NORTH CAROLINA REPORTS

VOLUME 300

SUPREME COURT OF NORTH CAROLINA

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TABLE OF CONTENTS

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

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J. FRANK HUSKINS
J. WILLIAM COPELAND
JAMES G. EXUM, JR.
DAVID M. BRITT
J. PHIL CARLTON
LOUIS B. MEYER[1]

Retired Chief Justices

WILLIAM H. BOBBITT
SUSIE SHARP

Retired Justices

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CARLISLE W. HIGGINS[2]
I. BEVERLY LAKE
DAN K. MOORE
WALTER E. BROCK[3]

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SHERRY M. COCHRAN

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1. Appointed Associate Justice by Gov. James B. Hunt, Jr., and took office 9 January 1981.
2. Deceased 9 October 1980.
3. Retired 1 December 1980.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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12	E. MAURICE BRASWELL	Fayetteville
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	COY E. BREWER, JR.	Fayetteville
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14	THOMAS H. LEE	Durham
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	JOHN C. MARTIN	Durham
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15B	F. GORDON BATTLE	Chapel Hill
16	HENRY A. MCKINNON, JR.[2]	Lumberton

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	JAMES C. DAVIS	Concord
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20	F. FETZER MILLS	Wadesboro
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21	WILLIAM Z. WOOD	Winston-Salem
	HARVEY A. LUPTON[3]	Winston-Salem

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	ROBERT E. GAINES	Gastonia
27B	JOHN R. FRIDAY	Lincolnton
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	HOLLIS M. OWENS, JR.	Rutherfordton
30	LACY H. THORNBURG	Webster

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PRESTON CORNELIUS	Troutman
WILLIAM H. FREEMAN[7]	Winston-Salem
CHARLES WINBERRY[8]	Nashville

EMERGENCY JUDGES

ALBERT W. COWPER	Wilson
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HENRY A. MCKINNON, JR.	Lumberton

1. Retired 31 December 1980 and succeeded by Wiley F. Bowen, Dunn, N. C., 16 January 1981.
2. Retired 31 October 1980 and constituted Emergency Judge on that date.
3. Retired 31 December 1980.
4. Retired 31 October 1980.
5. Appointed Resident Judge, Sixteenth District, 21 November 1980.
6. Appointed Resident Judge, Twenty-first District, 1 January 1981.
7. Appointed 1 December 1980.
8. Appointed 19 December 1980.

DISTRICT COURT DIVISION

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	SAMUEL L. OSBORNE	Wilkesboro
	JOHN T. KILBY	Jefferson
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EMERGENCY JUDGE

P. B. BEACHUM, JR.	Charlotte

1. Appointed 16 January 1981 to succeed Charles H. Manning who retired 31 December 1980.
2. Appointed Chief Judge 1 December 1980.
3. Elected 4 November 1980 and took office 1 December 1980 to succeed Charles H. Whedbee who retired 30 November 1980.
4. Elected 4 November 1980 and took office 1 December 1980 to succeed Joseph E. Setzer, Jr. whose term expired 30 November 1980.
5. Appointed Chief Judge 1 December 1980.
6. Elected 4 November 1980 and took office 1 December 1980 to succeed Frank T. Grady whose term expired 30 November 1980.
7. Appointed 1 October 1980 to succeed Thomas D. Cooper, Jr. who died 1 August 1980.
8. Elected 4 November 1980 and took office 1 December 1980 to succeed James Samuel Pfaff whose term expired 30 November 1980.
9. Elected 4 November 1980 and took office 1 December 1980 to succeed John B. Hatfield, Jr. whose term expired 30 November 1980.
10. Elected 4 November 1980 and took office 1 December 1980 to succeed Joseph Andrew Williams whose term expired 30 November 1980.
11. Elected 4 November 1980 and took office 1 December 1980 to succeed Frank Allen Campbell whose term expired 30 November 1980.
12. Appointed 1 December 1980 to succeed William H. Heafner who resigned 30 November 1980.
13. Appointed 1 December 1980 to succeed William H. Freeman who was appointed Special Judge, Superior Court, 1 December 1980.
14. Appointed Chief Judge 1 December 1980.
15. Elected 4 November 1980 and took office 1 December 1980 to succeed J. Ray Braswell whose term expired 30 November 1980.

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29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

PETITIONS TO REHEAR

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 23rd day of August, 1980, and said persons have been issued certificates of this Board:

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KERRY ANTHONY FRIEDMAN ..... Asheville
KIM WILLARD GALLIMORE ..... High Point
DAVID M. GANLY ..... Hillsborough
STEVEN CHARLES GARLAND ..... Winston-Salem
DEBRA HELMS GASKINS ..... Washington
GARY MARSHALL GAVENUS ..... Winston-Salem

ANTHONY WILTON GAY ..... Zebulon
JANE ELIZABETH KEIGER GEHRING ..... Walnut Cove
JAMES DAVIS GILLESPIE ..... Hamptonville
GILDA FRISHBERG GLAZER ..... Charlotte
PHILIP PITTMAN GODWIN, JR. ..... Gatesville
ANN RANDOLPH GOODMAN ..... Hickory
MARC RICHARD GORDON ..... Carrboro
TIMOTHY WILLIAMS GRIFFIN ..... Raleigh
ROBERT CURTIS GUNST ..... Pittsburgh, PA
RODNEY ALVIN GUTHRIE ..... Winston-Salem
PEYTON THOMAS HAIRSTON, JR. ..... Winston-Salem
PAMELA SUE HALL ..... Fayetteville
LETITIA D. HAMILL ..... Raleigh
JAMES ARTHUR HANEY ..... Burlington
STEWART ELLIS HANKINS ..... Wilmington
ANN WOOD HARDY ..... Chapel Hill
DAVID L. HARRIS ..... Elon College
JACOB ANDREW HARTSFIELD IV ..... Wake Forest
FRED ROBINSON HARWELL, JR. ..... Raleigh
EDMUND BURKE HAYWOOD ..... Raleigh
JOHN L. HAZLEHURST ..... Asheville
JOHN RICHARD HAZLETT ..... Fayetteville
REBECCA THOMPSON HELTON ..... Winston-Salem
THOMAS BARNES HENSON ..... Ethridge, TN
LEON EDWARD HICKMON ..... Wilmington
SUE BAYLOR HICKS ..... Fayetteville
THOMAS STEPHEN HICKS ..... Winston-Salem
EMILY KATE HIGHTOWER ..... Jefferson
DAVID A. HOLEC ..... Winston-Salem
KATHERINE S. HOLLIDAY ..... Charlotte
JAMES CRAIG HOLLOWAY ..... Green Bay, WI
PHILLIP ANTHONY HOLMES ..... Henderson
FELIX THOMAS HOLT III ..... Fayetteville
DEWEY JACK HOOKS, JR. ..... Whiteville
JAMES WADE HOVIS ..... Bessemer City
CHARLES F. HOWARD ..... Fayetteville
LINDA SHERYL HOWELL ..... Goldsboro
CHRISTOPHER ANDREWS HUDSON ..... Chapel Hill
DONALD CLAYTON HUDSON ..... Falcon
STAPLES STILWELL HUGHES ..... Durham
ROBERT HARRISON HULL, JR. ..... Charlotte
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MITCHELL S. HURWITZ ..... Carrboro
JANET MARLENE HYATT ..... Waynesville
KENNETH FRANK IREK ..... Buies Creek
HORACE BRYAN IVES III ..... Carrboro
SUSAN VAN DYKE JACKSON ..... Pittsburgh, PA
EVELYN B. JACOBS ..... Durham
CAROLYN BOWEN JAMESON ..... Chapel Hill
ROXANNE S. JANSEN ..... Durham

MARILYN L. JARRELL ..... Carrboro
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JOEL SNYDER JENKINS, JR. ..... Fayetteville
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HAROLD L. JOHNSON, JR. ..... Chapel Hill
DONN ALLAN JOHNSTON ..... Greensboro
CHARLES ARTHUR JONES ..... Greensboro
DAVID HAROLD JONES ..... Cunningham, TN
WILLIAM HUGH JONES, JR. ..... Winton
V. THOMAS JORDAN, JR. ..... Durham
ERNEST HAYES JOSEPHS, JR. ..... Buies Creek
THOMAS BRIAN KAKASSY ..... Gastonia
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JOHN WILLIAM KING, JR. ..... Louisburg
DOUGLAS EVERETTE KINGSBERY ..... Durham
BRUCE E. KINNAMAN ..... Sanford
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JOE THOMAS KNOTT III ..... Knightdale
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JOHN HADLEY KORNEGAY ..... Greensboro
ELIZABETH FAIRBANK KUNIHOLM ..... Durham
GREGORY LIPPOTT KUNKLEMAN ..... Matthews
CHRISTOPHER CHARLES KUPEC ..... Durham
STEVEN ROBERT LACY ..... Winston-Salem
B. JACQUELINE LAMBERT ..... Calypso
JOHN WELLS LASSITER ..... Cary
DANIEL RICHARD LAUFFER ..... Greenville
LYNN LLOYD LAUGHLIN ..... Greensboro
GEORGE VERNON LAUGHRUN II ..... Charlotte
JAMES WALTER LEA III ..... Ahoskie
KEVIN MARTIN LEAHY ..... Carrboro
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MARY JILL LEDFORD ..... Charlotte
CARL DOUGLAS LEE ..... New Bern
MARY ELIZABETH LEE ..... Burgaw
RANDOLPH MARSHALL LEE ..... Charlotte
JUDITH ELLEN LEONARD ..... Chapel Hill
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WILLIAM FREDERICK LIPSCOMB ..... Winston-Salem

JANE PICKELMANN LONG ..... Durham
JOE O'NEAL LONG ..... Robbinsville
PHYLLIS WILLETTS LONG ..... Lexington, VA
ROBERT WAYNE LONG ..... Durham
THOMAS W. LONG ..... Pompano Beach, FL
ELIZABETH SHELDON LOVE ..... Monroe
MARK THOMAS LOWE ..... Wadesboro
ROBERT DOUGHTON LYERLY, JR. ..... Salisbury
WM. GREGORY MCCALL ..... Macon, GA
JULIA CAROL MCDONALD ..... Carrboro
KAREN LYNN MCDONALD ..... Durham
WILLIAM DRUMMOND MCDOWALL, JR. ..... Asheville
LAWRENCE UPCHURCH MCGEE ..... Winston-Salem
BRENDA FORD MCGHEE ..... Durham
TERRI TOTH MCKEE ..... Lillington
GERALD R. MCKINNEY ..... Linville Falls
ANTHONY C. MCLAUGHLIN ..... River Edge, NJ
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KATHRINE AYCOCK MCLENDON ..... Chapel Hill
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GAYL M. MANTHEI ..... Pleasant Prairie, WI
JOHN WARREN MARIN ..... Durham
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LORRAINE HATCHER MEANS ..... Fayetteville
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WILLIAM L. MILLS III ..... Concord
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CHARLES EDWIN MONTEITH, JR. ..... Chapel Hill
EDWARD GRANT MOORE ..... Monroe
MICHAEL DOUGLAS MOORE ..... Charlotte
RONALD LEE MOORE ..... Asheville
DAVID ROBERT MOOSE ..... Newton
MARK RICHARD MORANO ..... Durham
MICHAEL RIVERS MORGAN ..... Raleigh
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EUGENE TAYLOR MORRIS, JR. ..... Lexington
SAMUEL JOSEPH MORRIS III ..... Jacksonville
CAROL ANNETTE MORRISON ..... Fayetteville
ELIZABETH RANDALL MORROW ..... Charlotte
ALLEN CLAUD MOSELEY ..... Winston-Salem
HENRY EDWARD MOSS ..... Durham
RICHARD ANTHONY MU ..... Winston-Salem
ERNIE KEITH MURRAY ..... Winston-Salem
JAMES ARTHUR NELSON, JR. ..... Bethel

PAUL MARTIN NEWBY ..... Jamestown
LOU ANN NEWMAN ..... Apex
ROBERT NIEGELSKY ..... Reidsville
HUGH DAVIS NORTH III ..... High Point
ISAAC NOYES NORTHUP, JR. ..... Chapel Hill
RODERICK W. O'DONOGHUE, JR. ..... Raleigh
MICHAEL GRIFFIN OKUN ..... Carrboro
NANCY CAROL OSBORNE ..... Elkin
DANIEL E. O'TOOLE ..... Winston-Salem
NEIL MATTHEW O'TOOLE ..... Cape Coral, FL
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DAVID RANDOLPH PALETTA ..... Durham
JESSICA LOUISE PARKS ..... Knoxville, TN
CORNELIUS THEODORE PARTRICK, JR. ..... Washington
RONALD STEPHEN PATTERSON ..... Raleigh
STAFFORD ALLEN PATTERSON II ..... Buies Creek
TIMOTHY LEE PATTI ..... Gastonia
CYNTHIA LOUISE PAULEY ..... Winston-Salem
PENNI LEIGH PEARSON ..... Chapel Hill
SUEANNA PYATT PEELER ..... Salisbury
JAMES STOCKTON PERRY ..... Kinston
ALICE MARIE PETTEY ..... Chapel Hill
WILLIAM WALT PETTIT ..... Charlotte
RANDEL EUGENE PHILLIPS ..... Charlotte
THELMA DIANE PHILLIPS ..... Goldsboro
RACHEL PICKARD ..... Carrboro
JOSEPH GREGORY PIEMONT ..... Charlotte
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DANIEL RUTLEDGE POLLITT ..... Chapel Hill
RICHARD CHENOWETH POOLE ..... Salisbury, MD
MARK NIXON POOVEY ..... Morganton
JANE HARPER PORTER ..... Charlotte
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MARK JAY PRAK ..... Durham
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ROBERT ERNEST PRICE ..... Clemmons
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JACQUELINE WILLIAMS QUICK ..... Greensboro
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STEPHEN MARK RABIL ..... Clemmons
ROBERT KIRK RANDLEMAN ..... Jonesville
GISELE LUNSFORD RANKIN ..... Chapel Hill
KAREN ANN RASCHKE ..... Winston-Salem
PATRICIA A. REUSING ..... Asheville
CHRISTINE PETERJOHN RICHARDS ..... Durham
WILLIAM O. RICHARDSON ..... Buies Creek
FRITZ RICHTER III ..... Winston-Salem

JUDITH ANN ROBB ..... Raleigh
LARRY EDWARD ROBBINS ..... Raleigh
JUDSON WINSTON ROBERTS ..... Lewisville
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STANLEY LEIGH RODENBOUGH IV ..... Madison
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SELWYN ROSE ..... Winston-Salem
SARAH PRATT ROSS ..... Chapel Hill
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CORINNE GRIFFIN RUSSELL ..... Columbia, SC
SAMUEL REID RUSSELL III ..... Wilmington, DE
STEPHEN MCDANIEL RUSSELL ..... Winston-Salem
MARC LAWRENCE SANDMAN ..... Asheville
ELIZABETH GARLAND SARN ..... Gastonia
JOHN GALES SAULS ..... Raleigh
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PAULA S. SCHAEFFER ..... New Hartford, NY
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DOUGLAS STUART SEA ..... Chapel Hill
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RANDOLPH ALONZO SIGLEY ..... Buies Creek
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WALTER MARSHALL SMITH ..... Wilmington
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WILLIAM N. STRANDBERG ..... Greensboro
J. WILLIAM STRICKLAND ..... Chapel Hill

FRANCIS WILLIAM STURGES ..... Charlottesville, VA
KIP D. STURGIS ..... Durham
DAVID ALLEN SWANSON ..... Lenoir
JAN LEIGH SWANSON ..... Raleigh
EDGAR MELVIN SWINDELL ..... New Bern
ALLAN R. TARLETON ..... Raleigh
JOHN EDWARD TATE, JR. ..... Chapel Hill
DONALD RAY TEETER ..... Fayetteville
PHILIP ANDREW TELFER ..... Durham
JULIANN TENNEY ..... Chapel Hill
CATHERINE ELIZABETH THOMPSON ..... Southern Pines
SANFORD WEBB THOMPSON IV ..... Raleigh
JAMES ALLEN TIDDY ..... Gastonia
AIMEE ANN TOTH ..... Statesville
JERRY MORGAN TOWNSON ..... Lillington
JEANNE CELESTE TRAHAN ..... Washington, DC
WILLIAM HOLT TROTMAN ..... Jamestown
MARLA TUGWELL ..... Farmville
AUGUSTA BERNADETTE TURNER ..... Raleigh
JOHN MARSH TYSON ..... Fayetteville
SUSAN MORRISON UMSTEAD ..... Buies Creek
STEPHEN MAY VALENTINE ..... Nashville
DONNELL VAN NOPPEN III ..... Morganton
MARC VAN NUYS ..... Winston-Salem
NANCY LYNN VAN VLEET ..... Durham
ERIC A. VERNON ..... Garner
BERYL ELAINE WADE ..... Washington, DC
TANYA TERRY WALLACE ..... Chapel Hill
STEPHEN WILLIAM WARD ..... Charlotte
G. DOUGLAS WEBB ..... Chapel Hill
STEVENSON LEE WEEKS ..... Morehead City
MICHAEL LLOYD WEISEL ..... Buies Creek
ROBERT M. WEISENFELD ..... Charlotte
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THOMAS ROSWELL WEST ..... Raleigh
JAMES BLOCK WHELESS, JR. ..... Louisburg
CHARLES LEROY WHITE II ..... Winston-Salem
WILEY DAVID WHITE ..... Mt. Airy
ANDREW O. WHITEMAN ..... Columbus, OH
MICHAEL EUGENE WILLIAMS ..... Elizabeth City
CARLTON FORREST WILLIAMSON ..... Whiteville
MARVIN ALLEN WILSON ..... Granite Falls
STEPHANI CEIL WILSON ..... Carrboro
WILLIAM THOMAS WILSON III ..... Winston-Salem
MELANIE A. WOOD ..... Greensboro
S. KYLE WOOSLEY ..... Greensboro
BENJAMIN LEE WRIGHT ..... Roseboro

N. HUNTER WYCHE, JR. ..... Buies Creek
STEPHEN BRENT YOUNT ..... Southport
JEFFREY LEE ZIMMER ..... Wilmington

Given under my hand and seal, this the 24th day of October 1980.

FRED P. PARKER III
Executive Secretary
The Board of Law Examiners of
The State of North Carolina

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons were duly admitted to the practice of law in the State of North Carolina, having successfully passed the North Carolina Bar Examination:

On October 16, 1980, the following individuals were admitted:

GARLAND BROADDUS KINCHELOE, JR. ..... Raleigh
ARTHUR REXFORD WILLIS III ..... Raleigh

On October 6, 1980, the following individuals were admitted to the practice of law in the State of North Carolina by comity:

ALBERT M. BRONSON ..... Wilson, applied from Texas
JOHN W. GARLAND ..... Ahoskie, applied from District of Columbia
WILLIAM P. KELLY ..... West End, applied from Pennsylvania
FREDERICK SIMON LUTZ ..... High Point, applied from Oklahoma
CHARLES BUCHANAN MARKHAM ..... Durham, applied from District of Columbia
STANLEY B. SPRAGUE ..... Greensboro, applied from Massachusetts

Given under my hand and seal this the 24 day of October, 1980.

FRED P. PARKER III
Executive Secretary

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named person was duly admitted to the practice of law in the State of North Carolina, having successfully passed the North Carolina Bar Examination:

On November 21, 1980, the following individual was admitted:

PETER JOSEPH SPECKMAN, JR. ..... Winston-Salem

On November 21, 1980, the following individuals were admitted to the practice of law in the State of North Carolina by comity:

GEORGE DALTON DOVE ..... Morehad City, applied from the State of Ohio
RAY ALBERT SPILIMAN ..... Charlotte, applied from the State of New York, 1st Dept.

Given under my hand and seal this the 22nd day of December, 1980.

FRED P. PARKER III
Executive Secretary

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1980

STATE OF NORTH CAROLINA v. JAMES FREDERICK FRANKS, JR.

No. 51

(Filed 6 May 1980)

1. **Criminal Law § 63— mental capacity of defendant—examination by non-treating psychiatrist—expert testimony based on personal knowledge**

A psychiatrist could properly give an opinion based on personal knowledge that defendant knew the difference between right and wrong and the nature and quality of his acts at the time of a murder, although the psychiatrist was not treating defendant in an effort to cure him but observed, evaluated and diagnosed defendant to prepare himself to testify at defendant's trial, where the psychiatrist conducted thorough and professional examinations of defendant and took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations which accompanied it. Furthermore, since the opinion was admissible, the psychiatrist could properly testify concerning the content of his conversations with defendant in order to show the basis for his diagnosis.

2. **Criminal Law § 63— mental capacity of defendant—expert qualified to base opinion on personal knowledge—use of hypothetical question**

Defendant could ask an expert witness a hypothetical question concerning whether defendant had a mental disease or defect even though the witness had personally examined defendant so that he was qualified to give an opinion based on his personal knowledge.

3. **Criminal Law § 63— mental capacity of defendant—prior attitudes and acts—remoteness**

The trial court did not err in refusing to permit the forty-seven year old defendant to introduce testimony by his mother and sister regarding his

childhood attitudes, his school attendance, his father's drinking problems, and an episode when defendant was thirty years old when he cut his wrists with a razor blade, since the excluded testimony was too remote to have any relevance to defendant's mental condition at the time of the murder in question.

4. **Criminal Law § 87.4— exclusion of repetitious testimony on redirect**

The trial court did not err in refusing to permit an expert witness to restate on redirect examination his opinion regarding defendant's mental illness where the testimony was merely repetitious and did not clarify testimony which had been cast into doubt on cross-examination, clarify new matter brought out on cross-examination, or refute testimony elicited on cross-examination.

5. **Criminal Law § 96— allowing motions to strike—instruction to disregard stricken evidence given at first of trial**

Defendant was not prejudiced because the jury heard testimony which was stricken by the court upon motions by defendant where the court instructed the jury at the beginning of the trial not to consider the answer of a witness when a motion to strike was allowed and referred to this instruction when the motions to strike were allowed, although the better procedure is to give the instruction to disregard the answer immediately after allowing the motion to strike.

6. **Criminal Law § 63— mental capacity of defendant—exclusion of expert testimony—error favorable to defendant**

A psychiatrist should have been allowed to state an opinion based on his personal knowledge obtained as a result of his examinations of and conversations with defendant as to whether defendant knew the difference between right and wrong or understood the nature and quality of his acts on the date of a murder, but the trial court's refusal on at least twenty-five occasions to permit the psychiatrist to state his opinion constituted error favorable to defendant.

7. **Criminal Law § 50— expert testimony—necessity for stating basis of opinion**

The general rule is that when the facts are within an expert's personal knowledge, he may relate them first and then give his opinion or, in the discretion of the judge, he may give his opinion first and leave the facts to be brought out on cross-examination.

8. **Criminal Law § 50— expert's testimony as to relevant facts**

Relevant facts may be testified to by an expert even if ultimately the expert is not allowed to state his opinion or conclusion concerning those facts.

9. **Criminal Law § 53— expert medical testimony—conversations with patient**

A medical expert should not recount the content of conversations with a patient to show the basis for his opinion unless his opinion is admissible into evidence, since the content of those conversations is not substantive evidence and is admissible only to show the basis for the expert's opinion.

10. Criminal Law § 53— expert medical opinion based on conversations with patient—determining admissibility of conversations

Where a medical expert's opinion is based in part on conversations with the patient, (1) the expert may testify as to the background facts other than the content of conversations and then give his opinion, if admissible, followed by his testimony as to the content of the conversations on which his opinion was based, or (2) the trial judge may conduct a *voir dire* hearing and rule on the admissibility of the opinion, and if the opinion is ruled inadmissible and the only justification for admitting the conversations is to show the basis for the opinion, the content of the conversations is inadmissible.

11. Criminal Law § 53— medical expert—opinion excluded—admission of conversations with patient—harmless error

While it was error for the court to permit a psychiatrist to testify as to conversations with defendant during his examination of defendant since the court excluded the psychiatrist's opinion on defendant's mental capacity at the time of the crime, such error was not prejudicial to defendant where substantially the same information came into evidence when defendant testified in his own behalf and when his confession was admitted into evidence.

12. Criminal Law § 75.9— volunteered confession—admissibility

Defendant's confession was properly admitted in a murder trial where the evidence supported findings by the court that defendant was advised of his *Miranda* rights on a trip from Maryland to North Carolina, signed a written waiver of rights form, but did not implicate himself in the murder in response to questioning; the questioning then stopped; three to five hours later defendant initiated the conversation in which he admitted that he strangled the victim; and defendant's confession was not the result of interrogation but was volunteered and spontaneous.

13. Criminal Law § 5.1— jury argument concerning defense of insanity—no impropriety

The prosecutor's jury argument to the effect that a finding that defendant has a mental illness does not alone make out the defense of insanity but that the defense is not complete unless defendant did not know the difference between right and wrong or did not know the nature and quality of his acts was proper and did not violate a pretrial order prohibiting the prosecutor from referring to the fact that defendant would not be incarcerated if he was found not guilty by reason of insanity at the time of the crime but was found to be sane at the time of the trial.

14. Criminal Law § 112.6— instructions—burden of proof of insanity—failure to define "satisfaction"

The trial court was not required to define "satisfaction" as requested by defendant after instructing that defendant had the burden of proving insanity to the satisfaction of the jury.

15. Criminal Law § 112.6— effect of mental disease on criminal intent—failure to give requested instructions

The trial court, in instructing on the defense of insanity in a first degree murder case, did not commit prejudicial error in refusing to give defendant's

requested instruction that "criminal intent . . . is an essential element of murder, and if by reason of mental disease a person is incapable of forming any intent, he cannot be regarded by the law as guilty," since (1) if "criminal intent" in the requested instruction referred to a specific intent to kill, failure to so instruct was not prejudicial to defendant because the theory of diminished mental responsibility has not been adopted in this State and because the jury, by its verdict finding defendant guilty of first degree murder, found that defendant had the mental capacity to know right from wrong and thus that he had the lesser included mental capacity to form a specific intent to kill; and (2) if "criminal intent" referred to a general intent to perform the act constituting murder, the insanity instruction as given fully explained to the jury that defendant was not guilty of any offense if he did not have the intent to commit the act constituting murder.

APPEAL by defendant from *Smith (Donald J.), S.J.* at the 16 July 1979 extended Special Criminal Session of WAKE County Superior Court.

Defendant was charged in an indictment, proper in form, with first degree murder in the death of Mary Poole Hamer. The State's evidence tended to show that in January, 1979, the defendant, an alcoholic, was attending the Wake County Alcoholic Treatment Center. There, he met Mary Hamer. When they both were discharged from the Center, she invited him to move in with her until he could find a permanent place to stay.

Defendant stated in his confession which was offered into evidence that on Thursday, 9 February 1979, he bought a pint of vodka and returned to the deceased's house. He took a drink from the bottle and she saw him. She said that she had been "dying for a drink" and she took a glass and went into the living room. Defendant did not see whether or not she took a drink. She returned to the kitchen, placed defendant's dinner before him at the table, and went over to the sink to wash dishes. Defendant further stated in his confession:

> ". . . Suddenly something came to me and something said to me to choke her. I know you think I'm lying but there was no argument or no words whatever between us. I got up and walked over to the sink, took a towel from the counter that she had been using. I wrapped the towel around her neck. When she faced me and I twisted it tight the only thing she said was please James, don't do this to me. Everything was hazy and then I turned her loose. She fell to the floor. I just don't know what happened to me."

Afterwards, defendant packed his clothes, took the deceased's money, her credit cards, and her car and headed for Baltimore, Maryland.

Neighbors became concerned when Mary Hamer did not answer her door or her telephone on 8 or 9 February 1979. On the morning of 10 February 1979, they discovered that the front door of her home was unlocked. The police were notified and they found the deceased's body in the kitchen of her home. Dr. Kaasa, a specialist in Pathology on the staff of Wake County Medical Center, performed the autopsy and testified that deceased "came by her death by asphyxiation by strangulation."

On 9 February 1979, defendant was arrested in Warren County for driving under the influence of intoxicating liquor. He was released the next morning and was arrested later that day near Dumfries, Virginia for public intoxication. The next day he was arrested near Perryville, Maryland for driving under the influence of intoxicating liquor. Defendant was searched and credit cards belonging to Mary Hamer were found in his possession.

North Carolina authorities were notified. Defendant waived extradition and was transported from Maryland to Raleigh, North Carolina. During the trip he was advised of his rights and he signed a waiver of rights form. He told the police officers he was willing to talk. At first he stated that Mary Hamer had given him her car and that he did not know anything about her death. Three to five hours later, he initiated a conversation with the officers in which he confessed that he strangled Miss Hamer and stated that he knew it was wrong to do so. This confession was not recorded because the police officer was driving the car and it was nighttime. When they arrived in Raleigh defendant was again read his rights and he signed a waiver of rights form. He confessed that he strangled Mary Hamer. The confession was written down, defendant read over it, made corrections, and signed it.

Defendant testified in his own behalf. He admitted that he strangled Mary Hamer but stated that he does not know why he did it. He testified that, "I didn't know what I was doing. I'm satisfied I didn't know because if I did I wouldn't a killed the woman." He further testified that, "something just told me to do it and I just got up and choked her."

Dr. Harper, a psychiatrist, testified that his review of defendant's medical history revealed that "he has been in and out of the hospitals and institutions since he was fifteen. He has been twelve times at Dorothea Dix and he has been hospitalized at about six other hospitals." Dr. Harper examined the defendant on three occasions and found him "to be very upset and felt that he showed to me the appearance of a person suffering from mental illness, in that he was disturbed, suspicious and depressed." He testified that defendant had described auditory hallucinations to him. In response to a hypothetical question, Dr. Harper stated that in his opinion defendant "suffered then, as he does now, from chronic undifferentiated schizophrenia." On cross-examination he stated that in his opinion the defendant did know the difference between right and wrong and did understand the nature and quality of his acts with reference to the death of Mary Hamer.

The jury found defendant guilty of first degree murder. At the sentencing phase, the jury found no aggravating circumstances and recommended life imprisonment. The trial judge imposed that sentence and defendant appealed to this Court.

Other facts necessary to the decision of this case will be related in the opinion.

C. Diederich Heidgerd for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Richard L. Griffin for the State.

COPELAND, Justice.

[1] On cross-examination, Dr. Harper testified that in his opinion, based on his observations of and conversations with the defendant, defendant knew the difference between right and wrong and knew the nature and quality of his acts. Defendant maintains in his first assignment of error that Dr. Harper was not treating the defendant in an effort to cure him. At this time, he was merely observing, evaluating and diagnosing the defendant to prepare himself to testify at defendant's trial. Defendant argues that our decisions in *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979) and *State v. Bock*, 288 N.C. 145, 217 S.E. 2d 513 (1975), *death sentence vacated*, 428 U.S. 903 (1976), hold that such a non-treating physician cannot state his opinion based upon personal knowledge but may only respond to a hypothetical question.

Defendant's reading of *Wade* and *Bock* is completely erroneous. The rule is that when the facts upon which the expert bases his opinion " 'are all within the expert's own knowledge, he may relate them himself and give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination. . . .' " *State v. Abernathy,* 295 N.C. 147, 162, 244 S.E. 2d 373, 383 (1978), *quoting* 1 Stansbury, N.C. Evidence § 136, p. 446 (Brandis rev. 1973); *State v. Hunt,* 297 N.C. 258, 262, 254 S.E. 2d 591, 595 (1979); *State v. Hightower,* 187 N.C. 300, 121 S.E. 616 (1924).

In *State v. DeGregory,* 285 N.C. 122, 203 S.E. 2d 794 (1974), we held that it was proper to allow Dr. Robert Rollins of Dorothea Dix Hospital, whom the trial judge had ordered to examine the defendant, to give his opinion of defendant's mental capacity based on his personal examination and interview of the defendant, "and any other information contained in his official record. . . ." *Id.* at 131, 203 S.E. 2d at 800. Dr. Rollins specifically stated in his testimony quoted by this Court in *DeGregory* that, "I was not *treating* Mr. DeGregory. I was just *diagnosing*. . . ." *Id.* at 131, 203 S.E. 2d at 801 [Emphasis added.] It was further explained in *DeGregory* that the expert may have personal knowledge of some facts even though he did not personally make the observations in order to gather those facts.

> " 'With the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the courtroom.' " *Id.* at 134, 203 S.E. 2d at 802, *quoting Birdsell v. United States,* 346 F. 2d 775, 779-80 (5th Cir.), *cert. denied,* 382 U.S. 963 (1965).

The specific issue in *Wade* and *Bock* was whether the expert could give his opinion *based upon his personal knowledge when that knowledge came from and his opinion was based upon (in whole or in part) conversations with the patient.* The rule was stated and applied in *Bock* as follows:

> " 'Where an expert witness testifies as to the facts based upon his personal knowledge, he may testify directly as to his opinion. Generally, however, an expert witness can-

not base his opinion on hearsay evidence. . . .' *Cogdill v. Highway Commission* and *Westfeldt v. Highway Commission*, 279 N.C. 313, 326, 182 S.E. 2d 373, 381 (1971). The opinion of a physician, however, is not ordinarily rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, *if those statements are made in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. Penland v. Coal Co.*, 246 N.C. 26, 31, 97 S.E. 2d 432, 436 (1957). *See* 1 Stansbury's North Carolina Evidence § 136 (Brandis Rev., 1973). In such a situation it is reasonable to assume that the information which the patient gives the doctor will be the truth, for self-interest requires it. Here, however, Dr. Smith [who testified for the defendant] did not examine defendant for the purpose of treating him as a patient, but for the purpose of testifying as a witness for defendant in this case in which he is charged with first-degree murder. The motive which ordinarily prompts a patient to tell his physician the truth is absent here. The evidence was therefore incompetent and properly excluded." *State v. Bock*, *supra* at 162-63, 217 S.E. 2d at 524. [Emphasis in original.]

In *Wade*, the expert was Dr. Maloney to whom the defendant had been referred for treatment by Dorothea Dix Hospital. The general rule that an expert may give an opinion based on facts within his personal knowledge without resort to a hypothetical question was noted. Then, it was stated that "[p]roblems arise . . . when a physician's opinion is derived in whole or in part through information received from another . . . because of a second rule . . . that . . . 'an expert witness cannot base his opinion on hearsay evidence.' *Cogdill v. Highway Commission*, 279 N.C. 313, 327, 182 S.E. 2d 373, 381 (1971);" *State v. Wade*, *supra* at 458, 251 S.E. 2d at 409.

The Court noted, from a thorough analysis of the major cases on this issue, that a common element in our cases is the requirement that in order for the expert to be able to give an opinion based on his personal knowledge when that includes information supplied to the physician by others, including the patient, the information must be inherently reliable even though it is not independently admissible into evidence. When the opinion is ad-

missible the expert may testify to the information he relied on in forming the opinion, not for substantive purposes, but for the purpose of showing the basis of the opinion. *State v. Wade, supra.* Thus stated, it can be seen that *Bock* is but a more specific statement and application of the broader reliability requirement set forth in *Wade.*

In *Wade*, there were two indicia of reliability to support the admission of Dr. Maloney's opinion: defendant was sent to him as a patient for treatment and a sufficient indication of reliability was found in the nature of Dr. Maloney's entire examination. The nature of the examination was explained as follows:

> "The examination . . . was a thorough, carefully designed attempt to gain an understanding of defendant's state of mind. Dr. Maloney did not rely for his conclusions on any one statement by defendant or on any particular fact he disclosed. Instead he took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it. . . . Conversation, and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind. *When it is conducted with the professional safeguards present here, it provides a sufficient basis for the introduction of an expert diagnosis into evidence.*" *Id.* at 463, 251 S.E. 2d at 412. [Emphasis added.]

Dr. Harper was not a treating physician but he conducted thorough and professional examinations of the defendant. He took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it. Thus, his opinion was properly admitted into evidence. *State v. Wade, supra.* Since the opinion was admissible, it was proper for him to testify concerning the content of his conversations with defendant in order to show the basis for his diagnosis. *Id.* This assignment of error is overruled.

[3] Prior to putting Dr. Harper on the witness stand, defendant sought to introduce testimony from his sister and mother regarding his childhood attitudes, school attendance, his father's drinking problem, and an episode when defendant was thirty years old when he cut his wrists with a razor blade. (Defendant was age

forty-seven at the time of Mary Hamer's death.) Defendant attempted to get this testimony in as foundation testimony upon which to ask a hypothetical question of Dr. Harper concerning his diagnosis of defendant's mental illness.

The trial judge refused to allow the testimony to be given. He explained that, "I think that if you were to get Dr. Harper's opinion in then you could go into how he reached that opinion; but I think you're going at it backwards. . . . I think you can go into it to explain the opinion that he is insane." This constitutes defendant's fifth assignment of error.

[2] Defendant did not desire to elicit Dr. Harper's opinion on insanity. He wanted to ask Dr. Harper a hypothetical question concerning whether defendant had a mental disease or defect. In this State,

> " '[a]n accused is legally insane and exempt from criminal responsibility by reason thereof if he commits an act which would otherwise be punishable as a crime, and at the time of so doing is laboring under such a defect of reason, from disease of the mind, as to be incapable of knowing the nature and quality of the act he is doing, or, if he does know this, incapable of distinguishing between right and wrong in relation to such act.' " *State v. Potter*, 285 N.C. 238, 249, 204 S.E. 2d 649, 656 (1974), *quoting State v. Swink*, 229 N.C. 123, 125, 47 S.E. 2d 852, 853 (1948).

Establishing that defendant had a mental disease or defect at the time of the commission of the crime is thus a relevant link in defendant's chain of evidence, *see, State v. Vernon*, 208 N.C. 340, 180 S.E. 590 (1935), though standing alone it is not sufficient to completely make out the defense of insanity. *State v. Potter, supra.*

Furthermore, even though Dr. Harper had personally examined the defendant so that, as we have held above, he was qualified to give an opinion based on his personal knowledge, defendant nevertheless should not have been precluded from asking a hypothetical question if that is the manner in which he wanted to elicit this testimony. 31 Am. Jur. 2d, *Expert and Opinion Evidence* § 37 (1967) and cases cited therein. (Of course, the reverse is not true. An expert with personal knowledge may base

his opinion on that knowledge without the use of a hypothetical question or he may respond to a hypothetical question; however, an expert without such personal knowledge may respond *only* to a hypothetical question. He is not qualified to give his opinion based on personal knowledge when, by definition, he has none.)

[3] Nevertheless, we uphold the rulings of the trial judge in refusing to admit this tesimony because it concerned times too remote to have any relevance to defendant's mental condition at the time of the death of Mary Hamer.

> "Where the line is to be drawn between evidence that is too remote and evidence that is not, is not a new question. The rule in this respect, which is in accord with our decisions, is given by Stansbury on Evidence, sec. 90, p. 170, as follows: 'Whether the existence of a particular state of affairs at one time is admissible as evidence of the same state of affairs at another time, depends altogether upon the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime. The question is one of the materiality or remoteness of the evidence in the particular case.' " *State v. Kelly*, 227 N.C. 62, 64, 40 S.E. 2d 454, 455 (1946).

In the case of *In re Will of Hargrove*, 206 N.C. 307, 173 S.E. 577 (1934), this Court held that testimony from witnesses concerning testator's mental capacity to write a will in 1906 was improper when those witnesses first became acquainted with testator at times ranging from two to twenty years after execution of the will. These times were too remote from the time in issue. The reasoning of *Hargrove* is applicable here. The most recent occurrence about which the defendant wanted to offer testimony was seventeen years prior to the death of Mary Hamer. We hold that this testimony involved defendant's mental condition at times too remote to have any probative value regarding the existence of any mental disease or defect at the time in issue in the case *sub judice*.

In any event, Dr. Harper did testify that defendant has a history of being in and out of mental hospitals since he was fifteen. Dr. Harper testified that, "[i]n a great many of these hospitals he received diagnoses compatible with disturbances in

his acting pattern of the things he was doing. In some of the other hospitals he received diagnoses of chronic undifferentiated schizophrenia, which would fit in with my own examination and my own observation." With this testimony in mind, the excluded testimony regarding specific events and attitudes of the defendant during his childhood and again at age 30 add nothing of probative value to this case. This assignment of error is overruled.

[4] Defendant's fourth assignment of error is that the trial judge improperly refused to allow Dr. Harper to restate on redirect examination his opinion regarding defendant's mental illness. This question sought merely repetitious testimony and thus was properly excluded. *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844 (1950).

Defendant was not seeking to clarify testimony which had been cast into doubt upon cross-examination, to clarify new matter brought out on cross-examination, or to refute testimony elicited on cross-examination as was the case in *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977) and *State v. Cates*, 293 N.C. 462, 238 S.E. 2d 465 (1977). Indeed, on cross-examination Dr. Harper stated the very same opinion he had given during the direct examination that he felt defendant had a mental illness. On cross-examination he went further and stated that despite this mental illness he felt defendant nevertheless knew the difference between right and wrong. Defendant had no additional testimony concerning this latter opinion to bring out on redirect examination. He merely wanted Dr. Harper to state for at least the third time that defendant had a mental illness. The jury was fully aware of Dr. Harper's position in this respect. This assignment of error is overruled.

Defendant complains in his second and third assignments of error that Dr. Robert Rollins, the psychiatrist who examined the defendant when the trial judge referred him to Dorothea Dix Hospital for evaluation, could testify for the State only in response to a hypothetical question and could not give his opinion based on personal knowledge since he was not a treating physician.

At the points in the record where defendant took exceptions to Dr. Rollins' testimony relating to his second assignment of error, Dr. Rollins did not give an opinion based on his personal

knowledge. He was giving background or foundation facts concerning his examinations and observations of and conversations with the defendant. This and other such testimony will be examined below under defendant's sixth assignment of error. Defendant's second assignment of error is overruled.

[5] At the points in the record where defendant took exceptions relating to his third assignment of error we need only note that defendant's motions to strike this testimony were in fact allowed by the trial judge. We find no prejudicial error in the fact that the jury actually heard the answers since they were instructed at the beginning of the trial not to consider the answer of any witness when a motion to strike was allowed. The trial judge referred to this instruction when, during the trial, the motions to strike were allowed. Although, this was not prejudicial error, we note that the better procedure is to give the instruction to disregard the answer immediately after allowing the motion to strike. *State v. Lyles*, 298 N.C. 179, 257 S.E. 2d 410 (1979); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *Moore v. New York Life Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966). This assignment of error is overruled.

[6] The district attorney asked Dr. Rollins on at least twenty-five occasions if he had an opinion based on his personal knowledge (obtained as a result of his examinations of and conversations with the defendant) as to whether defendant knew the difference between right and wrong or understood the nature and quality of his acts on 8 February 1979. The trial judge sustained defendant's objection each time the question was asked. Defendant argues that it was prejudicial error for the trial judge to allow the same question to be asked so many times. This constitutes defendant's eighth assignment of error.

Dr. Rollins was an expert who had personally examined the defendant. He was qualified to give his opinion on this question based on his personal knowledge (and not based on assumed facts set forth in a hypothetical question). *State v. DeGregory, supra.* This remains true even though the opinion would have been based in part on conversations he had had with the defendant. We find a sufficient indication of reliability in the thorough and professional examination conducted by Dr. Rollins to warrant admitting the opinion under *State v. Wade, supra.* This is true because

in the questioning it was revealed that Dr. Rollins had taken into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it. On at least some of the occasions, the question was asked in a sufficiently proper form so that Dr. Rollins should have been allowed to state his opinion.[1] Thus, it was error favorable to the defendant for Dr. Rollins not to be allowed to give his opinion. This assignment of error is overruled.

In his sixth assignment of error, defendant maintains that since Dr. Rollins was in fact not allowed to state his opinion, it was prejudicial error to allow him to state the basis for and give the background or foundation facts for his opinion.

[7, 8] The general rule is that when the facts are within the expert's personal knowledge, he may relate them first and then give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination. *State v. Abernathy, supra; Stansbury, supra* § 136 and cases cited therein; 31 Am. Jur. 2d *Expert and Opinion Evidence* § 38 (1967) and cases cited therein. Relevant facts may be testified to by an expert or any other witness even if ultimately the expert is not allowed to state his opinion or conclusion concerning those facts.

[9] However, the situation is different where conversations between physician and patient are involved. In this instance, the expert should not recount the content of those conversations to show the basis for his opinion unless his opinion is admissible into

1. For example, the following question was proper in form:

"Q. Based on your conversations with Mr. Franks on February the 16th, 1979, based on your evaluation of previous psychiatric reports concerning admissions to Dorothea Dix Hospital and based on the events as they were related to you by Mr. Franks concerning the death of Mary Hamer on February the 8th, 1979; and based on your medical expertise; do you have an opinion satisfactory to yourself and based to a degree of reasonable medical certainty as to whether or not the defendant James Franks as a result of mental disease or of mental defect either did not know the difference between right and wrong, or did not understand the nature and quality of his act on February 8th, 1979, concerning the death of Mary Hamer?

MR. HEIDGERD: OBJECTION.

COURT: SUSTAINED.

EXCEPTION NO. 71"

evidence. The content of those conversations is not substantive evidence. The first issue when an opinion is based in whole or in part on conversations with the patient or others is the admissibility of the opinion (the reliability requirement.) If the opinion is admissible, then the expert may recount the content of those conversations to show the basis for his opinion. *State v. Wade, supra.*

[10] Two routes are available in this situation. First, the expert may testify as to the background facts (other than the content of conversations) first and then give his opinion followed by testimony concerning the content of the conversations upon which his opinion is also based in whole or in part. If the opinion is not admitted, the conversations may not be recounted to the jury. Second, a *voir dire* hearing may be conducted. At the conclusion of this hearing, the trial judge will make his ruling on the admissibility of the opinion. If he rules it inadmissible, the expert may still testify as to any relevant facts within his knowledge but may not relate conversations he had with the patient unless there is an applicable hearsay exception. If the only justification for admitting the conversations is to show the basis for his opinion, obviously this justification is absent where the opinion may not be given. If the opinion is ruled admissible at the conclusion of the *voir dire* hearing, then the order of facts, conversations and opinion does not really matter since there is no danger of the conversations coming into evidence as the basis for the expert's opinion without the opinion also coming into evidence.

[11] Here, it was not error for all of the facts, other than the content of the conversations, to come into evidence even though Dr. Rollins was not allowed to give his opinion. It was error for the conversations to come in but on the facts of this case the error was non-prejudicial since substantially the same information came into evidence when defendant testified in his own behalf and when his confession was admitted into evidence. This is the same information that defendant told to Dr. Rollins during his examinations of the defendant that Dr. Rollins recounted to the jury during the trial. Since there was no prejudicial error, this assignment of error is overruled.

[12] Defendant's fourteenth assignment of error is that there is insufficient evidence to support the trial judge's findings of fact and conclusion of law that his confession was admissible.

The evidence does support the finding that defendant was advised of his Miranda rights at a rest stop on the trip from Maryland to North Carolina. No questioning occurred before defendant was advised of his rights. After being so advised defendant signed a written waiver of rights form. In response to questioning, he did not implicate himself in the killing of Mary Hamer. The questioning then stopped. Three to five hours later, defendant initiated the conversation in which he admitted that he strangled Mary Hamer. There is evidence to support the findings and the findings support the conclusion that this confession was not the result of interrogation but was "knowingly, intentionally, freely and voluntarily, spontaneously" made. This assignment of error is overruled.

[13] By his ninth assignment of error, defendant contends that the trial judge erred in refusing to sustain his objection to a portion of the district attorney's closing argument and to instruct the jury to disregard those remarks.

Prior to trial, a ruling was made upon defendant's motion *in limine* to restrict the remarks of the district attorney during the jury *voir dire* and the trial. The applicable portion of the order is as follows:

> "IT IS THEREFORE ORDERED that the District Attorney is hereby prohibited, during the course of the jury voir dire and trial, from making any reference, directly or indirectly, to any of the following matters, separately or severally:
>
> . . .
>
> . . .
>
> 3. References to the fact that if the defendant is found not guilty by reason of insanity at the time the offense was committed but is found presently sane, that the defendant would not be incarcerated but would be legally free."

The complained of portion of the district attorney's closing argument is as follows:

> "You might be satisfied that had it not been for him being mentally ill or suffering from a mental defect that he might not have killed Mary Hamer; a causal relationship, but for, had it not been for this mental disease or mental defect this

would not have happened, the death of Mary Hamer. You might go back there and be satisfied of that and you might say that's the reason he did it. The reason he killed Mary Hamer was because he was mentally ill.

Ladies and gentlemen, that's not enough. I say that you might find that because there seems to be no other explanation as to why he killed her but that is not enough. If you're satisfied that there is a causal connection, again, you must find that he did not know the difference between right and wrong or did not understand the nature and quality of his act.

[You might not think that's a fair law. You might agree with it. You might think that if a person kills somebody because they are mentally ill that they ought to be able to walk out the door and be put back out on the streets; but you are obliged to follow the law and that's what the law says and I'm sure that you will follow the law.]

MR. HEIDGERD: OBJECTION and motion to strike that statement.

COURT: OVERRULED.

EXCEPTION NO. 108."

This argument is not in violation of the pretrial order because the argument does not refer to the consequences of being found not guilty by reason of insanity. It refers to the consequences of finding that the defendant has a mental illness. That alone is not enough to make out the defense of insanity. The defense is not complete unless the mental illness causes the defendant to not know the nature and quality of his acts or, if he does know his actions, to not know the difference beween right and wrong. This argument was especially pertinent for the State to make in the light of Dr. Harper's testimony that defendant had a mental illness but still knew the nature and quality of his actions and knew the difference between right and wrong. This assignment of error is overruled.

[14] Defendant's tenth assignment of error is that the trial judge was obligated to define "satisfaction" after instructing the jury that defendant had the burden of proving insanity to the satisfaction of the jury.

The trial judge instructed the jury in relevant part as follows:

> "If you find from the evidence beyond a reasonable doubt that the defendant choked or strangled Mrs. Hamer, you must then determine if the defendant was insane when that act occurred. In regard to this question the defendant has the burden of proving insanity. However, he need not prove this beyond a reasonable doubt but he need prove it, if at all, only to your satisfaction."

Defendant requested that "satisfaction" be defined as follows:

> "To the satisfaction of the jury simply means such evidence as satisfies the jury of the truth of the matter and the jury alone is the judge of its satisfaction."

This instruction would have added nothing whatsoever to what the jury was told since defendant defines "satisfaction" as "such evidence as satisfies." The jury knew that what satisfied it was for its own determination and, from the trial judge's instructions, the standard is less than the reasonable doubt standard. The jury is presumed to have understood the plain English contained in Judge Smith's instructions. This assignment of error is overruled.

[15] By his eleventh assignment of error, defendant contends that the trial judge erred in refusing to give a certain requested instruction on the defense of insanity.

The trial judge instructed the jury virtually verbatim from defendant's request except he left out that portion of the request that is enclosed in brackets:

> "Now I instruct you that sanity or soundness of mind is the normal condition of men. Therefore the law presumes that everyone is sane until the contrary is made to appear. The defendant in this case would be insane if, at the time of the alleged crime and as a result of mental disease or defect, he either did not know the nature and quality of his act or did not know that it was wrong. Thus, the mere existence of a mental disease or defect is not sufficient. The disease or defect, if any, must have so impaired the defendant's mental capacity that he either did not know the nature and quality of his act or he did not know that it was wrong.

On the other hand, it need not be shown that the defendant lacked mental capacity with regard to all matters. A person may be sane on every subject but one but yet if his mental disease or defect with reference to that one subject rendered him unable to know the nature and quality of his act with which he is charged, or know that the act was wrong, then his defense would be complete [for he was not responsible for his acts and he is not guilty of any offense against the law as guilt arises from the mind and wicked will. Criminal intent, of course, is an essential element of murder, and if by reason of insanity or mental disease a person is incapable of forming any intent, he cannot be regarded by the law as guilty.]

So I charge you that if you're satisfied that the defendant was insane at the time of the choking or strangulation of Mary Hamer, he would not be guilty by reason of insanity, and that would end the case.

However, if you were not satisfied, then you would be required to determine whether he was guilty of first degree murder, second degree murder, voluntary manslaughter; or whether he is in fact not guilty of that offense."

While the portion of the above instructions that is enclosed in brackets is a correct statement since a similar instruction with a reference to criminal intent was approved in *State v. Bracy*, 215 N.C. 248, 1 S.E. 2d 891 (1939), *overruled on other grounds, State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976), its omission in this case was not prejudicial error. It is not clear whether the reference to "criminal intent" is a reference to a specific intent to kill (first degree murder) or is a reference to a general intent to commit the act constituting murder.

If the reference is to a specific intent to kill, then defendant's position has been expressly rejected by this Court. *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976); *State v. Shepherd*, 288 N.C. 346, 218 S.E. 2d 176 (1975) (no error in the trial judge's failure to instruct the jury as to the effect of insanity or mental weakness on premeditation and deliberation which includes a specific intent to kill). *See also, State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975) in which we found no reversible error in the trial judge's refusal to instruct that a mental deficiency or disease

could prevent a defendant from forming a specific intent to kill which is required for a conviction of first degree murder by premeditation and deliberation. There was no error because, as is true in the case *sub judice*, the jury found the defendant guilty of first degree murder. The jury, by its verdict, established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts. It requires less mental ability to form a specific purpose to do an act than to determine its moral quality. Since the jury found, by its verdict, that the defendant had this greater mental capacity (the ability to know right from wrong) it necessarily follows that he had the lesser included mental capacity (the ability to form a specific intent to kill). *Id.*

We held in *State v. Shepherd, supra,* that we have not adopted this theory of diminished mental responsibility. In this State the test for insanity which is a complete defense to a criminal charge is,

> "whether the accused, at the time of the alleged act, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act, or, if he does know this, was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to such act." *State v. Jones,* 293 N.C. 413, 425, 238 S.E. 2d 482, 490 (1977); *accord, State v. Pagano,* 294 N.C. 729, 242 S.E. 2d 825 (1978); *State v. Willard,* 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Harris, supra; State v. Hammonds, supra; State v. Cooper, supra; State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516, *cert. denied,* 414 U.S. 1042 (1973); *State v. Johnson,* 256 N.C. 449, 124 S.E. 2d 126 (1962).

If the reference to "criminal intent" in the above requested instruction is a reference to a general intent to perform the act constituting murder, then clearly there was no error in omitting this part of the request. It appears from the context of the entire requested instruction that it is a reference to a general intent because the requested instruction reads that if that intent is absent and the "person is incapable of forming any intent, he cannot be regarded by the law as guilty." In other words, if the intent to commit the act constituting murder is absent defendant is not

guilty of any offense. The insanity instruction as given fully explains this point to the jury.

The jury was fully and adequately instructed regarding the definition of insanity in this State, the burden of proof on the defense, and that it is a complete defense resulting in a verdict of not guilty by reason of insanity. If one does not know the nature and quality of his acts or does not know the *difference between right and wrong*, then, by definition, he does not have a *criminal* intent. This assignment of error is overruled.

Defendant has abandoned assignments of error numbers seven, twelve, thirteen, fifteen and sixteen since he did not bring them forward and argue them in his brief. Rule 28(a), (b)(3), Rules of Appellate Procedure.

Defendant was "entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 97 L.Ed. 593, 605, 73 S.Ct. 481, 490 (1953); *accord, State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). Defendant received a fair trial free from prejudicial error and we find

No error.

FOOD TOWN STORES, INC., PETITIONER v. CITY OF SALISBURY, RESPONDENT

BRAD RAGAN, INC., PETITIONER v. CITY OF SALISBURY, RESPONDENT

BRAD RAGAN REALTY COMPANY, PETITIONER v. CITY OF SALISBURY, RESPONDENT

B. V. HEDRICK GRAVEL AND SAND COMPANY, HEDRICK REALTY AND INVESTMENT COMPANY, AND 601 INDUSTRIAL DEVELOPMENT CORPORATION, PETITIONERS v. CITY OF SALISBURY, RESPONDENT

No. 21

(Filed 6 May 1980)

1. Municipal Corporations § 2.2— annexation—method of counting lots

In an action challenging the validity of an annexation ordinance adopted by respondent city, the trial court did not err in determining that the city's

method of counting lots in a subdivision for the purpose of establishing compliance with the requirements of G.S. 160A-48 was calculated to provide reasonably accurate results, since the city considered a group of lots in single ownership and used for a single purpose as being a single tract; and it was reasonable for the city to follow actual use and ownership patterns in a particular subdivision where the subdivision consisted of numerous lots which were twenty-five feet in width, but actual development in the area had proceeded without regard to the lot lines in the subdivision plat, and in fact deed restrictions for the project required ownership of three lots before development could occur.

2. **Municipal Corporations § 2.2— annexation—method of lot calculation—different method used previously**

The fact that different methods of lot calculation have been used by a city in past annexations is of no import where the record establishes that the method utilized in the annexation under scrutiny complies with the requirements of G.S. 160A-54.

3. **Municipal Corporations § 2.2— annexation—four lots counted as one used for industrial purposes—no error**

In an action challenging the validity of an annexation ordinance adopted by respondent city, the trial court did not err in finding that four parcels of property owned by a grocery store were correctly counted by the city as one tract which was being used for industrial purposes, since two of the tracts contained the warehouse-office complex of the grocery store; all of the tracts were contiguous; of the 68.51 usable acres, over 20 were under roof or pavement and an additional 8.5 acres had been graded and filled for future expansion; and the two tracts which did not have buildings on them were used to support the industrial improvements on the other tracts in that they were used for a sediment basin to control erosion, fill material was taken from one tract to use in construction on another tract, and one tract contained employee parking facilities.

3. **Municipal Corporations § 2; Dedication § 4— annexation—portions of streets excluded from lot computation—areas not subject to withdrawal from dedication**

The trial court did not err in concluding that respondent city properly excluded from its computation of lots and tracts eight areas in a subdivision which constituted unopened portions of streets which were otherwise opened and maintained by the State, since the areas in question were not subject to withdrawal from dedication on the date of annexation.

5. **Municipal Corporations § 2.2— annexation—land used for industrial purposes—classification proper**

The trial court did not err in concluding that a particular parcel of land was properly classified by respondent city as being used for commercial and industrial purposes, even though a portion of the parcel may have been vacant, since part of the land was being used for a laundry, part was used as a storage yard or facility in conjunction with the laundry operations, and part was vacant, but petitioner did not offer evidence disclosing what percentage of the

parcel was vacant, and it was therefore impossible to determine whether the lot was vacant to such an extent as to require its division into separate lots or tracts.

6. Municipal Corporations § 2.6— annexation—extension of municipal services—plan in compliance with statute

The trial court correctly concluded that respondent city's plans for extension of municipal services satisfied the requirements of G.S. 160A-47(3)a where the city's report indicated that the number of full-time policemen would be increased from 49 to 53 and police vehicles from 19 to 20; the existing patrol districts would be realigned to include the proposed annexations; the city would acquire a new fire engine and would contract with a volunteer fire department to aid in furnishing fire protection until a complete municipal water distribution system was available in the areas proposed to be annexed; and the areas to be annexed could be included in the existing garbage collection routes without additional increase in equipment and personnel.

7. Municipal Corporations § 2.2— annexation—use test—margins of error

The language of G.S. 160A-54 is free from ambiguity and represents a legislative determination that margins of error should be allowed with respect to the calculations made by a municipality to establish compliance with the population and subdivision tests of G.S. 160A-48(c) but not with respect to the calculations made to establish compliance with the use test of G.S. 160A-48(c); therefore, the trial court erred in concluding that the incorrect percentage of use figures submitted by respondent city were within the five percent margins of error allowed by G.S. 160A-54 and were thus sufficient to establish compliance with the use test.

8. Municipal Corporations § 2.2— annexation—land classified as residential—land not in use for qualifying purpose

The trial court did not err in determining that a parcel of land, classified by respondent city as residential, was not in use for a qualifying purpose where the evidence tended to show that the house on the land had not been used as a dwelling for eleven years; a visual inspection indicated that the building was unkept, that the back porch had completely fallen in, and that the front porch and front porch roof members were sagging; and the house was not suitable for human habitation and did not meet applicable city codes. Furthermore, evidence that the house was being used "more or less" for storage or as a warehouse was insufficient to support a finding that the structure was in industrial or commercial use.

9. Evidence § 48— expert in real estate—opinion as to habitability of property—admissibility

Evidence that a witness had been engaged in real estate development for over forty years, in home building since 1951, that he had been involved in the development of eighteen subdivisions, over two hundred residential homes and also condominiums was sufficient evidence from which the trial court could properly determine that the witness possessed the requisite skill to form an opinion as to the habitability of a structure on a parcel of land which respondent city had classified as residential.

10. Municipal Corporations § 2.2— annexation—land classified as residential—land not in use for qualifying purpose

The trial court properly found that there was no habitable dwelling unit on a parcel of land which the city had classified as residential and the court thus properly concluded that the parcel was not being used for a qualifying purpose where there was evidence tending to show that some six months after the annexation ordinance was passed there was no home on the lot, but there was rubble indicating past construction.

11. Municipal Corporations § 2.2— annexation—land used for ball park—improper finding that land not in use for qualifying purpose

The trial court erred in concluding that a parcel of land was not in use for commercial, industrial, institutional or governmental purposes where the evidence tended to show that the land contained two fenced baseball fields, permanent bleachers, night lights, a concession stand and a parking area; these facilities advanced the object of the Rowan Little League, Inc., a non-profit entity, which was to promote little league baseball activities and to construct and maintain little league facilities for the benefit of the youth of the county; and the construction, maintenance, and promotion of little league facilities was a use possessing the characteristics of urban life.

12. Municipal Corporations § 2.2— annexation—use test—failure of city to count qualifying lot—no authority of court to add lot

Judicial review of an annexation ordinance is limited to determination of whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute, and a reviewing court does not have authority to amend an annexation ordinance by recognizing a previously uncounted lot for purposes of establishing compliance with the use test of G.S. 160A-48(c)(3); therefore, the trial court erred in adding another lot to the annexation report and ordinance submitted by respondent city, even though the city presented evidence which established that, as a result of an error in the tax maps, it had failed to include an additional qualifying lot within the boundaries of an area in the annexation report and ordinance.

Justice COPELAND did not participate in the decision of this case.

APPEAL by petitioners from judgment of *Walker, S.J.*, entered 13 February 1979 in ROWAN Superior Court.

On 27 June 1978 the governing board of the City of Salisbury adopted an ordinance providing for the annexation of certain areas of land referred to as Area A and Area B. Petitioners own property in the area described in the ordinance as Area A. Pursuant to the provisions of G.S. 160A-50, petitioners in apt time filed a petition in the Superior Court of Rowan County seeking review of the ordinance adopted by the governing board of the City of Salisbury. From judgments affirming the ordinance, peti-

tioners appealed to this Court, assigning errors discussed in the opinion.

Evidence necessary to understand the various assignments of error will be narrated in the discussion of the assignment to which the evidence relates.

Thomas M. Caddell and Dwight L. Crowell III, for Food Town Stores, Inc., petitioner appellant.

Clarence Kluttz and Malcolm B. Blankenship, Jr., of Kluttz and Hamlin, for Brad Ragan, Inc., Brad Ragan Realty Co., B. V. Hedrick Gravel and Sand Company, Hedrick Realty and Investment Co., and 601 Industrial Development Corp., petitioner appellants.

Margaret R. Short, City Attorney; H. Michael Boyd, of Constangy, Buckley & Boyd, for City of Salisbury, respondent appellee.

HUSKINS, Justice.

In the review proceedings below, petitioners challenged the validity of an annexation ordinance adopted by the City of Salisbury on 27 June 1978 as the culmination of simultaneous annexation proceedings held pursuant to the terms of G.S. 160A-45, *et seq.* Only one of the two areas annexed, Area A, was the subject of the review proceeding.

On its face, the record of the annexation proceedings submitted by the City in Superior Court demonstrated substantial compliance with all applicable provisions of G.S. 160A-45, *et seq.* Thus, the burden was on petitioners, who appealed from the annexation ordinance, to show by competent evidence that the City in fact failed to meet the statutory requirements or that there was irregularity in the proceedings which materially prejudiced their substantive rights. *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971); *Huntley v. Potter*, 255 N.C. 619, 122 S.E. 2d 681 (1961). *See generally*, G.S. 160A-50(f), (g).

Both petitioners and respondent bring forward numerous assignments of error which challenge the correctness of specific findings of fact and conclusions of law made by the trial court in the review proceedings below. On appeal, the findings of fact

made below are binding on this Court if supported by the evidence, even though there be evidence to the contrary. *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979); *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E. 2d 795 (1961). Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968).

[1] G.S. 160A-54 provides that "[i]n determining population and degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results." Petitioners contend the trial court erred in determining that the method used by the City to determine the number of lots in Area A for purposes of establishing compliance with the requirements of G.S. 160A-48 was calculated to provide reasonably accurate results.

The method utilized by the City in the instant proceedings is stated on the last page of the annexation report:

> "The Rowan County tax and subdivision maps have been used to determine the number of lots and tracts as well as their acreage. There are several methods which can be used in determining what is a lot or tract in making an appraisal of an area to be annexed. The method used in this report considered a group of lots in single ownership and used for a single purpose as being a single tract and referenced by a single tax map parcel number. Where a single ownership tract was divided by a street right-of-way, the resulting division was counted as multiple tracts rather than one tract."

Petitioners object strenuously to this method because within the area to be annexed was a subdivision known as Milford Terrace which was formally subdivided into numerous lots which were 25 feet in width. Petitioners contend the City's method of lot calculation is unreasonable because it fails to follow the formal pattern of subdivision in Milford Terrace.

G.S. 160A-54 does not specify any particular method by which a municipality is to calculate the number of lots in the area to be annexed; rather, it requires that the method chosen be "calculated to provide reasonably accurate results." The reasonableness of the method chosen is to be determined in light

of the particular circumstances presented by the annexation proceedings in question.

Review of the record in the instant case indicates that the actual development of the Milford Terrace area has proceeded without regard to the lot lines in the recorded subdivision plat. It is obvious that lots 25 feet in width cannot be developed individually but only in groups. In fact, deed restrictions for the Milford Terrace Housing Project require ownership of three lots before development can occur. Under these circumstances, it is eminently reasonable for the City to follow actual use and ownership patterns instead of artificial patterns of subdivision in determining the number of lots in the area to be annexed. Such method of lot counting was calculated to provide reasonably accurate results as required by G.S. 160A-54.

[2] Petitioners argue that the City in past annexations has followed subdivision boundaries and that failure to do so in this case was arbitrary and capricious. This argument is without merit. Our previous discussion of G.S. 160A-54 indicates that a municipality is not tied to any particular method of calculating the number of lots so long as the method utilized is calculated to provide reasonably accurate results. The fact that different methods of lot calculation have been used by the City in past annexations is of no import where, as here, the record establishes that the method utilized in the annexation under scrutiny complies with the requirements of G.S. 160A-54. This assignment is overruled.

[3] Petitioner Food Town contends the trial court erred in its finding of fact that Food Town's property was correctly counted as one lot or tract rather than separate lots or tracts. The parcels in question—labeled A through D—are contiguous and house Food Town's continually expanding office and warehouse operations. The property is in a triangle formed by Harrison Road and the Western North Carolina Railroad, which converge upon the Highway 601-Bypass. The property is served by a spur railroad and by three natural gas lines. Of 68.51 usable acres, over twenty are under roof or pavement. An additional 8.5 acres behind the warehouse have been graded and filled for future expansion.

Petitioner Food Town argues that the above mentioned improvements are contained within parcels C and D; that parcels A

and B are, in essence, unimproved and ought to be counted separately. Review of the record, however, indicates that parcels A and B are being actively used to support the industrial improvements housed within parcels C and D. Food Town has stipulated that a sediment basin and earthen dam was constructed in 1976 on parcel B in conjunction with construction and grading activities in parcels C and D. Food Town was required by erosion and sediment control laws to make these improvements on parcel B in order to carry out the construction on parcels C and D. *See* G.S. 113A-50, *et seq.* The sediment basin in parcel B controls erosion on the rear portions of parcels C and D and protects nearby streams from sedimentation. "Said sediment basin has remained in existence since construction in 1976 and presently forms a part of Food Town's present plans for complying with applicable laws regarding erosion and sediment control." Trial Stipulations, No. 31 (Filed 11 December 1978). Additionally, tract B has been the source of fill material needed for construction activities on tracts C and D. Employee parking facilities on tract C have been expanded onto tract A. A bank 15 to 20 feet in height is located at the "boundary" between parcels A and B and the warehouse on parcels C and D. The bank consists of fill used for construction activities on parcels C and D.

This constitutes sufficient evidence to support a finding that Food Town is using the entire tract as a single tract. Had Food Town not owned tracts A and B, its actual use and development of the remaining tracts would have been seriously impacted. It could not have constructed improvements and a 15-to-20-foot bank along the very edge of the old boundaries of tracts A and B. Off-site transportation of fill material would have been necessary. Compliance with environmental regulations would have been more difficult.

R. R. v. Hook, 261 N.C. 517, 135 S.E. 2d 562 (1964), relied upon by petitioner, is factually distinguishable. In *Hook*, the 14-acre tract in question was not contiguous to the tract containing the primary industrial plant; rather, it was separated from this tract by a highway. Approximately one acre of this tract was used for employee parking, the remainder was graded and being held for *possible* industrial use. There was no evidence that the remaining acreage was "being used either directly or indirectly for industrial purposes. All of the evidence [tended] to show

that it was not being *used* for any purpose." *Id.*, 261 N.C. at 520. Under these circumstances, the Court concluded that the tract in question could not be considered as one lot being used for industrial purposes; rather, the parking area had to be considered as an industrial lot and the remaining acreage as an unused lot. In the instant case the tracts in question are adjacent to the tracts containing the Food Town warehouse—office complex and are actively *used* to support and facilitate the industrial use of the adjacent tracts. Unlike *Hook*, the contiguous portions of the Food Town property are essential to the use of the entire tract for industrial purposes. Accordingly, we hold that the trial court did not err in finding that the Food Town property was correctly counted as one tract which is being used for industrial purposes.

[4] Petitioner Food Town contends the trial court erred in concluding that the City properly excluded from its computation of lots and tracts eight areas in the Milford Terrace subdivision which constitute unopened portions of streets in the subdivision which are otherwise opened and maintained by the State. Petitioners ground this contention on the possibility that these unmaintained portions of the street system may at some time in the future be withdrawn from dedication under G.S. 136-96. This contention is without merit. "It is now well settled [that] the dedication of a street may not be withdrawn, if the dedication has been accepted and the street *or any part of it* is actually opened and used by the public." *Russell v. Coggin*, 232 N.C. 674, 62 S.E. 2d 70 (1950) (emphasis added). Review of the record indicates that the areas in question were not subject to withdrawal from dedication on the date of annexation since such areas were but unopened portions of streets which were otherwise actually opened and used by the public. We note, moreover, that land may not be withdrawn from dedication until the fee owners record in the register's office a declaration withdrawing such land from the use to which it has been dedicated. G.S. 136-96; *Sheets v. Walsh*, 215 N.C. 711, 2 S.E. 2d 861 (1939). There is no evidence in the record indicating that such declaration had been filed by the fee owners of the areas in question. We hold, therefore, that the trial court properly concluded that these areas were dedicated to public use as streets on the date of annexation and were thus properly excluded by the City in its computation of lots.

Petitioner Food Town contends the trial court erred in concluding that two lots marked IX and X on Exhibit 27A were properly excluded by the City in its computation of lots and tracts in the area to be annexed. This contention is without merit. Comparison of the marks made on Exhibit 27A with the map showing in detail the boundaries of the area to be annexed (Exhibit D, Amendments to the Annexation Report) indicates that the alleged lots would either have to be within the city limits or within the railroad right-of-way. Thus, the trial court properly concluded that the lots in question were not within the area to be annexed. This assignment is overruled.

[5] Petitioner Food Town contends the trial court erred in concluding that parcel 34 on tax map 450 was properly classified by the City as being used for commercial and industrial purposes. Evidence was presented tending to show that parcel 34 was under the same ownership; that part of parcel 34 was already within the city limits and was being used by a laundry; that the part of parcel 34 being annexed contains a storage yard or facility which is used by the laundry; that in determining that parcel 34 was used for commercial and industrial purposes, consideration was given to the fact that the storage facility in the unannexed portion of parcel 34 was being used in conjunction with the laundry operations on the portion of parcel 34 already within the City. This constitutes sufficient evidence from which the trial court could find that the predominant use of parcel 34 was industrial in nature.

Nonetheless, petitioner argues that evidence tending to show that portions of parcel 34 were vacant warrants a finding that substantial portions of the lot were vacant. Thus, according to petitioner, parcel 34 should have been counted as two lots—one vacant and one industrial. The record, however, fails to disclose what percentage of parcel 34 was vacant. As a result, it is impossible to determine whether the lot was vacant to such an extent as to require its division into two separate lots or tracts. The burden of proof was on petitioner on this point. Failure to meet this burden leaves the City's prima facie case intact. *Huntley v. Potter*, supra. Accordingly, we hold that the trial court did not err in upholding the City's classification of parcel 34. This assignment is overruled.

[6] In its annexation report the City must include a statement setting forth the plans of the municipality for extending certain enumerated municipal services to the area to be annexed on the date of annexation "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." G.S. 160A-47(3)a. Petitioners contend the trial court erred in concluding that the plans submitted by the City for extending police protection, fire protection and garbage collection complied with the requirements of G.S. 160A-47(3)a.

With respect to police protection, the City's report notes in pertinent part that on 21 March 1978 the governing board had approved an organizational change in the police department to become effective 1 July 1978. This change realigned the existing patrol districts to include the proposed annexations and increased the number of full-time officers from 49 to 53 and police vehicles from 19 to 20. The foregoing establishes prima facie full compliance with G.S. 160A-47(3)a in relation to extension of police protection. Review of the record indicates that petitioners failed to carry the burden of showing otherwise with respect to these matters.

With respect to extending fire protection, the report provides, in pertinent part, that delivery on a "new 1,000 gpm pumper" engine was expected in June, 1978, and that the City would contract with the Locke Volunteer Fire Department (VFD) to aid the City in furnishing fire protection until a complete municipal water distribution system was available in the two areas proposed to be annexed. At trial, Salisbury's Fire Chief testified that, in fact, the City had contracted for additional fire protection with the Franklin VFD, which had a larger tanker capacity. The Fire Chief indicated that with the exception of the Milford Terrace Subdivision, there were fire hydrants in all portions of Area A, that there was a fire hydrant at the edge of the city limits within 1200 feet of any point in Milford Terrace, and that residential fires could be effectively fought in an area where the nearest hydrant was 1200 feet away. Finally, the Fire Chief indicated that the contract with the Franklin VFD was merely supplementary and that there was no point in Area A that would require a greater response time to a fire alarm than would be required in any other portion of the City. The foregoing constitutes

sufficient evidence to support a finding and conclusion that the City's plans for extending fire protection comply with G.S. 160A-47(3)a.

With respect to garbage collection, the report provides, in pertinent part, that the areas to be annexed will be included within existing routes without additional increase in equipment and personnel. At trial, the Sanitation Superintendent testified that Area A would be serviced by adding it to a collection route which is presently a short route. Even with Area A included, the route would still be considered a short one. It takes about four and one half hours to complete an average collection route. Sanitation workers get paid for eight hours, even if they finish their assigned routes in less time. Thus, servicing Area A would not present manpower problems. A dumpster hoister unit—one of four—which burned out would be replaced. In the interim, service could be provided to Area A on substantially the same basis as in other areas within the city limits. The foregoing constitutes sufficient evidence to support a finding and conclusion that the City's plans for extending garbage collection comply with G.S. 160A-47(3)a.

We note, finally, that petitioners have failed to demonstrate that any material prejudice resulted from the City's decision to jointly discuss plans for extending municipal services to both areas to be annexed in one statement rather than discussing each area separately. See G.S. 160A-50(g).

In summary, the trial court correctly concluded that the City's plans for extension of municipal services satisfied the requirements of G.S. 160A-47(3)a.

Petitioners bring forward assignments of error directed to the trial court's failure to compel discovery under Rule 37 of the Rules of Civil Procedure. We have carefully considered these assignments and find no prejudicial error which warrants the granting of a new trial.

Finally, we turn to the several assignments and cross-assignments challenging the trial court's determination that Area A met the 60 percent use requirement imposed by G.S. 160A-48(c)(3), which provides that the area to be annexed must be so developed such that "at least sixty percent (60%) of the total

number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional, or governmental purposes. . . ."

The annexation report and ordinance prepared by the City indicated that Area A contained 62 lots and tracts, 39 of which were being used for qualifying purposes. This yields a percentage figure of 62.9, which exceeds the statutory requirement. After hearing evidence, the trial court found that three of the 39 lots purportedly being used for qualifying purposes were not, in fact, being used for such purposes. However, the trial court further found that there was one additional qualifying lot within Area A which the City had failed to count. These findings decreased the number of lots being used for qualifying purposes to 37 of 63. The resulting percentage of use was thus reduced from 62.9 percent as determined by the City to 58.7 percent, which is below the statutory requirement. Nonetheless, the court concluded as a matter of law that the 58.7 percent use figure was within the 5 percent margin of error permitted under G.S. 160A-54 and thus determined that the City had complied with the 60 percent use requirement of G.S. 160A-48(c)(3).

The first question arising out of this final series of assignments, then, is whether the 5 percent margins of error permitted by G.S. 160A-54(2) and (3) apply to figures submitted by the City indicating compliance with the use requirement of G.S. 160A-48(c)(3).

The 5 percent error margins allowed by G.S. 160A-54(2) and (3) expressly apply to certain calculations made by the City for purposes of determining compliance with the requirements of G.S. 160A-48(c). Accordingly, resolution of the question posed requires us to consider the provisions of G.S. 160A-48(c) in conjunction with those of G.S. 160A-54.

G.S. 160A-48(c) provides:

> "(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

(1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or

(2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less in size and such that at least sixty percent (60%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size."

It should be noted that G.S. 160A-48(c) prescribes three *alternative* standards for determining whether the area to be annexed is developed for urban purposes. The first standard imposes a population test. The second standard imposes a population and subdivision test. The third standard imposes a use and subdivision test. In the instant case, the City was proceeding under the third standard.

G.S. 160A-54 provides in pertinent part:

"§ 160A-54. Population and land estimates.—In determining population and degree of land subdivision for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results. In determining whether the standards set forth in G.S. 160A-48 have been met on appeal to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of the municipality:

* * * *

(2) As to total area if the estimate is based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable map used for official purposes by a governmental agency, unless the petitioners on appeal demonstrate that such estimates are in error in the amount of five percent (5%) or more.

(3) As to degree of land subdivision, if the estimates are based on an actual survey, or on county tax maps or records, or on aerial photographs, or on some other reasonably reliable source, unless the petitioners on appeal show that such estimates are in error in the amount of five percent (5%) or more."

Due consideration of the plain language of G.S. 160A-54 in conjunction with the provisions of G.S. 160A-48(c) compels the conclusion that the 5 percent error margins it allows apply exclusively to calculations made by the municipality for purposes of establishing compliance with the population and subdivision tests contained within the alternative standards prescribed by G.S. 160A-48(c).

At the outset, G.S. 160A-54 provides that "[i]n determining *population* and *degree of land subdivision* for purposes of meeting the requirements of G.S. 160A-48, the municipality shall use methods calculated to provide reasonably accurate results." (Emphasis added.) Subsections (2) and (3) of section 54 then provide that if estimates as to total area and degree of subdivision in the area to be annexed are based on certain enumerated sources, then the reviewing courts shall accept the estimate of the municipality "unless the petitioners on appeal demonstrate that such estimates are in error in the amount of five percent (5%) or more." Calculations as to total area are necessary to determine compliance with the population and subdivision tests prescribed in G.S. 160A-48(c). Calculations as to degree of land subdivision are of course necessary to determine compliance with the subdivision tests prescribed in G.S. 160A-48(c). On the other hand, the *use test* prescribed in G.S. 160A-48(c) does not require calculations of total area or degree of subdivision in the area to be annexed. Similar provisions for error margins are not made in G.S. 160A-54 with respect to the calculations necessary to determine compliance with the use test.

