitting testimony that defendant refused to allow the victim to view him immediately after his arrest. *S. v. McNeil*, 235.

§ 68 (NCI3d). Other evidence of identity

Testimony by an expert in forensic hair identification that hairs found on the victim and on a sheet of the victim's bed could have originated from defendant

was admissible in a prosecution for first degree rape and taking indecent liberties with a child, but further testimony by the witness that "it would be improbable that these hairs would have originated from another individual" constituted an impermissible expression of opinion as to defendant's guilt. *S. v. Faircloth*, 685.

§ 73 (NCI3d). Hearsay testimony in general

Testimony by an investigator as to the impressions or "feeling" of an eyewitness that defendant was a victim rather than a perpetrator of the crime was inadmissible hearsay. *S v. Sherrill*, 540.

An investigator's testimony as to an eyewitness's relation of statements made to him by defendant was hearsay and not admissible to corroborate defendant's testimony. *Ibid.*

§ 73.2 (NCI3d). Statements not within the hearsay rule

The trial court did not err in an embezzlement prosecution by admitting a statement by the deceased victim through her twin sister. *S. v. Whitted*, 502.

§ 74 (NCI3d). Confessions generally; manner of reading to jury or otherwise introducing into evidence

Defendant acquiesced in the correctness of a written statement transcribed by an investigator when defendant had the investigator include a sentence at the bottom of his statement that "[t]he basic facts in this is true and untrue due to the slant that it is written," and the trial court thus properly permitted the investigator to read the confession as part of his testimony. *S. v. Melvin*, 16.

§ 75.7 (NCI3d). Requirement that defendant be warned of constitutional rights; when warning is required; what constitutes "custodial interrogation"

Defendant was not in custody when she was transported to the sheriff's department and waited in a conference room with her daughters and family friends, and she did not invoke her right to counsel when she asked if she needed an attorney. *S. v. Torres*, 364.

§ 76.2 (NCI3d). Voir dire hearing on admissibility of confession; when hearing required

The trial court at defendant's second trial was not required to conduct a voir dire to determine the admissibility of his confession where a voir dire was held at the first trial and defendant offered no additional evidence justifying a reconsideration of the prior ruling. *S. v. Melvin*, 16.

§ 85.3 (NCI3d). Character evidence relating to defendant; State's cross-examination of defendant

The trial court did not err in a prosecution for first degree rape and other offenses by admitting evidence that defendant had touched female employees in a sexually offensive manner and had made sexually offensive comments to female employees. *S. v. Cotton*, 615.

There was no prejudice in a prosecution for rape and other offenses from the admission of testimony that the victims here were of the same race and of similar ages as the victims of defendant's offensive touching and offensive language at work. *Ibid.*

§ 146 (NCI4th). Revocation or withdrawal of plea generally

A sentence of fourteen years' imprisonment based on a guilty plea to armed robbery was vacated and remanded following defendant's attempted revocation of his plea. *S. v. Deal*, 456.

CRIMINAL LAW — Continued

§ 162 (NCI3d). Necessity for objections to evidence

Defendant waived his right to challenge the qualification of experts when he made no objection at trial. *S. v. Jones*, 412.

§ 174 (NCI4th). Conclusiveness of court's findings on defendant's capacity to stand trial

The trial court did not err in ruling after an extensive voir dire hearing that defendant was competent to proceed to trial. *S. v. Nobles*, 473.

§ 214 (NCI4th). Speedy trial; excludable periods for delay for mistrial

The trial court erred in excluding for speedy trial purposes the time period between the declaration of a mistrial and the beginning of the next term of court. *S. v. Melvin*, 16.

§ 224 (NCI4th). Speedy trial; excludable periods of delay when continuance is granted

The trial court properly excluded from the time computation under the Speedy Trial Act continuances granted for the illness of a State's witness, a crowded court calendar, and defense counsel's representation of another client in federal court. *S. v. Melvin*, 16.

§ 288 (NCI4th). Procedure on motion for continuance generally; necessity and time for motion

Defendant could not complain on appeal that motions to continue were not served upon his attorney of record and that proof of service was not made by the State as required by G.S. 15A-951(b) where there was no motion to vacate any of the orders. *S. v. Melvin*, 16.

§ 293 (NCI4th). Joinder of multiple charges against same defendant generally; discretion of court

The trial court did not err in consolidating for trial separate indictments against defendant for child abuse where the victim was burned about the mouth on 11 August and on the buttocks on 16 August. *S. v. Church*, 647.

§ 305 (NCI4th). Consolidation of multiple sex charges or offenses

Defendant was not prejudiced by the joinder of sex offenses occurring in 1985 and 1987 where all charges involved the same defendant acting against the same child. *S. v. Estes*, 312.

§ 307 (NCI4th). Consolidation of charges against same defendant for multiple offenses against property

The trial court did not err in consolidating for trial charges against defendant for felonious breaking of an apartment, felonious breaking and entering of another apartment in the same complex, and larceny from the second apartment. *S. v. Evans*, 88.

§ 375 (NCI4th). Miscellaneous comments and actions

Comments made by a judge during trial were made in a permissible effort to move the trial along and did not affect the verdict. *S. v. Blackwell*, 359.

§ 401 (NCI4th). Permitting counsel to assist or act in lieu of district attorney generally

The trial court did not err in allowing a private attorney to participate in a bigamy prosecution because defendant contended that he might need to call the attorney as a witness. *S. v. Woodruff*, 107.

§ 687 (NCI4th). Court's discretion to give substance of, or to refuse to give, requested instruction

The trial court did not err in failing to give defendant's requested instructions on mere presence, the amount of evidence, and the credibility of a law officer since the requested instructions were given in substance. *S. v. Townsend*, 534.

§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence generally

The submission of an instruction on acting in concert in a murder prosecution was supported by the evidence. *S. v. Smart*, 730.

§ 884 (NCI4th). Appellate review of jury instructions; objections; waiver of appeal rights

Defendant was barred from assigning error to the trial court's instruction to the jury that evidence of a prior rape for which defendant had been acquitted could be considered to show defendant's intent, knowledge, plan or scheme where defendant failed to object to the proposed instruction during the charge conference or during the trial. *S. v. Scott*, 113.

By failing to object to the jury charge, defendant waived his right to appeal any possible error regarding the trial court's instruction that defendant's alleged conduct constituted three separate offenses of rape. *Ibid.*

§ 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 an indecent liberty is an immoral or indecent touching when the jury could have found that either acts of intercourse or acts of fondling constituted a violation of the indecent liberties statute. *S. v. Jones*, 412.

§ 1042 (NCI4th). Conformity of judgment to verdict or plea

This case was remanded to the trial court for correction of the judgment to make it consistent with the verdict where the verdict convicted defendant of the misdemeanor of maintaining a dwelling house for selling controlled substances but the judgment reflected a conviction for a felony. *S. v. Townsend*, 534.

§ 1062 (NCI4th). Scope of matters and evidence considered at sentencing hearing

The trial court did not improperly consider the impact of each of the sentencing options under G.S. 14-1.1(a)(3) on defendant's parole eligibility with the intention of trying to circumvent the parole process. *S. v. Williams*, 333.

§ 1064 (NCI4th). Evidence at sentencing hearing of defendant's prior criminal record or conduct

Failure of defendant to object to the nature of evidence offered by the State to prove prior convictions during the sentencing phase amounted to a waiver of his right to appeal the sufficiency of the evidence to support the court's finding of the prior convictions aggravating factor. *S. v. Canady*, 189.

§ 1082 (NCI4th). Consideration of aggravating and mitigating factors where there is an aggravating factor but no mitigating factor

The trial court did not err in sentencing defendant to a term greater than the combined presumptive sentence for two crimes where the court found the prior convictions aggravating factor and the sentence was well below the maximum for the most serious felony. *S. v. Canady*, 189.

CRIMINAL LAW — Continued

§ 1086 (NCI4th). Required findings of aggravating and mitigating factors where two or more convictions are consolidated for hearing or judgment

Since defendant's 40 year sentence for his four consolidated convictions did not exceed the 50 year maximum sentence for the most serious offense, the trial court did not err in failing to make separate findings in aggravation and mitigation of punishment for each offense. *S. v. Howard*, 347.

§ 1102 (NCI4th). Permissible use of nonstatutory aggravating factor

The trial court properly found as an aggravating factor for obtaining property by false pretenses that defendant attempted to induce a State's witness to perjure herself. *S. v. Melvin*, 16.

§ 1108 (NCI4th). Dangerousness as aggravating factor

It was error for the trial judge to aggravate defendant's sentence for child abduction on the ground that she suffered from an abnormal mental condition which made her significantly more dangerous to others. *S. v. Nobles*, 473.

§ 1110 (NCI4th). Prior criminal activity as nonstatutory aggravating factor

The trial court did not err in finding as a factor in aggravation for child abuse that defendant had violated the military code of justice and deserted from the armed forces. *S. v. Church*, 647.

§ 1114 (NCI4th). Lack of acknowledgement of wrongdoing; lack of remorse

The trial court did not err in finding as a factor in aggravation of child abuse that defendant failed to render aid to the 17-month-old victim who was in defendant's care for three days during which time the child was suffering from second degree burns. *S. v. Church*, 647.

§ 1123 (NCI4th). Premeditation as aggravating factor

The trial court properly found premeditation and deliberation as an aggravating factor for a second degree murder. *S. v. Torres*, 364.

§ 1127 (NCI4th). Conduct or condition of victim as aggravating factor

The court erred in considering the location of a child in a hospital as a factor in aggravation for child abduction. *S. v. Nobles*, 473.

§ 1133 (NCI4th). Aggravating factor of position of leadership or inducement of others to participate

Evidence that defendant's daughter assisted her in caring for a child after defendant took the child from a hospital was insufficient to support the court's finding as an aggravating factor for child abduction that defendant induced another to participate as an accessory after the fact. *S. v. Nobles*, 473.

§ 1145 (NCI4th). Especially heinous, atrocious, or cruel offense generally

The evidence supported the court's finding of the heinous, atrocious, or cruel aggravating circumstance upon defendant's conviction of involuntary manslaughter of his wife. *S. v. Shadrick*, 354.

§ 1148 (NCI4th). Especially heinous, atrocious or cruel aggravating factor; cases involving death of the victim generally

The trial court did not err when sentencing defendant for second degree murder by finding as an aggravating factor that the offense was especially heinous, atrocious or cruel. *S. v. Smart*, 730.

CRIMINAL LAW — Continued

§ 1161 (NCI4th). Young victim as aggravating factor

The age of the victim who was only a few days old was not a proper aggravating factor for child abduction. *S. v. Nobles*, 473.

§ 1166 (NCI4th). Mental infirmity of victim as aggravating factor

The trial court was required to find that the victim was mentally infirm at the time he was killed where the evidence showed that the victim was intoxicated and defendant knew it. *S. v. Torres*, 364.