[7] If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls. *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979). The language of G.S. 160A-54 is free from ambiguity and represents a legislative determination that margins of error should be allowed with respect to the calculations made by a municipality to establish compliance with the population and subdivision tests of G.S. 160A-48(c) but not with respect to the calculations made to establish compliance with the use test of G.S. 160A-48(c). It is not for us to determine the wisdom of this determination. *Commissioners v. Henderson*, 163 N.C. 114, 79 S.E. 442 (1913). The meaning of the law is plain and we must apply it as written. *In re Poindexter's Estate*, 221 N.C. 246, 20 S.E. 2d 49 (1942).

Accordingly, we hold that the 5 percent margins of error set out in G.S. 160A-54 do not apply to figures submitted by a municipality indicating compliance with the use test of G.S. 160A-48(c). The trial court thus erred in concluding that the incorrect percentage of use figures submitted by the City were within the five percent margins of error allowed by G.S. 160A-54 and were thus sufficient to establish compliance with the use test.

The conclusion we reach dictates that the 62.9 percentage of use figure submitted by the City must stand on its own merits, without benefit of the error margins allowed in G.S. 160A-54. As a result, it now becomes necessary to consider the correctness of the trial court's determination that only 37 of 63 lots in Area A (58.7%) were being used for qualifying purposes. The trial court arrived at this figure by finding that the following lots or tracts, which the City asserted were being used for qualifying purposes, were, in fact, not so used: (1) Parcel 82, Block C, Tax Map 331B; (2) Parcel 97, Tax Map 331B; (3) Parcel 9, Tax Map 450. Additionally, the trial court found that there was an additional qualifying parcel within Area A—Parcel 36, Tax Map 450A—which the City had failed to account for in its original report and annexation ordinance. The soundness of each of these findings and conclusions will be discussed seriatim.

[8] The trial court found that the house located on Parcel 82 was not a habitable dwelling unit on 16 May 1978—the date the an-

nexation report was submitted to the governing board—and thus concluded that said parcel of land, classified by the City as residential, was not in use for a qualifying purpose. There is competent evidence in the record supporting the trial court's finding. There was evidence tending to show that the house had not been used as a dwelling for eleven years; that a visual inspection undertaken in December, 1978 indicated the building was unkept, that the back porch had completely fallen in, that the front porch and front porch roof members were sagging, and that the house was not suitable for human habitation and would not meet applicable City codes.

[9] The City contends the trial court erroneously determined that petitioner's expert witness, Leo Wallace, was qualified to give an opinion as to the habitability of the structure on Parcel 82. This contention is without merit. The competency of a witness to testify as an expert in the particular matter at issue is addressed primarily to the sound discretion of the trial court, and its determination is not ordinarily disturbed by the reviewing court. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972); 1 Stansbury's N.C. Evidence § 133 (Brandis rev. 1973). In the instant case, Mr. Wallace testified that he had been engaged in real estate development for over forty years, in home building since 1951, that he had been involved in the development of eighteen subdivisions, over two hundred residential homes, and also condominiums. This constitutes sufficient evidence from which the trial court could properly determine that Mr. Wallace possessed the requisite skill to form an opinion as to the habitability of the structure on Parcel 82.

[8] Finally, the City contends that the trial court erred in failing to determine that Parcel 82 was in industrial or commercial use. The City relies on testimony by petitioners' witnesses that the structure on Parcel 82 was being used "more or less" for storage or as a warehouse. The testimony relied on by the City fails to specify the extent of such storage activities and whether such activities were carried out in pursuance of a commercial or industrial enterprise. In any event, even though there be evidence to the contrary, this Court is bound by the trial court's finding that Parcel 82 was not being used for a qualifying purpose, which we have determined is supported by competent evidence. *See, In*

re Annexation Ordinances, supra, 253 N.C. at 644. The City's cross-assignment with respect to Parcel 82 is overruled.

[10] The trial court found there was no habitable dwelling unit located on Parcel 97 on 16 May 1978 and thus concluded that said parcel, classified by the City as residential, was not being used for a qualifying purpose. Review of the record indicates there is competent evidence to support the finding of the court. There is evidence tending to show that in December, 1978, some six months after the annexation ordinance was passed, there was no home on the lot; rather, there was rubble indicating past construction, "a few old brick and some dirt piled up." Accordingly, the City's cross-assignment to the trial court's finding with respect to Parcel 97 is overruled.

[11] The trial court concluded that Parcel 9 was not in use for commercial, industrial, institutional or governmental purposes on 16 May 1978. Located on Parcel 9 is the Little League Ball Park or the Shell Oil Park. All of the pertinent evidence regarding the ball park is the subject of stipulation. The ball park consists of two fenced baseball fields. Permanent bleachers, night lights and a cinderblock concession stand have been erected. The field and concession stand are operated during the baseball season by the Rowan County Little League, Inc., a non-profit corporation organized "[t]o promote little league baseball activities and to construct and maintain little league facilities for the benefit of the youth of the County." Exhibit 4, Articles of Incorporation. Profits from the concession stand and revenues generated from advertising placed along the outfield fences are used by the Rowan County Little League, Inc., in its tax-exempt purpose of providing an opportunity for young children to play baseball. The fee simple title to the lot is held by Shell Oil, Inc., which leases the land free of charge to the Rowan County Little League, Inc.

In our view, Parcel 9 on Tax Map 450 is being used for institutional purposes. Accordingly, we hold that the trial court erred as a matter of law when it concluded that said parcel was not in use for a qualifying purpose.

The term "institutional" is not specially defined in the laws governing annexation by cities of more than 5,000 in population. Absent a special or technical definition or other clear indication to the contrary, words in a statute must be given their common

and ordinary meaning. *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E. 2d 297 (1976); *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E. 2d 199 (1974). The term "institutional" refers to or pertains to matters originated by an "establishment, organization, or association, instituted for the promotion of some object, [especially] one of public or general utility, religious, charitable, educational, etc. . . ." 5 The Oxford English Dictionary at 354 (1933). Within the context of G.S. 160A-48(c)(3), "institutional" refers to an urban use of land which directly advances the goals or objects of the organization making use of the land. Such a definition of "institutional" comports not only with the ordinary meaning of the word but also with the legislative policy of encouraging "sound urban development" by permitting annexation only of land which is "developed for urban purposes." *Compare* G.S. 160A-45(1) *with* G.S. 160A-48(c). Certainly, the urban use of land by an institution which directly advances its goals or objects is a use which possesses the essential characteristics of urban development.

Application of the above definition to the instant facts compels the conclusion that Parcel 9 on Tax Map 450 is being used for institutional purposes. The fenced baseball fields, permanent bleachers, night lights, concession stand, and parking area directly advance the object of the Rowan Little League, Inc., a nonprofit entity, which is to promote little league baseball activities and to construct and maintain little league facilities for the benefit of the youth of the county. Needless to say, the construction, maintenance and promotion of little league facilities is a use possessing the characteristics of urban life.

To summarize, we have determined that the trial court was not totally correct in its conclusion that three of the lots which the City claimed were being used for qualifying purposes were not, in fact, being used in such a manner. As to two of these lots—Parcel 82, Block C, Tax Map 331B, and Parcel 97 on Tax Map 331B—the trial court is correct. As to the third lot—Parcel 9 on Tax Map 450—the trial court erred in concluding that it was not being used for a qualifying purpose. Thus, of the sixty-two lots which the annexation report and ordinance indicate are contained in Area A, thirty-seven are actually being used for qualifying purposes. This yields a percentage figure of 59.6, which is below the statutory requirement.

[12] At this junction, consideration of the additional qualifying lot found by the trial court within the boundaries of Area A becomes crucial, for recognition of this lot would raise the count to thirty-eight of sixty-three lots being used for qualifying purposes. Recognition would thus increase percentage of usage from 59.6, below the statutory minimum, to 60.3, above the minimum. Neither petitioner disputes the findings of the trial court confirming existence of a sixty-third lot which is being used for a qualifying purpose. A question arises, however, as to whether a reviewing court has authority, in effect, to amend an annexation ordinance by recognizing a previously uncounted lot for purposes of establishing compliance with the use test in G.S. 160A-48(c)(3).

We previously considered this question in *Huntley v. Potter*, supra, and determined that the courts do not have authority to amend the annexation report or ordinance. Judicial review of an annexation ordinance is limited to determination of whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute. *See* G.S. 160A-50(f); *Huntley v. Potter, supra; In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974); *In re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971). The reviewing court may affirm the action of the governing board, remand to the governing board for amendment with respect to such noncompliance as is found, or declare the action of the board to be null and void. G.S. 160A-50(g). "If the record of annexation proceedings on its face fails to show substantial compliance with any essential provision of the Act, the superior court upon review must remand to the governing board for amendment with respect to such noncompliance. The court itself is without authority to amend the report, ordinance or other part of the record. This is true even if evidence is presented which justifies amendment." *Huntley v. Potter*, supra, 255 N.C. at 627-28 (citations omitted).

Application of the above principles impels the conclusion that the reviewing court here had no authority to add a sixty-third lot to the annexation report and ordinance submitted by the City. This is so, even though the City presented evidence which established that, as a result of an error in the tax maps, it had failed to include an additional qualifying lot within the boundaries of Area A in the annexation report and ordinance. Concededly, such evidence justifies amendment of the annexation report and

ordinance. However, the correction of such oversight is not within the province of the reviewing court; rather, amendments to the annexation report and ordinance must be made by the governing board in accordance with procedures outlined in G.S. 160A-45, *et seq.*

Accordingly, we hold that Area A does not meet the 60 percent use test of G.S. 160A-48(c)(3) since only thirty-seven of the sixty-two lots or tracts (59.6 percent) mentioned in the annexation ordinance are being used for qualifying purposes. The judgment of the trial court affirming the action of the governing board without change is reversed. In accordance with G.S. 160A-50(g)(2) this cause is remanded to the Superior Court of Rowan County for further remand to the municipal governing board of the City of Salisbury for amendment of Area A lot boundaries—if the City be so advised—to reflect the sixty-third qualifying lot, the inclusion of which would conform the annexation ordinance under attack to the requirements of G.S. 160A-48(c)(3).

Reversed and remanded.

Justice COPELAND did not participate in decision of this case.

STATE OF NORTH CAROLINA v. JESSE ELY BROWN, JR. AND PALMER JUNIOR COFFEY

No. 61

(Filed 6 May 1980)

1. Criminal Law § 92.5— several crimes committed pursuant to single scheme—severance properly denied

The trial court did not err in denying defendant's motion to sever charges of breaking and entering, larceny and robbery with firearms, since the theory of the State's case was that defendant broke into and entered a home from which he took a stereo for the purpose of selling such stolen property, and, pursuant to this single plan or scheme, he went to an apartment one week later to sell the stolen property and, while there, committed the crime of robbery with firearms when he obtained $300 from a person who claimed to be the owner of the stereo.

2. Robbery § 4— robbery with firearms—sufficiency of evidence

Evidence of felonious intent was sufficient to support a conviction of robbery with firearms, and there was no merit to defendant's contention that he did not know or have reasonable grounds to know that he was not entitled to the possession of the stereo in question or that the stereo he took was in fact the property of the person he allegedly robbed where the State's evidence tended to show that defendant broke into a home and stole a stereo which he tried to sell a week later; a person claiming to be the owner of the stereo demanded its return; defendant demanded $300 at gunpoint before he relinquished possession of the stereo; defendant contended that he bought the stereo, which he valued at $900, from a stranger at night for $300; defendant contended that when he first entered the apartment where the alleged robbery occurred, a man claimed ownership of the stereo and offered to show defendant documents proving his ownership; and defendant stated that he did not know for sure if the stereo belonged to the robbery victim, but defendant felt he was entitled to either the stereo or the money he had paid for it.

3. Robbery § 5.4— robbery with firearms—failure to instruct on assault with deadly weapon—error

In a prosecution for robbery with firearms where the evidence tended to show that defendant relinquished possession of a stereo to the person claiming ownership only after that person handed over $300 while defendant held a gun on him, the trial court erred in failing to submit to the jury the lesser included offense of assault with a deadly weapon, since defendant asserted a claim of right in the stereo and there was therefore conflicting evidence as to felonious intent.

4. Robbery § 5.1— robbery with firearms—felonious intent—instructions inadequate

In a prosecution for robbery with firearms, the trial court in the jury instructions did not clearly bring into focus the conflicting contentions arising from the evidence as to the absence or presence of felonious intent.

5. Robbery § 4.7— robbery with firearms—aiding and abetting—insufficiency of evidence

In a prosecution for robbery with firearms where the State rested its case against one defendant upon the theory that he aided and abetted the other defendant in the commission of the crime, the trial court erred in denying the first defendant's motion for nonsuit, though defendant was present at the crime scene and was apparently on friendly terms with the defendant who actually committed the robbery, since there was no evidence that defendant by word or act communicated an intent to aid the actual perpetrator should assistance become necessary.

ON CERTIORARI. Defendants Brown and Coffey were charged in separate indictments with robbery with firearms, and breaking and entering, and larceny. The charges were consolidated for trial.

The State offered evidence tending to show that on 26 January 1978 the home of David Pruett and his wife Carolyn was broken into, and several items of personal property including a stereo system were taken from their home. After reporting the theft to the Sheriff's Department, David Pruett also told his friend Jeff Winkler of the occurrence. Winkler agreed to make inquiries so as to locate the missing property.

On 2 February 1978, J. D. Bushburger came to Winkler's apartment, and Winkler asked him if he knew where a stereo system could be bought. Bushburger then made several trips to an automobile, where defendant Brown was sitting, and obtained information concerning an available stereo. From the information furnished, Winkler concluded that the stereo might be the one taken from the Pruett home. He then made arrangements for the stereo to be brought to his apartment and called David Pruett to come to the apartment. Pruett and his wife Carolyn arrived at the Winkler apartment at about 11:30 p.m., and shortly thereafter defendants Brown and Coffey arrived, accompanied by Forrest Menton and J. D. Bushburger. Brown and Menton brought in the stereo system, and immediately thereafter Pruett, armed with a knife, stood up and told defendant Brown that the stereo was his. He further stated that he had receipts and serial numbers to prove his ownership. He said that Brown was not going to leave with the stereo unless it was over his dead body. Brown replied, "It might be that way." After some further discussion, Brown left the apartment and returned with a shotgun, pointing it at Pruett's head. At that time, Pruett was standing at the closed apartment door, and when he looked through the glass window of the door, he saw Brown pointing the shotgun at his head. He asked Brown, "What are you going to do, blow my head off?" Brown replied, "Well, I might." Pruett then let Brown into the apartment, and they returned to the living room. Brown waved the gun in an arc so that it was temporarily pointed at some of the occupants of the room but did not actually aim or hold the gun on anyone. Brown then said that he had bought the stereo for $300, and he wanted that sum before they left. He did not make it clear where he had purchased the stereo but finally said that he bought it from a black man named Guy Patterson. At this point, Pruett gave Brown $300, and Brown and his companions departed.

The State's evidence further tended to show that defendant Coffey did not bring any parts of the stereo into the apartment, that he did not make any threats of any kind, and that he did not communicate with or assist Brown in any manner. There was some evidence that Coffey stated that he had $100 in the stereo and that he made some statement as to whether the stereo was purchased.

Defendant Brown testified in his own behalf and stated that he bought the stereo from a man named Guy Patterson for the sum of $300, $100 of which he had borrowed from Coffey. He said that Patterson wanted to sell the stereo because he and his wife were breaking up. When Pruett told him that the stereo had been stolen from him, Brown replied that he had paid for the property and did not know that it was stolen. He left the apartment and obtained his gun because he was frightened by the knife displayed by Pruett, and because another occupant of the apartment had a poker in his hand. He did not point the gun at anyone but held it like a club. He told Pruett that he wanted either the $300 or to take the stereo back. Thereafter, Pruett gave him $300, and after a friendly visit, he and his companions left. He did not feel that a robbery had been committed when he left the apartment that night. He further testified:

> I didn't know how much the stereo was actually worth. Mr. Pruett did have documents which he offered to show me which I did not look at because I believed he had the documents to prove it was his. I said I either wanted my money or the stereo back when I was speaking to Mr. Pruett on the night of February 2, 1978. I didn't know for sure that it was Mr. Pruett's stereo, but I took his word for it when he said it was. I felt that I was entitled to David Pruett's stereo because I had paid cash money for it. I don't know whether or not buying it from a thief gives me a better title than one who bought it from a true owner because I didn't know I was buying it from a thief.

On cross-examination by Mr. Applefield, he stated:

> Mr. Coffey never did get out of the car when we met Gary Patterson between Lenoir and Hickory near the service station. He did not even help carry the stereo in to the Pruetts' house and he never looked at the stereo before I car-

ried it in to the Pruett house. Mr. Coffey did not assist me in getting the gun or anything else.

Each defendant was found not guilty of breaking, entering and larceny. The jury returned verdicts finding defendant Brown guilty of robbery with a firearm and finding defendant Coffey guilty of common law robbery. Each defendant appealed, and the Court of Appeals dismissed their appeals for failure to comply with the appellate rules. On 23 April 1979, defendants filed a petition for writ of certiorari with the Court of Appeals which was denied on 27 August 1979. Defendants on 24 September 1979 filed petitions for writ of certiorari and for discretionary review pursuant to G.S. 7A-31 with this Court. On 8 January 1980, we denied defendants' petition for discretionary review and allowed defendants' petition for writ of certiorari. We now treat defendants' petition for writ of certiorari as a motion pursuant to G.S. 7A-31 to review the cause on its merits prior to review by the Court of Appeals and allow that motion.

Rufus L. Edmisten, Attorney General, by J. Chris Prather, Associate Attorney, and Robert W. Newsom III, Assistant Attorney General, for the State.

Richard E. Mattar for defendant appellant Brown.

Gerald I. Applefield for defendant appellant Coffey.

BRANCH, Chief Justice.

Appeal of Defendant Brown

[1] Defendant Brown first assigns as error the denial of his motion to sever the charged offenses.

G.S. 15A-926 in part provides:

> *Joinder of offenses and defendants.*—(a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or 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. Each offense must be stated in a separate count as required by G.S. 15A-924.

This statute, which supplanted G.S. 15-152 and was effective 1 July 1975, permits joinder of offenses which are based on a series of acts or transactions "constituting parts of a single scheme or plan" if the joinder does not hinder or deprive a defendant of his ability to present his defense. The question before the court on a motion to sever is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial. Whether offenses should be joined is a matter addressed to the sound discretion of the trial judge. *State v. Greene,* 294 N.C. 418, 241 S.E. 2d 662 (1978).

Here the theory of the State's prosecution was that on 26 January 1978 defendant Brown broke into and entered the Pruett home and took the stereo for the purpose of selling the stolen property. Pursuant to this single plan or scheme, he went to the Winkler apartment on the night of 2 February 1978 to sell the stolen property, and while there committed the crime of robbery with firearms when he obtained $300 from David Pruett.

Under the facts of this case, we cannot say that the trial judge abused his discretion in denying defendant's motion to sever or that defendant has shown any resulting prejudice.

Furthermore, G.S. 15A-927(a)(2) provides:

> If a defendant's pretrial motion for severance is overruled, he may renew the motion on the same grounds before or at the close of all the evidence. *Any right to severance is waived by failure to renew the motion.* [Emphasis added.]

This record discloses that defendant failed to renew his motion at the close of all the evidence and thereby waived his right, if any, to severance. However, defendant takes the position that his motion for appropriate relief, filed after judgment, amounted to a renewal of his motion to sever at the close of all the evidence. A motion for appropriate relief, by the terms of the statute, is made after the verdict is rendered. G.S. 15A-1414. A motion made after the verdict comes too late to avoid the waiver provision of G.S. 15A-927(a)(2).

[2] Defendant Brown next contends that the trial judge erred in denying his motions to dismiss the charge of robbery with firearms and in denying his subsequent motion for appropriate

relief. G.S. 14-87 of the General Statutes governs the crime of robbery with firearms and provides as follows:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business . . . shall be guilty of a felony.

Robbery with firearms is a legislative outgrowth of common law robbery, which is the felonious taking of money or goods of any value from the person of another or in his presence, against his will, by violence or by putting him in fear. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971). G.S. 14-87 does not create a new offense, but provides for a more serious punishment when firearms or other dangerous weapons are used. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974).

A motion to dismiss is governed by the same rules as motions for judgment as of nonsuit. The question presented by the motion is whether there is sufficient evidence to send the case to the jury and to support a verdict of guilty of the charged offense. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969); *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977).

Initially, we note that there is ample evidence that defendant Brown by the use or threatened use of a deadly weapon took money in the amount of $300 from David Pruett against his will and by putting him in fear. Even so, defendant argues that the State has failed to prove the essential element of felonious intent.

Felonious intent is an essenital element of the crime of robbery with firearms and has been defined to be the intent to deprive the owner of *his goods* permanently and to appropriate them to the taker's own use. *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Lunsford*, 229 N.C. 229, 49 S.E. 2d 410 (1948).

Defendant argues that he did not know or have reasonable grounds to know that he was not entitled to the possession of the property or that the property that he took was in fact the property of David Pruett. The crux of the question presented by this

assignment of error is whether there is any evidence of felonious intent.

This Court considered the question of felonious intent in the case of *State v. Sowls*, 61 N.C. 151 (1866). There the defendant was charged with common law robbery. The State offered evidence tending to show that the defendant, who mistakenly thought he was acting under the orders of Captain Meares of the Home Guard, entered a dwelling and by force took a sword for the purpose of disarming one Stanly and not for the purpose of appropriating it to his own use. Stanly was not present, but his father and wife delivered the sword to the defendant out of fear. At trial, counsel for the defendant requested the Court to instruct the jury that if the defendant acted under the order of Meares, believing that he had a lawful military command, they should acquit him, whether Meares was authorized to give such orders or not. The court declined to give the charge, and the defendant was convicted. In granting a new trial, the Court in part stated:

> This offense is defined to be "a felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence, and putting him in fear." 2 East, P. C., 707; Roscoe's Cr. Ev., 890.
>
> It must be done *animo furandi*, with a felonious intent to appropriate the goods taken to the offender's own use. . . .
>
> * * *
>
> If the prisoner were acting in obedience to orders issued by the captain of a company of that guard, or *bona fide* thought that he was acting under such orders, and in obedience to them took the prosecutor's sword, not for the purpose of appropriating it to his own use, but solely with the view to disarm the prosecutor, he could not be held to have been guilty of robbery, no matter how wrongfully he may have acted. Under such circumstances the *animus furandi* would be as much wanting as it was in *Hall's case*, 3 Car. & P., 409 (14 Eng. C. L. Rep., 337), which is thus stated by Mr. Roscoe: The prisoner had set wires in which game was caught. The gamekeeper finding them, was carrying them away, when the prisoner stopped him, and desired him to give them up. The gamekeeper refused, upon which the prisoner lifting up a

> large stick, threatened to beat out his brains if he did not deliver them. The keeper, fearing violence, delivered them. Upon an indictment for robbery, Vaughan, Baron, said: "I shall leave it to the jury to say whether the prisoner acted under an impression that the wires and the pheasant were his own property; for, however, he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bona fide* impression that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail." The prisoner was acquitted.

61 N.C. at 153-55.

The Court also ordered a new trial in *State v. Curtis*, 71 N.C. 56 (1874), so that the jury might find whether the defendant who was charged with robbery took the property with felonious intent. In that case the Court said:

> In the case before us the special verdict states what was done, but the intent is not stated. And it is very evident that that was the difficulty they had in coming to a general verdict. They could not satisfy themselves as to the intent. Was it the purpose to steal, or was it a Christmas frolic. Now that is not a question of law, but it is a question of fact which the jury ought to have found.

Id. at 59.

Here the evidence discloses that defendant Brown, according to his own testimony, had bought a stereo in the nighttime, from a man he had not previously known, for the sum of $300. Defendant placed a value on this property of approximately $900. He testified that, when he first entered the Winkler apartment, Mr. Pruett told him that the stereo belonged to him and that Pruett offered to show him documents to prove his ownership. He stated that he did not know for sure that it was Mr. Pruett's stereo, but he felt he was entitled to either the stereo or the money he had paid for it. He did not know he was buying it from a thief.

Applying the well-recognized rule that upon motion for nonsuit in a criminal action, the evidence must be considered by the court in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn

from the evidence, we hold that there was sufficient evidence to permit the jury to reasonably infer that defendant by the threatened use of a shotgun feloniously took the sum of $300 in money from David Pruett against his will by putting him in fear.

The trial judge correctly denied defendant's motions for dismissal and his motion for appropriate relief.

[3] Defendant assigns as error the failure of the trial judge to submit and charge upon the offense of assault with a deadly weapon.

Assault with a deadly weapon is a lesser included offense of robbery with firearms, and the jury may acquit as to the greater charge and return a verdict as to the lesser if the evidence warrants such a finding. However, it is not necessary to submit the lesser included offense if the evidence discloses no conflicting evidence relating to the essential elements of the greater crime. *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954); *State v. Holt*, 192 N.C. 490, 135 S.E. 324 (1926). When there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge must instruct on the lesser included offense even where there is no specific request for such instruction. An error in this respect will not be cured by a verdict finding a defendant guilty of the greater crime. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Wagoner*, 249 N.C. 637, 107 S.E. 2d 83 (1959); *State v. Burnette*, 213 N.C. 153, 195 S.E. 356 (1938).

Defendant argues that the evidence shows that defendant asserted a claim of right in the stereo and therefore there was conflicting evidence as to felonious intent. We agree. Although there was evidence of all the essential elements of the crime of robbery, defendant's evidence asserting a claim of ownership of the stereo created a conflict in the evidence as to felonious intent. There certainly was ample evidence of the lesser included crime of an assault with a deadly weapon. Thus, defendant was entitled to a charge on the crime of assault with a deadly weapon in order "to have the different views arising on the evidence presented to the jury upon proper instructions. . . ." *State v. Childress*, 228 N.C. 208, 210, 45 S.E. 2d 42, 44 (1947).

[4] Finally, defendant contends that the trial judge did not adequately charge on the element of felonious intent. He argues that the court failed to clearly explain defendant's theory of defense and his contentions as to his intent and purpose in taking the stereo.

G.S. 15A-1232 provides:

> *Jury instructions; explanation of law; opinion prohibited.*—In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

In the initial portion of the charge, Judge Howell stated defendant's contentions as to felonious intent in the following language:

> [Defendant] did not intend to rob or hurt anyone, but simply to obtain his three hundred dollars. And that at no time did he have the intent to rob or steal anything that wasn't his, but to obtain only such money as he had tied up in the stereo component system there at the Pruett home in which he had brought there.

The court thereafter in defining the crime of robbery with firearms explained felonious intent with this language:

> In this connection, the term "felonious taking" means a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker, *the taker knowing that he is not entitled to take the property.* [Emphasis added.]

In his final mandate to the jury on the charge of robbery with firearms, Judge Howell in pertinent part instructed:

> [I]f you find from the evidence and beyond a reasonable doubt that on the 2nd day of February, 1978, the defendant, Jesse Brown, feloniously took and carried away three hundred dollars from the person of David Pruett . . . and that defendant did so with the specific intent on his part to deprive the owner of his property permanently and to convert it to the defendant's own use, the *defendant knowing that he was not*

> *entitled to take it,* it would be your duty to return a verdict of guilty of robbery with a firearm. [Emphasis added.]

In our opinion, Judge Howell in his charge correctly defined the crime of robbery with firearms; however, there remains the question of whether, under the facts of this case, he clearly brought into focus the conflicting contentions arising from the evidence as to the absence or presence of felonious intent.

"The comprehensiveness and specificality of the definition and explanation of 'felonious intent' required in a charge depends on the facts in the particular case." *State v. Spratt,* 265 N.C. 524, 526, 144 S.E. 2d 569, 571 (1965); *see also State v. Lawrence,* 262 N.C. 162, 136 S.E. 2d 595 (1964).

Spratt and *Lawrence* highlight this rule of law in that, in each instance, this Court, speaking through Moore, J., applied the same principles of law and reached differing results because of the facts in the respective cases.

In *Spratt* the defendant was charged with robbery, and the State's evidence tended to show that defendant took money from the cashier of a store by the threatened use of a pistol. The defendant's sole defense was alibi. The court instructed the jury:

> [I]f the defendant armed with a pistol drew it on and pointed it at Mr. Blackmon for the intention and purpose of taking money from his cash register by force and against his will, and if he actually made an overt effort to take money or any part of it, and if in doing so it was by force and against the will of Mr. Blackmon and if his life was in danger or threatened, the crime of attempt to commit robbery under this Statute would have been complete.

265 N.C. at 526, 144 S.E. 2d at 571.

The defendant challenged the adequacy of the charge on the element of felonious intent. The Court in finding no error in the charge stated:

> [W]here the evidence relied on by defendant tends to admit the taking but to deny that it was with felonious intent, it is essential that the court fully define the "felonious intent" contended for by the State and also explain defendant's

> theory as to the intent and purpose of the taking, in order that the jury may understandingly decide between the contentions of the State and defendant on that point. In other words, where the evidence is susceptible of conflicting inferences on the question of intent, develops a direct issue on that point and makes intent the battleground of the case, full and explicit instructions on this phase is required. [Citation omitted.]
>
> * * *
>
> The *evidence* did not raise a direct issue as to intent. The court told the jury, in effect, that before they could return a verdict of guilty, they must find that defendant attempted to take the property with "intent to rob." . . . The word "rob" was known to the common law and the expression "intent to rob" is a sufficient definition of "felonious intent" as applied to the robbery statute, in the absence of evidence raising an inference of a different intent or purpose.

Id. at 526-27, 144 S.E. 2d at 571-72.

In *Lawrence* defendant also assigned as error the failure of the trial judge to adequately define and apply the element of "felonious taking" to the facts of the case. Holding this to be error, the Court concluded:

> In the instant case defendant and the prosecuting witness had been drinking. Defendant told prosecuting witness that he owed him something and he (defendant) would get it himself. In the light of all of the circumstances disclosed by the State's evidence, a contention by defendant that his actions amounted only to a forcible trespass may seem unreasonable indeed, but the weight and reasonableness of the evidence is for the jury, and defendant has the right to have the jury consider the case in accordance with his theory of the legal effect of his acts if his theory is supported by any permissible inference to be drawn from the evidence. *State v. Guss*, 254 N.C. 349, 118 S.E. 2d 906. The learned judge inadvertently failed to give a legal explanation of the term "felonious taking," and to apply it to the facts. This was error which entitles defendant to a new trial.

262 N.C. at 168, 136 S.E. 2d at 600.

In the case *sub judice*, there was evidence susceptible of conflicting inferences as to the question of defendant's intent which raised a direct issue on that point. We therefore are of the opinion, and so hold, that the trial judge did not fully and adequately explain the law and apply it to the facts so as to clearly bring into focus defendant's contentions and his theory of defense.

For reasons stated, there must be a new trial as to defendant Brown.

Appeal of Defendant Coffey

[5] Defendant Coffey assigns as error the failure of the trial judge to grant his motion for judgment as of nonsuit. Counsel for defendant Coffey moved for judgment as of nonsuit at the close of State's evidence and moved to dismiss at the close of all the evidence. The motions were denied.

When a motion for judgment as of nonsuit or a motion to dismiss is lodged in a criminal action, the court must consider all the evidence actually admitted, whether competent or incompetent, in the light most favorable to the State. All contradictions or discrepancies must be resolved in its favor, and it must be given the benefit of every reasonable inference to be drawn from the evidence. When all the evidence is so considered, it is for the court to decide whether there is sufficient evidence to support a finding that the charged offense has been committed and that the defendant was the perpetrator of the offense. If, when so considered, the evidence is only sufficient to raise a suspicion or conjecture that the offense has been committed or that the defendant committed the charged offense, then the motion for judgment as of nonsuit or the motion to dismiss should be allowed. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). *See also State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *reversed on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977).

In the case before us, the State rests its case on the charge of robbery with firearms against defendant Coffey upon the theory that he aided and abetted in the commission of the crime. In support of this position, the State relies heavily upon the case of *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied*, 423 U.S. 1091 (1976). In *Sanders* the defendant was charged with malicious injury to occupied personal property and

willful and malicious injury to Albert Stout, Jr., by means of an explosive device. The State proceeded upon the theory of aiding and abetting and offered evidence tending to show that the defendant was present when a bomb was placed in S.B.I. Agent Stout's car, and was at that time seated in a nearby automobile guarding Jewel Hutton, who testified as a State's witness at trial and averred that he was a police informer. When the defendant in the company of Hutton, Jack Sellers and Otis Blackmon arrived at the place where Stout's automobile was parked, Blackmon and Sellers left the car carrying a paper bag in which the defendant had earlier seen dynamite and wiring. Blackmon and Sellers raised the hood of Agent Stout's automobile and worked there for about ten minutes and returned to the car without the paper bag. The four left together. At about 8:00 a.m. on the morning of 10 September 1974, Agent Stout entered his automobile and when he turned his key in the ignition, he was seriously injured by an explosion. This Court in upholding the trial judge's denial of defendant's motion for judgment as of nonsuit stated:

> The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Gaines*, 260 N.C. 228, 132 S.E. 2d 485 (1963). To support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators. *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961); *State v. Holland*, 234 N.C. 354, 67 S.E. 2d 272 (1951).

Accord: State v. Scott, 289 N.C. 712, 224 S.E. 2d 185 (1976). Here the State strongly contends that defendant's relation to the actual perpetrator of the armed robbery and his actions at the scene of the crime communicated an intent to aid defendant Brown in the commission of the crime.

It is true that defendant Coffey was present at the scene of the alleged crime and was apparently on friendly terms with the defendant Brown. This is not enough to permit the jury to find Coffey guilty on the theory of aiding and abetting. *State v. Scott, supra.* The only additional evidence which might permit an inference that defendant Coffey intended to aid defendant Brown is that Coffey had loaned Brown $100 of the purchase price of the stereo and had made some statement as to where the stereo was obtained. In considering the weight of all the evidence, it must be borne in mind that the evidence overwhelmingly shows that defendants Brown and Coffey initially came to the Winkler apartment for the sole purpose of selling the stereo. It was only after David Pruett displayed a knife that defendant Brown left the apartment and returned armed with a shotgun. This was the beginning of the crucial period as to defendant Coffey's innocence or guilt on the charge of robbery with firearms. From the moment that defendant Brown returned to the Winkler apartment with the shotgun, we are unable to find any evidence which would support a reasonable inference that defendant Coffey did anything to indicate or communicate to defendant Brown an intent to aid him in the commission of the crime of robbery with firearms should his assistance be necessary. To the contrary, the victim of the alleged crime stated that defendant Coffey "didn't hardly move, he was standing behind the couch and he never did really move." Further, Pruett's wife testified, "Palmer Junior Coffey never touched the gun and didn't communicate or assist Jesse Brown." The State's witness Jeff Winkler said, "Junior Coffey never threatened me in any way and I don't even recall him saying anything."

Obviously, *Sanders* and instant case are distinguishable. In *Sanders* there is ample evidence that defendant was present at the scene, actually assisting the actual perpetrators of the crime with knowledge of their plan to commit the crimes. Here there was no evidence that defendant even knew that defendant Brown intended to commit the crime of armed robbery. There was no evidence that he by word or act communicated an intent to Brown to aid him should assistance become necessary.

In our opinion, all of the evidence in this case was only sufficient to raise a suspicion that defendant Coffey might have been

guilty of the charged crime. Such evidence is not sufficient to repel defendant Coffey's motion for judgment as of nonsuit.

The verdict and judgment in *State v. Palmer Junior Coffey*, No. 78-CR-348 are vacated, and it is ordered that the action in that case be dismissed.

As to defendant Coffey, reversed.

As to defendant Brown, new trial.

DUKE POWER COMPANY, PETITIONER v. WORTH WINEBARGER AND WIFE, REBECCA WINEBARGER, RESPONDENTS

No. 88

(Filed 6 May 1980)

1. **Eminent Domain § 6.2— value of land similar to condemned land—admissibility**

Where the value of a particular parcel of realty is directly in issue, the price paid at voluntary sales of land similar in nature, location, and condition to the land involved in the suit is admissible as independent evidence of the value of the land in question if the sales are not too remote in time. Whether two properties are sufficiently similar to admit the sales price of one as circumstantial evidence of the value of the other is a question to be determined by the trial judge, usually upon voir dire.

2. **Eminent Domain § 6.2— value of dissimilar land—inadmissibility**

Where a particular property is markedly dissimilar to the property in issue, the sales price of the former may not be alluded to in any manner which suggests to the jury that it has a bearing on the estimation of the value of the latter.

3. **Eminent Domain § 6.9— value witness—cross-examination as to knowledge of values and sales prices of dissimilar properties**

Where a witness has been offered to testify to the value of the property directly in issue, the scope of that witness's knowledge of the values and sales prices of dissimilar properties in the area may be cross-examined for the limited purpose of impeachment to test his credibility and expertise. However, it is improper for the cross-examiner to refer to specific values or prices of noncomparable properties in his questions to the witness, and if the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied

and the inquiry as to that property is exhausted. If the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues, and in such a rare case the cross-examiner must be prepared to take the witness's answer as given.

4. **Eminent Domain § 6.9— cross-examination of value witness—references to values and sales prices of dissimilar properties—errors not cured by limiting instruction**

In this action to condemn a power line easement, the trial court erred in failing to rule promptly on respondents' continued objections to persistent references by petitioner's counsel during cross-examination of respondents' value witnesses to values and sales prices of properties not comparable to respondents' land and in ultimately overruling those objections; furthermore, such errors were not cured by the court's occasional instructions to the jury to consider the witnesses' testimony relating to the sales prices of other properties only insofar as it bore upon the witnesses' knowledge of values where (1) no curative instruction was given as to the cross-examination of one value witness, (2) the curative instructions given by the court were not sufficient to disabuse the jury of the impressions inevitably made by the repeated price and value references posed in questions by petitioner's counsel, and (3) petitioner's counsel persisted in the improper mode of cross-examination to such an extent that it pervaded the whole trial.

5. **Appeal and Error § 24; Rules of Civil Procedure § 46; Trial § 15.2— objection to line of questioning—insufficiency of general objection**

A general objection will not suffice to afford counsel the benefits of the rule which preserves the continued effect of a specific objection, once made, to a particular line of questioning, G.S. 1A-1, Rule 46(a)(1); rather, objecting counsel must alert the trial judge to the specific legal infirmities which may inhere in a "specified line of questioning."

6. **Appeal and Error § 24; Rules of Civil Procedure § 46; Trial § 15.2— objection to line of questioning—line objected to apparent to court and parties**

The requirement in Rule 46(a)(1) that counsel object to a "specified" line of questioning is satisfied where the "line" of questioning objected to is apparent to the court and the parties.

7. **Appeal and Error § 24; Eminent Domain § 6.9; Rules of Civil Procedure § 46; Trial § 15.2— objections to line of questions—failure to object to questions—no waiver of objection**

Pursuant to G.S. 1A-1, Rule 46(a)(1) and Appellate Rule 10(b)(1), respondents' failure to object to two questions posed on cross-examination of their value witness concerning the sales prices of noncomparable lands did not constitute a waiver of respondents' objections to those questions or to similar questions posed to other value witnesses where respondents' counsel objected some fourteen times to questions by petitioner's attorney which disclosed or sought to elicit sales price figures on noncomparable properties; several bench

conferences occurred at which the trial judge was made fully aware of the specific grounds of respondents' objections; the two questions not objected to were the same as those earlier allowed over strenuous objections during the cross-examination of two other witnesses; and it was clear that later objections to the same line of questioning would be of no avail.

APPEAL pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals which found no error in a trial conducted by *Judge Albright* at the 1 May 1978 Session of WILKES Superior Court in which respondents were awarded damages in petitioner's condemnation action. The opinion of the Court of Appeals (by *Chief Judge Morris*, concurred in by *Judge Webb* with *Judge Hedrick* dissenting) is reported at 42 N.C. App. 330, 256 S.E. 2d 723 (1979). This case was docketed and argued as No. 84, Fall Term 1979.

McElwee, Hall, McElwee & Cannon, by Wm. H. McElwee III, William C. Warden, Jr., Wm. I. Ward, Jr., Chief Trial Counsel, Attorneys for plaintiff appellees.

Franklin Smith, Attorney for defendant appellants.

EXUM, Justice.

Respondents Worth and Rebecca Winebarger appeal from a judgment on a verdict assessing damages of $16,000 to compensate them for petitioner's taking of an electric power line easement and right-of-way over their land. Error is assigned to certain evidentiary rulings and instructions thereon by the trial judge during trial. For errors committed in these rulings on questions propounded on cross-examination of respondents' expert witnesses, we reverse the Court of Appeals and grant respondents a new trial.

The gist of this appeal lies in respondents' disagreement with the adequacy of the jury's verdict. Respondents vigorously contend that the jury was prejudiced by improper references made by petitioner's counsel to values and sales prices of properties not comparable to respondents' land. Under the circumstances of this case, we agree.

During cross-examination of respondents' value witnesses, petitioner's counsel continually and persistently alluded to alleged sales prices of parcels of land other than that involved in the

case. For instance, respondents' witness Fred Norman was asked on cross-examination:

"Q. Let me ask you this, do you know anything of a 225.4 acre sale made by Johnson J. Hayes, Jr., to John and Joy Payne in November, 1976?

A. No. As I stated I did not base any appraisal on any comparable.

Q. You don't know that property sold for $148.00 an acre, do you?

A. No, sir.

Mr. Smith objects. Overruled.

EXCEPTION NO. 4.

Q. You don't know that sold for $148.00 an acre?

A. No, I do not.

Q. How about the Douglas Ferguson sale of property from Coyd Kilby?

Mr. Moore objects.

Q. You don't know that it sold for $114.00 an acre?

Mr. Smith objects.

BY THE COURT: Show the jury to the jury room.

[Jury retires]

BY MR. MOORE: If he is going to cross-examine the witness to specific property, he has to show that that property is comparable to the property which they are talking about.

BY MR. MCELWEE: It is not presented for purpose of comparable sales, just testing his knowledge.

BY THE COURT: As I understand the rule on cross-examination, he is entitled to test, to question him to test his knowledge and familiarity for the purpose of impeachment."

Similarly, the following questions were propounded on cross-examination to respondents' witness Paul Osborne with respect to property previously owned by Osborne:

"Q. You paid $60.00 an acre for the property, did you not?

Mr. Moore objects.

A. We swapped land.

BY MR. MCELWEE: We present this for the purpose of qualification.

A. I didn't buy it directly.
Mr. Moore objects.
EXCEPTION NO. 8
A. I didn't buy the land from him, we swapped land.
Q. The price was $60.00 an acre?
Mr. Moore objects.
EXCEPTION NO. 9

A. No, I wouldn't say it was $60.00 an acre.
BY MR. MOORE: He said he swapped. Objection.

. . . .

A. Shortly after I traded the property in Boomer, I sold it. . . .
Q. Can you tell us how much you sold it for?
Mr. Smith objects. Overruled.
EXCEPTION NO. 11
A. $150.00 an acre. I testified previously that I keep up with land sales, and I am not familiar with the sale of property by Mary Gwyn Hubbard to Caney Lowe and Sid Mullis, 44.1 acre tract of land for $500.00 per acre in Boomer Township. No, I'm not familiar with it.
Q. I will ask you if you are familiar with the sale of 202.4 acres of property by Johnson J. Hayes, Jr.—
BY MR. MOORE: Objection.
EXCEPTION NO. 12
Q. To John and Joy Payne for the price of $148.00 per acre in Boomer Township?
Mr. Moore Objects. Overruled.
EXCEPTION NO. 13

. . . .

Q. I asked you if you are familiar with the sale from Lloyd Kilby to Douglas L. Ferguson that would for 175 acres of land, twenty-five acres being pasture and 150 woodland at $114.00 per acre in Boomer Township?
Mr. Moore objects. Overruled.
EXCEPTION NO. 14"

Finally, respondents' witness Cecil Kilby was cross-examined by petitioner's counsel as follows:

"Q. I'll ask you if that 202.4 acres was not purchased by you and Mr. Church for $37,500.00?

Mr. Moore objects.

A. I believe it was purchased by me.

BY THE COURT: Just a minute, let me talk to you up here at the bench.

Whereupon the counsel approaches the bench for conference with the Court.

BY THE COURT: I am going to overrule the objection.

EXCEPTION NO. 18

. . . .

Q. I ask if you are not familiar with the sale of property from J. J. Hayes, Jr., to John and Joy Payne, 202.4 acres in 1976 for $148.00 an acre?

A. No, I don't think that I know where that piece of property is, it's another one that you climb to.

Q. Are you familiar with the sale?

A. No, sir.

Q. Nor are you familiar with the sale of property from Mr. Lloyd Kilby to Douglas Ferguson, 175 acres for $114.00 an acre?

A. No, I don't know that one."

There was no showing that any of the properties referred to in the questions above were in any way comparable to respondents' property. There was thus no foundation for the use of statements of their values or sales prices as competent circumstantial evidence of the value of respondents' land. *See generally* 1 Stansbury's North Carolina Evidence § 100 (Brandis rev. 1973). Petitioner contends nevertheless that the questions were entirely proper on cross-examination for the purposes of impeaching the witnesses and probing their knowledge of land values in the area. Apparently agreeing with petitioner on this point, the judge overruled or ignored respondents' repeated objections to this line of questioning. Instead he instructed the jury not to consider the testimony as substantive evidence for the purpose of evaluating respondents' property. This resulted in error prejudicial to respondents.

A witness who expresses an opinion on property value may be cross-examined with respect to his *knowledge* of values of nearby properties for the limited purpose of testing the worthiness of his opinion, or challenging his credibility, even if those properties are not similar to that involved in the litigation. *Templeton v. Highway Commission*, 254 N.C. 337, 118 S.E. 2d 918 (1961); *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959). It is always the duty of the presiding judge, however, to confine the nature and scope of this line of cross-examination to matters relevant to its limited impeachment purpose. That which is revealed to the jury in either the examiner's questions or the witness' answers should not exceed the bounds of such relevancy. This principle is well illustrated in a number of our cases.

In *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61 (1957), the witness was asked on cross-examination whether he knew of the values and sales prices of other property in the area. The witness answered in the negative, and the cross-examination ended at that point. Speaking for this Court, Justice (later Chief Justice) Bobbitt found no impropriety in the questions propounded:

> "The testimony so elicited was relevant solely to the credibility of the witness, and the weight, if any, to be given his testimony. Let it be noted that none of the questions undertook to elicit testimony as to the valuations or sales prices of other properties, the questions being directed to whether the witness *had opinions or knowledge* with reference thereto." 246 N.C. at 506-507, 99 S.E. 2d at 65. (Emphasis original.)

In *Barnes v. Highway Commission, supra*, the condemnor's appraisal witness was asked by petitioner's counsel on cross-examination: "Now, Mr. Minish, you yourself appraised approximately 13 acres of property directly east of this [subject] property and abutting on this property for $300,000.00, didn't you?" An objection to this question was sustained. This Court found no error, noting that:

> "[b]ecause of the dissimilarity of the tracts, testimony adduced thereby was incompetent on the question of value. The total appraisal value placed on the land by the witness would

not of itself have impeached the witness or shown lack of knowledge of values in the vicinity. . . . *The conclusion is inevitable that petitioner desired only to get the $300,000.00 figure before the jury to induce thereby a liberal award.* This within itself would violate the applicable rule of evidence. . . ." 250 N.C. at 396, 109 S.E. 2d at 233. (Emphasis supplied.)

More recently, in *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972), a condemnation action instituted by the state to acquire an undeveloped portion of an island for historic preservation purposes, this Court said:

"Similarly prejudicial was the evidence that lots, fronting 200 feet on the ocean and extending back 100 feet *in the developed portion* of Shell Island, were selling for $75.00 per front foot or $15,000.00 a lot. Respondents elicited this testimony during the cross-examination of the State's expert witness Cantwell, who had testified on direct examination to his opinion of the fair market value of the land taken. It was competent for respondents to question Cantwell's knowledge of the value of coastal lands in that area and, in response to such questions, he had said that he himself had appraised Shell Island and knew at what price lots thereon had been sold and the price at which the remaining lots were listed for sale. *This information satisfied the only legitimate purpose the question could have had.* . . . Respondents' purpose in eliciting the figures $75.00 and $15,000.00 before the jury could only have been 'to induce thereby a liberal award. . . .'" 282 N.C. at 20, 191 S.E. 2d at 654, *quoting from Barnes v. Highway Commission, supra.* (Emphasis supplied.)

These cases support the principle that, while a witness' *knowledge*, or lack of it, of the values and sales prices of certain noncomparable properties in the area may be relevant to his credibility, the specific dollar amount of those values and prices will rarely if ever be so relevant. The impeachment purpose of the cross-examination is satisfied when the witness responds to a question probing the scope of his knowledge. Any further inquiry which states or seeks to elicit the specific values of property dissimilar to the parcel subject to the suit is at best mere surplusage. At worst it represents an attempt by the cross-examiner to convey to the jury information which should be ex-

cluded from their consideration. When wilful and persistent, such an attempt undercuts the applicable rule of evidence and tends to confuse the jury. It was undoubtedly for these reasons that the rule was explained by Justice (later Chief Justice) Sharp in *Carver v. Lykes*, 262 N.C. 345, 356-57, 137 S.E. 2d 139, 148 (1964), as follows:

> "The 'utmost freedom of cross-examination' to test a witness' knowledge of values . . . does not mean that counsel may ask a witness if he doesn't know that a certain individual sold his property for a stated sum with no proof of the actual sales price other than the implication in his question. . . . Where such information is material it is easy enough to establish by the witness himself, whether a certain property has been sold to his knowledge and, if so, whether he knows the price. If he says he does not know, his lack of knowledge is thus established by his own testimony and doubt is cast on the value of his opinion. . . . If he asserts his knowledge of the sale and, in response to the cross-examiner's question, states a totally erroneous sales price, is the adverse party bound by the answer or may he call witnesses to establish the true purchase price? Unless per chance the purchase price of the particular property was competent as substantive evidence of the value of the property involved in the action, it would seem that the party asking the question should be bound by the answer. To hold otherwise would open a Pandora's box of collateral issues." (Citations omitted.)

For clarity we here restate the following controlling principles:

[1] (1) Where the value of a particular parcel of realty is directly in issue, the price paid at voluntary sales of land similar in nature, location, and condition to the land involved in the suit is admissible as independent evidence of the value of the land in question, if the sales are not too remote in time. Whether two properties are sufficiently similar to admit the sales price of one as circumstantial evidence of the value of the other is a question to be determined by the trial judge, usually upon *voir dire*. *State v. Johnson, supra; Redevelopment Commission v. Panel Co.*, 273 N.C. 368, 159 S.E. 2d 861 (1968).

[2] (2) Conversely, where a particular property is markedly dissimilar to the property at issue, the sales price of the former may not be introduced or alluded to in any manner which suggests to the jury that it has a bearing on the estimation of the value of the latter.

[3] (3) Where a witness has been offered to testify to the value of the property directly in issue, the scope of that witness' *knowledge* of the values and sales prices of dissimilar properties in the area may be cross-examined for the limited purposes of impeachment to test his credibility and expertise. *Templeton v. Highway Commission, supra.*

(4) Under these limited impeachment circumstances, however, it is improper for the cross-examiner to refer to specific values or prices of noncomparable properties in his questions to the witness. *Carver v. Lykes, supra.* Moreover, if the witness responds that he does not know or remember the value or price of the property asked about, the impeachment purpose of the cross-examination is satisfied and the inquiry as to that property is exhausted. *Highway Commission v. Privett, supra.* If, on the other hand, the witness asserts his knowledge on cross-examination of a particular value or sales price of noncomparable property, he may be asked to state that value or price only when the trial judge determines in his discretion that the impeachment value of a specific answer outweighs the possibility of confusing the jury with collateral issues. In such a rare case, however, the cross-examiner must be prepared to take the witness' answer as given. *Carver v. Lykes, supra.*

[4] Applying these principles to the instant case, we believe the cross-examination tactics employed by petitioner's counsel to "test the knowledge" of respondents' value witnesses violated the rule set forth in *Carver v. Lykes, supra.* The trial court erred in failing to respond promptly to respondents' continued objections to this line of questioning, and in ultimately overruling the objections. Furthermore, under the circumstances of this case, we do not believe these errors were rendered harmless by the court's occasional instructions to the jury to consider the witnesses' testimony "relating to the sales prices of other properties" only insofar as it bore upon the witnesses' knowledge of values.

Whether an instruction to disregard or give limited consideration to evidence cures an error potential in its admission must always depend upon the nature of the evidence admitted and the circumstances of the case. *See, e.g., State v. Aycoth*, 270 N.C. 270, 154 S.E. 2d 59 (1967). "[I]f the evidence admitted is obviously prejudicial, and especially if it is emphasized by repetition or by allowing it to remain before the jury for an undue length of time, it may be too late to cure the error by withdrawal" or cautionary instructions. 1 Stansbury's North Carolina Evidence § 28, pp 75-76 (Brandis rev. 1973). Here the record indicates that no curative instruction was given as to the cross-examination of respondents' witness Fred Norman. Second, although curative instructions were given as to the cross-examination testimony of the witnesses Paul Osborne and Cecil Kilby, we do not think they were sufficient to disabuse the jury of the impressions inevitably made by the repeated price and the value references posed in the questions asked by petitioner's counsel. Third, petitioner's counsel persisted in the improper mode of cross-examination to such an extent that it, fairly considered, pervaded the whole trial. The low figures revealed by the questions propounded on cross-examination by petitioner's counsel could only have served to prejudice respondents' case with respect to the value of their own land, the sole question at issue. Under these circumstances, we will not indulge in the usual presumption that the jury followed the letter and intent of the judge's instructions. *See State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938).

Although the Court of Appeals agreed that the questions propounded on cross-examination to the witness Fred Norman concerning Norman's knowledge of the Hayes sale ("for $148.00 an acre") and the Kilby sale ("for $114.00 an acre") were improperly phrased, it nevertheless concluded that respondents waived their objections to these questions by failing to object to the same questions posed to the witness Cecil Kilby. We do not agree.

[5] General Statute 1A-1, Rule 46(a)(1) provides that "when there is an objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." This Court has noted before that "the rationale behind this rule is persuasive." *State v. Hunter*, 290 N.C. 556, 572, 227 S.E. 2d 535, 545 (1976), *cert. denied*, 429 U.S.

1093 (1977). The rule does not modify the general principle that the benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without *any* objection, *see Shelton v. R.R.*, 193 N.C. 670, 139 S.E. 232 (1927). It does operate to preserve the continued effect of a specific objection, once made, to a particular line of questioning. It eliminates, therefore, the burdens and tactical disadvantages which would otherwise result to objecting counsel from the necessity for repeated statements of essentially the same objection. *See generally* 1 Stansbury's North Carolina Evidence § 30, p 81 (Brandis rev. 1973). A general objection, however, will not suffice to afford counsel the benefits of the rule. *State v. Hunter, supra.* Rather, objecting counsel must alert the trial judge to the specific legal infirmities which may inhere in a "*specified* line of questioning." If at that point counsel's objection is overruled, he is entitled to assume the court will continue to make the same ruling in response to subsequent objections to the same line of questioning.

[6] Although in this case it would have been the better practice for counsel to have precisely defined the "line" of cross-examination to which he was objecting, to hold that the trial judge was not in fact cognizant of respondents' opposition to a specified line of questioning would truly exalt form over substance. Though not literally complied with in this case, the requirement in Rule 46(a)(1) that counsel object to a "specified" line of questioning is obviously satisfied where, as here, the "line" of questioning objected to is apparent to the court and the parties. *Cf. Anderson v. Butler*, 284 N.C. 723, 729, 202 S.E. 2d 585, 588 (1974), holding mandatory the provision in Rule 50(a) that a motion for directed verdict shall state the *specific* grounds therefor, but noting that "the courts need not inflexibly enforce the rule when the grounds for the motion are apparent to the court and the parties." *See also Hodges v. Hodges*, 37 N.C. App. 459, 246 S.E. 2d 812 (1978).

Respondents' counsel objected some fourteen times to questions by petitioner's attorney which disclosed or sought to elicit sales price figures on noncomparable properties. Several bench conferences occurred at which the trial judge was made fully aware of the specific grounds of respondents' objections. The two questions posed to the witness Kilby without objection were the

very same as those earlier allowed over strenuous objections during the cross-examinations of Norman and Osborne. These previous objections had been twice overruled by the court after a discussion with counsel of the applicable law. It was thus abundantly clear that later objections to the same line of questioning would be of no avail.

[7] Under these circumstances we hold that respondents' choosing not to make obviously fruitless objections during the Kilby cross-examination did not waive their right to complain on appeal of this or the earlier errors of the same sort. The reason for no waiver does not rest entirely on the provisions of G.S. 1A-1, Rule 46(a)(1). Whether an objection has been duly preserved for purposes of appeal is a question of appellate procedure over which this Court, not the legislature, has final authority. "The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court." N.C. Constitution, Art. IV, § 13(2). Our appellate rules provide: "Any exception which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal *by objection noted or which by rule or law was deemed preserved or taken without any such action*, may be set out in the record on appeal and made the basis of an assignment of error." App. R. 10(b)(1). (Emphasis supplied.) It is thus Appellate Rule 10 in conjunction with Civil Procedure Rule 46 which enables respondents to take advantage of this assignment of error.

Similar considerations apply to respondents' objections to petitioner's questioning of the witness Paul Osborne concerning the specific value of property ("$60.00 an acre") previously acquired by Osborne. Here again, respondents contend that the trial court's failure to rule promptly on their continued objections to statements of price and value in petitioner's questions resulted in prejudice which was not cured by subsequent limiting instructions. The Court of Appeals agreed that the questioning was improper under the rule of *Carver v. Lykes*, *supra*, but held in effect that respondents failed to urge this rule as the specific ground for their objections. This conclusion is not supported by the record, wherein the following colloquy appears:

BY THE COURT: [Outside of the presence of the jury]: I want to hear some more circumstances of this transaction before I rule on it, I am going to ask the witness.

BY THE COURT: You said this was a swap of property, was it?

BY THE WITNESS: Yes . . . we swapped 300 acres for 525, and I did pay him some difference, but I have forgotten what it was.

. . . .

BY THE COURT: I am not sure this comes within the rule of *State Highway v. Templeton* case, and I am going to sustain the objection."

His Honor's reference at this point to the *Templeton* case (*Templeton v. Highway Commission, supra*) demonstrates that he considered respondents' objections in the context of appropriate, applicable law, *i.e.*, with reference to the extent to which a witness may be cross-examined to test his knowledge of property values. Although respondents' objections were ultimately sustained, we believe the ruling came too late to avoid the prejudice occasioned by petitioner's repeated references to incompetent price figures. Under the particular circumstances of this case, the failure to rule promptly on respondents' meritorious objections and to limit the scope of cross-examination constituted reversible error.

Respondents' remaining assignments of error have been correctly addressed by the Court of Appeals and we need not repeat them here. For prejudicial error occurring in petitioner's cross-examination of respondents' witnesses, however, respondents must be afforded a new trial on the issue of damages. Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to Wilkes Superior Court for a new trial to be conducted under principles herein discussed.

Reversed.

Error and remanded.

STATE OF NORTH CAROLINA v. LARRY DONNELL SMITH

No. 46

(Filed 6 May 1980)

1. **Criminal Law § 146— sentence less than life imprisonment—appeal to Court of Appeals**

Appeal should have been filed in the Court of Appeals where the minimum sentence imposed was less than life imprisonment.

2. **Criminal Law § 22— absence of formal arraignment—defendant not prejudiced**

While it is the better practice to conduct a formal arraignment proceeding, defendant failed to show that his right to a fair trial was prejudiced by the absence of a formal arraignment where defendant's counsel did indicate to the court that his plea was not guilty, there was no indication that defendant was unaware of the charge against him, and the trial was conducted throughout as an adversary proceeding.

3. **Criminal Law § 57; Robbery § 3— opinion testimony as to caliber of gun**

A robbery victim was properly permitted to testify that the gun used in the robbery "looked to me like it was probably about the caliber of a .38. It was not a big gun," since the victim had ample opportunity to observe the gun during the robbery, and it would have been difficult for the victim to have described the gun's characteristics sufficiently to permit the jury to draw its own inferences.

4. **Criminal Law § 43.2— competency of photograph for illustrative purposes**

The trial court properly allowed the State to introduce a photograph of the interior of a store in which a robbery occurred for the purpose of illustrating the victim's testimony where the victim testified that the photograph was a fair and accurate representation of his store as it appeared at the time of the robbery.

5. **Criminal Law § 99.3— court's question to witness about photograph—no expression of opinion**

The trial judge did not express an opinion or otherwise emphasize the importance of a photograph of the inside of a robbery victim's store when the victim asked the judge if he was to show the photograph to the jury, the judge asked the witness if it portrayed the way the store actually looked, and, upon receiving an affirmative answer, the judge directed the witness to pass the photograph to the jury and directed the witness not to say anything to the jurors.

6. **Criminal Law § 71— shorthand statement of fact**

A witness's testimony that he yelled to a passerby that "somebody had tried to rob [the prosecuting witness], and I would try to keep in sight of the car" did not constitute an opinion on a question of law but was admissible as a shorthand statement of fact.

7. Robbery § 4.4— attempted armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for attempted armed robbery where it tended to show that defendant pulled a gun from under his shirt after he entered a store and pointed it at the proprietor at close range; defendant ordered the proprietor not to move and not to put his hands under the counter; the proprietor raised his hands in the air and defendant ordered him to move away from the counter and to the center of the store; a witness who was driving past the store saw the proprietor with his arms upraised; the witness thereupon turned his vehicle around to return to the store and, as he did so, he saw defendant run from the store.

8. Criminal Law § 138.7— sentencing hearing—F.B.I. report—reliable hearsay

In a post-trial hearing to determine the sentence to be imposed upon defendant for attempted armed robbery, the trial court did not err in admitting an F.B.I. fingerprint report which indicated that defendant had a prior conviction in South Carolina for aiding and abetting an armed robbery where the court found that the report was reliable hearsay.

9. Criminal Law § 138.7— sentencing hearing—privilege against self-incrimination—waiver

Defendant waived his right to assert that his privilege against self-incrimination was violated at his sentencing hearing when the trial judge propounded questions to him about his prior criminal record where he failed at the sentencing hearing to assert the privilege or to object to the questions.

APPEAL by defendant from judgment of *Bruce, J.*, entered at the 4 September 1979 Criminal Session of BLADEN Superior Court.

Defendant was tried upon an indictment proper in form which charged him with attempted armed robbery. A verdict of guilty was returned by the jury. Following a sentencing hearing, the court entered judgment imposing a prison sentence of not less than 20 years and not more than life.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General David S. Crump, for the state.

W. Leslie Johnson, Jr., for defendant-appellant.

BRITT, Justice.

[1] At the outset we note that this appeal should have been filed in the Court of Appeals since the minimum sentence imposed is less than life imprisonment. *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). Even so, we treat the papers filed by defendant in this court as a motion to bypass the Court of Appeals, allow the motion, and consider the case on the merits. G.S. 7A-31.

[2] Defendant contends first that the trial court erred in proceeding to try him without first having conducted a formal arraignment. This contention has no merit.

The conducting of arraignments is dictated by Article 51 of Chapter 15A of the North Carolina General Statutes. An arraignment is a proceeding whereby a defendant is brought before a judge having jurisdiction to try the offense so that the defendant may be formally apprised of the charges pending against him and directed to plead to them. G.S. § 15A-941 (1978). If a defendant fails to plead after the prosecutor has read the charges or otherwise fairly summarized them, the court must record the fact, and defendant must be tried as if he had entered a plea of not guilty. *Id.* Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of a formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. *State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975).

In the present case the record reflects that the assistant district attorney called the cases of defendant, Wayne McKiever, and Curtis Leon McKoy and made a motion to consolidate. With the consent of the three defendants, the motion was allowed. After granting the motion, the court inquired, "[T]he plea is not guilty?" Defense counsel replied affirmatively. The court thereupon told the venire at the beginning of jury selection that the defendants had entered pleas of not guilty. In his instructions to the jury, the trial judge stated that defendants had pled not guilty; he further instructed that an indictment is not evidence of guilt and that the burden of proof was on the state to prove the guilt of each defendant beyond a reasonable doubt.

While it is clear that defendant was not formally arraigned, his counsel did indicate to the court that the plea was not guilty. Furthermore, the trial was conducted throughout as an adversary proceeding. There is no indication whatsoever that defendant was unaware of the nature of the charge. While it is the better practice to conduct a formal arraignment proceeding, defendant has failed to establish that his right to a fair trial was prejudiced by its absence in this case. We perceive no prejudicial error.

[3] During the state's case-in-chief, Larry Nunnery, the owner and operator of a convenience store near Elizabethtown that defendant allegedly had attempted to rob, testified that a black man entered his store wearing a dark jacket; that the man came up to him as he was behind the counter which held a cash register; and that the man had a gun in his jacket. Nunnery went on to describe the gun as being covered by a glove or sock as it was pointed at him. At that point, the following exchange took place.

Q. Would you describe the gun, please.

A. The gun was a dark metal gun, and it looked to me like it was probably about the caliber of a .38. It was not a big gun.

MR. JOHNSON: Objection and motion to strike.

COURT: Read back what he said after 'a .38.'

REPORTER: . . . about the caliber of a .38. It was not a big gun.

COURT: Overruled. Motion denied.

Defendant argues that allowing the witness to testify as to the caliber of the gun was inflammatory and prejudicial. We reject this argument.

Opinion evidence is inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them, and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. *See generally* 1 Stansbury's North Carolina Evidence § 124 (Brandis Rev. 1973). However, it is well settled that opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences. *E.g., State v. Watson,* 287 N.C. 147, 214 S.E. 2d 85 (1975); *see also* 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973). Implicit in the rule is the recognition that the limitations of the language may make it difficult or impractical for a witness to describe the facts in detail. *Tyndall v. Harvey C. Hines, Co.,* 226 N.C. 620, 39 S.E. 2d 828 (1946); *State v. Dills,* 204 N.C. 33, 167 S.E. 459 (1933).

Nunnery's description of the gun was competent. He had the opportunity to observe the weapon during the course of the attempted armed robbery. The record indicates that his observation was made from a distance of only about three feet. It is a matter of common knowledge that the size of the bore of a gun barrel depends upon the caliber of the weapon. It cannot be doubted that, with the weapon pointed at him at close range, Nunnery's attention was fixed immutably upon it. It would have been unreasonable to have required him to describe in elaborate detail all of the gun's characteristics in light of the circumstances which surrounded his observation. There was no error.

[4] Nor was it error for the court to allow the state to introduce a photograph of the interior of Nunnery's store during his testimony. Defendant objects not only to the admission of the photograph but also to the trial judge asking the witness whether the photograph accurately portrayed the way the store looked. Neither contention is meritorious.

A witness may use a photograph to illustrate his testimony to make it more intelligible to the court and jury. *E.g., State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *see generally* 1 Stansbury's North Carolina Evidence § 34 (Brandis Rev. 1973). A photograph of the scene of a crime may be admitted into evidence if it is identified as portraying the locale with sufficient accuracy. *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972). So long as the witness is able to testify that the photograph is a fair and accurate representation of the scene, it is irrelevant that the witness did not take the photograph, *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *death sentence vacated*, 403 U.S. 948 (1971). Nor is it necessary that the photograph be made at the time of the events to which it relates. *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976); *State v. Johnson, supra.*

In the case at bar, the witness Nunnery testified that the photograph was a fair and accurate representation of his store as it appeared at approximately 2:00 p.m. on 6 June 1978, the time and date of the alleged attempted robbery. The threshold test of fair and accurate representation was clearly and properly met. Furthermore, at the time the photograph was received, the trial judge correctly instructed the jury that the photograph was not substantive evidence but was admitted for the limited purpose of

illustrating Nunnery's testimony. *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Frazier*, 280 N.C. 181, 185 S.E. 652, *death sentence vacated*, 409 U.S. 1004 (1972). There was no error.

[5] Defendant further objects to the conduct of the judge in receiving the photograph into evidence. After the photograph of the interior of the store was received, the court asked the witness if it portrayed the way the store actually looked. Upon receiving an affirmative answer, the judge directed that the photograph be passed to the jury for their inspection. In directing the witness Nunnery to pass the photograph to the jury, the court further instructed him that he was not to say anything to them.

While a judge should proceed with caution in propounding questions to a witness, *Andrews v. Andrews*, 243 N.C. 779, 92 S.E. 2d 180 (1956); *In re Bartlett's Will*, 235 N.C. 489, 70 S.E. 2d 482 (1952), we perceive no error in this instance. A judge who is presiding over a trial is a responsible participant in an organized pursuit of the truth. While it is improper for a judge to manifest partisanship in any way in his handling of the cause before him, he is under a concurrent obligation to insure that the established rules of evidence and the substantive criminal law are followed to the end that a defendant's right to have a fair trial free from prejudicial error is safeguarded. At the time that the witness was questioned by the judge, he had just been instructed by the district attorney to show the photograph to the jury. On his own motion, the judge instructed the district attorney that he was not to lead his own witness in a description of the interior of the store as it was represented to be by the photograph. Nunnery was evidently confused by the exchange in that he asked the judge if he was to show the picture to the jury. It was at this point that the judge questioned the witness about the sufficiency of the representation. It was only after satisfying himself as to this threshold requirement that the judge allowed the photograph to be circulated among the jury. In directing the witness to take the picture to the jury for their inspection, the court instructed him that he was to say nothing to them. In no way can it be said that the judge expressed any opinion or otherwise emphasized the importance of the exhibit that was tendered. There was no error.

[6] During its case-in-chief, the state presented Robert Kinlaw, who was a passerby at the time of the alleged armed robbery. Kinlaw testified that he had yelled at another passerby ". . . to run up to Mr. Lawrence's (Nunnery) store, that he had just—somebody had tried to rob him, and I would try to keep in sight of this car." Defendant's objection to the testimony was overruled.

Defendant contends that Kinlaw's testimony amounts to an impermissible legal conclusion. We disagree. Using the word "rob" as he did, Kinlaw did not express an opinion on a question of law but described what he had seen at Nunnery's convenience store in a shorthand statement of fact. *State v. Pearce*, 296 N.C. 281, 250 S.E. 2d 640 (1979); *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977). We perceive no error.

[7] The crux of this appeal is whether the trial court erred in denying defendant's motion to dismiss at the close of the state's case and renewed at the close of all the evidence. Resolution of this issue requires that we review the evidence relating to the attempted armed robbery to determine if the state made out a *prima facie* case.

The state's evidence is summarized in pertinent part as follows:

Lawrence "Larry" Nunnery was the owner of a convenience store near Elizabethtown, North Carolina. On 6 June 1978 he was working in the store alone. At approximately 2:00 p.m., defendant came into the store while Nunnery sat behind the check-out counter with his back to the front window of the store. As defendant came through the door, he pulled a gun from under his shirt and pointed it at Nunnery from a distance of about three feet. The handle was covered at the time by a glove or sock. As defendant pointed the gun at Nunnery, he said, "Don't move." Defendant then proceeded to tell Nunnery, "Don't put your hands under that counter." Nunnery responded by raising his hands in the air. Defendant thereupon ordered the proprietor to move away from the counter, directing him to move to the center of the store. Nunnery complied with the command.

At this time, Robert Kinlaw, who was returning to work from lunch, drove past the convenience store. The route which he

usually took in returning from lunch to his job took him in front of the store. It was Kinlaw's custom to wave at Nunnery as he passed the store. As Kinlaw drove past the store and approached the adjacent intersection, he turned his head to look into the store and wave at Nunnery. In doing so, he saw the proprietor of the store with his arms upraised.

Kinlaw thereupon turned his pickup truck around in the intersection to return to the store. As he did, he saw a man, later identified as defendant, run from the store. Defendant and two other men who had been standing outside of the store ran into a nearby clump of woods.

After talking very briefly with Nunnery, Kinlaw drove back onto the highway where he then saw defendant's two companions walking towards a nearby church parking lot. Unable to get any response from the two men other than some mumbling, Kinlaw drove on up the highway to the church where he saw a 1973 or 1974 Ford Torino automobile. He observed that the car's license plate was covered by a towel and that the key was still in the ignition. As another car approached the churchyard, Kinlaw yelled to its driver. By this time, the two men had reached the churchyard and had been warned by Kinlaw not to bother the Torino. Notwithstanding Kinlaw's admonition to them, the men jumped in the Torino and sped off. Kinlaw gave chase in his pickup truck and followed the Torino until it ran off the road a short distance away.

It is an established principle of law that upon a motion to dismiss in a criminal action, all of the evidence, whether competent or incompetent, must be considered in the light most favorable to the state, and the state is entitled to every reasonable inference therefrom. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Witherspoon, supra; State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972). In considering a motion to dismiss, it is the duty of the court to ascertain whether there is substantial evidence of each essential element of the offense charged. *State v. Allred*, 279 N.C. 398, 183 S.E. 2d 553 (1971). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a con-

clusion. *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E. 2d 538 (1977); *Com'r. of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977).

The two elements of an attempt to commit a crime are: first, the intent to commit the substantive offense; and, second, an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Powell*, 277 N.C. 672, 178 S.E. 2d 417 (1971); *State v. McNeely*, 244 N.C. 737, 94 S.E. 2d 853 (1956); *see generally* W. LaFave & A. Scott, Handbook on Criminal Law §§ 59-60 (1972); R. Perkins, Criminal Law 552-577 (1969).

The case of *State v. Powell, supra*, is particularly illustrative of these principles as they apply to the facts now before us in defendant's case. In *Powell*, the defendant was indicted for violating G.S. 14-87, the same statute which defendant in the present case stands accused of violating. The state's evidence tended to show that the male defendant entered an ABC store in Winston-Salem wearing a woman's wig and carrying a woman's purse. He then ordered three bottles of liquor, specifying the size and the brand. As a clerk placed the bottles on the counter and began to put them in a bag, he observed that the defendant had placed the purse on the counter, opened it, and was retrieving a pistol from within it. Scared by the sight of the gun, the clerk reached out and grabbed defendant's wrist with one hand and with the other took the pistol from the defendant. By that time, another clerk in the store had drawn his own pistol, which he pointed at the defendant. Thereupon, the defendant raised his hands in the air crying out, "No, man, no." The defendant was tried upon the charge of attempt to commit armed robbery and was found guilty as charged. On appeal, this court held that there was no error.

Our examination of the record now before us impels the conclusion that the trial court properly denied defendant's motions to dismiss in light of our disposition of *Powell*. It will be observed that defendant here went further in his display and use of a firearm than did the defendant in *Powell*. In *Powell*, the defendant was restrained from further action when a store clerk grabbed his wrist and seized the gun *before he was able to withdraw it from the purse.* At no time did the defendant in

Powell point the weapon at anybody, nor did he at any time make any demands upon the store personnel other than those which are normally incident to the act of buying. We held in *Powell* that the crime of attempted armed robbery was complete when the defendant procured a pistol from the purse and began withdrawing it with the intent of completing the substantive offense of armed robbery through its use.

The case at bar is governed by the same rationale. Defendant went beyond the conduct dealt with in *Powell*. Defendant not only had obtained possession of a weapon, in this case a .38 pistol, but actually employed it in a manner which was sufficient to enable him to assume control and direction over the actions of Lawrence Nunnery. Not only did defendant pull a gun from under his shirt after he had entered the store, but he actually pointed it at the proprietor at close range. Defendant thereupon ordered Nunnery not to move and not to put his hands under the counter. Having obtained the owner's compliance with his demands, defendant then proceeded to order him to move away from the counter, directing him to move to the center of the store. It was at this point that the intended robbery was interrupted when Robert Kinlaw came upon the scene. But by this time, the crime of attempted armed robbery was complete because defendant had manifested an intent to rob Nunnery and had done an affirmative act beyond mere preparation in furtherance of that intent.

Defendant's reliance upon the case of *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971), is misplaced. In *Evans*, the defendant and two companions went to a fried chicken restaurant in Winston-Salem. All three men entered the building. One of defendant's companions stood in front of the counter while their take-out order was prepared. At no time did he make any movement toward the cash register. Another companion stood inside the restaurant near the door, cradling a breeched shotgun loaded with shell. When approached by a regular customer of the restaurant, that companion unloaded the gun and left the restaurant as he was directed to do by the customer. At no time did he point the weapon at anybody nor did he make any demands upon anybody in the store. Evans went into the kitchen area and said to an employee of the store, "This is a hold-up; no one's going to get hurt." (Defendant took the stand and denied making the statement, saying that the only reason he went into

the kitchen area was that he was looking for a restroom and that he said nothing to the employee other than to communicate his need to find the facility.) In any event, the employees of the store went about their business. The companion of defendant who had been standing at the counter paid for the take-out order. The three men then got in their car and drove away. On appeal, this court held that the evidence was insufficient to support a verdict finding the defendant and his companions guilty of attempted armed robbery. Writing for the court, Justice Lake observed that the conduct of the defendant and his companions was utterly inconsistent with an attempt to rob. One of the defendants simply stood at a counter while a take-out order was prepared. Another of the defendants left the building and unloaded a shotgun he was carrying after the single remonstrance of one customer. While the state's evidence showed that Evans did make a statement about a holdup, the evidence further showed that the employees of the restaurant completely ignored it and continued performing their tasks.

We hold that there was substantial evidence of each essential element of the crime of attempted armed robbery. Accordingly, the trial court did not err in denying defendant's motions to dismiss.

[8] At the post-trial sentencing hearing, the court, over defendant's objection, admitted into evidence an F.B.I. fingerprint study alleged to be his which indicated that defendant had a prior conviction in South Carolina for aiding and abetting an armed robbery. Defendant denied that it was his record. In admitting the record, the trial court found that it was reliable hearsay and that it would be considered for the purpose of sentencing. There was no error.

Clearly the record was hearsay. *See generally,* 1 Stansbury's North Carolina Evidence §§ 138-139 (Brandis Rev. 1973). However, G.S. § 15A-1334(b) expressly provides that the formal rules of evidence do not apply in the conduct of sentencing hearings. This statute codifies the long standing rule in North Carolina that upon the conduct of a sentencing hearing, the court is permitted wide latitude and the rules of evidence are not strictly enforced. *State v. Perry,* 265 N.C. 517, 144 S.E. 2d 591 (1965); *State v. Pope,* 257 N.C. 326, 126 S.E. 2d 126 (1962). In determining

the proper sentence to impose upon a convicted defendant, it is appropriate for the trial judge to inquire into such matters as the age, character, education, environment, habits, mentality, propensities, and record of the person about to be sentenced. *State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966); *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695 (1953). Such an inquiry is needed if the imposition of the criminal sanction is to best serve the goals of the substantive criminal law. *See State v. Woodlief*, 172 N.C. 885, 90 S.E. 137 (1916).

[9] Defendant argues that his Fifth Amendment privilege against self-incimination was violated at the sentencing hearing when the trial judge propounded questions to him about his prior criminal record. Specifically, the judge inquired whether defendant had been imprisoned in South Carolina, when he had been released, and upon what charge he had been convicted. Defendant stood at the direction of the court and answered each question. At no time did defendant assert the privilege against self-incrimination or otherwise lodge an objection. Defendant's failure to object or otherwise assert his Fifth Amendment privilege amounts to a waiver and he will not now be heard on appeal to complain. *State v. Hicks*, 290 N.C. 767, 228 S.E. 2d 252 (1976); *compare Wainwright v. Sykes*, 433 U.S. 72, 53 L.Ed. 2d 594, 97 S.Ct. 2497 (1977); *see generally* 1 Stansbury's North Carolina Evidence § 27 (Brandis Rev. 1973).

We have carefully considered all of the other assignments of error argued on appeal by defendant's able counsel and find them to be without merit. We conclude that defendant received a fair trial free from prejudicial error.

No error.

JANICE SUE JOLLY v. LORENZA WRIGHT

No. 22

(Filed 6 May 1980)

1. **Constitutional Law § 40— indigent's right to counsel—statute applicable only to criminal cases**

The provisions of G.S. 7A-451(a)(1), entitling indigent persons to counsel in certain situations, apply only to criminal cases subject to Sixth Amendment limitations.

2. **Constitutional Law § 23— civil contempt for nonsupport—no due process right to counsel**

Due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness.

DEFENDANT appeals from an order of District *Judge Parker* dated 15 May 1979 and filed in the District Court of WAKE County.

The record discloses that on 26 May 1976 defendant signed a voluntary agreement to pay child support for his two-year old daughter in the amount of $25 per month. The agreement provided that the payments were to begin on 1 July 1976 and were to be made to the Clerk of the Superior Court of Wake County to be delivered to the Department of Human Resources for the care and benefit of defendant's dependent daughter. The voluntary support agreement, entered into pursuant to Chapter 110 of the General Statutes of North Carolina, was approved by a district judge who ordered that said agreement "henceforth shall have the same force and effect, retroactively and prospectively in accordance with the terms of said Agreement, as an Order of this Court and shall be enforceable and subject to the modification in the same manner as is provided by Law for Orders of this Court entered in child support cases." The order is dated 28 June 1976.

On 2 March 1979 a verified motion in the cause was filed by the Wake County Child Support Enforcement Agency alleging that as of 31 January 1979 defendant was $650 in arrears, and requesting issuance of an order to show cause why defendant should not be held in civil contempt. The court issued a show cause order which was personally served on defendant on 3

March 1979 giving him nineteen days advance notice to appear at 9 a.m. on 22 March 1979 and show cause, if any he had, why he should not be committed to jail for failure to comply with the lawful order of the court. The order also required defendant to bring with him his income tax returns for the last two years and all pay vouchers or other documents in his possession to show his income since 28 June 1976.

On the day of the hearing Wake-Johnston-Harnett Legal Services made a limited appearance and filed a motion for appointment of counsel in all civil contempt cases for nonpayment of child support instituted by Wake County and alleged, by affidavit, that defendant was indigent.

The court found numerous facts, including the following:

> "8. That the character of the issues raised by this particular proceeding requiring the Defendant to show cause why he should not be held in civil contempt for failure to comply with the terms of the support order previously entered in this cause are of insufficient complexity for the Defendant to be prejudiced or treated unfairly by the refusal of the Court to appoint him legal counsel."

The court concluded as a matter of law that there is no constitutional mandate, state or federal, requiring court appointed counsel in every civil contempt case for nonpayment of child support instituted under Article IX of Chapter 110 of the General Statutes of North Carolina. The court further concluded that G.S. 7A-451(a)(1) creates no absolute right to court appointed counsel for indigents in civil contempt cases for nonpayment of child support.

The court thereupon denied the motion for appointment of counsel and defendant appealed to the Court of Appeals. Further action on the contempt citation was stayed during the pendency of the appeal, defendant having agreed to pay child support in the sum of $25 twice per month pending this appeal. Defendant indicated by affidavit that his net monthly income was $320.

We allowed motion to bypass the Court of Appeals and the case is now before this Court for initial appellate review.

John C. Cooke, Assistant Wake County Attorney, for plaintiff appellee.

Wake-Johnston-Harnett Legal Services by Gregory C. Malhoit and M. Travis Payne, attorneys for defendant appellant.

Rufus L. Edmisten, Attorney General, by R. James Lore, Associate Attorney, for the State, Amicus Curiae.

HUSKINS, Justice.

The sole question presented for review is whether an indigent defendant has a statutory or constitutional right to be represented by appointed counsel in civil contempt proceedings brought to compel compliance with outstanding child support orders.

Defendant asserts both a statutory and constitutional entitlement to appointed counsel. He relies on G.S. 7A-451(a)(1), the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Law of the Land provisions in Article I, Section 19 of the North Carolina Constitution.

We turn first to defendant's statutory claim. Defendant contends his entitlement to appointed counsel is granted in G.S. 7A-451(a)(1) which provides:

> "(a) An indigent person is entitled to services of counsel in the following actions and proceedings:
>
> (1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more is likely to be adjudged."

Defendant reasons that a civil contempt action is a "case in which imprisonment . . . is likely to be adjudged," and thus concludes that the instant case is encompassed by the plain language of G.S. 7A-451(a)(1). Plaintiff contends that consideration of the legislative and case law background against which G.S. 7A-451(a)(1) was enacted, and a contextual reading of subsection (a)(1) together with the other provisions of G.S. 7A-451(a), will demonstrate that the language in question refers only to criminal cases to which the Sixth Amendment is applicable. Resolution of these conflicting contentions requires us to interpret the statutory language in

question in light of the applicable canons of statutory construction.

The intent of the Legislature controls the interpretation of a statute. *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E. 2d 248 (1979). In ascertaining the intent of the Legislature, it is proper to consider judicial decisions affecting the constitutionality of prior statutes dealing with the same subject matter, and legislative changes, if any, made subsequent to such decisions. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967); *Ingram v. Johnson, Comr. of Revenue*, 260 N.C. 697, 133 S.E. 2d 662 (1963). Word and phrases of a statute may not be interpreted out of context; rather, individual expressions must be interpreted as part of a composite whole, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *Burgess v. Brewing Co.*, supra; *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978); *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505 (1952). To this end, a statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage. *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

[1] Application of the above principles leads us to conclude that the provisions of G.S. 7A-451(a)(1) apply only to criminal cases. G.S. 7A-451(a) (1979 Cum. Supp.) constitutes the latest legislative determination of the scope of an indigent's entitlement to court appointed counsel. It lists thirteen distinct "actions and proceedings" in which such entitlement exists. The present statute significantly expands an indigent's entitlement to counsel beyond the realm of criminal prosecutions. Subsections (2) through (13) specifically list a variety of civil, administrative, and quasi-criminal proceedings in which the entitlement to counsel applies. This relatively recent expansion of the right to counsel embodied in subdivisions (2) through (13) of G.S. 7A-451(a) tends to obscure the purpose and effect of subdivision (1) in the statutory scheme defining an indigent's right to court appointed counsel. A joint review of legislative history and case law developments in the area of the Sixth Amendment right to appointed counsel leaves no doubt that the purpose of subdivision (1) is to state the scope

of an indigent's entitlement to court appointed counsel in criminal cases subject to Sixth Amendment limitations.

As originally enacted in 1969, G.S. 7A-451(a)(1) provided in pertinent part:

> "(a) An indigent person is entitled to services of counsel in the following actions and proceedings:
>
> (1) Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollar ($500.00) fine. . . ." 1969 Session Laws, Chapter 1013, Section 1.

The language adopted by the General Assembly in 1969 codified the holding in *State v. Morris*, 275 N.C. 50, 165 S.E. 2d 245 (1969). In *Morris* we reviewed the Sixth Amendment decisions of the United States Supreme Court since *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963), and concluded that the Sixth Amendment right to appointed counsel was applicable to all felony and misdemeanor cases where the authorized punishment exceeded six months in prison and a $500 fine. On June 12, 1972, the constitutional test for entitlement to court appointed counsel was once again changed by *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). In *Argersinger*, the United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37. On April 10, 1973, G.S. 7A-451(a)(1) was amended to its present form in order to reflect the new constitutional standard articulated in *Argersinger*. Accordingly, G.S. 7A-451(a)(1) now allows for appointment of counsel in "[a]ny case in which imprisonment, or a fine of five hundred dollars ($500.00) is likely to be adjudged."

It is clear, then, that the purpose of G.S. 7A-451(a)(1), as presently written, is to state the scope of entitlement to court appointed counsel in Sixth Amendment cases in light of current constitutional doctrine.[1] Use of the phrase "[a]ny case" is responsive

1. Legislation defining the scope of an indigent's entitlement to court appointed counsel in criminal cases has always reflected case law developments in the Sixth Amendment area. Former G.S. 15-4.1, enacted in 1949, codified the holding in

to the precise holding of *Argersinger*, which states that the Sixth Amendment precludes *imprisonment* of a person for "any offense," however classified, unless he was represented by counsel at his trial. The words "[a]ny case" in G.S. 7A-451(a)(1) must therefore be construed as any criminal case to which Sixth Amendment protections apply. It should be noted that the holding in *Argersinger* left undisturbed that portion of *State v. Morris, supra*, in which we held that the right to appointed counsel attaches in felony or misdemeanor cases where the authorized punishment exceeds a five hundred dollar fine. *See Argersinger v. Hamlin, supra*, 407 U.S. at 37. Accordingly, the current version of G.S. 7A-451(a)(1) carries over the provisions in the 1969 version granting entitlement to counsel in criminal cases where a fine in excess of five hundred dollars may be imposed.

We note, moreover, that a contextual reading of G.S. 7A-451(a) confirms our conclusion that the provisions of subsection (a)(1) have application only to criminal cases. As previously noted, G.S. 7A-451(a) lists thirteen distinct "cases and proceedings" in which the entitlement to court appointed counsel exists:

> "(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;
>
> (2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
>
> (3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;
>
> (4) A hearing for revocation of probation;
>
> (5) A hearing in which extradition to another state is sought;

Powell v. Alabama, 287 U.S. 45 (1932). See 1949 Session Laws, Chapter 112. G.S. 15-4.1 was amended in 1963 in response to the holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963). See 1963 Session Laws, Chapter 1080, Section 1. In 1969 G.S. 15-4.1 was repealed and superseded by G.S. 7A-451(a), which is discussed in text.

(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals) of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes;

(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;

(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;

(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and

(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;

(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;

(13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes."

The format of G.S. 7A-451(a) suggests that each numbered subdivision is intended to encompass a distinct type of proceeding for which court appointed counsel has been authorized. This is readily apparent from the legislative decision to define the scope of entitlement by individually listing each type of proceeding for which court appointed counsel is available. The structure of the statute thus calls for application of the maxim, *expressio unius est exclusio alterius, i.e.*, when certain things are specified in a statute, an intention to exclude all others from its operation may be inferred. *See generally, Campbell v. Church*, 298 N.C. 476, 259

S.E. 2d 558 (1979); *In re Sale of Land of Sharpe*, 230 N.C. 412, 53 S.E. 2d 302 (1949); *Old Fort v. Harmon*, 219 N.C. 241, 13 S.E. 2d 423 (1941).

Review of the numbered subdivisions in G.S. 7A-451(a) indicates that subdivision (1) is the only subdivision that has application to criminal cases. The remaining subdivisions specifically and separately list those civil proceedings for which court appointed counsel is authorized. Civil contempt cases are not included in this list. Significantly, two other types of civil cases, execution against the person and civil arrest and bail proceedings, in which, like civil contempt, an adjudication of imprisonment is likely, are listed in subdivision (7). Thus, a contextual reading of G.S. 7A-451(a) indicates that in subdivision (1), the legislative intent was to define the scope of entitlement to appointed counsel in criminal cases, and that in subdivisions (2) through (13), the intent was to list specifically those civil proceedings in which appointment of counsel was authorized. The failure to list civil contempt proceedings in subdivisions (2) through (13) must be construed as a legislative determination that appointed counsel for indigents is not authorized in such proceedings.

In summary, review of the legislative history and case law background against which G.S. 7A-451(a)(1) was enacted and analysis of the internal structure of G.S. 7A-451(a) both lead to the conclusion that G.S. 7A-451(a)(1) has application only to criminal cases subject to Sixth Amendment limitations. Accordingly, we hold that G.S. 7A-451(a) (1979 Cum. Supp.), as presently drafted, does not grant to indigent persons the right to be represented by appointed counsel in civil contempt proceedings.

It now remains for us to determine whether an indigent defendant has a constitutional right to be represented by appointed counsel in civil contempt proceedings initiated to compel compliance with outstanding child support orders.

The constitutional sources of an indigent person's right to appointed counsel are the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. Decisions of the United States Supreme Court indicate that the right to appointed counsel is stronger in Sixth Amendment cases than in noncriminal cases subject only to due process limitations. In *Argersinger v. Hamlin*, *supra*, the Court held that the Sixth Amendment right to ap-

pointed counsel attaches as a matter of law in any criminal prosecution where a defendant may be imprisoned. The emphasis in *Argersinger* on imprisonment as an event triggering an absolute Sixth Amendment right to counsel leads to the contention that the due process right to counsel is equally strong in civil cases where imprisonment is possible. In essence, the argument is that it would be improper to distinguish a civil proceeding from a criminal proceeding where the outcome of either may result in imprisonment. This contention was authoritatively rejected by the Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973) (8-1 decision), handed down within a year of the decision in *Argersinger*.

In *Gagnon*, the Court refused to adopt a per se rule requiring appointed counsel as a matter of due process in *all* civil proceedings where the possibility of incarceration existed:

> "But due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed.
>
> In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in *Betts v. Brady*, 316 U.S. 455, 86 L.Ed. 1595, 62 S.Ct. 1252 (1942), was later rejected in favor of a per se rule in *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792, 93 A.L.R. 2d 733 (1963). See also *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed. 2d 530, 92 S.Ct. 2006 (1972). We do not, however, draw from Gideon and Argersinger the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings . . . ."

411 U.S. at 788. According to *Gagnon*, whether due process requires an automatic or case-by-case approach to appointment of counsel depends on the type of proceedings under consideration. If the proceedings are informal in nature and if the legal and factual issues generally raised at such proceedings are not complex, then *Gagnon* suggests that the minimum requirements of due process may be satisfied by evaluating the necessity of counsel on a case-by-case basis. State appointment of counsel for indigents would thus be required at such proceedings only if needed to ensure fundamental fairness—the touchstone of due process—in

particular cases. *Id.* at 790. For example, appointment of counsel might be required where the legal or factual issues raised are difficult or of such complexity that the assistance of counsel is necessary for an adequate presentation of the merits, or where the defendant is unable to speak for himself. *Id.*

In North Carolina, civil contempt proceedings are without question civil in nature. G.S. 5A-21, *et seq.* and Official Commentary (1979 Cum. Supp.). The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court. *Duval v. Duval*, 114 N.H. 422, 322 A. 2d 1 (1974). Accordingly, defendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court. The imprisonment or fine is lifted as soon as defendant decides to comply with the order of the court, or when it becomes apparent that compliance with the order is no longer feasible. *See generally, Shillitani v. United States*, 384 U.S. 364, 16 L.Ed. 2d 622, 86 S.Ct. 1531 (1966); D. Dobbs Remedies § 2.9 (1973). The strictly coercive nature of civil contempt is often illustrated by invoking the image of the imprisoned defendant, who by virtue of his ability to comply with the court order, carries "the keys of [his] prison in [his] own pocket." *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902). In the recently enacted contempt statute, civil contempt is carefully defined along these lines. G.S. 5A-21, *et seq.* and Official Commentary. The new statutory definition of civil contempt makes clear that civil contempt is not a form of punishment; rather, it is a civil remedy to be utilized exclusively to enforce compliance with court orders. *Id.*

Given the civil nature of civil contempt, it follows that the Sixth Amendment right to counsel as set forth in *Argersinger* is inapplicable to civil contempt because that right is confined to criminal proceedings. Accordingly, if there is a right to counsel in a civil contempt action, its source must be found in the Due Process Clause of the Fourteenth Amendment in light of the principles enunciated in *Gagnon*.[2] *Accord, Sword v. Sword*, 399 Mich. 367, 249 N.W. 2d 88 (1976); *Duval v. Duval, supra.*

2. In the instant case, the limitations imposed by the Law of the Land provisions in Art. 1, § 19, of the North Carolina Constitution are identical to those of the

It now remains for us to determine whether due process requires automatic appointment of counsel for indigents in nonsupport civil contempt cases. In general, the legal and factual issues in such proceedings are neither numerous nor complex. Defendant's obligation to pay child support has been previously adjudicated. The existence and current effectiveness of the court order obligating defendant to pay child support can be determined by reference to court records. "The facts establishing the arrearage are bookkeeping matters and rarely are subject to substantial dispute." *Sword v. Sword, supra.* Inquiries as to whether the purpose of the order may still be served by compliance, defendant's ability to pay, reasons for the arrearage and mitigating circumstances normally are not complicated. The judge in most cases questions the parties in a relatively informal hearing. *Id.*

[2] Since the nature of nonsupport civil contempt cases usually is not complex, due process does not require that counsel be automatically appointed for indigents in such cases; rather, the minimum requirements of due process are satisfied by evaluating the necessity of counsel on a case-by-case basis. *Gagnon v. Scarpelli, supra,* 411 U.S. at 790. We thus hold that due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness.

In *Gagnon v. Scarpelli, supra,* the United States Supreme Court held that indigent defendants are not entitled to automatic appointment of counsel in parole or probation revocation proceedings. It is worth noting that the potential loss of liberty in such cases is much more serious and extensive than in nonsupport civil contempt cases. Revocation of probation or parole generally spells commencement or resumption of a determinate, punitive sentence. In contrast, a person in civil contempt holds the key to his own jail by virtue of his ability to comply. Moreover, state involvement is much greater in probation or parole revocation proceedings than it is in nonsupport civil contempt proceedings. In revocation proceedings the State is the sole party capable of peti-

Due Process Clause. *See generally, Horton v. Gulledge,* 277 N.C. 353, 177 S.E. 2d 885 (1970).

tioning for punitive sanctions against defendant. In contrast, State initiation of nonsupport civil contempt proceedings comes about only if the State has become assignee of private child support rights. *See* G.S. 110-137. Thus, factually as well as legally, the result in the instant case is consistent with the holding in *Gagnon.*

Our research indicates that the precise question at issue has been definitively determined by the highest courts in four of our sister states. The Supreme Courts of Michigan and New Hampshire have held that due process does not require automatic appointment of counsel for indigents in nonsupport civil contempt proceedings. *Sword v. Sword, supra; Duval v. Duval, supra.* The Supreme Courts of Washington and Alaska have held to the contrary. *Tetro v. Tetro,* 86 Wash. 2d 252, 544 P. 2d 17 (1975); *Otton v. Zaborac,* 525 P. 2d 537 (Alaska 1974). In our view the Michigan and New Hampshire decisions are better reasoned. Accordingly, we follow the rationale of these courts and reach a similar result.

Finally, our holding here is limited to the precise questions posed. We express no opinion on the scope of an indigent's right to appointed counsel in criminal contempt proceedings.

For the reasons stated the order of the Wake District Court is affirmed. The case is remanded for further proceedings as provided by law and in accord with this opinion.

Affirmed.

LUCY WOOD TAYLOR v. J. P. STEVENS AND COMPANY AND LIBERTY MUTUTAL INSURANCE COMPANY

No. 35

(Filed 6 May 1980)

1. Master and Servant § 68— workers' compensation—occupational disease—no requirement of proof of disability within year after exposure

A worker claiming disability from an occupational disease under the Workers' Compensation Act is not required to prove that the disability arose within one year from the last exposure to hazardous working conditions. Dictum in *Duncan v. Carpenter,* 233 N.C. 422, suggesting that disability from an

occupational disease other than asbestosis or silicosis must arise within one year of the last exposure is expressly overruled.

2. **Master and Servant §§ 68, 91— workers' compensation—occupational disease—time for filing claim**

The time within which an employee must give notice or file a claim for an occupational disease runs from the time the employee is first informed by competent medical authority of the nature and work-related cause of his disease or "injury."

3. **Master and Servant § 68— workers' compensation—byssinosis—which statute applies—date of disability**

Whether the 1963 version of G.S. 97-53(13) or the 1971 version of that statute, effective 1 July 1971, applies to a claim for disability resulting from byssinosis depends upon the date when plaintiff's disablement or actual incapacity from byssinosis occurred.

4. **Master and Servant § 68— workers' compensation—occupational disease—1963 statute—byssinosis**

The 1963 version of G.S. 97-53(13) which provides that an occupational disease includes an "infection or inflammation of . . . internal . . . organs of the body due to . . . any other materials or substances" covers those persons suffering from byssinosis or brown lung disease or from occupational obstructive lung disease.

ON defendants' motion for discretionary review of a decision of the Court of Appeals, 43 N.C. App. 216, 258 S.E. 2d 426 (1979), vacating and remanding a decision by the full Industrial Commission affirming the decision of Conely, Deputy Commissioner, filed 19 December 1977.

On 5 December 1975 plaintiff, then a 61-year-old former textile worker, filed notice and claim of total permanent disability from chronic obstructive lung disease resulting from occupational exposure to cotton dust. After three hearings, the Deputy Commissioner found as a fact that plaintiff began working in a textile mill in Roanoke Rapids in 1928 at the age of fourteen. Throughout most of the following 35 years, she worked in the weave room as a weaver and smash hand, but was exposed to considerably more cotton dust in those work stations than usually encountered.

About 1939 she began experiencing a tightness in her chest which intensified when she came to work after a day off. At this time she also experienced coughing, incontinence and pain. After a two-year leave of absence in 1953-1955, her symptoms became worse. She had more shortness of breath and more coughing. By

1958 there was no change in her condition from one day to the next and she finally ceased working 2 August 1963. At that time she received Social Security disability for "ulcers, hernia, heart block, hypertension, and obesity."

After a long series of hospitalizations, she was told by a physician for the first time that she had byssinosis, or brown lung disease, in November 1975. She filed notice and claim of disability with defendants and the Industrial Commission.

Plaintiff was seen by two Industrial Commission physicians. Their opinions were somewhat inconsistent. One physician testified that in his opinion plaintiff had Byssinosis, Grade I. The other testified that the plaintiff had lung problems consistent with the diagnosis of chronic obstructive lung disease. From this testimony, the Deputy Commissioner found that plaintiff was disabled, in part, as a result of "an occupational chronic obstructive lung disease contracted as a result of her exposure to cotton dust in her employment." He denied plaintiff's claim for disability payments, however, on the ground that she had failed to carry the burden of proof that she was disabled within one year of the last exposure to the hazards of cotton dust, citing G.S. 97-58, G.S. 97-52, and *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951) as authority.

Plaintiff appealed to the full Commission which affirmed the decision of the Deputy Commissioner 9 May 1978. Plaintiff then appealed to the Court of Appeals. That court held that the rule of *Duncan v. Carpenter, supra*, requiring proof of disability within one year of last exposure, was mere dictum and had been overruled by the inference of this Court in *Wood v. J. P. Stevens & Company*, 297 N.C. 636, 256 S.E. 2d 692 (1979) and *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). It vacated the Commission's order and remanded for further proceedings.

We allowed defendants' petition for discretionary review 4 December 1979.

Teague, Campbell, Conely & Dennis by C. Woodrow Teague and George W. Dennis III for defendant appellants.

Davis, Hassell & Hudson by Charles R. Hassell, Jr., and Robin E. Hudson for the plaintiff appellee.

CARLTON, Justice.

[1] At issue in this case is whether a worker claiming disability from an occupational disease under the North Carolina Workers' Compensation Act, G.S. 97-1 *et seq.*, must prove the disability arose within one year from the last exposure to hazardous working conditions. We hold that she does not and therefore affirm and modify the decision of the Court of Appeals.

An employee seeking occupational disease disability payments under the North Carolina Workers' Compensation Act must negotiate a careful scheme of notice and claim in order to recover benefits. Both the general notice provisions of G.S. 97-22 and the general claim provisions of G.S. 97-24 are triggered by the occurrence of an *accident* rather than the onset of an *injury*, a statutory plan followed in half of the states in the country. 3A. Larson, *Workmen's Compensation Law* § 78.42(a) (1976). However, this presents peculiar problems in the case of a latent injury or an occupational disease. Unlike accidents which are sudden and obvious, such diseases and injuries frequently develop insidiously, and, in the case of diseases, usually only manifest themselves after long and cumulative exposure to hazardous substances. The General Assembly, in providing for *notice* to employers, has considered the latent quality of occupational diseases and has expressly circumvented the problem.

Thus, while G.S. 97-22 provides:

> Notice of accident to employer.—Every injured employee or his representative shall immediately on the occurrence of an *accident*, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident . . . but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the *accident* or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby (Emphasis added).

G.S. 97-58(b) states simply that "[t]he time of notice of an occupational disease shall run from the date that the employee has been

advised by competent medical authority that he has [the occupational disease]."[1]

The plan for complying with the *claim* provisions of the statute in the case of occupational diseases is a little more complex. The general claim provisions of G.S. 97-24(a) provide that a claim must "be filed with the Industrial Commission within two years after the *accident*." (Emphasis added.) G.S. 97-52, however, provides that "[d]isablement or death of an employee resulting from an occupational disease . . . shall be treated as the happening of an *injury by accident*." (Emphasis added.)

The statutory scheme does not stop there. G.S. 97-58(c) further provides that in the case of an occupational disease, "The right to compensation . . . shall be barred unless a claim be filed with the Industrial Commission within two years after death, *disability*, or *disablement* as the case may be." (Emphasis added.)

Disability and *disablement* are technical words defined elsewhere in the statutes. G.S. 97-55 provides that "[t]he term '*disability*' . . . means the state of being incapacitated as the term is used in defining disablement in G.S. 97-54." (Emphasis added.)

G.S. 97-54 provides that in all cases of occupational disease other than asbestosis or silicosis, " 'disablement' shall be equivalent to 'disability' as defined in G.S. 97-2(9)."

G.S. 97-2(9) provides, "The term 'disability' means incapacity because of *injury* to earn the wages which the employee was receiving at the time of *injury* in the same or any other employment." (Emphasis added.)

Although this statutory route is circuitous and somewhat redundant, it seems clear that the General Assembly has emphasized that two factors trigger the onset of the two-year period in the case of an occupational disease. Time begins running when an employee has suffered:

(1) injury from an occupational disease which

1. The record here shows that the plaintiff was first told by competent medical authority on 9 November 1975 that she had byssinosis. She filed her notice of disability with her employer on 5 December 1975, well within the 30-day requirement of G.S. 97-22. She has therefore fully complied with the notice requirements of the Act.

(2) renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by injury.

Defendants assert here that the disablement must in any event be within one year of last exposure to the occupational hazard which led to the disease. They rely for authority on *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951).

In *Duncan v. Carpenter, supra*, plaintiff was claiming disability from silicosis under G.S. 97-58. Then, as now, that statute in pertinent part provided:

> Claims for certain diseases restricted; time limit for filing claims.—(a) [A]n employer shall not be liable for any compensation for asbestosis or silicosis or lead poisoning unless disablement or death results within two years after the last exposure to such disease, or, in case of death, unless death follows continuous disablement from such disease, commencing within the period of two years limited herein, and for which compensation has been paid or awarded or timely claim made as hereinafter provided and results within seven years after such last exposure. . . .
>
> (b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in case of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years [then one year] after death, disability, or disablement as the case may be.

The *Duncan* Court construed G.S. 97-58(a) *in pari materia* with G.S. 97-58(b) and held that time for claim to the Industrial Commission in the event of asbestosis, silicosis and lead poisoning should "date from the time the employee was notified by competent medical authority that he had such disease." 233 N.C. at 427, 64 S.E. 2d at 414. However, the Court went on to say,

> It follows, however, as a matter of course, that the finding of the competent medical authority must be to the ef-

> fect that disablement occurred within two years from the last exposure in cases of asbestosis, silicosis and lead poisoning, *and in claims involving other occupational diseases that disability occurred within one year thereof.*

Id., 64 S.E. 2d at 414 (Emphasis added).

Defendants cite this passage as settled authority that plaintiff must show she was disabled from lung disease within one year of her last exposure to cotton dust. We disagree and to the extent that dictum in *Duncan v. Carpenter* has been construed to mean that disablement must be within one year of last exposure from hazards in the case of all occupational diseases, that construction is expressly disavowed.

It is clear that the *Duncan* Court was deciding the time for disablement in a case of silicosis and only a case of silicosis. It is also clear that silicosis, along with asbestosis, holds a special place in our Workers' Compensation Act. G.S. 97-60 through G.S. 97-61.7 set up a special program which monitors workers at risk of developing these diseases. Furthermore, unlike the case of disablement from other occupational diseases, disablement from silicosis and asbestosis is measured from the time a claimant can no longer work at dusty trades, not from the time he can no longer work at *any* job. G.S. 97-54. The inference is clear that because an employee with either of these diseases would have been carefully monitored throughout his entire course of employment and would have been, theoretically at least, informed of the presence of either of these diseases and removed from the hazard before reaching total disability, and in fact would have been compensated for the removal, the two-year time limit for disability under G.S. 97-58(a) was an equitable provision.

Nothing in G.S. 97-58(a) or indeed any other provision of the Workers' Compensation Act, however, limits disablement from *other* occupational diseases to a time one year subsequent to last exposure to hazardous substances. Certainly, the special statutory provisions justifying such a limit for disablement in the case of asbestosis and silicosis are absent from provisions for other occupational diseases. Equally certain, the question of time of disablement in any *other* occupational disease was not before the Court in *Duncan v. Carpenter*. Thus the sentence in that case relied upon by defendants here to limit claims for all occupational

diseases was mere *obiter dictum* and is not binding on this Court or any other.

The problem remains, however, that plaintiff here has presented some evidence her disablement began in 1963, but she did not claim her benefits until 1975, long past the two-year claim period provided by G.S. 97-58(c). Defendants alternately argue that plaintiff's claim should be barred since she did not comply with G.S. 97-58(c).

This Court has long held that disablement for the purpose of notice and claim in the case of silicosis and asbestosis dates from the time an employee was first advised he had the disease, even if the disablement existed from the time the employee quit work. Thus in *Autrey v. Victor Mica Company*, 234 N.C. 400, 67 S.E. 2d 383 (1951), claimant ceased work in 1945, three years prior to his claim. At that time he was told he had asthma and dust allergy. Only in 1948 was he informed that the nature of his disease was silicosis and that the silicosis was work related. This Court held his claim allowable and dated the time of disablement for the purpose of making a claim from the time he was told by a competent doctor in 1948 that he had silicosis. Indeed, even in *Duncan v. Carpenter, supra*, claimant was allowed benefits when he filed some three days beyond the then existing statutory period for making claims. There, as in *Autrey, supra*, and the case *sub judice*, the claimant was informed of the nature and work-related quality of his disease only close to or after the time for making claim had expired.

The reasoning the Court applied in *Autrey, supra*, and *Duncan, supra*, for holding that time for claims runs from notification of injury is equally applicable here. Like silicosis and asbestosis, byssinosis is an insidious disease. The Legislature, in the notice section of the statute for occupational diseases, G.S. 97-58(b), has recognized the peculiar problems of such a disease and has dated the time for making notice, not from the time of actual physical incapacity, but from the date of notification by competent medical authority of the nature and work-related quality of the disease. The claim provision of G.S. 97-58(c), however, makes no such allowance. To construe our statutes so that an employee seeking benefits can notify his employer within 30 days of the time he is told by competent medical authority that he suffers from an oc-

cupational disease, but then to prevent him from recovering because he was not told within two years of his incapacity that he suffered an occupational disease, would be to render our statutory scheme absurd.

This we are unwilling to do. Such a construction contradicts established principles of statutory analysis. Statutes dealing with the same subject are *in pari materia* and should be construed together. *Newlin v. Gill*, 293 N.C. 348, 237 S.E. 2d 819 (1977); *Cedar Creek Enterprises, Inc. v. Department of Motor Vehicles*, 290 N.C. 450, 226 S.E. 2d 336 (1976); *Duncan v. Carpenter, supra.* Where language is ambiguous, the court must construe it to ascertain the true legislative intent. *Institutional Food House, Inc. v. Coble*, 289 N.C. 123, 221 S.E. 2d 297 (1976); *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968); *Young v. Whitehall Company, Inc.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). And where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the policy and goals behind the statute should control. *Mazda Motors of America, Inc. v. Southwestern Motors, Inc.*, 296 N.C. 357, 250 S.E. 2d 250 (1979); *Duncan v. Carpenter, supra; State v. Barksdale*, 181 N.C. 621, 107 S.E. 505 (1921).

[2] It is clear that our Legislature never intended that the statutory scheme of G.S. 97-58 would be construed to render time for notice and claim absurd. It is equally clear that our Legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to notification by other medical authority of his disease in order to timely make his claim. *Duncan v. Carpenter, supra; Autrey v. Victor Mica, supra.* Thus we hold that with reference to occupational diseases the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease.

[3] This is not to say that the time of disablement for other statutory provisions is necessarily the date a claimant was informed he was disabled by an occupational disease. We can see from the facts *sub judice* that while an employee may be suffering a debilitating disease of an origin totally unknown to him, he still feels the economic and physical ravages of disability. Thus

for the purpose of determining whether the 1963 or the 1971 version of G.S. 97-53(13) should apply, as well as determining what the statutory benefits are, we hold that whether section 1 of Chapter 965 of the 1963 Sesison Laws or the current version of G.S. 97-53(13), effective 1 July 1971, applies in this case depends upon the date when plaintiff's disablement or actual incapacity due to byssinosis occurred. This holding accords with our decision in *Wood v. Stevens & Company*, 297 N.C. 636, 256 S.E. 2d 692 (1979), where we said: "[T]he better rule in cases involving occupational disease is to apply the law in effect at the time the employee becomes disabled, at least where the statute does not dictate a contrary result. Our decision in this regard is in accord with authority from other jurisdictions." *Id.* at 645, 256 S.E. 2d at 698. The date when plaintiff became disabled due to byssinosis is deemed to be the date upon which she sustained an injury by accident, G.S. 97-52. As mentioned earlier in this opinion, G.S. 97-2(9) further provides, "The term 'disability' means incapacity because of injury to earn the wages which the employee was earning at the time . . . in the same or other employment." It is therefore incumbent upon the Industrial Commission to determine when plaintiff became disabled or actually incapacitated due to byssinosis before it decides which law applies to her claim. If the Commission finds she became disabled after 1 July 1971, the effective date of the current version of G.S. 97-53(13), it should determine her claim in accordance with that statute. If it finds her disablement occurred prior to 1 July 1971, then the 1963 law will control.

In the case *sub judice*, plaintiff's counsel stated on oral argument that she was disabled within the meaning of the statute on 1 August 1963. This allegation, however, has never been found as a fact. Accordingly, this case must be remanded to the Industrial Commission to make that determination.

We note that on appeal to the full Industrial Commission from the decision of the Deputy Commissioner, plaintiff unsuccessfully attempted to introduce affidavits of friends and neighbors as evidence of her disability in 1963. She did this because the Deputy Commissioner had found that at her original hearing, the only evidence she presented of disability—her own testimony—was "not credible." While we realize that a motion to present new or additional evidence is addressed to the discretion

of the Commission, *Wood v. J. P. Stevens, supra; Hall v. Thomason Chevrolet, Incorporated*, 263 N.C. 569, 139 S.E. 2d 857 (1965); G.S. 97-85, because the case must be remanded for further hearings to determine the actual date of disability, any and all competent evidence presented at new hearing about this date would no doubt be relevant.

[4] We further note that if indeed plaintiff became disabled in 1963, the version of the Workers' Compensation Act then existent fully covers her occupational obstructive lung disease. The statutory definition then existing provided coverage for: "Infection or inflammation of the skin, eyes or other external contact surfaces or oral or nasal cavities or any other internal or external organ or organs of the body due to irritating oils, cutting compounds, chemical dust, liquids, fumes, gases or vapors, and any other materials or substances." 1963 N.C. Sess. Laws ch. 965.

Whether a given illness falls within the general definitions set out in the Workers' Compensation Act, G.S. 97-53(13) presents a mixed question of fact and law. *Wood v. J. P. Stevens & Company, supra* at 640, 256 S.E. 2d at 695. In the record of this case, both of the Industrial Commission's expert witnesses testified that byssinosis is a lung disease caused by the inhalation of cotton dust in the course of one's employment which debilitates one suffering from the disease by inflaming the tracheal-bronchial tree and blocking the lungs' capacity to exchange air. This fully conforms to the statutory definition of an "infection or inflammation of . . . internal . . . organs [the lungs] of the body due to . . . any other materials or substances [cotton dust]."

Further, we note that while one expert witness testified that plaintiff here had byssinosis, the other testified only that she had an obstructive lung disease. They both agreed plaintiff's symptoms indicated an inflammation of the tracheal-bronchial tree which compromised her ability to breathe. The Deputy Commissioner determined this compromised breathing capacity was a result of occupational exposure to cotton dust. This, too, fully conforms to the statutory definition contained in the 1963 version of the Workers' Compensation Act.

In summary, we therefore hold that (1) dicta in *Duncan v. Carpenter, supra*, suggesting that time of disability in the event of an occupational disease other than silicosis or asbestosis runs

from one year of last exposure is expressly overruled; (2) time for making a claim for an occupational disease runs from the time a claimant is notified by competent medical authority of the nature and work-related quality of his disease or "injury"; (3) time of disablement for the purpose of deciding which version of the Workers' Compensation Act to apply runs from the date the claimant was incapable of working due to the later diagnosed occupational disease and (4) the 1963 version of the Workers' Compensation Act provides benefits for those suffering from byssinosis or brown lung disease, and occupational obstructive lung disease of the type this plaintiff suffers.

Accordingly, the decision of the Court of Appeals in this case is modified and affirmed. The case is remanded to that court so that it can remand to the Industrial Commission for further hearings to determine as a matter of fact the date of plaintiff's actual physical inability to earn her living due to her obstructive lung disease.

Modified, affirmed and remanded.

STATE OF NORTH CAROLINA v. WILLIAM CHARLES DANIELS

No. 73

(Filed 6 May 1980)

1. Criminal Law § 66.16 — photographic identification — in-court identification of independent origin

The trial court did not err in denying defendant's motion to suppress identification testimony by the alleged victim and an eyewitness of the armed robbery with which defendant was charged, since there was ample evidence to support the trial court's conclusion that the two witnesses had ample opportunity to observe the perpetrator of the robbery at the well lighted crime scene; subsequent thereto nothing occurred which would indicate any suggestion by any person which would color identification of defendant's photograph which had been placed in a mug book with other photographs; the photographic identification of defendant by both of the witnesses was of independent origin based solely upon what each of them observed at the time of the robbery and was not the result of any confrontation otherwise which might have been suggestive or conducive to mistaken identification; and the photographic lineup procedure was not so suggestive as to lead to irreparable mistaken identification.

2. Constitutional Law § 53— eighteen months between arrest and trial—delay caused by defendant—no denial of speedy trial

The trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial, though eighteen months elapsed between defendant's arrest and trial, since most of the delay was caused by defendant and his counsel who filed numerous pretrial motions, and since defendant did not show that he was prejudiced by the delay and did not complain about the delay until sixteen months after commission of the crime charged when he filed his motion to dismiss.

3. Criminal Law § 34.5— stealing of gas—unrelated criminal act—admissibility to show identity

There was no merit to defendant's contention in a homicide prosecution that the trial court erred in allowing into evidence testimony concerning the stealing of gas which was unrelated to the case under consideration, since the witness in question made no reference to the gasoline having been stolen, and since the testimony was relevant to the murder charge as it tended to show that a person meeting the description of the murder victim was seen in an automobile similar to that driven by defendant a short while prior to the robbery and the time when the victim was found shot in the head.

4. Robbery § 4.3— armed robbery—sufficiency of evidence

The trial court did not err in denying defendant's motion to dismiss the charge of armed robbery where the victim and an eyewitness were unequivocal in their identification of defendant as the perpetrator; several rolls of coins and bundles of bills were taken during the robbery; defendant's abandoned car was found shortly after the robbery with rolls of coins therein; defendant was apprehended near the scene of the crime while he was attempting to flee on foot; and when apprehended defendant had $153 in his pockets, including several bundles of bills like those taken in the robbery.

5. Homicide § 21.1— shooting of partner in crime—defendant as murderer—insufficiency of evidence

Evidence was insufficient to support defendant's conviction for the murder of his partner in crime which took place while both were fleeing through a wooded area where the evidence tended to show that the two ran into the woods together, but the victim was not shot at close range; there were numerous police officers with weapons in the area at the time the victim was shot; although the State showed that many of the officers did not fire a weapon, it was not clear that no officer fired one; the victim was in a thickly settled residential area and was near an outbuilding within forty feet of one residence when he was shot; and there was no evidence that someone in that residence or in any of the other nearby residences did not fire a shot.

6. Criminal Law § 171.1— defendant convicted of two charges—one conviction improper—single sentence imposed

Where defendant was properly convicted of armed robbery but improperly convicted of voluntary manslaughter, and the court, for the purpose of sentencing, consolidated the charges and imposed a sentence of life imprisonment, the judgment need not be disturbed, since the single sentence imposed

was within the parameters of the punishment authorized for the crime of armed robbery.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant from *Preston, J.*, 20 August 1979 Criminal Session of CUMBERLAND Superior Court.

Upon pleas of not guilty defendant was tried on a bill of indictment charging him with (1) the murder of Jimmy Carl Bullard and (2) the armed robbery of Donald Ray Jones. The jury returned verdicts finding defendant guilty of involuntary manslaughter and armed robbery. The court consolidated the charges for purpose of judgment and imposed a life sentence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Norma S. Harrell, for the state.

Public Defender Mary Ann Tally and Assistant Public Defender Gregory A. Weeks for defendant-appellant.

BRITT, Justice.

We find no merit in any of defendant's assignments of error in the armed robbery case. However, we conclude that the trial court erred in denying defendant's motion to dismiss the murder charge because of insufficiency of evidence.

[1] Defendant contends first that the trial court erred in denying his motoin to suppress any identification of him by Jones, the alleged victim of, and Driggers, an eyewitness to the alleged armed robbery. We reject this contention.

The alleged robbery took place on 26 February 1978. On 24 July 1978 defendant filed a motion asking the court to suppress identification evidence by Jones and Driggers. A hearing on the motion was held by Judge Herring at the 25 September 1978 Criminal Session of the Court. Following testimony by investigating Officer Pearson, Jones and Driggers, the court made findings of fact summarized in pertinent part as follows (numbering ours):

1. The Service Distributing Company located on West Hudson Street in Fayetteville was the victim of an armed robbery at about 1:30 a.m. on 26 February 1978. Shortly thereafter defendant was taken into custody and detained at the Cumberland County

Law Enforcement Center in connection with the alleged robbery. Driggers and Jones were present at the time of the robbery. Both of them had ample opportunity to observe the white male who had in his hand a gun which was used to accomplish the robbery. There was adequate lighting both inside and outside of the building where the robbery occurred for both witnesses to clearly and plainly observe the perpetrator of the robbery.

2. Both of said witnesses were transported separately to the Law Enforcement Center and placed in separate rooms apart from the defendant. They were not afforded an opportunity to observe the defendant who was then in custody in another part of the building.

3. At approximately 2:30 a.m. defendant was photographed in the office of Detective Sam Pearson who had been provided with descriptions of the person who committed the robbery as given by Jones and Driggers. Detective Pearson took the photograph of defendant which was made by him and placed it in a mug book along with other photographs of approximately 400 persons which included males and females and persons of the white, black and Indian races. Approximately 175 to 200 white males were pictured in the book.

4. Separated from each other, Jones and Driggers were asked to view photographs in the book and indicate whether they saw anyone they had seen before. Jones viewed some 30 to 35 photographs before he came to and pointed out defendant's photograph as being that of the person who committed the robbery. Driggers viewed some 10 or 15 photographs before he came to defendant's picture and identified him as being the one who committed the robbery.

5. The general description given by both Jones and Driggers generally fit the description and appearance of defendant, although not "necessarily accurate in every respect, such as weight and height." The photographic lineup was not so suggestive as to taint an identification of defendant's photograph by Jones or Driggers.

The court concluded as a matter of law that Jones and Driggers had ample opportunity to observe the perpetrator of the robbery; that subsequent thereto nothing appears to have occurred that would indicate any suggestion by any person which would

color identification of defendant's photograph which had been placed in a mug book with other photographs; that the photographic identification of defendant's picture by both of said witnesses was of an independent origin based solely upon what each of them observed at the time of the robbery and "is not the result of any confrontation otherwise which might have been suggestive or conducive to a mistaken identification;" and that the photographic lineup procedure was not so unnecessarily suggestive or inducive as to lead to irreparable mistaken identification to the extent that defendant would thereby be denied due process of law.

The court then ordered that defendant's motion to suppress be denied and held that evidence of the photographic lineup and the identification of defendant would be competent evidence in the trial of this case.

This court has held many times that an in-court identification will not be excluded because of pretrial photographic identification procedures unless those procedures were so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *E.g., State v. Knight,* 282 N.C. 220, 192 S.E. 2d 283 (1972), *accord, State v. Carson,* 296 N.C. 31, 249 S.E. 2d 417 (1978); *State v. Legette,* 292 N.C. 44, 231 S.E. 2d 896 (1977). The trial court's findings and conclusions in the case at hand that the photographic lineup was not so suggestive as to taint an identification of defendant's photograph by Jones and Driggers, that the identification was of an independent origin based solely upon what each of them observed at the time of the robbery, and that the photographic lineup procedure was not so unnecessarily suggestive or inducive as to lead to irreparable mistaken identification are fully supported by competent evidence; therefore, they are binding on this court. *State v. Sweezy,* 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Davis,* 290 N.C. 511, 227 S.E. 2d 97 (1976).

[2] The trial court did not err in denying defendant's motion to dismiss for lack of a speedy trial. Inasmuch as this case arose before the effective date of Chapter 787 of the 1977 Session Laws, sometimes referred to as the Speedy Trial Act, our discussion of this assignment relates solely to defendant's constitutional right to a speedy trial.

The main factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) prejudice to the defendant; and (4) waiver by the defendant. 3 Strong's N.C. Index 3d, Constitutional Law § 50 and cases therein cited. A defendant's constitutional right to a speedy trial is not violated unless the delay is wilful or the result of negligence on the part of the prosecution; and the accused has the burden of showing that the delay was due to the state's wilfulness or neglect. *Id.* § 52; *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969).

Although there was a period of approximately eighteen months between the date of defendant's arrest and his trial, the record reveals that a substantial part of the delay was caused by defendant or his counsel. Numerous pretrial motions were filed by defendant and they had to be scheduled and heard. For a considerable period of time defendant's counsel was engaged in the trial of other cases and would not agree for defendant to be represented by other counsel. Defendant failed to establish that he was prejudiced by the delay, and he did not complain about the delay until 17 August 1979 when he filed his motion to dismiss.

[3] Defendant states his third contention thusly: "The trial court erred in allowing into evidence testimony concerning the stealing of gas which was totally unrelated to the case under consideration by the jury."

This contention relates to the testimony of state's witness Clyde Smithwick. Before he was allowed to testify before the jury, the court conducted a *voir dire* in the absence of the jury. At that time, the witness testified that on the night in question he was working at a Gulf Station; that a tan Ford Mustang occupied by two persons drove up to the outside pumps; that the passenger got out of the car and put gas into it; that the car left without anyone paying for the gas; that he wrote down a description of the automobile and the license number; and that he reported the theft of gasoline to the police and gave them the information regarding the car.

When he testified before the jury, Smithwick carefully avoided making any statement that the gas was stolen. He testified that a tan Mustang came to his station between 12:00

and 1:00 a.m.; that the passenger, whom he described, got out of the car and put $5.00 worth of gasoline into it; that he wrote down the license number of the car and that he later called the sheriff's department.

Clearly the testimony given to the jury was free from error. The contention as stated by defendant is inaccurate as the witness in his testimony before the jury made no reference to the gasoline having been stolen. The testimony was relevant to the murder charge as it tended to show that a person meeting the description of the murder victim was seen in an automobile similar to that driven by defendant a short while prior to the robbery and the time when Bullard was found shot in his head. ". . . [E]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." 1 Stansbury's North Carolina Evidence § 77 (Brandis Rev. 1973).

Defendant's fourth contention is that the trial court erred in denying his motion to dismiss the charges because of insufficient evidence. The evidence presented by the state is summarized in pertinent part as follows:

At around 4:00 p.m. on 25 February 1978 defendant, Jimmy Carl Bullard and Walter Elder, Jr., were together at a bar in the eastern section of Fayetteville. Elder owned a 1968 gold colored Mustang. The three of them shot pool and drank beer. Later on they went to two other clubs where they shot pool and drank beer. Defendant drove the car from one club to the other because Elder did not have a driver's license. Thereafter, defendant and Elder went "downtown" where Elder was arrested for carrying a concealed weapon and public drunkenness. Defendant kept the keys to the car.

That night, between 12:00 and 1:00 a.m., a tan Ford Mustang with two people in it drove up to a Gulf station off Murchison Road in or near the City of Fayetteville. A man with curly, blond, sandy hair, wearing a white tee shirt and dungarees, got out on the passenger side and put $5.00 worth of gasoline into the car. The station attendant did not see anyone else in the car. As the car left the station, the attendant wrote down the license number and communicated it to the sheriff's department.

On said night Donald Ray Jones was operating a gas station on West Hudson Street in Fayetteville belonging to Service

Distributing Company. At around 1:30 a.m., while Jones and his friend Hubert Driggers were in the station talking, a man, later identified by Jones and Driggers as defendant, entered the station, pulled a handgun on Jones and demanded money. The man had brown hair and was wearing brown khaki pants, a blue jean jacket but no shirt. Jones proceeded to give the intruder several rolls of quarters, nickels and dimes; also two bundles of $1.00 bills containing twenty-five to the bundle, with rubber bands around the bundles; also "some tens and fives". The total amount missing from the station was $203.00. After getting the money, the robber backed out of the station, entered a light colored Mustang and sped away on Charles Street, a dirt street, which ran by the side of or behind the station premises. Jones called police and they came to the station immediately.

On the night in question, Lorenda Conne was living at 203 Charles Street, approximately 300 yards from the Service Distributing Company station. While sitting in her living room at about 1:35 a.m. she heard a car racing its engine. She went to her window, looked out and saw a man dressed in light colored clothing get out of the passenger side of the car, a Mustang. He proceeded to the front of the car and tried to push it out of some sand. The driver, dressed in dark clothing, got out and also attempted to push the car out of the sand. After making two or three unsuccessful attempts to extricate the car, the two men ran into the woods across the street from the Conne residence. Approximately one minute later, a police car, operated by Officer Wayne Alsup of the Fayetteville Police Department arrived at the scene.

Alsup observed that the brown colored Mustang was stuck in the sand. There was no one in the car and both doors were open. He was soon joined by Deputy Sheriff Simms. Very soon thereafter, they observed a flash of light and heard "a bang, loud noise" from the wooded area some 100 yards away from the stuck car. Those two officers, together with other officers who converged from the opposite direction, went into the woods to investigate the blast. As Officers Alsup and Simms approached Ladley Street (which roughly parallels Charles Street) they found a white male, later identified as Bullard, sitting on the ground by a small outbuilding. Bullard was bleeding from his head, did not respond to the officers and later died from a bullet wound in his

head. He was dressed in a white tee shirt and blue jean pants and had a buck knife in a sheath on his side. An autopsy revealed that Bullard died from a single bullet wound to his head; that the bullet was fragmented; and the medical expert stated as his opinion that the gun which fired the bullet was not fired at close range. The place where Bullard was found was some 40 feet from a residence, and there were numerous other residences located in that area of Ladley Street.

After finding Bullard, Officer Alsup returned to the Mustang and examined it more closely. He found several rolls of coins in the car, later determined to amount to $49.00.

During the early morning hours of the night in question, Captian Doug Bramble of the Cumberland County Sheriff's Department, was driving north on U.S. 301 south of Fayetteville. He had received a radio transmitted message (supposedly relating to the robbery and providing a description of the suspect). Seeing a man running across U.S. 301 toward the Americana Motel, Captain Bramble drove to the motel, overtook the runner and ordered him to stop. The man turned out to be defendant and at the time was wearing khaki pants and a blue denim jacket but no shirt. Other officers arrived at the scene and a search of defendant disclosed $153.00 in his pockets. This included two bundles of $1.00 dollar bills with $25.00 "in each stack in rubber bands". The officers found a .38 caliber Colt revolver near a bush on the motel lawn. The weapon was cocked and contained one bullet. Tests failed to identify any fingerprints on the gun.

The lead fragments of the bullet removed from Bullard's head were so badly deformed that an S.B.I. expert was unable to determine whether the bullet had been fired from the gun found on the motel lawn. All of the police officers who testified at the trial denied firing any weapon.

Defendant offered no evidence.

[4] Clearly the evidence was more than sufficient to overcome defendant's motion to dismiss the armed robbery charge. Jones and Driggers were unequivocal in their identification of defendant as the perpetrator of the robbery, and the evidence relating to events following the crime pointed unerringly to defendant's guilt.

[5] As to the homicide charge, we have a different situation. There was no direct evidence tending to show that defendant committed this offense, and the state had to rely on circumstantial evidence. The applicable rule is stated in *State v. Blizzard*, 280 N.C. 11, 16, 184 S.E. 2d 851 (1971), as follows:

> To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute substantial evidence of every essential element of the crime charged. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. Guilt must be a legitimate inference from facts established by the evidence. When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed.

Accord, State v. Pinyatello, 272 N.C. 312, 158 S.E. 2d 596 (1968); *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967).

While, in the case at hand, the state presented substantial evidence tending to show that a homicide was committed, it failed to present substantial evidence that defendant committed the homicide. There were numerous police officers with weapons in the area at the time Bullard was shot; although the state showed that many of the officers did not fire a weapon, it is not clear that no officer fired one. The evidence further showed that defendant and Bullard ran from the car into the woods together but Bullard was not shot at close range. It also showed that Bullard was in a thickly settled residential area, and that he was near an outbuilding within 40 feet of one residence when he was shot; there was no evidence that someone in that residence or in any of the other nearby residences on Ladley Street did not fire a shot.

We hold that the facts and circumstances supported by the evidence do nothing more than raise a suspicion of defendant's guilt of homicide. Therefore, the motion to dismiss that charge should have been allowed. The verdict finding defendant guilty of involuntary manslaughter is vacated.

Defendant next contends that the trial court erred in submitting involuntary manslaughter as an alternative verdict in the murder case. Since we have already held that all homicide

charges should have been dismissed at the close of all the evidence, we do not reach this issue.

We have carefully considered all of defendant's other assignments of error and have concluded that they are without merit.

[6] While we have held that the trial court erred in denying defendant's motion to dismiss the homicide charge, this error does not require that the judgment appealed from be disturbed. Where the jury renders a verdict of guilty on each count of a bill of indictment, an error in the trial or in the charge of the court as to one count is cured by the verdict on the other count where the offenses which are charged are of the same grade and punishable alike, only one sentence is imposed, and the error relating to one count does not affect the verdict on the other. The same result follows if the error relates solely to the lesser count in the indictment. *State v. Barbour*, 278 N.C. 449, 180 S.E. 2d 115 (1971), *cert. denied*, 404 U.S. 1023 (1972); *State v. McCaskill*, 270 N.C. 788, 154 S.E. 2d 907 (1967); *State v. Vines*, 262 N.C. 747, 138 S.E. 2d 630 (1964); 4 Strong's N.C. Index 3d, Criminal Law § 171.1.

Although defendant's case does not fall precisely within the rule which is stated above, we think that the rule is applicable to this situation. Defendant was tried on charges of first-degree murder and armed robbery. Had he been convicted of first-degree murder, he would have received the death penalty. G.S. 14-17. Upon his conviction of armed robbery, the court was authorized to impose a prison sentence of not less than seven years and not more than life imprisonment. G.S. 14-87(a). The court submitted involuntary manslaughter as an alternative verdict on the murder count. Defendant was found guilty of that lesser charge. At the time of defendant's trial, involuntary manslaughter was punishable by fine or imprisonment or both in the discretion of the court. G.S. 14-18. In any case, no prison sentence for involuntary manslaughter may exceed ten years.[1] G.S. 14-2.

Because of the verdicts rendered by the jury, the armed robbery charge became the dominant charge. For the purpose of

1. The changes in penalties for various offenses which are prescribed by Chapter 760 of the 1979 Session Laws do not apply to this case because they become effective on 1 July 1980.

sentencing, the court consolidated the charges and imposed a sentence of life imprisonment. It is self-evident that the single sentence imposed was within the parameters of the punishment authorized for the crime of armed robbery.

Our decision is:

In the murder case, verdict vacated.

In the trial of the armed robbery case and in the judgment entered, we find

No error.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. LEROY CLARK, JR.

No. 64

(Filed 6 May 1980)

1. **Criminal Law § 29— defendant's mental capacity to stand trial—sufficiency of evidence**

Evidence, though conflicting, was sufficient to support the trial court's ruling that defendant was capable of proceeding to trial where the evidence consisted of testimony by defendant's sister and two psychiatrists; the sister testified to defendant's strange behavior; one psychiatrist testified that defendant was a paranoid schizophrenic and did not have the capacity to proceed to trial; the witness based his opinion upon an interview with defendant and particularly upon defendant's refusal to discuss the murder with which he was charged; the second psychiatrist had several interviews with defendant and found him uncommunicative; the psychiatrist testified that defendant was very aware of the murder charge pending against him and indicated that he would not plea bargain but would plead self-defense; and the witness concluded that defendant understood it was wrong for him to stab his father and that he was capable of proceeding to trial.

2. **Criminal Law § 29— mental capacity to stand trial—test**

The test of a defendant's mental capacity to proceed to trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed.

3. Criminal Law § 87.1— leading questions

There was no merit to defendant's contention that the trial court erred in permitting the State to ask leading questions, since the district attorney was merely directing the witnesses' attention to the subject matter at hand in a manner best calculated to elicit the truth; moreover, the information so obtained was admitted without objection at other points in the witnesses' testimony and defendant therefore was not prejudiced.

4. Criminal Law § 86.4— cross-examination about defendant's prior conviction—no prejudice shown

Defendant did not show error in the trial court's failure to instruct the jury to disregard the district attorney's cross-examination of defendant concerning whether he had ever been convicted of homicide, since defendant failed to object at the time of the question; defendant's assignment of error failed to comply with the Rules of Appellate Procedure in that defendant did not show what question was asked; defendant made no showing as to whether the district attorney acted in good faith in inquiring into defendant's prior criminal offenses or reprehensible conduct and the court's ruling permitting the question is therefore presumed to be correct; and any possible prejudice to defendant was negated by the fact that he was given the opportunity to explain that he had not been convicted of homicide.

APPEAL by defendant from *Strickland, J.*, 13 September 1979 Criminal Session of BEAUFORT Superior Court.

Defendant was charged in an indictment proper in form with the murder of his father, Leroy Clark, Sr. He entered a plea of not guilty and filed a motion pursuant to G.S. 15A-959 giving notice of his intention to rely on the defense of insanity.

Prior to the selection of the jury, counsel for defendant filed a motion questioning defendant's capacity to proceed to trial. A hearing was held on that motion in accordance with G.S. 15A-1002(b)(3) at which testimony was presented by both the defendant and the State. The trial judge held that defendant was competent to proceed to trial.

At trial the State offered evidence tending to show that on 7 March 1979 defendant was living with his father in Belhaven, North Carolina and had been visiting there since early January of that year. On the afternoon of March 7, defendant was in the yard cleaning fish with a long knife and his father was inside his mobile home cooking fish.

Allen Winfield testified that he was a neighbor of Leroy Clark, Sr. and on that afternoon, he was in the yard and observed

defendant take some fish to his father inside the trailer. At that time, he heard the sound of something falling. Defendant came outside to get a mop, and the witness saw chicken gravy spilled on the floor. After defendant went back inside the mobile home and closed the door, Winfield heard defendant's father exclaim, "You're cutting me, stop cutting me." The witness ran to the door of the trailer and, upon finding it locked, went to a nearby window where he observed defendant striking his father in the side with a knife similar to the one he had used for cleaning fish. The witness then left and called the police. After Officer O'Neal arrived, defendant came out of the trailer with blood on his pants and sleeves and stated that "everything is all right." The witness at that time observed the bloody body of Leroy Clark, Sr. lying on the floor. The witness Winfield further testified that he had never heard defendant talk about things that did not make sense.

Captain Willie O'Neal of the Belhaven Police Department testified that he went to the trailer in response to Mr. Winfield's call. As he approached the trailer, defendant came out and told him that there had been a conspiracy of two people and that the other person was inside the trailer. Captain O'Neal then looked inside and saw defendant's father lying on the floor in a pool of blood. Defendant was bloody from his chest to his shoes. When the officer told him that he would have to be taken to the police station, defendant said he understood because he himself was an F.B.I. agent. As they walked to the car, Captain O'Neal asked him if he had stabbed his father, and defendant answered that he had. A later search of the trailer revealed blood in the tub area and on the towel rack and a bloody knife found approximately eight to ten feet from the body. At the police station, Captain O'Neal found some money in defendant's pocket which had blood on it. After defendant had been advised of his rights, the officer again asked defendant if he had stabbed his father, and he responded that he had.

Dr. Lawrence Harris, a forensic pathologist, testified for the State that he performed an autopsy upon the body of the deceased on 8 March 1979 indicating that the deceased had recently suffered eight stab wounds and one incised wound. The fatal injury was a deep stab wound in the chest which penetrated the heart at the aorta.

Defendant took the witness stand in his own behalf and testified that he was an F.B.I. agent with badge number zero. He had lived in New York prior to January 1979, but he was born in Africa on "the first year, the first day, the first month, three-one-one-one." He denied having a mother or any sisters. He claimed to be Leroy Clark, Sr. and that he had come to Belhaven to investigate his "son," the victim of the stabbing. Defendant stated that he was thirty-nine years old while his son was thirty-eight, and that this was possible because his son "was born in three months," on thirteen-twelve-one.

Defendant testified further that on 7 March 1979, he was cleaning fish when he had a quarrel with his "son" concerning who owned the trailer and some property in Belhaven. His "son" had formed a conspiracy to take this property away from him and was trying to tell defendant that he was not his son but was really his father. Defendant became upset and hit him in the face several times. Defendant went outside to get a mop and was trying to get blood off the floor when his "son" grabbed the knife defendant had been using to clean fish and told defendant he was going to kill him. The two men struggled and fell to the floor. Defendant wrestled the knife away from his "son" and stabbed him several times.

On cross-examination defendant testified that in New York he had been convicted twenty-five times of burglary "of my property" as well as of other crimes. Defendant stabbed his "son" to protect himself and subsequently took money out of his "son's" pocket because it really belonged to defendant.

Gertrude Clark, defendant's sister, testified as to his unusual behavior during recent years.

Dr. Phillip Nelson, a psychiatrist, testified that in his opinion defendant was a paranoid schizophrenic for whom the prognosis was "guarded." In his opinion, defendant might have had a psychotic break and therefore would not have known right from wrong at the time of the stabbing.

Dr. Mary M. Rood, a forensic psychiatrist, testified for the State in rebuttal that in her opinion defendant knew right from wrong, knew the quality and nature of his acts at the time of the killing, and was capable of proceeding to trial.

The testimony of Gertrude Clark, Dr. Phillip Nelson and Dr. Mary M. Rood regarding defendant's mental condition was substantially the same at trial as that given at the pretrial hearing. A more detailed statement of that testimony will be set forth in our consideration of defendant's assignments of error.

Defendant was recalled by the State and testified that he knew it was wrong to stab his father, but that he did so in self-defense.

The jury returned a verdict of guilty of first-degree murder and recommended that defendant be sentenced to life imprisonment. The trial court imposed a sentence of life imprisonment, and defendant appealed.

Rufus L. Edmisten, Attorney General, by Jane Rankin Thompson, Assistant Attorney General, for the State.

Franklin B. Johnston for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the trial judge's ruling that defendant was capable of proceeding to trial.

At the pretrial hearing held pursuant to G.S. 15A-1002(b)(3), defendant offered the testimony of his sister, Gertrude Clark, who stated that she had grown up with defendant and had continued to see him frequently over the years. For the past several years, she had noticed a change in his behavior. He began to talk about strange things such as his wife and children when he apparently had neither. In the fall of 1978, he tried to jump off the Brooklyn Bridge and was taken to a New York hospital for treatment which continued for about two months. He was again hospitalized after he had attempted to molest a nephew. The witness testified that defendant was still acting strangely when he went to visit his father in January, 1979. On cross-examination she said that her brother had spent most of his adult life in prison. At his father's funeral, defendant had told her he did not know that his father was dead.

Dr. Phillip Nelson, an expert in psychiatry, testified that he examined defendant on 24 June 1979 in the Beaufort County jail. At that time, he had read a psychiatric report from Manhattan-

Meyer Hospital in New York in which defendant was described as being alert and lucid although he had a delusional thinking process. That report diagnosed defendant's condition as being "paranoid schizophrenic, [with] habitual heavy drinking and drug dependence." Dr. Nelson testified that when he interviewed defendant he denied ever being in a hospital or having a criminal record. Defendant appeared to be very disturbed about the fact that his attorney could not get him out on bail and stated that he wanted another attorney for this reason. He did not appear to have any concept of the seriousness of his situation or understand the nature of the charges against him. Further, he was uncooperative and refused to discuss the circumstances surrounding the pending charges, stating that he would discuss this with his attorney. Dr. Nelson stated that in his opinion defendant was a paranoid schizophrenic and a person suffering with this disease could become violently dangerous when certain stimuli triggered a psychotic episode. He testified that, assuming that defendant was experiencing such an episode at the time of the stabbing, he would not have understood the nature of what he was doing or have been able to distinguish between right and wrong. The witness concluded that defendant did not have the capacity to proceed to trial, basing this upon his interview and particularly upon defendant's refusal to discuss the stabbing of his father.

The State offered the testimony of Dr. Mary M. Rood, a forensic psychiatrist at Dorothea Dix Hospital, who had examined defendant for the purpose of determining whether he was capable of proceeding to trial. She observed defendant over a period of thirteen days in March, 1979. Her initial interview lasted for about twenty minutes, and she had several subsequent interviews with him. She observed no outward evidence of mental illness, and in her opinion he was basically normal but tended to be uncommunicative and distrustful of others. In her opinion, in March 1979, defendant was not a paranoid schizophrenic but rather was a paranoid personality. He was very aware of the first-degree murder charge pending against him and indicated that he would not plea bargain but would plead self-defense. She concluded that he understood it was wrong for him to stab his father and that he was capable of proceeding to trial.

At the close of the pretrial hearing, the trial judge made the following findings of fact and conclusions of law:

1. That the defendant, Leroy Clark, Jr., was admitted to the Dorothea Dix Hospital on March 13, 1979 and remained there through March 26, 1979; that the defendant was interviewed on some occasion by a forensic psychiatrist and observed on other occasions; that the defendant was not communicative and that his history and responses to answers were unreliable; that the defendant previously had been admitted to the Manhattan-Meyer Hospital in New York on or about October 12, 1977, where he was diagnosed as being alert and lucid, but in a delusional process, suffering from drug dependence and habitual drinking, and he was diagnosed as being a paranoid schizophrenic; that on June 24, 1979, the defendant advised one Dr. Nelson, a psychiatrist, during an examination, that he wanted to get out of jail on bail and wanted to discharge his attorney, because he was not out of jail; that the defendant, during his stay at Dorothea Dix hospital, adjusted well to his surroundings and had no difficulty with other people; that the defendant was well aware that he was indicted on a first degree murder charge, but would not plea bargain and stated that he could plead self-defense.

Based upon the above findings of fact, the Court makes the following conclusion of law:

1. That the defendant has paranoid personality, precipitated by drugs and alcohol and may have psychotic episodes.

2. That the defendant is . . . mentally capable of proceeding with trial and assisting his counsel in the preparation and trial of his case.

It is therefore the ruling of the Court that the defendant has the capacity to proceed with trial.

[2] The test of a defendant's mental capacity to proceed to trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. *State v. Willard*, 292 N.C. 567, 234 S.E. 2d 587 (1977); *State v. Cooper*, 286 N.C. 549, 213 S.E.

2d 305 (1975); *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974); *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971). The issue may be determined by the trial court with or without the aid of the jury. *State v. Cooper, supra; State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968). When the trial judge, as here, conducts the inquiry without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. Willard, supra; State v. Thompson*, 285 N.C. 181, 203 S.E. 2d 781, *cert. denied*, 419 U.S. 867 (1974).

Although the evidence as to defendant's mental capacity to proceed to trial was in conflict, we are of the opinion and so hold that there was ample evidence to support the trial judge's findings and the findings in turn support the court's conclusions of law and ruling. Thus, the trial court correctly ruled that defendant had the capacity to proceed to trial.

[3] Defendant next contends that the trial judge erred in allowing the State to ask certain leading questions on direct examination.

A leading question has been defined as one which suggests the answer desired and is a question which may often be answered by "yes" or "no." *State v. Manuel*, 291 N.C. 705, 231 S.E. 2d 588 (1977); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); 1 Stansbury's North Carolina Evidence § 31 (Brandis rev. 1973). This Court has held that the trial judge has discretionary authority to permit leading questions in proper instances, and such discretionary action on the part of the trial judge will not be disturbed absent a showing of abuse of discretion. *State v. Manuel, supra; State v. Cranfield*, 238 N.C. 110, 76 S.E. 2d 353 (1953).

Our examination of the challenged rulings discloses no abuse of discretion on the part of the trial judge. To the contrary, it appears that the district attorney was merely directing the witnesses' attention to the subject matter at hand in a manner best calculated to elicit the truth. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10, *cert. denied*, 429 U.S. 932 (1976); *State v. Greene, supra*. Moreover, the information so obtained was admitted without objection at other points in the witnesses' testimony and thus defendant was not prejudiced thereby. *State v. Manuel, supra*. This assignment of error is overruled.

[4] Defendant next assigns as error the failure of the trial judge to instruct the jury to disregard the district attorney's cross-examination of defendant concerning whether he had ever been convicted of homicide.

In *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977), we considered the scope and nature of cross-examination when a defendant elects to become a witness and testify in his own behalf. There Chief Justice Sharp wrote:

> A defendant who elects to testify in his own behalf knows that he is subject to impeachment by questions relating not only to his conviction of crime but also to any criminal or degrading act which tends to discredit his character and challenge his credibility. Such questions, however, must be asked in good faith. It would be highly improper for the prosecuting attorney to ask a witness an impeaching question without reasonable grounds for belief that the witness had committed the crime or degrading act about which he was inquiring. *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977); *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912, 97 S.Ct. 301, 50 L.Ed. 2d 278 (1976); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). *See* 1 Stansbury's N.C. Evidence § 112 (Brandis rev. 1973).
>
> Whether the cross-examination transcends propriety or is unfair is a matter resting largely in the sole discretion of the trial judge, who sees and hears the witnesses and knows the background of the case. His ruling thereon will not be disturbed without a showing of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972).

Id. at 684-85, 239 S.E. 2d at 456-57.

These rules do not conflict with our decision in *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), in which we held that a witness including a criminal defendant may not be impeached on cross-examination by questions concerning whether he had been *arrested, accused* or *indicted* for a criminal offense other than that for which he is then on trial.

We initially note that in the case *sub judice*, defendant failed to object at the time of the question but subsequently entered an objection "to the District Attorney's questioning of the defendant as to whether or not he had been convicted of homicide anywhere" on the ground that the district attorney had before him an F.B.I. report showing that defendant had been charged but not convicted of homicide. Such an assignment of error is not in compliance with Rule 9(c)(1) of the Rules of Appellate Procedure which requires that "[w]here 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." In its present state, the record does not disclose what question was asked so as to permit an intelligent ruling on its propriety.

Even had defendant been in compliance with the rule, the record does not support his contention that the district attorney acted in bad faith. The F.B.I. report was not made a part of the record, and defendant failed to request a *voir dire* to determine whether the district attorney acted in good faith. We have held that when the record contains no evidence regarding whether a district attorney acted in good faith in inquiring into a defendant's prior criminal offenses or reprehensible conduct, the court's ruling permitting the question to be asked will be presumed to be correct. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). Furthermore, any possible prejudice to defendant was negated by the fact that he was given the opportunity to explain that he had not been convicted of homicide. *State v. McLean, supra.* We find no merit in this assignment of error.

Finally, defendant assigns as error the trial judge's denial of his motion for dismissal. Defendant argues that his motion should have been allowed because of overwhelming evidence that he was not mentally competent to proceed to trial and that he was legally insane at the time of the fatal stabbing. We disagree.

It is well settled that upon a motion to dismiss or a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). Applying the well-known rules governing a motion to dismiss, we are of the

opinion that here the evidence was sufficient to withstand defendant's motion.

We have carefully considered this entire record and find no error warranting a new trial.

No error.

DAVID L. MAINES v. CITY OF GREENSBORO, NORTH CAROLINA

No. 44

(Filed 6 May 1980)

1. **Municipal Corporations §§ 8.1, 11 — ordinance requiring city employees to reside in city — standing to challenge constitutionality**

Plaintiff had standing to litigate the issue of the constitutionality of a city ordinance requiring all permanent employees to be residents of the city but permitting employees living outside the city when the ordinance was adopted to continue to do so where plaintiff was discharged as a fireman for violation of the ordinance, and he alleges that the ordinance is void on its face and that it was applied with an uneven hand, since plaintiff has suffered a direct injury under the very terms of the ordinance which he seeks to challenge.

2. **Municipal Corporations § 9 — ordinance requiring city employees to reside in city — exception for those residing outside city on ordinance date — no unconstitutional delegation of power to city manager**

A city ordinance requiring all permanent city employees to be residents of the city, providing that all employees living inside the city limits on the date of the ordinance must continue to reside within the city limits at all times, permitting employees living outside the city on that date to continue to do so, and directing the city manager to implement the residency rules and prescribe other reasonable standards which are "consistent with the standards and criteria" specifically set out in the ordinance does not unconstitutionally vest unlimited discretion in the city manager to enforce the ordinance.

3. **Municipal Corporations § 11 — ordinance requiring city employees to reside in city — exception for those residing outside city on ordinance date — no unconstitutional application of ordinance**

A city ordinance requiring all permanent city employees to be residents of the city, requiring all employees living inside the city to continue to live inside the city, and permitting employees living outside the city on the date of the ordinance to continue to do so was not unconstitutionally applied to a city fireman who was discharged for moving his residence outside the city because the city manager permitted employees who had committed themselves to buying or leasing a residence outside the city prior to the date of the ordinance to

move outside the city after the date of the ordinance, where there was no evidence that plaintiff had entered into any type of commitment to construct or rent a residence outside the city prior to the date of the ordinance, and plaintiff's evidence showed only that he was denied permission two months after the date of the ordinance to change his address form to reflect what he contended was his true address outside the city on the date of the ordinance, since the denial of plaintiff's request to change his address form did not amount to enforcing the ordinance against him in an unequal manner compared with others "similarly situated."

4. **Administrative Law § 6; Municipal Corporations § 11.1— administrative determination—review by certiorari—effect of independent action**

The proper procedure to review a determination by an administrative agency where none is provided by statute is to petition for a writ of certiorari in the superior court, and where plaintiff fireman did not seek judicial review of an administrative determination that he moved his residence outside the city of his employment but filed an original action in the superior court, the appellate court is bound by the administrative determination that plaintiff moved his residence outside the city limits.

5. **Municipal Corporations § 11— discharge of city fireman—notice and hearing**

An employment contract is generally not a sufficient proprietary interest to require full-scale constitutional protection in the form of a pretermination hearing. Even if plaintiff city fireman's interest in his employment was sufficient to invoke constitutional requirements of notice and hearing before his discharge for moving his residence outside the city limits, plaintiff received adequate notice and hearing to comport with due process where plaintiff was informed by letter on 27 May 1977 that a hearing would be held on 31 May 1977 concerning his alleged violation of a city ordinance requiring him to remain a resident of the city and that he was entitled to have someone accompany or represent him at the hearing; a departmental hearing was held before a board consisting of members of the fire department, and plaintiff was permitted to put on evidence; plaintiff was subsequently notified of the decision to terminate his employment and the reasons therefor; and plaintiff appealed this decision to the city manager and was given a hearing before the city manager with the opportunity to offer additional facts in support of his case.

APPEAL by plaintiff from the decision of the Court of Appeals reported in 43 N.C. App. 553, 259 S.E. 2d 334, affirming summary judgment entered by *Albright, J.*, 14 August 1978 Session of GUILFORD Superior Court.

Plaintiff filed this action on 8 August 1977 seeking a declaration that he had been illegally discharged from his employment with defendant's fire department. He asked for reinstatement with restoration of back pay and benefits, plus costs.

The pleadings, together with affidavits filed, tended to show the following:

Plaintiff was employed by defendant as a fireman on 16 September 1974 and continued to be employed until his discharge on 2 June 1977. On 2 September 1976, the City of Greensboro adopted an ordinance which required all employees residing in the City to continue to reside in the City limits. The ordinance provided that employees then living outside the City could continue to do so. At this time, fire department records showed plaintiff's address as 606 Fifth Avenue, Greensboro, North Carolina. Shortly after the adoption of the ordinance, City employees were required to sign a form stating their current address and acknowledging the terms of the ordinance. Plaintiff alleges that he requested an "out of City" form but was given an "in City" form instead. He maintains that his residence was, at all times relevant to this action, in Surry County and that he gave his father's address in Greensboro to defendant merely as a matter of convenience. In signing the "in City" form, plaintiff noted on it that he also resided in Surry County.

In November 1976, plaintiff requested that he be permitted to change his address form to reflect what he contended was his true address in Surry County. He was informed that the ordinance prohibited such a change, and in early December received a letter from the Deputy Chief of the Fire Department denying his request.

On 29 December 1976, plaintiff purchased a mobile home at 4100 North O'Henry Boulevard, outside of the City limits of Greensboro. In late May 1977, one of his superiors learned of plaintiff's new address. Subsequently, the Assistant City Manager and the Director of Public Safety met with plaintiff, at which time he again contended that he had never been a resident of the City of Greensboro but only used his father's residence there as temporary quarters.

Plaintiff received notice of and attended a departmental hearing on 31 May 1977. On 2 June 1977, plaintiff received a letter from First Deputy Chief R. L. Powell, Jr., informing him that his employment with the Fire Department was terminated due to his moving his residence outside the City in violation of the residency

ordinance. On appeal to the City Manager, the decision to terminate was upheld.

After the institution of this action, defendant moved for summary judgment. The trial court granted defendant's motion on 22 August 1978. Plaintiff appealed and the Court of Appeals, in an opinion by Judge Robert M. Martin, unanimously affirmed. Plaintiff appealed to this Court pursuant to G.S. 7A-30(1).

Dees, Johnson, Tart, Giles & Tedder by J. Sam Johnson, Jr., for plaintiff appellant.

Miles & Daisy, by James W. Miles, Jr., for defendant appellee.

BRANCH, Chief Justice.

The primary questions presented for review center on the following Greensboro City Ordinance:

> Section 1. That all permanent city employees employed on and after 2 September 1976 shall be required to be permanent residents of the City of Greensboro; provided, that any such employees shall be given ninety (90) days to move their residence inside the city limits of Greensboro from the date of employment.
>
> Section 2. All existing permanent employees employed before 2 September 1976 who are presently living outside the city limits of the City of Greensboro may continue to reside outside the city limits until such time as any such permanent employees either move their residence inside the city limits or their residence is annexed within the city limits. Thereafter, such employees may not move their residence outside the city limits of the City of Greensboro.
>
> Section 3. As of 2 September 1976, all permanent city employees living inside the city limits of the City of Greensboro must continue to reside within the city limits at all times.
>
> Section 4. The City Manager is hereby directed to implement the above mentioned residency requirements within the personnel rules and regulations of the City of Greensboro. In addition, the City Manager may prescribe other reasonable

standards with regard to residency requirements as he may determine to be in the best interest of the City of Greensboro which requirements shall be supplemental to and consistent with the standards and criteria set out above.

Plaintiff first contends that the ordinance is unconstitutional on its face in that it delegates excessive authority to the City Manager and provides no guidelines for the exercise of his discretion. In the alternative, plaintiff argues that the ordinance is unconstitutional as applied since the evidence indicates that the City Manager allowed certain Greensboro residents to move outside the City limits after the ordinance was adopted.