§ 1214 (NCI4th). Miscellaneous nonstatutory mitigating factors

The trial court in a child abuse case did not err in declining to find as a factor in mitigation that defendant was himself the victim of child abuse. *S. v. Church*, 647.

§ 1222 (NCI4th). Mental or physical condition of defendant as mitigating factor generally

Expert testimony concerning the battered wife syndrome did not require the sentencing judge to find as a mitigating factor for defendant's second degree murder of her husband that she suffered from a mental condition that significantly reduced her culpability. *S. v. Torres*, 364.

§ 1266 (NCI4th). Good character or reputation as mitigating factor generally

The trial court did not err in failing to find defendant's good standing in the community as a mitigating factor where the evidence was not manifestly credible. *S. v. Torres*, 364.

§ 1283 (NCI4th). Indictment charging defendant as an habitual felon

An indictment charging defendant with being an habitual felon sufficiently stated the state or sovereign against whom the felonies were committed as required by G.S. 14-7.3 where it set forth each of the underlying felonies as being in violation of an enumerated N. C. General Statute. *S. v. Williams*, 333.

§ 1502 (NCI4th). Restitution and reparation as condition of probation generally

The statute of limitations for a wrongful death action was inapplicable to a restitutionary condition of probation predicated on a wrongful death measure of damages. *S. v. Smith*, 184.

The requirement that a defendant pay restitution as a condition of probation does not violate a defendant's equal protection rights. *Ibid.*

DAMAGES

§ 17.7 (NCI3d). Punitive damages

The trial court did not err in not submitting punitive damages arising from the leasing of substandard housing. *Allen v. Simmons*, 636.

DEATH

§ 7 (NCI3d). Damages in wrongful death actions

The trial court in a wrongful death action should submit to the jury separate issues for compensatory and punitive damages when the evidence supports submission of these issues. *Jones v. McCaskill*, 764.

DIVORCE AND ALIMONY

§ 19.5 (NCI3d). Effect of separation agreements and consent decrees

The trial court properly entered summary judgment for defendant on plaintiff's claim that the parties' separation agreement was the result of a mutual mistake by the parties and the attorneys who represented them. *Lowry v. Lowry*, 246.

§ 21.5 (NCI3d). Enforcement of alimony awards; punishment for contempt

Evidence that plaintiff conveyed a house with at least $60,000 equity to defendant and defendant had personal property of value supported the court's findings that defendant was capable of complying with his financial obligations under a consent judgment. *Hartsell v. Hartsell*, 380.

Defendant was held to have understood and consented to the contents of a consent judgment where both he and his counsel signed the consent judgment. *Ibid.*

Where defendant was incarcerated with an opportunity to purge his contempt by complying with a prior consent order and paying attorney fees and damages, the relief granted was wholly civil in nature, and the appellate court was not required to examine whether defendant's fifth amendment rights were adequately protected during the contempt proceeding. *Ibid.*

Upon a finding of contempt where the original order requires a transfer of property, the trial court has authority to order the contemnor to transfer the property as a condition for purging the contempt but does not have authority to require the contemnor to pay compensatory damages incurred as a result of his noncompliance with the original order. *Ibid.*

§ 24.1 (NCI3d). Determining amount of child support

The trial court's judgment did not improperly compel defendant to pay mortgage payments on the parties' home but instead allowed defendant to pay child support in the form of cash or mortgage payments. *Von Ramm v. Von Ramm*, 153.

A child support award may not be based on a financial affidavit which includes personal expenditures not yet made by a party with no concrete plans to make such expenditures. *Witherow v. Witherow*, 61.

§ 25.1 (NCI3d). Child custody; requirement that person be fit and proper

The trial court did not err in awarding joint custody of the minor children to both parties where the court had before it plaintiff's own admission that she thought defendant to be a fit and proper person. *Witherow v. Witherow*, 61.

§ 25.10 (NCI3d). Modification of custody order; changed circumstances not shown

The trial court was not required to modify a child custody order to give defendant either sole or joint custody of his children because the evidence showed that he was a caring and capable father since no substantial change of circumstances was shown. *Ratley v. Ratley*, 219.

§ 30 (NCI3d). Distribution of marital property in divorce action

The trial court erred in reducing plaintiff's equitable distribution award by $6,000 in alimony previously paid by defendant. *Swilling v. Swilling*, 551.

The trial court erred in concluding that an equal division of marital property would not be equitable where the court did not make findings of fact required by statute. *Ibid.*

EASEMENTS

§ 7 (NCI3d). Actions to establish easements

Plaintiffs' complaint alleging an easement across defendants' land based on a conveyance of "an easement granting a 30-foot right of way over the lands in the rear of lot 20 to Spring Park Road if and when said road is opened" stated a claim for relief since the description was not necessarily patently ambiguous. *May v. Martin*, 216.

ELECTRICITY

§ 7.1 (NCI3d). Sufficiency of evidence of defendant's negligence

The evidence was sufficient to permit the jury to find that defendant's negligence in attaching electric service cables to the first truss on one end of a building on which plaintiff was installing a new roof caused the truss system to collapse and injure plaintiff. *Britt v. Sharpe*, 555.

§ 8 (NCI3d). Contributory negligence

Plaintiff was not contributorily negligent in failing to warn defendant power company of the dangerous condition of the trusses of a new roof since plaintiff had no duty to anticipate that defendant would attach a heavy cable to the truss system and cause it to collapse. *Britt v. Sharpe*, 555.

EMBEZZLEMENT

§ 5 (NCI3d). Evidence in prosecution for embezzlement

The trial court did not err in the prosecution of an attorney for embezzlement of client funds by admitting evidence of misapplication of funds of another client. *S. v. Whitted*, 502.

EQUITY

§ 2.2 (NCI3d). Laches; applicability of doctrine to particular proceedings

An action to remove a cloud on title arising from a tax foreclosure was not appropriate for the application of laches where the county's failure to properly notify plaintiffs rendered the judgment void but a full examination of equities reveals that all parties must share in the blame. *Jenkins v. Richmond County*, 717.

EVIDENCE

§ 13 (NCI3d). Privileged communication between attorney and client

Testimony by defendant's former attorney about correspondence with defendant did not violate the attorney-client privilege. *Hartsell v. Hartsell*, 380.

§ 28 (NCI3d). Public records and documents

The trial court erred in a rent abatement action by refusing to allow a city housing official to testify about public records already admitted and their significance; however, there was no prejudice because the records themselves had already been admitted. *Allen v. Simmons*, 636.

§ 47 (NCI3d). Expert testimony in general; as invasion of province of jury

The trial court erred in appointing and determining that a witness was an expert without entering an order to show cause why the expert witness should not be appointed. *Swilling v. Swilling*, 551.

EVIDENCE — Continued

§ 49.2 (NCI3d). Basis of hypothetical questions; disputed facts and facts not shown by the evidence

The testimony of an economist as to the past and future economic earnings of plaintiff was not inadmissible because his opinion was based on the assumptions of medical experts and plaintiff's attorney. *Johnson v. Skinner*, 1.

FALSE PRETENSE

§ 3.1 (NCI3d). Sufficiency of evidence; nonsuit

The evidence in a prosecution for obtaining property by false pretenses was sufficient to support an inference that defendant insurance agent intended to cheat or defraud when without authority he submitted a life insurance application based on information taken from another company's policy, paid the first month's premium himself, and received a six months' advance on his commission. *S. v. Melvin*, 16.

FIDUCIARIES

§ 2 (NCI3d). Evidence of fiduciary relationship

Summary judgment was properly granted for defendant sales agents on a claim of breach of fiduciary duty in an action arising from misapplication of deposits from the sale of property. *Forbes v. Par Ten Group, Inc.*, 587.

FRAUD

§ 3.3 (NCI3d). Material misrepresentations; concealment

The trial court properly granted summary judgment for defendants on the issue of fraud arising from the misuse of funds from the sale of lots and memberships in a resort golf course community. *Forbes v. Par Ten Group, Inc.*, 587.

§ 4 (NCI3d). Knowledge and intent to deceive

Summary judgment was properly entered between some plaintiffs and defendants and improperly entered between others in an action arising from the misapplication of deposits from the sale of lots and memberships in a resort golf course community. *Forbes v. Par Ten Group, Inc.*, 587.

The trial court properly entered a directed verdict on a claim for fraud where defendant alleged in a counterclaim that plaintiff fraudulently induced defendant to rent unfit premises by promising to make needed repairs. *Allen v. Simmons*, 636.

GAS

§ 1 (NCI3d). Regulation

The evidence was sufficient to support the Utilities Commission's determination of the proper rate schedule for complainant's account for gas service. *In re Blue Ridge Textile Printers v. Public Service Co.*, 193.

The Utilities Commission did not violate its own order in placing complainant retroactively in a different classification for gas service. *Ibid.*

The limitation period in G.S. 62-132 was inapplicable to complainant's action to recover overcharges for gas service where the rates charged by respondent were "established" by the Utilities Commission in a formal order after a full hearing. *Ibid.*

GAS — Continued

The Utilities Commission improperly barred plaintiff's claim for a refund of gas overcharges by applying the two-year statute of limitations of G.S. 62-132. *In re Eaton Corp. v. Public Service Co.*, 174.

It was for the Utilities Commission to determine whether the claimant in a proceeding to recover for gas overcharges maintained complete standby fuel and equipment so as to be eligible for a lower rate schedule, but if claimant was entitled to recover under the statute prohibiting a public utility from receiving greater compensation than that prescribed by the Commission or under the statute prohibiting discrimination by utilities as to rates or services, there was no applicable statute of limitations. *Ibid.*

The affirmative defense of the statute of limitations was adequately raised by respondent in a proceeding to recover for gas overcharges, even though not raised in the pleadings, where respondent explained to a hearing examiner that it first offered claimant a refund calculated upon the basis of the statute of limitations in ordinary contracts cases. *Ibid.*

GUARANTY

§ 2 (NCI3d). Actions to enforce guaranty

There was a genuine issue of material fact as to whether the individual defendant intended to sign a guaranty agreement only as president of defendant corporation or whether he intended to be personally liable. *Carolina-Atlantic Distributors v. Boyce Insulation Co.*, 577.

HOMICIDE

§ 15.4 (NCI3d). Expert and opinion evidence

The trial court properly permitted an expert in pathology to testify that one shot which entered the victim could have been fired while he was on the floor. *S. v. Torres*, 364.

§ 21.7 (NCI3d). Sufficiency of evidence of guilt of second degree murder

There was sufficient evidence of malice in a second degree murder case where defendant shot her husband five times at some distance away with a rifle. *S. v. Torres*, 364.

The trial court did not err in a murder prosecution by denying defendant's motion to dismiss for lack of substantial evidence. *S. v. Smart*, 730.

§ 28 (NCI3d). Instructions on self-defense generally

The trial court in a second degree murder case did not err in failing to instruct on imperfect self-defense where the victim was intoxicated, unarmed, and posed no threat of immediate harm. *S. v. Torres*, 364.

HOSPITALS

§ 2.1 (NCI3d). Control and regulation; selection of hospital site

A petition for a contested case hearing after the denial of an application for a certificate of need for a nursing home was timely under the statutes then in effect where it was received by the agency and by the Office of Administrative Hearings within thirty days of the agency's decision, although it was not filed

by the Office of Administrative Hearings until two days later. *Huntington Manor of Murphy v. N.C. Dept. of Human Resources*, 52.

In denying petitioner's request for a certificate of need for a nursing home, respondent erred in concluding that low income people would not have access to the nursing home and that petitioner's application for the certificate thus did not comply with G.S. 131E-183(a)(3) and 13(a). *Ibid.*

A home health agency is not required to obtain a certificate of need in order to open branch offices within its current service area. *In re Request for Declaratory Ruling by Total Care, Inc.*, 517.

INDICTMENT AND WARRANT

§ 7 (NCI3d). Form, requisites, and sufficiency of indictment in general

The trial court was not required to instruct the indicting grand jury on the elements of the crime in question. *S. v. Treadwell*, 769.

INFANTS

§ 20 (NCI3d). Judgments and orders in juvenile cases; dispositional alternatives

A trial court order committing a juvenile to the Division of Youth Services for 30 days arising from an assault charge and guilty plea was remanded where there was no evidence of the inappropriateness of any community-based alternatives. *In re Randall*, 356.

The evidence was insufficient to support the trial court's findings that alternatives to commitment were unsuccessfully attempted or inappropriate, and the court thus erred in committing the juvenile to confinement for thirty days with the Division of Youth Services. *In re Mosser*, 523.

INJUNCTIONS

§ 16 (NCI3d). Liabilities on bonds

A defendant is entitled to damages on an injunction bond only when there has been a final adjudication substantially favorable to defendant on the merits of plaintiff's claim. *Industrial Innovators, Inc. v. Myrick-White, Inc.*, 42.

INSURANCE

§ 2.2 (NCI3d). Liability of broker or agent to insured for failure to procure insurance

Defendant insurance agent fulfilled his duty to procure builder's risk insurance for plaintiff during construction of a house and was not negligent in failing to procure or maintain insurance on the house after construction was completed. *Baldwin v. Lititz Mutual Ins. Co.*, 559.

§ 46 (NCI3d). Accident insurance; intentional and unintentional acts

Plaintiff was entitled to recover under an accidental death policy where she presented evidence that, although decedent voluntarily became intoxicated, his slipping and falling into a creek one foot deep and drowning was an additional, unexpected, and unforeseeable mishap which caused his death. *Collins v. Life Insurance Co. of Virginia*, 567.

INSURANCE — Continued

§ 69 (NCI3d). Protection against injury by uninsured or underinsured motorists generally

The automobile liability insurer for an individual injured within the course and scope of her employment was not entitled to reduce its $50,000 limit in underinsured motorist coverage by the $20,392.70 of workers' compensation benefits paid to the insured by her employer's compensation carrier. *Ohio Casualty Group v. Owens*, 131.

§ 69.4 (NCI3d). Hit-and-run accidents

An automobile insurer which provided uninsured motorist coverage was obligated to pay a default judgment obtained by an insured against John Doe, an unidentified hit-and-run driver, where the insurer was given notice of the action against the unidentified driver but failed to provide a defense for such driver. *Sparks v. Nationwide Mutual Ins. Co.*, 148.

§ 148 (NCI3d). Title insurance generally

Summary judgment was properly entered for defendants in an action by a title insurance company to recover defense and settlement funds where the policy required that the insureds must suffer an actual loss and the purchaser gave the seller a promissory note which conditioned payment on final clearance of title. *Fidelity National Title Ins. Co. v. Kidd*, 737.

JURY

§ 6.3 (NCI3d). Propriety and scope of examination generally

The trial court did not err by disallowing certain questions posed by defense counsel during the voir dire examination of prospective jurors. *S. v. Nobles*, 473.

§ 7.8 (NCI3d). Particular grounds for challenge for cause and disqualification

There was no error in refusing to exclude two jurors for cause where one was employed as an Assistant Attorney General and the other may have glimpsed defendant in a hallway in handcuffs. *S. v. McNeil*, 235.

§ 7.14 (NCI3d). Manner, order and time of exercising peremptory challenges

Defendant failed to make a prima facie showing of racial discrimination in the State's use of peremptory challenges to remove minority jurors. *S. v. Melvin*, 16.

There was no error in allowing the State to exercise four peremptory challenges against blacks where there was no prima facie case of discrimination. *S. v. McNeil*, 235.

KIDNAPPING

§ 1.2 (NCI3d). Sufficiency of evidence

The evidence in a kidnapping case did not require the trial court to submit to the jury the lesser offense of false imprisonment. *S. v. Nicholson*, 143.

§ 1.3 (NCI3d). Instructions

The trial court was not required to give defendant's requested instruction on scienter in a prosecution for child abduction. *S. v. Nobles*, 473.

LABORERS' AND MATERIALMEN'S LIENS

§ 6 (NCI3d). Filing of notice or claim of lien

The evidence supported the trial court's findings that employees of plaintiff and a supplier installed an exhaust fan and intercom system in defendant's condominiums on 3 February 1988, that these services were not trivial in nature, and that they were performed in furtherance of the original contractual obligation. *Blalock Electric Co. v. Grassy Creek Development Corp.*, 440.

Where defendant did not challenge on appeal the court's findings that plaintiff filed its materialman's lien 118 days after the last furnishing of materials and labor and filed its action to enforce its lien 175 days after the last furnishing, those findings were binding on appeal, and the court properly concluded that the plaintiff's lien was timely filed. *Ibid.*

LANDLORD AND TENANT

§ 5 (NCI3d). Lease of personal property

Summary judgment should not have been granted for plaintiff and should have been granted for defendant in an action in which plaintiff sought to recover from defendant sums owed plaintiff by its insolvent insurer pursuant to a residual value insurance policy on leased automobiles. *BarclaysAmerican/Leasing, Inc. v. N.C. Ins. Guaranty Assn.*, 290.

§ 19 (NCI3d). Rent and actions therefor

A rental agent who had actual authority to repair and keep rented premises in a fit and habitable condition was a landlord subject to liability for rent abatement. *Surratt v. Newton*, 396.

Plaintiff tenant could recover for those defects enumerated in G.S. 42-42(a)(4) without having given written notice to the landlord where repair of those defects was necessary to put the premises in a fit and habitable condition. *Ibid.*

The amount of defendant rental agent's fee is not a limitation of the amount of the recovery by plaintiff tenant from the agent, but the amount of rent paid is a limit on recovery from all parties in an action for rent abatement. *Ibid.*

The plaintiff in a rent abatement action was precluded from recovering rent for the periods in which she paid no rent. *Ibid.*

Plaintiff has a claim for rent abatement against a rental agent who is a landlord for the amount of rent paid even though that amount exceeded what he was paid as agent. *Ibid.*

The evidence was sufficient to support an award for damages in an action for rent abatement where defendant testified that the fair rental value of the property was $600 a month and plaintiff testified that the rental value of the property in its then existing condition was between $100 and $150. *Ibid.*

The trial court in a rent abatement action against a rental agent should have granted a credit against the damage award for sums received in a settlement with the owners. *Ibid.*

§ 19.1 (NCI3d). Rent and actions therefor; defenses

The trial court should not have granted a directed verdict against defendant tenant, who had counterclaimed for rent abatement, where there was sufficient evidence to go to the jury on whether the house was uninhabitable during the period in which defendant did not pay rent and there was evidence of the value of the premises in a fit condition and the value in an uninhabitable state. *Allen v. Simmons*, 636.

LARCENY

§ 6 (NCI3d). Competency and relevancy of evidence

There was no error in a prosecution for felonious larceny arising from shoplifting in admitting evidence of an empty clothing rack. *S. v. Odom*, 265.

§ 6.1 (NC3d). Identity, ownership, and value of property stolen

There was no error in a prosecution for felonious larceny arising from shoplifting by admitting testimony of a store employee on the value and ownership of the stolen merchandise based on price tags on the merchandise. *S. v. Odom*, 265.

§ 7 (NCI3d). Weight and sufficiency of evidence generally; circumstantial evidence

There was no error in a prosecution for felonious larceny arising from shoplifting by denying defendant's motion to dismiss for insufficient evidence that the merchandise was stolen. *S. v. Odom*, 265.

§ 7.1 (NCI3d). Proof of intent

Evidence of defendant's guilt of an earlier larceny at an apartment was properly admitted to show defendant's intent to commit larceny when he broke into a second apartment. *S. v. Evans*, 88.

§ 7.4 (NCI3d). Possession of stolen property

There was no error in a prosecution for felonious larceny arising from shoplifting in denying defendant's motion to dismiss based on insufficient evidence that defendant was the perpetrator of the crime where the State relied on the doctrine of recent possession. *S. v. Odom*, 265.

§ 8.3 (NCI3d). Instructions as to value of property stolen

There was no error in a prosecution for felonious larceny arising from shoplifting in refusing the jury's request for additional instructions on the element of value. *S. v. Odom*, 265.

§ 8.4 (NCI3d). Instructions as to presumption from recent possession of stolen property

There was no error in a prosecution for felonious larceny arising from shoplifting in instructing the jury on the doctrine of possession of recently stolen property. *S. v. Odom*, 265.

LIBEL AND SLANDER

§ 16 (NCI3d). Sufficiency of evidence and nonsuit

The evidence in a slander action based on an accusation that plaintiff gave a worthless check for groceries was sufficient to be submitted to the jury on the issue of whether defendant's statement was published or communicated to and understood by a third person. *Harris v. Temple*, 179.

The evidence was sufficient to show that a statement by defendant district attorney to a newspaper reporter that plaintiff assistant district attorney was incompetent because he conducted only two days of trial before stating that he had nothing else ready to go forward for trial constituted both slander and libel per se since he spoke with the intent that the words be reduced to writing. *Clark v. Brown*, 255.

Plaintiff, a former assistant district attorney, rebutted defendant district attorney's claim of qualified privilege where plaintiff raised genuine issues of fact on both the falsity of a charge of incompetence and the existence of actual malice. *Ibid.*

LIBEL AND SLANDER — Continued

A newspaper article about plaintiff's past involvement in a kidnapping and sexual offense in England did not constitute libel where the article was based on wire service stories published in leading newspapers and on information obtained from the sheriff. *McKinney v. Avery Journal, Inc.*, 529.

§ 18 (NCI3d). Damages and verdict

The evidence supported an award for punitive damages in a slander action based on an accusation that plaintiff gave a worthless check for groceries. *Harris v. Temple*, 179.

LIMITATION OF ACTIONS

§ 8 (NCI3d). Exceptions to operation of limitation laws generally

An action challenging a zoning amendment was barred by the statute of limitations where the claim was brought after the nine-month period had lapsed and plaintiff's equitable arguments were of no avail. *Mahaffey v. Forsyth County*, 676.