Defendant contends, on the other hand, that the terms of the ordinance do not vest excessive discretion in the City Manager since he is only authorized to prescribe reasonable standards which are "consistent with the standards and criteria" specifically enumerated in the body of the ordinance. Defendant further argues that the ordinance is not unconstitutional as applied. Defendant maintains that the City Manager granted exceptions to the City residents who had begun construction on homes outside the City or otherwise changed their positions prior to the adoption of the ordinance. Such action was necessary, defendant argues, to prevent undue financial hardship. Defendant submits that the City Manager's actions were entirely reasonable and that, in effect, he merely treated certain employees who had "begun to move" their residences prior to 2 September 1976 as if they had already moved outside the City.

[1] We note at the outset that the Court of Appeals held that plaintiff lacked standing to challenge the constitutionality of the ordinance, since he "was discharged for a violation of Section 3 of the ordinance, and all exceptions granted have been in accord with Section 2 of the ordinance." We disagree. The evidence is clear, and defendant does not deny, that certain employees were permitted to move out of the City after September 1976 due to commitments made prior to the adoption of the ordinance. The exceptions granted were thus exceptions to the requirements of Section 3, and that is the section under which plaintiff was discharged.

Standing to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to

suffer, a direct injury as a result of the law's enforcement. *Turner v. City of Reidsville*, 224 N.C. 42, 29 S.E. 2d 211 (1944). Plaintiff was discharged from employment for violation of the ordinance. He alleges that the ordinance under which he was discharged is void on its face, or alternatively, that it was applied with an uneven hand since he was discharged for the same course of conduct which others were permitted to follow without penalty. In our view, plaintiff has suffered a direct injury under the very terms of the ordinance which he now seeks to challenge. We therefore hold that plaintiff has standing to litigate the issue of the constitutionality of the ordinance.

Turning now to the merits of plaintiff's constitutional challenges, we recognize the validity of the general rule that an ordinance on its face must be fair and impartial and must not permit unwarranted discrimination. *Clinton v. Standard Oil Co.*, 193 N.C. 432, 137 S.E. 183 (1927); 5 E. McQuillin *Municipal Corporations* § 18.09 (3d Ed. 1969). Furthermore, it is well settled that an ordinance which vests unlimited or unregulated discretion in a municipal officer is void. *Bizzell v. Board of Aldermen*, 192 N.C. 348, 135 S.E. 50 (1926).

[2] Plaintiff alleges that Section 4 of the challenged portion violates the general rule by vesting unlimited discretion in the City Manager to enforce the ordinance. Section 4 of the challenged ordinance directs the City Manager to implement the rules concerning residency and, in addition, to "prescribe other reasonable standards with regard to residency requirements as he may determine to be in the best interest of the City of Greensboro *which requirements shall be supplemental to and consistent with the standards and criteria set out above.*" [Emphasis added.] The plain language of the ordinance directs that any standard promulgated by the City Manager must be consistent with the standards set out in the ordinance. Section 3 of the ordinance makes it clear that employees living inside the City limits "*must* continue to reside within the City at all times." [Emphasis added.] So plain a directive leaves little, if any, room for the City Manager, in his discretion, to prescribe other supplemental standards *consistent with* the standards of Section 3. By no stretch of the imagination could we say that the City Manager was vested with unlimited or unbridled discretion in administrating the ordinance. We therefore hold that, on its face and by its plain

terms, Section 4 of the ordinance does not vest unfettered discretion in the City Manager.

[3] Plaintiff contends alternatively that the City Manager has made several exceptions to the requirements of Section 3 and that enforcing the ordinance only as to him violates the constitutional guarantee of equal protection of the laws. Plaintiff thus submits that the ordinance is unconstitutional as applied.

It is well established that legislation may be fair on its face and yet be void as a violation of equal protection because it is applied unequally to persons similarly situated. *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886). "An actual discrimination arising from the method of administering a law is as potent in creating a denial of equality of rights as a discrimination made by law." 16A Am. Jur. 2d "Constitutional Law" § 802 (1979); *see Norris v. Alabama*, 294 U.S. 587, 79 L.Ed. 1074, 55 S.Ct. 579 (1935).

On the other hand, actions of public officials are presumed to be regular and done in good faith. *Philbrick v. Young*, 255 N.C. 737, 122 S.E. 2d 725 (1961), and the burden is on the challenger to show that the actions as to him were unequal when compared to persons *similarly situated. See Snowden v. Hughes*, 321 U.S. 1, 88 L.Ed. 497, 64 S.Ct. 397 (1944), *rehearing denied*, 321 U.S. 804, 88 L.Ed. 1090, 64 S.Ct. 778 (1944). The initial question then is whether plaintiff has met his burden of showing that he received treatment different from others similarly situated. 16A Am. Jur. 2d, *supra* § 803.

In the instant case, it is uncontroverted that the City Manager permitted certain residents of the City to move outside the City after the effective date of the ordinance. It is equally uncontroverted that those persons granted exceptions had, in some way, committed themselves, prior to that date, to the buying or leasing of a residence outside the City, and that the City Manager granted exceptions to relieve those persons of the undue financial hardship which would result from strict compliance with the ordinance. The Manager thus elected to treat those particular employees as if they had already completed the move outside the City prior to the effective date of the ordinance.

On the other hand, there is no indication in the record that plaintiff had entered into any type of commitment to construct or rent a residence outside the City prior to 2 September 1976, the date of adoption of the ordinance. All of the evidence indicates that two months following its adoption, plaintiff merely requested that he be allowed to change his address form so as to reflect an address different from that listed as of 2 September 1976. Nothing in the record indicates that any person was in fact granted an exemption who did not already have a commitment to buy or lease a residence outside the City. In our view, the denial of plaintiff's request to change his address form did not amount to enforcing the ordinance against him in an unequal manner compared with others *similarly situated.* We therefore hold that the ordinance is not a denial of equal protection as applied to plaintiff.

Plaintiff finally contends that his right to due process of law was denied because the conclusion of the hearing board that he violated the ordinance is not supported by competent evidence in the record. He submits that all of the competent evidence supports his contention that he resided in Surry County at all times relevant to this matter, and that the conclusion reached by the hearing board and the City Manager is not binding on this Court. We disagree.

[4] The proper procedure to review a determination by an administrative agency where none is provided by statute is to petition for a writ of *certiorari* to the Superior Court. *Bratcher v. Winters*, 269 N.C. 636, 153 S.E. 2d 375 (1967). Plaintiff has not sought judicial review of the administrative determination that he moved his residence outside the city limits but rather filed an original action in Guilford County Superior Court. The general rule is that an essential issue of fact which has been litigated and determined by an administrative decision is conclusive between the parties in a subsequent action. 2 Am. Jur. 2d "Administrative Law" § 502 (1962). We are therefore bound by the determination that plaintiff moved outside the City limits of Greensboro.

Furthermore, even if we were not bound by that determination, the scope of our review would be limited to the question of whether any competent evidence in the record supports the finding. *In re Burris*, 261 N.C. 450, 135 S.E. 2d 27 (1964). In this case, there is evidence indicating that plaintiff gave the Greensboro ad-

dress on at least two occasions before and after 2 September 1976 and that he spent considerable time at that address. While plaintiff submitted numerous exhibits indicating that he had on other occasions given a Surry County address, we are of the opinion that there is competent evidence in the record tending to show that plaintiff resided in Greensboro to support the finding that he moved outside the City limits in violation of the ordinance.

[5] Plaintiff also argues that he was denied due process because he was not afforded an adequate hearing. A review of the proceedings in this case indicates otherwise. Plaintiff was informed by letter dated 27 May 1977 that a hearing would be held on 31 May 1977 concerning his alleged violation of the ordinance, and that he was entitled to have someone accompany or represent him at the hearing. A departmental hearing was held before a board consisting of various members of the fire department, and plaintiff was permitted to put on evidence. Plaintiff was notified subsequently of the decision to terminate his employment and was given the reasons for the decision. He then appealed the decision to the City Manager and was permitted a hearing before the Manager with the opportunity to offer any additional facts in support of his case.

At the threshold of any procedural due process claim is the question of whether the complainant has a liberty or property interest, determinable with reference to state law, that is protectable under the due process guaranty. *Bishop v. Wood*, 426 U.S. 341, 48 L.Ed. 2d 684, 96 S.Ct. 2074 (1976); *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979). We have consistently held that, "[n]othing else appearing, an employment contract in North Carolina is terminable at the will of either party," *Presnell v. Pell*, *supra*, and that such a contract is not a sufficient proprietary interest to require full-scale constitutional protection in the form of a pretermination hearing. *Id.*

Furthermore, even if plaintiff's interest in his employment were sufficient to invoke constitutional requirements of prior notice and hearing, the evidence here clearly indicates that he received prior notice and hearing. We therefore hold that plaintiff was not denied the right to due process of law under the fourteenth amendment to the United States Constitution.

The decision of the Court of Appeals affirming the entry of summary judgment in favor of defendant is

Modified and affirmed.

STATE OF NORTH CAROLINA v. LEROY R. DALE LINVILLE

No. 38

(Filed 6 May 1980)

1. **Criminal Law § 63— defendant's statements showing mental state—admissibility**

Statements by an accused of an existing emotion or other mental state made before commission of the crime and not shown to be in contemplation of the commission of the crime are admissible as bearing upon the mental capacity of the accused at the time the crime was committed; however, such statements by an accused after the commission of the crime are not admissible, for to admit them would permit the accused to make evidence for himself.

2. **Criminal Law § 63— defendant's statements to sister—admissibility to show insanity—exclusion not prejudicial**

In an armed robbery prosecution where defendant pled not guilty by reason of insanity, defendant was not prejudiced by the exclusion of his sister's testimony that defendant had told her he felt dizzy, felt like he was smothering, and did not know what had come over him, since the sister did testify that defendant had told her that he felt woozy, and that was substantially the same as dizzy; the statement that defendant did not know what had come over him was made after commission of the crime in question; and exclusion of the statement that defendant felt he was smothering, if it did have probative force in establishing insanity, was not prejudicial in light of all the remaining testimony before the jury on the question of defendant's insanity.

3. **Criminal Law § 5.1— defense of insanity—first issue submitted to jury—no error**

In an armed robbery prosecution where defendant pled insanity, the trial court did not err in submitting the insanity issue so as to be answered first before a consideration of a general verdict of guilty or not guilty of the offense charged, since the applicable principles of law were adequately explained to the jury, and the jury had a clear understanding of its duties in relation to the law and the evidence.

4. **Criminal Law § 5.1— defense of insanity—last issue for jury**

In cases where a plea of not guilty by reason of insanity is recorded, the court should first submit general issues of guilt or innocence, and thereafter, where the evidence justifies instructions on the defense of insanity, a special

issue as to whether the jury found defendant not guilty because he was insane may be submitted as the last issue, but the jury should be instructed that it is not to consider the special issue unless it has returned a general verdict of not guilty.

THIS case is before us on defendant's petition for discretionary review of an opinion of the Court of Appeals reported at 43 N.C. App. 204, 258 S.E. 2d 397 (1979). The appeal to the Court of Appeals was from *Albright, Judge.* Judgment entered 5 January 1979 in Superior Court, SURRY County. The Court of Appeals found no error. Our order for discretionary review was entered 4 December 1979.

Defendant was indicted for armed robbery. He entered pleas of not guilty and not guilty by reason of insanity. The State offered evidence which tended to show that during the afternoon of 11 July 1978 defendant robbed two employees of The Dollar General Store of Mount Airy by threatening them with a gun. The jury found defendant guilty of robbery with a firearm and he was sentenced to a term of not less than 20 nor more than 30 years.

Other facts necessary for an understanding of the questions raised on this appeal will be set out in the opinion.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Stephen G. Royster for the defendant.

BROCK, Justice.

Defendant offered evidence in support of his plea of not guilty by reason of insanity. He offered the testimony of Dr. Billy J. Royal, a forensic psychiatrist. Dr. Royal testified that defendant suffered from a schizoid personality and possibly schizophrenic reaction; that the defendant gave the impression of having "a lot of fantasy life and having difficulty in separating out reality at times." Dr. Royal further testified that defendant was not psychotic during any of his examinations, but that it was possible that he could have had psychotic episodes in the past. He testified that he was not able to say that the defendant did not know right from wrong at the time of the alleged robbery, but that defendant could have been experiencing a psychotic episode.

[1, 2] Defendant's sister was also offered as a witness to establish defendant's mental condition on the day of the robbery. Following a hearing of the witness' testimony in the absence of the jury the trial judge ruled that the witness could testify about her visual observation of defendant and her opinion of whether defendant knew right from wrong at the time of the offense, but that she could not relate defendant's statements to her. We agree with defendant that in the light of *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1978) the ruling of the trial judge was partially incorrect. In *Wade* it was clearly held that statements by an accused of an existing emotion or other mental state made before the commission of the crime and not shown to be in contemplation of the commission of the crime are admissible as bearing upon the mental capacity of the accused at the time the crime was committed. However, such statements by an accused after the commission of the crime are not admissible, for to admit them would permit the accused to make evidence for himself.

In the case *sub judice* defendant points to three statements by him to his sister which she, as his witness, was not allowed to relate to the jury: (1) "I am feeling dizzy in the head; (2) that he was smothering; (3) I don't know what is come over me."

With respect to the third alleged statement the trial judge's ruling was correct for it was a statement defendant made to his sister after the crime had been committed. *See* 296 N.C. at 466, 251 S.E. 2d at 414.

With respect to the first alleged statement, the defendant's sister did in fact testify before the jury that defendant told her he was feeling woozy and funny. In our view the statement that he was feeling woozy clearly imported to the jury that he was feeling dizzy. In fact woozy means "affected with dizziness." *See Webster's Third New International Dictionary.* Defendant's sister having testified to a statement with the same import as the one excluded by the judge, defendant cannot be said to have been prejudiced by the erroneous ruling.

Even if the second alleged statement "that he was smothering," which was excluded, has probative force in establishing insanity, with all of the remaining testimony before the jury on the question of defendant's insanity (a psychiatrist and three lay witnesses) we cannot see how the exclusion of this one statement

"that he was smothering" could constitute prejudice to the defendant's effort to establish his insanity. Defendant's assignment of error to the exclusion of evidence is overruled.

[3] Defendant's second and final assignment of error is addressed to the order in which the issue of insanity was submitted to the jury and to the instructions necessary to the submission of the issue in that order.

In this case the insanity issue was submitted so as to be answered first, before a consideration of a general verdict of guilty or not guilty of the offense charged. The issues were submitted and answered as follows:

"INSANITY ISSUE

1 (a). Was the defendant on July 11, 1978, by reason of a defect of reason or disease of the mind, incapable of knowing the nature and quality of the act which he is charged with having committed, or if he did know this, was he by reason of such defect or disease, incapable of distinguishing between right and wrong in relation to such act?

ANSWER: No.

1 (b). If so, is the defendant NOT GUILTY by reason of insanity?

ANSWER: _____.

s / D.B. KIMREY, JR.
Foreman

Answered in Open Court 1-5-79

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VERDICT

We, the jury, unanimously find the defendant, Leroy Linville, Guilty of Robbery with a firearm.

s / R.B. KIMREY, JR.
Foreman

Answered in Open Court 1-5-79"

We have carefully examined defendant's arguments concerning the order in which the issues were submitted and concerning

the instructions necessary for the issues as submitted. In our opinion the applicable principles of law were adequately explained to the jury, and the jury had a clear understanding of its duties in relation to the law and the evidence. We find no error prejudicial to the defendant.

However, in view of the apparent confusion which has arisen from this Court's suggestions in *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975), Chief Justice Sharp dissenting, and in *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976), and the arguments these suggestions have engendered, we feel it is appropriate to reexamine the cases and the order of issues where a plea of not guilty by reason of insanity is recorded.

A finding of not guilty by reason of insanity is basically nothing more than a general verdict of not guilty rendered because the defendant has satisfied the jury that he was insane at the time he committed the offense. In a like manner a general verdict of not guilty may be rendered due to the fact that the State has failed to satisfy the jury beyond a reasonable doubt that: (1) defendant was the person who committed the offense; (2) the offense was committed; (3) that some necessary element of the offense was present; (4) that defendant did not act in self-defense; (5) that defendant did not act in defense of another; or (6) defendant's act was not otherwise legally excused. In none of these latter instances does the court know, or inquire upon what ground the jury returned its verdict of not guilty. Therefore it is clear that a general verdict of not guilty in instances where the defendant has carried his burden of satisfying the jury that he was insane at the time he committed the offense is acceptable. It must be remembered, however, that when a jury acquits a defendant because it is satisfied that he was insane at the time of the offense, the reason for the jury's verdict must be disclosed upon the record. *See* G.S. 15A-1237(c). This information must be disclosed to the defendant, to the State, and to the court in order that appropriate mental treatment can be accorded to the defendant through proceedings for commitment of defendant to an institution for psychiatric or other care. It is only the *method* of obtaining this necessary information concerning a verdict of not guilty by reason of insanity that has caused some confusion and considerable argument. By the discussion which follows we hope to simplify the matter, and to clarify such confusion as may exist.

In *State v. Cooper, supra,* the defendant was charged with the murder of his wife and four of their children. He pleaded insanity and offered evidence in support thereof. In *Cooper* the trial judge submitted four issues to the jury:

1. First degree murder.

2. Second degree murder.

3. Not guilty by reason of insanity.

4. Not guilty.

This Court in *Cooper* found no error but suggested issues as follows:

"1. 'Was the defendant (at the time of the alleged offense), by reason of a defect of reason or disease of mind, incapable of knowing the nature and quality of the act which he is charged with having committed, or if he did know this, was he, by reason of such defect or disease, incapable of distinguishing between right and wrong in relation to such act?' "

2. First degree murder.

3. Second degree murder.

4. Not guilty.

286 N.C. at 571, 213 S.E. 2d at 320. The dissent in *Cooper* suggested issues as follows:

"1. 'Did the defendant kill the deceased?

2. If so, was defendant insane when the killing occurred?' "

3. First degree murder.

4. Second degree murder.

5. Not guilty.

286 N.C. at 590, 213 S.E. 2d at 331.

In *State v. Hammonds, supra,* the defendant was charged with the murder of a store owner in Wadesboro, N.C. He pleaded insanity and offered evidence in support thereof. In *Hammonds* the trial judge submitted the following issues to the jury:

1. Did the defendant kill Herman Capel on May 21, 1975?

2. If so, is the defendant not guilty by reason of insanity?

3. Guilty of first degree murder.

4. Guilty of second degree murder.

5. Not guilty.

These issues were presented in the order suggested by the dissent in *Cooper*, and on appeal, this Court in *Hammonds* approved the order in which the issues had been submitted by the trial judge. However, a new trial was ordered in *Hammonds*, because following closing argument of the district attorney suggesting that if the jury found the defendant not guilty by reason of insanity he would be returned to the community, the trial judge failed to instruct the jury upon the law and commitment procedure applicable after a verdict of not guilty by reason of insanity.

The Conference of Superior Court Judges has adopted N.C. P.I.—Crim. 304.10 which employs the submission of issues in accordance with *Hammonds*. The problem with the procedure adopted in N.C. P.I.—Crim. 304.10 is that it applies the procedure to all criminal acts whereas *Hammonds* and the dissent in *Cooper* were dealing only with a homicide. While we think the procedure adopted in N.C. P.I.—Crim. 304.10 is satisfactory in some homicide cases, the same procedure in other criminal offense cases requires a delicate, painstaking, and risky articulation of the first issue as is demonstrated in the case *sub judice* which appears to be a combination of the majority and dissenting suggestions in *Cooper*.

[4] While we hold that in the present case the order of issues and the necessary instructions thereon clearly presented the questions to the jury and therefore were not erroneous, we feel that a better degree of uniformity and simplicity can be achieved by the submission of issues of guilt or innocence in the normal fashion in all cases, including homicide. Thereafter, in cases where the evidence justifies instructions on the defense of insanity, a Special Issue can be submitted as the last issue as follows:

Special Issue: Did you find defendant not guilty because you were satisfied that he was insane?

An affirmative answer to this issue would place upon the record the information necessary for the trial judge to institute commitment procedures pursuant to G.S. 15A-1321.

The submission of a Special Issue as the last issue, presupposes a correct instruction to the jury on defendant's defense of insanity for the return of its general verdict. The jury should be instructed, of course, that it will not consider the Special Issue *unless* it has returned a general verdict of not guilty. However, in the event of a general verdict of not guilty, the jury must clarify for the record whether its general verdict of not guilty was or was not based upon its satisfaction that defendant was insane. Of course, the reason for a verdict of not guilty rendered for a reason other than insanity need not be specified.

The Court of Appeals' opinion finding no error in the trial of this defendant is

Affirmed.

STATE OF NORTH CAROLINA v. KEITH EUGENE COLLINS

No. 48

(Filed 6 May 1980)

1. **Criminal Law § 23— plea bargain—no absolute right of defendant—State's withdrawal before entry of plea proper**

There is no absolute right to have a guilty plea accepted, and the State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement.

2. **Criminal Law § 23— plea agreement with recommended sentence—judicial approval required**

G.S. 15A-1023(b) provides that a plea agreement proposed by the prosecutor which involves a recommended sentence must first be approved by the trial judge before it can become effective, and such lack of judicial approval when required by statute renders the proposed plea bargain agreement null and void.

APPEAL by defendant from the decision of the North Carolina Court of Appeals, reported in 44 N.C. App. 141, 260 S.E. 2d 650 (1979), which found error in the trial before *Walker, J.*, at the 2 April 1979 Session of FORSYTH Superior Court and remanded for a new hearing on defendant's motion to suppress.

Defendant was charged in bills of indictment proper in form with possession of lysergic acid diethylamide (LSD) and possession of phencyclidine (PCP), both controlled substances, in violation of G.S. 90-95(a)(3) and (d)(2).

Defendant moved to dismiss on the ground that the State failed to honor a plea arrangement. In a hearing upon the motion to dismiss, defendant presented evidence tending to show that on the morning of 17 January 1979, defendant was scheduled to appear in district court for the probable cause hearing on the two felony charges and for trial on a related misdemeanor charge of possession of marijuana. At that time, defendant's counsel and Officer W. G. Grainger of the Winston-Salem Police Department entered into plea negotiations with the assistant district attorney, Mr. Howard Cole. This resulted in a written plea agreement which provided as follows:

> Keith Collins is charged with possession of LSD, PCP, and marijuana, and he is willing to cooperate fully with the WSPD in the giving of information and assistance to the WSPD which will lead to the arrest of known criminals. In return, the State will allow the defendant to plead guilty as charged in the Superior Court and will guarantee that he will not receive active time. That the defendant has three (3) months to perform tasks assigned to him by the WSPD to their satisfaction. The defendant agrees that he will not raise his speedy trials rights under Chapter 15. That the defendant's cases now pending in District Court will be dismissed under the pretext of an illegal search.
>
> s/ H. COLE, Ass. D.A.
> s/ W. GRAINGER, WSPD
> s/ B. ERVIN BROWN, II

Later the same day at the probable cause hearing on the felony charges, Assistant District Attorney Dan Johnson refused to honor the plea agreement. Mr. Johnson testified that he had

control over the cases on the docket that day and that he had not been consulted regarding this agreement. He refused to dismiss the cases because he believed that the plea bargain was inappropriate in light of the severity of the charges. He also did not want to make a hasty decision, since he would be held responsible, and was upset that he had not been consulted initially. Mr. Johnson did, however, request a continuance of both the probable cause hearing and the trial on the misdemeanor charge, which was granted.

Defendant was subsequently indicted on the two felony charges, pleaded not guilty, and the case went to trial. The trial judge denied defendant's motions to compel the State to reveal the informant's name and address, to suppress certain evidence against him, and to dismiss the indictment on the basis of an invalid arrest. The jury returned verdicts finding defendant guilty of felonious possession of PCP and guilty of possession of LSD. Defendant was sentenced to imprisonment for two consecutive terms, to run four to five years each. The judge further found in each case that defendant, aged twenty, would not derive benefit from being committed as a committed youthful offender under G.S. 148-49.14.

Defendant appealed to the Court of Appeals which, in an opinion by Judge Arnold, held that defendant's motion to dismiss for failure of the State to abide by the plea negotiations was properly denied. That court also held that the trial judge erred in denying defendant's motion to compel the State to reveal the name and address of the informant. The cause was remanded for a hearing on the motion to suppress, to enable defendant to offer evidence to prove the nonexistence of the informant. Defendant appealed from that portion of the Court of Appeals' decision affirming the trial judge's denial of defendant's motion to dismiss. He appealed as a matter of right pursuant to G.S. 7A-30(1) on the ground that the case involves a substantial question arising under the Constitution of the United States.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the State.

B. Ervin Brown II, for defendant appellant.

BRANCH, Chief Justice.

The sole question presented by this appeal is whether the trial court erred in denying defendant's motion to dismiss. Defendant contends that he was deprived of his sixth amendment right to effective assistance of counsel and his fourteenth amendment right to due process of law by the judge's refusal to enforce the plea arrangement between defendant and Assistant District Attorney Cole.

This is a case of first impression before this Court. Defendant relies primarily upon *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971), and the subsequent decision in *Cooper v. United States*, 594 F. 2d 12 (4th Cir. 1979). In *Santobello*, the defendant was originally indicted on gambling-related charges. As part of a plea arrangement, the prosecutor had promised to make no sentence recommendation and to have more serious charges dismissed on the condition that Santobello would plead guilty to a lesser included offense. After entering his guilty plea, Santobello appeared for sentencing and a new prosecutor unknowingly violated the agreement by recommending the maximum sentence. The judge expressly disclaimed any reliance on that recommendation, but nonetheless imposed the maximum imprisonment of one year. The United States Supreme Court vacated the judgment and held that the State's failure to keep its commitment concerning the sentence recommendation required that the case be remanded for reconsideration. Chief Justice Burger writing for the Court stated that an acceptance of a plea of guilty under such circumstances

> must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

404 U.S. at 262, 92 S.Ct. at 499, 30 L.Ed. 2d at 433.

In *Cooper v. United States*, the United States Court of Appeals for the Fourth Circuit added a new dimension to this area of the law. Defendant Cooper was convicted of federal violations on two counts of bribery of a witness and two counts of obstruc-

tion of justice. Before trial, defendant's counsel had negotiated with an assistant United States attorney, who had proposed a plea agreement under which defendant would, *inter alia*, cooperate with the federal authorities and plead guilty to one count of obstruction of justice, while the government would bring defendant's cooperation to the judge's attention at sentencing and would dismiss all other counts of the indictment. When defense counsel obtained the defendant's consent later that day and called the assistant United States attorney to accept, he was informed that the offer had been withdrawn on the instructions of the assistant United States attorney's superior. Although defense counsel protested, defendant was ultimately convicted on all four counts.

Writing for the court, Judge Phillips noted that although courts in the past have drawn analogies to contract law in affording relief to defendants aggrieved in the negotiating process, *Santobello* stands for the proposition that defendants have a constitutional right to be treated with "fairness" throughout the process. In earlier cases in which a defendant's rights in a plea negotiation had been violated, the defendant had already entered a guilty plea and in some instances performed other obligations before the government disavowed the plea agreement. Under these circumstances, a specific agreement had already been reached and the defendant had substantially performed in reliance thereon. Consequently, the courts have found these cases to be analogous to a breach of an express contract, or to an unfulfilled promise on which the other party relies to his tangible detriment, and have granted relief on this basis. *See Harris v. Superintendent*, 518 F. 2d 1173 (4th Cir. 1975) (per curiam); *United States v. Brown*, 500 F. 2d 375 (4th Cir. 1974); *United States v. Carter*, 454 F. 2d 426 (4th Cir. 1972), *cert. denied*, 417 U.S. 933 (1974); *State ex rel. Gray v. McClure*, 242 S.E. 2d 704 (W.Va. 1978), *and cases cited therein.*

The Court of Appeals in *Cooper* recognized that the case there involved neither a completed contract nor any detrimental reliance on defendant's part. Nevertheless, in finding that the constitutional requirement of "fairness" was not limited by the law of contracts, the court stated:

> We hold instead that under appropriate circumstances—which we find here—a constitutional right to enforcement of plea proposals may arise before any technical "contract" has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals.

594 F. 2d at 18. The court noted further that although *Santobello* was unclear as to the source or content of the constitutional right involved in reality that right was derived from two constitutional guarantees, namely, the right to fundamental fairness of substantive due process and the sixth amendment right to effective assistance of counsel.

The subsequent decision of the fourth circuit in *United States v. McIntosh*, No. 79-5036 (4th Cir. Dec. 18, 1979), sheds considerable light on the constitutional rights involved in both *Cooper* and the case *sub judice*. The defendant McIntosh was charged by both Virginia state and federal authorities with running illegal gambling operations. His attorneys reached an agreement with the prosecutor, and the defendant pleaded guilty accordingly. At the subsequent hearing on the federal charges of tax evasion, a defense attorney testified that the state prosecutor had promised to pay the $3,000 seized from the defendant as evidence of gambling to the Internal Revenue Service and that the defendant would consequently not be prosecuted by the I.R.S. Although the prosecutor denied promising to clear the defendant with the I.R.S., he had agreed to give the money seized to the I.R.S. in order to satisfy any jeopardy assessments arising out of the defendant's gambling activities.

The defendant relied on the *Cooper* decision in arguing that the state prosecutor's promise should suffice to bar federal prosecution, if it was in fact made to and was reasonably believed by the defense attorneys. Judge Hall, writing for the court in *McIntosh*, distinguished the holding in *Cooper* with the following language:

> We held [in *Cooper*] that the technical rules of offer and acceptance in contract law should not defeat a criminal defendant's personal acceptance, since, under the facts presented, it

> could irreparably affect the defense attorney's credibility, impairing the effectiveness of his representation.
>
> The issues here do not involve technical rules of contract; they concern the content of the plea bargain and whether any authority existed which could make it binding on parties who were not privy to it. These issues were not presented in *Cooper*, and we do not think its thoughtful analysis leads to the proposition that authority to make an offer to forego prosecution can rest upon a subjective belief of the defendant or his counsel.
>
> Contrary to appellant's argument, *Cooper* does not shun fundamental contract and agency principles where the content and validity of a plea bargain is at issue.

Id., slip op. at 5-6. Thus, "where the content of a plea bargain and the authority for its offer are at issue . . . traditional precepts of contract and agency should apply." *Id.* The court in *McIntosh* found no evidence that any federal official had authorized the state prosecutor to make such a promise or had done anything to clothe him with apparent authority. Thus, traditional precepts of contract and agency were applied to defeat defendant's claim. "A bare representation by an unauthorized party cannot bind federal prosecutors to forego prosecution." *Id.* at 7.

[1] We reject the holding in *Cooper* and elect to follow the decisions in other jurisdictions which we interpret to be consistent with *Santobello*. We therefore hold that there is no absolute right to have a guilty plea accepted. The State may withdraw from a plea bargain arrangement at any time prior to, but not after, the actual entry of the guilty plea by defendant or any other change of position by him constituting detrimental reliance upon the arrangement. *Santebello v. New York, supra; Shields v. State*, 374 A. 2d 816 (Del.), *cert. denied*, 434 U.S. 893 (1977); *State v. Edwards*, 279 N.W. 2d 9 (Iowa 1979); *see State v. Brockman*, 277 Md. 687, 357 A. 2d 376 (1976); *Wynn v. State*, 22 Md. App. 165, 322 A. 2d 564 (1974); *People v. Heiler*, 79 Mich. App. 714, 262 N.W. 2d 890 (1977); *State ex rel. Gray v. McClure, supra.* The rationale behind these decisions is that plea bargain arrangements

> are not binding upon the prosecutor, in the absence of prejudice to a defendant resulting from reliance thereon, until

> they receive judicial sanction, anymore than they are binding upon defendants (who are always free to withdraw from plea agreements prior to entry of their guilty plea regardless of any prejudice to the prosecution that may result from a breach).

People v. Heiler, supra at 721-22, 262 N.W. 2d at 895.

When viewed in light of the analogous law of contracts, it is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading. Thus, the prosecutor agrees to perform if and when defendant performs but has no right to compel defendant's performance. Similarly, the prosecutor may rescind his offer of a proposed plea arrangement before defendant consummates the contract by pleading guilty or takes other action constituting detrimental reliance upon the agreement. *Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains,* 66 Calif. L. Rev. 471 (1978); *see Shields v. State, supra; State v. Edwards, supra.*

In the instant case, defendant had neither entered a guilty plea nor in any way relied on the plea agreement to his detriment. After the rescission of the agreement, the State's motion for a continuance was granted and defendant was thereafter afforded a fair trial. Defendant has not been prejudiced by the disavowal of his plea arrangement, and we find no violation of his constitutional rights.

[2] We further note that G.S. 15A-1023(b) provides that a plea agreement proposed by the prosecutor which involves a recommended sentence must first be approved by the trial judge before it can become effective. Such lack of judicial approval when required by statute renders the proposed plea bargain agreement null and void. *People v. Reagan,* 395 Mich. 306, 235 N.W. 2d 581 (1975). Although not necessary to our decision, we note that the decision in *Cooper* is distinguishable from the case *sub judice* because of this statutory provision in G.S. 15A-1023(b).

We do not approve of the prosecutorial conduct in the case before us, since the prosecutor's office has the responsibility of "letting the left hand know what the right hand is doing." *San-*

tobello v. New York, supra at 262, 92 S.Ct. at 499, 30 L.Ed. 2d at 433. However, this does not alter the fact that the prosecutor had no authority to bind the State to the dispensation of a particular sentence in defendant's case until the trial judge had approved of the proposed sentence.

For the reasons stated, the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JERRY NORMAN WARD

No. 59

(Filed 6 May 1980)

1. **Criminal Law § 57— ballistics expert—testimony that bullet "could have" been fired from defendant's pistol—reference to capability**

An expert in ballistics and firearms was properly permitted to testify in a homicide case that the fatal bullet "could have" been fired from defendant's pistol where, considered contextually, the witness was testifying in effect that the fatal bullet, a .22 caliber slug, was capable of being discharged from defendant's .22 caliber pistol or from any other .22 caliber weapon.

2. **Criminal Law § 113.2— failure to instruct on material feature of case**

While the trial judge is not required to instruct the jury as to evidentiary matters essentially "subordinate," *i.e.*, those which do not relate to the elements of the crime charged or to defendant's criminal responsibility, failure to instruct upon a substantive or "material" feature of the evidence and the law applicable thereto will result in reversible error even in the absence of a request for such an instruction.

3. **Criminal Law §§ 112, 113.2; Homicide § 23— failure to charge on defendant's material testimony—inadequate final mandate**

The trial court in a second degree murder case erred in omitting any reference in the charge to defendant's testimony that he did not shoot at or near the deceased but fired his pistol away from deceased, since defendant's testimony related to a material and substantial feature of the case in that it tended to show either that he did not fire the fatal shot and was not guilty of any homicide or that, if he did fire the fatal shot, the killing was not the result of an intentional assault and he would be guilty at most of involuntary manslaughter; furthermore, such error was prejudicial to defendant when coupled with the court's further error in failing to instruct the jury in the final mandate that if the jurors were not satisfied beyond a reasonable doubt as to each

essential element of the charge of second degree murder, then it would be their duty to return a verdict of not guilty of that charge.

APPEAL by defendant from a judgment rendered by *Judge Clark* at the 20 August 1979 Criminal Session of COLUMBUS Superior Court. Defendant was charged with first degree murder, convicted of murder in the second degree, and sentenced to not less than 30 years nor more than life imprisonment.[1]

Rufus L. Edmisten, Attorney General, by Thomas B. Wood, Assistant Attorney General, for the State.

D. Jack Hooks and Ray H. Walton, Attorneys for defendant appellant.

EXUM, Justice.

Defendant's assignments of error challenge the admissibility of certain testimony offered by a ballistics expert on behalf of the state and the sufficiency of the trial court's instructions to the jury. For errors in the jury instructions, we reverse and grant a new trial.

The state's evidence tended to show that on 29 March 1979, the deceased, Joe Eddy White, was at the home of his parents watching television with his mother. White's mother testified that around 9:30 p.m. she observed the lights of a vehicle pulling into the driveway and heard a horn blow. Joe Eddy went outside to investigate. A few moments later, the mother heard a shot and ran outside to see Joe Eddy walk back towards the house and then fall down on his knees. He said, "Mother, Jerry Ward has shot me" and then collapsed. Joe Eddy died on the way to the hospital. An autopsy revealed the cause of death to be internal hemorrhage secondary to a .22 caliber gunshot wound.

1. Since defendant did not receive a determinate sentence of life imprisonment, this appeal should have been to the Court of Appeals. G.S. 7A-27(a) and (b); *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). Rather than remand the matter for determination by the Court of Appeals, we have determined to treat defendant's appeal as a petition for determination prior to decision by the Court of Appeals. We have allowed the petition in our discretion on the ground that, otherwise, "[d]elay in final adjudication is likely to result . . . ." G.S. 7A-31(b)(3).

Law enforcement officers took defendant into custody around 11:00 p.m. at the home of his sister. They then took him to the Law Enforcement Center in Whiteville. During the trip he was upset and crying and repeatedly made such statements as, "I didn't mean to kill him. I just wanted to get him in the truck and take him down the road and beat the hell out of him."

Defendant's evidence tended to show that before the fatal incident on 29 March, the deceased had been having a relationship with defendant's wife, Ida Marie. Ida Marie had left home on 24 February. Defendant next saw her sitting in a car with Joe Eddy on the evening of 4 March. After an emotional confrontation, defendant told Joe Eddy "to just not let me see him no more" and then left with his wife. Later that evening, defendant's wife was admitted to the mental ward of a hospital in Lumberton. On the afternoon of 15 March, while defendant's wife was still in the hospital, defendant in a telephone conversation warned Joe Eddy to stay away from his wife or risk a beating. Joe Eddy responded that he would pick the time and place for any fight, to which defendant replied, "Well enough." On the evening of 29 March defendant received an anonymous telephone call from a man who told him Joe Eddy wanted to see him. Thinking that Joe Eddy wanted to fight, defendant later drove to the Whites' residence, pulled in the driveway, and blew the horn. He remained seated in the cab of his pickup truck. Joe Eddy came out of the house with his right hand in his back pocket. Some words were exchanged, and Joe Eddy jerked his right hand out of his back pocket and pointed it at defendant. Fearing that Joe Eddy was about to shoot him, defendant dove for his .22 caliber pistol lying on the floorboard of his truck and fired the pistol out the window. An instant later he heard a rifle shot fired from the direction of the house. He then saw Joe Eddy "coming by me cussing and holding his side" with his right hand placed under his left armpit. Defendant then left in the truck.

The pathologist who examined the body of the deceased testified that the fatal wound penetrated several inches below the left armpit on the left side, slightly to the rear of midline. The bullet's projectory was upwards. The bullet lodged beneath the sternum three to four inches higher than the point at which it entered the body. Defendant testified, however, that Joe Eddy had been facing him at all times up to and during the instant when defendant

fired out the window. The bullet removed from Joe Eddy's body was too deformed for a positive determination that it was in fact fired from defendant's gun.

[1] Defendant's first assignment of error relates to the trial court's admission of certain testimony by state's witness Robert Cerwin, a ballistics and firearms expert, concerning State's Exhibit No. 5, the bullet removed from the deceased's body. Cerwin was allowed to testify on direct examination as follows:

> "Q. Do you have an opinion satisfactory to yourself as to whether or not State's Exhibit No. 5 could have been fired from [defendant's pistol]?
>
> MR. HOOKS: Objection.
>
> COURT: Overruled.
>
> A. Yes, sir. It could have been fired. This type of bullet can be discharged from this type of firearm due to the family that it is. In other words, it is a .22 caliber bullet. And in [defendant's pistol] the bullet can be chambered or discharged with a .22 caliber cartridge which holds a .22 caliber bullet."

Upon cross-examination Mr. Cerwin stated that "State's Exhibit No. 5 is too deformed for comparison. By that I mean I could not make a comparison between that and any other bullet fired from [defendant's pistol]. It could have been fired from any weapon in the same family of weapons."

Defendant contends that the expert's answer that the fatal bullet "could have" been fired from defendant's gun amounted to no more than mere speculation and therefore was inadmissible under the rule in *Lockwood v. McCaskill*, 262 N.C. 663, 138 S.E. 2d 541 (1964). *Lockwood*, however, requires only that an expert's opinion that a particular cause "might" or "could" have produced a particular result be based upon a reasonable probability "that the result is *capable* of proceeding from the particular cause as a scientific fact . . . ." 262 N.C. at 669, 138 S.E. 2d at 545. (Emphasis supplied.) Considered contextually, witness Cerwin's testimony was to the effect that the fatal bullet, a .22 caliber slug, was *capable* of being discharged from defendant's .22 caliber pistol *or from any other .22 caliber weapon.* Although the witness

could have been allowed to express a more positive opinion, if he had had one, as to the causal relationship between defendant's gun and the bullet removed from the deceased's body, *see State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), *death sentence vacated*, 428 U.S. 905 (1976), there was no error in the admission of his testimony that the bullet "could have" been fired from defendant's pistol. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977). That the testimony might have had little probative value goes to the question of its weight and sufficiency, not its admissibility. *See generally* 1 Stansbury's North Carolina Evidence § 137 n. 97 (Brandis rev. 1973 and 1979 Supplement).

Defendant next argues that the trial court erred (a) in omitting a substantial feature of defendant's case in the recapitulation of the evidence to the jury and (b) in failing to instruct the jury in the final mandate that if they were not satisfied beyond a reasonable doubt as to each essential element of the charge of second degree murder, then it would be their duty to return a verdict of not guilty of that charge. These contentions have merit.

The record reveals that portions of defendant's testimony, elicited on direct and cross-examination, described his 29 March confrontation with the deceased as follows:

> "When I stopped my truck was about four or five feet in front of the back end of the porch. . . . In just a minute Joe Eddy came out of the house. . . . He was then at the left front of my truck. I was sitting in the truck. . . . He came out of the house by the right side of my truck. He came in front of my truck and came around there and stepped out to the front of it. He did not ever come up beside my truck. . . . When he raised his hand it was pointing toward me. At that time he was about 15 or 18 feet from me and was kind of northeast from me. He was over at the left front fender of my pickup. . . . I did not think that he had a pistol. . . . It didn't hit my mind until he jerked his hand. . . . He pointed his hand straight at me. . . . At that time I thought he had a pistol in his hand because of his actions. . . . I fell to my right to get out of the way of a possible bullet and I reached for the pistol. *I did not mean to point a pistol at Joe Eddy and kill him. I just shot out the window like that so I could get gone, so he wouldn't come on there to the truck. . . . I*

pulled the pistol up in one motion and fired it out the window. . . . I shot straight out my truck. I didn't shoot in the direction of Joe Eddy White. I did not. I did not shoot in the direction of Joe Eddy White because I did not want to hit nobody. I just wanted to get out of the yard and get gone. I am not testifying that I ever pointed the pistol at Joe Eddy White. I did not see Joe Eddy White at the time I fired the pistol. . . . At the time I fired the gun Joe Eddy was about 15 feet from where I pointed the gun. . . . I sure didn't want to kill him or anybody else. At the time he came by my truck he had his right hand under his left armpit. . . . I figured he had been hit with a rifle bullet because I heard a rifle shot." (Emphasis supplied.)

In his recapitulation of the evidence, Judge Clark failed to mention to the jury that evidence offered by the defendant tended to show that defendant did not fire the pistol in the direction of the deceased. This was a material omission.

[2] General Statute 15A-1232 (substantively the same as former G.S. 1-180) requires the trial judge to instruct the jury in such a way as to "declare and explain the law arising on the evidence." Although the judge's charge need not, and indeed should not, encompass every fragment of evidence offered by the state and defendant, it is required to "segregate the *material* facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence." *State v. Friddle*, 223 N.C. 258, 261, 25 S.E. 2d 751, 753 (1943). (Emphasis supplied.) Failure to instruct upon a substantive or "material" feature of the evidence and the law applicable thereto will result in reversible error, even in the absence of a request for such an instruction. *State v. Williams*, 284 N.C. 67, 199 S.E. 2d 409 (1973); *State v. Merrick*, 171 N.C. 788, 88 S.E. 501 (1916). On the other hand, the judge is not required to instruct the jury as to evidentiary matters essentially "subordinate," *i.e.*, those which do not relate to the elements of the crime charged or to defendant's criminal responsibility. See *State v. Hunt*, 283 N.C. 617, 623, 197 S.E. 2d 513, 518 (1973) and cases cited therein.

[3] In the instant case, defendant's testimony was to the effect that he fired his pistol *away from* Joe Eddy White, pointing the

gun 15 feet from where the deceased was standing. This testimony was competent evidence which, if believed by the jury, would tend to establish *either* that the bullet from defendant's gun was not the one which struck and killed Joe Eddy White, *or* that even if defendant's gun fired the fatal bullet, the killing was not the result of an intentional assault. If the bullet fired from defendant's gun did not in fact strike the deceased, defendant would not be guilty of any homicide. If, on the other hand, defendant did fire the fatal shot, but did not do so intending to shoot at, near, or in the direction of the deceased, he would be guilty at most of involuntary manslaughter. In the first instance, defendant's evidence negates the essential element of causation. In the second, his testimony negates a finding of an intentional assault, an essential element of murder and voluntary manslaughter. *See State v. Ray*, 299 N.C. 151, 158, 261 S.E. 2d 789, 794 (1980). Under either view, then, defendant's evidence clearly relates to an essential feature of the intentional homicide for which he was indicted. This evidence therefore presented a material and substantial feature of his case. The trial court erred in failing to mention it anywhere in the charge. G.S. 15A-1232; *see, e.g., State v. Williams, supra; State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969); *State v. Sherian*, 234 N.C. 30, 65 S.E. 2d 331 (1951).

This error was compounded by a further omission in the trial court's mandate with reference to second degree murder. That portion of the judge's charge read:

> "I therefore instruct you that if you find from the evidence, beyond a reasonable doubt, that on or about March 29, 1979, Jerry Norman Ward intentionally and with malice and without justification or excuse shot Joe Eddy White with a .22 caliber pistol, that being a deadly weapon, thereby proximately causing Joe Eddy White's death, it would be your duty to return a verdict of guilty of second degree murder. . . ."

Judge Clark failed to complete this portion of the mandate with an instruction to the effect that if the jury did not find or had a reasonable doubt as to one or more of these facts, then it would be their duty to acquit the defendant of second degree murder. This omission was likewise error. *State v. Overman*, 257 N.C. 464, 125 S.E. 2d 920 (1962). By failing to give the converse or alter-

native view that acquittal should result if the jury were not satisfied beyond a reasonable doubt as to each and every stated element, the trial judge failed to provide even a general application of the law to the evidence raised by defendant's testimony.

We stress that our opinion today is not to be construed as imposing any new duty or burden upon the trial court beyond that traditionally required by the mandatory provisions of G.S. 15A-1232. Certainly the trial judge is not required to frame his instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged. *State v. Spratt*, 265 N.C. 524, 144 S.E. 2d 569 (1965). *See, e.g., State v. Williams*, 235 N.C. 752, 71 S.E. 2d 138 (1952); *State v. Jackson*, 36 N.C. App. 126, 242 S.E. 2d 891, *cert. denied*, 295 N.C. 470, 246 S.E. 2d 11 (1978). In the instant case, however, the omission of any reference in the charge to defendant's statement that he did not shoot at or near the deceased, *coupled with* the omission in the mandate referred to above, combined to deprive defendant of the full benefit of his testimony. There must, therefore, be a

New trial.

STATE OF NORTH CAROLINA v. JOSEPH FERRELL

No. 66

(Filed 6 May 1980)

1. **Criminal Law § 146— sentence of ten years to life imprisonment—no appeal directly to Supreme Court**

A sentence of imprisonment of from ten years to life is not a sentence of "imprisonment for life" within the meaning of G.S. 7A-27(a) so as to create a direct appeal of right to the Supreme Court from the superior court, since the term "imprisonment for life" as used in G.S. 7A-27(a) means only a determinate life sentence and does not include an indeterminate sentence merely because the stated maximum is life imprisonment.

2. **Homicide § 26— second degree murder—instructions—choking victim "without malice"—prejudicial error**

The trial court committed prejudicial error in instructing the jury that defendant would be guilty of second degree murder if he choked the victim "without malice" and proximately caused his death where the court's er-

roneous instruction went uncorrected, and the error was accentuated by the fact that it was in the court's final mandate to the jury.

3. **Homicide §§ 28.1, 30.2— second degree murder—erroneous failure to instruct on manslaughter, self-defense**

The trial court in a prosecution for second degree murder by strangling the victim erred in failing to instruct on the lesser included offense of voluntary manslaughter and on the defense of self-defense where there was evidence that the victim had slapped at defendant and knocked his glasses off, that the two had argued just prior to the killing, and that the victim had a box cutter in his hand and struck the first blow, since there was evidence from which the jury could find that defendant lacked the malice necessary to sustain a second degree murder conviction because he acted in the heat of passion upon sudden provocation, and there was evidence from which the jury could find that the force defendant used was reasonable and constituted a complete defense or that it was unreasonable so as to reduce the crime to voluntary manslaughter.

APPEAL by defendant from the decision of the Court of Appeals, *Judge Martin (Robert M.)* dissenting, reported at 44 N.C. App. 374, 260 S.E. 2d 808 (1979), dismissing his appeal for the reason that writ of certiorari had been improvidently granted.

Defendant was charged in an indictment proper in form with the second-degree murder of Leslie William Royals. He entered a plea of not guilty.

At trial, evidence for the State tended to show that on 19 July 1978, at around 1:00 a.m., officers from the Goldsboro Police Department were called to the residence of the deceased Leslie William Royals to investigate a possible homicide. Upon arrival, they found the body of the deceased lying on a bed. The officers noted that there were numerous cuts and scratches around the victim's throat and ear. The bed and other furnishings were in disarray. A razor-type knife was found near the deceased's right hand. Dr. John Butts testified as a medical expert that in his opinion the cause of death was strangulation.

At the time of the initial investigation, there were numerous people in and about the residence of the deceased, and a man later identified as defendant was among the bystanders. Officer Andrew Jones testified that he learned defendant's name and that defendant was living with the deceased. He subsequently asked defendant to accompany him to the police station. At the station, defendant was informed of his rights and signed a written

waiver form. He was not under arrest at this time. During this initial visit to the police station on 19 July 1978, defendant gave at least two statements which were offered into evidence by the State. The first of the statements was to the effect that defendant left the residence of the deceased at around 7:00 p.m. on 18 July 1978. He returned at approximately 1:30 a.m on 19 July 1978 and, at that time, discovered the body of the deceased. He immediately called the rescue squad.

In his second statement, defendant told Officer Edwin Bundy substantially the same story but added that, at the time he discovered deceased's body, he "had a spell" and did not know how long he was "out." He then stated that he "came to" and ran out to get help.

On 20 July 1978, defendant was picked up at the Goldsboro bus station and charged with the murder of deceased. He was taken to the police station and advised of his rights. After signing a written waiver of his rights, defendant made a third statement. In this statement, defendant said that when he arrived home around 1:00 a.m. on 19 July 1978, the deceased awoke and began arguing with him. According to defendant, the deceased slapped at him and had a box cutter in his hand. Defendant stated that the deceased "got mad and slapped me up beside of the head and knocked my glasses off and I remember pushing him and the next thing that I remember, I was on him on the bed and had my hand on his neck." Defendant further stated, "I must have had one of those spells at this point. . . . Bells rang in my head and I pushed him. . . ."

Defendant took the stand and testified in his own behalf. He denied killing deceased. He testified that on the evening of the killing he was getting dressed in his room and heard something fall on the floor. He saw someone running out, with "something gray all over their head." He then discovered deceased's body and called the rescue squad.

The jury returned a verdict of guilty of second-degree murder, and defendant was sentenced to a term of imprisonment of not less than ten years nor more than life.

After entry of judgment, the time for giving notice of appeal expired. Defendant petitioned the Court of Appeals for, and was

granted, a writ of certiorari. The Court of Appeals, in an opinion by Judge Hedrick, Judge Wells concurring, dismissed the appeal on the ground that the court lacked jurisdiction since the sentence imposed included a life sentence and was, therefore, directly appealable only to this Court. Judge Martin (Robert M.) dissented without opinion, and defendant appealed to this Court pursuant to G.S. 7A-30(2). Although defendant appealed only from the dismissal of his case, in the interests of justice and in order to avoid needless circuity, we elected to treat his notice of appeal as a motion, pursuant to G.S. 7A-31, to bypass the Court of Appeals and allowed that motion.

Rufus L. Edmisten, Attorney General, by Elisha H. Bunting, Jr., Assistant Attorney General, for the State.

H. Bruce Hulse, Jr., for defendant.

BRANCH, Chief Justice.

[1] The threshold question presented for review in this case is whether a sentence of imprisonment for ten years to life is a sentence of "imprisonment for life" within the meaning of G.S. 7A-27(a) so as to create a direct appeal of right to this Court from the superior court. In dismissing the appeal for lack of jurisdiction, the Court of Appeals reasoned that a sentence of imprisonment of ten years to life was essentially a life sentence and therefore appeal lay directly to this Court from the trial court. We disagree.

G.S. 7A-27 governs appeals of right from the trial division and provides in pertinent part as follows:

> (a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendre, appeal lies of right directly to the Supreme Court.

The primary function of a court in construing a statute is to ascertain the intent of the legislature. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). In ascertaining this intent, a court looks to the language and spirit of the statute and what it sought to accomplish. *Stevenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). It is also relevant to look to the history of the legislation

and the circumstances surrounding its enactment. *Sale v. Johnson*, 258 N.C. 749, 129 S.E. 2d 465 (1963).

In 1967 the legislature created the present appellate division, consisting of the Supreme Court and the Court of Appeals. 1967 N.C. Sess. Laws c. 108, s. 1. Prior to that time, the appellate division consisted solely of the Supreme Court. 1965 N.C. Sess. Laws c. 310, s. 1. According to the *Report of the Courts Commission*, a primary goal of creating two branches within the appellate division was to alleviate the heavy case load which had burdened the Supreme Court until that time. *Report of the Courts Commission* 14 (1967). The Commission recommended to the legislature that every case, civil and criminal, should be appealable initially to the Court of Appeals. The Commission, however, noted that there should be an exception to the "basic arrangement that all cases be appealed directly to the Court of Appeals in the first instance," and that the exception would be in "cases in which a sentence of death or life is imposed." As the authors of the report pointed out, "[i]t is important to have as a part of the organic law of the State the absolute right of a person under these *ultimate* sentences to appeal directly and in the first instance to the Supreme Court." *Id.* at 17. (Emphasis added.)

While the *Report of the Courts Commission* does not address the specific problem which is before us, we think it is abundantly clear that the Commission intended to recommend to the legislature that direct appellate review by this Court be confined to a "strictly limited category of 'important' cases . . . ." *Id.* at 4[1]. We need not dwell on the reasons why cases involving sentences of death and of life imprisonment constitute "important cases." Those reasons are self-evident. Suffice it to say that the sentence imposed in this case is for imprisonment for a term of ten years to life and is thus an indeterminate sentence. *See People v. Rivas*, 85 Cal. App. 2d 540, 193 P. 2d 151 (1948). In light of what we perceive to be the purpose of G.S. 7A-27 in permitting only a limited number of direct appeals to this Court from the trial division, we do not think that the term "imprisonment for life" encompasses a sentence which is indeterminate. An indeterminate sentence, which, as here, merely states life imprisonment as a

1. The 1967 legislation creating the appellate division meticulously follows the recommendations of the Courts Commission.

maximum, simply does not rise to the level of importance or seriousness which we think the drafters of G.S. 7A-27(a) intended for cases warranting a special direct appeal to this Court from the trial division.

We therefore hold that the term "imprisonment for life" as it is used in G.S. 7A-27(a) means only a determinate life sentence and does not include an indeterminate sentence merely because the stated maximum is a life term. *See People v. Rivas, supra; Maddox v. People*, 178 Colo. 366, 497 P. 2d 1263 (1972); *Jaramillo v. District Court*, 173 Colo. 459, 480 P. 2d 841 (1971). *But see State ex rel. Corbin v. Court of Appeals*, 103 Ariz. 315, 441 P. 2d 544 (1968). Thus, since defendant was not sentenced to "imprisonment for life" as that term is used in G.S. 7A-27(a), his appeal was properly within the jurisdiction of the Court of Appeals.

[2] Defendant assigns as error the following portion of the trial court's charge to the jury:

> So with regard to this charge of Second Degree Murder. If the State of North Carolina has satisfied you from the evidence and beyond a reasonable doubt that on or about the 19th day of July, 1978, Joseph Ferrell choked Leslie William Royals with his hands; that he did so *without malice* and without justification or excuse and thereby proximately caused the death of Leslie William Royals; it would be your duty to return a verdict of guilty of Second Degree Murder. (Emphasis added.)

Defendant contends that the instruction is contrary to the law of North Carolina and that he is entitled to a new trial.

The State contends that the trial judge instructed correctly on the requirements of second-degree murder just prior to the erroneous portion set out above. Thus, the State maintains that the charge when read as a whole is correct, relying on the case of *State v. Cole*, 280 N.C. 398, 185 S.E. 2d 833 (1972). In *Cole*, the trial judge defined second-degree murder as "the unlawful killing of a human being *without* (emphasis added) malice. . . ." *Id.* at 402, 185 S.E. 2d at 836. This Court found no error but did so specifically for the reason that the trial court corrected its error and "immediately followed the erroneous instruction with the statement malice is a necessary element of murder in the second degree."

Id. at 403, 185 S.E. 2d at 836. The Court noted explicitly that, if the error had not been corrected, a new trial would have been required.

Unlike *Cole*, the error in the court's instruction in this case went uncorrected. Furthermore, the error was accentuated by the fact that it was in the judge's final mandate to the jury. Defendant is therefore entitled to a new trial.

[3] Defendant also assigns as error the failure of the judge to instruct on the lesser included offense of voluntary manslaughter and on self-defense. The State contends that there was insufficient evidence of either to warrant an instruction to the jury.

It is the duty of the trial court to instruct on all substantial features of the case. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). If there is evidence from which the jury could find that the defendant committed a lesser included offense, the judge must charge on that lesser offense. *State v. Ford*, 297 N.C. 144, 254 S.E. 2d 14 (1979). Likewise, where there is competent evidence from which the jury could find that defendant acted in self-defense, the court must charge on that defense, even though there may be evidence to the contrary. *State v. Dooley, supra.*

In the case at bar, at least two of defendant's statements, offered into evidence by the State, indicated that he had "had a spell." In his third statement, he said that the deceased had slapped at him and had knocked his glasses off and that the two had argued just prior to the killing.

The unlawful killing of a human being under the influence of passion upon sudden provocation is voluntary manslaughter. *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971). There is evidence in this case from which a jury could find that defendant lacked the malice necessary to sustain a second-degree murder conviction because he acted in the heat of passion upon sudden provocation.

Further, the evidence that deceased had a box cutter in his hand and struck the first blow was sufficient to permit the jury to reasonably infer that defendant acted in self-defense. *See State v. Marsh*, 293 N.C. 353, 237 S.E. 2d 745 (1977). Thus, defendant was entitled under the facts of this case to have the jury determine, under proper instructions, whether the force he used was

reasonable and constituted a complete defense, or whether the force was unreasonable so as to reduce the crime to voluntary manslaughter. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971).

The trial court committed error prejudicial to defendant in failing to instruct on the lesser included offense of manslaughter and on the defense of self-defense. For the reasons set forth in this opinion, we hold that defendant is entitled to a new trial.

Since we are remanding the case for a new trial, we do not deem it necessary to address defendant's remaining assignments of error, inasmuch as the matters which gave rise to them probably will not recur on retrial.

The dismissal of the cause by the Court of Appeals is reversed, and for errors in the trial, the cause is remanded to the Wayne County Superior Court for a new trial.

Reversed and remanded.

Justices COPELAND and CARLTON took no part in the decision of this case.

GRADY M. CLICK, EMPLOYEE v. PILOT FREIGHT CARRIERS, INC., EMPLOYER, SELF-INSURER

No. 91

(Filed 6 May 1980)

1. Master and Servant § 96.5— workers' compensation—injury from employment related accident—sufficiency of evidence

Though plaintiff's earlier statements conflicted with his testimony before the Industrial Commission concerning the onset of his injury, it was for the Commission to weigh the evidence and judge plaintiff's credibility. Evidence was sufficient to support the Commission's finding that plaintiff was injured as the result of an employment related accident where such evidence tended to show that plaintiff dock worker's back was injured when he was struck from the rear by a cart on a conveyor line.

2. Master and Servant §§ 65.2, 93.3— workers' compensation—herniated disc—expert medical evidence as to causation required

The Industrial Commission erred in awarding plaintiff workers' compensation for a herniated disc in the absence of expert medical testimony tending to establish a causal relationship between plaintiff's work related accident and the injury for which compensation was sought.

Workers' Compensation case. Defendant appeals from an opinion by the Court of Appeals, 41 N.C. App. 458, 255 S.E. 2d 192 (1979), upholding an award to plaintiff by the Industrial Commission. This Court allowed defendant's petition for discretionary review pursuant to G.S. 7A-31 on 24 August 1979. The case was argued as No. 95, Fall Term 1979.

White and Crumpler, by Frank J. Yeager, Attorneys for Plaintiff Appellee.

Hutchins, Tyndall, Bell, Davis & Pitt, by Walter W. Pitt, Jr., and Richard D. Ramsey, Attorneys for Defendant Appellant.

EXUM, Justice.

Defendant's appeal challenges the sufficiency of the evidence to support the Industrial Commission's findings that plaintiff sustained a compensable injury by accident arising out of and in the course of his employment with defendant. We hold there is competent evidence to support the finding of accident, but remand the case to the Commission to take expert medical evidence on the causal relationship between the accident and the injury complained of.

Plaintiff Grady Click, the employee, was awarded compensation for temporary total disability and a 25 percent permanent partial disability resulting from a herniated disc at the L4-5 interspace. The record discloses that Click gave conflicting stories about the cause of his injury. On 31 August 1976 he was employed as a dock worker by defendant Pilot Freight Carriers, Inc. As he pulled carts off a conveyor line in the dock area of the freight terminal, he felt a pain in his back. He mentioned the pain to two co-workers but continued working until the end of his shift. At home that evening, he experienced a sharp pain in his back when he bent over to take off his socks. The pain was so intense and disabling that he remained in bed until 3 September, at

which time he was hospitalized and the herniated disc was subsequently discovered during exploratory surgery. Click told his doctor that he had hurt his back while bending to pick up something from the floor at his home. He submitted insurance forms to another insurer stating that he was injured at home. At the Commission hearing in July, 1977, however, Click testified that he had been struck in the back by a cart while he worked on the conveyor line at a freight terminal on 31 August. Click testified that when he was struck in this manner he "felt a sharp pain in [his] back" which worsened after he returned home from work. He testified that he "went to bed" and "remained in bed until [he] couldn't stand the pain any longer and they took [him] to the hospital." The only medical evidence adduced at the hearing was a statement by Click's physician concerning the nature and extent of Click's injuries. Based upon this evidence, the Commission found that Click had sustained a compensable injury by accident which occurred when plaintiff was struck from the rear by a cart on the conveyor line.

[1] Defendant first assigns error to the Commission's finding that plaintiff was injured as a result of an employment related accident. Defendant argues that the conflicting evidence in this case cannot "reasonably" support a finding of injury by accident inasmuch as plaintiff's testimony before the Commission is contradicted by his earlier statements about the onset of the injury. It is not for a reviewing court, however, to *weigh* the evidence before the Industrial Commission in a workmen's compensation case. By authority of G.S. 97-86 the Commission is the sole judge of the credibility and weight to be accorded to the evidence and testimony before it. Its findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). Thus, if 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. *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874 (1968); *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963). Applying these principles to the instant case, we cannot say as a matter of law that the Commission erred in lending credence to plaintiff's

testimony concerning the alleged accident. Plaintiff's testimony was competent even though it was contradicted by his prior statements. Its credibility was for the Commission, not the courts, to determine. Defendant's assignment of error on this point is overruled.

[2] Defendant next contends that the Commission's award cannot stand because there is no expert medical testimony tending to establish a causal relationship between the work related accident and the herniated disc for which compensation is sought. Under the circumstances of this case, we agree.

For an injury to be compensable under the terms of the Workmen's Compensation Act, it must be proximately caused by an accident arising out of and suffered in the course of employment. G.S. 97-2(6). There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, *i.e.*, some evidence that the accident at least might have or could have produced the particular disability in question. The quantum and quality of the evidence required to establish *prima facie* the causal relationship will of course vary with the complexity of the injury itself. There will be "many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E. 2d 753, 760 (1965). On the other hand, where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. *Id.*; *see generally*, Annot., Admissibility of Opinion Evidence as to the Cause of Death, Disease, or Injury, 66 A.L.R. 2d 1082, § 8 (1959 and Supplement).

In *Gillikin v. Burbage, supra*, and in *Miller v. Lucas*, 267 N.C. 1, 147 S.E. 2d 537 (1966), this Court held that jury awards for ruptured disc injuries could not be sustained in the absence of expert medical testimony on the matter of causation. Writing for the Court in *Gillikin*, Justice (later Chief Justice) Sharp noted authority to the effect that one of the most difficult problems in legal medicine is the determination of the causal relationship between a specific trauma and the rupture of an intervertebral disc. 263

N.C. at 325, 139 S.E. 2d at 760, *citing* 1 Lawyers' Medical Cyclopedia § 7.16 (1958 Ed.). The difficulty of pinpointing the precise causative factors of disc injuries remains today. Indeed, "full knowledge of the spine is still wrapped in uncertainty, mystery, and enigma." Howard, "Understanding Causes of Low Back Pain," 21 DePaul L. Rev. 182 (1971); *see also* Zeitlin, "The Common Causes of Low Back Pain and the Question of Traumatic Aggravation," 21 DePaul L. Rev. 147 (1971). Thus, although cases involving "slipped" or ruptured discs continue to provide livelihood for the compensation lawyer, they remain "the anathema of the orthopedic and neurosurgeon," not only because of the difficulties of treatment but also because "[i]t is . . . extremely difficult at times to sort out the complaints due to injury from those of nontraumatic origin." Brooke, *In the Wake of Trauma* 124, 132 (2nd Ed. 1974).

In light of the continuing medical difficulty in determining the etiology of intervertebral diseases and injuries, this Court is not disposed to modify the holding in *Gillikin*. Nor do we think that the fact that the instant case was heard before the Industrial Commission rather than by a jury warrants suspension of the *Gillikin* rule. Reliance on Commission expertise is not justified where the subject matter involves a complicated medical question. *See generally* 3 Larson, *Workmen's Compensation Law* §§ 79.51-79.54 (1976) and cases cited therein.

We do not rule out the possibility that a disc injury case may arise in the future wherein the facts are so simple, uncontradictory, and obvious as to permit a finding of a causal relationship between an accident and the injury absent expert opinion evidence. For instance, in *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E. 2d 491 (1970), the Court of Appeals upheld a workmen's compensation award for temporary total disability resulting from a nonspecific lower back injury (not a disc injury), despite the lack of expert medical evidence linking the back condition with the work place accident. The court held evidence that the onset pain of which plaintiff complained was simultaneous with the accident, along with other evidence in the case, was sufficient to allow the trier of fact to draw a reasonable inference that the injury was the proximate result of the accident. The Supreme Court of Oregon has noted that the "distinguishing features" of most com-

pensation cases holding medical testimony unnecessary to make a *prima facie* case of causation include:

> "[A]n uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to his superior and consultation with a physician, and the fact that the plaintiff was theretofore in good health and free from any disability of the kind involved. A further relevant factor is the absence of expert testimony that the alleged precipitating event could not have been the cause of the injury. . . ." *Uris v. State Compensation Department*, 247 Or. 420, 426, 427 P. 2d 753, 756 (1967) (Citations omitted.)

Such a case is not presented here. Although Click's testimony tended to link the herniated disc with the accident at his work place, other evidence in the case suggested that his injury was caused by an occurrence at his home. In the absence of guidance by expert opinion as to whether the accident could or might have resulted in his injury, the Commission could only speculate on the probable cause of his condition. Medical testimony was therefore needed to provide a proper foundation for the Commission's finding on the question of the injury's origin.

Accordingly, the decision of the Court of Appeals affirming the Industrial Commission's award should be and is hereby vacated, and the cause is remanded to the Court of Appeals for further remand to the Commission for the taking of expert medical evidence on the question of causation.

Vacated and remanded.

BILLY RAY ANDERSON v. E. L. GOODING, EXECUTOR OF THE WILL OF ELIZABETH GOODING HARDY, J. W. BREWER, AND GREAT AMERICAN INSURANCE COMPANY

No. 63

(Filed 6 May 1980)

Executors and Administrators §§ 18, 19.1— executor's notice to creditors—failure to name day after which claims barred—failure to state time runs from the first publication

An executor's general notice to creditors published in a newspaper was fatally defective where it failed to name a *day* after which claims would be barred and failed to give notice that claims must be filed within six months from the day of the *first* publication of the notice; therefore, the notice to creditors was ineffective to start the running of the six months' statute of limitations of G.S. 28A-19-3(a) in bar of a claim against decedent's estate to recover for personal injuries received in an automobile accident.

PLAINTIFF appeals from decision of the Court of Appeals, 43 N.C. App. 611, 259 S.E. 2d 398 (1979), reversing judgment of *Reid, J.*, entered 24 October 1978 in PITT Superior Court.

The following facts appear of record:

1. On 25 March 1977 plaintiff was injured and Elizabeth Gooding Hardy was killed in a collision between plaintiff's truck and Mrs. Hardy's car, allegedly caused by the negligence of decedent Elizabeth Gooding Hardy. Mrs. Hardy died approximately forty-five minutes after the accident.

2. On 20 April 1977 E. L. Gooding qualified as Executor of Elizabeth Gooding Hardy, deceased.

3. The Executor caused a general notice to creditors to be published on 27 April 1977, 4 May 1977, 11 May 1977 and 18 May 1977 in *The Standard Laconic*, a newspaper meeting all the requirements of G.S. 1-597.

4. On 16 November 1977 E. L. Gooding, Executor of Elizabeth Gooding Hardy, received a written notice of plaintiff's claim for damages arising out of the motor vehicle collision which occurred on 25 March 1977. Said claim was denied by the Executor on 17 November 1977 on the ground that it was not presented to the Executor within six months after the day of the first publication of the notice to creditors.

5. On 21 December 1977 plaintiff brought his action for damages for personal injuries he allegedly sustained in the collision on 25 March 1977. In addition to E. L. Gooding, Executor, plaintiff included as defendants Great American Insurance Company and its claim adjustor, J. W. Brewer, alleging unfair and deceptive trade practices as to them and seeking damages on account thereof. However, plaintiff's claims against Great American and J. W. Brewer were severed for trial, and all matters pertaining thereto are not now before the Court. The record reveals that Elizabeth Gooding Hardy had liability insurance with Great American in the sum of $20,000.

6. E. L. Gooding, Executor, filed answer to plaintiff's complaint and pled, among other things, the six months' Statute of Limitations contained in G.S. 28A-19-3(a) in bar of plaintiff's claim.

7. Plaintiff moved for partial summary judgment as to defendant's plea that this action is barred as a matter of law by the provisions of G.S. 28A-19-3(a). At the hearing on that motion defendant Executor, pursuant to Rule 56(c) of the Rules of Civil Procedure, moved that summary judgment be entered in his favor and against plaintiff on the ground that the action is barred as a matter of law by said statute, relying upon an affidavit of E. L. Gooding in support of his motion. The trial court allowed plaintiff's motion for partial summary judgment and denied defendant's motion. The Court of Appeals reviewed the matter on certiorari, reversed and remanded with instructions that summary judgment be entered against plaintiff and in favor of defendant Executor. Judge Vaughn dissented and plaintiff appealed to this Court as of right pursuant to G.S. 7A-30(2).

James, Hite, Cavendish & Blount, by Marvin Blount, Jr., and Robert D. Rouse III, attorneys for plaintiff appellant.

Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Sumner; White, Allen, Hooten, Hodges & Hines, P.A., by John R. Hooten, attorneys for defendant appellees.

HUSKINS, Justice.

Plaintiff contends that the notice to creditors published by E. L. Gooding, Executor of Elizabeth Gooding Hardy, did not comply with G.S. 28A-14-1, gave inadequate notice to plaintiff and

was therefore ineffective to start the running of the six months' Statute of Limitations contained in G.S. 28A-19-3(a). The Court of Appeals held to the contrary, and this constitutes plaintiff's first assignment of error before this Court.

G.S. 28A-14-1, in effect at the time in question, read in pertinent part as follows:

> "Every personal representative and collector within 20 days after the granting of letters shall notify all persons . . . having claims against the decedent to present the same to such personal representative or collector, on or before *a day to be named in such notice*, which day must be six months from the day of the first publication or posting of such notice." (Emphasis added.)

G.S. 28A-19-1, in effect at the time in question, provided in pertinent part that claims against a decedent's estate may be presented by delivering or mailing to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed. Such claim is deemed presented when it is received by the personal representative.

G.S. 28A-19-3(a), in effect at the time in question, provided in pertinent part as follows:

> "All claims . . . against decedent's estate . . . founded on . . . tort, or other legal basis, which are not presented to the personal representative or collector . . . within six months after the day of the first publication or posting of the general notice to creditors as provided for in G.S. 28A-14-1 are forever barred against the estate, the personal representative, the collector, the heirs, and the devisees of the decedent."

The notice to creditors published by E. L. Gooding, Executor of Elizabeth Gooding Hardy, deceased, reads in its entirety as follows:

STATE OF NORTH CAROLINA
LENOIR COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

ADMINISTRATOR'S-EXECUTOR'S NOTICE

Having qualified as Executor of the Estate of Elizabeth Gooding Hardy of Greene County, North Carolina, this is to notify all persons having claims against the estate of said Elizabeth Gooding Hardy to present them to the undersigned within 6 months from date of the publication of this notice or same will be pleaded in bar of their recovery. All persons indebted to said estate please make immediate payment.

This the 27th day of April, 1977.

ESTATE OF ELIZABETH GOODING HARDY
E. L. Gooding, Executor
P. O. Box 3169
Kinston, N. C. 28501

WHITE, ALLEN, HOOTEN & HINES, P.A.
Attorney
4/27, 5/4, 11, 18

Was the notice as published sufficient to start the running of the six months' Statute of Limitations so as to bar plaintiff's claim which he filed with the Executor on 16 November 1977? For reasons which follow, we hold that it was not.

G.S. 28A-14-1 requires the notice to creditors to be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, notifying all persons having claims against the decedent to present them to the personal representative on or before "a day to be named in such notice, which day must be six months from the date of the first publication . . . of such notice." This means that the notice must *name a day* after which claims may no longer be presented for payment but will be forever barred. And the day named in the notice must be at least six months from the date of the *first* publication of the notice. Fixing the last day on which claims may be presented for payment is a duty imposed upon the personal representative by the statute. Accordingly, the notice in question here should have

stated that all persons having claims against the decedent must present them to the executor on or before 27 October 1977 or the claims will be forever barred thereafter. *See* G.S. 1-593 and Rule 6(a) of the Rules of Civil Procedure. *See also Harris v. Latta*, 298 N.C. 555, 259 S.E. 2d 239 (1979), and cases therein cited, with respect to the general rule for computation of time.

In the case before us, the notice actually published was fatally defective in that it failed to name a *day* after which claims would be barred. Moreover, it failed to give notice that claims must be filed at least six months from the day of the *first* publication of the notice. Since the notice in question was published on 27 April, 4 May, 11 May and 18 May, a claimant could assume, with equal logic, that the six months' period commenced on 18 May 1977, the *last* publication date, rather than 27 April 1977, the *first* publication date. The fact that plaintiff's claim in this case was received by the Executor on 16 November 1977, a date within six months from the last publication, accentuates the importance of naming a day certain in the notice after which all claims will be barred.

When an administrator or executor pleads G.S. 28A-19-3(a) as a defense against claims presented against the estate, he must establish the fact that he did advertise as required by G.S. 28A-14-1. Failure of such proof causes failure of the defense made under G.S. 28A-19-3(a). *Compare Gilliam v. Willey*, 54 N.C. 128 (1853). In the instant case, the proofs do not sustain the defense and, as a result, the limiting statute is no bar to the suit. The time limitations for presentation of claims provided in G.S. 28A-19-3(a) will not aid an executor or administrator who fails to observe its requirements. *Compare Love v. Ingram*, 104 N.C. 600, 10 S.E. 77 (1889).

Morrisey v. Hill, 142 N.C. 355, 55 S.E. 193 (1906), is inapplicable in the factual context of this case. That case deals with the statutory limitation placed on the commencement of actions to recover claims which have already been duly *presented* to and rejected by the executor. *See* G.S. 28A-19-16.

For the reasons stated the decision of the Court of Appeals is reversed to the end that partial summary judgment entered by the trial court in favor of plaintiff may be reinstated. Plaintiff is

entitled to have his action tried on the merits and disposed of according to law.

We find it unnecessary to reach or decide other questions raised on this appeal.

Reversed and remanded.

DAVID SPENCER DANIELSON v. ALAN WALKER CUMMINGS AND WILLIAM SHELBY CUMMINGS, JR.

No. 45

(Filed 6 May 1980)

Rules of Civil Procedure § 41.1 — voluntary dismissal announced in open court — one year to bring new action — when year begins to run

When a case has proceeded to trial and both parties are present in court, the one year period in which a plaintiff is allowed to reinstitute a suit from a Rule 41(a)(i) voluntary dismissal begins to run from the time of oral notice of voluntary dismissal given in open court, not from the time written notice is filed with the clerk of court.

Justice BROCK did not participate in the consideration or decision of this case.

PLAINTIFF appeals as a matter of right from a decision of the Court of Appeals, one judge dissenting, affirming summary judgment for defendants entered by *Kivett, Judge,* on 5 December 1978 in Superior Court, GUILFORD County. The Court of Appeals' decision is reported at 43 N.C. App. 546, 259 S.E. 2d 332 (1979).

Plaintiff and defendant Alan Walker Cummings were involved in an automobile accident on 20 August 1973 in Greensboro. On 27 March 1975, plaintiff filed complaint against defendants, the driver and owner of the car involved. Defendants, in turn, answered the complaint, and the case was calendared for trial at the 31 January 1977 Civil Jury Session of Superior Court, Guilford County before Judge Collier.

At trial on 1 February 1977, subsequent to empaneling the jury but prior to resting his case, plaintiff's counsel gave notice of voluntary dismissal in open court. The court minutes for that day

indicate that plaintiff's counsel said that "a voluntary dismissal would be presented in this case." In a subsequent affidavit, the courtroom clerk stated: "[T]hat during the trial of this action and before the plaintiff rested, the attorney for the plaintiff stated in open court that the plaintiff was taking a voluntary dismissal as to this action." Thereupon, the judge presiding stopped the trial, dismissed the jury and went on to other calendared business. No written motion of voluntary dismissal was filed at that session of court.

On 25 April 1977, plaintiff's counsel filed written notice of voluntary dismissal pursuant to Rule 41(a)(i), N. C. Rules of Civil Procedure with the Clerk of Court for Guilford County. On 15 February 1978 plaintiff reinstituted this suit, one year and fourteen days past the time of voluntary dismissal taken in open court, but less than ten months from the filing of written notice of voluntary dismissal.

Defendants moved for summary judgment asserting the action was barred by the three-year statute of limitations, G.S. 1-52, because reinstitution of the suit was more than one year from the taking of the voluntary dismissal in open court. The superior court agreed and granted summary judgment. Plaintiff appealed to the Court of Appeals. A majority of that court affirmed summary judgment for the defendants.

Charles A. Lloyd for plaintiff appellant.

Perry C. Henson & Perry C. Henson, Jr., for defendant appellees.

CARLTON, Justice.

The sole question presented is whether the one-year period in which to reinstitute suit from a voluntary dismissal taken pursuant to G.S. 1A-1, Rule 41(a)(i), runs from time of notice given in open court prior to plaintiff resting his case or from the time written notice is filed with the clerk of court. We hold that the one-year period runs from the time notice is given in open court and so affirm the decision of the Court of Appeals.