§ 8.1 (NCI3d). Fraud, mistake, and ignorance of cause of action as exceptions to operation of limitation clause

Fraudulent concealment cannot toll the running of the statute of repose after a medical malpractice claim has accrued. *Stallings v. Gunter*, 710.

MALICIOUS PROSECUTION

§ 13.3 (NCI3d). Sufficiency of evidence of malice

Material issues of fact existed as to whether defendant law officers acted maliciously and without probable cause in obtaining a warrant charging defendant with felonious possession of a stolen tractor. *Carson v. Moody*, 724.

MASTER AND SERVANT

§ 7.5 (NCI3d). Discrimination in employment

The State Personnel Commission properly used the "disparate treatment" test in making an award in favor of respondent employee for racial discrimination in a Central Prison correctional officer employment promotion decision. *N.C. Dept. of Correction v. Hodge*, 602.

The evidence was sufficient to support findings by the State Personnel Commission that respondent correctional officer was better qualified for a captain's position than the promoted employee and that the State's nondiscriminatory reason for promoting the other employee was a pretext for racial discrimination. *Ibid.*

§ 10.2 (NCI3d). Actions for wrongful discharge

The trial court properly granted summary judgment for defendants in an action for wrongful discharge. *Kearney v. County of Durham*, 349.

§ 11.1 (NCI3d). Competition with former employer; covenants not to compete

Covenants not to compete in three employment contracts were unenforceable for lack of consideration where there was no agreement as to the terms of the covenants at the time of employment and none of the employees received a salary increase or other benefit for signing the covenants. *Young v. Mastrom, Inc.*, 120.

The fact that employees do not possess unique trade secrets as a result of their employment cannot properly serve as a basis for holding covenants not to compete invalid. *Ibid.*

§ 50 (NCI3d). Independent contractors

G.S. 97-19 may apply as between two independent contractors but does not apply between a principal and an independent contractor. *Cook v. Norvell-Mackorell Real Estate Co.*, 307.

Plaintiff was an independent contractor and not an employee and thus could not recover under the Workers' Compensation Act for injuries sustained while she was working for defendant as a scallop shucker. *Spencer v. Johnson & Johnson Seafood*, 510.

§ 50.1 (NCI3d). Who are independent contractors; determination

The Industrial Commission properly concluded that it did not have subject matter jurisdiction over plaintiff's claim where a real estate agency which engaged a roofing company was not an independent contractor but merely an agent for the owners and was not plaintiff's statutory employer. *Cook v. Norvell-Mackorell Real Estate Co.*, 307.

§ 69 (NCI3d). Amount of recovery generally

The evidence supported a finding by the Industrial Commission that a lumbar laminectomy recommended by plaintiff's orthopaedic physician had a high probability of significantly reducing the period of plaintiff's disability and would be sought by a similarly situated reasonable man, and the Commission properly ordered that plaintiff undergo such surgery or lose his right to compensation. *Watkins v. City of Asheville*, 302.

§ 77.1 (NCI3d). Grounds for modification and review of award; change of conditions or circumstances

An award of 20% permanent partial disability of the back was not subject to modification for a change of condition or newly discovered evidence where plaintiff testified that his condition was the same as it had been when the award was entered, and a neurologist's diagnosis that plaintiff was totally disabled amounted merely to a new opinion about an old condition. *Wall v. N.C. Dept. of Human Resources*, 330.

§ 96.3 (NCI3d). Review of jurisdictional findings

Jurisdictional facts found by the Industrial Commission were not binding on the Court of Appeals. *Cook v. Norvell-Mackorell Real Estate Co.*, 307.

§ 99 (NCI3d). Workers' compensation; costs and attorneys' fees

The evidence supported a finding that defendant had no reasonable basis for concluding that a workers' compensation claim was not compensable where the Industrial Commission had assessed an attorney's fee against defendants. *Beam v. Floyd's Creek Baptist Church*, 767.

MINES AND MINERALS

§ 1 (NCI3d). Definitions

The Mining Commission's judgment that removal of old stockpiles of sand was mining within the statutory definition was supported by competent and substantial

MINES AND MINERALS — Continued

evidence and was not arbitrary or capricious. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 431.

§ 2 (NCI3d). Liabilities in connection with mining operations

The Mining Commission had the authority to impose a civil penalty where there was sufficient evidence in the record that plaintiff mined without a permit on several dates after receiving a notice. *Crowell Constructors, Inc. v. State ex rel. Cobey*, 431.

A penalty for mining without a permit was not arbitrary and capricious even though the company had a good record of complying with the Mining Act. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 7 (NCI3d). Construction as to debts secured

Summary judgment was properly granted for intervenor Heights of Texas F.S.B. in an action involving the surplus proceeds from a foreclosure where there was no genuine question of material fact regarding the terms of the parties' agreement and the purpose of the 1985 amendment to G.S. 45-68 was to require a written instrument or notation for future obligations only when the parties agreed to require it. *In re Foreclosure of Greenleaf Corp.*, 489.

§ 32 (NCI3d). Deficiency and personal liability

An order entered by the clerk of court in a foreclosure proceeding under a power of sale is not an "order or decree of court" which would make the value of the property unavailable to the debtors as a defense under G.S. 45-21.36 in an action by the foreclosing creditor to obtain a deficiency judgment. *United Carolina Bank v. Tucker*, 95.

The statute permitting the debtors to raise the value of the property as a defense to a creditor's action for a deficiency judgment applied where the creditor purchased property at a foreclosure sale which was subject to prior liens or deeds of trust. *Ibid.*

Where mortgaged property was purchased at the foreclosure sale by the lender, defendants who were liable on the underlying note but held no interest in the secured property could not assert the G.S. 45-21.36 defense to the lender's action for a deficiency judgment that the property was worth the amount of the debt secured by it. *Raleigh Federal Savings Bank v. Godwin*, 761.

MUNICIPAL CORPORATIONS

§ 4.4 (NCI3d). Powers in particular areas; public utilities and services

A city's power to set rates for sewer system services includes the power to charge for services available but not received. *Ricks v. Town of Selma*, 82.

A town ordinance which provided for a charge for water and sewer services available but unused was discriminatory where it required a customer who received only water service to pay one flat fee per unit for sewer service unconnected to use. *Ibid.*

§ 30.6 (NCI3d). Special permits and variances

Both the Board of Adjustment and the trial court correctly determined that petitioner had a through lot so that a variance was required for a fence over

three feet six inches in height. *Donnelly v. Bd. of Adjustment of The Village of Pinehurst*, 702.

A petitioner should not be required to obtain a variance from a zoning ordinance on the ground that he erected a nonconforming type of fence without a more specific definition in the ordinance of picket and stockade fences. *Ibid.*

The Board of Adjustment had no duty to make findings and conclusions on the merits of petitioner's request for a variance where the requested variance would be directly contrary to the zoning ordinance. *Ibid.*

§ 30.9 (NCI3d). Comprehensive plans; spot zoning

A 1988 rezoning constituted invalid spot zoning. *Mahaffey v. Forsyth County*, 676.

§ 30.15 (NCI3d). Nonconforming uses generally

Defendants established an "existing use" in the operation of their truck sales business prior to the effective date of a county zoning ordinance so that the business qualified as a permitted nonconforming use. *Randolph County v. Coen*, 746.

NARCOTICS

§ 2.3 (NCI3d). Elements and essentials of statutory offenses relating to narcotics

There was no separate possession of .22 grams of cocaine found on top of a dresser and 2.1 grams of cocaine in baggies found a few feet away between the bed and a wall so as to require the trial court to instruct on the lesser included offense of misdemeanor possession of cocaine. *S. v. Smith*, 67.

§ 4.3 (NCI3d). Sufficiency of evidence of constructive possession; cases where evidence was sufficient

The evidence was sufficient to support an inference that defendant had constructive possession of marijuana, cocaine, and drug paraphernalia found in a house leased by defendant. *S. v. Smith*, 67.

The evidence was sufficient to support an inference of defendant's constructive possession of cocaine and drug paraphernalia found in a bedroom of his mother's house. *Ibid.*

§ 4.6 (NCI3d). Instructions as to possession

The trial court did not improperly express an opinion by instructing the jury regarding close proximity as it related to defendant but not to her twin sister. *S. v. King*, 283.

§ 4.7 (NCI3d). Instructions as to lesser offenses

The trial court in a trafficking case did not err in failing to instruct on the lesser included offense of possession of cocaine. *S. v. King*, 283.

§ 5 (NCI3d). Verdict and punishment

The trial court did not abuse its discretion when sentencing defendant for trafficking in cocaine by finding that defendant's evidence of substantial assistance to law enforcement authorities was insufficient under G.S. 90-95(h)(5). *S. v. Morocco*, 421.

NEGLIGENCE

§ 13 (NCI3d). Contributory negligence in general

Defendants' failure to plead plaintiffs' contributory negligence was a bar to the issue being raised on appeal. *Forbes v. Par Ten Group, Inc.*, 587.

§ 27.1 (NCI3d). Competency of evidence of insurance

Evidence concerning the uninsured status of defendant car owner was admissible to show defendant's motive for using his employer's dealer tags, to show that defendant dealership had knowledge that defendant owner wanted to use the tags so his vehicle could be driven on the highway after his insurance had lapsed, and to allow the jury to assess the foreseeability of an accident when dealer tags are loaned to a person who has not complied with N. C. Financial Responsibility Act. *Johnson v. Skinner*, 1.

§ 30.2 (NCI3d). Nonsuit generally; proximate cause

The trial court properly directed verdict for defendant where the evidence, including testimony by plaintiff's medical expert, raised no more than speculation as to whether plaintiff's exposure to acetic acid released by defendant's plant caused plaintiff's respiratory impairment or whether the impairment was caused by plaintiff's cigarette smoking and occupational cotton dust exposure. *Hinson v. National Starch & Chemical Corp.*, 198.

OBSCENITY

§ 3 (NCI3d). Prosecutions for disseminating obscenity

The trial court did not err in excluding expert testimony as to the proper community standard for obscenity in Mecklenburg County based on studies conducted in that county. *S. v. Treadwell*, 769.

The trial court did not abuse its discretion in ruling that the danger of misleading the jury outweighed the probative value of evidence that "comparable materials" had been rented from the same store by more than one percent of the population of the county. *Ibid.*

PARENT AND CHILD

§ 2.2 (NCI3d). Child abuse

The evidence was sufficient to support convictions of defendant for misdemeanor child abuse based on a burn around the victim's mouth and felonious child abuse based on a second degree burn on the victim's buttocks. *S. v. Church*, 647.

§ 8 (NCI3d). Liability of parent for torts of child

Plaintiffs' complaint was sufficient to state a claim against defendant parents for failing properly to supervise their children's use of air rifles. *McMillan v. Mahoney*, 448.

PARTNERSHIP

§ 3 (NCI3d). Rights, duties, and liabilities of partners among themselves

The trial court properly granted plaintiff's motion for judgment on the pleadings in an action to enforce an agreement between the parties giving plaintiff the option to buy defendant's partnership interest in a professional basketball team. *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 481.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 12 (NCI3d). Liability of anesthetist and assistants

An anesthesiologist's assurance that, if an epidural became necessary during delivery of plaintiff's child, only he or another fully trained faculty anesthesiologist would administer it was not supported by consideration and was thus unenforceable. *LaBarre v. Duke University*, 563.

The trial court properly allowed defendants' motions for summary judgment on the issue of medical negligence based on an anesthesiologist's alleged failure to keep a promise as to who would administer the anesthetic since North Carolina does not provide a remedy in tort where a promisor negligently fails to keep a contractual promise. *Ibid.*

§ 13 (NCI3d). Limitations of action for malpractice

The continuing course of treatment doctrine may be used in determining the starting date for the professional malpractice statute of repose set forth in G.S. 1-15(c). *Stallings v. Gunter*, 710.

The starting point for the statute of repose in a malpractice action against a dentist based on his alleged failure to inform plaintiff of possible injuries from orthodontic treatment was not postponed by the continuing course of treatment doctrine after the date defendant informed plaintiff of the extent of her injuries. *Ibid.*

Fraudulent concealment cannot toll the running of the statute of repose after a medical malpractice claim has accrued. *Ibid.*

§ 17.4 (NCI3d). Malpractice; dental work

Plaintiff failed to show genuine issues of fact in a dental malpractice action concerning defendants' breach of the applicable standard of care or the applicability of the doctrine of res ipsa loquitur, and an issue regarding informed consent was not raised in plaintiff's complaint or otherwise before the trial tribunal. *Elliott v. Owen*, 465.

PROCESS

§ 8 (NCI3d). Personal service on nonresident individuals in this State

Defendant in a debt collection action waived the issue of personal jurisdiction by appearing at trial without raising the question. *Schall v. Jennings*, 343.

§ 9 (NCI3d). Personal service on nonresident individuals in another state

Where a nonresident defendant directed plaintiff N.C. accounting partnership to send his monthly and yearly draws from partnership earnings to him in Alabama, and plaintiff distributed this money from N.C., the money paid was shipped from the State by the plaintiff to defendant on his order or direction so as to give the trial court long-arm jurisdiction over defendant under G.S. 1-75.4(5)(d) in an action to recover for defendant's purchase of clients from plaintiff after he had left the partnership. *Cherry Bekaert & Holland v. Brown*, 626.

§ 9.1 (NCI3d). Personal service on nonresident individuals; minimum contacts test

The respondent in a proceeding to terminate parental rights had insufficient contacts with this State to justify the court's exercise of jurisdiction over him. *In re Trueman*, 579.

A nonresident individual's contacts with this state were insufficient to support the exercise of in personam jurisdiction over her in an action involving the sale of a car advertised in a national magazine. *Stallings v. Hahn*, 213.

PROCESS — Continued

Defendant accountant who worked in Alabama for plaintiff N.C. accounting partnership had sufficient contacts with N.C. to permit the courts of this State to exert personal jurisdiction over him in an action to recover under the partnership agreement for defendant's purchase of clients from plaintiff after he left the partnership. *Cherry Bekaert & Holland v. Brown*, 626.

§ 14.3 (NCI3d). Service of process on foreign corporation; sufficiency of evidence; contacts within this state

Defendant nonresident corporation's contacts with this state were sufficient to support the exercise of in personam jurisdiction in an action involving the sale of a horse to a North Carolina resident. *Watson v. Graf Bae Farm*, 210.

§ 19 (NCI3d). Actions for abuse of process

Material issues of fact existed as to whether defendant law officers willfully misused a warrant they obtained charging defendant with felonious possession of a stolen tractor for the ulterior motive of obtaining payment of a civil claim. *Carson v. Moody*, 724.

PUBLIC OFFICERS

§ 9 (NCI3d). Personal liability of public officers to private individuals

The Protective Services Investigation Supervisor for a county DSS, the Program Administrator for DSS, and the Assistant Director of DSS are public employees rather than public officers and may be held personally liable for the negligent performance of their duties. *Hare v. Butler*, 693.

The Director of a county DSS is a public officer and is immune from liability in his individual capacity for alleged negligence in failing properly to train and supervise DSS employees. *Ibid.*

Plaintiff's complaint was sufficient to allege claims for punitive damages against the Director and various employees of a county DSS in their individual capacities based on allegations of malicious actions by all defendants with respect to an investigation of allegations against defendant of child abuse. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 4 (NCI3d). Relevancy and competency of evidence

The trial court properly permitted experts to testify concerning post traumatic stress disorder and child sexual abuse accommodation syndrome. *S. v. Jones*, 412.

The trial court did not err in allowing the prosecutor to ask expert witnesses if they had opinions as to whether the prosecutrix was afflicted with a mental disorder which would cause her to fantasize about sexual assaults in general. *Ibid.*

The trial court erred in a prosecution for assault on a female and attempted second degree rape by admitting a psychologist's testimony concerning post-traumatic stress disorder where the probative value was outweighed by the danger of unfair prejudice. *S. v. Huang*, 658.

Testimony by an expert in forensic hair identification that hairs found on the victim and on a sheet of the victim's bed could have originated from defendant was admissible in a prosecution for first degree rape and taking indecent liberties with a child, but further testimony by the witness that "it would be improbable that these hairs would have originated from another individual" constituted an impermissible expression of opinion as to defendant's guilt. *S. v. Faircloth*, 685.

RAPE AND ALLIED OFFENSES — Continued

§ 4.1 (NCI3d). Improper acts, solicitation, and threats; proof of other acts and crimes

Testimony by a child rape and indecent liberties victim concerning two prior sexual assaults upon her by defendant were admissible to show common scheme or plan. *S. v. Faircloth*, 685.

§ 4.3 (NCI3d). Character or reputation of prosecutrix; unchastity

There was no error in a rape prosecution in closing to the public a voir dire hearing to determine the relevance of the victim's past sexual behavior. *S. v. McNeil*, 235.

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The evidence was insufficient for submission of a charge of attempted first degree rape to the jury where it would not give rise to a reasonable inference that the attack on the victim was sexually motivated. *S. v. Nicholson*, 143.

Evidence of penetration of the anal opening was sufficient to be submitted to the jury in a prosecution for first degree sexual offense against an eleven-year-old girl. *S. v. Estes*, 312.

Testimony by an alleged rape victim was sufficient to support a finding of a jury that she was under the age of 13 at the times of the alleged offenses. *S. v. Jones*, 412.

§ 6.1 (NCI3d). Instructions on lesser degrees of the crime

The trial court did not err in failing to instruct the jury on the lesser included offense of attempted first degree sexual offense. *S. v. Estes*, 312.

§ 19 (NCI3d). Indecent liberties with child

Defendant's right to a unanimous verdict was not violated by the court's instruction that an indecent liberty is an immoral or indecent touching when the jury could have found that either acts of intercourse or acts of fondling constituted a violation of the indecent liberties statute. *S. v. Jones*, 412.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings

Defenses asserted to an action to enforce a Virginia judgment on a note were not so outside the bounds of reasonableness as to warrant sanctions under Rule 11. *First American Bank of Va. v. Carley Capital Group*, 667.

§ 37 (NCI3d). Failure to make discovery; consequences

The trial court did not abuse its discretion in striking defendant's answer and counterclaim as a sanction for defendant's failure to produce documents requested by plaintiff and ordered by the court. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

§ 55.1 (NCI3d). Setting aside default

Defendant did not show good cause to set aside a default entered as a sanction for failure to produce documents by thereafter producing the required documents. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

§ 59 (NCI3d). New trials; amendment of judgments

There was no merit to plaintiff's contention that, despite the trial court's specific words granting defendants' motion for a new trial "in its discretion," the court's decision was based on matters of law. *Burgess v. Vestal*, 545.

RULES OF CIVIL PROCEDURE — Continued

The trial court did not abuse its discretion in setting aside the jury's verdict as to damages. *Ibid.*

§ 60.2 (NCI3d). Grounds for relief from judgment or order

Where the trial court had jurisdiction and authority to enter a contempt order, the order was not void, and a Rule 60(b)(4) motion was not an appropriate means to rectify the court's alleged error in failing to appoint an attorney for defendant at the contempt hearing. *Vaughn v. Vaughn*, 574.

§ 60.4 (NCI3d). Relief from judgment or order; appeal

Defendant's notice of appeal from the trial court's order denying his motion to set aside an earlier child support order did not present the underlying judgment for review. *Von Ramm v. Von Ramm*, 153.

SALES

§ 22.2 (NCI3d). Defective goods or materials; sufficiency of evidence

Plaintiff store owner's recovery in a product liability action based on defendant's negligence in delivering to plaintiff a cleaner for automobile parts rather than a floor cleaner was barred by G.S. 99B-4 because plaintiff's employee was contributorily negligent in failing to read the directions printed on the label before applying the parts cleaner to the floor. *Champs Convenience Stores v. United Chemical Co.*, 275.

SCHOOLS

§ 11.1 (NCI3d). Liability for negligence in operation of school buses

Defendant board of education's purchase of general liability insurance did not waive its governmental immunity with respect to a claim for injuries to a student who was struck by a car based on alleged negligence by the board in the design of a school bus route and stop since the student's injuries were excluded from coverage under the liability policy. *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 753.

SEARCHES AND SEIZURES

§ 7 (NCI3d). Search and seizure incident to arrest

There was no error in the court's refusal to exclude testimony of what occurred at defendant's home when he was arrested. *S. v. McNeil*, 235.

§ 8 (NCI3d). Searches without warrant; warrantless arrest

Defendant in a cocaine trafficking prosecution was not illegally detained so that his consent to a search of his car was not rendered involuntary where the officer engaged defendant in polite conversation in his patrol car while writing a warning citation for not wearing a seat belt. *S. v. Morocco*, 421.

§ 9 (NCI3d). Searches without warrant; arrest for traffic violations

The findings in a cocaine trafficking prosecution supported the trial court's conclusion that a traffic stop on I-95 for not wearing a seat belt was not pretextual. *S. v. Morocco*, 421.

SEARCHES AND SEIZURES — Continued

§ 14 (NCI3d). Searches without warrant; voluntary, free, and intelligent consent

The trial court's conclusion in a cocaine trafficking prosecution that defendant consented to a search of his vehicle was supported by the findings and the findings were supported by competent evidence. *S. v. Morocco*, 421.

§ 15 (NCI3d). Standing to challenge lawfulness of search generally

The fourth amendment rights of an attorney charged with embezzlement were not violated when the State obtained records from a bank account because defendant failed to establish that he had a reasonable expectation of privacy as to the bank records. *S. v. Whitted*, 502.

§ 24 (NCI3d). Cases where evidence is sufficient to show probable cause; information from informers

An affidavit submitted by a deputy sheriff based upon information received from three informants was sufficient to support the magistrate's finding of probable cause to search defendant's home and vehicles for controlled substances. *S. v. Tuggle*, 164.