The pertinent part of Rule 41 provides:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case. . . . If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal. . . .

Prior to the adoption of this rule, voluntary dismissals in this jurisdiction were governed by the provisions of G.S. 1-25, which allowed plaintiffs the absolute right to take a voluntary dismissal for any reason at any time prior to verdict. *See, e.g., Southeastern Fire Insurance Company v. Walton*, 256 N.C. 345, 123 S.E. 2d 780 (1962) and cases cited therein. This often resulted in a heavy but needless expenditure of time and effort by the court and other parties. For example, in *Southeastern Fire Insurance Company v. Walton, supra*, plaintiff was allowed to take a voluntary nonsuit when the jury had reached a verdict, had handed that verdict over to a deputy sheriff and the deputy sheriff was walking to the bench to deliver it to the judge. *See also Comment* to G.S. 1A-1, Rule 41, quoting *McCann v. Bentley Stores Corporation*, 34 F. Supp. 234 (W.D. Mo. 1940).

As enacted in 1967, the original version of North Carolina's Rule 41 was designed to correct this problem once the Rule became effective in January 1970. The language of the original version of Rule 41(a)(i) tracked the language of the comparable federal rule and provided:

> [A]n action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment or of any motion treated as a motion for summary judgment under these Rules, whichever first occurs. . . .

1967 N.C. Sess. Laws 1315-16.

The two-fold purpose of this provision in the federal rules was to facilitate the taking of voluntary dismissals but at the same time to "safeguard abuse of the right *by limiting it to an early stage of proceedings*." (Emphasis added.) 5 *Moore's Federal*

Practice ¶ 41.02 at 41-18 (2d ed. 1948 & 1979) and cases cited therein.

It is clear, then, that the drafters of this early version of Rule 41 in both North Carolina and federal practice contemplated that a taking of voluntary dismissal as a matter of right would occur at a very early stage of an adjudication where the only official contact between parties was written contact and where no one considered immediate face-to-face confrontation in open court.

This early version of Rule 41, however, was not the version which finally became effective in North Carolina on 1 January 1970. Prior to that date, and in response to a great deal of controversy, *see* Elster, Highlights of Legislative Changes to the New Rules of Civil Procedure, 6 W.F.L. Rev. 267 (1970), the 1969 Session of the General Assembly amended the Rule into the present version. This amended version extended plaintiffs' right to take a voluntary dismissal from the narrow time period allowed in the federal version but

> 'had the effect of changing [the] former practice [under G.S. 1-25] only to the extent that the plaintiff desiring to take a voluntary . . . dismissal . . . must now act before he rests his case. . . . [U]nder our former practice he could do so at any time before the verdict. *In other respects, however, our former practice was not expressly changed by Rule 41(a)(i) as it finally became effective.*' 24 N.C. App. at 376, 210 S.E. 2d at 533. *See* W. A. Shuford, North Carolina Civil Practice and Procedure § 41-4 (1975).

McCarley v. McCarley, 289 N.C. 109, 112, 221 S.E. 2d 490, 493 (1976) (emphasis added).

Despite this liberalization of time periods in amended Rule 41, the language was not totally altered. Commentators noted that the statutory provision for "filing" notice of dismissal remained as a carry-over from the counterpart federal rule and did not "fit too well that stage of the [s]tate period for dismissal by notice which extends into trial." 2 McIntosh, North Carolina Practice and Procedure § 1647 at n. 43 (2d ed. 1956 & Pocket Part 1970). At that time, Professor, now Judge, Dickson Phillips suggeted, "Presumably once the case is at the trial stage 'filing' will be read to include 'giving oral notice in open court.' " *Id.*

Given this legislative history and subsequent interpretation, we cannot believe, as plaintiff asserts, that in amending Rule 41 our General Assembly intended that notice of voluntary dismissal from which one year to reinstitute suit runs must always be a paper writing filed with the clerk of court. To so interpret the words of Rule 41 ignores the liberalization of time limits provided by the 1969 amendment. It also ignores the prior practice of giving oral notice of dismissal at trial which has been incorporated into the present version of Rule 41, *McCarley v. McCarley, supra,* and fails to account for the very strong tradition in this State equating oral notice in open court with written notice filed with the clerk. See, *e.g., Wood v. Wood,* 297 N.C. 1, 5-6, 252 S.E. 2d 799, 802 (1979) noting that Rule 7 of the North Carolina Rules of Civil Procedure allows certain oral motions in open court, unlike its federal counterpart.

Clearly, when parties confront each other face-to-face in a properly convened session of court where a written record is kept of all proceedings, there is no necessity to file a paper writing in order to take notice of a voluntary dismissal. In such a case, oral notice of dismissal is clearly adequate, and fully satisfies the "filing" requirements of Rule 41(a)(i).

Plaintiff's reliance on *Rowland v. Beauchamp,* 253 N.C. 231, 116 S.E. 2d 720 (1960), as suggesting otherwise, is unfounded. In that case, the plaintiff was subjected to an *involuntary* nonsuit (now dismissal), and gave notice of appeal. When appeal was not timely perfected, defendant moved and obtained dismissal of the appeal. Thereafter plaintiff reinstituted his lawsuit. Under the version of code pleading then existent, plaintiff was permitted to reinstitute his suit within one year of an involuntary dismissal. Defendants argued that plaintiff had only a year from the involuntary nonsuit; plaintiff argued he had a year from dismissal of the appeal of the involuntary nonsuit. The Court determined that the issue was whether "the judgment of involuntary nonsuit dismissing plaintiff's first action *[became] final* . . . when it was entered [in open court] . . . or when plaintiff's appeal from such judgment was dismissed [for] . . . failure to perfect his appeal." (Emphasis added.) 253 N.C. at 236, 116 S.E. 2d at 724. The Court there held that the judgment of nonsuit became final when the appeal was dismissed and allowed reinstitution of the lawsuit.

The issue in *Rowland v. Beauchamp* therefore was the finality of the termination of the first lawsuit. There final termination only occurred when the appeal process was over. Here the first action was definitely and finally terminated by plaintiff's voluntary dismissal in open court when Judge Collier ended the case and dismissed the jury on 1 February 1977. There was no appeal, and time to reinstitute the suit ran from this date. *Rowland* does nothing to further plaintiff's position. We further note that to allow plaintiff's interpretation of Rule 41(a)(i) would allow all plaintiffs to extend indefinitely the time for reinstituting a lawsuit by delaying filing written notice of dismissal with the clerk of court once they have given notice in open court. We cannot believe the drafters of our version of Rule 41(a)(i) ever intended such a consequence.

Accordingly, we hold that when a case has proceeded to trial and both parties are present in court, the one-year period in which a plaintiff is allowed to reinstitute a suit from a Rule 41(a)(i) voluntary dismissal begins to run from the time of oral notice of voluntary dismissal given in open court.

The decision of the Court of Appeals is

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. C. RICHARD TATE

No. 77

(Filed 6 May 1980)

1. Criminal Law § 21— motion in limine

A motion *in limine* is a preliminary or pretrial motion.

2. Criminal Law § 21— allowable motion before trial

Any motion which can be made at trial can, if the facts are known beforehand, be made before trial.

3. **Criminal Law § 149— granting of motion in limine to suppress evidence—right of State to appeal**

The State could appeal from the granting of defendant's motion *in limine* to suppress the results of a test on green vegetable matter on the ground that the test had no scientific acceptance as a reliable means of identifying marijuana.

4. **Narcotics § 3— test results on vegetable matter—unreliable test**

The trial court's ruling that the results of tests conducted on green vegetable matter by using the Duquenois-Levine color test in the Sirchie drug kit were inadmissible in evidence was supported by the court's findings that the test is not scientifically accepted, reliable or accurate and that the test is not specific for marijuana because it reportedly also gives a positive reaction for some brands of coffee and aspirin.

ON appeal by the State from the decision of the Court of Appeals (opinion by *Clark, J.* with *Hill, J.* concurring and *Vaughn, J.* dissenting), which dismissed the case as an improper interlocutory appeal and therefore let stand the order of *Davis (James C.), J.* which allowed defendant's motion to suppress certain evidence.

Defendant was charged in an indictment, proper in form, with destroying evidence in violation of G.S. 14-221.1. Prior to the destruction of the evidence, it had been tested in the High Point police laboratory using the Duquenois-Levine color test in the Sirchie drug kit. The evidence that was tested, a green vegetable material, had a positive reaction for marijuana.

Defendant moved to suppress evidence concerning the test results on the ground that the test was "not specific for marijuana" and had "no scientific acceptance as a reliable and accurate means of identifying the controlled substance marijuana." The motion was allowed by the trial judge and the State appealed to the Court of Appeals. Having lost in the Court of Appeals with a dissenting opinion, the State has now appealed to this Court pursuant to G.S. 7A-30.

Other facts necessary to the decision of this case will be related in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Joan H. Byers for the State.

Walter E. Clark, Jr., and Byerly & Byerly by W. B. Byerly, Jr., for the defendant.

COPELAND, Justice.

[1, 2] A motion *in limine* is, by definition, a motion made "[o]n or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary, p. 708 (5th ed. 1979). In other words, a motion *in limine* is a preliminary or pretrial motion. Any motion which can be made at trial can, if the facts are known beforehand, be made before trial. *See e.g., State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980) (motion *in limine* made to restrict the district attorney's closing argument). These motions can be made in order to prevent the jury from ever hearing the potentially prejudicial evidence thus obviating the necessity for an instruction during trial to disregard that evidence if it comes in and is prejudicial.

Article 53 of Chapter 15A deals with a specific type of a motion *in limine* and that is the motion *in limine* to suppress evidence. Two situations are specified in which the motion to suppress *must* be made *in limine*. The motion to suppress must be made before trial (*in limine*) when the Constitution of the United States or the Constitution of the State of North Carolina requires that the evidence be excluded and when there has been a substantial violation of Chapter 15A. G.S. 15A-974(1) and (2). G.S. 15A-975 requires that these motions be made "only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c)." G.S. 15A-975(a). The fact that it is a motion to suppress denotes the *type* of motion that has been made. The fact that it is also a motion *in limine* denotes the *timing* of the motion regardless of its type.

The reasons for requiring the motion to suppress to be made *in limine* in the two situations specified in G.S. 15A-974 are set forth in the Official Commentary. If the motion is denied then the defendant, "whose only real defense is the motion to suppress [can immediately appeal without] . . . going through a trial simply to preserve his right of appeal." Official Commentary, G.S. 15A-979. If the motion is granted, then the State can immediately appeal provided that jeopardy has not attached which would bar further prosecution. *Id.* The intention is that "[t]he phrase 'prior to trial' unquestionably will be interpreted to mean prior to the

attachment of jeopardy," *id.*, so that the State will be able to appeal in all cases where the motion has been granted.

G.S. 15A-979 deals with the effect of orders concerning motions to suppress whether they are made *in limine* or at trial and provides in part that "[a] motion to suppress evidence made pursuant to this Article is the *exclusive* method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974." G.S. 15A-979(d). The clear implication of this subsection is that motions to suppress evidence which are not based on the two grounds specified in G.S. 15A-974 may or may not be made *in limine*.

In other words, when the motion to suppress is based on the grounds specified in G.S. 15A-974(1) and (2) then the motion to suppress must be made *in limine*. G.S. 15A-975; G.S. 15A-979(d). Motions to suppress on grounds other than those specified in G.S. 15A-974(1) and (2), *e.g.*, a motion to suppress on the ground that the evidence has not been properly authenticated, *State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979), or on grounds of unreliable testing as in the case *sub judice*, may be made for the first time at trial or for the first time before trial. G.S. 15A-979(d).

When the motion to suppress must be made *in limine*, G.S. 15A-974(1) and (2); G.S. 15A-975; G.S. 15A-979(d), but the defendant fails to make the motion at the proper time, then he has waived his right to contest the admissibility of the evidence at trial or on appeal on constitutional grounds. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *see, State v. Detter, supra; see also, Wainwright v. Sykes*, 433 U.S. 72, 53 L.Ed. 2d 594, 97 S.Ct. 2497, *rehearing denied*, 434 U.S. 880 (1977).

[3] When the motion to suppress *must* be and is made *in limine* or *can* be and is made *in limine*, then the defendant can appeal if the motion is denied and he enters a plea of guilty, G.S. 15A-979(b), and the State can appeal if the motion is granted, G.S. 15A-1445 (which refers to G.S. 15A-979).

When the motion to suppress can be and is made for the first time at trial, then, if the motion is denied, "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction. . . ." G.S. 15A-979(b).

Here, defendant began his pretrial motion as follows: "NOW COMES the defendant . . . pursuant to Chapter 15A, Article 53, of the General Statutes of North Carolina, and moves to suppress evidence of a reported test. . . ." Later in the proceedings, defendant asked that the motion be considered as a motion *in limine instead of* as a motion to suppress. As discussed above, the motion was, by definition, both of these things because it was a motion before trial (*in limine*) to suppress. When a motion to suppress is made *in limine*, the applicable Article, whether the defendant refers to it in his motion or not, is Article 53 of Chapter 15A, and more specifically, G.S. 15A-979. Defendant did not have to make his motion to suppress *in limine*. G.S. 15A-974(1) and (2). However, he could and did so make the motion and it was granted. Thus, the State has a right to appeal. G.S. 15A-1445; *see*, G.S. 15A-979.

[4] The State argues that the trial judge erred in suppressing the test results because the evidence upon which the findings of fact are based is solely hearsay and is therefore insufficient to support the findings.

The State failed to take any exception to any finding of fact in the order. The State excepted solely to the conclusion of law (the judgment itself). When there are no exceptions to the findings of fact, the facts found will be presumed to be correct and supported by the evidence and thus are binding on appeal. *MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967); *Nationwide Homes of Raleigh, Inc. v. First-Citizens Bank & Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693 (1966); *Keeter v. Town of Lake Lure*, 264 N.C. 252, 141 S.E. 2d 634 (1965). Since the State excepted only to the judgment, the sole issue is whether the findings of fact, taken as true, support the conclusion of law (the judgment). *Hertford v. Harris*, 263 N.C. 776, 140 S.E. 2d 420 (1965); *Winborne v. Stokes*, 238 N.C. 414, 78 S.E. 2d 171 (1953).

The trial judge concluded that the test results are inadmissible based on his findings that the Duquenois-Levine color test used in the Sirchie drug kit is not scientifically accepted, reliable or accurate. The test is not specific for marijuana because reportedly it also gives a positive reaction for "[s]ome brands of coffee, as well as aspirin." The conclusion to exclude the test results is amply supported by these findings of fact.

The action may, therefore, proceed without the use of the test results. The trial judge's order was solely concerned with the competency of a certain testing method and the admissibility of those test results. It was not a determination of the relevancy of this particular evidence when you consider that the statute makes it illegal to destroy evidence no matter what that evidence is (a green vegetable material or actually marijuana) so long as it is "evidence relevant to any criminal offense." G.S. 14-221.1 (1979 Cum. Supp.). The statute defines evidence as "*any article* or document in the possession of a law enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence." *Id. Cf., State v. Bissette*, 250 N.C. 514, 108 S.E. 2d 858 (1959) (regarding the sufficiency of an indictment), *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972) (sufficiency of the indictment), *State v. Loesch*, 237 N.C. 611, 75 S.E. 2d 654 (1953) (the indictment must either charge the offense in the language of the act or specifically set forth the facts constituting the offense); *cf., also, State v. Nunley*, 224 N.C. 96, 29 S.E. 2d 17 (1944) (fatal variance between indictment and proof) and *State v. McCall*, 12 N.C. App. 85, 182 S.E. 2d 617, *cert. denied*, 279 N.C. 513, 183 S.E. 2d 689 (1971) (no fatal variance).

The State had a right to appeal and the test results were properly suppressed; therefore, the Court of Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Humphries v. City of Jacksonville

RAY HUMPHRIES, JR.; C. KNOX COUNCIL; TOMMY O. HOLMES AND SHIRLEY HOLMES; IVAN N. REINER AND JUNSUN REINER; JOE CORBIN AND MARY LOU CORBIN; JAMES R. WILLIAMS AND ALBERTA WILLIAMS; SYLVESTER HOWARD AND CORNELIUS HOWARD; CHARLES E. LABBY, JR.; LESTER MAY; CHARLES W. COUNTS AND THELMA COUNTS; NOEL ROGERS AND DIANE ROGERS; MELVIN VOIGHT AND GLORIA VOIGHT; GEORGE G. PATRICK; ADA LASSITER AND RICHARD LASSITER, ON BEHALF OF HIMSELF AND AS PRESIDENT OF THE BRYNN MARR/COLLEGE PARK CITIZENS ASSOCIATION, ON BEHALF OF ALL MEMBERS OF THE BRYNN MARR/COLLEGE PARK CITIZENS ASSOCIATION, AN ASSOCIATION OF RESIDENTS OPPOSING ANNEXATION INTO THE CITY OF JACKSONVILLE v. CITY OF JACKSONVILLE, NORTH CAROLINA; W. BRUCE TEACHEY; A. D. GUY; GEORGE L. JONES; M. C. CHOATE; JOE T. MORGAN; AND JAMES L. PENNINGTON

No. 55

(Filed 6 May 1980)

1. **Municipal Corporations § 2.1— annexation—maps supplied by city—compliance with statute**

In a proceeding attacking an annexation ordinance, evidence was sufficient to support the trial court's conclusion that maps supplied by respondent city substantially met the requirements of G.S. 160A-47.

2. **Municipal Corporations § 2.1— annexation ordinance challenged—exclusion of black community—statutory requirements met**

In a proceeding attacking an annexation ordinance there was no merit to petitioners' contention that the requirements of G.S. 160A-45 (declarations of policy) had not been met because a small, black residential area with no sewer services had not been annexed by respondent, since (1) the primary statute prescribing the exact procedure for annexation is G.S. 160A-49, and petitioners stipulated that respondent fully complied with the requirements of that statute, and (2) petitioner asserted that there was injury to the residents of the black community due to a discriminatory annexation policy, but petitioners lacked standing to raise this issue.

APPEAL by petitioners from judgment of *Tillery, J.* at the 25 June 1979 Session of ONSLOW County Superior Court.

On 25 April 1979, the City of Jacksonville adopted an ordinance providing for the annexation of the Brynn Marr/College Park Area. On 21 May 1979, petitioners, who own land in the area to be annexed, filed a petition in the Superior Court pursuant to G.S. 160A-50 seeking review of the city's action. At the conclusion of the hearing in Superior Court, Tillery, J. entered his findings of fact and conclusion of law upholding the annexation ordinance in all respects.

Petitioners appealed to this Court and pending appeal an order was entered staying the annexation.

Facts necessary to the decision of this case will be related in the opinion.

Burney, Burney, Barefoot & Bain by Michael R. Mitwol for petitioner-appellants.

Warlick, Milsted, Dotson & McGlaughon by Marshall F. Dotson, Jr. for respondent-appellees.

COPELAND, Justice.

G.S. 160A-38(h), as amended in 1977, provides that the appeal in annexation cases involving cities of less than 5,000 people is to the Court of Appeals. G.S. 160A-50(h) presently provides that the appeal in annexation cases involving cities of 5,000 or more people is to this Court. Therefore, petitioners properly appealed directly to this Court.

[1] Review in the superior court and appeal to the appellate division in annexation cases are governed by G.S. 160A-50. G.S. 160A-50(f)(2) allows the petitioner to present evidence to show that the provisions of G.S. 160A-47 have not been met. Specifically, petitioners complain that the provisions of subsection (1) a, b and c of section 47 have not been met. That statute provides that a map or maps must be included in the annexation report showing the following information:

"a. The present and proposed boundaries of the municipality.

b. The present major trunk water mains and sewer interceptors and outfalls, and the proposed extensions of such mains and outfalls as required in subdivision (3) of this section.

c. The general land use pattern in the area to be annexed." G.S. 160A-47(1).

On appeal, the findings of fact made below are binding on this Court if supported by the evidence, even when there may be evidence to the contrary. *In re Annexation Ordinance*, 296 N.C. 1, 249 S.E. 2d 698 (1978). Conclusions of law drawn by the trial judge from the findings of fact are reviewable *de novo* on appeal. *Food*

Town Stores, Inc. v. City of Salisbury, 300 N.C. 21, 265 S.E. 2d 123 (1980); *Harrelson v. State Farm Mutual Automobile Ins. Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968).

Our inquiry is whether petitioners have met their burden of showing by competent and substantial evidence that respondent did not comply with this statute. *In re Annexation Ordinance, supra.* Although petitioners have evidence in the record to the contrary, there is evidence to support the trial judge's findings that the maps substantially comply with the requirements of this statute. The entire present boundaries of the City of Jacksonville are not shown on any map in the record. However, we need not reach the issue of whether G.S. 160A-47(1) a. requires that the *entire* present city boundaries be shown for two reasons. First, one of the reasons a map is needed is to determine whether the contiguity requirements of G.S. 160A-48(b)(1) and (2) have been met. Petitioners stipulated that all of the requirements of G.S. 160A-48 have been fully met. Second, petitioners cannot show that they have been prejudiced or have suffered material injury due to this alleged noncompliance. Therefore, the error, if any, does not constitute reversible error. There is evidence to support the finding that "the petitioners have failed to show by competent evidence that they have suffered material injury by reason of any failure of the City of Jacksonville to comply with the procedures set forth in the statutes or any failure of the respondent to meet the requirements set forth in G.S. 160A-47 or G.S. 160A-48 or that there was any irregularity in the proceedings which materially prejudiced the substantive rights of the petitioners." This assignment of error is overruled.

[2] Petitioners contend that under G.S. 160A-50(f)(1) they can present evidence that the requirements of G.S. 160A-45 (declarations of policy) have not been met. Their argument is that the spirit and intent of the policies enumerated in subsections (1)—(4) of G.S. 160A-45 have been violated because Pickettown, a small, Black residential area with no sewer services, has not been annexed by the respondent. This assignment of error is without merit for two reasons.

First, it is true that the annexing authority must comply with the requirements of Part 3 of Chapter 160A which includes G.S. 160A-45 through 50. *In re Annexation Ordinance, supra.*

However, the provisions of G.S. 160A-45 are merely statements of policy. No procedural steps, substantive rights, or annexation requirements are contained in that statute. The policies enumerated there are aids for statutory interpretation when other sections of part 3 of Chapter 160A are in need of clarification, definition, and interpretation.

For example, subsection (1) of G.S. 160A-45 states as a matter of policy that "sound urban development is essential to the continued economic development of North Carolina." The other provisions of part 3 of Chapter 160A then prescribe what must be done in order to annex an area. When G.S. 160A-47, 48 and 49 have been followed, then sound economic development has occurred because these statutes were enacted to implement and effectuate the intent and policies of the legislature that are enumerated in G.S. 160A-45. We have held above that G.S. 160A-47 was followed and petitioners have stipulated that the requirements of G.S. 160A-48 and 49(a)—(e) have been met with respect to the annexation of the Brynn Marr/College Park Area.

As discussed above, G.S. 160A-50(f)(2) allows a petitioner to present evidence that the requirements of G.S. 160A-47 (prerequisites to annexation; ability to serve; report and plans) have not been met. G.S. 160A-50(f)(3) allows a petitioner to present evidence that the requirements of G.S. 160A-48 (character of area to be annexed) have not been met. G.S. 160A-50(f)(1) allows a petitioner to present evidence that "the statutory procedure was not followed." The primary statute prescribing the exact procedure for annexation is G.S. 160A-49 (procedure for annexation) and petitioners have stipulated that the respondent has fully complied with the requirements of G.S. 160A-49(a)—(e).

Second, the residents of this area do not argue that they are themselves suffering material injury or prejudice. They are asserting that there has been injury to the residents of Pickettown due to a discriminatory annexation policy. This they lack standing to do, *see, Warth v. Seldin*, 422 U.S. 490, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975) (no self-injury or justification to allow standing to enforce the rights of others), and such a cause of action, if any, does not lie in a petition to review an annexation ordinance. This assignment of error is overruled.

The stay of annexation is dissolved and the judgment of the trial judge is

Affirmed.

STATE OF NORTH CAROLINA v. WINSTON FRED WILLIAMS

No. 72

(Filed 6 May 1980)

Burglary and Unlawful Breakings § 5; Rape § 5— first degree burglary—second degree rape—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of first degree burglary and second degree rape.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant from *Martin, J.*, 8 October 1979 Regular Criminal Session of WAKE Superior Court.

Defendant was charged in bills of indictment proper in form with the second-degree rape of Ms. Nancy Sue Grant and the first-degree burglary of her apartment. He entered a plea of not guilty to each charge.

At trial[1], the State offered evidence summarized in pertinent part as follows:

On 5 December 1978, Ms. Grant was a registered nurse employed at Rex Hospital in Raleigh, North Carolina. After getting off duty at 11:00 p.m. on said date she returned to her apartment complex after taking a co-worker home. Before going to her own apartment, Ms. Grant stopped to check her mailbox. As she did, she noticed a light blue sedan with its passenger door open parked nearby. A beared man wearing a blue shirt was leaning over near the car.

Ms. Grant picked up her mail and drove on to her apartment. After going inside, she closed her front door, locked it, and put on the security chain. Shortly thereafter, the doorbell rang and someone started knocking at the front door. She turned on the

1. This case was called for trial originally on 4 September 1979 in Wake Superior Court, Martin, J., presiding. The first trial ended in a mistrial.

light in her living room and went to the door. She turned the door knob and slightly opened the door without removing the door chain. As she did, a man broke through the door, pulling the security chain out of the door frame. Ms. Grant screamed at his entry, but he put his hand over her mouth and slammed the door shut. As the intruder kept his hand over her mouth, he talked with her, apparently trying to calm her down. Throughout this time, he remained standing behind the nurse, and she was unable to see his face.

Taking his hand off of her mouth, the assailant ordered Ms. Grant to stand flat against the door. All the while, he remained behind her, talking with her, saying that he would not hurt her. As yet, she had still not seen him face to face, though she noticed he was wearing black gloves. Despite her pleas to leave the apartment and let her go, the intruder remained, continuing to talk to her as he restrained her. After the passage of an indeterminate period of time, he directed Ms. Grant into her bedroom and ordered her to remove her clothes. Despite Ms. Grant's protestations, he forced her to get into bed with him.

After remaining in bed with her for a short while, the assailant blindfolded Ms. Grant and proceeded to kiss and caress her, forcing her to submit to the act of cunnilingus. Thereupon, she was ordered to put on a nightgown. When she had done so, the man removed her blindfold and directed her to go into the living room again. Ms. Grant, seeing the intruder for the first time, identified him as defendant. At that time he was wearing a blue shirt, black pants, and black shoes.

Defendant sat with Ms. Grant on the couch in the living room and talked with her. After a while, he directed her to sit on his lap, saying that he wanted to make love to her and that she was going to ask him to do so. If she did not, he was going to rape her. She complied with the demand, and defendant began to caress her.

Defendant thereupon forced her to go back to the bedroom and get in bed. He then removed his clothing, got in bed, and raped her. After the assault had been completed, defendant allowed Ms. Grant to go into her bathroom, whereupon she locked the door and refused to come out. After defendant demanded that she come out, saying that she was no match for him, she emerged

from the bathroom. While defendant dressed, he continued to talk with her, asking if she intended to call the police. He kissed her again and left the apartment. As soon as he walked out, Ms. Grant locked the bedroom door. After waiting for three or four minutes, she came out of the bedroom and called a friend.

On 6 December 1978, after receiving medical treatment at Wake Medical Center, and on several occasions thereafter, Ms. Grant perused mug books provided her by the Raleigh Police Department without identifying her assailant. She was also unable to formulate a composite picture of the rapist. On 6 March 1979, she spotted a photograph of defendant in a mug book and identified him as the man who had raped her.

Defendant took the stand in his own behalf and denied that he had raped Ms. Grant. He stated that on the night of 5 and 6 December 1978 he was in Durham because of problems he had been having with a new employee. A number of defense witnesses testified as to defendant's good reputation in the community.

Defendant was convicted of second-degree rape and first-degree burglary. He was sentenced to life imprisonment on the charge of first-degree burglary and to a term of 25 years to life on the charge of second-degree rape. The sentences are to run concurrently.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General H. A. Cole, Jr., for the state.

Brian A. Tenney for defendant-appellant.

BRITT, Justice.

Counsel for defendant excepted to the judgment entered and perfected his appeal. The record on appeal contains no assignments of error. Without presenting any arguments in his brief, defense counsel has submitted the record on appeal with a request that we examine the record to the end that we might determine whether any prejudicial error occurred at defendant's trial.

While Rule 28 of the Rules of Appellate Procedure specifies that our view is limited to questions which are supported by arguments and authorities cited in the brief, we may suspend or vary the Rules in order to prevent manifest injustice or expedite

a decision in the public interest. *State v. Adams*, 298 N.C. 802, 260 S.E. 2d 431 (1979); N.C. R. App. P. 2.

Though no argument has been presented to us for our consideration, because of the seriousness of the offenses charged and the severity of the punishment imposed, we have elected to examine the entire record. On the basis of our examination, we conclude that the cases were properly presented to the jury for decision since there was substantial evidence of every essential element of the offenses charged and that defendant was the perpetrator of the offenses. *See State v. Adams, supra; State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). Furthermore, we are unable to find any prejudicial error in the admission of evidence. The court in its instructions correctly explained and applied the applicable law to the evidence presented.

We, therefore, hold that there was no error committed which would warrant the disturbing of the verdicts and judgments.

No error.

Justice BROCK did not participate in the consideration or decision of this case.

BELIN v. ROHM & HAAS

No. 128 PC.

Case below: 45 N.C. App. 554.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

BOST v. RILEY

No. 74 PC.

Case below: 44 N.C. App. 638.

Petition by defendant doctors for discretionary review under G.S. 7A-31 denied 6 May 1980.

BRICKELL v. COLLINS

No. 95 PC.

Case below: 44 N.C. App. 707.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

BROWN v. POWER CO.

No. 112 PC.

Case below: 45 N.C. App. 384.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

CAUBLE v. CITY OF ASHEVILLE

No. 124 PC.

No. 21 (Fall Term).

Case below: 45 N.C. App. 152.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 May 1980. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question denied 6 May 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

CITIZENS ASSOC. v. CITY OF WASHINGTON

No. 91 PC.

Case below: 45 N.C App. 7.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 6 May 1980.

CLARK v. CLARK

No. 92 PC.

Case below: 44 N.C. App. 730.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

CLARK v. CLARK

No. 93 PC.

Case below: 44 N.C. App. 730.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

CLONTZ v. CLONTZ

No. 35 PC.

Case below: 44 N.C. App. 573.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 May 1980.

COCKERHAM v. WARD and ASTRUP CO. v. WEST CO.

No. 90 PC.

Case below: 44 N.C. App. 615.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

DANJEE, INC. v. ADDRESSOGRAPH MULTIGRAPH CORP.

No. 73 PC.

Case below: 44 N.C. App. 626.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

GREENHILL v. CRABTREE

No. 86 PC.

No. 18 (Fall Term).

Case below: 45 N.C. App. 49.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 6 May 1980.

HARRELL v. STEVENS & CO.

No. 127 PC.

Case below: 45 N.C. App. 197.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 May 1980.

HASSELL v. WILSON

No. 25 PC.

No. 16 (Fall Term).

Case below: 44 N.C. App. 434.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 6 May 1980.

HOTEL CORP. v. TAYLOR and
FLETCHER v. FOREMANS, INC.

No. 111 PC.

No. 20 (Fall Term).

Case below: 45 N.C. App. 229.

Petition by defendants Fletcher for discretionary review under G.S. 7A-31 allowed 6 May 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

INSURANCE CO. v. INGRAM, COMR. OF INSURANCE

No. 4 PC.

No. 15 (Fall Term).

Case below: 43 N.C. App. 621.

Petition by Wake Anesthesiology Assoc. and its employees for rehearing is allowed, orders of 1 April 1980 (299 N.C. 736) denying discretionary review and dismissing appeal are rescinded, and petition for discretionary review is now allowed and motion to dismiss appeal is dismissed 6 May 1980.

JEFFREYS v. SNIPES

No. 57 PC.

Case below: 45 N.C. App. 76.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

JONES v. PROFIT SHARING RETIREMENT

No. 137 PC.

Case below: 45 N.C. App. 713.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

KEELS v. TURNER

No. 114 PC.

Case below: 45 N.C. App. 213.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 May 1980.

LAMP CO. v. CAPEL

No. 43 PC.

Case below: 45 N.C. App. 105.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

LOVE v. INSURANCE CO. and INSURANCE CO. v. MOORE

No. 108 PC.

Case below: 45 N.C. App. 444.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

MAYTON v. HIATT'S USED CARS

No. 105 PC.

Case below: 45 N.C. App. 206.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

NEWGARD v. NEWGARD

No. 107 PC.

Case below: 44 N.C. App. 730.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

PAUL v. COMR. OF MOTOR VEHICLES

No. 53 PC.

Case below: 44 N.C. App. 731.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 May 1980.

PIERCE v. PIVER

No. 88 PC.

No. 19 (Fall Term).

Case below: 45 N.C. App. 111.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 May 1980. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question denied 6 May 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

REICH v. REICH

No. 37 PC.

Case below: 44 N.C. App. 613.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

SAVINGS AND LOAN LEAGUE v. CREDIT UNION COMM.

No. 76 PC.

No. 17 (Fall Term).

Case below: 45 N.C. App. 19.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 May 1980. Motion of respondents to dismiss appeal for lack of substantial constitutional question denied 6 May 1980.

SMITH v. BYERS

No. 81 PC.

Case below: 44 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

STATE v. BALL

No. 137.

Case below: 45 N.C. App. 713.

Motion of Attorney General to dismiss defendant's notice of appeal for lack of substantial constitutional question allowed 6 May 1980.

STATE v. COLLINS

No. 113 PC.

Case below: 45 N.C. App. 555.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

STATE v. DOUGLAS

No. 58 PC.

Case below: 44 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 May 1980.

STATE v. GREENE

No. 54 PC.

Case below: 44 N.C. App. 731.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

STATE v. HARVELL

No. 106 PC.

Case below: 45 N.C. App. 243.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 May 1980.

STATE v. KRAMER

No. 110 PC.

Case below: 45 N.C. App. 291.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

STATE v. LEDFORD

No. 158 PC.

Case below: 46 N.C. App 122.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. MOREHEAD

No. 192 PC.

Case below: 46 N.C. App. 39.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 May 1980.

STATE v. PARTIN

No. 170 PC.

Case below: 46 N.C. App. 122.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 May 1980.

STATE v. RIDDLE

No. 80 PC.

Case below: 45 N.C. App. 34.

Petition by defendants Riddle and Smith for discretionary review under G.S. 7A-31 denied 6 May 1980. Motion of Attorney General to dismiss defendant Smith's notice of appeal for lack of substantial constitutional question allowed 6 May 1980.

STATE v. WARD

No. 126 PC.

No. 22 (Fall Term).

Case below: 44 N.C. App. 513.

Petition by Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 6 May 1980.

STATE v. WRIGHT

No. 129 PC.

Case below: 45 N.C. App. 555.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 May 1980.

THOMAS v. POOLE

No. 98 PC.

Case below: 45 N.C. App. 260.

Petition by defendant Security Service Corp. for discretionary review under G.S. 7A-31 denied 6 May 1980.

THOMPSON v. INSURANCE CO.

No. 56 PC.

Case below: 44 N.C. App. 668.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

TOWN OF BLADENBORO v. McKEITHAN

No. 76.

Case below: 44 N.C. App. 459.

Motion of plaintiff to dismiss appeal for failure to comply with Rules allowed 22 April 1980.

TRIPLETT v. JAMES

No. 49 PC.

Case below: 45 N.C. App. 96.

Petition by defendant Western Surety Co. for discretionary review under G.S. 7A-31 denied 6 May 1980.

WAREHOUSE v. AUTO SUPPLY

No. 138 PC.

Case below: 45 N.C. App. 555.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WILLIS v. WILLIS

No. 94 PC.

Case below: 44 N.C. App. 732.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

WRAY v. HUGHES

No. 89 PC.

Case below: 44 N.C. App. 678.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 May 1980.

PHYLLIS H. SNYDER v. GEORGE K. FREEMAN, JR.; DOUGLAS L. CROOM; JOHN COLUCCI, JR.; JOHN COLUCCI III; WOODROW PRIDGEN; AERONAUTICS, INC.; AND PAUL DaSAN MARTINO

No. 26

(Filed 3 June 1980)

1. **Limitation of Actions § 7— accrual of cause of action—questions of fact—summary judgment improper**

Where a question of fact existed as to when a breach of an agreement occurred and the statute of limitations began to run, summary judgment on the basis of the statute of limitations was inappropriate.

2. **Corporations § 4.1; Trusts § 13.1— agreement to repay loan from sale of stock—corporation not signatory to agreement—corporation bound by action of all shareholders**

Defendants' contention that they had no fiduciary duty as directors of a corporation to apply funds received by the corporation for the sale of stock in accordance with an agreement between defendants which earmarked a portion of the proceeds for plaintiff because the corporation itself did not sign the agreement and therefore was not bound by the agreement was without merit, since, under some circumstances the action of *all* the shareholders of a close corporation binds the corporation even if the corporation is considered to be a legal entity separate from the shareholders; therefore, the lower court erred in dismissing plaintiff's complaint for breach of trust by defendants as directors of the corporation where she alleged that at the time of the agreement in question, two of the defendants were the sole shareholders and were officers and directors of the corporation; pursuant to the terms of the agreement itself, four of the individual defendants became sole shareholders and directors; and under these circumstances, plaintiff could prove at trial that the corporation was bound by the agreement, notwithstanding that the corporation itself was not a signatory thereto.

3. **Corporations § 11— action by creditor—ratification by corporation**

In an action by plaintiff to recover for breach of trust by defendants as directors of a corporation where plaintiff claimed under an agreement signed only by the individual defendants and not by the corporation, plaintiff's complaint against the individual defendants was nevertheless sufficient to state a claim, since the principle of ratification could apply to bind the corporation, and thus defendant directors, where a shareholders' agreement was executed; the corporation then issued 6000 shares of stock to two of the defendants for which it received $10,000; and the corporation thereby accepted the benefits of the agreement.

4. **Trusts § 13.1— agreement to repay loan from sale of stock by corporation—failure of directors to repay—breach of trust—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim for breach of trust by defendants as directors of a corporation where plaintiff alleged that, pursuant

to a shareholders' agreement, the corporation was bound to earmark for plaintiff the sum of $5400, a part of the $10,000 proceeds derived from the issuance of 6000 shares of the corporation's stock, since the language of the shareholders' agreement was not, on its face, insufficient in law to establish a trust for plaintiff's benefit.

5. **Corporations § 4; Trusts § 13.1— money held by corporation as trustee—reliance on trust fund doctrine—sufficiency of complaint**

If plaintiff could prove that a corporation held $5400 as trustee under a special trust for her benefit, she then could rely on the "trust fund doctrine"—which means, in a sense, that the assets of a corporation are regarded as a trust fund, and the officers and directors occupy a fiduciary position in respect to stockholders and creditors, which charges them with the preservation and proper distribution of those assets—to show a breach of defendant directors' fiduciary duty, and the lower court erred in dismissing her complaint.

6. **Corporations § 13; Rules of Civil Procedure § 19— action against directors of corporation—injury personal to plaintiff—joinder of corporation as plaintiff unnecessary**

In an action to recover for breach of trust by defendants as directors of a corporation, the corporation was not a necessary party plaintiff, since plaintiff, in claiming that a portion of proceeds from sale of stock had been earmarked to repay her for a loan to the corporation, claimed an injury peculiar or personal to herself and did not claim injury to the corporation.

7. **Contracts § 25— implied contract—sufficiency of complaint**

Plaintiff's complaint was sufficient to state a claim on an implied contract between herself and defendants where the pleadings did not show an express agreement between plaintiff and defendants; the only agreement alleged was between defendants; it was the provisions of that agreement designed for plaintiff's benefit that could constitute, at least by implication, an offer to plaintiff; and by forbearing to collect her claims against the corporation of which defendants were directors or resigning from the board, or both, plaintiff, again by implication, accepted the offer and furnished consideration for the resulting agreement.

8. **Contracts § 14.1— contract for benefit of third party—complaint sufficient to state claim**

Plaintiff's complaint was sufficient to state a claim to recover as a third party beneficiary under an implied contract between defendant signatories to a shareholders' agreement and the corporation where plaintiff alleged that she was a creditor of the corporation; the signatories to the agreement were alleged to be the beneficial owners of the corporation with full power to control it; plaintiff could thus prove that the signatories promised each other and, by implication, the corporation itself, that if the corporation would issue 6000 shares of its stock, it would receive $10,000 capital; the agreement was tantamount to a promise by the signatories to cause the corporation to issue the stock, to receive the capital, and to pay plaintiff, among other creditors, out of the proceeds; the signatories caused the corporation to issue its stock and accept the capital, but they failed to cause it to pay plaintiff; and for this breach,

plaintiff could be entitled to recover as a direct, intended, creditor beneficiary of the implied promise of the signatories to the debtor corporation.

ON certiorari to the Court of Appeals, opinion by *Judge Clark*, with *Judges Vaughn* and *Hedrick* concurring, reported at 40 N.C. App. 348, 253 S.E. 2d 10 (1979). The Court of Appeals affirmed dismissal of the complaint by Judge Rouse presiding at the 28 November 1977 Session of NEW HANOVER Superior Court. We allowed plaintiff's petition for writ of certiorari on 25 September 1979 pursuant to App. R. 21.

Franklin L. Block, Attorney for plaintiff-appellant.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., Attorneys for defendant appellee George K. Freeman, Jr.

Rountree & Newton, by J. Harold Seagle and George Rountree III, Attorneys for defendant-appellees John Colucci, Jr., John Colucci III, and Aeronautics, Inc.

EXUM, Justice.

This is an action against the shareholders, officers and directors of General Aviation, Inc., in their individual capacities for breach of an agreement to which only they, individually, are signatories. That part of the agreement relied on provides for the earmarking for the benefit of plaintiff as creditor of the corporation some of the proceeds of the sale of capital stock of General Aviation pursuant to other provisions in the agreement. The question presented is whether defendants can be liable to plaintiff in their individual capacities when the funds so earmarked for the plaintiff's benefit have not been paid to her but have, apparently, been used for other corporate purposes. The Court of Appeals concluded that they could not and, therefore, the complaint failed to state a claim upon which relief could be granted. We disagree and reverse.

Plaintiff alleges in substance as follows: Before 3 February 1967 she was an employee of General Aviation and had loaned it $4,602.50. On 3 February 1967, therefore, General Aviation was indebted to her for this amount plus interest. The corporation also owed her $800.00 plus interest for back salary earned. Defendants Freeman and Croom were at these times officers, directors, and sole shareholders of the corporation. On 3 February

1967, Freeman and Croom contracted in writing with defendants Colucci that the latter would pay General Aviation the sum of $10,000 for a 50 percent interest in the corporation to be evidenced by the issuance of 6000 shares of its stock. Plaintiff attaches this written agreement to the complaint and incorporates it therein. General Aviation is not a signatory to the agreement and there is nothing on the face thereof which indicates that the individual signatories are acting for the corporation. Section 3(b) of the agreement provides that upon its consummation plaintiff "shall resign from the Board of Directors of General Aviation and [defendants Freeman and Croom] shall elect to the board to fill her vacancy Mr. John Colucci III or his designee." Section 3(c) provides:

> "Out of monies coming in to the corporation from the sale of 6,000 shares of stock to the parties of the second part or their designee, the corporation shall pay salaries accrued to Mrs. Snyder in the amount of approximate [sic] $800.00, a note payable for equipment (a Pepsi-Cola drink machine) in the amount of approximately $150.20, the following notes payable to Mrs. Anne T. Freeman in the amount of $1,286.86 plus interest and to Mrs. Phyllis Snyder in the amount of $4,602.50 plus interest; accrued Federal Taxes in the amount of $2,742.06 (It is understood that George K. Freeman, Jr., has already paid said Federal Taxes in said amount and that the check will be made to reimburse him); and the balance of such monies to be paid against outstanding accounts payable as revealed by an audit of the company dated November 30, 1966, done and prepared by Norborne G. Smith, Jr., Certified Public Accountant of Goldsboro, North Carolina."

Plaintiff further alleges: after the execution of the agreement and pursuant thereto the Coluccis paid $10,000 to General Aviation, received 6000 shares of its stock, and "became officers and/or directors of the corporation." Defendants, however, have "failed to pay the plaintiff the funds owing her" in accordance with the agreement. Rather defendants "injustifiably dissipated said funds for other purposes." Plaintiff withheld making prior formal demand for payment because she feared she would lose her job if she did so. On 30 June 1975 General Aviation ceased doing business and was from that date "defunked [sic] and without

assets." Subsequently plaintiff unsuccessfully demanded payment of the corporate and individual defendants.

The complaint, filed on 2 February 1977, seeks damages of $5,402.50 plus interest against defendants individually, jointly and severally. General Aviation was not made a party to the action. All defendants except Croom answered. Two defenses asserted are failure of the complaint to state a claim upon which relief can be granted and the three year statute of limitations. Judge Rouse, on 28 November 1977, after hearing, ordered that the complaint be dismissed "for failing to state a cause of action against the Defendants and in the alternative, if a cause of action is stated, that the same is barred by the statute of limitations." The Court of Appeals affirmed the dismissal for failure to state a claim but vacated that part of the order grounded on the statute of limitations.

[1] We agree with the Court of Appeals' conclusion that Judge Rouse's dismissal on the ground of the statute of limitations was, in effect, the entry of summary judgment inasmuch as matters outside the pleadings must have been considered by him. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Although the three year statute of limitations is applicable, there is, as the Court of Appeals noted, "a question of fact remaining as to when the breach occurred and the statute of limitations began to run." 40 N.C. App. at 353, 253 S.E. 2d at 13. Summary judgment on the basis of the statute of limitations is, therefore, not appropriate. We also agree that no claim has been stated against defendant Aeronautics, Inc.[1] We disagree, however, with the Court of Appeals' determination that the complaint was properly dismissed for failure to state a claim under Rule 12(b)(6) as to defendants Colucci, Freeman, and Croom.

" 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or a fact suffi-

1. Plaintiff, after Judge Rouse's ruling, took a voluntary dismissal as to defendants Pridgen and Martino. The complaint alleges that in 1974 these defendants purchased 75 percent of General Aviation's stock from the Coluccis and Freeman and that, in turn, in 1975, this stock was transferred to Aeronautics, Inc. Plaintiff does not allege that either Pridgen, Martino, or Aeronautics, Inc., were parties to the 1967 agreement nor does the agreement itself, attached to the complaint, show them to have been.

cient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim,' But a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Sutton v. Duke*, 277 N.C. 94, 1020-3, 176 S.E. 2d 161, 166 (1970), *quoting* Moore, Federal Practice, § 12.08 (1968). (Emphasis original.) "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *White v. White*, 296 N.C. 661, 667, 252 S.E. 2d 698, 702 (1979).

The question is, then, whether under any set of facts which plaintiff may be able to prove relevant to the agreement on which she relies, there is some legal theory available by which she can establish liability against defendants Coluccis, Croom, and Freeman in their individual capacities. We think there are at least three such theories: (1) breach of trust by defendants as directors of General Aviation; (2) breach of an implied contract between defendants as shareholders of General Aviation and plaintiff; and (3) breach of an implied contract by defendants as shareholders of General Aviation and the corporation to which plaintiff is a third-party beneficiary.

Breach of Directors' Fiduciary Duty

The breach of directors' fiduciary duty theory rests on these propositions: (1) the shareholders' agreement relied on bound General Aviation, as a corporation, to its terms, one of which was to earmark a portion of the $10,000 stock sale proceeds for plaintiff's benefit; (2) the individual defendants as directors of the corporation had a fiduciary duty to plaintiff to see that these corporate funds were so earmarked and duly paid to her; (3) by failing to so earmark these funds and applying them to other purposes, albeit for proper corporate purposes, these defendants breached this fiduciary duty. The Court of Appeals rejected this theory; it concluded that the first proposition on which the theory rests was invalid since, as a matter of law, the corporation could not be bound by the shareholders' agreement. The Court of Appeals said, "[I]n order for a trust to be created in the capital obtained from issuing stock, the corporation itself must agree to hold the capital in trust for creditors." 40 N.C. App. at 351, 253 S.E. 2d at 12. Defendants argue to us that since the corporation

itself did not sign the agreement, the agreement cannot bind the corporation. Therefore they, as directors of the corporation, had no fiduciary duty to apply the funds in accordance with the agreement. Indeed defendants argue boldly to this Court that the agreement insofar as it requires the funds to be earmarked for plaintiff is illusory, binding neither them nor the corporation to its terms; therefore, plaintiff cannot enforce it.

[2] Plaintiff, however, alleges that at the time of the agreement, Freeman and Croom were the sole shareholders and were officers and directors of the corporation. Pursuant to the terms of the agreement itself, the Coluccis, Freeman, and Croom became sole shareholders and directors. We think under these circumstances plaintiff may prove the corporation bound by the agreement, notwithstanding that the corporation itself was not a signatory thereto.

Under some circumstances, the action of *all* the shareholders of a close corporation bind the corporation even if the corporation is considered to be a legal entity separate from the shareholders. A corporation is ordinarily bound by acts of its shareholders and directors "only when they act as a body in regular session or under authority conferred at a duly constituted meeting." *Park Terrace, Inc. v. Phoenix Indemnity Co.*, 241 N.C. 473, 478, 85 S.E. 2d 677, 680 (1955), *on rehearing*, 243 N.C. 595, 91 S.E. 2d 584 (1956). Nevertheless, " '[t]he contracts of the sole shareholder, or all the shareholders, will bind the corporation in modern law, although not made by the authority of the board of directors, since they are the only persons beneficially interested, aside from corporate creditors. If they do not distinguish between corporate business and their individual affairs, or waive formalities established for their benefit, there is no reason why the courts should insist on such formalities. The contract of the owners of all shares will be regarded as binding on the corporation if so intended.' "[2] *Philadelphia Life Insurance Co. v. Crosland-Cullen Co.*,

2. Some indication that Croom, Freeman and the Coluccis intended General Aviation to be bound by the Agreement is found in those terms of the agreement which require General Aviation to issue 6,000 shares of its stock to the Coluccis, or their designee. This provision provides: "As soon as the parties of the second part [Coluccis] shall pay into the Treasurer of General Aviation, Inc. the sum of Ten Thousand Dollars ($10,000.00) and said Treasurer or the appropriate officers shall issue 6,000 shares of stock to the parties of the second part or their designee, then and upon such event, the parties hereto agree as follows:"

234 F. 2d 780, 783 (4th Cir. 1956), *quoting* Ballentine on Corporations § 126, p. 296.[3] *See also Wall v. Colvard, Inc.*, 268 N.C. 43, 149 S.E. 2d 559 (1966); 18 Am. Jur. 2d, Corporations § 485 (1965). *See generally* Latty, "A Conceptualistic Tangle and the One- or Two-Man Corporation," 34 N.C. L. Rev. 471 (1956).

In *Brewer v. First Natinal Bank of Danville*, 202 Va. 807, 120 S.E. 2d 273 (1961), plaintiff's action against a corporation was based on a shareholder's agreement to pay plaintiff $40 per week for life. The corporation was a family business, all the shares of which were originally owned by plaintiff. The agreement in question was executed between plaintiff and members of her family as a part of a transaction for the sale of plaintiff's stock to the family members. The agreement was signed by plaintiff and by each subsequent shareholder. Payment was made by the corporation pursuant to the agreement from 1955 to 1959. The Virginia Supreme Court held: Ordinarily a corporation is bound only by actions taken at a duly constituted meeting of the board of directors. Where, however, shareholders, officers, and directors of a family or close corporation ignore such formalities and conduct business informally, such actions are nonetheless binding on the corporation. The agreement called for the corporation to make the payments to plaintiff; it was bound to do so.

3. The Fourth Circuit relied on the citation of this section of Ballentine in the second *Park Terrace* case. One basis for the holding in *Park Terrace* was that when one person acquires all the stock of a corporation, the corporation as a separate entity "becomes dormant or inactive," 243 N.C. at 597, 91 S.E. 2d at 586; in effect the corporation as a legal entity merges with its sole shareholder. This much of *Park Terrace's* rationale was overruled by the enactment of G.S. 55-3.1 which "provides among other things that fewer than three persons may acquire all the capital stock of a corporation without impairing its capacity to act as a corporation." *Lester Brothers v. Pope Realty & Insurance Co.*, 250 N.C. 565, 567, 109 S.E. 2d 263, 266 (1959). The validity of other principles enunciated in *Park Terrace*, however, was not affected by the legislative enactment. We believe this principle of law from Ballentine, quoted with approval by the Fourth Circuit, is sound and unaffected by the legislation referred to. The principle seems to have been adopted in the better reasoned cases from other jurisdictions. *Nordin v. Kaldenbaugh*, 7 Ariz. App. 9, 435 P. 2d 740 (1967); *Merlino v. West Coast Macaroni Mfg. Co.*, 90 Cal. App. 2d 106, 202 P. 2d 748 (1949); *Moss v. Waytz*, 4 Ill. App. 2d 296, 124 N.E. 2d 91 (1955); *Petruzzi v. Peducka Construction Co.*, 362 Mass. 190, 285 N.E. 2d 101 (1972); *Elyea v. Lehigh Salt Min. Co.*, 169 N.Y. 29, 61 N.E. 992 (1901); *Brewer v. First National Bank of Danville, supra*, 202 Va. 807, 120 S.E. 2d 273 (1961) (discussed in text). *But see Bator v. United Sausage Co.*, 138 Conn. 18, 81 A. 2d 442 (1951); *Broyles v. Johnson*, 99 Ga. App. 69, 107 S.E. 2d 851 (1959); *Weber v. Sidney*, 19 App. Div. 494, 244 N.Y.S. 2d 228 (1963), *aff'd* 14 N.Y. 2d 929, 252 N.Y.S. 2d 327, 200 N.E. 2d 867 (1964).

The policy of this state as declared in its Business Corporation Act is to permit the shareholders in a close corporation to bind the corporation under appropriate circumstances. Subsections (b) and (c) of G.S. 55-73 provide, in part, as follows:

> "(b) Except in cases where the shares of the corporation are at the time or subsequently become generally traded in the markets . . . no written agreement to which all of the shareholders have actually assented . . . and which relates to any phase of the affairs of the corporation, whether to the management of its business or division of its profits or otherwise, shall be invalid as between the parties thereto, on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners. . . .
>
> (c) An agreement between all or less than all of the shareholders, whether solely between themselves or between one or more of them and a party who is not a shareholder, is not invalid, as between the parties thereto, on the ground that it so relates to the conduct of the affairs of the corporation as to interfere with the discretion of the board of directors, *but the making of such an agreement shall impose upon the shareholders who are parties thereto the liability for managerial acts that is imposed by this Chapter upon directors.*" (Emphasis supplied.)

These provisions are designed to permit the management of close corporations by shareholders thereof who act by other than normal corporate procedures. Such actions by the shareholders, if so intended, must perforce bind the corporation. The shareholders who participate therein have the same "liability for managerial acts that is imposed . . . upon directors." G.S. 55-73(c). *See generally* Latty, "The Close Corporation and the New North Carolina Business Corporation Act." 34 N.C. L. Rev. 432 (1956).

[3] The corporation may likewise be bound by this agreement under a principle of agency law: ratification. The facts alleged which may trigger its application are: After execution of the shareholders' agreement, General Aviation itself issued 6,000 shares of stock to the Coluccis for which it received $10,000. By accepting the benefits of the agreement, the corporation might

have made the agreement its own and become bound by it even if initially the agreement would not have bound the corporation.

"The binding effect of an agent's acts does not, however, necessarily depend upon the existence of authority in the agent at the time the act was done. It is fundamental that acts performed by an agent beyond the scope of his authority, and even acts performed by one who in point of fact is not an agent, but who assumes to act as an agent, may, if they could lawfully have been delegated, be ratified by the principal or by one in whose behalf they are assumed to be done. As applied to the law of agency, ratification is the affirmance by a person of a prior act which did not bind him, but which was done or professed to be done on his account, whereby the act is given effect as to some or all persons, as if originally authorized." *Jones v. Bank of Chapel Hill*, 214 N.C. 794, 798, 1 S.E. 2d 135, 137 (1939).

"The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts. 3 *Am. Jur.* 2d, Agency § 162. 'It is what a party does, and not what he may actually intend, that fixes or ascertains his rights under the law. He cannot do one thing and intend another and very different and inconsistent thing. The law will presume that he intended the legal consequences of what he does, or, in other words, that his intention accords in all respects with the nature of his acts.' " *Carolina Equipment & Parts Co. v. Anders*, 265 N.C. 393, 401, 144 S.E. 2d 252, 258 (1965).

" 'The defendant will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in its behalf. [Citation omitted.] It is a rule too well established to admit of debate that if a principal, with full knowledge of the material facts, takes and retains the benefits of an unauthorized act of his agent, he thereby ratifies such act, and with the benefits he must necessarily accept the burdens incident thereto or which naturally result therefrom. The substance of ratification is confirmation after conduct. [Citation omitted.] It is also a settled principle of ratification that the principal must ratify the whole of his agent's unauthorized act or not at all. He cannot accept its benefits and repudiate its burdens.' " *Maxwell v.*

Proctor & Gamble Distributing Co., 204 N.C. 309, 318, 168 S.E. 403, 407 (1933). *See also Brinson v. Mill Supply Co.*, 219 N.C. 505, 14 S.E. 2d 509 (1941); *Morris v. Basnight*, 179 N.C. 298, 102 S.E. 389 (1920); *Anderson v. American Suburban Corp.*, 155 N.C. 131, 71 S.E. 221 (1911).

The Court of Appeals concluded that none of the signatories to the agreement even "purported to act for the corporation . . . ." 40 N.C. App. at 351-52, 253 S.E. 2d at 12. We believe plaintiff might be able to prove otherwise. First, G.S. 55-73, discussed above, permits the shareholders of a close corporation to conduct the business of the corporation. Second, the agreement itself requires the corporation to issue 6,000 shares of its stock for which it was to receive $10,000. Inasmuch as the agreement requires corporate action, plaintiff might prove that its signatories in executing it were purporting to act for the corporation whose action was to be required. The corporation, by accepting the benefits of the transaction intended to and did, in fact, ratify the agreement. It thereby became bound by the agreement.

[4] If, then, plaintiff can prove General Aviation bound by the shareholders' agreement, she may also prove it was bound to earmark, or hold in special trust, for her the sum of $5,402.50, a part of the $10,000 proceeds derived from the issuance of 6,000 shares of General Aviation's stock. Defendants argue: (1) the language of the agreement is insufficient to establish a trust, (2) there was no intent to establish a trust, and (3) a corporation cannot legally establish such a trust because it amounts to a preference of one general creditor over another.

We believe the language of the agreement is not, on its face, insufficient in law to establish a trust for plaintiff's benefit. "[N]o particular words are necessary to create a trust if the purpose to create is evident." *YWCA of Asheville v. Morgan*, 281 N.C. 485, 490, 189 S.E. 2d 169, 172 (1972). "If it appears that the intention is that the property be held or dealt with for the benefit of another, a court of equity will affix to it the character of trust." *Stephens v. Clark*, 211 N.C. 84, 88, 189 S.E. 191, 194 (1937). Whether a trust was created depends on the parties' intent, but that intent is to be ascertained primarily from the language of the written document itself in light of surrounding facts and circumstances. *Citizens National Bank v. Home for Children*, 280 N.C. 354, 185

S.E. 2d 836 (1972); *Campbell v. Jordan*, 274 N.C. 233, 162 S.E. 2d 545 (1968); *McCain v. Womble*, 265 N.C. 640, 144 S.E. 2d 857 (1965); *In re Will of Wilson*, 260 N.C. 482, 133 S.E. 2d 189 (1963). A party to a contract may not, by asserting that he did not mean what he said, obtain an interpretation contrary to the express language of the contract. *Fidelity & Casualty Co. of N.Y. v. Nello L. Teer Co.*, 250 N.C. 547, 109 S.E. 2d 171 (1959). That this language is contained in a shareholders' agreement does not change the rules of construction. As stated in *Blount v. Taft*, 295 N.C. 472, 484, 246 S.E. 2d 763, 771 (1978):

> "Since consensual arrangements among shareholders are *agreements*—the products of negotiation—they should be construed and enforced like any other contract so as to give effect to the intent of the parties as expressed in their agreements, unless they 'violate the express charter or statutory provision, contemplate an illegal object, involve . . . fraud, oppression or wrong against other stockholders, or are made in consideration of a private benefit to the promisor.' "

Defendants rely on this language from *Wilson v. Crab Orchard Development Co.*, 276 N.C. 198, 209, 171 S.E. 2d 873, 881 (1970):

> "There is, however, at least, serious doubt that a corporation may make a valid contract to hold in trust for specified persons, or a specified group of persons, to whom it is not otherwise obligated, the capital it receives in exchange for its issuance of its own stock, so as to defeat the rights of its own creditors and of transferees of such stock therein."

Plaintiff, however, was one to whom General Aviation was otherwise obligated. Plaintiff may prove, further, that no rights of other creditors would have been defeated by General Aviation's compliance with the agreement. *See Wall v. Colvard, supra*, 268 N.C. 43, 49, 149 S.E. 2d 559, 564, where the Court noted:

> "In a number of jurisdictions 'the sole stockholder or the stockholders by unanimous action may do as they choose with the corporation's assets provided the interest of its creditors are not affected.' 18 Am. Jur. 2d, Corporations § 487 (1965) and cases therein cited. So far as the record

discloses, except for the conditional vendors of the cash register and truck, plaintiff was the corporation's only creditor at the time the mortgage in suit was given."

Whether any preference to plaintiff, moreover, was such as to defeat the rights of other creditors may depend on General Aviation's solvency at the time of the agreement's consummation. G.S. 23-1, *et seq.; Flowers v. American Agricultural Chemical Company*, 199 N.C. 456, 154 S.E. 736 (1930); *see also Commissioner of Banks v. Turnage*, 202 N.C. 485, 163 S.E. 451 (1932); *Cowan v. Dale*, 189 N.C. 684, 128 S.E. 155 (1925).

[5] If plaintiff can thus prove that General Aviation held $5,402.50 as trustee under a special trust for her benefit, she may then rely finally on the last of the three propositions to show a breach of directors' fiduciary duty. "Directors of a corporation are trustees of property of the corporation for the benefit of the corporate creditors as well as shareholders. It is their duty to administer the trust . . . for the mutual benefit of all parties interested . . . ." *Pender v. Speight*, 159 N.C. 612, 615, 75 S.E. 851, 852 (1912); *see also Anthony v. Jeffress*, 172 N.C. 378, 90 S.E. 414 (1916). "North Carolina adheres to the 'trust fund doctrine,' which means, in a sense, that the assets of a corporation are regarded as a trust fund, and the officers and directors occupy a fiduciary position in respect to stockholders and creditors, which charges them with the preservation and proper distribution of those assets." *Underwood v. Stafford*, 270 N.C. 700, 702, 155 S.E. 2d 211, 212 (1967). "And directors are liable for the misapplication of funds held in trust by the corporation, where they knew or ought to have known thereof. . . . Directors who mingle money collected for another with the funds of the corporation, in violation of the instruction of the owner, or who knowingly permit their subordinates to do so, whereby the fund is lost, are personally liable therefor." *Minnis v. Sharpe*, 198 N.C. 364, 367, 151 S.E. 735, 737 (1930).

[6] Neither is the corporation a necessary party plaintiff because of the holding in *Underwood v. Stafford, supra.* There the action was by a corporate creditor against four individuals who were officers, directors and shareholders of the corporate debtor. The complaint alleged defendants had defrauded corporate creditors by appropriating to themselves corporate assets. This Court held that since the allegations claimed wrongs against the corporation

itself, it was the duty of the corporation, primarily, to enforce defendants' obligations; therefore, the corporation was a necessary party plaintiff. The Court noted, however, 270 N.C. at 703, 155 S.E. 2d at 213:

> "If the cause of action were founded on injuries peculiar or personal to plaintiff himself, so that any recovery would not pass to the corporation and indirectly to other creditors, the cause of action could have been properly asserted by plaintiff; however, where the alleged breach or injuries are based on duties owed to the corporation and not to any particular creditor or stockholder, the creditor or stockholder cannot maintain the action without a demand on the corporation, or its receiver if insolvent, to bring the suit and a refusal to do so, and a joinder of the corporation as a party."

Plaintiff here claims injury "peculiar or personal" to herself. She does not claim injury to the corporation. Apparently all proceeds of the $10,000 stock issue were used for legitimate corporate purposes. Plaintiff claims only a violation by the directors of the special trust for her benefit upon which she alleges a portion of these funds were held.

Implied Contract

[7] Plaintiff may be able to prove a contract, implied in fact, between her and defendant shareholders who were signatories to the shareholders' agreement.

"A 'contract implied in fact,' . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract." 17 C.J.S., *Contracts* § 4(b) (1963). An implied contract is valid and enforceable as if it were express or written. "[A]part from the mode of proving the fact of mutual assent, there is no difference at all in legal effect between express and contracts implied in fact." Simpson, Contracts, § 5 (2d ed. 1965). Whether mutual assent is established and whether a contract was intended between parties are questions for the trier of fact. *Storey v. Stokes*, 178 N.C. 409, 100 S.E. 689 (1919); *Devries v. Haywood*, 64 N.C. 83 (1870).

The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). This mutual assent and the effectuation of the parties' intent is normally accomplished through the mechanism of offer and acceptance. "In the formation of a contract an offer and acceptance are essential elements." *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E. 2d 820, 823 (1960). With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.

In this case the plaintiff may prove that the shareholders' agreement itself constituted this offer to her: if she would forbear collecting her claims against the corporation, or resign from the board, or do both, defendants would cause the corporation to earmark a portion of the $10,000 proceeds for her benefit and to pay her out of these proceeds. By her forbearance and resignation, plaintiff may show she accepted the offer. Acceptance by conduct is a valid acceptance. *Durant v. Powell*, 215 N.C. 628, 2 S.E. 2d 884 (1939); *Woodman v. Millikan*, 126 Kan. 640, 270 P. 584 (1928) (forbearance by plaintiff creditor; held, acceptance of offer to pay if original debtor did not pay). Plaintiff's forbearance or resignation may constitute not only an acceptance of the offer, but also, sufficient consideration to support the contract. Forbearance in the exercise of a legal right is sufficient consideration. *Myers v. Allsbrook*, 229 N.C. 786, 51 S.E. 2d 629 (1949).

We are not inadvertent to the principle that where there is an express contract between parites, there can be no implied contract between them covering the same subject matter dealt with in the express agreement. *Vetco Concrete Company v. Troy Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962). In this case, plaintiff had furnished materials for the building of various houses under an express agreement with Fore-Taylor Building Company (Fore-Taylor) that it would pay for the materials. Some of the houses were actually constructed on lots owned by defendant Troy Lumber Company (Troy Lumber). Plaintiff did not know which company owned the lots when it furnished the materials. When Fore-Taylor defaulted on its contractual obligations to pay plaintiff, plaintiff brought action against defendant on the theory of an implied contract that defendant would pay. This Court held that plaintiff should have been nonsuited for the reason that hav-

ing expressly agreed to look to Fore-Taylor for payment for materials furnished, plaintiff could not rely on any implied agreement between it and Troy Lumber. The Court said, *id.* at 713-14, 124 S.E. 2d at 908:

> "It is stated in 12 Am. Jur., Contracts, Section 7, page 505: 'There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing,' citing, among other cases, *Manufacturing Co. v. Andrews, supra,* and *McLean v. Keith, supra.* It is further stated in a footnote that, 'Perhaps it is more precise to state that where the parties have made a contract for themselves, covering the whole subject matter, no promise is implied by law.
>
> " 'The same rule has been applied to benefits conferred under a special contract with a third person. When there is a contract between two persons for the furnishing of services or goods to a third, the latter is not liable on an implied contract simply because he has received such services or goods. *Walker v. Brown,* 28 Ill. 378, 81 Am. Dec. 287; *Massachusetts General Hospital v. Fairbanks,* 129 Mass. 78, 37 Am. Rep. 303; *Sullivan v. Detroit, Y. & A.A. R. Co.,* 135 Mich. 661, 98 N.W. 756, 64 L.R.A. 673, 106 Am. St. Rep. 403.' "

These principles may not defeat plaintiff here from relying on an implied contract between herself and defendants because, as far as the pleadings show, plaintiff has not entered into any express agreement covering the matter in question. The only express agreement alleged is between defendants. It is those provisions of this very agreement designed for plaintiff's benefit that may constitute, at least by implication, an offer to plaintiff. By forbearing to collect her claims against the corporation or resigning from the board, or both, plaintiff, again by implication, accepted the offer and furnished consideration for the resulting agreement.

Third-Party Beneficiary

[8] Plaintiff may prove she is entitled to recover as a third-party beneficiary of an implied contract between the signatories to the

shareholders' agreement and the corporation. The Court of Appeals rejected one version of this theory on the ground that the intent of the parties to the agreement was to benefit the corporation, not plaintiff, inasmuch as the corporation, not plaintiff, was to receive the proceeds of the stock issue. The Court of Appeals said, 40 N.C. App. at 352, 253 S.E. 2d at 13:

> "In the case *sub judice*, the parties intended to benefit the corporation by providing additional capital so that it could meet its obligation to its creditors. There was no provision in the contract whereby the defendants agreed to pay money directly to plaintiff; the defendants' agreement was to pay the money directly to the *corporation*. Nor is there any provision in the contract whereby the defendants agreed to become guarantors of the corporate debt; on the contrary, the terms of the agreement provided that the *corporation* would pay the creditors. Therefore, the plaintiff is not directly benefited by the contract and has no rights against the individual defendants pursuant to that contract. Plaintiff's sole cause of action was against the corporation on the original debt."

This conclusion fails to take full cognizance of the setting in which the agreement was executed, the law governing third-party beneficiaries and the law of implied contracts. As already noted, shareholders' agreements are construed like other contracts. *Blount v. Taft, supra*, 295 N.C. 472, 246 S.E. 2d 763; *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964). North Carolina recognizes the right of a third-party benficiary to sue for breach of a contract executed for his benefit. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970); *American Trust Co. v. Catawba Sales & Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955); *Boone v. Boone*, 217 N.C. 722, 9 S.E. 2d 383 (1940). Ordinarily " 'the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts.' 17 Am. Jur. 2d, *Contracts* § 304. It is not sufficient that the contract does benefit him if in fact it was not intended for his direct benefit." *Vogel v. Supply Co., supra*, 277 N.C. at 128, 177 S.E. 2d at 279.

In *Vogel*, though, this Court expressly adopted the analysis of the American Law Institute's Restatement of Contracts, § 133, in determining whether a beneficiary of an agreement made by others has a right of action on that agreement. This section, Restatement 2d, Contracts § 133 at 285-86 (1973), provides:

> "§ 133. Intended and Incidental Benficiaries
>
> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary."

The commentary to § 133(a) reads, in part:

> "b. *Promise to pay the promisee's debt.* The type of beneficiary covered by subsection (1)(a) is often referred to as a 'creditor beneficiary.' In such cases the promisee is surety for the promisor, the promise is an asset of the promisee, and a direct action by beneficiary against promisor is normally appropriate to carry out the intention of promisor and promisee, even though no intention is manifested to give the beneficiary the benefit of the promised performance."

Under this analysis, plaintiff's allegations are sufficient to permit her to prove that she is a creditor beneficiary of an implied contract between the signatories to the shareholders' agreement, as promisors, and the corporation, as promisee so that her right to enforce performance of this contract is "appropriate to effectuate the intention of the parties" under Section 133(1)(a) of the Restatement. Plaintiff alleges she is a creditor of General Aviation. The signatories to the agreement are alleged to be the beneficial owners of the corporation with full power to control it.

Plaintiff may thus prove: The signatories promised each other and, by implication, the corporation itself, that if the corporation would issue 6,000 shares of its stock, it would receive $10,000 capital. The agreement is tantamount to a promise by the signatories, *to cause the corporation* to issue the stock, to receive the capital, and to pay plaintiff, among other creditors, out of the proceeds. The corporation was both plaintiff's debtor and, by implication, promisee of the agreements designed to retire the debt. The signatories caused the corporation to issue its stock and accept the capital; but they failed to cause it to pay plaintiff. For this breach, plaintiff may be entitled to recover as a direct, intended, creditor beneficiary of the implied promise of the signatories to the debtor corporation. The result is like the first illustration of an intended, creditor beneficiary given in Restatement 2d, Contracts at 287:

> "A owes C a debt of $100. The debt is barred by the statute of limitations or by a discharge in bankruptcy, or is unenforceable because of the Statute of Frauds. B promises A to pay the barred or unenforceable debt. C is an intended beneficiary under Subsection (1)(a)."

Although the signatories here do not *themselves* promise to pay the corporation's debt, plaintiff may prove that they have indeed promised to cause the corporation over which they have full control to pay plaintiff out of the proceeds raised pursuant to the agreement, for the breach of which she is entitled to recover against them individually. Agreements by shareholders to vote their shares so as to cause their corporation to take certain action are generally enforceable against the shareholders. *Wilson v. McClenny, supra*, 262 N.C. 121, 136 S.E. 2d 569. "[W]here two or more persons agree that a corporation shall do a certain thing, which they can compel it to do, because they hold a majority of the stock, or otherwise, the corporation is not bound by their agreement,[4] but they bind themselves individually, unless it is ex-

4. This language does not affect our earlier discussion concerning a breach of directors' fiduciary duty where we stated that under certain circumstances, the shareholders of a close corporation acting to manage the corporation informally and intending to bind the corporation may be held to have bound it. In *Morse*, the Court was simply restating the *general* rule, that shareholders not authorized by the corporation to act for it, cannot bind the corporation. The Court in *Morse* had no occasion to consider whether an exception to that general rule might be applicable in that case.

pressly agreed that the other party is looking to the corporation, and not to [the persons controlling the corporation]." *Morse v. Tillotson & Wolcott Co.*, 253 F. 340, 351 (2d Cir. 1918).

Conclusion

For the reasons given, we conclude the complaint does state a claim upon which relief may be granted. We have alluded to several legal theories which may be available to plaintiff. Much depends on the nature of the proof at trial. We have not attempted to provide a definitive analysis of any of the theories to which we have alluded or to say whether any or all of the theories will ultimately be applicable. Without full factual development, which is not provided by the pleadings, neither the definitive boundaries of the various theories nor their ultimate applicability can appropriately be determined.

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. PEGGY MASSEY LEONARD

No. 96

(Filed 3 June 1980)

1. Constitutional Law § 50— inapplicability of Speedy Trial Act

The statute requiring the trial of a defendant within a certain time after a new trial has been granted on appeal, G.S. 15A-701(a)(5), did not apply where defendant was arrested, indicted and first placed on trial before 1 October 1978, the effective date of the statute.

2. Constitutional Law § 51— speedy trial—retrials—mental commitments

Defendant was not denied her constitutional right to a speedy trial where she was arrested on 18 May 1977; she was committed to a State mental hospital on 19 May 1977 to determine her competency to stand trial; an indictment was returned against her in September 1977; she was brought to trial at the 2 November 1977 session and a mistrial was declared upon motion of defense counsel; she was again tried at the 12 December 1977 session and was found guilty of first degree murder; she was awarded a new trial on appeal in an opinion certified to the superior court on 18 December 1978; she was again committed to a State mental hospital upon motion of her counsel on 19 December 1978; the hospital notified the court on 13 February 1979 that de-

fendant was competent to stand trial; and defendant was again placed on trial at the 30 April 1979 session of court.

3. **Criminal Law § 75.14— volunteered statements—admissibility without determination of mental competence**

In a prosecution for first degree murder, the State could introduce evidence of questions asked the arresting officer by defendant upon her sole initiative as to how many times she shot the victim and whether the State still had the death penalty without a preliminary inquiry into defendant's mental competence to understand the nature and gravity of those questions. Evidence proffered by defendant on voir dire upon the question of defendant's mental competence at the time she asked the questions would have been appropriate before the jury for its determination of the credibility of any statements by defendant but not upon the admissibility of those statements.

4. **Homicide § 21.5— first degree murder—sufficiency of evidence**

The State's evidence, including the testimony of two eyewitnesses, was sufficient to support defendant's conviction of first degree murder of her sister.

5. **Criminal Law § 86.5— cross-examination of defendant—impeachment—shooting of person in Florida—alleged verdict of not guilty by reason of insanity**

In this prosecution of defendant for the first degree murder of her sister, the trial court properly permitted cross-examination of defendant for impeachment purposes concerning whether she shot and killed a person in Florida in 1973, notwithstanding defendant's contention that she was found not guilty by reason of insanity of the 1973 Florida killing, since (1) defendant's hearsay testimony on voir dire was not sufficient to support a finding that defendant in fact had been found not guilty of the Florida killing by reason of insanity, and (2) a defendant may be asked if he in fact committed a crime so long as the question is asked in good faith. However, cross-examination of defendant concerning the 1973 Florida killing was improperly permitted for the purpose of identification, but such error was harmless in light of the overwhelming evidence that defendant shot and killed her sister.

6. **Criminal Law § 86.5— cross-examination of defendant—impeachment—prior acts of misconduct—mental responsibility for acts**

The prosecutor was not precluded from cross-examining defendant about prior acts of misconduct on the ground that defendant's long history of mental disease shows that she was not mentally responsible for her prior acts of misconduct where defendant's evidence showed that her mental disorder did not always prevent her from knowing right from wrong or the nature and quality of her acts, and there was no evidence of defendant's inability to distinguish right from wrong at the specific times of her prior acts of misconduct about which the prosecutor cross-examined her.

7. **Criminal Law § 5.1— not guilty by reason of insanity—no directed verdict**

A directed verdict of not guilty by reason of insanity would be improper in view of the presumption of sanity and defendant's burden of proof on that

issue even though defendant may have presented uncontradicted testimony as to her insanity at the time of the crime.

8. **Criminal Law § 111— instructions—evidence on post-trial motion for appropriate relief not considered**

Evidence offered on the hearing of a post-trial motion for appropriate relief does not relate back so as to justify a holding that the trial judge erroneously instructed the jury at trial.

9. **Criminal Law § 112.6— insanity—homicide case—instructions not misleading as to possible verdicts**

The trial judge did not leave the jury with the impression that their only verdict choices were not guilty by reason of insanity or guilty of first degree murder when he instructed in the final mandate that the jury could return a verdict of first degree murder "if you have not previously found [defendant] insane at the time of the alleged shooting" but failed to include such an instruction in the final mandate as to the lesser included degrees of homicide, where the jury was fully instructed that if they found that defendant was not insane at the time of the shooting, they must determine whether she was guilty of first degree murder or some lesser included offense of homicide, and the jury was given a written list of the issues and the possible verdicts.

10. **Criminal Law §§ 86.5, 102.5— cross-examination of defendant—impeachment—shooting of person in Florida—not guilty by reason of insanity—prosecutor's withholding of PIN report—absence of prejudice**

In the trial of defendant for first degree murder of her sister, the State was entitled to cross-examine defendant for impeachment purposes as to whether she shot and killed a person in Florida in 1973 even if defendant was found not guilty by reason of insanity of a homicide charge arising out of the shooting; furthermore, defendant was not prejudiced by the prosecutor's failure to disclose that, during the cross-examination of defendant, he received a PIN report indicating that defendant had been found not guilty in the 1973 Florida case by reason of insanity, since this information did not affect the right of the prosecutor to cross-examine defendant about the Florida shooting, and the PIN report itself furnished the prosecutor a sufficient good faith basis for his questions to defendant.

Justice COPELAND dissenting.

Justices EXUM and CARLTON join in the dissenting opinion.