§ 38 (NCI3d). Scope of search based on consent

A highway patrolman did not exceed the scope of defendant's consent for the search of his vehicle by searching a tote bag found therein. *S. v. Morocco*, 421.

STATE

§ 8.3 (NCI3d). Negligence of State employee; prisoners

A doctor who contracted to provide medical services for prison inmates was not an employee but was an agent of the State so that the State would be liable under the Tort Claims Act for his negligent treatment of inmates. *Medley v. N.C. Dept. of Correction*, 296.

§ 12 (NCI3d). State employees

There was substantial evidence to support dismissal of petitioner bank examiner for insubordination. *Floyd v. N.C. Dept. of Commerce*, 125.

The State Personnel Commission did not err in concluding that petitioner failed to show that respondent hospital's stated reasons for promoting another employee over her were merely a pretext for petitioner's having prevailed in a racial discrimination claim against respondent ten years earlier. *Gadson v. N.C. Memorial Hospital*, 169.

SUBROGATION

§ 1 (NCI3d). Generally

The trial court properly granted summary judgment for defendants in an action in which plaintiffs sought to recover payment for installation of a heating and air-conditioning system under the doctrine of equitable subrogation where plaintiff had an adequate legal remedy in the form of a statutory lien but did not exercise it in a timely manner. *Jones Cooling & Heating v. Booth*, 757.

TAXATION

§ 39.2 (NCI3d). Foreclosure of tax sale certificate; notice

The trial court properly refused to grant defendants' motion for a directed verdict in an action to remove a cloud upon title arising from a tax foreclosure sale where the failure of the county to attempt to send notices to each individual taxpayer rendered the subsequent execution sale invalid and the county did not exercise due diligence in attempting to locate the current mailing address of any of the owners. *Jenkins v. Richmond County*, 717.

TELECOMMUNICATIONS

§ 3 (NCI3d). Rights of way, poles, and wires

The trial court erred in a negligence action arising from the severing of a telephone cable during the removal of old asphalt from a parking lot by not admitting into evidence portions of the Underground Damage Prevention Act. *Continental Telephone Co. v. Gunter*, 741.

The trial court erred in a negligence action arising from the severing of a telephone cable during the removal of old asphalt from a parking lot by granting a directed verdict for defendant. *Ibid.*

TORTS

§ 2.1 (NCI3d). Joint tortfeasors; particular cases

Plaintiff's complaint was sufficient to state a claim for concurrent negligence against the minor defendants on the theory of alternative liability or acting in concert in this action to recover damages sustained when the minor plaintiff was struck in the head by a pellet from an air rifle fired by one of the two minor defendants. *McMillan v. Mahoney*, 448.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

Publication of articles about plaintiff's past involvement in a kidnapping and sexual offense case in Europe based on wire service stories did not constitute the intentional infliction of emotional distress. *McKinney v. Avery Journal, Inc.*, 529.

Defendant's claim for intentional infliction of emotional distress arising from the condition of housing which she rented from plaintiff failed because she did not produce evidence of serious mental distress or bodily harm resulting from mental distress. *Allen v. Simmons*, 636.

TRIAL

§ 13 (NCI3d). Allowing jury to visit exhibits or scene

The trial court did not err in allowing the jury to view evidence during deliberation where the jurors viewed the exhibits in open court with no communication among them. *Surratt v. Newton*, 396.

TRUSTS

§ 7 (NCI3d). Investment and management of funds

The trial court properly entered summary judgment for defendant bank in an action to recover losses sustained from an allegedly negligent investment of

funds deposited by plaintiff trustees of a liquidating trust in defendant bank pursuant to an investment agency agreement. *Kaplan v. First Union National Bank*, 570.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court did not err in finding an unfair trade practice based on defendant's tortious interference with contract by hiring three of plaintiff's salesmen and placing them in their former territories. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

The trial court did not err in concluding that defendant builder's breach of a contract to correct a water accumulation problem under a house sold to plaintiffs constituted an unfair trade practice. *Rucker v. Huffman*, 137.

Summary judgment was proper for some plaintiffs and improper for others on an unfair and deceptive trade practices claim in an action arising from a misapplication of deposits from the sale of real estate. *Forbes v. Par Ten Group, Inc.*, 587.

A jury could find on the record that plaintiff committed an unfair trade practice and the trial court erred in not submitting this issue to the jury where defendant leased from plaintiff a residential dwelling which contained numerous defects and which rendered the house unfit and uninhabitable. *Allen v. Simmons*, 636.

Fraud by an individual in the sale of a residence through a realtor at a public auction did not constitute an unfair trade practice in violation of G.S. 75-1.1. *Bhatti v. Buckland*, 750.

UTILITIES COMMISSION

§ 4 (NCI3d). Practice and procedure

Intervenor was not prejudiced by any improper communication between the applicant for a transfer of water and sewer franchises and the Utilities Commission in violation of G.S. 62-70 when the Commission considered a late-filed affidavit in denying an interlocutory injunction. *State ex rel. Utilities Comm. v. Village of Pinehurst*, 224.

§ 19 (NCI3d). Regulation of water companies

The "adverse effect" test of G.S. 62-111(e) is inapplicable to transfer approval proceedings involving water and sewer franchises. *State ex rel. Utilities Comm. v. Village of Pinehurst*, 224.

Transfer of utility franchises cannot be made contingent upon or subject to Utilities Commission approval but must be made subsequent to such approval. *Ibid.*

VENUE

§ 5.1 (NCI3d). Actions involving real property

The trial court properly granted defendants' motion for a change of venue where plaintiff brought an action in Forsyth County for declaratory relief regarding the existence of a lease, plaintiff resides in Forsyth County and defendants reside in Ashe County, the lease was executed in Ashe County, and the leased property is located in Ashe County. *Snow v. Yates*, 317.

WILLS

§ 13.1 (NCI3d). Jurisdiction over caveat proceedings

The trial court did not have subject matter jurisdiction over an action seeking to set aside a will and deed where the record is devoid of any indication that plaintiffs filed an appropriate caveat proceeding before the Clerk of Superior Court or that the case was duly transferred to the superior court in compliance with G.S. 31-32 and G.S. 31-33. *Casstevens v. Wagoner*, 337.

WITNESSES

§ 10 (NCI3d). Attendance, production of documents, and compensation

Though the trial court erred in appointing an expert witness, the court could properly assess each party a pro rata portion of the witness's fee. *Swilling v. Swilling*, 551.

ABUSE OF PROCESS

Officers' misuse of warrant, *Carson v. Moody*, 724.

ACETIC ACID

Exposure to, *Hinson v. National Starch & Chemical Corp.*, 198.

ACTING IN CONCERT

Instructions supported by evidence, *S. v. Smart*, 730.

AGGRAVATING CIRCUMSTANCES

Abducted child's location in hospital, *S. v. Nobles*, 473.

Attempt to induce perjury, *S. v. Melvin*, 16.

Defendant's mental condition, *S. v. Nobles*, 473.

Desertion from Army, *S. v. Church*, 647.

Failure to render aid to child victim, *S. v. Church*, 647.

Heinous, atrocious, or cruel manslaughter, *S. v. Shadrick*, 354; murder, *S. v. Smart*, 730.

Inducing another to participate, *S. v. Nobles*, 473.

Premeditation and deliberation, *S. v. Torres*, 364.

Separate findings for each offense not required, *S. v. Howard*, 347.

Victim's intoxication, *S. v. Torres*, 364.

Victim's youth, *S. v. Nobles*, 473.

AIR RIFLE

Parents' negligence, *McMillan v. Mahoney*, 448.

ANESTHESIOLOGIST

Promise to administer anesthetic not enforceable, *LaBarre v. Duke University*, 563.

APPEAL

Dismissal of part of plaintiff's claims, *Hare v. Butler*, 693.

APPEAL—Continued

Failure to object to charge, *S. v. Scott*, 113.

Issue first raised on appeal, *S. v. Sherrill*, 540.

Motion to set aside child support order, *Von Ramm v. Von Ramm*, 153.

New trial on damages immediately appealable, *Burgess v. Vestal*, 545.

No jurisdiction by stipulation, *Von Ramm v. Von Ramm*, 153.

Not timely, *Surratt v. Newton*, 396.

ARBITRATION

Right to compel, *Sturm v. Schamens*, 207.

ASSAULT WITH DANGEROUS WEAPON

Knife, *S. v. Robbins*, 75.

ATTEMPTED RAPE

Insufficient evidence, *S. v. Nicholson*, 143.

ATTORNEY-CLIENT PRIVILEGE

Testimony by attorney, *Hartsell v. Hartsell*, 380.

ATTORNEYS

Computational error in settlement agreement, *Lowry v. Lowry*, 246.

Embezzlement of client funds, *S. v. Whitted*, 502.

Rule 11 sanctions not warranted, *First American Bank of Va. v. Carley Capital Group*, 667.

ATTORNEYS' FEES

Contempt proceeding, *Hartsell v. Hartsell*, 380.

AUTOMOBILE RENTALS

Residual value insurance policy, *BarclaysAmerican/Leasing, Inc. v. N.C. Ins. Guaranty Assn.*, 290.

BAIL

Revoked during trial, *S. v. Nicholson*, 143.

BANK RECORDS

No reasonable expectation of privacy, *S. v. Whitted*, 502.

BETTERMENTS

Following tax foreclosure sale, *Jenkins v. Richmond County*, 717.

BIGAMY

Minister, *S. v. Woodruff*, 107.

BREACH OF CONTRACT

Water accumulation under house, *Rucker v. Huffman*, 137.

BUILDER'S RISK INSURANCE

No coverage after completion, *Baldwin v. Lititz Mutual Ins. Co.*, 559.

BURGLARY

Intent to commit rape, *S. v. Robbins*, 75.

CAVEAT

Jurisdiction, *Casstevens v. Wagoner*, 337.

CERTIFICATE OF DEPOSIT

Right of survivorship, *In re Estate of Heffner*, 327.

CERTIFICATE OF NEED

Branch offices, *In re Request for Declaratory Ruling by Total Care, Inc.*, 517.

Motion to intervene, *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 203.

Nursing home, *Huntington Manor of Murphy v. N.C. Dept. of Human Resources*, 52.

CHALLENGES FOR CAUSE

Assistant Attorney General, *S. v. McNeil*, 235.

Glimpse of defendant in handcuffs, *S. v. McNeil*, 235.

CHANGE OF VENUE

Immediately appealable, *Snow v. Yates*, 317.

CHARLOTTE HORNETS

Partnership buy out option, *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 481.

CHILD ABDUCTION

Requested instruction on scienter, *S. v. Nobles*, 473.

CHILD ABUSE

Burns, *S. v. Church*, 647.

Consolidation of indictments, *S. v. Church*, 647.

Evidence of abuse of wife, *S. v. Church*, 647.

CHILD CUSTODY

Joint, *Witherow v. Witherow*, 61.

Modification of, *Ratley v. Ratley*, 219.

Transferred from one district court to another, *In re Phillips*, 159.

CHILD SEXUAL ABUSE

Negligence in investigation by DSS, *Hare v. Butler*, 693.

CHILD SUPPORT

Incorrect financial affidavit, *Witherow v. Witherow*, 61.

Mortgage payments, *Von Ramm v. Von Ramm*, 153.

COCAINE

Constructive possession, *S. v. King*, 283.

Traffic stop, *S. v. Morocco*, 421.

COMPETENCY

To stand trial, *S. v. Nobles*, 473.

CONFESSIONS

Defendant's acquiescence in writing, *S. v. Melvin*, 16.

Voir dire at retrial unnecessary, *S. v. Melvin*, 16.

CONFRONTATION CLAUSE

Right to be present at trial, *S. v. Richardson*, 496.

CONSOLIDATION

Multiple sex offenses, *S. v. Estes*, 312.

Two break-ins in one apartment complex, *S. v. Evans*, 88.

CONSTRUCTIVE POSSESSION OF DRUGS

Found in defendant's bedroom, *S. v. Smith*, 67.

Premises leased by defendant, *S. v. Smith*, 67.

Separate locations in same room, *S. v. Smith*, 67.

Twin sisters, *S. v. King*, 283.

CONTEMPT

Failure to appoint attorney, *Vaughn v. Vaughn*, 574.

Failure to comply with domestic consent decree, *Hartsell v. Hartsell*, 380.

No authority to order compensatory damages, *Hartsell v. Hartsell*, 380.

CONTESTED CASE HEARING

Continuance, *Alexander v. Wilkerson*, 340.

CONTESTED CASE HEARING—Continued

Petition timely, *Huntington Manor of Murphy v. N.C. Dept. of Human Resources*, 52.

CONTINUING COURSE OF TREATMENT

Statute of repose for dental malpractice, *Stallings v. Gunter*, 710.

CONTRIBUTORY NEGLIGENCE

Failure to read label, *Champs Convenience Stores v. United Chemical Co.*, 275.

CORRECTIONAL OFFICER

Discrimination in promotion decision, *N.C. Dept. of Correction v. Hodge*, 602.

COVENANTS NOT TO COMPETE

Lack of consideration, *Young v. Mastrom, Inc.*, 120.

No unique trade secrets, *Young v. Mastrom, Inc.*, 120.

CROSS-EXAMINATION

Witness's residence, *S. v. McNeil*, 235.

DAMAGES

Past and present earnings of accident victim, *Johnson v. Skinner*, 1.

Verdict set aside, *Burgess v. Vestal*, 545.

DEALER TAGS

On personal vehicle, *Johnson v. Skinner*, 1.

DEED OF TRUST

Future construction advances, *In re Foreclosure of Greenleaf Corp.*, 489.

DEFICIENCY JUDGMENT

Absence of interest in property, *Raleigh Federal Savings Bank v. Godwin*, 761.

Value of property, *United Carolina Bank v. Tucker*, 95.

DENTAL MALPRACTICE

Failure to inform plaintiff of orthodontic dangers, *Stallings v. Gunter*, 710.

Standard of care, *Elliott v. Owen*, 465.

Statute of repose, *Stallings v. Gunter*, 710.

DEPARTMENT OF SOCIAL SERVICES

Investigation of child sexual abuse, *Hare v. Butler*, 693.

DISCOVERY

Sanctions, *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

DISTRICT ATTORNEY

Libel and slander of assistant, *Clark v. Brown*, 255.

DOUBLE JEOPARDY

Raised for first time on appeal, *S. v. Scott*, 113.

DWI

Pretrial release rights, *S. v. Blackwell*, 359.

EASEMENT

Latently ambiguous description, *May v. Martin*, 216.

EMBEZZLEMENT

By attorney, *S. v. Whitted*, 502.

EMPLOYEES

Plaintiff's salesmen hired by defendant, *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

EQUITABLE DISTRIBUTION

Findings for unequal division, *Swilling v. Swilling*, 551.

Reduction by amount of alimony paid, *Swilling v. Swilling*, 551.

EQUITABLE SUBROGATION

By subcontractor inappropriate, *Jones Cooling & Heating v. Booth*, 757.

ESCROW

Sale of golf course lots, *Forbes v. Par Ten Group, Inc.*, 587.

EXPERT WITNESS

Improperly appointed, *Swilling v. Swilling*, 551.

FALSE PRETENSE

False insurance applications, *S. v. Melvin*, 16.

FELONIOUS BREAKING

Entry thwarted, *S. v. Evans*, 88.

FENCE

Zoning variance, *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 702.

FINGERPRINTS

Sufficiency of evidence, *S. v. Evans*, 88.

FIRST DEGREE SEXUAL OFFENSE

Evidence of penetration, *S. v. Estes*, 312.

FLOOR CLEANER

Automobile cleaner delivered, *Champs Convenience Stores v. United Chemical Co.*, 275.

FORECLOSURE

Deficiency judgment, absence of interest in property, *Raleigh Federal Savings Bank v. Godwin*, 761.

Value of property as defense to deficiency, *United Carolina Bank v. Tucker*, 95.

FRAUD

Rental of unfit premises, *Allen v. Simmons*, 636.

FUTURE ADVANCES

Coverage by deed of trust without writing, *In re Foreclosure of Greenleaf Corp*, 489.

GOLF COURSE

Misapplication of deposits for lots and memberships, *Forbes v. Par Ten Group, Inc.*, 587.

GOVERNMENTAL IMMUNITY

Negligent design of bus route by school board, *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 753.

GRAND JURY

Instruction on elements of crime, *S. v. Treadwell*, 769.

GUARANTY

Signature as company president or individual, *Carolina-Atlantic Distributors v. Boyce Insulation Co.*, 577.

GUILTY PLEA

Withdrawal of, *S. v. Deal*, 456.

HABITUAL FELON

Indictment, *S. v. Williams*, 333.

HAIR

Forensic identification admissible, *S. v. Faircloth*, 685.

HEARSAY

Admissible under catchall exception, *S. v. Whitted*, 502.

Impressions told to investigator, *S. v. Sherrill*, 540.

HIT AND RUN DRIVER

Insurer's liability for judgment against John Doe, *Sparks v. Nationwide Mutual Ins. Co.*, 148.

HOME HEALTH AGENCY

Branch offices, *In re Request for Declaratory Ruling by Total Care, Inc.*, 517.

HOUSE

Water accumulation under, *Rucker v. Huffman*, 137.

HOUSING

Rental of substandard, *Allen v. Simmons*, 636.

IDENTIFICATION

Defendant's refusal to allow viewing by victim, *S. v. McNeil*, 235.

Expert testimony excluded, *S. v. Cotton*, 615.

IN PERSONAM JURISDICTION

Issue waived by appearance, *Schall v. Jennings*, 343.

Nonresident accountant, *Cherry Bekaert & Holland v. Brown*, 626.

Sale of car through national magazine, *Stallings v. Hahn*, 213.

IN PERSONAM JURISDICTION— Continued

Sale of horse in North Carolina, *Watson v. Graf Bae Farm*, 210.

Service in North Carolina, *Schall v. Jennings*, 343.

INDECENT LIBERTIES

Instructions on intercourse or fondling, *S. v. Jones*, 412.

INDEPENDENT CONTRACTOR

Scallop shucker, *Spencer v. Johnson & Johnson Seafood*, 510.

INDEX OF DOCUMENTS

Appeal moot, *News and Observer Publishing Co. v. Poole*, 352.

INDICTMENT

Instruction to grand jury on crime elements, *S. v. Treadwell*, 769.

INFORMANTS

Probable cause for search warrant, *S. v. Tuggle*, 164.

INFORMED CONSENT

Dental malpractice, *Elliott v. Owen*, 465.

INJUNCTION BOND

Entitlement to damages, *Industrial Innovators, Inc. v. Myrick-White, Inc.*, 42.

INMATES

Status of doctor providing medical services, *Medley v. N.C. Dept. of Correction*, 296.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Newspaper articles, *McKinney v. Avery Journal, Inc.*, 529.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS— Continued

Substandard housing, *Allen v. Simmons*, 636.

INTERFERENCE WITH CONTRACT

By district attorney, *Clark v. Brown*, 255.

Hiring of plaintiff's salesmen, *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

INTERROGATION

Without presence of counsel, *S. v. Torres*, 364.

JOHN DOE

Insurer's liability for judgment against, *Sparks v. Nationwide Mutual Ins. Co.*, 148.

JURY

Challenge of Assistant Attorney General, *S. v. McNeil*, 235.

Member's glimpse of defendant in handcuffs, *S. v. McNeil*, 235.

View of evidence during deliberation, *Surratt v. Newton*, 396.

JUVENILE DELINQUENT

Community based alternatives not considered, *In re Randall*, 356; *In re Mosser*, 523.

KIDNAPPING

False imprisonment not lesser offense, *S. v. Nicholson*, 143.

LACHES

Tax foreclosure sale, *Jenkins v. Richmond County*, 717.

LANDLORD

Unfit housing, *Surratt v. Newton*, 396; *Allen v. Simmons*, 636.

LAST CLEAR CHANCE

Striking pedestrian, *VanCamp v. Burgner*, 102.

LEASE

Local venue, *Snow v. Yates*, 317.

LIBEL

District attorney's statements about assistant, *Clark v. Brown*, 255.

Reliance on wire service stories, *McKinney v. Avery Journal, Inc.*, 529.

LIFE INSURANCE

False application by agent, *S. v. Melvin*, 16.

LONG-ARM STATUTE

Monies sent from N.C. to defendant in Alabama, *Cherry Bekaert & Holland v. Brown*, 626.

MALICIOUS PROSECUTION

Officers obtaining warrant for collateral purpose, *Carson v. Moody*, 724.

MATERIALMEN'S LIEN

Security system as last furnishing of services, *Blalock Electric Co. v. Grassy Creek Development Corp.*, 440.

MEDICAL MALPRACTICE

Continuing course of treatment doctrine, *Stallings v. Gunter*, 710.

MINIMUM CONTACTS

Accounting partnership, *Cherry Bekaert & Holland v. Brown*, 626.

Proceeding to terminate parental rights, *In re Trueman*, 579.

MINIMUM CONTACTS—Continued

Sale of car through magazine, *Stallings v. Hahn*, 213.

Sale of horse in North Carolina, *Watson v. Graf Bae Farm*, 210.

MINING

Without permit, *Crowell Constructors, Inc. v. State ex rel. Cobey*, 431.

MINOR

Custody transferred from one district court to another, *In re Phillips*, 159.

MITIGATING FACTORS

Defendant was abused child, *S. v. Church*, 647.

Good standing in community, *S. v. Torres*, 364.

Mental condition, *S. v. Torres*, 364.

Separate findings for each offense not required, *S. v. Howard*, 347.