APPEAL by defendant from *Long, Judge.* Judgments entered on 4 May 1979 and 8 July 1979 in Superior Court, DAVIDSON County. This case was argued as No. 116 at the Fall Term 1979.

On 18 May 1977 defendant was arrested upon a warrant charging her with the murder of her sister, Minnie Lee Kiger, on 17 May 1977. Minnie Lee Kiger died at 6:30 a.m. on 18 May 1977 as a result of multiple gunshot wounds to the chest and abdomen inflicted upon her at 8:00 to 9:00 p.m. on 17 May 1977.

On 19 May 1977 appointed counsel filed a motion suggesting defendant's mental incapacity to proceed to trial, and on that same date, defendant was committed to Dorothea Dix Hospital for observation and a determination of her mental capacity to proceed to trial. After it was determined that defendant was mentally competent to proceed to trial she was returned to the custody of the Sheriff, Davidson County.

On 16 August 1977 appointed counsel filed notice of intent of the defendant to rely on the defense of insanity at the time of the alleged offense. At the September 1977 Session of Superior Court, Davidson County, the grand jury returned a bill of indictment charging defendant with the first degree murder of her sister, Minnie Lee Kiger, on 17 May 1977.

At the 2 November 1977 Session defendant was brought to trial at which time she entered a plea of not guilty by reason of insanity. During the course of the trial, upon motion of defense counsel, Judge Rousseau ordered a mistrial.

Defendant was again brought to trial at the 12 December 1977 Session at which time she again entered a plea of not guilty by reason of insanity. The jury found defendant guilty of first degree murder and a sentence of life imprisonment was imposed by Judge Mills. Upon appeal this Court in *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978) ordered a new trial for error in denying defendant's challenge for cause to the three jurors. This opinion was certified to the Superior Court on 18 December 1978.

Again on 19 December 1978 appointed counsel filed a motion suggesting defendant's mental incapacity to proceed. She was committed to Dorothea Dix Hospital for observation and evaluation. On 13 February 1979 the hospital notified the court that defendant had been found competent to proceed to trial, and she was returned to the custody of the Sheriff, Davidson County.

On 30 April 1979 defendant filed a motion to dismiss the charges against her on the ground that she had been denied a speedy trial. This latter motion was filed on the first day of the Session during which defendant was again tried for first degree murder. The motion to dismiss was denied by Judge Long on 1 May 1979.

At trial the evidence for the State tended to show the following: On 17 May 1977 at about 8:00 to 9:00 p.m. defendant drove to the home of the deceased, defendant's sister. As deceased walked out of the house and was approaching defendant's automobile which was parked in the driveway, defendant stepped out of her car and shot deceased five or six times with a .22 cal. rifle. Defendant then backed out of the driveway and drove away. It was stipulated by and between the prosecuting attorney and the attorney for the defendant, that Minnie Lee Kiger died as a result of multiple gunshot wounds in the chest and abdomen fired from a .22 cal. rifle. When defendant was arrested at about midnight she was not interrogated. However, after being transported to the sheriff's office, she asked the officer two questions: (1) "How many times did I shoot her?" and (2) if the State still had the death penalty.

At trial the defendant's evidence tended to show the following: Defendant had a long history of mental disturbances. She heard and talked with numerous voices, God, Satan, thunder, and others. The voices, including God and Satan, sometimes told her what to do, and on occasion inflicted physical injury to her, such as cutting her and sticking her on the inside. At the time of the shooting of her sister, God told her to do it. Through the testimony of psychiatrists and others, defendant offered evidence that in 1972 she was diagnosed as chronic undifferentiated schizophrenic; that she knew she was shooting the gun and knew it was harmful; that as a result of her mental illness, she was not able to distinguish between right and wrong; and, that she believed what she was doing was right. Defendant's evidence also tended to establish that she had previously been confined to mental institutions in Florida and North Carolina.

The jury answered two special issues, finding (1) that defendant shot and killed Minnie Lee Kiger on 17 May 1977 and (2) that defendant was not insane at the time of the shooting. The jury thereafter returned a verdict of guilty of first degree murder. Judgment of imprisonment for life was entered on 4 May 1979, and defendant gave notice of appeal.

After judgment was entered, defendant in apt time filed a motion for appropriate relief in the form of a new trial alleging errors committed during the trial. Defendant further alleged

misconduct on the part of the prosecuting attorney in withholding from the court and defendant information in the possession of the prosecuting attorney that defendant had been acquitted of a charge of murder in the State of Florida on the grounds of insanity. On 8 July 1979, after a plenary hearing, the trial judge denied defendant's motion for a new trial. From this latter order, defendant gave notice of appeal.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson for the State.

R. B. Smith, Jr. for the defendant.

BROCK, Justice.

APPEAL CONCERNING THE TRIAL PROCEEDINGS

Defendant's first assignment of error reads as follows: "The trial court erred in denying the defendant's motion to dismiss all charges based on the State's failure to provide the defendant a speedy trial in violation of her Constitutional rights and in failing to provide the defendant a trial free from prejudicial error." (Emphasis ours.)

The latter portion of the defendant's first assignment of error (underlined above) is broadside and presents nothing for review. It will therefore be disregarded.

[1] The remaining part of assignment of error No. 1 asserts that defendant's constitutional right to a speedy trial has been denied. However in her brief, defendant fails to argue or cite any constitutional principle or authority supporting this assignment of error. Instead she argues that she is entitled to dismissal due to the prosecution's violation of North Carolina General Statute 15A-701(a)(5). Assuming arguendo that the assignment of error supports the argument brought forward, defendant's reliance on the statute is nonetheless misplaced. G.S. 15A-701, the statute itself, which became effective 1 October 1978, exempts this defendant from its application with the following words: "This act shall apply to any person who is arrested, served with criminal process, waives an indictment, or is notified pursuant to G.S.

15A-630 that an indictment has been filed with the superior court against him, *on or after October 1, 1978.*" Session Laws 1977, c. 787, p. 2. Defendant was arrested 18 May 1977; a true bill of indictment was returned in September 1977; and defendant was first placed on trial in November 1977, all well before the effective date of G.S. 15A-701.

[2] We also note that defendant has not been denied her constitutional right to a speedy trial. In *State v. Spencer*, 281 N.C. 121, 124, 187 S.E. 2d 779 (1972) this Court held that "whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case . . . . The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. (Citations omitted.) But this right is necessarily relative and is consistent with delays under certain circumstances. (Citations omitted.)" It is apparent from the history of defendant's involvement in this case, that the courts and the mental institutions of this State have been most generous with their time and facilities in according to her all reasonable protections. Defendant's first assignment of error is overruled.

[3] Defendant next brings forward in one argument her assignments of error Nos. 2 and 8. In these assignments defendant contends the trial court erred in allowing the State to introduce evidence of statements made by the defendant to the arresting officers after the defendant refused to sign a waiver of her constitutional rights. At trial, upon defendant's objection to any of these statements being introduced into evidence, an evidentiary hearing was conducted in the absence of the jury. On voir dire the State's evidence tended to show the following: When defendant was arrested at her home she was advised of her constitutional rights but was not interrogated and she made no statement. After she was transported to the Sheriff's office she was again advised of her constitutional rights and was asked to sign a waiver which she refused to do. She was not interrogated, but while waiting to be formally served with a warrant and transported to a jail cell defendant asked the arresting officer: "How many times did I shoot her?" She also asked the officer if the State still had the death penalty. The officer did not respond to either question. After the voir dire Judge Long found that defendant was advised of her *Miranda* rights and that the two

questions asked by defendant were not in response to interrogation but were volunteered by defendant and were admissible in evidence. The testimony of the officer relating the two questions asked by defendant were thereafter admitted before the jury in the State's case in chief.

Defendant argues that it was error for the trial judge to refuse to hear from defendant's witnesses (including psychiatrists) upon the question of defendant's mental competence to understand the nature and gravity of her statements. She further argues that it was error to admit the statements into evidence without first making a determination of her mental competence to understand the nature and gravity of those statements. Defendant cites numerous cases which support the proposition that a determination of the defendant's mental competence as it bears upon the voluntariness of her confession must be made prior to admitting into evidence her confession obtained through custodial interrogation. *See State v. Ross*, 297 N.C. 137, 254 S.E. 2d 10 (1979); *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961). These cases, however, are inapposite to the factual situation presented in the present case. In *Ross* and *Whittemore* the defendants' incriminating statements (*i.e.*, confessions) were made in response to custodial interrogation. An interrogation of the defendant in this case is not in issue, for there was no interrogation. Therein lies the difference. *See Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242 (1960). In the case *sub judice* the first question asked by the defendant, as to how many times she shot her sister, is merely a question asked upon the sole initiative of the defendant. Also the question concerning the death penalty was asked upon the sole initiative of the defendant. Notwithstanding the defendant's claim of insanity, the State may offer, without a preliminary inquiry into defendant's mental competence, testimony describing the defendant's acts in shooting the deceased and fleeing the scene. In a like manner the State may offer testimony describing the defendant's other self-initiated acts, statements and questions, without a preliminary inquiry into defendant's mental competence, so long as they are relevant to an issue under inquiry. Any intimation to the contrary in *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975) is disapproved. The evidence proffered by defendant on voir dire would have been ap-

propriate before the jury for its determination of the credibility of the confession, but not upon the question of its admissibility.

This argument by defendant on the admissibility of her confession strays far from the real issue in this case. There were two eyewitnesses to the shooting; defendant admitted the shooting to her psychiatrists; defendant testified at trial that she shot her sister; and the murder weapon was in her possession. The basic and real contested issue in this case is whether defendant was insane at the time she shot her sister, not whether she shot her. Assignments of error Nos. 2 and 8 are overruled.

[4] By her third assignment of error defendant argues that the trial judge erred in denying defendant's motion to dismiss all charges made at the close of the State's evidence. After the denial of her motion, defendant proceeded to offer evidence. Having elected to offer evidence defendant waived her motion to dismiss at the close of the State's evidence, and proper consideration is thereafter upon her motion to dismiss made at the close of all the evidence. G.S. 15-173; *accord, State v. Davis*, 282 N.C. 107, 113, 191 S.E. 2d 664, 668 (1972); *State v. Jones*, 296 N.C. 75, 77, 248 S.E. 2d 858, 859 (1978). The provisions of G.S. 15A-1227 do not alter this salutary and long standing rule in North Carolina. In any event, defendant's motion to dismiss was properly denied as the State's evidence, by way of the testimony of two eyewitnesses, when viewed in the light most favorable to the State, is clearly ample to support a verdict of guilty of first degree murder. *See State v. Haywood*, 295 N.C. 709, 717, 249 S.E. 2d 429, 434 (1978). Defendant's third assignment of error is overruled.

[5] Defendant brings forward in one argument her assignments of error Nos. 4 and 7. On cross-examination of defendant, the prosecutor was permitted, over objections, to question defendant concerning her prior conduct in the shooting and killing of Nellie Somner in the State of Florida in 1973. The use of this evidence was restricted by the trial judge for impeachment purposes, and for the purpose of identification, and he so instructed the jury. Defendant argues that both the admission of the evidence and the court's instruction to the jury constituted error.

Defendant argues that the evidence of the homicide in Florida was inadmissible for impeachment purposes. She contends that since she was found not guilty by reason of insanity in the

Florida case, that such a determination alleviated her from all criminal responsibility for the Florida homicide. However defendant's argument for exclusion of this evidence is premised upon an alleged determination of insanity in the Florida proceedings. From the record on appeal, we note that the only evidence concerning the Florida proceedings which was before the trial judge when defendant objected to the introduction of this evidence was defendant's self-serving and partly hearsay testimony obtained during the voir dire examination. Defendant stated on voir dire that she shot Nellie Somner on May 15, 1973; that she was not convicted of killing Nellie Somner; that *they said* she was temporarily insane; that they put her back in the hospital and then the doctor let her go. The defendant's hearsay testimony on voir dire is not adequate evidence upon which the trial judge could make a ruling that defendant had in fact, in the Florida case, been found not guilty by reason of temporary insanity. The records in the Florida case were available to defendant at the time of trial, and if they supported her present assertion, should have been secured and offered in evidence on the voir dire.[1]

Although a defendant, for impeachment purposes, may not be asked if he had been accused, arrested or indicted for a particular crime, he may be asked if he in fact committed the crime so long as the question is asked in good faith. In controlling the scope of such cross-examination, the trial judge has wide discretion, and his ruling should not be disturbed except when prejudicial error is disclosed. *State v. Mayhand*, 298 N.C. 418, 427, 259 S.E. 2d 231, 237 (1979) and cases cited therein. In our view the trial judge properly permitted cross-examination of defendant for impeachment purposes concerning whether she in fact shot Nellie Somner in Florida in 1973.

It is not clear why the evidence of the 1973 Florida homicide was also admitted for the purpose of identification. There was absolutely nothing in the evidence which tended to identify defendant as the one who shot Nellie Somner in Florida in 1973. However, although error, its admission for this purpose is clearly harmless beyond a reasonable doubt in the light of the identifica-

1. Failure of the district attorney to disclose to defense counsel and the court information concerning defendant's acquittal from the Florida charges on the grounds of insanity, is discussed in defendant's appeal concerning the trial court's denial of her motion for appropriate relief, *infra*.

tion of defendant by her niece and her nephew as the person who shot Minnie Lee Kiger; defendant's testimony that God told her to shoot her sister, Minnie Lee Kiger; and that when she shot her sister she believed what she was doing was right. Defendant's assignments of error Nos. 4 and 7 are overruled.

[6] In her fifth assignment of error defendant argues that the trial judge also committed error in allowing the prosecutor to cross-examine the defendant about other specific acts of misconduct (along with questions about the 1973 Florida homicide). It is well-established in this State that when a defendant elects to testify in his own behalf, he is subject to cross-examination, for purposes of impeachment, with respect to prior specific criminal acts or degrading conduct for which there has been no conviction. *State v. Ross*, 295 N.C. 488, 490, 246 S.E. 2d 780, 783 (1978); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *see* Stansbury's N.C. Evidence (Brandis Rev.) § 108 (1973). Defendant concedes this rule; however, she argues in this case that her long history of mental disease negates the impeachment value of such questions for such medical history shows that she was not mentally responsible for her prior acts of misconduct. The defect in defendant's argument is that although her evidence shows that she is now diagnosed as chronic undifferentiated schizophrenic, it also shows that such a mental disorder does not always prevent her from knowing right from wrong, nor does the evidence show that her mental disorder always prevents her from knowing the nature and quality of her acts. In fact, one of her psychiatrists stated: "It is my opinion that on the day of May 17, 1977 (the date of the Minnie Lee Kiger shooting) there was a period of time during that day that she was capable of distinguishing the difference between right and wrong . . . ." The expert testimony of Dr. Billy W. Royal and Dr. Bob Rollins, offered by the defendant, established that with her type of mental disorder, there were periods of time when the defendant knew right from wrong, and times when the defendant understood what was going on around her. Assuming arguendo the validity of defendant's argument for exclusion of evidence of prior acts for impeachment purposes where such acts were committed at a time when defendant did not know right from wrong, nevertheless since there was no evidence of defendant's inability to distinguish right from wrong at the specific times of her prior acts of misconduct about which the prosecutor

cross-examined her, such questions were proper for impeachment purposes. Defendant's fifth assignment of error is overruled.

[7] In her sixth assignment of error defendant argues that it was error to deny her motion for a directed verdict of not guilty at the close of all of the evidence. This motion accompanied the defendant's motion to dismiss for insufficiency of the evidence, and was a motion for a directed verdict of not guilty by reason of insanity. Defendant argues that her presentation of expert testimony of her insanity at the time of the shooting of her sister overcame the presumption of sanity since the State offered no direct testimony to the contrary.

This argument was clearly addressed and overruled by this Court in defendant's former appeal. Justice Britt, speaking for the Court stated:

> "We have repeatedly held, and we again reiterate the rule, that the burden of proving insanity is properly placed on the defendant in a criminal trial. Furthermore, a defendant must establish his insanity to the satisfaction of the jury if it is to provide a defense to a criminal charge. (Citations omitted.) The correctness of this rule is reinforced by the holding of the Supreme Court of the United States in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977). There the court held that placing the burden on the defendant of proving the defense of extreme emotional disturbance as defined by New York law did not violate the Due Process Clause of the Fourteenth Amendment to the United States' Constitution. We likewise find that no unconstitutional burden is imposed upon defendants by the requirement of North Carolina law which compels them to prove the defense of insanity.
>
> Defendant's argument fails to take into account the effect which placing the burden of proving insanity upon the defendant has on the presumption of sanity. '. . . [T]he prosecution may assume, as the law does, that the defendant is sane. The assumption persists until challenged and the contrary is made to appear from circumstances of alleviation, excuse, or justification; and it is incumbent on the defendant to show such circumstances to the satisfaction of the jury, unless they arise out of the evidence against him. (Citation

omitted.) If no evidence of insanity be offered, the presumption of sanity prevails. And where the defendant offers evidence of his insanity, the state may seek to rebut it or to establish the defendant's sanity *by the presumption of law, or by the testimony of witnesses, or by both* (emphasis added).' (Citation omitted.) Even if the evidence of insanity presented by the defendant is uncontradicted by the state, it is the defendant's burden to satisfy the jury of the existence of the defense. The credibility of the defense witnesses in this case was a proper matter for the jury. A diagnosis of mental illness by an expert is not in and of itself conclusive on the issue of insanity." (Citations omitted.) *State v. Leonard*, 296 N.C. 58, 64-65, 248 S.E. 2d 853, 856-57 (1978).

"The burden of this plea (of insanity) is upon the defendant . . . to show it to the satisfaction of the jury." (Citation omitted.) *State v. Cash*, 219 N.C. 818, 822, 15 S.E. 2d 277, 279 (1941). *See also* 4 Strong's North Carolina Index 3d, Criminal Law § 5.1, and cases cited in note 81. In view of the presumption of sanity and this Court's holdings that the question of sanity is one for the jury, a directed verdict of not guilty by reason of insanity would be improper. Defendant's sixth assignment of error is overruled.

[8] By her ninth assignment of error, defendant argues that based upon evidence presented by defendant on her motion for appropriate relief, the trial judge committed error in instructing the jury on the presumption of sanity and that defendant had the burden to prove her insanity at the time of the offense charged. Without, at this time, discussing the evidence offered by defendant on her motion for appropriate relief we hold that this assignment of error is without merit for the following reasons.

The evidence in this case was completed, counsel argued the case to the jury, the trial judge instructed the jury, and the jury returned its verdict of guilty on 4 May 1979. Judgment was entered and commitment was issued on 4 May 1979. On 14 May 1979 defendant filed her motion for appropriate relief. Defendant's motion for appropriate relief was heard by Judge Long (the trial judge in this case) beginning on 1 June 1979. If defendant is entitled to relief by reason of evidence offered by her in June 1979 it is by an order for appropriate relief entered upon that hearing. Evidence (even if otherwise convincing) offered

almost a month after the trial had concluded does not relate back so as to justify a holding that the judge erroneously instructed the jury at trial. Defendant's ninth assignment of error is overruled.

[9] By her tenth assignment of error defendant contends that the trial court erred when instructing the jury on what degrees of homicide were returnable by not stating that these verdicts were returnable "if you [the jury] have not previously found her [the defendant] insane at the time of the alleged shooting." The trial court did include this instruction in its final mandate on first degree murder but did not include it in its final mandate as to the lesser included degrees of homicide. The defendant argues that this omission may have confused the jury and left them with the impression that their only choices were not guilty by reason of insanity or guilty of first degree murder. We disagree.

The court instructed the jury that they must first determine if the defendant shot and killed Minnie Kiger. If they answered in the affirmative, they must then determine whether the defendant was insane at the time of the shooting. At this point the jury was fully instructed on the law concerning the insanity defense. The court then charged that if they found the defendant was *not* insane at the time of the shooting, they must determine whether she was guilty of first degree murder or some lesser included homicide offense. The court charged:

> "So, if you find she was not insane, you would consider whether she may be guilty of first-degree murder, or guilty of second-degree murder, or guilty of voluntary manslaughter, or guilty of involuntary manslaughter, or not guilty."

Later the court reiterated:

> "Members of the Jury, if you don't find the defendant insane at the time of the alleged shooting, you must consider whether she may be guilty of a homicide offense. Under the law and evidence in this case it will be your duty, if you find the defendant not insane, to return one of the following verdicts: either guilty of first-degree murder, or guilty of second-degree murder, or guilty of voluntary manslaughter, or guilty of involuntary manslaughter, or not guilty."

Finally, the jury was given a sheet of paper listing the two issues: (1) Did the defendant shoot and kill Minnie Lee Kiger? and (2) If so, was the defendant insane at the time of the shooting? The jury was also given a list of all possible verdicts. Viewing the charge as a whole, as it must be, *Beanblossom v. Thomas*, 266 N.C. 181, 189, 146 S.E. 2d 36, 42 (1966), the jury clearly understood all possible verdicts including not guilty by reason of insanity. Defendant's tenth assignment of error is overruled.

By her eleventh and twelfth assignments of error defendant contends that the trial court erred in denying her motion to set the verdict aside and her motion in arrest of judgment. Each of these motions was based upon alleged error heretofore discussed. Based upon our resolution of defendant's foregoing ten assignments of error, the eleventh and twelfth are overruled, also.

In our consideration of the assignments of error to the trial proceedings in May 1979, we find no prejudicial error.

APPEAL CONCERNING THE MOTION FOR APPROPRIATE RELIEF

Defendant's remaining assignments of error are addressed to alleged error in the hearing and resolution of her motion for appropriate relief heard by Judge Long in June 1979.

The first four grounds for relief alleged in defendant's motion were also subjects of her assignments of error heretofore discussed in connection with her appeal concerning the trial proceedings. We will not discuss them again. We affirm Judge Long's denial of relief upon each of these first four alleged grounds.

[10] The fifth alleged ground for relief is set out in defendant's motion as follows:

> "5. The District Attorney, during the course of the trial which began May 1st, 1979 and prior to the submission of the case to the jury had information that the defendant, Peggy Massey Leonard, had been found not guilty by reason of insanity of the killing of Nellie Somner in Polk County, Florida, on March 14th, 1973, and for this reason the defendant did not receive a fair and impartial trial."

The point in question relates to the propriety of the prosecutor's cross-examination of defendant about her alleged killing

of a woman in Florida in 1973, and the failure of the prosecutor to timely disclose to the court and defense counsel, information that defendant was found not guilty of that offense by reason of insanity.

When defendant was first tendered for cross-examination, the prosecutor asked her if she had been admitted to a mental hospital in Florida in 1973 for six or seven months. Without objection she answered that she had been. She was then asked, "[w]hy were you in that hospital?," and she replied: "They said I killed a woman." Defense counsel objected to the answer and moved to strike. The court overruled the objection, but instructed the jury not to consider "what they said she did." The court advised the prosecutor "you may examine her concerning any specific conduct." Defendant was then asked if she killed a woman. Defense counsel's objection to the question was overruled but his request for a voir dire was granted.

Pursuant to questioning by the prosecutor in the absence of the jury, defendant testified that she shot Nellie Somner on 15 May 1973; that "they said I was temporarily insane. After I came out of the hospital I wasn't convicted. They let me go. They put me back in the hospital and then the doctor let me go." In response to a question from the court, the prosecutor stated that he wished to introduce the evidence relating to the Florida killing for the purpose of impeachment "by specific act of misconduct." The court overruled defendant's objections, and allowed the defendant's testimony to be considered by the jury. The court also refused to recognize defendant's continuing objection to the "whole line of questions," and advised counsel to "bring my attention to the objectionable questions as they arise."

Following the voir dire, over objection, defendant testified on cross-examination that she pulled a gun on a woman in Florida and that woman was Nellie Somner. Defendant's *unobjected to* cross-examination is summarized in pertinent part as follows: The shooting of Nellie Somner took place in 1973. Prior to the shooting, defendant had worked with Nellie Somner in a beauty shop. At the time of the shooting, defendant and Nellie Somner were by themselves in an automobile. Defendant does not remember firing any shots but she remembers the gun being in her hand and hearing more than one shot. After the Somner

shooting, defendant was put in a mental hospital in Florida where she remained for six or seven months. After that time, she was released without ever being tried for any offense related to the shooting. Prior to the Somner shooting, and while she was in Florida in 1973, she shot at her then husband, James Masterson, because he was "going to rape me." She shot at Masterson with the same .22 pistol she had in her hand when Nellie Somner was shot.

It is settled law in this jurisdiction that for purposes of impeachment, it is permissible to cross-examine a witness, including the defendant in a criminal action, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct, so long as the questions are asked in good faith. *State v. Williams*, 279 N.C. 663, 675, 185 S.E. 2d 174, 181 (1971), and cases cited therein.

It is true that in *Williams*, this Court held that for purposes of impeachment, a witness may not be asked if he has been *arrested* or *indicted* for a specified offense. "However, the decision in *Williams* did not change the rule that for purposes of impeachment a witness may be asked whether he has *committed* specific criminal acts or been guilty of specified reprehensible conduct. (Citations omitted.)" *State v. Gainey*, 280 N.C. 366, 373, 185 S.E. 2d 874, 879 (1972). Also, in *State v. Herbin*, 298 N.C. 441, 451, 259 S.E. 2d 263, 270 (1979), this Court speaking through Justice Copeland held that it is permissible to cross-examine a defendant about a specific act of misconduct even though he has been acquitted of the charge, provided the questions are asked in good faith.

In the present case we hold the prosecutor was entitled to cross-examine defendant about the Somner shooting. The questions were properly directed at matters within the defendant's own personal knowledge and were solely intended to elicit information of a specific prior act of degrading conduct. *See State v. Williams, supra.*

In *State v. Purcell*, 296 N.C. 728, 732-33, 252 S.E. 2d 772, 775 (1979), Justice Exum writing for the Court noted:

> ". . . a criminal defendant who takes the stand may be cross-examined for purposes of impeachment concerning any prior specific acts of criminal and degrading conduct on his part.

> *Such acts need not have resulted in a criminal conviction to be appropriate subjects for inquiry. . . .* (Emphasis ours.)
>
> The purpose of permitting inquiry into specific acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them."

Here, even though the defendant's shooting of Nellie Somner did not result in a criminal conviction, the shooting clearly constituted prior degrading conduct, and was a proper subject of cross-examination. We will now address the facts developed at the post-trial hearing on defendant's motion for appropriate relief.

At the hearing, defendant presented evidence tending to show that prior to the cross-examination of defendant, the trial judge preliminarily ruled that if defendant had been tried upon a homicide charge in Florida, and found not guilty by reason of insanity, the State would not be allowed to bring the Florida homicide to the attention of the jury. Evidence was also presented, showing that prior to the cross-examination, defendant's counsel had asked the district attorney to reveal to him any information he had regarding the alleged Florida homicide and that shortly after the prosecutor began his cross-examination of defendant, he received a PIN (Police Information Network) report disclosing that in the Somner homicide case in Florida, defendant was found not guilty by reason of insanity. Further evidence introduced at the hearing showed the prosecutor did not disclose information concerning defendant's acquittal to the court or defense counsel until four days after the trial. Certified copies of the Florida court records presented at the hearing, showed that the homicide charge against defendant was dismissed on the grounds of her insanity.

The rule in this jurisdiction is that the prosecutor must act in good faith in his cross-examination of a defendant about prior specific acts of misconduct. That is to say, the prosecutor must have a reasonable and sufficient basis for his belief that defendant committed the specific act of misconduct before he may properly cross-examine a defendant concerning such act of misconduct. Otherwise a prosecutor conceivably could ask a defendant about any act of misconduct which the prosecutor decides to ask whether it has any basis in reality or is only a fig-

ment of imagination. Such unfounded cross-examination of a defendant must not be permitted, as its unfairness and prejudice to a defendant is obvious. Therefore bad faith in this fashion on the part of a prosecutor requires a new trial because of prejudice to the defendant.

In the case now being considered the defendant would have us extend the "good faith" rule to the conduct of the prosecutor. This we refuse to do for the PIN report provided the prosecutor sufficient basis for his questions to the defendant. The trial judge so found following the post-trial hearing.

We are unable to perceive how defendant was prejudiced by failure of the prosecutor to disclose the PIN report at the time he received it. Under the rule in *Williams*, the prosecutor still could have asked defendant about the Florida homicide since he did not ask her if she had been arrested or indicted for that offense. The only possible benefit defendant could have received from the report was to corroborate her statement that following the shooting and after her confinement in a mental hospital for six or seven months, she was released without ever being tried for any offense related to the shooting. Her statement was not challenged in any way and there is no reason to believe that the jury did not accept it at face value.

Defendant has been placed on trial three times for the merciless killing of her sister, in her sister's own yard and in the presence of her sister's two children. For reasons that do not appear in the record the first trial ended in a mistrial. The second trial resulted in a verdict of guilty of first degree murder and a judgment of life imprisonment. This Court found error in that trial and ordered a new trial because the trial court denied defendant's motion to excuse for cause three prospective jurors who indicated that they would not be willing to return a verdict of not guilty by reason of insanity even though defendant presented evidence that would satisfy them that she was insane at the time her sister was killed. At the third trial, a jury, about which defendant voices no complaint, found defendant guilty of first degree murder and the court again entered judgment imposing a life sentence.

Certainly, considerable weight should be given to the trial judge's findings and conclusions on defendant's post-trial motions.

He had witnessed every minute of the trial, had observed the demeanor of the witnesses, including defendant, and had the "feel" of the case in general. After patiently listening to evidence and arguments presented at the hearing on the post-trial motions, including a motion for a new trial, he concluded that the verdict and judgment should stand. We agree with that conclusion. "Every person charged with crime is 'entitled to a fair trial but not a perfect one.' *Lutwak v. United States*, 344 U.S. 604, 97 L.Ed. 593, 73 S.Ct. 481 (1953)." *State v. Tolley*, 290 N.C. 349, 373, 226 S.E. 2d 353, 371 (1976).

While we ordinarily would be strongly inclined to publicly censure the prosecutor in this case for his conduct in deliberately attempting to frustrate a preliminary ruling of the trial judge, nevertheless we will not do so for the following reason. The trial judge, who presided at both the trial and the post-trial proceedings had a view as clear, and probably clearer, as we can have from the cold record. He did not see fit to initiate any disciplinary action against the prosecutor and we will defer to his handling of the matter.

Although we do not agree with all of the reasons given by Judge Long in Section #1 of his order denying the motion for appropriate relief, we nevertheless agree that the cross-examination of the defendant with respect to her conduct in the shooting of Nellie Somner in Florida in 1973 is competent for the purposes of impeachment under the prevailing rules in this jurisdiction.

In our consideration of the assignments of error to the post-trial proceedings in June 1979, we find no prejudicial error.

No error.

Justice COPELAND dissenting.

The majority holds that defendant could be cross-examined during trial about "her prior conduct in the shooting and *killing* of Nellie Somner in the state of Florida in 1973" (emphasis added) even though she had been found not guilty by reason of insanity in that case and even though the trial judge in this case had ordered the prosecutor not to ask about any prior killings by the defendant for which she had been found not guilty by reason of insanity. The majority so holds because there was not, during

trial, "adequate evidence upon which the trial judge could make a ruling that defendant had in fact, in the Florida case, been found not guilty by reason of temporary insanity."

After trial, defendant moved for appropriate relief when she learned that the assistant district attorney had received a PIN report during the cross-examination of the defendant which revealed that she had been found not guilty by reason of insanity in the Florida case. The majority upholds the denial of defendant's motion for appropriate relief because "criminal and degrading conduct [may be asked about on cross-examination] . . . even though [defendant] . . . has been acquitted of the charge, provided the questions are asked in good faith."

I respectfully dissent because whether the question concerns a prior conviction, a prior act of misconduct for which there has been an acquittal as in *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979), or a prior act of misconduct which has not been the basis for a criminal prosecution, the conduct must be *mis*conduct, i.e., *wrongful.* The questioning in this case did not concern a prior act of *mis*conduct for two reasons. First, the questioning was about a prior killing, and second, defendant was found to be insane at the time of that killing.

In ignoring the first of these two points, the majority's holding is squarely in conflict with our decision last term in *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979). There we held it to be prejudicial error for the State to ask the defendant on cross-examination, "You have *killed* somebody haven't you, Mr. Purcell?" and "Well, it was known all around town that you had *killed* somebody weren't it?" (Emphasis added.) In so holding, Justice Exum writing for the Court stated that,

> "The purpose of permitting inquiry into specific acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them. For this purpose to be fulfilled, the questions put to the witness must enlighten the jury in some degree as to the nature of the witness' act. Questions so loosely phrased as the one here give the jury no clear indication about the witness' credibility. *Under our law and the mores of our society, killing is not categorically wrong.* As the Arkansas Supreme Court said when confronted with a

similar issue in *Stanley v. State*, 171 Ark. 536, 537, 285 S.W. 17, 18 (1926): 'A homicide is not necessarily a crime. The killing may have been an accident or entirely justifiable.' Indeed, a soldier who kills the enemy in war may be thought a hero. *When a question is put to a witness about some prior act for the purpose of impeaching his credibility, and the question does not show by its phrasing that the act was wrongful, an objection to it should be sustained.*" Id. at 733, 252 S.E. 2d at 775 [Emphasis added].

With regard to the second point, the rule is that, on cross-examination when defendant has not placed his character in issue, he may be asked, for purposes of impeachment, about any specific acts of misconduct which tend to impeach his character. *State v. Herbin, supra; State v. Purcell, supra; State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976); *State v. Hartsell*, 272 N.C. 710, 158 S.E. 2d 785 (1968). Of course, the misconduct does not have to be criminal. It includes any specific bad acts which tend to impeach defendant's character. 1 Stansbury's N.C. Evid. § 111, notes 9, 11 and 12 (Brandis Rev. 1973 and Cum. Supp. 1979) and the numerous cases cited therein.

The purpose for asking defendant about prior specific acts of misconduct is to impeach his *character*. Therefore, the act must have been one which reflects on his character by being morally and/or legally wrong. *Id.* The act must have been wrongful. *State v. Purcell, supra.*

The very definition of misconduct also makes this point clear:

"Misconduct. A transgression of some established and definite rule of action, a forbidden act, *a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior*; its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offense. . . ." Black's Law Dictionary (5th ed. 1979), p. 901. [Emphasis added.]

As the majority states the rule, criminal or degrading conduct may be asked about. By definition degradation means,

"A deprivation of dignity; dismissal from rank or office; act or process of degrading. *Moral or intellectual decadence*;

degeneration; deterioration." Black's Law Dictionary (5th ed. 1979), p. 381. [Emphasis added.]

An insane person cannot be held accountable for his actions because, by definition, he knows not the difference between right and wrong. Surely, defendant could be confined for *treatment*, but the law and society do not hold her legally or morally accountable and seek to punish her for any wrongdoing.

The majority does not base its decision on questioning about a prior conviction since defendant was found not guilty by reason of insanity. The majority holds that even though she was acquitted of the charge, it was still an act of misconduct that she could be questioned about citing *State v. Herbin, supra.* In *Herbin* we did hold that the defendant could be asked if he had in fact raped one Virginia Pearson even though he had been acquitted of rape and convicted of the lesser offense of assault on a female. However, rape is wrongful and illegal conduct for which the defendant could be held accountable to society and the law. Thus, there was misconduct in *Herbin* but there is not in the case *sub judice*. Therefore, *Herbin* is not supportive of the majority's holding in this case. Since defendant was found to be insane at the time of the killing in Florida and since the questioning was phrased in terms of a prior killing, we do not have a prior specific act of misconduct (wrongdoing) that was a proper subject of inquiry on cross-examination.

Asking about the incident was most certainly prejudicial to defendant, *State v. Purcell, supra*, because it opened up for possible inquiry by the jury what her culpability was for that Florida killing and whether she was sane or insane at the time. That was an impermissible subject of inquiry for the jury. It prejudiced the defendant because she may have been convicted for the North Carolina killing, whether she was guilty or not, simply because the jury was aware that this was at least the second time such a killing had occurred by her hand and thus she should be incarcerated. Thus, there is a reasonable possibility that had the error not occurred, a different result would have been reached at the trial. G.S. 15A-1443.

The assistant district attorney who prosecuted this case testified during the hearing on the motion for appropriate relief that he had been specifically instructed by the trial judge "that

cross-examination would not be allowed with regard to a prior killing if the person had been found not guilty by reason of insanity." During trial, the trial judge did not know the legal determination in the Florida case because assistant district attorney George Fuller, who came into possession of this information during the cross-examination of the defendant, did not reveal this information (contained in the PIN report) to the trial judge.

The actual determination in the Florida case is a matter of record in this case and is contained in the testimony of assistant district attorney George Fuller given during the hearing on the motion for appropriate relief. He testified that the information on the result of that Florida case was conflicting. He was told at one time that she had been found "not guilty by reason of insanity" and another time he was told that she was "never tried because she was found incompetent to stand trial." He then testified that he received Exhibit A (the PIN report). It revealed that "at one point [she was] hospitalized as being incompetent to stand trial. At a later point, *she was returned for trial and . . . found not guilty by reason of insanity. . . .*" [Emphasis added.] He testified that he came into possession of the PIN report "during the course of the trial after the *voir dire* of the Florida killing shortly in the cross examination of the defendant." Therefore, defendant was in fact found not guilty by reason of insanity in the Florida killing and the assistant district attorney violated the trial judge's instructions on this matter.

I believe that the trial judge was correct in his original instructions to the assistant district attorney during the trial because, as discussed above, the law says that an insane person is not to be held accountable to society for his actions and because the questions were phrased in terms of a prior killing. The assistant district attorney was clearly incorrect in his actions because he violated the trial judge's instructions and, for the reasons discussed above, this action was prejudicial error in the defendant's trial.

If Assistant District Attorney George Fuller had followed the trial judge's instructions during the trial, this error may not have occurred. Whether defendant was sane or insane at the time of the killing in North Carolina, I do not know. My concern is that she have her day in court so that this very issue may be justly

determined by a fair and impartial jury free from prejudicial influences. Defendant, as the majority notes, is not entitled to a perfect trial. However, she is entitled to one that is fair no matter how many times it may take the State to fulfill this requirement. Justice requires a new trial and that is how I cast my vote.

Justices EXUM and CARLTON join in this dissent.

ROY H. JOHNSON, W. CONNETTE JOHNSON, FOREST H. HARMON, LEWIS E. LAMB, JR., AND ALVIN A. STURDIVANT, JR., D/B/A KERNERS VILLAGE COMPANY v. PHOENIX MUTUAL LIFE INSURANCE COMPANY AND CAMERON-BROWN COMPANY

No. 68

(Filed 3 June 1980)

1. Fraud § 1— elements

To make out a case of actionable fraud, plaintiffs must show that defendant made a representation relating to some material past or existing fact; the representation was false; defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; defendant made the false representation with the intention that it should be relied upon by plaintiffs; plaintiffs reasonably relied upon the representation and acted upon it; and plaintiffs suffered injury.

2. Fraud § 3.1— promissory representation—intent to deceive

As a general rule, a mere promissory representation will not be sufficient to support an action for fraud, but a promissory misrepresentation may constitute actionable fraud when it is made with intent to deceive the promisee, and the promisor, at the time of making it, has no intent to comply.

3. Fraud § 12— construction of shopping center—mortgage broker—representations about substituting tenants—summary judgment proper

In an action to recover for fraud by defendant, who had been given the exclusive right to negotiate a permanent mortgage loan for plaintiff partners to construct a shopping center, defendant was entitled to summary judgment where plaintiffs based their action for fraud on allegations that an employee of defendant had made statements concerning the substitution of tenants in the shopping center and the effect of such substitution on the lender's loan commitment which amounted to a fraudulent misrepresentation, but depositions and affidavits before the trial court indicated that the statements were in fact true; there was no difficulty in obtaining the consent of defendant lender to substitute tenants in the shopping center; the problems encountered by plaintiff partnership in developing the project were caused by its inability to secure

tenants who were willing to enter into leases; and there was no evidence that defendant mortgage broker and defendant lender contributed in any way to the problems which were involved in securing the tenants.

4. **Unfair Competition § 1— unfair or deceptive practice—trade or commerce—relationship between borrower and mortgage broker**

Before a trade practice can be declared unfair or deceptive, it must first be determined that the practice or conduct which is complained of takes place within the context of the language of G.S. 75-1.1 pertaining to trade or commerce; the relationship of borrower and mortgage broker and the activities which are appurtenant to it are components of the larger concept of trade or commerce, though no tangible property of any kind moves through commerce because of this relationship, since an exchange of value does occur as a result of the process of securing a broker as the representative of the potential borrower.

5. **Unfair Competition § 1— unfair trade practice**

A trade 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.

6. **Unfair Competition § 1— unfair trade practice—inequitable assertion of power or position**

A party is guilty of an unfair trade practice or act when it engages in conduct which amounts to an inequitable assertion of its power or position.

7. **Unfair Competition § 1— shopping center construction—mortgage broker—representations about substituting tenants—no unfair trade practice**

In an action to recover from defendant who had been given the exclusive right to negotiate a permanent loan for plaintiff partners to construct a shopping center, defendant mortgage broker did not engage in any conduct which would amount to an unfair trade practice where defendant was at all times cooperative, doing what it could as an intermediary with defendant lender so as to secure for plaintiff partnership the terms and modifications it desired to have; as a result of defendant broker's efforts there was no difficulty posed in obtaining the consent of defendant lender for substitution of tenants; there was no evidence that defendant broker exerted itself in any manner which would have contributed to the problem of securing tenants for plaintiff's shopping center; and there was no evidence that defendant broker had anything to do with the construction lender's withdrawal from the shopping center project.

8. **Unfair Competition § 1— deceptive trade practice**

A trade practice or act is deceptive if it has the capacity or tendency to deceive, and in determining whether a representation is deceptive, its effect on the average consumer is considered.

9. **Unfair Competition § 1— mortgage broker—no deceptive trade practice**

The trial court did not err in granting defendant mortgage broker's motion for summary judgment as to plaintiff's claim for relief based on a deceptive trade practice where nothing in the depositions or affidavits supported

the view that statements by defendant's employee were deceptive, and defendant at all times undertook to keep plaintiff partnership accurately and clearly informed of the state of affairs concerning the loan commitment from defendant lender.

10. Brokers and Factors § 6; Contracts § 21— mortgage broker—contract to obtain financing—broker entitled to fee

Plaintiff's contention that defendant mortgage broker contracted to obtain permanent financing for plaintiff upon certain terms and conditions and that defendant should refund its placement fee of $13,000 because financing was never obtained was without merit, since defendant had no other obligation toward plaintiff than to negotiate a permanent loan commitment; defendant did obtain a mortgage loan commitment for plaintiff with defendant lender which was accepted in a revised fashion; and having obtained a loan commitment from defendant lender which was accepted by plaintiff, defendant mortgage broker earned its fee under the terms of the contract.

APPEAL by defendant Cameron-Brown from the decision of the Court of Appeals reported in 44 N.C. App. 210, 261 S.E. 2d 135 (1979), affirming in part and reversing in part the judgment of *McConnell, J.*, at the 24 April 1978 Schedule A Session of FORSYTH Superior Court granting motions of defendants for summary judgment.

This is an action for damages arising out of the unsuccessful efforts of plaintiffs to develop a shopping center at the intersection of Interstate 40 and North Carolina Highway 150 in the Town of Kernersville, North Carolina. Plaintiffs and Troy N. Wood were the original partners in the Kerners Village Company (hereinafter referred to as KVC), which had been formed in March 1973 to develop the proposed shopping center. Subsequently, Wood sold his partnership interest to KVC in October 1973, and his interest was thereafter purchased by Alvin A. Sturdivant, Jr.

In May 1973, KVC entered into a written contract with defendant Cameron-Brown Company which gave Cameron-Brown the exclusive right to negotiate a permanent mortgage loan for the partnership in the amount of $1,350,000 with an interest rate of 8½ percent. At the time KVC authorized Cameron-Brown to seek a loan commitment, KVC had negotiated four leases for tenants for the proposed shopping center: Lowe's, Mack's, Revco, and Goodyear. Bill Mullins, an agent for Cameron-Brown, and KVC regarded these firms as major credit tenants. Negotiations were then under way between the partnership and two other

firms who were potential tentants: Sears and the Bank of North Carolina.

As a result of Mullins' efforts, the Phoenix Mutual Life Insurance Company (hereinafter referred to as Phoenix) tendered a commitment to KVC on 20 July 1973 for a fifteen-year loan of $1,300,000 at 9 percent interest. KVC accepted the commitment in a letter dated 30 July 1973, subject to two conditions not relevant to the disposition of this appeal. On 14 August 1973, Phoenix modified its loan commitment offer along lines similar to those suggested by KVC, and KVC accepted the offer as modified on 30 August 1973.

The permanent loan commitment by Phoenix was conditioned on there being in effect at the time of the closing leases to Lowe's Foods, Inc., Mack's Stores, Inc., Revco, Inc., Goodyear Tire and Rubber Co., the Bank of North Carolina, and Sears, for terms of fifteen or twenty years, each at a specified annual rent. The loan commitment was further conditioned on KVC finding an interim construction lender who was reasonably acceptable to Phoenix. The commitment provided that it could be terminated at the election of Phoenix if the construction loan agreement was not delivered to it within ninety days of the permanent loan commitment.

On 17 September 1973, NCNB Mortgage Corporation (hereinafter referred to as NCNB) tendered a loan commitment to KVC which was accepted by the partnership. It was at about this time that the project began to encounter difficulties. Sears declined to enter into a lease for a catalog store. Further discussions thereafter took place which resulted in a reduction in the square footage of the project, as well as a reduction in the loan commitment of Phoenix to the sum of $1,200,000.00. After negotiations with Sears ended, the partnership entered into discussions with Pic-'N-Pay Shoes. On 22 January 1974, Phoenix advised Mullins that Pic-'N-Pay would be an acceptable tenant to replace Sears. Phoenix went on to inform Mullins that it would require $140,260 per year in credit lease income, including the bank lease, to substantiate the loan. This information was passed on to KVC.

KVC thereafter failed to secure a lease commitment from the Bank of North Carolina or any other bank. Because of the difficulties involved in securing leases and the inability of the partnership to raise the $100,000 difference in permanent loan financing,

NCNB refused to advance funds for construction. During these delays, construction costs increased, requiring the renegotiation of leases that had been signed. Subsequent negotiations with Phoenix proved unsuccessful, and Phoenix terminated its commitment in a letter dated 16 July 1974.

On 14 June 1977, plaintiffs filed this action against Cameron-Brown and Phoenix alleging that defendants had entered into a deliberate course of conduct which was designed to force KVC into an untenable economic position so that it would be unable to complete the project; that Phoenix cancelled its original loan commitment and issued a new one at a higher rate of interest with a holdback clause for $250,000 knowing that it would be unacceptable to the partnership; that the conduct of Phoenix and Cameron-Brown amounted to unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes; and that the standby fee collected by Phoenix and the placement fee received by Cameron-Brown were unearned and ought to be returned.

Defendants answered plaintiffs' complaint and denied liability for any damage sustained by KVC. On 17 March 1978, defendant Cameron-Brown moved for summary judgment, alleging that there were no genuine issues as to any material fact. On 20 March 1978, defendant Phoenix moved for summary judgment in its own right. Both motions were granted and judgment in favor of defendants was entered on 18 May 1978.

The Court of Appeals, in an opinion by Judge Wells, concurred in by Judge Erwin, affirmed the trial court as to Phoenix but reversed the trial court as to Cameron-Brown. Judge Clark dissented, and Cameron-Brown appealed pursuant to G.S. 7A-30(2).[1]

Badgett, Calaway, Phillips, Davis & Montaquila, by Chester C. Davis, for plaintiff-appellees.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John L. Jernigan, for defendant-appellant Cameron-Brown.

1. Plaintiffs did not petition this Court for discretionary review of the decision of the Court of Appeals as to Phoenix.

BRITT, Justice.

Cameron-Brown argues that it is entitled to summary judgment as to each of plaintiffs' claims for relief as a matter of law. The Court of Appeals disagreed, holding that the materials presented at the summary judgment hearing in support of the motions provided a sufficient forecast of evidence that Cameron-Brown, through its agent Mullins, could have deceived and misled plaintiffs. Our deliberations dictate the conclusion that summary judgment was properly entered in favor of Cameron-Brown. Accordingly, we reverse the Court of Appeals.

We note initially that we do not reach the issue of whether plaintiffs' complaint sufficiently alleges a claim for relief sounding in fraud. While it is unquestioned that the Rules of Civil Procedure, G.S. 1A-1, envisioned the notice theory of pleading, *see Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), Rule 9(b) requires that the circumstances constituting fraud shall be stated with particularity. *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). In disposing of this appeal, we assume, without deciding, that plaintiffs' complaint was sufficient to withstand a challenge to its particularity of averment. Nor do we reach the issue of whether plaintiffs' claims are barred by the statute of limitations. We assume, *arguendo*, that plaintiffs filed their complaint within its parameters.

The issue thus turns on the sole question of whether Cameron-Brown is entitled to summary judgment as a matter of law as to all of plaintiffs' claims for relief. The resolution of this issue requires that plaintiffs' allegations of fraud, as well as unfair and deceptive trade practices, be examined in light of the nature of summary judgment and the standard by which it is to be applied.

Summary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C. R. Civ. P. 56; *see* 10 C. Wright & A. Miller, Federal Practice and Procedure § 2711 (1973). The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of material fact by the record properly before the court. *Caldwell v. Deese*, 288

N.C. 375, 218 S.E. 2d 379 (1975); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); 10 C. Wright & A. Miller, *supra* § 2727.

Summary judgment may not be imposed in a vacuum. The examination of the propriety of its entry must not conclude with the determination that there are no genuine issues of material fact. The very terms of Rule 56 require that it also be established that the movant be entitled to judgment as a matter of law. The second prong of the test may be effected only when the evidence which is offered in support of the motion is examined in light of the substantive rules of law as they relate to a plaintiff's claim for relief. In the case at bar, plaintiffs sought relief alleging fraud as well as unfair and deceptive trade practices on the part of defendant Cameron-Brown. Our inquiry must now turn to a consideration of the essential elements which must be shown to support a recovery on causes of action which are founded upon such allegations.

[1] To make out a case of actionable fraud, plaintiffs must show: (a) that defendant made a representation relating to some material past or existing fact; (b) that the representation was false; (c) that defendant knew the representation was false when it was made or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that defendant made the false representation with the intention that it should be relied upon by plaintiffs; (e) that plaintiffs reasonably relied upon the representation and acted upon it; and (f) that plaintiffs suffered injury. *E.g.*, *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974); *see also Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261 S.E. 2d 99 (1980).

Using the *Ragsdale* case as a point of departure, we now turn our attention to an examination of the affidavits and other materials which were presented at the hearing on the motion for summary judgment.

[3] In support of its motion for summary judgment, Cameron-Brown presented the depositions of each of the partners in KVC, as well as the deposition of Frederick A. Osmers, a real estate investment officer with Phoenix, and the deposition and affidavit of Mullins, Cameron-Brown's agent. In addition, the trial court had before it numerous exhibits, consisting of agreements, letters, and memoranda which related to the development and financing of the

proposed shopping center. Though the depositions and exhibits are voluminous, detailing the complex series of events which surrounded the activities of the partnership as it sought to develop the project, resolution of the issue before us depends on a consideration of the statements by Mullins of Cameron-Brown concerning the substitution of tenants.

In May 1973, KVC entered into a contract with Cameron-Brown which gave Cameron-Brown the exclusive right to negotiate a permanent mortgage loan for the partnership in the amount of $1,350,000 with an interest rate of 8½ percent. At the time of this authorization, KVC had already negotiated four leases with tenants for the proposed shopping center: Lowe's, Mack's, Revco, and Goodyear.

Though they disagree as to the date of the meeting, Roy H. Johnson and Troy N. Wood, through their depositions, and Mullins, through his affidavit, agree that sometime in late July 1973, the partners in KVC met with Mullins at Cameron-Brown's Raleigh office. At that time, Mullins and the partners went over the loan commitment from Phoenix that was embodied in a letter dated 20 July 1973. The commitment provided, *inter alia*, that at the time of closing there were to be leases in effect to certain specified tenants including the four mentioned above, as well as to Sears and the Bank of North Carolina.

According to Mullins' affidavits, the partners asked a number of questions at the meeting, one of which was the possible consequence of their failure to secure a lease from Sears. Mullins replied that "[he] thought they would be allowed to substitute another credit tenant so long as Phoenix was satisfied that the substitute tenant had an equal credit rating and would contribute comparable income to the center." In his deposition, Johnson agrees that the subject of substitution came up at the meeting. It was his recollection that "[Mullins] led us to believe that there was no problem [about substitution]." Although he was not a partner in KVC at the time of the meeting, Alvin A. Sturdivant noted in his deposition that he had been told by Johnson that Mullins had assured him that "substitutions would be no problem." In his deposition, Lewis E. Lamb, Jr., stated that Mullins told his partners that it did not make any difference if Sears entered into a lease. The group did not sign the commitment at that time

because the partners wanted to review it further. Thereafter, the partners signed the commitment letter of 20 July 1973 to acknowledge their acceptance of its terms and delivered it to Cameron-Brown's office in Raleigh.

Though the depositions and the affidavit differ in their formulation of what Mullins actually said to the partners as they reviewed the terms of the commitment, the substance of the statement is clear: Mullins did not think that substituting another tenant for Sears would pose a problem. The essence of plaintiffs' argument is that this statement amounts to a fraudulent misrepresentation. We do not find this argument persuasive.

[2] As a general rule, a mere promissory representation will not be sufficient to support an action for fraud. *Pierce v. American Fidelity Fire Ins. Co.*, 240 N.C. 567, 83 S.E. 2d 493 (1954); *McCormick v. Jackson*, 209 N.C. 359, 183 S.E. 369 (1936). A promissory misrepresentation may constitute actionable fraud when it is made with intent to deceive the promisee, and the promisor, at the time of making it, has no intent to comply. *Ragsdale v. Kennedy, supra; Vincent v. Corbett*, 244 N.C. 469, 94 S.E. 2d 329 (1956). A mere recommendation or statement of opinion ordinarily cannot be the basis of a cause of action for fraud. *Myrtle Apartments, Inc. v. Lumberman's Mut. Casualty Co.*, 258 N.C. 49, 127 S.E. 2d 759 (1962); *Lester v. McLean*, 242 N.C. 390, 87 S.E. 2d 886 (1955).

[3] While there is some variation among the depositions and the affidavit as to what Mullins actually said regarding the substitution of tenants, we do not think that the character of the representations is determinative of this case. Assuming, *arguendo*, that the statements amount to more than promissory representations or opinions, they are insufficient to serve as a foundation of a claim for relief which sounds in fraud. Though the statements are sufficient to support an inference that they are definite and specific representations which relate to some material past or existing fact, the evidence adduced at the hearing on the motion for summary judgment establishes that the statements complained of were in fact truthful.

The evidence is uncontroverted that during September 1973, McAuliffe and Associates, KVC's leasing agent for the shopping center, informed the partnership that Sears had declined to enter

into a lease for a catalog store. At the same time, the agent informed the partnership that Pic 'N Pay Stores, Inc., would enter into a lease for less space than Sears would have occupied. During this period, Lowe's orally expressed an intention to increase its annual rent to cover anticipated cost overruns in the construction of its store. All of this information was communicated to Mullins orally. On 20 September 1973 and again on 1 October 1973, Mullins, at the request of KVC, wrote Osmers requesting that the original loan commitment be modified. By a letter dated 9 October 1973, Mullins further advised Osmers that the space which had been allocated to local tenants would be reduced from 21,000 square feet to 17,000 square feet. Prior to this time, on 17 September 1973, NCNB had issued a construction loan commitment to KVC.[2] This commitment was signed by all of the plaintiffs on 22 October 1973.[3]

On 25 October 1973, Osmers responded to Mullins' correspondence, advising that the requested modifications, if they were accepted, would probably result in some reduction in the amount of the loan. Osmers' reply noted that the existing lease with Lowe's guaranteed less annual rent than that which had been specified in the original loan commitment. Osmers went on to say that Phoenix would extend the deadline for submitting the required buy-sell agreement until 1 December 1973 and requested that he be provided with an executed copy of the Pic 'N Pay lease.

By a letter dated 27 November 1973, Osmers advised KVC that the finance committee of Phoenix had agreed to amend the commitment so as to reduce the amount of the loan by $100,000, to reduce the monthly payments, and to reduce the amount of rent to be paid by Lowe's Foods, Inc. The commitment was further amended to provide that the provisions which called for a lease to Sears for a catalog store be deleted in favor of substituting a lease to Pic 'N Pay for five years at an annual rent of $8,000.00.

2. Neither Phoenix nor Cameron-Brown had any involvement with the proposed construction loan.

3. Sturdivant became a partner in KVC in mid-October 1973, replacing Wood. In subsequent months, he became the principal spokesman for the partnership because of his twenty years' experience as a contractor and real estate developer.

The proposed amendment was submitted to KVC by Mullins at a meeting in Winston-Salem on or about 1 December 1973. At that meeting, McAuliffe assured plaintiffs that a lease with Pic 'N Pay was forthcoming. In his deposition, Sturdivant acknowledged that the proposed amendment incorporated all of the modifications which were sought by KVC at that time and that plaintiffs were satisfied that the project could be completed. The partnership accepted the amendment on 4 December 1973.

Despite the earlier assurances to the contrary, McAuliffe orally informed KVC in mid-December 1973 that Pic 'N Pay had declined to enter into a lease. By a letter dated 4 January 1974, McAuliffe notified the partnership that Pic 'N Pay's decision was final.

During January further discussions were had between KVC and NCNB, the construction lender. NCNB was unwilling to advance funds for construction until it was satisfied that the requirements of the Phoenix commitment concerning the unexecuted leases (Pic 'N Pay and a bank) could be met, as well as being satisifed that the partnership could provide the $100,000 which was needed to bridge the gap between the amount of the construction loan and the permanent loan.

At about the same time that the discussions with NCNB were had Sturdivant raised the same issues with Mullins. On 7 January 1974, Mullins wrote Osmers requesting that KVC be allowed to substitute a comparable credit tenant for Pic 'N Pay, as well as seeking advice as to the amount of credit tenant income that would be necessary to sustain the loan and the amount Phoenix would lend if KVC could not find a tenant to replace Pic 'N Pay. Osmers replied by way of a memorandum dated 22 January 1974 that Phoenix would allow the substitution of another satisfactory credit tenant for Pic 'N Pay and that Phoenix would require at least $140,000 in annual credit lease income, including the bank ground lease, to fund a loan in the amount of $1,200,000.00.

On 13 February 1974, Sturdivant wrote Mrs. Geneva McGrath of Cameron-Brown[4] that KVC had been unable to satisfy the construction lender concerning the unexecuted leases, that

4. Mullins left Cameron-Brown for another job on 31 January 1974.

construction costs had gone up, and that KVC had to renegotiate the duration of all the leases (and the rental on some). The letter concluded with the suggestion that Cameron-Brown and Phoenix refund the fees that KVC had paid and that the project start all over. This information was passed on to Phoenix. Osmers replied that Phoenix was willing to extend the commitment it had made if it were paid an additional $13,000.00.

Thereafter, Sturdivant, continuing to act for the partnership, corresponded with Michael S. Clapp of Cameron-Brown, seeking to revise the Phoenix loan commitment again. The substance of the discussion was embodied in a letter to Osmers dated 14 March 1974 which confirmed that KVC was considering the proffered extension and requested Osmers' opinion as to the possibility of increasing the amount of the loan to $1,300,000 if the leases on an attached schedule could be secured. The schedule proposed eliminating Pic 'N Pay and the bank ground lease. Osmers replied that the proposed schedules could not justify a loan in excess of $1,237,500.00.

By a letter dated 1 May 1974, Sturdivant outlined to Clapp the various problems which were facing KVC and requested a new commitment which would require only the four existing credit tenants (Lowe's, Mack's, Revco, and Goodyear) and an option from a bank for a ground lease. The proposal was forwarded to Osmers who concluded that it would justify a loan in the amount of $1,250,000.00. Osmers then submitted this conclusion to the policy committee on 10 June 1974. The policy committee accepted the recommendation but determined that $250,000 would be held back pending completion of the project and occupancy by the tenants. By its own terms, the new commitment offer required that it be accepted by 1 July 1974. Following KVC's failure to accept the offer in apt time, Phoenix advised the partnership in a letter dated 16 July 1974 that it was terminating the original commitment

> . . . because of the failure to deliver to us evidence of the closing of your construction loan on papers and with a lender acceptable to us and your failure to deliver to us the undertaking of the lender to assign the loan to us, all as contemplated by paragraph number 17 of the original commitment letter of 20 July 1973.

By a letter dated 19 July 1974, Sturdivant confirmed that KVC had rejected the proposed commitment, advised that the project had been postponed indefinitely, and requested refund of the fees which had been paid to Cameron-Brown and Phoenix. Cameron-Brown and Phoenix declined to make any refund.

From the foregoing discussion it is clear that Mullins' statements that substitution of tenants would pose no problem were true. Phoenix agreed to substitute Pic 'N Pay for a Sears Catalog Store. When Pic 'N Pay declined to enter into a lease at the shopping center, Osmers informed the partnership that Phoenix was willing to substitute another tenant for Pic 'N Pay. Furthermore, in June 1974, Phoenix indicated that it was willing to enter into a commitment which called for only the four existing leases and an option from a bank for a ground lease. The record indicates without contradiction that Phoenix was willing to accommodate the partnership's requests for modification of the original commitment so that the project could go forward. The record further establishes that Cameron-Brown actively sought to assist KVC in obtaining the requested modifications from Phoenix. There is no evidence in the record that either Phoenix or Cameron-Brown sought to influence NCNB who terminated its construction loan commitment in May 1974. Nor is there any evidence that either Cameron-Brown or Phoenix interfered with the efforts of McAuliffe and KVC to secure tenants for the project. It is clear from the record that neither of the defendants had any obligation to obtain leases for the project.

The evidence which was presented at the hearing on the motion for summary judgment makes it apparent that Mullins' statements were true; there was no difficulty in obtaining the consent of Phoenix to substitute tenants in the shopping center. The same evidence also establishes that the problems which were encountered by the partnership in developing the project were caused by its inability to secure tenants who were willing to enter into leases. The record is utterly barren of any evidence which would tend to show that Phoenix and Cameron-Brown contributed in any way to the problems which were involved in securing these tenants.

It necessarily follows that the evidence which was adduced at the hearing on the motion for summary judgment was sufficient

to forecast that the evidence to be introduced at trial by plaintiff would be inadequate as a matter of law to establish a *prima facie* case which sounds in fraud. There is absolutely no evidence which tends to show that Mullins' statements were false.

Allegations of fraud do not readily lend themselves to resolution by way of summary judgment because a cause of action based on fraud usually requires the determination of a litigant's state of mind. *See, e.g., Fogarty v. Security Trust Co.*, 532 F. 2d 1029 (5th Cir. 1976); *Weiss v. Kay Jewelry Stores, Inc.*, 470 F. 2d 1259 (D.C. Cir. 1972); *American Nat. Bank & Trust Co. of Chicago v. Certain Underwriters at Lloyd's of London*, 444 F. 2d 640 (7th Cir. 1971). A litigant's state of mind is seldom provable by direct evidence but must ordinarily be proven by circumstances from which it may be inferred. *See, e.g., State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). This renders summary judgment inappropriate in a fraud case where the court is called upon to draw a factual inference in favor of the moving party, *see Kubik v. Goldfield*, 479 F. 2d 472 (3d Cir. 1973); or where the court is called upon to resolve a genuine issue of credibility. *Kubik v. Goldfield, supra; Associated Hardware Supply Co. v. Big Wheel Distributing Co.*, 355 F. 2d 114 (3d Cir. 1966); *see generally* 6 Moore's Federal Practice ¶ 56.17[27] (1980). However, the issue of fraud may be summarily adjudicated when it is clearly established that there is no genuine issue of material fact. *E.g., Caplan v. Roberts*, 506 F. 2d 1039 (9th Cir. 1974); *Securities and Exchange Comm'n v. Geyser Minerals Corp.*, 452 F. 2d 876 (10th Cir. 1971). We have demonstrated above that no genuine issue of material fact exists in the present case. The evidence which was presented at the hearing on the motion for summary judgment showed without contradiction that Mullins' statements were true. Therefore, an essential element of a cause of action sounding in fraud could not be proven at trial. Accordingly, the issue of Mullins' state of mind as to whether he made his representations knowing them to be false when they were made or in reckless disregard of whether or not they were truthful does not come into consideration here.

[4] We now turn our attention to a consideration of whether the conduct of Cameron-Brown amounts to an unfair and deceptive trade practice within the purview of G.S. § 75-1.1. At the time plaintiffs' cause of action accrued, the statute provided, in pertinent part, that

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. G.S. § 75-1.1 (1975).

By its very terms, the statute declares unfair or deceptive acts or practices in the conduct of any trade or commerce to be unlawful. The facts which gave rise to the present litigation involve the relationships of borrower and lender, as well as borrower and broker. Before a practice can be declared unfair or deceptive, it must first be determined that the practice or conduct which is complained of takes place within the context of the statute's language pertaining to trade or commerce. In the present case, it must be decided whether the relationship of borrower and mortgage broker and the activities which are appurtenant to it are components of the larger concept of trade or commerce. If they are not, then the statute is of no import, and our inquiry is at an end.

"Commerce" in its broadest sense comprehends intercourse for the purposes of trade in any form. *Adair v. United States*, 208 U.S. 161, 52 L.Ed. 436, 28 S.Ct. 277 (1908); *Welton v. Missouri*, 91 U.S. (23 Wall.) 275, 23 L.Ed. 347 (1876); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824); *State ex rel. Edmisten v. J. C. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977). The use of the word "trade" interchangeably with the word "commerce" indicates that the statute contemplated a narrower definition of commerce which would comprehend an exchange of some type. *State ex rel. Edmisten v. J. C. Penney Co., supra.*[5] By enacting G.S. 75-1.1, as it was in effect during the attempted development of the shopping center, the General Assembly expressed its concern with insuring openness and fairness in those activities in which a participant could be characterized as a seller. *State ex rel. Edmisten v. J. C. Penney Co., supra.* The relationship of borrower and mortgage broker involves such activities. The broker is manifestly engaged

5. We note that in the wake of our decision in *Penney* the General Assembly amended G.S. 75-1.1, in part, to read as follows:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession. 1977 N.C. Sess. Laws c. 747.

in the business of selling his services in procuring a loan which is most favorable to the needs and resources of the potential borrower who, in turn, has sought to obtain a broker who can best represent his interests in securing proper financing. While no tangible property of any kind moves through commerce because of this relationship, an exchange of value does occur as the result of this process of securing a broker as the representative of the potential borrower. It is clear, therefore, that the activities of Cameron-Brown with regard to its relationships to KVC come within the purview of the statute. Whether these activities amount to unfair or deceptive trade practices is another question.

The language of G.S. § 75-1.1 closely resembles that employed by Section 5(a)(1) of the Federal Trade Commission Act which provides that

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. 15 U.S.C. § 45(a)(1) (1976).

The similarity in language apparently was not accidental. *State ex rel. Edmisten v. J. C. Penney Co., supra; see generally,* Morgan, *The People's Advocate in the Marketplace—The Role of the Attorney General in the Field of Consumer Protection,* 6 Wake Forest Intra. L. Rev. 1 (1969). Because of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of G.S. § 75-1.1. *Hardy v. Toler,* 288 N.C. 303, 218 S.E. 2d 342 (1975); *see generally* Note, 12 Wake Forest L. Rev. 484 (1976).

While Section 5 of the FTC Act undertakes to proscribe "unfair or deceptive acts or practices in or affecting commerce", the precise meanings of these terms are not enunciated by the statute itself. It is critical that the generality of these standards of illegality be noted. *Federal Trade Comm'n v. Colgate-Palmolive Co.,* 380 U.S. 374, 13 L.Ed. 2d 904, 85 S.Ct. 1035 (1965); *see generally Atlantic Refining Co. v. Federal Trade Comm'n,* 381 U.S. 357, 14 L.Ed. 2d 443, 85 S.Ct. 1498 (1965). The broad language of the statute indicates that the scope of its concept and application is not limited to precise acts and practices which can be readily catalogued. *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 9 L.Ed. 2d 325, 83 S.Ct. 476 (1963). What is an unfair or deceptive trade practice usually depends upon the

facts of each case and the impact the practice has in the marketplace. *Pan American World Airways, Inc. v. United States, supra; see also Commonwealth v. DeCotis*, 366 Mass. 234, 316 N.E. 2d 748 (1974); *Hardy v. Toler, supra.*

Though we recognize that the language employed in Section 5 of the FTC Act paints with a broad brush, the outer limits of its reach have emerged in the reported cases. Before proceeding to discuss the sweep of the statutory language, we note in passing that the language contemplates two distinct grounds for relief. While an act or practice which is unfair may also be deceptive, or vice versa, it need not be so for there to be a violation of the Act.

[5] The concept of "unfairness" is broader than and includes the concept of "deception." [1974] 2 Trade Reg. Rep. (CCH) § 7521. A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscruplous, or substantially injurious to consumers. *Spiegel, Inc. v. Federal Trade Comm'n*, 540 F. 2d 287 (7th Cir. 1976); *see Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 31 L.Ed. 2d 170, 92 S.Ct. 898 (1972).[6]

In *Spiegel, supra*, petitioner was a Delaware corporation with its office and principal place of business in Chicago, Illinois. It was a catalogue retailer who engaged in the advertising, offering for sale, and distribution of an extensive line of consumer goods. In the course of its mail order business, petitioner received orders in Illinois from purchasers in numerous states. In order to facilitate purchase of its products, Spiegel regularly extended credit to consumers. In the course of collecting retail credit accounts, Spiegel customarily used Illinois courts to sue allegedly defaulting customers who resided outside of Illinois. In filing these collection

6. In *Sperry & Hutchinson*, Mr. Justice White noted that

> The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:
>
> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes *substantial injury to consumers* (or competitors or other businessmen)." 405 U.S. at 244-245, 31 L.Ed. 2d at 179, 92 S.Ct. at 905, n. 5.

actions, Spiegel availed itself of the Illinois long-arm statute to establish jurisdiction. In the event that the defendant raised an objection to the forum on the ground of inconvenience, Spiegel would take a voluntary dismissal.[7] The Federal Trade Commission concluded after an investigation that the practice amounted to a violation of Section 5 and entered a cease and desist order. The order provided that Spiegel was to institute collection actions only in the county of the debtor's residence or in the county where the contract was signed.

[6] On appeal, the Seventh Circuit affirmed the conclusion of the Commission.[8] The court noted that many of Spiegel's customers lived outside of Illinois. Almost all of them had no contact with the state other than their business dealings with Spiegel, receiving its catalogues in the mail and executing the purchasing contracts in their homes. The court drew upon the opinion of the Commission, *In re Spiegel, Inc.*, 86 F.T.C. 425 (1975), to observe that the practice was offensive to articulated public policy to guarantee all citizens a meaningful opportunity to defend themselves in court. By using the Circuit Court of Cook County, Spiegel forced the consumer to appear in a courtroom hundreds or even thousands of miles from home, at a cost in travel alone that may have exceeded the amount in controversy. Even if the judgments obtained against the debtor were set aside, affirmative efforts to procure such action would be costly and burdensome to the consumer. The Commission and the Seventh Circuit were sensitive to the fact that improper judgments could be put to injurious uses such as the sullying of credit records. Though the factors which the Federal Trade Commission considers in making a determination of whether a practice is unfair are of necessity broad, the application they received by the Seventh Circuit in *Spiegel* reveals their 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. *Spiegel, Inc. v. Federal Trade Comm'n*, 540 F. 2d at 294; *cf. Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. at 244, 31 L.Ed. 2d at 179, 92 S.Ct. at 905. (". . . the Federal Trade Commission does not ar-

7. Spiegel ceased the practice in February 1973, before the order of the Commission.

8. The Seventh Circuit modified the order of the Commission as to particulars which are not now relevant.

rogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.")

[7] The record is devoid of any evidence which would tend to show that Cameron-Brown engaged in any conduct which would be unfair when judged in light of the principles we have enunciated above. At all times, Cameron-Brown was cooperative, doing what it could as an intermediary with Phoenix so as to secure for the partnership the terms and modifications it desired to have. As a result of Cameron-Brown's efforts, there was no difficulty posed in obtaining the consent of Phoenix for the substitution of tenants. The evidence shows without contradiction that the partnership had continuing problems securing tenants for the shopping center. There is no evidence whatsoever that Cameron-Brown exerted itself in any manner which would have contributed to the problem of securing tenants. Nor is there any evidence that Cameron-Brown had anything to do with NCNB's withdrawing from the project as the construction lender.

Having dealt with the concept of unfairness, we now turn our attention to the idea of deception.

[8] An act or practice is deceptive under Section 5 if it has the capacity or tendency to deceive. *Regina Corp. v. Federal Trade Comm'n*, 322 F. 2d 765 (3d Cir. 1963); *United States Retail Credit Ass'n v. Federal Trade Comm'n*, 300 F. 2d 212 (4th Cir. 1962); *Goodman v. Federal Trade Comm'n*, 244 F. 2d 584 (9th Cir. 1957); *Charles of the Ritz Distributors Corp. v. Federal Trade Comm'n*, 143 F. 2d 676 (2d Cir. 1944); *Federal Trade Comm'n v. Hires Turner Glass Co.*, 81 F. 2d 362 (3d Cir. 1935). Proof of actual deception is unnecessary. *Trans World Accounts, Inc. v. Federal Trade Comm'n*, 594 F. 2d 212 (9th Cir. 1979); *Resort Car Rental System, Inc. v. Federal Trade Comm'n*, 518 F. 2d 962 (9th Cir.), *cert. denied sub. nom., MacKenzie v. United States*, 423 U.S. 827 (1975). Though words and sentences may be framed so that they are literally true, they may still be deceptive. *Koch v. Federal Trade Comm'n*, 206 F. 2d 311 (6th Cir. 1953); *see Federal Trade Comm'n v. Sterling Drug*, 317 F. 2d 669 (2d Cir. 1963). In determining whether a representation is deceptive, its effect on the

average consumer is considered. *E.g., Aronberg v. Federal Trade Comm'n,* 132 F. 2d 165 (7th Cir. 1942).

[9] Our examination of the record leads us to conclude that Mullins' statements were not deceptive. While Mullins' statements were truthful, we do not base our conclusion on that fact. A statement which is truthful may yet be deceptive if it has the capacity or tendency to deceive. Nothing in the record supports the view that Mullins' statements possessed this characteristic. At all times, Cameron-Brown undertook to keep the partnership accurately and clearly informed of the state of affairs concerning the loan commitment from Phoenix. There is no evidence that such was not the case or the effect.

We, therefore, conclude that the trial court did not err in granting Cameron-Brown's motion for summary judgment as to the claim for relief which alleged an unfair and deceptive trade practice.

[10] Plaintiffs in their third claim for relief, allege that Cameron-Brown contracted to obtain permanent financing for the partnership upon certain terms and conditions, and since financing was never obtained, Cameron-Brown should refund its placement fee of $13,000.00. We disagree.

The undisputed facts establish that KVC entered into a written contract with Cameron-Brown on 9 May 1973. Under the terms of this contract, Cameron-Brown was granted the exclusive right to negotiate a permanent loan commitment for the partnership. Cameron-Brown had no other obligation towards plaintiffs. It is uncontroverted that Cameron-Brown did obtain a mortgage loan commitment for the partnership with Phoenix, which was accepted in a revised fashion on 30 August 1973. Having obtained a loan commitment from Phoenix which was accepted by KVC, Cameron-Brown earned its fee under the terms of the contract.

We hold that defendant Cameron-Brown is entitled to summary judgment as to each of plaintiffs' claims for relief.

The decision of the Court of Appeals is

Reversed.

In re Community Association

IN THE MATTER OF THE APPEAL FROM THE DENIAL OF THE APPLICATION TO DREDGE AND/OR FILL OF THE BROAD AND GALES CREEK COMMUNITY ASSOCIATION

No. 101

(Filed 3 June 1980)

1. **Appeal and Error § 14— judgment rendered out of session—no notice of appeal filed with clerk—minimal acceptable steps to perfect appeal**

While notice of appeal of a judgment rendered out of session was required by Appellate Rule 3(b) to be filed with the clerk and served on the other parties, steps taken by appellant in an attempt to perfect its appeal were minimally acceptable in this case because the respondents were in fact put on actual notice of applicant's intent to appeal from any adverse decision where applicant stated in open court that it would appeal if it lost, and the applicant in open court requested that the proposed judgment to be submitted by respondents contain appeal entries so that applicant's notice of appeal would be perfected if the court should sign the proposed judgment.

2. **Waters and Watercourses § 7— denial of dredge or fill permit—adverse effect on riparian owners—no unlawful delegation of legislative power**

There are adequate statutory guidelines and procedural safeguards relating to the authority of the Department of Natural Resources and Community Development and the review commission to deny an application for a permit to dredge or fill in estuarine waters pursuant to G.S. 113-229(e)(2) upon finding "that there will be significant adverse effect on the value and enjoyment of the property of riparian owners" so that G.S. 113-229(e)(2) does not constitute an unlawful delegation of legislative power in violation of Art. I, § 6 of the N. C. Constitution.

3. **Waters and Watercourses § 7— denial of dredge or fill permit—adverse effect on riparian owners—constitutional exercise of police power**

The statute giving the Department of Natural Resources and Community Development the authority to deny an application for a dredge or fill permit in estuarine waters upon finding "that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners," G.S. 113-229(e)(2), does not allow the State to favor private interests over public interests and is a constitutional exercise of the police power since the denial of a permit where either the water or adjacent private property will be adversely affected is a matter of public interest and is therefore a proper subject for regulatory legislation, the permit application system created by G.S. 113-229 is the most feasible and reasonable manner to control dredging and filling activities, and the restriction placed on a landowner is reasonable because it relates only to what the owner may do in the State's estuarine waters and does not interfere with the owner's right to use his own property.

4. **Waters and Watercourses § 7— application for dredge or fill permit—effect on riparian owners—consideration of boat ramp which is purpose of dredge and fill work**

In determining whether to deny an application for a dredge and fill permit in estuarine waters on the ground that there would be a significant adverse effect on the value and enjoyment of the property of riparian owners, the review commission was not limited to a consideration only of the effects of the dredging and filling itself on adjacent landowners but could properly consider the effects of a boat ramp which was the ultimate purpose of the dredge and fill work. Furthermore, even if the review commission exceeded its statutory authority in considering the effects of the boat ramp, the commission's denial of a dredge and fill permit would still be upheld where the application stated that the fill from the dredging operation would be placed on the roadbed leading to the boat ramp site; the riparian owners presented evidence that the roadbed has already suffered erosion, that erosion will continue unless adequate drainage measures which the applicant did not propose are taken, and that the erosion will affect the access area and the property of the riparian owners, since the adjacent owners' property will be adversely affected by the dredging and filling itself because of the further erosion that will occur.

5. **Waters and Watercourses § 7— denial of dredge and fill permit—boat ramp's adverse effect on riparian owners—sufficiency of evidence in record as a whole**

There was substantial evidence in the record as a whole to support the decision of the review commission upholding the denial of a dredge and fill permit by the Department of Natural Resources and Community Development on the ground that a boat ramp which is the ultimate purpose of the dredge and fill work will significantly adversely affect the value and enjoyment of riparian property.

Justice EXUM dissenting in part.

ON appeal by an adjacent riparian landowner and the Marine Fisheries Commission from the decision of the Court of Appeals, 44 N.C. App. 554, 261 S.E. 2d 510 (1980) (opinion by *Hedrick, J.* with *Wells, J.* concurring and *Martin [Robert M.], J.* dissenting), which reversed the judgment entered by *Rouse, J.* on 6 November 1978 in CARTERET County Superior Court upholding the decision of the Marine Fisheries Commission denying the applicant a permit to dredge and fill on Broad Creek.