MOTION TO INTERVENE

Proposed intervenor not party, *HCA Crossroads Residential Ctrs. v. N.C. Dept. of Human Res.*, 203.

MUTUAL MISTAKE

Settlement agreement, *Lowry v. Lowry*, 246.

NARCOTICS

Consent to search given in patrol car, *S. v. Morocco*, 421.

Constructive possession, *S. v. Smith*, 67.

Sentencing, assistance to law officers, *S. v. Morocco*, 421.

NATURAL GAS

Classification of customer, *In re Eaton Corp. v. Public Service Co.*, 174.

Overcharges, *In re Eaton Corp. v. Public Service Co.*, 174.

NATURAL GAS—Continued

Rate schedule, *In re Blue Ridge Textile Printers v. Public Service Co.*, 193.

Retroactive reclassification of customer, *In re Blue Ridge Textile Printers v. Public Service Co.*, 193.

Statute of limitations, *In re Eaton Corp. v. Public Service Co.*, 174.

NEWSPAPER

Libel, reliance on wire service stories, *McKinney v. Avery Journal, Inc.*, 529.

NONCONFORMING USE

Truck sales business, *Randolph County v. Coen*, 746.

NOTICE OF APPEAL

Sufficiency for review of two orders, *First American Bank of Va. v. Carley Capital Group*, 667.

NURSING HOME

Certificate of need, *Huntington Manor of Murphy v. N.C. Dept. of Human Resources*, 52.

OBSCENITY

Exclusion of expert testimony, *S. v. Treadwell*, 769.

Rental of comparable materials, *S. v. Treadwell*, 769.

OPEN COURTS

Stay pending action in another state, *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 322.

ORTHODONTIC TREATMENT

Failure to inform plaintiff of dangers, *Stallings v. Gunter*, 710.

OTHER OFFENSES

Acquittal of prior rape, *S. v. Scott*, 113.

OTHER OFFENSES—Continued

Guilt of earlier larceny, *S. v. Evans*, 88.

Prior sexual assaults upon child victim, *S. v. Faircloth*, 685.

PARTNERSHIP

Buy out option, *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 481.

PATHOLOGIST

Position of victim when shot, *S. v. Torres*, 364.

PEDESTRIAN

Struck by car, *VanCamp v. Burgner*, 102.

PEREMPTORY CHALLENGES

No racial discrimination, *S. v. Melvin*, 16; *S. v. McNeil*, 235.

PERSONAL JURISDICTION

See IN PERSONAM JURISDICTION this Index.

PLAIN ERROR DOCTRINE

Applied only in criminal cases, *Surratt v. Newton*, 396.

POSSESSION OF RECENTLY STOLEN PROPERTY

Shoplifting, *S. v. Odom*, 265.

POST TRAUMATIC STRESS DISORDER

Child rape victim, *S. v. Jones*, 412.

Evidence implicating defendant inadmissible, *S. v. Huang*, 658.

PRESENCE AT SCENE

Guilt not inferred from, *S. v. Townsend*, 534.

PRESENCE AT TRIAL

Right denied, *S. v. Richardson*, 496.

PRIVACY FENCE

Zoning variance, *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 702.

PRIVATE PROSECUTOR

Bigamy action, *S. v. Woodruff*, 107.

PROBATION

Restitution as condition of, *S. v. Smith*, 184.

PRODUCTS LIABILITY

Failure to read label, *Champs Convenience Stores v. United Chemical Co.*, 275.

PROMOTION

Of another employee as retaliation, *Gadson v. N.C. Memorial Hospital*, 169.

Racial discrimination, *N.C. Dept. of Correction v. Hodge*, 602.

PUBLIC EMPLOYEE

Investigation of child sexual abuse, *Hare v. Butler*, 693.

PUNITIVE DAMAGES

Slander, *Harris v. Temple*, 179.

RACIAL DISCRIMINATION

Promotion of correctional officer, *N.C. Dept. of Correction v. Hodge*, 602.

RAPE

Age of prosecutrix, *S. v. Jones*, 412.

Closed hearing on victim's past sexual behavior, *S. v. McNeil*, 235.

Defendant in handcuffs, *S. v. McNeil*, 235.

RAPE—Continued

Other offenses against victim, *S. v. Faircloth*, 685.

Sexual harassment of coemployees admissible, *S. v. Cotton*, 615.

Testimony concerning post-traumatic stress disorder not admissible, *S. v. Huang*, 658.

RENT ABATEMENT

Evidence sufficient, *Surratt v. Newton*, 396; *Allen v. Simmons*, 636.

Landlord as proper party, *Surratt v. Newton*, 396.

RES IPSA LOQUITUR

Dental malpractice, *Elliott v. Owen*, 465.

RESISTING ARREST

Admissible as evidence of guilt, *S. v. McNeil*, 235.

RESORT PROPERTY

Misapplication of deposits from sales, *Forbes v. Par Ten Group, Inc.*, 587.

RESPIRATORY IMPAIRMENT

Acetic acid, *Hinson v. National Starch & Chemical Corp.*, 198.

REST HOME

Revocation of license to operate, *Alexander v. Wilkerson*, 340.

RESTITUTION

Condition of probation, *S. v. Smith*, 184.

ROOF TRUSSES

Collapse of, *Britt v. Sharpe*, 555.

SANCTIONS

Against attorney not warranted, *First American Bank of Va. v. Carley Capital Group*, 667.

Findings necessary, *Lowry v. Lowry*, 246.

SAND

Mining of old stockpiles, *Crowell Constructors, Inc. v. State ex rel. Cobey*, 431.

SCHOOL BOARD

Negligent design of bus route, *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 753.

SEARCH

Consent given in patrol car, *S. v. Morocco*, 421.

Tote bag in automobile, *S. v. Morocco*, 421.

SECOND DEGREE MURDER

Fingerprint evidence, *S. v. Smart*, 730.

Sufficiency of evidence of malice, *S. v. Torres*, 364.

SELF-DEFENSE

Instruction not required, *S. v. Torres*, 364.

SENTENCING

Assistance to law enforcement authority not considered, *S. v. Morocco*, 421.

Convictions consolidated, *S. v. Howard*, 347.

Nature of evidence of prior convictions, *S. v. Canady*, 189.

Parole eligibility, *S. v. Williams*, 333.

SETTLEMENT AGREEMENT

Attorneys not negligent, *Lowry v. Lowry*, 246.

Mutual mistake, *Lowry v. Lowry*, 246.

SEWER SYSTEM

Charge for unused services, *Ricks v. Town of Selma*, 82.

SEXUAL ABUSE

Negligence in investigation by DSS, *Hare v. Butler*, 693.

SHOPLIFTING

Evidence sufficient, *S. v. Odom*, 265.

Value of stolen items from price tags, *S. v. Odom*, 265.

SLANDER

Accusation of worthless check, *Harris v. Temple*, 179.

District attorney's statements about assistant, *Clark v. Brown*, 255.

Punitive damages, *Harris v. Temple*, 179.

SOVEREIGN IMMUNITY

Investigation of child sexual abuse by DSS, *Hare v. Butler*, 693.

SPEEDY TRIAL ACT

Continuances, *S. v. Melvin*, 16.

Time between mistrial and next term of court, *S. v. Melvin*, 16.

SPOT ZONING

Invalid, *Mahaffey v. Forsyth County*, 676.

STATE EMPLOYEE

Dismissed for insubordination, *Floyd v. N.C. Dept. of Commerce*, 125.

Promotion of one employee over another, *Gadson v. N.C. Memorial Hospital*, 169.

STATUTE OF LIMITATIONS

Challenge to rezoning, *Mahaffey v. Forsyth County*, 676.

STATUTE OF LIMITATIONS—Continued

Natural gas overcharges, *In re Eaton Corp. v. Public Service Co.*, 174.

STATUTE OF REPOSE

Dental malpractice, *Stallings v. Gunter*, 710.

STAY

New Jersey action, *Home Indemnity Co. v. Hoechst-Celanese Corp.*, 322.

Petition to lift bankruptcy, *Barclays-American/Leasing, Inc. v. N.C. Ins. Guaranty Assn.*, 290.

STUDENT

Struck by car at bus stop, *Beatty v. Charlotte-Mecklenburg Bd. of Education*, 753.

SUBCONTRACTOR

Claim against owners, *Jones Cooling & Heating v. Booth*, 757.

SUBJECT MATTER JURISDICTION

Nonresident parties, *Schall v. Jennings*, 343.

TAX FORECLOSURE SALE

Insufficient notice, *Jenkins v. Richmond County*, 717.

TELEPHONE CABLE

Severing of, *Continental Telephone Co. v. Gunter*, 741.

TITLE INSURANCE

Defense provided voluntarily, *Fidelity National Title Ins. Co. v. Kidd*, 737.

TRACTOR

Misuse of felonious possession charge, *Carson v. Moody*, 724.

TRAFFICKING IN COCAINE

Instruction on lesser offense not required, *S. v. King*, 283.

Traffic stop for not wearing seat belt, *S. v. Morocco*, 421.

TRUST AGREEMENT

Negligent investment of funds, *Kaplan v. First Union National Bank*, 570.

UNDERINSURED MOTORIST COVERAGE

Reduction by amount of workers' compensation, *Ohio Casualty Group v. Owens*, 131.

UNFAIR TRADE PRACTICES

Hiring salesmen for same territory, *Roane-Barker v. Southeastern Hospital Supply Corp.*, 30.

Rental of unfit housing, *Allen v. Simmons*, 636.

Sale of residence at public auction, *Bhatti v. Buckland*, 750.

Water accumulation under house, *Rucker v. Huffman*, 137.

UNINSURED MOTORIST COVERAGE

Judgment against John Doe, *Sparks v. Nationwide Mutual Ins. Co.*, 148.

VENUE

Action involving lease, *Snow v. Yates*, 317.

WATER AND SEWER FRANCHISES

Transfer of, *State ex rel. Utilities Comm. v. Village of Pinehurst*, 224.

WORKERS' COMPENSATION

Attorney's fee awarded for defense without reasonable grounds, *Beam v. Floyd's Creek Baptist Church*, 767.

Insurance benefits reduced by, *Ohio Casualty Group v. Owens*, 131.

WORKERS' COMPENSATION—Continued

Jurisdiction, *Cook v. Norvell-Mackorell Real Estate Co.*, 307.

No change of circumstances, *Wall v. N.C. Dept. of Human Resources*, 330.

Refusal to have surgery, *Watkins v. City of Asheville*, 302.

Scallop shucker, *Spencer v. Johnson & Johnson Seafood*, 510.

Statutory employer, *Cook v. Norvell-Mackorell Real Estate Co.*, 307.

WRONGFUL DEATH

Compensatory and punitive damages separate issues, *Jones v. McCaskill*, 764.

WRONGFUL DISCHARGE

Employment at will, *Kearney v. County of Durham*, 349.

ZONING

Challenge barred by statute of limitations, *Mahaffey v. Forsyth County*, 676.

Variance for privacy fence, *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 702.

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