Applicant Broad and Gales Creek Community Association sought from the Department of Natural Resources and Community Development a permit to dredge and fill on Broad Creek for the purpose of constructing a boat launching ramp. Pursuant to G.S. 113-229(d), a copy of the application was served on the owner of each tract of riparian property adjoining the property concerned in the application. The two adjacent owners, Mrs. Nancy

Fadum, a part-owner of Rugumak, Ltd., and Fred Cone, filed written objections to the granting of the permit. In accordance with G.S. 113-229(e) the application was circulated among eleven state agencies so that they had an opportunity to raise any objections to the project that they might have. After reviewing the project and conducting inspections, there were no objections from any of the state agencies.

By letter dated 11 May 1976, Mr. Leo Tilley, Assistant Director of the Division of Marine Fisheries within the Department of Natural Resources and Community Development, informed the applicant that its request for the permit was denied. The denial was based on G.S. 113-229(e)(2) which provides that, "[t]he Department may deny an application for a dredge or fill permit upon finding: . . . (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners."

Pursuant to G.S. 113-229(f), applicant requested and received a hearing before the Marine Fisheries Commission.[1] The Commission conducted a hearing, heard the evidence and entered its findings of facts and conclusions of law. The Commission concluded that the denial of the permit was proper because the applicant, who had the burden of proof at the hearing, G.S. 113-229(g)(5), "failed to show by the greater weight of the evidence that the permit denial by the department was not in accordance with the law and the facts."

G.S. 113-229(f) provides that an "appeal from the ruling of the review commission [is to go] to the superior court of the county where the land or any part thereof is located, [and that the judicial review is governed by] . . . the provisions of Chapter 150A of the General Statutes [the Administrative Procedure Act]." Pursuant to that statute, the applicant appealed to the Superior Court of Carteret County and Rouse, J. affirmed the Commission's decision. From the reversal by the Court of Appeals, the adjacent riparian landowner, Rugumak, Ltd., and the Marine Fisheries Commission have appealed as a matter of right to this Court pursuant to G.S. 7A-30(2).

1. Effective 2 April 1979 the Coastal Resources Commission now conducts these hearings. G.S. 113-229(f) (Supp. 1979).

Other facts necessary to the decision of this case will be related in the opinion.

Wheatly, Wheatly, Davis & Nobles by Warren J. Davis for appellant Rugumak, Ltd.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General W. A. Raney, Jr. for appellant Marine Fisheries Commission.

Bennett, McConkey & Thompson, P.A. by Thomas S. Bennett for appellee.

COPELAND, Justice.

[1] Six questions are presented for our consideration. The first issue is whether the Court of Appeals erred in failing to dismiss the applicant's appeal to that court due to a failure to properly serve notice of appeal on the opposing party. The Court of Appeals did not address this issue. Nevertheless, "[a] party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court [Rugumak, Ltd.] may present in his brief . . . any questions which, pursuant to Rule 28(c), he properly presented for reivew to the Court of Appeals." Rule 16(a), Rules of Appellate Procedure. Rule 28(c) deals with the presentation of additional questions by an appellee and Rugumak, Ltd., as appellee in the Court of Appeals, properly presented this issue to that Court by noting an exception, making a cross-assignment of error, and arguing the question in its brief in the Court of Appeals. Therefore, as provided in Rule 16(a), the question is properly before us for review.

Rule 3(a), Rules of Appellate Procedure, allows the notice of appeal to be given in open court when the "*judgment or order . . . [is] rendered* in a civil action or special proceeding *during a session of court.*" [Emphasis added.] The judgment in this case was rendered out of session and Rule 3(b) plainly provides that "[a]ny party entitled by law to appeal from a judgment or order . . . rendered in a civil action or special proceeding out of session may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule."

The trial judge conducted a hearing on the motion to dismiss the appeal. In his order filed 22 February 1979 he concluded that the applicant properly perfected his appeal by giving notice of appeal in open court. In essence, he found that the applicant had complied with Rule 3(a) of the Rules of Appellate Procedure. The applicant had stated in open court that if he lost he would appeal. In addition, the trial judge noted in his order that the applicant had "in open court requested that the proposed judgment to be submitted by the respondents contain appeal entries to be made a part of the judgment proposed by the respondents so that in the event the court should sign the respondent's proposed judgment the applicant's notice of appeal would be perfected. . . . The proposed judgment tendered by the respondents did not contain appeal entries as requested by applicant in open court."

Thus, Rugumak was put on notice that the applicant would appeal in the event it lost in the trial court. While it is true that since the judgment was rendered out of session it is Rule 3(b) and not Rule 3(a) that is applicable, under the peculiar facts of this particular case we hold that the above noted steps taken by the applicant in an attempt to perfect an appeal are minimally acceptable because Rugumak was in fact put on actual notice of applicant's intention to appeal from any adverse decision. Such a procedure for giving notice of appeal should not, however, be repeated because the steps for taking an appeal are clearly set forth in Rule 3 and should be followed as written. This assignment of error is overruled.

Before discussing the remaining issues we must note that the parties to this appeal have not adhered to the literal requirements of Rule 16(a) of the Rules of Appellate Procedure. Rugumak was the appellee in the Court of Appeals and is the appellant here. The rule is: "A party who was an appellee in the Court of Appeals and is an appellant in the Supreme Court may present in his brief any questions going to the basis of the Court of Appeals' decision by which he is aggrieved, and any questions which, pursuant to Rule 28(c), he properly presented for review to the Court of Appeals." Rule 16(a).

The issue that Rugumak presented to the Court of Appeals for review pursuant to Rule 28(c) (upon a cross-assignment of error) was the denial of its motion to dismiss applicant's appeal. As

noted above, this issue was properly brought forward to this Court since it was presented to the Court of Appeals. The other issues which Rugumak should properly present here are those which go "to the basis of the Court of Appeals' decision by which he is aggrieved." The Court of Appeals decided that G.S. 113-229(e)(2) was an unconstitutional exercise of the police power and thus the action of the Marine Fisheries Commission (Commission) in basing its decision on this statute was arbitrary and capricious. Rugumak brought this issue to this Court as well as all of the other issues that the *applicant* had presented to the Court of Appeals even though that Court did not discuss or decide those other issues since it decided in the applicant's favor on the police power issue.

Nevertheless, we shall address all of the issues presented here by Rugumak as appellant because Rule 16(a) also provides: "A party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals. . . ." Rule 16(a). The applicant was the appellant in the Court of Appeals and is the appellee here. Thus, it is clear that if Rugumak had properly limited itself to the issues decided against its position in the Court of Appeals, the applicant, after responding in its brief to this Court to those issues, could then have presented as additional questions for review, *all* of the issues that *it* had presented to the Court of Appeals without limitation to those actually determined by that Court. Such steps would have then necessitated a reply brief from Rugumak to respond to those additional questions presented in the applicant's brief to this Court.

These additional steps were unnecessary on this appeal. The applicant has vigorously argued *all* of the issues and clearly wishes this Court to address all of the issues within our potential scope of review. *See,* Drafting Committee Note to Rule 16. Therefore, even though Rule 16 has not literally been followed, the parties have put before us all of the issues that were before the Court of Appeals. Rugumak seeks a reversal on the point upon which it lost in the Court of Appeals and the applicant would like us to address the additional grounds that he presented

to the Court of Appeals (success upon any one of which will lead to a decision in its favor).

[2] The second issue is whether G.S. 113-229 is an unconstitutional delegation of legislative power in violation of Art. I, sec. 6 of the North Carolina Constitution or is an unconstitutional exercise of the police power.

Our recent decision in *Adams v. N.C. Department of Natural and Economic Resources*, 295 N.C. 683, 249 S.E. 2d 402 (1978), fully sets forth the current status of and analysis of cases under the non-delegation doctrine in this jurisdiction. The full exposition of the doctrine in *Adams* by Justice Huskins cannot be improved upon and it would serve no useful purpose to simply repeat it here. It remains for us to apply the doctrine to the statute at issue in this case.

The test is whether the delegation is accompanied by adequate guiding standards. If so, the delegation will be upheld. The need to delegate a limited portion of legislative powers in order to effectively utilize administrative expertise must be reconciled with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. *Jernigan v. State*, 279 N.C. 556, 184 S.E. 2d 259 (1971). We must insure that the decision-making by the administrative agency is not arbitrary and unreasoned and that the agency is not asked to make important policy choices that might just as easily be made by the legislature. *Adams v. N.C. Department of Natural and Economic Resources, supra.* The goals and policies set forth by the legislature for the agency to apply in exercising its powers need be only as specific as the circumstances permit. *Id.; N.C. Turnpike Authority v. Pine Island, Inc.*, 265 N.C. 109, 143 S.E. 2d 319 (1965).

The applicable standard by which to judge applications for permits to dredge and fill that is at issue in this case provides:

> "The Department may deny an application for a dredge or fill permit upon finding: . . . (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners. . . ." G.S. 113-229(e)(2).

If the matter goes to the Commission for review, it shall conduct a hearing.

"At said hearing, evidence shall be taken by the review commission from all interested persons. . . . After hearing the evidence, the review commission shall make findings of fact in writing and shall affirm, modify or overrule the action of the Department concerning the permit application." G.S. 113-229(f).

"The burden of proof at any hearing shall be upon the person or agency, as the case may be, at whose instance the hearing is being held." G.S. 113-229(g)(5).

"No decision or order of the review commission shall be made in any proceeding unless the same is supported by competent, material and substantial evidence upon consideration of the whole record." G.S. 113-229(g)(6).

The above quoted statutes give clear and sufficiently detailed guidance to the Department of Natural Resources and Community Development (Department) and the review commission with respect to granting or denying applications for permits to dredge and fill. "It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Adams v. N.C. Department of Natural and Economic Resources, supra* at 698, 249 S.E. 2d at 411. In fact, it is precisely this need to deal with individual factual circumstances, as in the case of applications for permits to dredge and fill in the state's estuarine resources, which makes the task impossible for the legislature to manage alone. The legislature has properly set forth adequate standards here to allow the agency, with its accumulation of expertise in this subject area, to apply the standards to the varying factual circumstances.

In its conclusions of law, the Commission defined three of the terms appearing in G.S. 113-229(e)(2), the statute upon which the permit application was denied. Those definitions adopted by the Commission provide:

"1. 'Value' as it appears in G.S. 113-229(e) means fair market value.

2. 'Enjoyment' as it appears in G.S. 113-229(e) means possession and beneficial use for the purposes to which it is reasonably susceptible by a person of ordinary sensibilities.

3. As to what constitutes a 'significant adverse effect on value and enjoyment' as the phrase is used in G.S. 113-229(e), an objective standard is applied."

Final interpretation of statutory terms is, of course, a judicial function, but definitions and interpretations of the statute by the agency with the expertise in administering it are entitled to due consideration by the courts. *F.T.C. v. Texaco, Inc.*, 393 U.S. 223, 21 L.Ed. 2d 394, 89 S.Ct. 429 (1968). We find the above definitions to be entirely proper and in accordance with the intent and goals of the legislature.

Also, we see nothing wrong in placing the burden of proof at the hearing before the review commission on the party who lost before the Department. G.S. 113-229(g)(5). It is simply a recognition that it is presumed that the Department will act in accordance with the law and the facts and the losing party should have the burden of showing that the Department erred. *In re Annexation Ordinance*, 284 N.C. 442, 202 S.E. 2d 143 (1974).

Another relevant circumstance in determining whether a particular delegation of authority is supported by adequate guiding standards is to consider whether the authority vested in the agency is subject to procedural safeguards. This aids in insuring that the agency's decision-making is not arbitrary and unreasoned. *Adams v. N.C. Department of Natural and Economic Resources, supra.* There are four sources of procedural safeguards: (1) those provided by the Act, (2) those contained in the North Carolina Administrative Procedure Act (APA), (3) the Administrative Rules Review Committee created by G.S. 120-30.26 and (4) the "Sunset" legislation contained in G.S. 143-34.10 *et seq.*

G.S. 113-229(f) provides for appeal of the Department's decision to the review commission. G.S. 113-229(g) contains a list of procedural safeguards provided by the review commission. The hearings are open to the public. A record of the proceedings is kept. The procedures applicable to civil actions in superior court are to be generally followed by the Commission. The Commission has a subpoena power. The burden of proof is on the party

appealing from the Department's decision. The Commission's decision must be supported by competent, material and substantial evidence upon consideration of the whole record. The parties are given an opportunity to submit proposed findings of fact and conclusions of law and any brief in connection therewith. The record of the proceedings must show the Commission's ruling with respect to each requested finding and conclusion. The parties receive notice of all findings, decisions, meetings and hearing dates. G.S. 113-229(g)(1) - (9).

Review in the superior court is pursuant to the APA. G.S. 113-229(f). The regulations adopted by the Commission, 15 N.C.A.C. Subchapter 3D, are subject to review by the Administrative Rules Review Committee. G.S. 120-30.26; *Adams v. N.C. Department of Natural and Economic Resources, supra.* The Department's activities under G.S. 113-229 are also subject to legislative review under the "Sunset" legislation. G.S. 143-34.10 *et seq.* Article 17 of Chapter 113 will stand repealed effective 1 July 1983 unless revived by legislative action. G.S. 143-34.13. Thus, there are adequate guiding standards and procedural safeguards to fully justify this delegation of authority to the Department to grant or deny permits to dredge and fill and to the Commission to review the Department's decision.

[3] The Court of Appeals held that the grant of authority contained in G.S. 113-229(e)(2) to deny permits when the value and enjoyment by adjacent riparian landowners of their property would be significantly adversely affected is an unconstitutional exercise of the police power to the extent it allows the State to favor private interests over public interests. The Court of Appeals noted that: "The State in the exercise of its police power acts legitimately only when it acts to protect the *public* good and the *general* welfare." *In re Application to Dredge,* 44 N.C. App. 554, 559, 261 S.E. 2d 510, 513 (1980) (Emphasis in original). Since the purpose of the act is to conserve our estuarine resources, G.S. 113-131 and 132, the denial of permits under G.S. 113-229(e)(2) is proper only when there is evidence that the adjacent riparian landowners have been adversely affected in their enjoyment *of those resources* and not when the adverse effect relates solely to the enjoyment and value of *their own property.* For the reasons which follow, we reverse.

In *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 213-14, 258 S.E. 2d 444, 448-49 (1979), we held that:

> "The police power is inherent in the sovereignty of the State. . . . It is as extensive as may be required for the protection of the public health, safety, morals and general welfare. . . . [When there is a challenge to certain legislation on the grounds that the police power has been exercised in violation of constitutional provisions, the legislation is subjected to a two-pronged analysis.] First, is the object of the legislation within the scope of the police power? [In other words, does the legislation promote the public health, safety, morals, or general welfare?] Second, considering all the surrounding circumstances and particular facts of the case if the means by which the governmental entity has chosen to regulate reasonable? . . . This second inquiry is two-pronged: (1) Is the statute in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" [Citations omitted.]

When the most that can be said against a statute is that whether it is an unreasonable, arbitrary or unequal exercise of the police power is fairly debatable, the court will not interfere and will not substitute its judgment for that of the legislature since that body is charged with the primary duty of determining what is in the interest of the public health, safety, morals and general welfare. *Id.*

G.S. 113-229 does promote the public health, safety and general welfare. The statute requires that landowners adjacent to estuarine waters obtain permits before dredging and filling in those waters. The statute concerns what landowners may do as far as dredging and filling in those waters, which belong to the people of this State, G.S. 113-131, and not what they may or may not do on their own land. To the extent that the permits may be denied due to significant adverse effect on (a) the use of the water by the public, (b) the wildlife or fresh water, estuarine or marine fisheries, (c) the conservation of water supplies, or (d) the public health, safety and welfare, *see*, G.S. 113-229(e)(1), (3), (4) and (5), the object of the legislation is obviously within the police power. In these instances, the legislature has properly concerned itself with the conservation of our estuarine resources which belong to

the public and with the public's use and enjoyment of those resources. *See, Graham v. Reserve Life Insurance Co.*, 274 N.C. 115, 161 S.E. 2d 485 (1968). (It is within the police power of the State to own and operate a sanatorium for the treatment of turberculosis.)

The issue is whether G.S. 113-229(e)(2) is within the police power. If subsection (e)(2) were to be construed as the Court of Appeals held, then the adjacent landowners' use of the *water* rather than the use of their own *land* would have to be significantly adversely affected before a permit could be denied. Effect on the use of the water is already fully covered by subsection (e)(1). By having a subsection (e)(2), the legislature obviously intended to be adding another basis for the denial of a permit. The issue is whether it is within the police power to allow a permit to be denied when an adjacent landowner's use *of his own land* would be significantly adversely affected.

It is still to be noted that the restriction of (e)(2) is not a restriction regarding what a landowner may do with his own land but is concerned with what a landowner adjacent to our estuarine resources may do as far as dredging and filling in those waters when an adjacent landowner will be adversely affected in the enjoyment and value of his land. Nevertheless, the basic issue is the same: Is it of concern to the public when the actions of one landowner affect the value and enjoyment of another landowner's property? More specifically, does it promote the public health, safety, morals, or general welfare to place restrictions on what one landowner may do when his actions will adversely affect the value and enjoyment of the property of others?

We answered this issue in the context of a zoning case as follows:

> "The whole concept of zoning implies a restriction upon the owner's right to use a specific tract for a use profitable to him but detrimental to the value of other properties in the area, thus promoting the most appropriate use of land throughout the municipality, considered as a whole. The police power, upon which zoning ordinances must rest, permits such restriction upon the right of the owner of a specific tract, when the legislative body has reasonable basis to believe that *it will promote the general welfare by conserv-*

ing the values of other properties and encouraging the most appropriate use thereof." Blades v. City of Raleigh, 280 N.C. 531, 546, 187 S.E. 2d 35, 43 (1972). [Emphasis added.]

If the legislature may exercise the police power to restrict the rights of an owner on his own land, then *a fortiorari*, it may be exercised to restrict an applicant's right to dredge and fill in estuarine waters which belong to the public when the waters or adjacent private property will be adversely affected. Thus, G.S. 113-229(e)(2) does not place private interests over public interests as the Court of Appeals held. The public interest is promoted by the standard set forth in subsection (e)(2).[2]

With respect to the second prong of the test regarding the police power, the means chosen to achieve the legislative objective, the permit application system created by G.S. 113-229, is the most feasible and reasonable manner to control dredging and filling activities. Also, the restriction placed on the landowners is reasonable because the owner's right to use his own property has not been interfered with. The restriction relates *only* to dredging and filling activities and is a restriction on what the owner may do in the State's estuarine resources that are adjacent to his property. G.S. 113-229 is proper in all respects under the State's police power. These assignments of error are overruled.

[4] The next issue is whether G.S. 113-229 allows the Commission to consider only the effects of the dredging and filling itself

2. The Court of Appeals found that G.S. 113-229(e)(2) promotes only the private interests of adjacent landowners. The public interest referred to by the Court of Appeals is the public's desire for a public boat launching ramp on Broad Creek. Although the Broad and Gales Creek Community Association is a non-profit corporation with 1500-1700 members and counsel for the Association stated at oral argument that the Association might have been able to restrict use of the ramp to members of the Association, the ramp was to be constructed at the end of a street allegedly dedicated to public use. Therefore, we assume for purposes of this decision that the ramp would have been a public ramp that would have been maintained by the Association since the Department and the review commission are without jurisdiction to try title claims with respect to the access property and no issue regarding title to this property was taken to the court for resolution.

Often, however, the public may not be the beneficiary of the dredging and filling activity. It may solely benefit the private landowner who wishes to conduct the activity in the water adjacent to his property. No matter who the project may *benefit*, the *denial* of the permit in any instance where the water *or adjacent private property* will be adversely affected is, *in both instances*, a matter of public interest and therefore is a proper subject for regulatory legislation.

on adjacent landowners so that by considering the effects that the boat ramp would have on such landowners the agency exceeded its statutory authority.[3]

It is proper to presume that an administrative agency has properly performed its official duties. *In re Annexation Ordinance, supra; see, J. B. Montgomery, Inc. v. United States*, 206 F. Supp. 455 (D. Colo. 1962), *aff'd*, 376 U.S. 389, 11 L.Ed. 2d 797, 84 S.Ct. 884, *rehearing denied*, 377 U.S. 925 (1964). Of course, the responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform. *Garvey v. Freeman*, 397 F. 2d 600 (10th Cir. 1968).

The agency is a creature of the statute creating it and has only those powers expressly granted to it or those powers included by necessary implication from the legislative grant of authority. *Soriano v. United States*, 494 F. 2d 681 (9th Cir. 1974). The agency has those powers that are explicitly granted in the statute plus those powers that are ascertainable as inherent in the underlying policies of the statute, *United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 390 F. 2d 846 (D.C. Cir. 1967), *cert. denied sub nom.*, 391 U.S. 904 (1968), and that may be fairly implied from the statute. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 9 L.Ed. 2d 325, 83 S.Ct. 476 (1963); *Morrow v. Clayton*, 326 F. 2d 36 (10th Cir. 1963). The agency's powers include those that the legislative body intended the agency to exercise. *See, Midwest Video Corp. v. F.C.C.*, 571 F. 2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689, 59 L.Ed. 2d 692, 99 S.Ct. 1435 (1979). Regulatory legislation should be given a practical construction so that the agency may perform the duties required of it by the legislative body. *F.D.I.C. v. Sumner Financial Corp.*, 451 F. 2d 898 (5th Cir. 1971).

> "The court is not limited to the mere words of a statute or what is expressly declared therein, and that which is in-

3. The applicant also contends and the Court of Appeals held that the Commission exceeded its statutory authority in considering the effects of the boat ramp on the property of the adjacent owners since the statute permits it to consider only the effect of the boat ramp on the State's water resources. We disposed of this issue under our discussion of the State's police power. Here, the question is whether the effects of the boat ramp may be considered at all or whether the agency's consideration should be restricted to the effects of dredging and filling.

> cidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of powers, it is a general principle of law that where the end is required the appropriate means are given and that every grant of power carries with it the use of necessary and lawful means for its effective execution. There is therefore conferred by necessary implication every power proper and necessary to the exercise of the powers and duties expressly given and imposed." 1 Am. Jur. 2d, Administrative Law, § 44, p. 846 (1962).

It is the express policy and intent of the legislature in its grant of jurisdiction to the Department that it act to conserve our estuarine resources. G.S. 113-132. The legislature also expressly granted these administrative bodies the authority to deny a permit when an adjacent riparian owner would be significantly adversely affected. G.S. 113-229(e)(2). On the application for the permit the applicant must state the purpose for which the dredging and filling will occur. Certainly, when the agency knows the purpose of the dredging activity and there is evidence that it would cause a significant adverse effect on the estuarine resources (not from the dredging itself but as a result of the ultimate purpose of the dredging), then in order to fulfill its ultimate express statutory objective of conserving our estuarine resources, the agency has the authority to deny the permit.

The same is likewise true when there is evidence that the ultimate purpose of the dredging, the end result, will significantly adversely affect adjacent riparian landowners. In order to fulfill the purpose of G.S. 113-229(e)(2) to promote the public welfare by restricting the activities of one riparian owner when adjacent riparian owners will be adversely affected, the agency has the authority to deny a permit when there is evidence that the dredging will adversely affect such owners and when there is evidence that the end product of the dredging operation will adversely affect such owners.

To hold otherwise would be to unduly hamper the agency's efforts to achieve its statutory goals and purposes and to deprive it of a proper and necessary means (denial of a permit application when the end result of the project is detrimental to the estuarine resources or the property of any adjacent owners) to achieve the

ultimate policies and goals contained in the legislation (conservation of our estuarine resources and promotion of the public welfare in restricting the activities of riparian owners to prevent detriment to adjacent riparian owners). Furthermore we note that allowing the agency to exercise this authority is not an overbroad and unbounded power. To the contrary, the agency may grant or deny permits only with respect to dredging and filling operations. The possible end results of such an operation are not unlimited. The usual purposes of such activity are to make way for such things as an access channel, a boat basin, a boat ramp or a fill area. In other words, the agency is not concerned with zoning the use of the owner's own property. It is concerned solely with what the owner will do in the estuarine waters adjacent to his property and there is authority to act only when those activities involve dredging and filling.

In addition, even if we were to strike down all of the actions of the Commission in considering the effects of the boat ramp as being in excess of its statutory authority, we would still uphold the Commission's decision. This is true because the application states that the fill from the dredging operation would be placed on the roadbed leading to the site of the boat ramp. The riparian owners presented evidence that this roadbed has already suffered erosion, that the erosion will continue unless adequate drainage measures (that the applicant did not propose to implement) are taken and that the erosion will affect the access area and the property of the riparian owners. Therefore, the adjacent owners' properties will be detrimentally affected by the dredging and filling itself because of the further erosion that will occur. For the above reasons we conclude that the agency acted within its statutory authority and these assignments of error are overruled.

[5] The next issue is whether there is substantial evidence in view of the entire record as required by G.S. 150A-51(5) to support the decision of the review commission to uphold the Department's denial of the permit to the applicant. We hold that there is.

Consideration of the sufficiency of the evidence to support a decision under the whole record test does not allow us to replace the agency's judgment when there are two reasonably conflicting views. However, we are required to take into account the

evidence supporting the agency's decision as well as the evidence that detracts from the weight of that evidence and its decision. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

The record properly shows the review commission's ruling with respect to each proposed finding and conclusion submitted by the parties as required by G.S. 113-229(g)(7). In view of the entire record, there is ample evidence to support the major findings of the Commission that: (1) the erosion will continue, (2) there are no parking facilities nor adequate turnaround room in the access area, (3) there would be traffic congestion, noise and litter, (4) the proposals for maintenance of the boat ramp are inadequate, and (5) the value of the property of the adjacent riparian landowners would be significantly adversely affected. (Numbering ours.) These findings support the conclusions that the applicant did not carry its burden of showing that the Department's denial of the permit was contrary to the law and the facts and that the permit was properly denied under G.S. 113-229(e)(2). Therefore, these assignments of error are overruled.

The next issue is whether the Department or the review Commission acted arbitrarily or capriciously. Since the administrative bodies acted in accordance with the applicable statute which we find to be proper and constitutional in all respects and since the Commission applied an objective standard for determining whether there was a significant adverse effect on the value and enjoyment of the property of the adjacent owners, we find no arbitrary or capricious actions by either the Department or the review Commission. These assignments of error are overruled.

The last issue is whether the trial judge erred in signing the judgment he entered in this case. For all of the reasons discussed above, the trial judge was correct in all respects in affirming the decision of the Commission. Therefore, his judgment was properly signed and entered. These assignments of error are overruled.

The Court of Appeals is reversed and the judgment of the trial judge is reinstated.

Reversed.

Justice EXUM dissenting in part.

I dissent from that portion of the majority opinion which concludes that G.S. 113-229(e) authorized the denial of a dredge or fill permit upon a finding that the value and enjoyment of riparian owners' property will be affected not by the dredging and filling itself but by the nature of the project which the dredging and filling is designed to facilitate.

There is scant mention in the majority opinion of the evidence offered before the Marine Fisheries Commission (Commission) and the real basis for the objection of the appellant Rugumak, Ltd. This evidence is adequately summarized in the opinion of the Court of Appeals. The application for the dredge and fill permit was made by the Broad and Gales Creek Community Association for the purpose of constructing a public boat launching ramp. Thirty-four witnesses, living in the area of the ramp, appeared to support the project. Rugumak, Ltd., offered four witnesses, each of whom owned a one-fourth undivided interest in the Rugumak property adjacent to the proposed ramp. One of these expressed concern about people parking on his property and littering in the area. Another stated that she was worried about the litter and feared early morning noise which would preclude her sleeping late. Another witness testified that she was afraid of "some of the characters . . . that would come in and use [a public ramp]" and that the dogs in the neighborhood "would bark like mad" when strangers came in. Another witness expressed concern about losing her privacy. She said the boat ramp "will ruin what used to be private sunbathing and swimming" and that the noise would be detrimental to the enjoyment of her property. There was some concern about drainage and erosion problems on a dirt road leading to the ramp although all conceded that the Association had adequately maintained the road in the past. None of these four witnesses lived full time on the property. They vacationed there periodically.

There was no evidence that the *dredging and filling operation itself* would have any adverse effect on the enjoyment or value of the riparian owners' property. While the majority notes that "the application states that the fill from the dredging operation would be placed on the roadbed leading to the site of the boat ramp" and there was some evidence that the roadbed was

eroding, there is no evidence that placing the fill on the road would exacerbate the erosion. Indeed, the likelihood is that this would tend to combat whatever erosion preexisted this proposed dredging and filling operation.

It is clear that the objections of the riparian owners were not to the dredging and filling operation itself. Their objection was to the installation of a public boat ramp on Broad Creek. It is also clear that the Commission did not direct its attention to the effect of the dredging and filling; it denied the permit because of what it perceived to be the additional congestion, noise, and litter which would be caused in the area by a public boat ramp. In doing this, I believe the Commission exceeded its statutory authority.

G.S. 113-229(e) provides, in pertinent part:

> "The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect *of the proposed dredging and filling* on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or freshwater, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted." (Emphasis supplied.)

I am satisfied that the limiting language—"of the proposed dredging and filling"—was intended by the Legislature to apply not only to finding (1) but also to findings (2), (3), (4), and (5). The inquiry should be addressed to the effect of the proposed dredging and filling itself, not, as here, to the effect of whatever ultimate project the dredging and filling is designed to facilitate. This is so because the Marine Fisheries Commission's (and now the Coastal Resources Commission's, *see* G.S. 113-229(f) (Supp. 1979)) expertise lies in the management of our estuarine resources. The Commission is not, as the majority notes in other portions of its opinion, a super zoning commission with authority to regulate generally the use of land. The majority itself notes, "the statute concerns what landowners may do as far as dredging and filling [in estuarine waters], which belong to the people of this State,

G.S. 113-131, and not what they may or may not do on their own land." I thoroughly agree. The difficulty here is, however, that the Commission undertook to determine what the Broad and Gales Creek Community Association could do with its own property.

The gravamen of Rugumak's objection is that the use contemplated by the Community Association, to-wit, a public boat ramp, would constitute a private nuisance. If this is so, adequate redress lies in the courts. It does not, I submit, lie with the Department of Natural Resources and Community Development.

For this reason, I vote to affirm the decision of the Court of Appeals.

STILLWELL ENTERPRISES, INC., PLAINTIFF v. INTERSTATE EQUIPMENT COMPANY, ORIGINAL DEFENDANT AND THIRD-PARTY PLAINTIFF v. THE TRAVELERS INDEMNITY COMPANY, AND ROBERT D. KELLY, THIRD-PARTY DEFENDANTS

No. 92

(Filed 3 June 1980)

1. **Appeal and Error §§ 5.1, 45.1 — failure to present question in brief — no relief as matter of right — relief as matter of appellate grace**

Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under G.S. 7A-32(c) or pursuant to Appellate Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace.

2. **Attorneys at Law § 7 — recovery of attorney fees — necessity for statute**

A successful litigant may not recover attorney fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute.

3. **Attorneys at Law § 7.4 — attorney fees — meaning of "evidence of indebtedness"**

The term "evidence of indebtedness" as used in G.S. 6-21.2 refers to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money.

4. Attorneys at Law § 7.4— attorney fees—provision in lease of personalty

A contract for the lease of personalty constitutes an "evidence of indebtedness" within the meaning of G.S. 6-21.2 since the contract acknowledges a legally enforceable obligation by the lessee to remit rental payments to the lessor as they become due in exchange for the use of the property which is the subject of the lease. Therefore, a provision of the lease allowing the lessor reasonable attorney fees should the lease obligation be collected by an attorney after maturity is enforceable under the provisions of G.S. 6-21.2.

DEFENDANT appeals from a decision of the Court of Appeals by *Judge Erwin, Judges Parker* and *Harry Martin* concurring, vacating that part of an order entered by *Judge Thornburg* at the March 1978 Special Session of JACKSON Superior Court which allowed defendant summary judgment against plaintiff for defendant's attorneys' fees on defendant's counterclaim. The decision of the Court of Appeals is reported at 41 N.C. App. 204, 254 S.E. 2d 770 (1979). This Court granted defendant's petition for discretionary review pursuant to G.S. 7A-31 on 23 August 1979. The case was docketed and argued as No. 97, Fall Term 1979.

Raymer, Lewis, Eisele & Patterson, by Douglas G. Eisele, Attorneys for defendant appellant and third-party plaintiff appellant.

Smith, Currie & Hancock, by Bert R. Oastler, Attorneys for plaintiff appellee.

Coward, Coward, Jones & Dillard, by Roger L. Dillard, Jr., Attorneys for Robert D. Kelly, third-party defendant appellee.

EXUM, Justice.

The sole question presented by this appeal is whether a contract for the lease of specific goods may be deemed "evidence of indebtedness" within the meaning of G.S. 6-21.2. We hold that it may and reverse the decision of the Court of Appeals to the contrary.

The original plaintiff, Stillwell Enterprises, Inc., instituted this action against original defendant Interstate Equipment Co., on 22 July 1976, seeking damages alleged to have resulted when a pushloading road scraper leased by Equipment Co. to Stillwell broke in two. Defendant Equipment Co. filed answer denying liability to Stillwell and asserting an affirmative counterclaim for

the recovery of rental arrearages, sales taxes, repair charges, and attorneys' fees allegedly due under the terms of the lease agreement. By way of third-party action defendant sought also to recover from third-party defendant Robert Kelly on a guaranty executed by Kelly for Stillwell's performance under the lease. Defendant dismissed its action against the other third-party defendant, the Travelers Indemnity Company, before the matter was heard in the trial court.

After reviewing the express terms of the lease and the affidavits submitted by defendant, the trial court entered summary judgment dismissing plaintiff's claims and allowing defendant's counterclaim for a total of $24,804.68, including an amount of $2,929 for attorneys' fees. Summary judgment was also entered for a lesser amount against third-party defendant Robert Kelly. On appeal, the Court of Appeals affirmed the trial court's decision in all respects except for the entry of the award for defendant's attorneys' fees. Defendant's appeal to this Court challenges the validity of that decision.

[1] Defendant first contends that since plaintiff failed to address or argue the issue of attorneys' fees in its brief to the Court of Appeals, the Court of Appeals erred in disallowing *ex mero motu* defendant's recovery thereof. Rule 28(a) of the North Carolina Rules of Appellate Procedure clearly specifies that the scope of appellate review "is *limited* to questions . . . presented in the several briefs." (Emphasis supplied.) Thus under this Rule plaintiff's failure to present and argue in its brief the propriety of the trial court's judgment as to attorneys' fees precluded plaintiff from obtaining relief on this point in the Court of Appeals *as a matter of right. State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977). Nevertheless, the Court of Appeals, in the exercise of its general supervisory powers under G.S. 7A-32(c) or pursuant to App. R. 2,[1] could consider on its own initiative the question of the attorneys' fees award and give relief *as a matter of appellate grace*. The

1. Rule 2 of the North Carolina Rules of Appellate Procedure provides that:

"To prevent manifest injustice to a party, or to expedite decision in the public interest, *either court* of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party *or upon its own initiative* . . . ." (Emphasis supplied.)

Court of Appeals having considered the question, it is now properly before this Court by virtue of our further review and the arguments directed to the issue in the parties' new briefs. App. R. 16.

The lease contract provided for monthly rental payments by plaintiff lessee to defendant lessor in the amount of $7,000. Paragraph 21 of the contract further provided that "[t]he lessee further agrees to pay to lessor a reasonable attorney's fee if the obligation evidenced hereby be collected by an attorney at law after maturity." Based upon this provision, Judge Thornburg's entry of summary judgment against plaintiff on defendant's counterclaim for past due lease payments included an award for attorney's fees. The Court of Appeals vacated this award on the grounds that the lease was not the type of agreement which would entitle defendant to recover for attorneys' fees under the general provisions of G.S. 6-21.2. We disagree.

[2] As was stated by Chief Judge (now Justice) Brock in *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E. 2d 120, 123 (1976), "[t]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." Certainly in the absence of any contractual agreement allocating the costs of future litigation, it is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879. *See Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578 (1952); *Parker v. Realty Co.*, 195 N.C. 644, 143 S.E. 254 (1928). Thus the general rule has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1972). Even in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor. *Howell v. Roberson*, 197 N.C. 572, 150 S.E. 32 (1929); *Tinsley v. Hoskins*, 111 N.C. 340, 16 S.E. 325 (1892).

In *Tinsley v. Hoskins, supra*, this Court held void and unenforceable a stipulation in a promissory note awarding the promissee "the usual collection fee" in the event of collection of the

note by legal process. The opinion in *Tinsley* indicated that the Court viewed such a provision as an oppressive penalty, a shield for usury, and a device which tended to promote litigation. The *Tinsley* rationale was subsequently applied in *Brisco v. Norris*, 112 N.C. 671, 16 S.E. 850 (1893) (promissory note); *Williams v. Rich*, 117 N.C. 235, 23 S.E. 257 (1895) (deed of trust; "Such stipulations are in the nature of forfeitures and encourage litigation."); *Turner v. Boger*, 126 N.C. 300, 35 S.E. 592 (1900) (deed of trust; such a provision provides an "opportunity for oppression"); *Finance Co. v. Hendry*, 189 N.C. 549, 127 S.E. 629 (1925) (promissory note); and *Howell v. Roberson, supra*, (promissory note). Furthermore, although *Tinsley* and its progeny represent cases adjudicating the validity of attorneys' fees provisions incorporated in promissory notes or security instruments, statements from more recent case law clearly indicate that such provisions are generally deemed unenforceable without regard to the type of instrument in which they appear. Thus, the Court of Appeals in *Credit Corp. v. Wilson*, 12 N.C. App. 481, 183 S.E. 2d 859 (1971), *aff'd* 281 N.C. 140, 187 S.E. 2d 752 (1972), cited *Tinsley* for the proposition that "provisions calling for a debtor to pay attorney's fees incurred by a creditor in the collection of a debt were contrary to public policy and, therefore, unenforceable" and concluded that "[i]t is our view . . . that sound public policy continues to bar the enforcement of such provisions unless the same are clearly and expressly authorized by statute." 12 N.C. App. at 482, 483, 183 S.E. 2d at 859, 860. *See also Construction Co. v. Development Corp.*, 29 N.C. App. 731, 225 S.E. 2d 623, *cert. denied*, 290 N.C. 660, 228 S.E. 2d 459 (1976), expressly rejecting the argument that the common law of this state permitted the contractual allocation of attorneys' fees (in contracts other than notes or security instruments) that may be required by litigation based on the contract.

We conclude, therefore, that the provision in Paragraph 21 of the lease contract between plaintiff and defendant, allowing the lessor reasonable attorneys' fees should the lease obligation be collected by an attorney after maturity, can be enforced only to the extent that the same is expressly allowed by statute. The question before us, then, is whether the lease contract *sub judice* is the type of agreement contemplated within the terms of G.S. 6-21.2. That statute provides in pertinent part:

"Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

* * * *

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provisions shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing on said note, contract or other evidence of indebtedness.

* * * *

(4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the 'outstanding balance' shall mean the 'time price balance' owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

(5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees. If such party shall pay the 'outstanding balance' in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions."

It is apparent that G.S. 6-21.2 varies the well-established rule voiding attorneys' fees obligations only in the case of "obligations to pay attorneys' fees upon any note, conditional sale contract, *or other evidence of indebtedness* . . . ." (Emphasis supplied.) A contract for the lease of personalty does not constitute, without more, a "note" or "conditional sale contract." The question remains, however, whether such a contract may be deemed an "evidence of indebtedness" within the meaning of the statute.[2]

In the absence of express legislative guidance, the statutory expression "evidence of indebtedness" is not a well-defined term of art in today's jurisprudence. The proper scope of the term's application must therefore be gleaned from the context of the statute in which it appears and the factual circumstances surrounding the instrument or transaction to which it is sought to be applied. *Cf., United States v. Austin*, 462 F. 2d 724 (10th Cir. 1972), *cert. denied*, 409 U.S. 1048 (loan commitment letter representing enforceable obligation constitutes an "evidence of indebtedness" and hence a "security" for purposes of a prosecution for securities fraud); *Columbus and Southern Ohio Electric Co. v. Peck*, 161 Ohio St. 73, 118 N.E. 2d 142 (1954) (lease of personalty is not such "evidence of indebtedness" as to make it subject to state intangibles tax). In the instant case, as in any case involving statutory construction, we must give that interpretation to the term at issue which best harmonizes with the language, spirit, and intent of the act in which it appears. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972).

2. In *Construction Co. v. Development Corp., supra*, 29 N.C. App. 731, 225 S.E. 2d 623, the Court of Appeals held that a construction contract did not provide "evidence of indebtedness" within the contemplation of G.S. 6-21.2 so as to allow enforcement of an attorneys' fee provision contained in the contract. More recently, in *Systems, Inc. v. Yacht Harbor, Inc.*, 40 N.C. App. 726, 253 S.E. 2d 613 (1979), the Court of Appeals refused to enforce a fee provision embodied in a lease for personal property on the grounds that the lease contract was not an "evidence of indebtedness" and that "only agreements intended as security are covered" under the statute. Both of these cases were cited by the Court of Appeals in the present case as support for its conclusion that defendant's contract "is not an evidence of indebtedness within the meaning of G.S. 6-21.2." 41 N.C. App. at 211-12, 254 S.E. 2d at 775. However, we note that the discussion in *Construction Co. v. Gibson*, 30 N.C. App. 385, 226 S.E. 2d 837 (1976) clearly applied the provisions of G.S. 6-21.2 to a simple contract. And in *Leasing, Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 230 S.E. 2d 559, *cert. denied*, 292 N.C. 265, 233 S.E. 2d 393 (1977), the opinion definitely indicated that the statute was applicable to a lease for personalty which was not in itself a conditional sale contract. These latter decisions by the Court of Appeals appear to be in conflict with those relied upon by that court in the instant case.

Chapter 562 of the 1967 Session Laws, of which G.S. 6-21.2 is but a part, was enacted to amend certain provisions of the State's Uniform Commercial Code "and other related statutes." The totality of the 1967 amendment package became effective "on the same date as the Uniform Commercial Code, and the fact that the provisions of this act were enacted at a later date than the Uniform Commercial Code shall not be considered in construing the provisions contained herein . . . ." 1967 Session Laws, c. 562, s. 10. Although G.S. 6-21.2 was not itself codified as a constituent section of Chapter 25 of the General Statutes (the Uniform Commercial Code), we believe its legislative history clearly demonstrates that it was intended to supplement those principles of law generally applicable to commercial transactions. As with the Uniform Commercial Code in general, it would appear that some of the purposes underlying the enactment of G.S. 6-21.2 are "to simplify, clarify, and *modernize* the law governing commercial transactions" among the various jurisdictions,[3] and "to permit the continued expansion of commercial practices through custom, usage, *and agreement of the parties* . . . ." G.S. 25-1-102(2)(a) and (b). (Emphasis supplied.) By its limited allowance of that which was formerly prohibited under the common law of this state, *i.e.*, the contractual allocation of attorneys' fees incurred in an action on the debt evidenced in the contract itself, G.S. 6-21.2 clearly validates a new form of contractual remedy. The statute, being remedial, "should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope." *Hicks v. Albertson, supra*, 284 N.C. at 239, 200 S.E. 2d at 42 (construing liberally the allowance of counsel fees under G.S. 6-21.1).

[3] With these considerations in mind, we think the term "evidence of indebtedness" in G.S. 6-21.2 is intended to encompass more than security agreements or traditional debt financing arrangements. It is of course clear that a "note" or "conditional sale contract" is the most common type of "evidence of indebtedness"

3. It should be noted that, contrary to North Carolina's traditional disallowance of contractual attorneys' fees, the majority of other jurisdictions now hold that a stipulation in a note or other evidence of indebtedness for a reasonable attorneys' fee is a valid and enforceable agreement. *See generally* Annotation, Validity of provision in promissory note or other evidence of indebtedness for payment, as attorneys' fees, expenses, and costs of collection, of specified percentage of note." 17 A.L.R. 2d 288 (1951 and Supplement).

contemplated by the statute; indeed, it is in connection with these types of agreements that attorneys' fee provisions are most commonly employed. However, the express terms of Section 5 of the statute, along with the terms employed in other provisions, demonstrate that G.S. 6-21.2 applies not only to notes and conditional sale contracts, but also to such "other evidence of indebtedness" as "other *writing(s)* evidencing an unsecured debt" or "*any other* such security agreement[4] which evidences *both a monetary obligation and . . . a lease of specific goods.*" G.S. 6-21.2(5). (Emphasis supplied.) We agree, therefore, with Chief Judge (now Justice) Brock's statement in *Supply, Inc. v. Allen, supra*, 30 N.C. App. at 276, 227 S.E. 2d at 124, that "[t]hese provisions indicate, either explicitly or implicitly, that an evidence of indebtedness . . . is a *writing* which acknowledges a debt or obligation and which is executed by the party obligated thereby." More specifically, we hold that the term "evidence of indebtedness" as used in G.S. 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. Such a definition, we believe, does no violence to any of the statute's specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties.

[4] Viewed in light of this definition, defendant's lease agreement with plaintiff is obviously an "evidence of indebtedness." The contract acknowledges a legally enforceable obligation by plaintiff-lessee to remit rental payments to defendant-lessor as they become due, in exchange for the use of the property which is the subject of the lease. The contract, including the provision in Paragraph 21 for attorneys' fees, is in writing and is executed by the parties obligated under its terms. Plaintiff has made no assertion that the contract represents anything less than an arm's length transaction consummated by mutual agreement between the parties. There is no contention that plaintiff was not afforded

4. It is unclear just what the legislature intended by the use of the term "security agreement" in this context. The ordinary contract for a lease of personalty does evidence "both a monetary obligation" (the promise by the lessee to pay rent) "and . . . a lease of specific goods." That fact alone, however, does not technically render the contract a "security agreement." Only if the lease is one intended for security will the agreement creating it be deemed a "security agreement." *See* G.S. 25-1-201(37); 25-9-105(1)(h).

the requisite notice under G.S. 6-21.2(5). Under these circumstances, we see no reason why the obligation by plaintiff to pay attorneys' fees incurred by defendant upon collection of the debts arising from the contract itself should not be enforced to the extent allowed by G.S. 6-21.2. Accordingly, the decision of the Court of Appeals vacating Judge Thornburg's award to defendant of attorneys' fees should be and is hereby

Reversed.

EUNICE NICHOLSON v. HUGH CHATHAM MEMORIAL HOSPITAL, INC. AND DR. RICHARD B. MERLO, M.D.

No. 104

(Filed 3 June 1980)

1. **Husband and Wife § 9— consortium defined**

Consortium embraces service, society, companionship, sexual gratification, and affection.

2. **Husband and Wife § 9— action for loss of consortium permitted—joinder required with personal injury action**

A spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries. The cases of *Hinnant v. Tidewater Power Co.*, 189 N.C. 120, which took away the right of the wife to sue for loss of consortium, and *Helmstetler v. Duke Power Co.*, 224 N.C. 821, which eliminated the common law cause of action for consortium for the husband, are expressly overruled.

ON petition to this Court for discretionary review of a decision of the Court of Appeals, 43 N.C. App. 615, 259 S.E. 2d 586 (1979), affirming an order entered by *Battle, J.*, at the 6 September 1978 Session of Superior Court, ORANGE County, dismissing plaintiff's claim.

Plaintiff filed a complaint against defendants in February, 1978, alleging that on or about 9 March 1975, her husband Robert E. Nicholson was admitted to defendant hospital for diagnosis and treatment of suspected kidney stones. X-rays were ordered and made by defendant physician. Plaintiff alleged that as a result of

specific negligent acts of the defendant hospital and defendant physician in carrying out the x-ray procedure, her husband, Robert E. Nicholson, was greatly injured in his mind and body, became forgetful, became weakened physically and was rendered impotent, thereby depriving plaintiff of her conjugal rights. She further alleged that because of these injuries her husband could no longer function as the head of the household and as her marriage partner. She prayed for damages "in excess of $10,000.00."

Defendants answered separately, denying any negligence. They further asserted, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, that plaintiff's complaint failed to state a claim upon which relief could be granted.

Plaintiff was served notice of a hearing on a Rule 12(b)(6) motion to be held 18 June 1978. On 6 September 1978, a judge presiding ruled on the motion and dismissed plaintiff's claim with prejudice.

Plaintiff appealed to the Court of Appeals. That court treated her action as one "[seeking] to distinguish an action . . . for loss of conjugal rights from an action . . . for loss of consortium." Unconvinced, the Court of Appeals cited *Hinnant v. Tidewater Power Company*, 189 N.C. 120, 126 S.E. 307 (1925), as controlling and affirmed the trial court.

We allowed plaintiff's petition for discretionary review 6 February 1980.

Latham, Wood & Balog by Steve A. Balog for plaintiff-appellant.

Haywood, Denny & Miller by George W. Miller, Jr., for defendant-appellee Hugh Chatham Memorial Hospital.

Henson & Donahue by Perry C. Henson for defendant-appellee Dr. Richard B. Merlo.

CARLTON, Justice.

Plaintiff presents the sole question whether under the law of North Carolina a wife has a cause of action for loss of consortium resulting from a negligent injury to her husband. The Court of Appeals correctly recognized the historical and common law rule

in North Carolina and answered no. For reasons stated below, we reverse.

I.

At common law, consortium embraced those marital rights a husband had in respect to his wife. 2 R. Lee, *North Carolina Family Law* § 205 (3d ed. 1963); Prosser, *Law of Torts* § 125 (4th ed. 1971); Note: Torts—Recognition of Wife's Right to Husband's Consortium, 47 N.C.L. Rev. 1006 (1969). Precisely what those rights were, however, has been open to various interpretations, *see, e.g.*, Lee, *supra* at § 205 and authority cited therein; Note: The Case of the Lonely Nurse: The Wife's Action for Loss of Consortium, 18 West. Res. L. Rev. 621 (1967), and the term has been defined "sometimes in terms enormously complex as the judges followed the habit of lawyers of never using one word where two may be employed." *Montgomery v. Stephan*, 359 Mich. 33, 35, 101 N.W. 2d 227, 228 (1960). Certainly, at common law the husband's action for loss of his wife's consortium was based on the understanding that his legal obligation to support his wife was balanced by her obligation to serve him. Note: The Case of the Lonely Nurse, *supra* at 622; Harper & Skolnick, *Problems of the Family* 11 (1962). This definition has been amended in other jurisdictions, however, so that the essence of consortium today has become the mutual right of a husband and wife to the society, companionship, comfort and affection of one another. *Hitaffer v. Argonne Company*, 183 F. 2d 811 (D.C. Cir.), *cert. denied*, 340 U.S. 852, 71 S.Ct. 80, 95 L.Ed. 624 (1950); *overruled on other grounds, Smither & Company, Inc. v. Coles*, 242 F. 2d 220, *cert. denied*, 354 U.S. 914, 77 S.Ct. 1299, 1 L.Ed. 2d 1429 (1957). Unquestionably, this society and companionship includes a sexual component. *Cf. Deems v. Western Maryland Railway Co.*, 247 Md. 95, 231 A. 2d 514 (1967) (Consortium includes sexual relations); *Ekalo v. Constructive Service Corporation of America*, 46 N.J. 82, 215 A. 2d 1 (1965) (Compensation for impotent husband is a measure of loss of consortium); Note: 47 N.C.L. Rev. 1006, *supra* (Three most prominent elements in the consortium interest are "services, sexual intercourse and general companionship").

At common law, a husband could sue negligent third parties for loss of his wife's consortium, but a wife had no comparable cause of action. Indeed, at common law, a wife could not even sue

for her own personal injuries without joinder of her husband, *King v. Gates*, 231 N.C. 537, 57 S.E. 2d 765 (1950); *Hipp v. DuPont*, 182 N.C. 9, 108 S.E. 318 (1921); Lee, *supra* at § 205. The reason for this inequity was that a wife was regarded as little more than a chattel in the eyes of the law. Only a husband could maintain an action for a wife's injuries and he could do so for the same reason he could maintain action for injury to his horse, his slave or his other property. *Hipp v. DuPont, supra. See also* 3 W. Blackstone, *Commentaries* 143 (Lewis ed. 1897). All were his inferiors; none had capacity in themselves to sue.

The married women's provision in the North Carolina Constitution of 1868, Article X, section 6, abolished this unrealistic legal concept of married women, and provided that a wife's property no longer automatically became that of her husband upon marriage. *Hipp v. DuPont, supra.* The legislature further clarified a wife's legal position in 1913 by enacting the precursor to our present G.S. 52-4. That statute provided that any damage for her own personal injuries could be recovered by a wife suing alone. Lee, *supra* at § 205.

Even after passage of this legislation, it was clear that a husband could continue to maintain an action for loss of his wife's consortium, *see, e.g., Hipp v. DuPont, supra; Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916). The question remained open, however, whether the married women's legislation in North Carolina gave a wife the equal right to sue for loss of her husband's consortium.

In *Hipp v. DuPont, supra*, this Court first considered the question and answered in the affirmative. There, plaintiff's husband sued and lost in a Virginia court for injuries he received as a result of his employment at defendant's chemical plant in Hopewell, Virginia. The family subsequently moved and plaintiff sued in North Carolina to recover for expenses incurred in maintaining her husband, for services performed in caring for her husband, for loss of his support and maintenance, for loss of his consortium and for her own mental anguish.

The Court in *Hipp* held that as a husband could continue to sue for loss of his wife's consortium, then by virtue of the married women's legislation and by virtue of logic and fairness, the plain-

tiff wife could maintain an action in her own behalf for loss of her husband's consortium.

This view did not last long. Four years later in *Hinnant v. Tidewater Power Company*, 189 N.C. 120, 126 S.E. 307 (1925), the Court expressly overruled *Hipp*, noting as it did so, that it joined the weight of authority in other jurisdictions.

In *Hinnant*, plaintiff's husband was injured by a train crash at 6:30 a.m. and died the following morning at 3:00 a.m. Plaintiff wife sued for mental shock and anguish, loss of support, and loss of her husband's "society, love and affection, his counsel and advice, his tender ministration in sickness, and the many comforts and pleasures which the marital relationship brings to those who are congenial with each other." 189 N.C. at 121, 126 S.E. at 308.

The judge instructed the jury that among other things, they could allow damages in the amount of fair compensation for plaintiff's loss of the society and companionship of her husband suffered between the time of his injury and the time of his death.

The jury awarded damages to plaintiff for loss of consortium. On appeal, this Court reversed the award and expressly overruled *Hipp v. DuPont*. In holding that a wife could no longer sue for loss of her husband's consortium, the Court gave four grounds for its decision. *First*, the Court emphasized that historically the wife had no action for consortium. The inference was that the married women's legislation had not changed that historical inability. *Second*, the Court emphasized that consortium included a predominant factor of service and that any attempt to separate that service element from society, companionship and affection was impossible. Thus, it held that a husband's right to recover loss of his wife's consortium was in actuality a right to recover for loss of her services. As the married women's acts had given the wife a right to recover for loss of her services in her own name, nothing compensable remained of a right to consortium. The inference of such a holding was that damages from loss of society and companionship rather than loss of service would be impossible to measure.

Third, the Court held that the wife's damages were too remote a consequence of a defendant's negligent injury of her husband to have been proximately caused by that injury. The

Court apparently feared expansion of the cause of action so that unrelated third parties such as children, parents and employers would attempt to recover.

Fourth, the Court was concerned that to allow a wife's action for loss of consortium, particularly when the main component of that action was compensation for lost service, would allow double recovery. A husband, suing in his own behalf, would recover for loss of his services while a wife, suing for loss of consortium, would recover for loss of the selfsame services.

After *Hinnant*, a wife in North Carolina could not maintain an action for loss of consortium due to the negligence of third parties. The common law right of a husband to maintain such an action remained intact. That inequity was remedied in *Helmstetler v. Duke Power Company*, 224 N.C. 821, 32 S.E. 2d 611 (1945). There plaintiff husband sued a defendant whose bus had seriously injured his wife. The Court affirmed summary judgment for defendant citing *Hinnant* and reasoning that because a wife had no cause of action for loss of consortium, a husband had no such cause of action either. Each spouse stood on a parity with each other and could recover for injuries done to each individually. Neither, however, could recover for loss of consortium due to negligent injuries to the other spouse.

[2] Such has been the law in this jurisdiction since 1945. For the reasons stated below, however, we no longer consider this sound policy and expressly overrule *Hinnant* and *Helmstetler*.

II.

A close reading of both *Hinnant* and *Helmstetler* in the context of North Carolina law reveals several inconsistencies and anomalies which one leading case has termed "legalistic gymnastics." *Hitaffer v. Argonne Company, supra* at 816.

Taken together, *Hinnant* and *Helmstetler* strip both spouses of a right to recover for what can be a very real injury to the marital partnership. Such denuding contradicts the policy of modern law to expand liability in an effort to afford decent compensation as a measure to those injured by the wrongful conduct of others. *Diaz v. Eli Lilly and Company*, 364 Mass. 153, 302 N.E. 2d 555 (1973); *Ekalo v. Constructive Service Corporation, supra.* The intent behind such a policy is presumptively to allow

recourse for a definite injury to a legitimate interest, *Millington v. Southeastern Elevator Company*, 22 N.Y. 2d 498, 293 N.Y.S. 2d 305, 239 N.E. 2d 897 (1968). *See also Deems v. Western Maryland Railway Company, supra.* Thus to reason, as the *Helmstetler* Court did, that the action of the physically injured spouse alone is adequate compensation ignores the very real fact that the "uninjured" spouse's loss of conjugal fellowship deprives that spouse of sexual gratification and the possibility of children. Such deprivation can transform "a loving wife into a lonely nurse." *Ekalo v. Construction Services, supra* at 84, 215 A. 2d at 2.

Furthermore, the denial of a right to loss of consortium in cases such as this one is inconsistent with the rule in this jurisdiction that either spouse may sue for loss of consortium due to intentional torts by third parties. *See, e.g., Bishop v. Glazener*, 245 N.C. 592, 96 S.E. 2d 870 (1957) (Husband); *Knighten v. McClain*, 227 N.C. 682, 44 S.E. 2d 79 (1947) (Wife). True, intentional invasion of marital relationships can create tragic unhappiness and may all too frequently precipitate divorce. While lamentable in its result, such an intentional act, however, does not give rise to the awesome permanent deprivation one spouse faces when his or her marital partner is rendered a spectre of a former self. *See, e.g., Ekalo v. Constructive Service, supra.* We cannot believe total deprivation of a right of action, even though it extends to both husband and wife, is thus consistent with either our own law or sound public policy. *Accord: Deems v. Western Maryland Railway Co., supra; Ekalo v. Constructive Service Corp., supra.* For this reason alone, reversal of *Helmstetler* seems warranted.

The basis for our change, however, does not rest here. A close reading of *Hinnant*, the case which began eliminating a cause of action for loss of consortium, indicates its reasoning is suspect on at least four grounds.

First, to hold by inference, as *Hinnant* seems to, that the married women's legislation does not create a right in the wife equal to that of her husband to sue for loss of consortium ignores the very purpose for which these acts were passed—to remove common law disabilities against women and to equalize the rights of husbands and wives. R. Lee, *supra* at § 108. Indeed, this reasoning does not account for the holding of this Court that the married women's legislation gives a wife a right to sue for

damages for loss of consortium due to intentional injuries. *See, e.g., Knighten v. McClain, supra.*

Second, the *Hinnant* Court's presumption that service provides the totality of an action for consortium is no longer sound legal reasoning. In *Hinnant*, the Court itself acknowledged that in actions for intentional interference with consortium, "the loss of conjugal society and affection . . . stand[s] out and [is] emphasized as the preeminent and possibly sole basis of recovery." 189 N.C. at 123, 126 S.E. at 309, quoting *Marri v. Stamford Street Railroad Company*, 84 Conn. 9, 78 A. 582 (1911). For the Court to conclude nevertheless that loss of service provided the totality of the measure of damages for loss of consortium illogically ignored this definition of consortium provided by cases involving intentional torts.

Nor was this concept of consortium necessarily historically accurate. The vast majority of commentators today either assert that consortium at common law included several severable interests, only one of which was service, *see, e.g.*, Lippman, The Breakdown of Consortium, 30 Colum. L. Rev. 651 (1930), or conclude that consortium is primarily limited to society, aid and affection. *Hitaffer v. Argonne, supra*, and authority cited therein; Note: The Case of The Lonely Nurse, *supra.*

[1] Thus, while we recognize that consortium is difficult to define, we believe the better view is that it embraces service, society, companionship, sexual gratification and affection, and we so hold today. We do so in recognition of the many tangible and intangible benefits resulting from the loving bond of the marital relationship.

Third, the *Hinnant* Court's inference that damages in a consortium action are too remote to measure, again is no longer sound legal principle. The Court in *Hinnant* quoted *Marri v. Stamford Street Railroad Company, supra*, to the effect that where the injury was physical only to one spouse, there had been no actual injury to the affectionate feelings between the spouses. Common sense tells us this is not true. Indeed, experience with the North Carolina wrongful death statute, G.S. 28A-18-2(b), which does allow compensation for loss of consortium, indicates trial courts and juries recognize and can measure such damage to society, affection and companionship. Certainly the experience of other

jurisdictions in awarding damages for loss of a husband's consortium has developed a respectable factoring of measure of loss. *See, e.g., Annot.*, 74 A.L.R. 3d 805 (1976) and cases cited therein.

Finally, the *Hinnant* Court's fears of proximate causation and double recovery, while in themselves sound concerns, could have been dealt with in a fashion less draconian than totally denying a cause of action for loss of consortium. If a loss of consortium is seen not only as a loss of service but as a loss of legal sexual intercourse and general companionship, society and affection as well, by definition any damage to consortium is limited to the legal marital partner of the injured.[1] Strangers to the marriage partnership cannot maintain such an action, and there is no need to worry about extension of proximate causation to parties far removed from the injury.

In a similar vein, the prospect of double recovery can be virtually eliminated by limiting the action primarily to damage measures other than loss of services or support so that "[s]imple mathematics will suffice to set the proper *quantum* [of damages]." *Hitaffer v. Argonne Co., supra* at 819.

A far sounder way to avoid double recovery in a suit against negligent third parties, however, is to compel joinder of one spouse's action for loss of consortium with the other spouse's action for personal injury. This solution is not unique; at least seven other American jurisdictions compel such joinder: *Schreiner v. Fruit*, 519 P. 2d 462 (Alaska 1974); *Deems v. Western Maryland Railway, supra; Diaz v. Eli Lilly, supra; Ekalo v. Constructive Service, supra; Millington v. Southeastern Elevator, supra; Jones v. Slaughter*, 54 Mich. App. 120, 220 N.W. 2d 63 (1974); *Moore v. Baker*, 25 Ohio Misc. 140, 54 Ohio Ops 2d 139, 266 N.E. 2d 593 (1970).

The reasons for requiring joinder are sound. Not only does joinder avoid the problem of double recovery, it recognizes that, in a very real sense, the injury involved is to the marriage as an entity. "[B]ecause these marital interests [in sexual congress and progeny] are in reality so interdependent, because injury to these

1. Because G.S. 14-184 makes fornication and adultery a misdemeanor in this State, the only sexual relationship the law protects is that between married partners.

interests is so essentially incapable of separate evaluation as to the husband and wife . . . the conception of the joint action seems . . . a fair and practical juridical development." *Deems v. Western Maryland Railway, supra* at 109, 231 A. 2d at 522.

We no longer believe the reasoning behind *Hinnant* and *Helmstetler* is sound. Defendants here, however, urge that if we are tempted to an "activist" role in dealing with the anomalies inherent in those decisions, we should rely on legislative action rather than forsake the "salutory doctrine of *stare decisis.*" The argument overlooks the fact that this entire area of the law has been developed by judicial decree. This Court created a wife's right to sue for loss of consortium due to negligence in *Hipp*, took that right away from the wife in *Hinnant* and eliminated the common law cause of action for the husband in *Helmstetler*. In view of such a history of judicial activity, we do not believe legislative fiat is necessary. We therefore overrule the holdings in *Hinnant* and *Helmstetler* and restore to both spouses a cause of action for loss of consortium due to the negligence of third parties.

In so holding, this jurisdiction once again returns to the mainstream of American legal thought. When this Court first decided *Hinnant* in 1925, it did so partly in response to a trend in other jurisdictions eliminating the cause of action. That trend has changed. Beginning in 1950 with *Hitaffer v. Argonne Company, supra*, 37 American jurisdictions, including 35 states, now recognize the right of either spouse to sue for loss of consortium due to the negligence of third parties. *See, Annot.*, 36 A.L.R. 3d 900 (1971 and Supp. 1979) and cases cited therein.

[2] For all these reasons, we hold that a spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries.

The decision of the Court of Appeals is reversed, and this case is remanded to that court with instructions to remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. CHARLES JAMES MITCHELL

No. 50

(Filed 3 June 1980)

1. **Searches and Seizures § 34— seizure of car in plain view**

A car reasonably believed to be the fruit, instrumentality or evidence of a crime can be seized whenever found in plain view.

2. **Searches and Seizures § 34— search and seizure of car in plain view—probable cause—exigent circumstances**

Officers had probable cause to believe that a white Pinto car had been used by defendant in a bank robbery and that the vehicle itself, particularly its right rear tire, would aid in the apprehension or conviction of defendant for armed robbery, and the warrantless seizure of the vehicle was lawful under the plain view doctrine, where officers knew that an old model white Pinto car had been used in recent robberies of a convenience store and a bank, that a man whose description matched that of defendant was involved in both robberies, and that defendant drove an old model white Pinto; officers also knew that tire impressions made in an area where such a Pinto had been seen parked prior to the bank robbery showed that the right rear tire had a distinct type tread with hexagons on it; on the day the seizure occurred, officers received information that defendant might be living at a certain address; officers proceeded to that address and upon arrival saw an old model Pinto parked in plain view at the rear of the house; defendant was not in the house, and the owner of the house indicated that the Pinto belonged to defendant and that if the car was involved in any trouble the officers were free to take it away; and upon examining the Pinto, officers discovered that the right rear tire was different from the others and had hexagons on its tread pattern. Furthermore, the circumstances which gave officers probable cause to seize the car as criminal evidence also gave them probable cause to search the interior, and exigent circumstances resulting from the fact that defendant was still at large and could have driven the car away gave the officers the right to make a warrantless search of the car at the scene or to seize the car and search it at the station house.

3. **Searches and Seizures § 33— plain view rule—inadvertent discovery**

Even if "inadvertent discovery" is required for a warrantless seizure of evidence of crime when the evidence is in plain view of an officer who has a right to be in a position to have that view, which question is not decided, officers' discovery of a white Pinto allegedly used in two robberies was inadvertent where officers went to a residence to look for defendant; the officers had no prior knowledge that a white Pinto belonging to defendant would be parked at the residence; and only upon inspecting the car and being told that it belonged to defendant did the officers develop reason to believe that the Pinto before them was the one used by defendant in the two robberies in question.

APPEAL by the State from order of *Brewer, J.*, 21 May 1979 Criminal Session, CUMBERLAND Superior Court. The order was entered "*nunc pro tunc*" on 29 June 1979.

Defendant is charged in a bill of indictment, proper in form, with the armed robbery of First-Citizens Bank and Trust Company at 2621 Raeford Road, Fayetteville, North Carolina, on 22 January 1979. The bill alleges that defendant took and carried away the sum of $9,179 in United States currency.

Prior to trial, defendant filed a motion to suppress certain evidence on the ground that it had been illegally and unconstitutionally obtained. The motion was heard by Judge Brewer in the absence of the jury. The facts hereinafter set out are gleaned from the motion, affidavits in support thereof, and testimony elicited on a voir dire hearing.

On 16 January 1979 a Quik Stop store was robbed and a white Pinto car was used in that robbery. An informant told Detective Maxwell by telephone that the day Quik Stop was robbed the informant had seen Kenneth Sanders and another black male he knew as Mitchell, who drove a white older model Pinto, sitting around counting a small amount of money in tens, fives, ones and a single twenty-dollar bill. The informant's description of "Mitchell" matched the description of one of the Quik Stop robbers.

On 22 January 1979, the First-Citizens Bank was robbed, allegedly at gunpoint. The description of these robbers matched the description of the Quik Stop robbers. The clothing worn by the robbers was similar. An FBI agent checked the area where witnesses had seen an older model white Pinto parked near the bank just prior to the robbery. Tire tracks were discovered and the impression of the right rear tire showed a distinct type of tread—similar to a Michelin-type tread. The tread had hexagons in it. A photo of the tire impression was made.

On 26 January 1979, Detective Maxwell received information that Mitchell might be living in Red Springs at Route 4, Box 185L. He and another officer went to that address that afternoon. Upon arrival, they saw an old model white Pinto parked at the rear of the house. Mr. Mitchell was not there. One of the residents originally stated she didn't know Charles Mitchell but then admitted she did know him but did not know his whereabouts. With permission of Walter Norris, owner of the

house and lot where the white Pinto was parked, the officers searched the house, the outbuildings and the white Pinto. They observed at first glance that the right rear tire of the old white Pinto was different from the others, was a radial-type tire with hexagons in the tread pattern. The officers were informed by Walter Norris that the Pinto belonged to Charles Mitchell; that it was on his property; that he did not give Mr. Mitchell permission to leave it there; that it had been there since the 23rd of January; that he consented for the officers to look at the car and also to go into his house; that if the car was involved in any trouble he didn't want it in his yard; that the officers had his permission to take it away. The white Pinto was then seized.

The SBI laboratory compared the right rear tire from Mitchell's old white Pinto with photographs of the tracks left in the dirt by an old white Pinto which had been seen parked near the First-Citizens Bank on the day of the robbery. That comparison indicated the tire taken from the Mitchell Pinto had the same approximate size, shape, tread design and amount of wear as the tire which had left the tire track in the dirt at the bank. Although there was an insufficient number of distinct characteristics to permit a positive identification, it was the examiner's opinion that the tire taken from the Mitchell Pinto could have made the tire track impression found in the dirt near the bank.

Defendant testified on voir dire that his sister, who lives in Tennessee, gave him the white Pinto in August 1978 and he drove it to Fort Bragg where he is stationed as a member of the military forces; that he used the car until December 1978 and parked it at the home of Mr. Norris, Route 4, Box 185L, Red Springs, North Carolina; that the daughter of Mr. Norris was his girl friend at that time and they are now married; that the old Pinto was in a bad state of repair, did not run over 30 miles an hour, and he simply left it at the Norris home. Defendant further stated that he never gave anyone consent to tow the car away. He stated that he drove the car through January 1979 and let others drive it; that when the Tennessee license tags expired he took them off and parked the car at the Norris home. When he discovered the car was gone, he inquired of the sheriff and the police as to its whereabouts and was thereupon taken into custody.

At the close of the voir dire hearing, Judge Brewer found: (1) That a 1971 Ford Pinto which defendant had been operating for several months was seized by the officers pursuant to a search of the property of Walter Norris; (2) that defendant voluntarily placed the Pinto at the Norris residence without obtaining a specific permit to do so but he had implied permission to leave the vehicle there; (3) that initial examination of the Pinto at the Norris residence by the officers, based upon the consent of Mr. Norris, was in all respects proper and did not constitute an impermissible search; (4) that at the time the officers viewed the Pinto they had no probable cause to believe that the vehicle constituted contraband, had been utilized in any illegal activity, or constituted evidence of any crime; (5) that descriptions of a Pinto observed at the scene of criminal offenses and the appearance of the Mitchell Pinto, including its tires, at the Norris residence on the day of the search and seizure lacked sufficient similarity to constitute probable cause for the seizure of the vehicle; and (6) that the 1971 Ford Pinto and the accompanying tires were seized by the officers incident to the search.

Based upon the above findings, Judge Brewer concluded as a matter of law that the seizure of the Mitchell Pinto and the tire later removed from the right rear wheel constituted an illegal seizure in that (a) the consent of the owner was not obtained and Walter Norris had no proprietary interest in the vehicle sufficient to enable him to give valid permission for that seizure; and (b) the search of the vehicle on the Norris premises, although valid, did not give rise to sufficient probable cause to justify the seizure. Judge Brewer thereupon allowed defendant's motion to suppress the 1971 Pinto together with any and all testimony concerning it, the right rear tire and all testimony concerning a comparison of said tire with a tire track impression found in the dirt near the bank. The State took exception and appealed to this Court pursuant to G.S. 15A-979(c).

Rufus L. Edmisten, Attorney General, by Joan H. Byers, Assistant Attorney General, for the State appellant.

Gerald Beaver, attorney for defendant appellee.

HUSKINS, Justice.

Did the trial court err in granting defendant's motion to suppress the physical evidence on the ground that there was no prob-

able cause for the warrantless search and seizure of defendant's old white Pinto and its right rear tire? For reasons which follow, we answer in the affirmative.

[1] It is well settled that evidence of crime falling in the plain view of an officer who has a right to be in a position to have that view is subject to seizure and may be introduced into evidence. *State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978); *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978), and cases cited therein. A car reasonably believed to be the fruit, instrumentality or evidence of a crime can be seized whenever found in plain view. *Accord, North v. Superior Court*, 8 Cal. 3d 301, 104 Cal. Rptr. 833, 502 P. 2d 1305 (1972); *State v. Young*, 21 N.C. App. 369, 204 S.E. 2d 556, *cert. denied*, 285 N.C. 595 (1974). *See generally*, W. LaFave, Search & Seizure § 7.3(a) (1978).

[2] Neither party disputes the finding of the trial court to the effect that "the initial examination of the vehicle at the residence by law enforcement officers based upon the consent of the owner of the residence, was in all respects proper and did not constitute a constitutionally impermissible search." This finding is supported by competent evidence and establishes beyond dispute that the white Pinto was in the plain view of officers who had a right to be in the place where the view was taken. The only issue in dispute is whether the officers had probable cause to believe that the white Pinto had been utilized in the commission of the armed robbery or itself constituted evidence of the crime. If probable cause existed, then the warrantless seizure was legal since the vehicle was unquestionably in the plain view of the officers.

Probable cause to seize, in the setting of this case, may be defined as a reasonable ground to believe that the object seized will aid in the apprehension or conviction of the offender. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). " 'To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. . . . The existence of "probable cause" . . . is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular cir-

cumstances and the particular offense involved.' " *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971), quoting 5 Am. Jur. 2d, Arrest §§ 44, 48.

Here, the totality of the circumstances would lead a reasonably prudent man to believe that the old white Pinto had been used by defendant in the bank robbery and that said car, particularly its right rear tire, would aid in the apprehension or conviction of defendant Mitchell for armed robbery. Prior to viewing the vehicle in question, the officers were aware that a Quik Stop store had been robbed on 16 January 1979, and a First-Citizens Bank had been robbed on 22 January 1979; that an old model white Pinto car had been used in both robberies; that a man whose description matched that of defendant Mitchell had been involved in both robberies; that defendant Mitchell drove an old model white Pinto. The officers also knew that tire impressions had been made in the area where an older model white Pinto had been seen parked prior to the bank robbery. The impressions of the right rear tire had shown a distinct type tread with hexagons in it. On the day the seizure occurred, the officers received information that Mitchell might be living in Red Springs at Route 4, Box 185L. The officers proceeded to that address. Upon arrival they saw an old model white Pinto parked at the rear of the house. Mr. Mitchell was not at the house. The owner of the house indicated that the Pinto belonged to Mitchell; that if the car was involved in any trouble the officers were free to take it away. Upon examining the Pinto, the officers discovered that the right rear tire was different from the others and had hexagons in its tread pattern.

The above circumstances would lead a reasonably prudent officer to believe that the white Pinto had been used by Mitchell in two robberies and that the vehicle itself constituted criminal evidence which might lead to the apprehension and conviction of Mitchell. Given such probable cause, it follows that the warrantless seizure was legal, since the vehicle was unquestionably in plain view of the officers.

[3] The plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971), expressed the view that the plain view doctrine was applicable only to the inadvertent discovery of incriminating evidence. Although he concurred in judgment, Justice Harlan declined to join in that portion of the

plurality opinion. 403 U.S. at 491. The dissenting justices expressly disagreed with the plurality on this point. 403 U.S. at pp 505-510, 522. Since the justices were equally divided on this point, it follows that the "inadvertent discovery" restriction on the plain view rule does not have the force of precedent and is not binding on the states. *Compare Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed. 2d 325, 94 S.Ct. 2464 (1974), where another plurality upheld a plain view seizure of evidence, the discovery of which was not inadvertent. *See generally, North v. Superior Court, supra;* W. LaFave, *supra*, § 7.3(a). In this posture we find it unnecessary to reach or decide whether "inadvertent discovery" is required for a warrantless seizure of evidence of crime when the evidence is in plain view of an officer who has a right to be in a position to have that view. Nonetheless, we note parenthetically that in the instant case the discovery of the white Pinto by the officers was truly inadvertent. The officers had no prior knowledge that a white Pinto belonging to defendant Mitchell would be parked at the Norris residence. Only upon inspecting the car and being told that it belonged to Mitchell, did the officers develop a reason to believe that the Pinto before them was the one used by Mitchell in the two robberies under investigation. Thus, *Coolidge* is distinguishable from the instant case. In *Coolidge*, the police knew far in advance the location of the evidence and intended to seize it.

[2] Here, the circumstances which gave the officers probable cause to seize the car as criminal evidence also gave them probable cause to search the interior of the car for further evidence of the bank robbery. Moreover, the exigent circumstances gave the officers the right to make a warrantless search of the car at the scene. "[A] warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to get a search warrant." *State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973). Although there was evidence tending to show the Pinto was in a bad state of repair, there was no indication that it was incapable of movement. *See State v. Mathis*, supra. Mitchell was still at large and could have driven the car away while a warrant was being obtained. *See, e.g., United States v. Farnkoff*, 535 F. 2d 661 (1st Cir. 1976); *Love v. State*, 487 S.W. 2d 677 (Tenn. App. 1972); W. LaFave, *supra*, § 7.2 at 527. If exigent circumstances justify a

warrantless search, it matters not that the vehicle is parked rather than moving at the time it is located by police. *See, e.g., Haefeli v. Chernoff*, 526 F. 2d 1314 (1st Cir. 1975); *Carlton v. Estelle*, 480 F. 2d 759 (5th Cir.), *cert. denied*, 414 U.S. 1043 (1973). Once the right to make a warrantless search obtained, the officers could search the Pinto immediately or could *seize* it and search it at the station house. *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *State v. Allen, supra.* In the instant case the officers chose the latter course. Thus, seizure of the Pinto could also be lawfully made for the purpose of conducting a warrantless search of the vehicle at the station house.

Prior to removing the Pinto from the premises, the officers returned briefly to the station house, borrowed a camera, returned to the premises and photographed the car. Suffice it to say that by the time the officers returned to the station house to borrow a camera, it was no longer necessary to obtain a warrant since the right to make a warrantless search and seizure had already arisen. *See generally, Chambers v. Maroney, supra; State v. Allen, supra.* Moreover, defendant was still at large and could have removed the car from the premises. Thus, it was imperative that the officers quickly return to the premises where the car was parked.

The trial court's findings that when the officers viewed the Mitchell Pinto in Red Springs they had no probable cause to believe that the vehicle was contraband or had been used in any illegal activity are not supported by the evidence. The trial court's conclusion that the Mitchell Pinto and its right rear tire were illegally seized is erroneous.

For the reasons stated the order appealed from is reversed. The case is remanded to Cumberland Superior Court for trial on the merits as provided by law and in accord with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. DARRILL LEWIS HANDSOME

No. 116

(Filed 3 June 1980)

1. **Criminal Law § 26.5— punishment for kidnapping and armed robbery—no double jeopardy**

There was no double jeopardy in defendant's having been convicted of and sentenced for armed robbery and kidnapping of the same person.

2. **Criminal Law § 138.2; Constitutional Law § 79— consecutive sentences—sentences within statutory limits—no cruel and unusual punishment**

There was no merit to defendant's contention that consecutive sentences imposed upon him which made him eligible for parole only after 32 years constituted cruel and unusual punishment, since all of the sentences imposed were within statutory limits and therefore did not constitute cruel and unusual punishment.

3. **Criminal Law § 113.7— acting in concert—instruction supported by evidence**

Though defendant presented evidence of duress, the trial court did not err in charging on acting in concert, since there was evidence that defendant was present at the scene of the crimes and, pursuant to a common plan or purpose to commit those crimes, acted together with another who performed the acts necessary to constitute the crimes charged.

4. **Robbery § 4.3— armed robbery—sufficiency of evidence**

Evidence was sufficient to show that the crime of armed robbery was committed and that defendant committed it where it tended to show that the victim's personal property was taken from his person without his consent by violent means with the intent to steal, and a firearm was used, even though the victim was shot first and then his money was taken.

5. **Criminal Law § 42— victim's clothing—admissibility**

The trial court in an armed robbery prosecution did not err in allowing a victim's clothing into evidence since the victim identified it as clothing he was wearing on the night of the crimes, and he stated that the clothing was "now bloody and dirty" which was consistent with his testimony that he had been shot and thrown out of a car into a ditch; moreover, though the trial court erred in allowing hearsay testimony from a police officer that he received the articles of clothing from an emergency room nurse who told him that she had received the clothing from the victim, admission of the testimony was not prejudicial error because the victim had already identified the articles of clothing as those he had on the night of the crimes.

6. **Criminal Law § 43— photographs of crime scene—admissibility**

The trial court did not err in admitting photographs of the crime scene into evidence, since the photographs were properly authenticated.

7. Criminal Law § 88.1— cross-examination limited—no error

There was no merit to defendant's contention in an armed robbery case that the trial court erred in restricting his cross-examination of a witness concerning the witness's failure to tell police officers on the night the crimes were committed that defendant had a gun since the jury was made fully aware of all the relevant facts concerning defendant's theory on this point.

8. Criminal Law § 85.1— defendant's character evidence—evidence of specific act inadmissible

Where defendant testified in general terms about his volunteer work for a certain organization, it was not error to refuse to allow him to testify as to a specific act he performed concerning that work as evidence of his good character in order to show that he did not commit the crimes charged.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant from *Brown, J.* at the 8 October 1979 Session of WAYNE County Superior Court.

Defendant was charged in indictments, proper in form, with: kidnapping George Thomas Bryant; assaulting Bryant with intent to kill inflicting serious bodily injury; armed robbery of Bryant; kidnapping Jimmy Floyd Uzzell; and assaulting Uzzell with intent to kill.

The State's evidence tended to show that George Bryant arrived at his apartment at approximately 10:30 p.m. on 20 May 1979. The defendant met him on the street and walked with him to his apartment. When George entered his apartment, he found that Gerald Bryant was already inside. Gerald pointed a long, black pistol at George and told him to lie down on the floor. George testified that the defendant also had a gun but did not take it out or use it. He stated that he knew this because on the way up to his apartment the defendant had asked him to wait so that he could go back to his car and get his gun.

Gerald asked George where Jimmy Uzzell was and George replied that "he was home or maybe with his girl friend." Gerald instructed the defendant to tie George up. Defendant pulled strings and rags out of his pocket and tied George up. Gerald then instructed the defendant "to go get Jimmy."

The defendant found Jimmy Uzzell at home and told him that George wanted to see him. The defendant and Uzzell returned to George's apartment. As they entered, Gerald grabbed Uzzell, put

a gun to his head and pulled him into the apartment. Gerald then told Uzzell and the defendant to both get on the floor. The defendant then stated to Gerald: "Man, you can't kill me; I got a wife and kid. Let me write a letter to my wife." Gerald agreed and defendant got up and wrote something on a piece of paper. Uzzell testified that two people then blindfolded him and tied him up.

Gerald and the defendant then took Uzzell outside to George's car and put him in the back seat. The defendant got behind the wheel of the car while Gerald went back to the apartment and brought George to the car and put him in the back seat also. Gerald then got in the front seat of the car and instructed the defendant where to drive. At one point, as the car slowed to make a turn, Uzzell opened the door and jumped from the car. Gerald shot at him and they searched for him for approximately five minutes before driving off.

George observed the defendant whisper to Gerald. Gerald then turned and shot George three times. Gerald searched George's pockets, took his money and then pushed him out of the car. The defendant took Gerald to Snow Hill and put him out at a downtown intersection. Defendant then went home and later that night was taken into custody by police officers.

Defendant testified that Gerald visited him on the afternoon of 20 May 1979. Later that afternoon, defendant borrowed a car from James Calvin Johnson. The defendant and Gerald then went to George's apartment. Gerald told the defendant that he planned to take some drugs from George and the defendant "had better [do] what he told . . . [him] to do." Defendant testified that,

> "[Gerald] told me that if I didn't do what he told me to do that me and my whole family were in trouble. . . . He told me if I didn't do what he told me to do that I could forget about my family. . . . He said all he had to do was to make one call. . . . [H]e told me he had my family watched."

Defendant testified that while they were waiting for George to get home Gerald allowed him to go back to his home and check on his family. He went home and saw his wife and child but "I didn't take them to the police because I was afraid to. I didn't want to upset [my wife]." Defendant returned to George's apartment. He stated that after George arrived, Gerald gave him some

string and instructed him to tie up George. Defendant did as he was instructed. He further stated that when he went to find Uzzell, "I didn't get in touch with my wife because I was afraid to. I didn't know if anyone was at home with my wife."

After defendant and Uzzell were in George's apartment, the defendant was forced to lie on the floor and Gerald tied his hands and taped his feet. Later, Gerald untied his feet and defendant then walked outside to George's car. Defendant did not attempt to escape while Gerald was putting George or Uzzell in the car because he was afraid for himself and his family. Defendant stated that he did not share in the proceeds of the robbery.

Defendant testified that Gerald had told him on a previous occasion that he planned to rob George but decided against doing it when he learned that George and the defendant were friends. George sold drugs, particularly marijuana, and the defendant had seen George sell drugs to Gerald on at least five or six occasions.

The jury found the defendant guilty as charged with respect to all of the offenses. The trial judge found that "the kidnapping victim [Uzzell] escaped in a safe place [and] was not sexually assaulted nor seriously injured." The defendant was sentenced to twenty-five years in prison for this kidnapping conviction and was given a consecutive ten-year sentence for assaulting Uzzell with a deadly weapon with intent to kill. The trial judge found "that the kidnapping victim [George Bryant] was not released in a safe place and was seriously injured;" therefore, defendant was given a life sentence for this kidnapping conviction. Defendant was given a sentence of twenty years for assaulting George Bryant with intent to kill inflicting serious bodily injury and the trial judge provided that this sentence would begin to run at the expiration of the life sentences. Defendant was given a sentence of not less than ten nor more than fifty years for his conviction of robbery with a firearm and this sentence will also begin to run at the expiration of his life sentence.

Defendant appealed to this Court from his kidnapping conviction which resulted in a life sentence. Defendant's motion to bypass the Court of Appeals on his appeal from his four other convictions and sentences was allowed by this Court on 18 March 1980.

Other facts necessary to the decision of this case will be related in the opinion.

David B. Brantley for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Jane Rankin Thompson for the State.

COPELAND, Justice.

[1] By his tenth assignment of error, defendant contends that the trial judge erred in giving him separate and consecutive sentences for the armed robbery and kidnapping of George Bryant.

Defendant concedes in his brief that this Court's decision in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), is dispositive of this issue. It is not necessary to prove the completed offense of armed robbery as a part of proving the offense of kidnapping. Under G.S. 14-39 it is necessary to prove that the confinement, restraint, or removal is *for the purpose of*, among other alternatives, "facilitating the commission of any felony." *Id.; State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977); *see, State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *see also, Banghart v. United States*, 148 F. 2d 521 (4th Cir. 1945) (per curiam), *cert. denied*, 325 U.S. 887 (1945). Thus, there is no violation of the Double Jeopardy Clause of the Fifth Amendment in defendant's having been convicted of and sentenced for both offenses. The situation is analogous to the crime of burglary. An element of burglary is that the defendant intended to commit a felony at the time of the breaking and entering. The defendant may also be convicted of that felony if he in fact commits it after accomplishing the breaking and entering with that intent.

[2] Defendant also maintains that the consecutive sentences imposed in this case which make him eligible for parole only after thirty-two years constitute cruel and unusual punishment.

All of the sentences imposed were within statutory limits. We have held that sentences that are within the statutory limits and impose consecutive sentences do not constitute cruel and unusual punishment. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973), and cases cited therein; *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). This assignment of error is overruled.

[3] By his eleventh assignment of error, defendant contends that since he asserted the defense of duress he was at most guilty of aiding and abetting and it was error for the trial judge to charge on acting in concert with respect to all of the crimes charged. There is evidence that the defendant was present at the scene of the crimes and, pursuant to a common plan or purpose to commit those crimes, acted together with another who performed the acts necessary to constitute the crimes charged. Thus, the trial judge properly instructed on acting in concert. *State v. Williams*, 299 N.C. 652, 263 S.E. 2d 774 (1980); *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). This assignment of error is overruled.

[4] By his sixth, seventh and ninth assignments of error, defendant contends that his motions for nonsuit, judgment notwithstanding the verdict, arrest of judgment, and for a new trial should have been granted because the evidence is insufficient to show that the crime of armed robbery was in fact committed and that if it was, the defendant did not participate in it.

As held above, the trial judge properly instructed on acting in concert with respect to the crime of armed robbery. *State v. Williams, supra; State v. Joyner, supra.* Defendant further argues that no armed robbery was committed because no threats or requests for money were made to the victim before the money was taken. The victim was shot first and *then* his money was stolen. This contention is devoid of merit.

George Bryant's personal property was taken from his person without his consent by violent means with the intent to steal. This is the definition of robbery. *State v. Bailey*, 278 N.C. 80, 178 S.E. 2d 809 (1971), *cert. denied*, 409 U.S. 948 (1972). In addition, a firearm was used thus making the crime armed robbery. The elements of violence and taking were so joined in time and circumstances in one continuous transaction amounting to armed robbery as to be inseparable. *State v. Lilly*, 32 N.C. App. 467, 232 S.E. 2d 495, *cert. denied*, 292 N.C. 643, 235 S.E. 2d 64 (1977). These assignments of error are overruled.

[5] By his second and fourth assignments of error, defendant contends that it was error to allow a victim's clothing to be introduced into evidence since a sufficient chain of custody was not established and that it was error to admit a certain hearsay statement.

In order to be admitted into evidence, real evidence, such as the clothing in this case, must be authenticated as the same objects involved in the incident and it must be shown that the objects have undergone no material change in condition since the incident. *State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). Trial judges must exercise sound discretion in making these determinations. *Id.*

The clothing was properly admitted into evidence. The victim identified the clothing in court as the clothing that he was wearing on the evening of 20 May 1979. He stated that the clothing was "now bloody and dirty." This was consistent with his testimony that he had been shot and thrown out of a car into a ditch. It was error to allow a police officer to testify that he received the articles of clothing from an emergency room nurse who told him that she had received the clothing from the victim. This was a hearsay statement offered to prove the truth of the matter asserted in the statement. Nevertheless, its admission was not prejudicial error because the victim had already identified the articles of clothing as those that he was wearing that night and the exhibits had already been properly admitted into evidence. These assignments of error are overruled.

[6] By his third assignment of error, defendant contends that the trial judge erred in admitting photographs of the crime scene into evidence. The photographs were properly authenticated. The jury should be instructed to consider photographs for illustrative purposes only; however, where the defendant does not request that the limiting instruction be given, as he did not in this case, it is not error when the instruction is not given. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). This assignment of error is overruled.

By his first assignment of error, defendant maintains that the trial judge erred in allowing George Bryant to testify that he thought he was "going to die the whole time." Bryant had earlier testified that while he was tied up in his apartment he thought he was going to be killed and that after he was shot he was in a great deal of pain and had difficulty breathing. Since this substantially similar testimony was admitted without objection, this assignment of error is without merit, 1 Stansbury's N.C. Evidence § 30 (Brandis Rev. 1973) and cases cited therein, and is overruled.

[7] By his fifth assignment of error, defendant argues that it was error to restrict his cross-examination of Jimmy Uzzell. Defendant's theory is that Uzzell did not state to police officers on the night the crimes were committed that the defendant had a gun. He realized after a conference with the district attorney that it would strengthen the case against the defendant if Uzzell testified that the defendant had a gun on that night. Therefore, he so testified.

This theory was fully explored during the course of the trial. Uzzell testified that he thought the defendant hit him over the head with a gun and that he told a police officer on the night it happened that the defendant had a gun. Officer Whaley testified that Uzzell said he had been hit over the head several times and that he had seen the defendant with a gun on previous occasions but Uzzell did not tell him that night that defendant had a gun on 20 May 1979. Officer Uzzell testified that he interviewed George Bryant and Jimmy Uzzell on 20 May 1979 and he did not recall either of them saying that the defendant had a gun. Concerning the meeting in the district attorney's office, Officer Whaley testified that George Bryant stated that the defendant had a gun but that *Jimmy Uzzell stated that the defendant did not have a gun.* Since the jury was made fully aware of all the relevant facts concerning defendant's theory on this point, this assignment of error is overruled.

[8] By his eighth assignment of error, defendant contends that testimony regarding his good character as evidence that he did not commit the crimes charged was improperly restricted.

A defendant is permitted to introduce evidence of his own good character as substantive evidence of his innocence. 1 Stansbury's N.C. Evidence § 104 (Brandis Rev. 1973) and cases cited therein. When such evidence of good character is offered as evidence of a person's conduct on a particular occasion, it may be proved by reputation evidence but not by specific acts. Specific acts may be asked about on cross-examination to test the witness' knowledge of the reputation of the person in question. *Stansbury's, supra,* §§ 110-111 and cases cited therein.

Defendant testified in general terms regarding his volunteer work for the Congress of Black Awareness in Wayne County. It was not error to refuse to allow him to testify as to a specific act

he performed concerning that work (his participation in Black Family Day in August 1978) as evidence of his good character in order to show that he did not commit the crimes charged. *State v. Vaughn*, 296 N.C. 167, 250 S.E. 2d 210 (1978). This assignment of error is overruled.

Defendant received a fair trial free from prejudicial error. The convictions and sentences are affirmed because in the trial we find

No error.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JOEL DEAN STEPHENS

No. 18

(Filed 3 June 1980)

1. **Criminal Law § 62— polygraph test—results inadmissible**

Results of a polygraph test are not admissible in evidence to establish the guilt or innocence of an accused.

2. **Criminal Law §§ 62, 75— incriminating statements during interrogation—statements not result of polygraph test—admissibility**

The fact that defendant's incriminating statements to an SBI agent were made in a polygraph testing room was irrelevant on the question of their admissibility, since the challenged statements were not the result of any polygraph test and, if otherwise competent, were admissible.

3. **Criminal Law §§ 75.4, 75.11— right to counsel—privilege against self-incrimination—defendant tricked into waiving rights—statements not voluntary**

Defendant was tricked or cajoled into waiving his right to counsel and his privilege against self-incrimination, and his statements to an SBI agent therefore were not voluntary, where the evidence tended to show that defendant and his attorney went to SBI headquarters in Raleigh for defendant to be given a polygraph examination; defendant and his attorney were told that the examination would consist of the polygraph test itself and an interrogation; they were also told that the attorney could not be present during the test phase but he would be allowed to be present during the interrogation phase; contrary to this advice, defendant's attorney was left outside the examination room during the test and the interrogation; the attorney, who could neither

see nor hear what was transpiring, thought the testing phase was still in progress; and defendant himself apparently assumed that his lawyer would be admitted to the room at the proper time.

DEFENDANT appeals from judgment of *Wood, J.*, entered at the 4 June 1979 Criminal Session, RANDOLPH Superior Court.

Defendant was charged in separate bills of indictment, proper in form, with the murder of his grandparents, DeLacy Fogleman and wife, Ethel Jarrett Fogleman on 4 April 1976.

The State's evidence tends to show that on Sunday morning, 5 April 1976, Ethel Fogleman's father, age eighty-eight, went to the Fogleman home to see why they had failed to attend church that morning. He found Mr. Fogleman's body in a pool of blood on the floor in the kitchen and found Ethel Fogleman's body on the bed in the master bedroom. Officers were summoned. Examination of the bodies revealed that both had died from gunshot wounds. Dresser drawers had been pulled out. A wallet with papers and other articles were found scattered on the bed. Included among the papers was Mrs. Fogleman's expired driver's license which was found near the wallet. A fingerprint lifted from Mrs. Fogleman's expired driver's license was later compared with defendant's fingerprints, and SBI Agent Wesley Layton, Jr., qualified fingerprint expert, testified that the print on the driver's license was made by defendant's right index finger.

Carlene King testified that she was born and reared in Liberty, North Carolina, where the victims lived and the murders occurred; that she knew defendant by sight although she had not seen him in the last two or three years; that he was short, fat, and balding; that on the night of the murders she was walking down Highway 421 and passed through the Fogleman's yard; that she heard dogs barking and then heard one to three shots; that she feared the shots were directed at her and crouched down; that she saw and recognized Joel Stephens at the side of the house; that a light in front of the house was burning and it was a clear night; that defendant was "in a fast walk or run," took a few steps toward the woods and then turned back; that she "duck walked" to a ditch beside the highway and heard two to four more shots; that she left the area and, being afraid for her family who still lived in Liberty, told no one what she had seen and heard; that in July 1978 she saw defendant's picture in the paper

as the recipient of an award by the Jaycees and decided to notify the SBI because she felt it wasn't right for defendant to receive an award in light of what he had done. Mrs. King was sure she heard more than one shot the first time and more than two shots the second time.

Testimony of several officers indicated that on 5 April 1976, during their investigation of the murders, a light was in fact burning near the driveway of the Fogleman house. The light was strong enough to illuminate an area thirty to forty feet in diameter. One officer testified that the light was bright enough for him to recognize other officers going in and out of the house and around the house as he observed them from the highway.

Following a voir dire and denial of defendant's motion to suppress, SBI Agent Davenport testified, over objection, that defendant was fully advised of his constitutional rights, knowingly and understandingly signed a waiver and agreed to answer questions without the presence of an attorney. During that interrogation, which followed a polygraph test conducted with the consent of defendant and his attorney, defendant said he had no key to his grandparents' home and had not been there in three or four weeks preceding the murders; that if his fingerprints were found on Ethel Fogleman's wallet, someone must have planted them there "with a fingerprint glove"; that he did not kill his grandparents; that "if he did he did not remember it." When he was asked what should happen to whoever killed his grandparents, defendant replied that it would depend. He didn't think it should "mess up the person's life over one mistake."

Other evidence relevant to the questions raised on appeal will be narrated in the opinion.

Defendant offered no evidence.

The jury found defendant guilty of murder in the first degree in both cases, and he was sentenced to life imprisonment in each case. Defendant appealed to the Supreme Court assigning errors discussed in the opinion.

Rufus L. Edmisten, Attorney General, by Ben G. Irons II, Assistant Attorney General, for the State.

Bell and Browne, P.A., by Deane F. Bell and Charles T. Browne, Attorneys for defendant appellant.

HUSKINS, Justice.

Defendant challenges the trial court's refusal to suppress certain incriminating statements defendant made immediately following a polygraph test administered to him by SBI Agent Steve Davenport. Admission of the statements constitutes defendant's fifteenth and sixteenth assignments of error. We first ascertain the factual basis for these assignments.

The record reveals that defendant and his attorney, William Heafner, were present in the SBI Office in Raleigh on 10 November 1976. Defendant said he was there "to take the polygraph examination." The SBI agent advised him of the following rights:

> "I fully realize that I am not required to take this examination. I may first consult with an attorney or anyone I wish before either signing this form or taking the examination. I have a right to remain silent the entire time I am here. Anything I may say can be used against me in a Court of Law. I have a right to talk to a lawyer for advice before answering any questions and to have him present during questioning. If I cannot afford an attorney and desire one, an attorney will be appointed for me before any questioning if I wish. If I decide to answer questions now without a lawyer present, I will still have the right to stop answering at any time. I also have the right to stop answering at any time until I have talked to a lawyer and I have the opportunity to exercise all of these rights at any time I wish during the entire time that I am here. Nevertheless, I voluntarily request and authorize Special Agent V. S. Davenport to now proceed with the examination."

Defendant signed a form acknowledging that he had read and understood his rights. He was not in custody at that time. Defendant was arrested for the murder of Mr. and Mrs. Fogleman on 16 August 1978.

Agent Davenport testified on voir dire in the absence of the jury that the polygraph examination "includes within it a phrase which is called testing. This is an instrumentation part. During that phase, there is no interrogation. It is strictly the asking of questions and taking the answers in which the person who is tak-

ing the examination gives it face value. Not challenging his answers at all. At the conclusion of all the testing, the instrumentation testing, if in my opinion, the person is lying then at that point the interrogration does start. And once the interrogation starts, the attorney does have a right to be there. His attorney was not allowed to be there during the test, but he was allowed [entitled] to be there during the interrogation."

In answer to certain questions propounded by the court, Mr. Davenport testified that one portion of defendant's statement was made during the "test phase" and another portion during "the interrogation." Continuing, Mr. Davenport said:

> "Mr. Stephens' attorney was not present when I asked him about the fingerprints. I asked Mr. Stephens what reason he could give for why his fingerprints had been found on his grandmother's wallet. I did not know the answer to the question of my own knowledge. Mr. Stephens' attorney was not present when this question was answered. His attorney could have been present if he had asked. When Mr. Heafner and Mr. Stephens arrived at the SBI office, I advised his attorney, Mr. Heafner, that he could not be present during the testing of Joel Dean Stephens. The question regarding fingerprints was not asked during the testing procedure. I did not specifically advise Mr. Heafner, Mr. Stephens' attorney, that he could be present during the interrogation. At the conclusion of the testing, I didn't leave the examination room. I do not know if anybody in law enforcement advised Mr. Stephens' attorney that he would be welcome to be with his client. I did not advise him that he could be present with Mr. Stephens at that time. . . . I went right from the testing into the questions. No one went outside and told Mr. Stephens' lawyer that he could come in when I was questioning Mr. Stephens. Mr. Stephens was advised of his rights and he signed the document prior to the testing stage. The rights contained a phrase that informed him that his attorney could be present during questioning. But I went right in from the polygraph test into the questioning. And Mr. Heafner, Mr. Stephens' attorney, was outside. Mr. Stephens was not advised at that time after the testing 'now at this point your attorney can be present.' Nor did I advise the attorney that he could come in to the room at that point. It would be reason-

able to believe that the attorney thought that I was conducting the polygraph portion of the test."

It thus appears from Mr. Davenport's testimony that Attorney Heafner was told he had no right to be present during the "test phase" of the polygraph examination, while defendant was told that he was entitled to have his lawyer present during the interrogation phase. Defendant was then taken into the testing room while his attorney waited outside. Nobody advised either defendant or his attorney when the testing phase ended and the interrogation phase began. The State contends that defendant's failure to demand the presence of his attorney and the attorney's failure to enter the room when the testing phase had ended indicates a recognition on their part that the presence of counsel had been waived. Therefore, the State argues, the interrogation was entirely proper and the incriminating answers elicited from defendant were competent and properly admitted into evidence. We now examine the challenged validity of the State's position.

[1,2] We note initially that the results of a polygraph test are not admissible in evidence to establish the guilt or innocence of an accused. *See State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979). Even so, the fact that defendant's incriminating statements to SBI Agent Davenport were made *in the polygraph testing room* is irrelevant on the question of their admissibility. *State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222 (1974). The challenged statements were not the result of any polygraph test and, if otherwise competent, were admissible.

The test of admissibility is whether the statements made by defendant were in fact voluntarily and understandingly made. *State v. Jones*, 278 N.C. 88, 178 S.E. 2d 820 (1971). Admissibility depends upon whether the statement was freely and voluntarily made and whether the officers who elicited the statement employed appropriate procedural safeguards. *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). A confession or incriminating statement is voluntary in law when, and only when, it is in fact voluntarily made. *State v. Vickers*, 274 N.C. 311, 163 S.E. 2d 481 (1968). The question of voluntariness must be determined by the total circumstances of each particular case. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). Although *Miranda* warnings are required only when defendant is being subjected to *custodial* in-

terrogation, *State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974), and are not required during the investigatory stage when defendant is not in custody at the time he makes the statement, *State v. Meadows*, 272 N.C. 327, 158 S.E. 2d 638 (1968), all *involuntary* confessions or incriminating statements, made in custody or out, are ordinarily inadmissible for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 57 L.Ed. 2d 290, 98 S.Ct. 2408 (1978); *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978); *State v. Meadows, supra;* 2 Stansbury, North Carolina Evidence § 186 (Brandis rev. 1973). We now examine the admissibility of the challenged statements in light of these legal principles.

After defendant had been advised of his constitutional rights, his privilege against self-incrimination and his right to counsel could be waived provided the waiver was voluntarily, knowingly and intelligently made. If the totality of circumstances indicates that defendant was threatened, *tricked*, or cajoled into a waiver of his rights, his statements are rendered involuntary as a matter of law. "The totality of circumstances under which the statement is made should be considered when passing on admissibility." *State v. Steptoe*, 296 N.C. 711, 252 S.E. 2d 707 (1979).

[3] In the instant case the totality of circumstances indicates that, in effect, defendant was tricked or cajoled into waiving his right to counsel and his privilege against self-incrimination. Absent a knowing and intelligent waiver of these rights, defendant's statements cannot be considered to have been voluntarily made. Agent Davenport's testimony tends to show that he and others at SBI headquarters in Raleigh, in contradiction to the instructions Mr. Davenport had given defendant and his counsel regarding counsel's right to be present during interrogation, left defendant's attorney patiently waiting outside while Mr. Davenport went directly from the testing phase into the interrogation phase. Attorney Heafner could neither see nor hear what was transpiring. He thought the testing phase was still in progress. Defendant himself apparently assumed that his lawyer would be admitted to the room at the proper time. These circumstances impel the conclusion that defendant and his counsel were misled by a procedure which effectively breached rather than safeguarded the right to counsel and the privilege against self-incrimination. Essentially, defendant was advised of his rights and then adroitly prevented from asserting them by the procedures employed. It is

unrealistic to conclude that defendant's counsel accompanied him on a sixty-mile trip to the SBI Office in Raleigh for the mere purpose of sitting idly by while defendant, without consulting his attorney, knowingly waived counsel and made the challenged incriminating statements. Mr. Davenport's testimony on voir dire affirmatively demonstrates that defendant did not *voluntarily, knowingly* and *intelligently* waive his right to counsel during the interrogation here in question.

The evidence offered on voir dire in this case is insufficient to support the trial court's implicit finding and conclusion that defendant voluntarily, knowingly and intelligently *waived counsel* when he was *interrogated* by SBI Agent Davenport at SBI headquarters in Raleigh on 10 November 1976. The procedures used strongly suggest a denial of fundamental fairness. Those statements should have been suppressed. We cannot say there was no reasonable possibility that the statements contributed to defendant's conviction so as to bring them within the harmless error rule. *See Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). In light of the circumstances under which the statements were obtained, their admission before the jury entitles defendant to a new trial.

We have carefully reviewed the remaining assignments of error and find no merit in any of them. Defendant's motion to suppress his in-court identification by the witness Carlene King was properly denied. *See State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976). The testimony of SBI Agent Layton concerning defendant's fingerprint on Mrs. Fogleman's expired driver's license was properly admitted. Whether the print could have been impressed "only at the time of a crime" is a question for the jury and not for the court. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). The remaining assignments are either formal and require no discussion or are unlikely to arise on retrial.

For the reasons stated, defendant is awarded a

New trial.

MARTHA BARHAM, EMPLOYEE v. FOOD WORLD, INC., EMPLOYER AND STANDARD FIRE INSURANCE COMPANY, CARRIER

No. 123

(Filed 3 June 1980)

Master and Servant § 62.1 — workers' compensation — grocery store employee — fall in loading zone while going from car to work site — no on-premises injury

An injury to plaintiff grocery store employee when she slipped and fell on ice in a loading zone in front of defendant employer's store in a shopping center while she was walking to her work site after parking her car in the shopping center parking lot did not occur on her employer's premises and thus did not arise out of and in the course of her employment where defendant neither owned nor leased the parking lot or the loading zone; although defendant had instructed employees not to park in the loading zone and had occasionally asked customers to move their cars from the zone, it had no responsibility for the upkeep of the loading zone area and had no authority or obligation under its lease with the shopping center to instruct drivers not to park in any area; the parking lot and loading zone were common areas and all of the stores had access to them for the convenience of their customers; and plaintiff failed to show that she was performing any duties for defendant employer at the time of her injury or that she was exposed to any danger greater than that of the public generally.

Justice BROCK took no part in the consideration or decision of this case.

Justice COPELAND dissenting.

Justice CARLTON joins in the dissenting opinion.

APPEAL from the decision of the Court of Appeals, *Judge Hill* dissenting, reported at 45 N.C. App. 409, 263 S.E. 2d 285, affirming the opinion and award of the Industrial Commission which upheld the findings and award of Commissioner Coy M. Vance.

The essential facts of this case are not in dispute. Plaintiff, Martha Barham, was employed by defendant employer at its Store No. 19 located in King's Shopping Center at Muirs Chapel Road and Market Street in Greensboro, North Carolina. Her duties consisted of waiting on customers at the store's delicatessen and bakery.

Eight or nine stores were located in the King's Shopping Center. All of the stores fronted on a common sidewalk. The sidewalk and the shopping center's parking lot were used by the customers and employees of all the stores. A loading zone was

located in front of three businesses: King's, the Country Kitchen, and defendant Food World's store. The loading zone was marked by yellow lines and was used for pickups and deliveries.

On 4 February 1977, plaintiff parked her car in the parking lot and walked toward defendant employer's store. As she approached the front of the store, she noticed some ice running across the parking lot and attempted to step over it. In so doing, she slipped and fell backwards into the loading zone and sustained injuries to her head.

Plaintiff filed a claim with the Industrial Commission, and the case came on for hearing on 29 November 1978 before Commissioner Coy M. Vance for the sole purpose of determining whether the claim was compensable under the North Carolina Workers' Compensation Act, G.S. 97-1 *et seq.* Commissioner Vance found as a fact that plaintiff "sustained an injury by accident arising out of and in the course of her employment" and concluded that plaintiff's injury was compensable under the Act. Defendants appealed, and the Full Commission, one member dissenting, affirmed the Commissioner's order and award. Defendants appealed to the Court of Appeals and that court, in an opinion by Judge Martin (Harry C.), Chief Judge Morris concurring, affirmed. Judge Hill dissented and defendants appealed to this Court pursuant to G.S. 7A-30(2).

McNairy, Clifford & Clendenin, by Harry H. Clendenin, III, for plaintiff appellee.

Smith Moore Smith Schell & Hunter, by J. Donald Cowan, Jr. and William L. Young, for defendant appellants.

BRANCH, Chief Justice.

The sole question presented for review is whether plaintiff sustained an injury arising out of and in the course of her employment with defendant Food World. Defendants maintain that the evidence does not support a finding or conclusion that plaintiff's injury occurred on the premises of the employer and that therefore plaintiff's injury did not arise out of and in the course of employment. Plaintiff, on the other hand, contends that the evidence supports the conclusion that defendant employer had control of the loading zone; thus, she argues that the area should

be treated as the employer's premises. Plaintiff submits that, since the injury occurred on the defendant Food World's premises, she sustained an injury arising out of and in the course of her employment.

In reviewing an order and award of the Industrial Commission in a case involving workmen's compensation, this Court is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings. *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E. 2d 649 (1969). Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976).

Commissioner Vance's findings of fact in the instant case include the following:

> 4. The defendant employer leased the store which gave them access to the entire parking lot of the shopping center to allow their customers and employees to use while shopping and working. There was a sidewalk which ran in front of each store in the shopping center.
>
> 5. There was a traffic lane marked off with yellow lines directly in front of defendant employer's store for the convenience of their customers to pick up and load their groceries. Delivery trucks also parked there when unloading supplies delivered to defendant employer. The bag boys employed by defendant employer placed groceries in customers' cars in the loading zone.
>
> 6. Mr. James Hill, manager of the store, notified employees where they should park while at work away from directly in front of the store in order that the customers could use the space directly in front of the store.
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> * * *
>
> 9. Defendant employer leased space for Store No. 19 and the lease gave the store access to all parking spaces at the shopping center for its employees' and customers' use.

The Commissioner then found as a fact and concluded as a matter of law that plaintiff sustained an injury arising out of and in the course of her employment.

In order to be compensable under our Workers' Compensation Act, an injury must arise out of and in the course of employment. G.S. 97-2(6). The two requirements are separate and distinct, and both must be satisfied in order to render an injury compensable. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). The term "arising out of" refers to the origin or causal connection of the injury to the employment; the phrase "in the course of" refers to the time, place and circumstances under which the injury by accident occurs. *Id.*

As a general rule, injuries occurring while an employee travels to and from work do not arise in the course of employment and thus are not compensable. *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570 (1962). "[W]hile admittedly the employment is the cause of the workman's journey between his home and the factory, it is generally taken for granted that workmen's compensation was not intended to protect him against all the perils of that journey." 1 A. Larson, *Workmen's Compensation Law* § 15.11 (1978). However, the rule has evolved that an employee injured while going to and from work *on the employer's premises* is generally covered by the Act. *Strickland v. King*, 293 N.C. 731, 239 S.E. 2d 243 (1977); *Maurer v. Salem Co.*, 266 N.C. 381, 146 S.E. 2d 432 (1966); Larson, *supra*. Such a rule is not without its problems. *See* Larson, *supra*, § 15.12. Even so, the "premises rule" supplies a real and tangible connection between the injury and the employment. *Id.* Furthermore, the reason for the rule "is, and always has been, the impracticality of drawing another line at such a point that the administrative and judicial burden of interpreting and applying the rule would not be unmanageable." *Id.* While certain exceptions to the premises rule are recognized. *e.g.*, Larson, *supra*, § 15.13, none of those exceptions is applicable to the facts of this case.

The resolution of this case thus turns on whether the evidence supports a determination that the loading zone was on defendant Food World's premises so that the injury can fairly be said to have arisen in the course of plaintiff's employment. The Commission and the Court of Appeals both determined that this is essentially an on-premises case. We disagree.

Lowell W. Plunkett, Vice-President of defendant Food World, testified in pertinent part and without contradiction as follows:

> Food World does not own or lease the sidewalk in front of the store. The sidewalk is a common area. Food World does not own or lease the pick up and loading lane. The loading lane is a common area. Food World does not own or lease the parking area. The parking lot is a common area. We have a right for our employees to use the parking lot. The loading area extends across the front of King's, Food World and the Country Kitchen.
>
> * * *
>
> Customers at all the stores in the shopping center use the loading area. . . . The pick up and loading lane is for the convenience of all the customers in the shopping center.
>
> * * *
>
> Food World does not have any lease responsibility, ownership or responsibility for the parking lot in King's Shopping Center.

There are numerous cases dealing with parking lot injuries and the vast majority which permit recovery do so on the ground that the employer owned, maintained, provided, controlled, or otherwise exercised dominion over the parking lot, walkway or other area in question. *E.g., De Hoyos v. Industrial Commission*, 26 Ill. 2d 110, 185 N.E. 2d 885 (1962); *Dewar v. General Motors Corp.*, 19 N.J. Misc. 297, 19 A. 2d 194 (1941); *Maurer v. Salem Co., supra; E. I. du Pont de Nemours Co. v. Redding*, 194 Okla. 52, 147 P. 2d 166 (1944). While the evidence here indicates that defendant Food World instructed its employees not to park in the loading zone, and that occasionally it asked customers to move their cars from the zone, we do not think such evidence rises to that level of control which is necessary to support a determination that this loading zone was a part of defendant Food World's premises. To the contrary, the uncontradicted evidence is to the effect that Food World neither owned nor leased the parking lot or the loading zone. It had no responsibility for the upkeep or maintenance of those areas and had no obligation or authority under its lease with the shopping center to instruct drivers not to

park in any particular area. The evidence indicates that the parking lot and loading zone were common areas, and that all of the stores had access to them for the convenience of their customers. We therefore hold that, under the uncontroverted facts of this case, the parking lot and loading zone were not sufficiently under the control of defendant Food World so as to permit the conclusion that those areas constituted a part of the employment premises. *See Donzelot v. Park Drug Co.*, 239 S.W. 2d 526 (Mo. Ct. App. 1951); *Workmen's Compensation Appeal Board v. Hentish*, 20 Pa. Cmwlth. 514, 314 A. 2d 926 (1975); *Tri-City Towel & Linen Service, Inc. v. Cope*, 529 S.W. 2d 51 (Tenn. 1975). Furthermore, plaintiff has failed to demonstrate that she was performing any duties for her employer at the time, or that she was exposed to any danger greater than that of the public generally. *See Donzelot v. Park Drug Co., supra; Gallimore v. Marilyn's Shoes, supra; Tri-City Towel & Linen Service, Inc. v. Cope, supra.* Since the injury sustained by plaintiff did not occur on the employer's premises, and plaintiff has failed to bring her case within any exception to the premises rule, we hold that plaintiff did not suffer an injury arising out of the course of employment and therefore does not qualify for compensation under our Workers' Compensation Act. G.S. 97-2(6).

The decision of the Court of Appeals affirming the award of the Industrial Commission is

Reversed.

Justice BROCK took no part in the consideration or decision of this case.

Justice COPELAND dissenting.

When an employee is injured while going to or from his place of work and is upon premises owned or controlled by his employer, then the injury is generally deemed to have arisen out of and in the course of the employment. *Bass v. Mecklenburg County*, 258 N.C. 226, 128 S.E. 2d 570 (1962). Here, Food World does not own or lease the loading zone in front of its store. The issue is whether it exercises such control over the area as to come within the rule set forth in *Bass* by Justice R. Hunt Parker (later Chief Justice).

Control means:

> "Power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee." Black's Law Dictionary, p. 298 (5th ed. 1979).

Control does not necessarily mean *exclusive* control. Two or more persons or businesses may exercise varying degrees of control over the same activities or areas.

The Industrial Commission in its findings of fact, which are supported by the evidence, relied upon the following factors to conclude that this accident arose out of and in the course of plaintiff's employment:

> "5. . . . Delivery trucks [park] . . . there when unloading supplies delivered to defendant employer. The bag boys employed by defendant employer placed groceries in customers' cars in the loading zone.
>
> 6. Mr. James Hill, manager of the store, notified employees where they should park while at work away from directly in front of the store in order that the customers could use the space directly in front of the store."

Defendant employer obviously does not have exclusive control over the loading zone since the area is also used by the stores on either side of Food World and since it neither leases nor owns the area. However, it is equally obvious that it exercises some control over this area since it is interested primarily in keeping the zone open to get its purchases moved into the store and its sales moved out of the store.

The majority states that,

> "[w]hile the evidence here indicates that defendant Food World instructed its employees not to park in the loading zone, and that occasionally it asked customers to move their cars from the zone, we do not think such evidence arises to that level of control which is necessary to support a determination that this loading zone was a part of defendant Food World's premises."

I disagree for two reasons.

First, the test is whether there is evidence to support the Commission's findings and whether the findings support its conclusions. *Byers v. Highway Commission*, 275 N.C. 229, 166 S.E. 2d 649 (1969). We are bound by the Commission's findings when there is competent evidence to support them. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976).

Since this is the scope of our review, I believe that the Commission, on the evidence regarding control in this case, reached the correct conclusion under the test as set forth in *Bass*. The majority in effect concedes that the defendant does exercise some degree of control over the loading zone. In my view, that degree of control is sufficient in order to apply the decision in *Bass* and say that the accident is deemed to arise out of and in the course of the employment. This is the conclusion in fact reached by the Commission which is supported by the findings which are in turn supported by competent evidence. Therefore, under *Byers* and *Watkins*, this Court should be bound.

Second, as Justice (now Chief Justice) Branch stated in *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 282 (1972):

> "Equally well recognized is the rule that the Workmen's Compensation Act should be liberally construed so that the benefits under the Act will not be denied by narrow, technical or strict interpretation."

This reasoning should apply equally to any construction of the term "control" as used in *Bass*. Therefore, I respectfully dissent.

Justice CARLTON joins in this dissent.

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE CITY OF ALBEMARLE, ORDINANCE NO. 78-7, TO EXTEND THE CORPORATE LIMITS OF THE CITY OF ALBEMARLE, NORTH CAROLINA UNDER THE AUTHORITY GRANTED BY PART 3, ARTICLE 4A, CHAPTER 160A OF THE GENERAL STATUTES OF NORTH CAROLINA

No. 111

(Filed 3 June 1980)

1. **Municipal Corporations § 2— annexation ordinance—city over 5,000—appeal to Supreme Court**

Appeal of an annexation ordinance of a city of 5,000 or more people should have gone initially to the Supreme Court pursuant to G.S. 160A-50(h).

2. **Municipal Corporations § 2.2— annexation—outlying urban areas—intervening undeveloped lands**

Cities with 5,000 or more people may annex an outlying urban area pursuant to G.S. 160A-48(c) and the intervening undeveloped lands pursuant to G.S. 160A-48(d) so long as the entire area meets the contiguity requirements of G.S. 160A-48(b)(1) and (2) and is not already included within the boundary of any other incorporated municipality, G.S. 160A-48(b)(3). However, the urban area that a city seeks to qualify for annexation under one of the urban purposes tests set forth in G.S. 160A-48(c)(1)-(3) must be considered as a whole, *i.e.*, as one area, and may not be divided into subareas or study areas.

3. **Municipal Corporations § 2.1— annexation—public hearing—explanation of annexation report—reading of entire report**

A city complied with the requirement of G.S. 160A-49(d) that a public hearing be held at which "a representative of the municipality shall first make an explanation of" the annexation report where an officer of the municipality read the entire report of the proposed annexation, since the reading of the report in its entirety was a more detailed explanation of the report than a shorter summary explanation prepared by a representative of the municipality would have been.

4. **Municipal Corporations § 2.6— annexation—plans for extension of services**

A city complied with the requirements of G.S. 160A-47(3) pertaining to the extension of municipal services to an area to be annexed where (1) the annexation report indicates that the city will hire six additional firemen, will let a contract within 12 months for construction of a fire station in the area, will acquire the necessary fire-fighting apparatus for the station, and in the interim period will either contract with a volunteer fire department to serve the area or will establish a temporary fire station in the area with the necessary men and equipment; (2) the report states that garbage is collected in the city twice a week, that collection in the newly annexed area will be on substantially the same basis as in the rest of the city, and that the city will purchase one new garbage truck and will employ additional personnel to provide collection on substantially the same basis and in the same manner as the rest of the city; (3) the report makes adequate provision for uniform street maintenance in the

city and the newly annexed area; and (4) the report states that the city will extend water and sewer lines into the area where such lines do not presently exist, contains exhibits showing the location of these lines, and states that contracts for the construction of these lines will be let not more than 12 months after the effective date of the annexation ordinance.

Justice BROCK did not participate in the decision of this case.

ON petition for discretionary review pursuant to G.S. 7A-31 from the opinion of the Court of Appeals, 44 N.C. App. 274, 261 S.E. 2d 39 (1979) (opinion by *Martin [Robert M.], J.* with *Parker, J.* and *Chief Judge Morris* concurring), which affirmed the judgment of *Walker (Ralph), S. J.* entered 27 October 1978 in STANLY County Superior Court in which he affirmed the annexation ordinance that the City Council of Albemarle adopted on 8 May 1978.

Petitioners own land in the area to be annexed. On 26 May 1978, they petitioned for review of the annexation ordinance on the grounds that the respondent failed to meet the requirements of G.S. 160A-47(3), 160A-48, and 160A-49(d) and that petitioners would suffer material injury as a result of these failures to comply with the statutory requirements regarding the annexation of an area by a city.

Petitioners lost in the trial court and in the Court of Appeals. We allowed discretionary review on 5 March 1980.

Edwin H. Ferguson, Jr. for petitioner-appellants.

Henry C. Doby, Jr. for respondent-appellee.

COPELAND, Justice.

[1] We allowed discretionary review in this case because it was improper for the appeal to go initially to the Court of Appeals. Albemarle is a city of 5,000 or more people and pursuant to G.S. 160A-50(h) appeal lies directly to this Court. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E. 2d 189 (1980).

Originally, appeals in cases involving cities of less than 5,000 people, G.S. 160-453.6(h) and (i) (1964) (now G.S. 160A-38(h)), and appeals in cases involving cities of 5,000 or more people, G.S. 160-453.18(h) and (i) (1964) (now G.S. 160A-50(h)), came directly to

this Court since the Court of Appeals was not then in existence. After creation of the Court of Appeals (effective 1 January 1967), this Court decided the case of *Adams-Millis Corp. v. Town of Kernersville*, 281 N.C. 147, 187 S.E. 2d 704 (1972).

The case involved a city with less than 5,000 people; therefore, the appeal was pursuant to G.S. 160-453.6(h) and (i). The appeal was taken to the Court of Appeals but this Court elected pursuant to G.S. 7A-31 to certify the appeal for initial appellate review by the Supreme Court. Nevertheless, this Court held that the appeal had been properly taken to the Court of Appeals. Justice (later Chief Justice) Sharp writing for the Court held that:

> "When the Court of Appeals was created as of 1 January 1967, the appellate division of the General Court of Justice became the Supreme Court and the Court of Appeals. G.S. 7A-5, G.S. 7A-16; *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376. *By a clear legislative oversight Sections (h) and (i) of G.S. 160-453.6 were not amended to include the Court of Appeals as one of the appellate courts.* However, N.C. Sess. Laws, Ch. 108, Section 1 (1967), codified as G.S. 7A-25 to -35, defines the respective appellate jurisdiction of the Supreme Court and the Court of Appeals. *By G.S. 7A-27 initial appellate jurisdiction of this cause is given to the Court of Appeals subject, however, to the provisions of G.S. 7A-31. The Court of Appeals, therefore, is now deemed to be included in Sections (h) and (i) of G.S. 160-453.6. Guilford County v. Estates Administration, Inc.*, 212 N.C. 653, 194 S.E. 295. This appeal was properly taken to the Court of Appeals, from which it was transferred to this Court upon our order entered under G.S. 7A-31." *Adams-Millis Corp. v. Town of Kernersville, supra* at 149, 187 S.E. 2d at 705. [Emphasis added.]

Subsequently, in 1977, the statute dealing with appeals in annexation cases involving cities with less than 5,000 people was amended by the legislature to provide that the appeal is to go initially to the Court of Appeals. G.S. 160A-38(h) (Supp. 1979).

However, the statute dealing with appeals in annexation cases involving cities with 5,000 or more people *still* provides that the appeal is directly to this Court. G.S. 160A-50(h). Since the legislature amended G.S. 160A-38(h) to provide that those appeals

are to go to the Court of Appeals, we cannot say that its failure to amend G.S. 160A-50(h) is a "clear legislative oversight" as was the case in *Adams-Millis*. Where an Article (Article 4A of Chapter 160A) has two distinct sections (160A-38(h) and 50(h)) dealing with related matters, an amendment to one section is not an amendment to the other because it is presumed that if the legislature had intended the amendment to apply to both sections, it would have expressed such intent. *See, Arrington v. Stone & Webster Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965) (dealing with two subsections within one statute); *see also, Andrews v. Nu-Woods, Inc.*, 299 N.C. 723, 264 S.E. 2d 99 (1980) (legislature clearly expressed its intent in G.S. 97-29 to amend G.S. 97-38). The result is that G.S. 160A-38(h) provides for appeal to the Court of Appeals in cases involving less than 5,000 people and G.S. 160A-50(h), pursuant to which the appeal was taken in this case, provides for appeal to the Supreme Court in cases involving 5,000 or more people. Therefore, this case should have come directly to this Court. *See, In re Annexation Ordinance [Goldsboro]*, 296 N.C. 1, 249 S.E. 2d 698 (1978) (direct appeal to this Court pursuant to G.S. 160A-50(h) decided without this issue being raised).

[2] The first issue is whether the area to be annexed meets the statutory requirements of G.S. 160A-48(b), (c) and (d).

G.S. 160A-48(a)(1) requires that the area to be annexed meet the general standards of subsection (b). Subsection (b) then requires that the *total* area to be annexed meet certain contiguity requirements, G.S. 160A-48(b)(1) and (2), and that the area not already be included within the boundary of any other incorporated municipality, G.S. 160A-48(b)(3).

G.S. 160A-48(a)(2) then requires that *"[e]very part . . .* [of the area to be annexed must meet] the requirements of *either subsection (c) or subsection (d)."* [Emphasis added.] Subsection (c) states that *"[p]art or all* of the area to be annexed must be developed for urban purposes," [emphasis added] and three tests for urban purposes are set forth in (c) (1)-(3). Part or all of the area to be annexed must meet the requirements of at least one of those three tests.

Subsection (d) provides:

"(d) *In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any*

area which does not meet the requirements of subsection (c) if such area either:

(1) *Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area*; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes *and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes* or between two or more areas developed for urban purposes." [Emphasis added.]

Respondent followed precisely the requirements as set forth above. Cities with 5,000 or more people may annex an outlying urban area pursuant to G.S. 160A-48(c) and the intervening undeveloped lands pursuant to G.S. 160A-48(d) so long as the entire area meets the requirements of G.S. 160A-48(b).

Nothing contained in this opinion is inconsistent with this court's decision in *In re Annexation Ordinance [Charlotte]*, 284 N.C. 442, 202 S.E. 2d 143 (1974). In that case, the City of Charlotte did not attempt to utilize G.S. 160A-48(d) in its efforts to annex certain areas to the city. Instead, it sought to accomplish the annexation solely pursuant to G.S. 160-453.16(c)(1) (now G.S. 160A-48(c)(1)). The city divided the area to be annexed into study areas and applied the urban purpose test of (c)(1) to each study area individually rather than to the area to be annexed as a whole. This was found to be contrary to the legislature's intent as set forth in (c)(1).

Thus, combining the holding in this case involving subsections (c) and (d) with the holding in *In re Annexation Ordinance [Charlotte], supra* involving subsection (c) the following principles emerge. The urban area that a city seeks to qualify for annexation under one of the urban purposes tests set forth in G.S. 160A-48(c)(1) - (3) must be considered as a whole; i.e., as one area and may not be divided into sub-areas or study areas. This requirement, however, does not preclude annexation of intervening undeveloped land pursuant to G.S. 160A-48(d). Finally, the entire area to be annexed must meet the requirements of G.S. 160A-48(b).

An annexation in accordance with the above standards is entirely in keeping with the declaration of policy as set forth in G.S. 160A-45(4) which notes that urban development in and around cities involving 5,000 or more people is more scattered than in smaller cities thus making it more difficult to annex and expand services into those areas. Such circumstances are to be taken into account when a city of 5,000 or more people attempts to annex an area and expand services into that area. G.S. 160A-48(c) and (d) set the standards which allow annexations to occur and services to be expanded into the developed areas in such situations.

The same is not true for cities of less than 5,000 people. They do not have a provision comparable to G.S. 160A-48(d). *See* G.S. 160A-36 and our decision in *Hawks v. Town of Valdese*, 299 N.C. 1, 261 S.E. 2d 90 (1980).

[3] The second issue is whether the city failed to comply with the requirement of G.S. 160A-49(d) that a public hearing be held at which,

> "a representative of the municipality shall first make an explanation of the report required in G.S. 160A-47. Following such explanation, all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given an opportunity to be heard." G.S. 160A-49(d).

At the public hearing, an officer of the municipality read the entire report of the proposed annexation prepared pursuant to G.S. 160A-47. He offered no further explanation other than the reading of the report after which all persons were heard who

wished to be heard. Reading the report in its entirety was a more detailed explanation of the report than a shorter summary explanation prepared by a representative of the municipality would have been. In this manner, those who attended the meeting were made aware of each and every provision and statement in the report and were then given an opportunity to be heard. This is sufficient compliance with the requirements of G.S. 160A-49(d).

[4] The third issue is whether the city complied with the requirements of G.S. 160A-47(3) which pertains to the extension of municipal services to the area to be annexed and the timetable for doing so.

Petitioners complain that adequate provision has not been made to extend fire protection to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the municipality prior to annexation. However, the report indicates that the city will hire six additional firemen and within twelve months will let a contract for construction of a new fire station in the area to be annexed and will acquire the necessary fire-fighting apparatus for the station. In the interim period, the city will either contract with the Bethany Volunteer Fire Department (which now serves the area to be annexed) to serve this area or will establish a temporary fire station in the area with the necessary men and equipment.

Petitioner makes the same claim with respect to the extension of garbage collection to the area to be annexed because no schedule of trash collection is set out in the report and it does not state how many additional personnel will be hired to perform the task. The report states that garbage is collected in the city twice a week and collection in the newly annexed area will be on substantially the same basis and in the same manner as in the rest of the city. The report further states that the city will purchase one new garbage truck and will employ additional personnel to provide collection on substantially the same basis and in the same manner as in the rest of the city.

Petitioners voice the same complaint with respect to provisions for street maintenance in the area to be annexed. The report makes adequate provision for uniform maintenance in the city and the newly annexed area.

Lastly, petitioners complain that the provisions for extending water and sewer lines into the area to be annexed are not adequate to place this area on substantially equal terms with the rest of the city. The report reveals that the contrary is true. The city will extend water and sewer lines into this area "where such do not [presently] exist" and various exhibits detail the location of these lines. Contracts for the construction of these lines will be let not more than twelve months after the effective date of the ordinance. This is sufficient compliance with G.S. 160A-47(3(c). We held *In re Annexation Ordinance [Goldsboro], supra*, that it would appear from a reading of G.S. 160A-49(h) that a city annexing territory has one year and possibly fifteen months to implement its plans for extending services to an annexed area. Also, there is no requirement that the city duplicate services that are already available in the annexed area. *Id.*

We hold that the report and plans are sufficient upon all grounds upon which they have been challenged.

Since the Court of Appeals was without jurisdiction to hear and determine this appeal, its decision is vacated. The decision of the trial judge is affirmed.

Court of Appeals' decision is

Vacated.

Judgement entered by the trial judge is

Affirmed.

Justice BROCK did not participate in this decision.

STATE OF NORTH CAROLINA v. JOHN GADSDEN AND CARL GADSDEN

No. 112

(Filed 3 June 1980)

1. **Homicide § 30.2— second degree murder case—instruction on manslaughter not required**

The trial court in a second degree murder case did not err in failing to charge the jury that it might find defendant, who offered no evidence in his own behalf, guilty of voluntary manslaughter, since evidence presented by the State tended to show that defendant was guilty of murder if he was guilty of anything, and evidence presented by a codefendant tended to show that defendant was not guilty of anything.

2. **Criminal Law § 113.7— two defendants—acting in concert—instructions proper**

In a second degree murder prosecution of two defendants where voluntary manslaughter was submitted as an alternative verdict for only one defendant, there was no merit to defendant's contention that the trial court gave conflicting instructions concerning acting in concert to the jury, since the instructions about which defendant complained were given while the court was instructing on second degree murder, and the court subsequently clearly instructed on what the jury would have to find in order to return a verdict of guilty of second degree murder or voluntary manslaughter against defendant.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by defendants from *McLelland, J.*, 8 October 1979 Criminal Session, WAKE Superior Court.

Upon pleas of not guilty defendants were tried on bills of indictment charging them with the murder of Jerome Gordon. The cases were tried together and the state asked for no greater verdict than that of murder in the second degree.

Evidence presented by the state is summarized in pertinent part as follows:

On 5 May 1979 Eddie Jarman was "in charge" of a rooming house located at 202 Linden Avenue in Raleigh. His duties included collecting rent from tenants. Gordon lived in the house on the first floor and was scheduled to succeed Jarman as the house manager. Defendant John Gadsden rented a room or apartment on the second floor of the house and occupied it with his girl friend Francine Dantzler. Defendant Carl Gadsden is the brother

of defendant John, did not live at the house but visited his brother quite frequently.

Late in the afternoon of said date, Gordon was in his bathroom washing some shirts. Defendant John asked Gordon the whereabouts of "his sorry friend" who lived in Room 6 at the house. Gordon denied any friendship with the person referred to. Defendant John accused the person of stealing his television set and stated that he was going to get his boys together, come back and make somebody pay for it.

A short while later defendant John returned to the house and defendant Carl was with him. Defendant John asked Gordon again about his "friend" who lived upstairs. At that time defendant John had a butcher knife on his person. After a few words with Gordon defendants went upstairs. Shortly thereafter a lot of noise came from upstairs "as if somebody was tearing up the building."

Jarman went upstairs to investigate the cause of the noise and Gordon went with him. When they reached the second floor they found that the door to Room 6 had been broken down and the contents of the room disarranged. Defendants and Francine were close by and defendant John was fussing about what he was going to do "to the guy when he catch him"; defendant John had two butcher knives in his hand at the time and was "talking, walking and prancing."

Jarman decided to go downstairs and call the owner of the house. Gordon elected to stay upstairs and try to talk to the defendants. Defendant Carl had a pocketknife in his hand at that time.

After getting downstairs and calling the owner of the house, Jarman heard more noise from upstairs. Sensing trouble, he then called the police and also called for an ambulance. He went to the door of his room and saw defendants and Gordon run out of the house and into the street. Both defendants were stabbing Gordon with knives, defendant John stabbing him from his front and defendant Carl stabbing him from his back. Gordon had nothing in his hands and was quite intoxicated at the time.

After being stabbed numerous times by defendants, Gordon finally managed to get back to the porch of the house. Defendant

John called for Jarman to come outside "so I can give you some of this." As Gordon lay on the porch bleeding, defendants removed a television set and record player from the house, placed it in an automobile and they and Francine left.

Gordon was carried to Wake Medical Center in Raleigh where he died on an operating table at 7:50 p.m. An autopsy disclosed that Gordon had received ten cuts, three in the front portion of his body and seven in his back. Five of the cuts entered his body cavity and death resulted from internal bleeding caused from the severing of two major blood vessels inside of his body. A heavy content of alcohol, equivalent to a .30 reading on a breathalyzer machine, was found in the victim's blood.

Defendant John offered no evidence. Defendant Carl presented evidence, including his own testimony, which is summarized in pertinent part as follows:

On 5 May 1979 he was living in Raleigh with his grandmother on Oakwood Avenue. His parents lived in Philadelphia. He visited his brother, defendant John, at his apartment on Linden Avenue at various times and knew Jarman and Gordon when he saw them. Jarman, Gordon and other men "hung around" Rebecca Howard's home which was located next to the rooming house. Jarman was Rebecca's boyfriend and sold liquor. In April of 1979 she got mad with defendant Carl, threatened to have him "taken care of", and thereafter he was afraid that Jarman, Gordon and others would try to hurt him. On the following day defendant Carl purchased a knife.

At around 2:00 p.m. on the day in question defendant Carl went to his brother's apartment where the two of them and Francine watched television until about 3:30 p.m. Defendant John went to the kitchen to wash some glasses and when he did not return in a few minutes, defendant Carl went out into the hall to look for him. There he saw five men including Gordon standing around his brother. When defendant Carl asked his brother if he was okay, the men sort of dispersed and defendant John returned to his room. The five men came to the room door and one of them asked Gordon "is that the man", referring to defendant Carl. Gordon indicated that it was and the five left.

Some ten or fifteen minutes later defendants decided to walk to their grandmother's house. As they came down the stairs at the rooming house, they saw Jarman, Gordon and the other three men they had seen upstairs enter Rebecca Howard's house. After staying in the area of their grandmother's home for about forty-five minutes, they returned to the rooming house where Francine told them someone had entered their room and had taken the television, radio, a watch and a ring. At defendant John's request defendant Carl helped him search an adjoining room, the door to which was open. They failed to find the stolen property.

Defendants then decided to go and tell their grandmother what had happened. As they reached the top of the stairs and were about to descend, Gordon started coming up the stairs talking in a fairly loud voice. He said he wanted to talk to John, that he (Gordon) was the houseman now, and that he wanted John to get his stuff together and move. Gordon was talking in an "aggressive manner" and had a small paring knife in his hand.

Defendant Carl obtained his knife and told his brother that Gordon had a knife. Thereupon, Gordon swung the knife toward defendant John who pushed him away. Gordon then advanced toward defendant Carl with his knife raised. He threw his arms around defendant Carl who then grabbed Gordon's hand with the knife in it and with his knife in his other hand began stabbing Gordon in his back. The two of them "tussled" down the stairs and fell through the screen door onto the porch. The altercation continued on the porch, in the yard and onto Howard's porch with defendant Carl stabbing Gordon several times but never receiving any cut from Gordon. While defendant Carl and Gordon were fighting in the yard and on the Howard porch, defendant John was on the porch of the rooming house yelling to Gordon not to stab his brother. Defendant John did not have a knife in his hand at any time and inflicted no wound on Gordon.

Immediately after the fight, defendants and Francine left the rooming house and went to her sister's. They returned to the rooming house around 11:00 or 11:30 p.m. to get their belongings and defendants were arrested at that time.

On cross-examination defendant Carl stated that when he first saw that Gordon had a knife, defendant John was at the top of the stairs, Gordon was on the stairs "within striking distance

of him," and he (Carl) was about three-fourths of the way down the stairs; that defendant John pushed Gordon when he "started to swing a knife"; that Gordon then leaped (down the stairs) to defendant Carl; that he did not know where defendant John was after the cutting began until they were outside of the house and defendant John was yelling to Gordon not to stab his brother; and that defendant John "didn't come down the steps behind me . . . not that I know of."

As to defendant John, the court instructed the jury that it might return a verdict of guilty of second-degree murder or not guilty. As to defendant Carl, the jury was instructed to return a verdict of guilty of second-degree murder, manslaughter or not guilty. The jury returned verdicts finding both defendants guilty of second-degree murder.

With respect to defendant John, the court entered judgment imposing a prison sentence of not less than twenty years nor more than life. As to defendant Carl, the court entered judgment imposing a prison sentence of not less than fifteen years nor more than twenty-five years. Both defendants appealed.

This court allowed defendant Carl's motion to bypass the Court of Appeals. Defendant John's appeal was docketed in this court; we now consider the appeal as a motion to bypass the Court of Appeals and allow it.

Attorney General Rufus L. Edmisten, by Associate Attorney Evelyn M. Coman, for the state.

Benjamin F. Clifton, Jr., for defendant-appellant John Gadsden, and Kyle S. Hall for defendant-appellant Carl Gadsden.

BRITT, Justice.

DEFENDANT JOHN GADSDEN'S APPEAL

[1] By his only assignment of error, defendant John contends the trial court erred in not submitting voluntary manslaughter as an alternative verdict as to him. He argues that if the jury had chosen to believe the state's evidence tending to show that he participated in the stabbing of Gordon, and then believed defendant Carl's testimony relating to self-defense, they could have

found him as well as his brother guilty of voluntary manslaughter. We find no merit in the assignment.

It is well settled that the trial court is not required to charge the jury upon the question of a defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976); *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971); 4 Strong's N.C. Index 3d, Criminal Law § 115.

In the case at hand the trial court in instructing the jury gave both defendants the benefit of defendant Carl's testimony regarding self-defense. The court charged:

> If, however, you believe that John Gadsden did not stab Gordon and that Carl Gadsden, who did not provoke or voluntarily enter into the fight, believed it necessary to stab Gordon to save himself from death or great bodily harm, that the circumstances as they appeared to Carl Gadsden at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, considering the size, age and strength of the defendant Carl Gadsden as compared to the size, age and strength of Jerome Gordon, and considering any weapon held by Gordon; and that in stabbing Gordon, Carl Gadsden did not use excessive force, that is, more force than reasonably appeared to him to be necessary to save himself from death or great bodily harm; then you will have determined that the killing was in self-defense, excused, and in that sense was lawful; your verdict as to each defendant in such case should be not guilty.

Thereafter, the court instructed the jury on the principles of heat of passion and excessive force and their relation to malice, a necessary element of second-degree murder. The instructions include the following:

> The State's evidence tends to show that there was no provocation of the defendants by Gordon; that the defendants acted in anger but not in the heat of passion as the law defines that state of mind.
>
> The evidence of the defendant Carl Gadsden tends to show that John Gadsden did not act at all against Gordon;

that Gordon aggressively demanded that John Gadsden move out of the rooming house, then swung at John Gadsden, then attacked Carl Gadsden, holding him by the neck with his arm. If you believe that these actions on the part of Gordon took place as defendant Carl Gadsden testified, and believe that they adequately provoked heat of passion in the mind of Carl Gadsden and that he began stabbing Gordon so soon after such provocation that such a passion in a person of average mind and disposition would not have cooled, then you will have determined that Carl Gadsden acted without malice in stabbing Gordon.

* * *

As to the second rule mentioned earlier, one who does not provoke or voluntarily enter into a fight and who reasonably believes it to be necessary to stab another to save himself from death or great bodily harm, is not excused by the law of self-defense if that stabbing is more force than reasonably appeared to the accused to be necessary.

It is for you the jury to say whether you find the true circumstances to be as recounted by the defendant Carl Gadsden, the force used, that is stabbing, reasonably appeared to Carl Gadsden to be necessary. If you believe the force used did reasonably appear to Carl Gadsden to be necessary, it was not excessive, then the killing is excused by the law of self-defense. If, however, you believe that it did not reasonably appear to him to be necessary to use that force, that is stabbing, it was excessive and the killing is not excused by the law of self-defense but it is without malice, then it is not second degree murder.

We hold that the trial judge did not err in failing to charge the jury that it might find defendant John guilty of voluntary manslaughter. The evidence presented by the state tended to show that he was guilty of murder or nothing. The evidence presented by defendant Carl tended to show that defendant John was not guilty of anything. The state's evidence tended to show no provocation of defendants by Gordon. Defendant Carl's evidence tended to show that he was provoked into stabbing Gordon but that defendant John, although provoked, did not stab Gordon.

The question of excessive force arises solely on the testimony of defendant Carl and he testified that defendant John did not use any force except to push Gordon away from him. There was no evidence to require submission of voluntary manslaughter as to defendant John.

DEFENDANT CARL GADSDEN'S APPEAL

[2] By his only assignment of error, defendant Carl contends the trial court erred to his prejudice in that it gave conflicting instructions to the jury. The assignment has no merit.

In explaining the law with respect to acting in concert, the court instructed the jury as follows:

> So that, if you further find beyond a reasonable doubt that one or more stab wounds inflicted by either, proximately caused the death of Jerome Gordon, each would be equally responsible for the killing. (Underlining added.)

Defendant Carl argues that since voluntary manslaughter was not submitted as an alternative verdict for his brother, the quoted instruction conflicted with the instructions relating to voluntary manslaughter as to him and that he was prejudiced by the conflict.

The jury charge must be construed as a whole in the same connected way in which it was given; and "a disconnected portion may not be detached from the context of the charge and then critically examined for an interpretation from which erroneous expressions may be inferred." *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied.* 409 U.S. 948 (1972), and cases therein cited.

The quoted instruction was given very early in the charge when the court was instructing on second-degree murder. Much later in the charge the court gave clear instructions on voluntary manslaughter as related to defendant Carl, some of those instructions being set out above in discussing defendant John's appeal. In its final mandate the court again instructed clearly on what the jury would have to find in order to return a verdict of guilty of second-degree murder or voluntary manslaughter against defendant Carl.

We hold that the charge, when considered as a whole, was free from prejudicial error.

As to defendant John Gadsden—no error.

As to defendant Carl Gadsden—no error.

Justice BROCK did not participate in the consideration or decision of this case.

DAVID HARRELL, T/A HARRELL SAND & SEPTIC CO. v. W. B. LLOYD CONSTRUCTION COMPANY

No. 95

(Filed 3 June 1980)

Rules of Civil Procedure § 50.5— evidence legally insufficient—new trial properly granted

Where a court on appeal reverses a trial court's determination that plaintiff's evidence is legally sufficient, nothing in the Rules of Civil Procedure precludes the Appellate Division from determining in a proper case that plaintiff appellee is nevertheless entitled to a new trial. Therefore, the Court of Appeals, having found that plaintiff's competent evidence at trial was legally insufficient to support his quantum meruit claim against defendant, was correct in failing to overrule the trial court's denial of defendant's motion for involuntary dismissal and in remanding the cause for a new trial where the record shows that incompetent evidence was erroneously considered by the trial judge in his ruling on the sufficiency of plaintiff's evidence, since, had it not been for the erroneous admission of the incompetent evidence in the first place, plaintiff might well have introduced other, competent evidence of the same import which would have properly withstood defendant's motion for voluntary dismissal or directed verdict.

DEFENDANT appeals from a decision of the Court of Appeals by *Judge Harry Martin*, *Judges Parker* and *Mitchell* concurring, which granted plaintiff a new trial upon defendant's appeal from a judgment entered by *Judge Nicholas Long* in the 29 May 1979 Civil Non-Jury Session of HERTFORD District Court. The Court of Appeals' opinion is reported at 41 N.C. App. 593, 255 S.E. 2d 280 (1979). This Court allowed defendant's petition for discretionary review pursuant to G.S. 7A-31 on 11 September 1979. The case was docketed and argued as No. 111, Fall Term 1979.

Cherry, Cherry and Flythe, by Larry S. Overton and Thomas L. Cherry, Attorneys for plaintiff appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James K. Dorsett III, and James G. Billings, Attorneys for defendant appellant.

EXUM, Justice.

The sole question presented by this appeal is whether the Court of Appeals, having found that plaintiff's evidence at trial was legally insufficient to support his *quantum meruit* claim against defendant, was correct in failing to overrule the trial court's denial of defendant's motion for involuntary dismissal and in remanding the cause for a new trial. For the reasons stated hereafter, we affirm the Court of Appeals.

Plaintiff instituted this action to recover for monies allegedly due for construction services performed for defendant. Plaintiff alleged that during the period of 10 September 1976 through 4 March 1977 it performed backhoe, bulldozer, and tractor work and various hauling services for defendant contractor in connection with the construction of a building in Hertford County. Attached to plaintiff's verified complaint were ledger sheets showing an itemized account of the work plaintiff alleged it had performed. Defendant's answer admitted that plaintiff had performed some backhoe work for defendant but alleged that plaintiff had been paid in full for all work performed on the job.

At a non-jury trial before Judge Long in the Hertford District Court, plaintiff was allowed over objection to introduce the ledger sheets into evidence. Plaintiff referred to the itemized entries in the ledger sheets to describe the nature of the equipment used, the hours worked, and the number of employees involved in the services performed for defendant. He further testified that all ledger entries were made at his direction and in his presence. Both plaintiff's testimony and the account evidenced by the ledger sheets disclosed that the total charges billed to defendant were $4,574.50 and that defendant had made a payment of only $1,000.

At the close of plaintiff's evidence, defendant moved for an involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b). This mo-

tion was denied. Defendant offered no evidence, choosing instead to renew its motion for dismissal, which was again denied. The trial court then found facts in favor of plaintiff and entered judgment against defendant for the sum of $3,574.50 (plus interest), the amount outstanding according to plaintiff's ledger sheet entries.

On appeal to the Court of Appeals, defendant argued that since plaintiff neither alleged nor proved the existence of an express contract between the parties, plaintiff's recovery could only be had under a theory of *quantum meruit*, based upon an implied promise by defendant to pay plaintiff the reasonable value of the services rendered. According to defendant, plaintiff's failure at trial to prove the reasonable worth or market value of the work performed for defendant was a fatal deficiency; defendant's motion for involuntary dismissal should, therefore, have been granted. The Court of Appeals agreed that plaintiff's action sounded in *quantum meruit* and that plaintiff had not met its burden of proving the reasonable value of its services. That court further concluded: Plaintiff's evidence indicated that further work had been performed for defendant after defendant's payment of $1,000. Plaintiff's evidence was, therefore, sufficient to show an implied contract and its breach, for which plaintiff was entitled at the least to nominal damages. Thus, the Court of Appeals reasoned, the trial judge properly denied defendant's Rule 41(b) motion to dismiss and plaintiff should be granted a new trial.

Defendant strenuously contends to this Court that the Court of Appeals, having concluded in effect that plaintiff's case at trial was legally insufficient to support a verdict for more than nominal damages, erred in awarding plaintiff a new trial. We agree with defendant that if the Court of Appeals had in fact determined plaintiff to be entitled to no more than nominal damages, then the proper course would have been a remand for entry of judgment for nominal damages. By according plaintiff a new trial, however, the Court of Appeals obviously intended to give plaintiff a second chance to prove the merits of his claim. Under the circumstances of this case, we hold this action by the Court of Appeals to be entirely appropriate and well within the scope of its authority.

Assuming *arguendo* that plaintiff's case at trial was restricted to an action founded upon implied contract,[1] and that plaintiff's evidence was not competent to furnish a sufficient basis for the assessment of the reasonable value of the services rendered defendant by plaintiff,[2] the Court of Appeals nevertheless was correct in refusing to reverse the trial court's denial of defendant's motion for involuntary dismissal. This is so even if the trial judge may have erroneously considered information revealed by plaintiff's ledger sheet entries as competent evidence of the market value of plaintiff's services.

A motion for involuntary dismissal under Rule 41(b) serves in part to test the legal sufficiency of all evidence admitted on behalf of the plaintiff in a non-jury case. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). It does not challenge the competence of that evidence to prove a particular point, nor does it renew an objection to its admission in the first place. In effect, the very act of admitting evidence into the case signifies to the parties that the trial judge considers that evidence to be competent, at least for some relevant purpose. If the defendant is aggrieved by the ad-

1. An examination of the verified ledger sheets attached to plaintiff's complaint and submitted as evidence at trial reveals an itemized statement of account which shows on its face the identity of plaintiff as creditor and defendant as debtor. These ledger sheets were verified by plaintiff's witness David Harrell, who testified to their accuracy and authenticity. It would thus appear that the ledger sheets were competent evidence of a debt owed plaintiff by defendant under the terms of G.S. 8-45. That statute provides *inter alia* that in actions instituted "upon an account for goods sold and delivered, for rents, *for services rendered, or labor performed* . . . a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness." (Emphasis supplied.) *See generally* 1 Stansbury's North Carolina Evidence § 157 (Brandis rev. 1973) and cases cited therein. Moreover, it would appear from the record that the trial judge was cognizant of this statute, or at least of the theory of account as applied to plaintiff's case. In his conclusions of law, Judge Long stated that "the defendant breached the contract for work performed by failing to pay this plaintiff the balance due as set out in plaintiff's *itemized statement of account*." R p 22. (Emphasis supplied.) However, the applicability of G.S. 8-45 to the instant case is not raised by any of the questions presented in the parties' briefs to this Court, and we need not further address it here. App. R. 16(a) and 28(a).

2. The Court of Appeals expressly concluded that the ledger entries were incompetent as evidence of value. Plaintiff did not appeal from the award of a new trial by the Court of Appeals, nor does he argue before this Court that the trial court's judgment should be reinstated on the ground that the ledger sheets alone constituted some evidence of the reasonable value of his services. Thus the correctness of the Court of Appeals' conclusion as to the competence of the ledger sheet evidence is not properly before us on this appeal, and we do not address it here.

mission of the evidence, he may later complain of error in its admission on appeal from an adverse judgment. On the other hand, the plaintiff, the party in whose favor the evidence was admitted, may temporarily assume the correctness of the trial court's opinion that the evidence is competent and may safely rely upon the substantive value of that evidence as part of his case in chief. The evidence so admitted is then entitled to consideration along with all other evidence offered by plaintiff when the trial court is called upon by defendant's Rule 41(b) motion to determine the cumulative sufficiency of plaintiff's evidentiary offerings to make out a prima facie case. The motion goes to sufficiency, not competence. In ruling upon the motion, *all* relevant evidence admitted by the trial court must be accorded its full probative value irrespective of whether it has been erroneously received. *See, e.g., Ballard v. Ballard,* 230 N.C. 629, 55 S.E. 2d 316 (1949) (discussing the test of sufficiency to be applied under a motion for compulsory nonsuit, former G.S. 1-183).

If an appellate court subsequently determines that the evidence in issue is incompetent and was erroneously admitted, there yet applies in non-jury cases a presumption that the judgment appealed from was based solely upon other evidence which was competent and correctly admitted. *Cogdill v. Highway Commission,* 279 N.C. 313, 182 S.E. 2d 373 (1971); *Bizzell v. Bizzell,* 247 N.C. 590, 101 S.E. 2d 668 (1958). Only where the record on appeal affirmatively discloses that the challenged ruling by the trial court was based upon or influenced by erroneously admitted evidence will there be a finding of reversible error. *Hicks v. Hicks,* 271 N.C. 204, 155 S.E. 2d 799 (1967); *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954).

In the instant case, the Court of Appeals found reversible error in the fact that the trial judge's award of damages to plaintiff was obviously based upon plaintiff's ledger sheet entries which, the Court of Appeals concluded, were incompetent to establish the *quantum meruit* of plaintiff's services. 41 N.C. App. at 595, 255 S.E. 2d at 281. The exclusion of the ledger sheet entries—the only indication of the value of plaintiff's services offered at trial—clearly renders plaintiff's proof insufficient as a matter of law to make out a prima facie case based on *quantum meruit* for more than nominal damages.

That fact alone, however, does not automatically entitle defendant to prevail at the appellate level upon his trial motion for involuntary dismissal, or to a remand for entry of nominal damages only. As with any appellate reversal of a trial court's determination that plaintiff's evidence is legally sufficient, nothing in the Rules of Civil Procedure *precludes* the Appellate Division from determining in a proper case that plaintiff appellee is nevertheless entitled to a new trial. *See, e.g.*, G.S. 1A-1, Rule 50(d); *Neely v. Eby Construction Co.*, 386 U.S. 317, 322-329 (1967) (interpreting the federal counterpart to Rule 50(d)); *Lindsey v. The Clinic for Women*, 40 N.C. App. 456, 463, 253 S.E. 2d 304, 308 (1979). And it is well established that the granting of a new trial is the usual and appropriate appellate remedy in cases such as this one, where incompetent evidence has been erroneously considered by the trial judge in his ruling on the sufficiency of plaintiff's evidence. *Midgett v. Nelson*, 212 N.C. 41, 192 S.E. 854 (1937); *Morgan v. Benefit Society*, 167 N.C. 262, 83 S.E. 479 (1914); *Pruden v. Keemer*, 1 N.C. App. 417, 161 S.E. 2d 783 (1968); *see generally* 1 Strong's N.C. Index 3d *Appeal and Error* § 59.2 and cases cited therein. The rationale behind giving plaintiff a second chance in such cases is obvious: Had it not been for the erroneous admission of the incompetent evidence in the first place, plaintiff might well have introduced other, *competent* evidence of the same import which would have properly withstood defendant's motion for involuntary dismissal or directed verdict. In effect, plaintiff's failure to produce evidence sufficient to establish a prima facie case may have stemmed not from the fact that the evidence was unavailable but rather from plaintiff's reasonable reliance upon the trial court's admission of evidence which the Court of Appeals determined should have been excluded.

So it is in the case before us. There is not the slightest suggestion in the record that plaintiff's failure to introduce competent evidence of the value of the services rendered to defendant was an omission incapable of prompt curative action. Had Judge Long ruled the ledger sheet entries incompetent as evidence of value, plaintiff would have been put on notice of the defect in his case. In all likelihood, he could have then readily produced competent opinion evidence, including his own, as to the reasonable value of his services. He should not now be denied that opportunity simply because he rested the sufficiency of his case upon

assurances by the trial judge that his evidence was competent. Accordingly, the decision of the Court of Appeals granting plaintiff a new trial is

Affirmed.

RONNIE GENE CHESNUTT, PETITIONER v. ELBERT L. PETERS, JR., COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 79

(Filed 3 June 1980)

Automobiles § 2.2— driver's license—epileptic—blackout while driving—insufficient evidence of uncontrolled seizures

The entire record, considered as a whole, does not support the conclusion of the Medical Review Board that petitioner, who suffers from epilepsy, is afflicted with an uncontrolled seizure disorder which prevents him from exercising reasonable and ordinary control over a motor vehicle while operating it upon the highways where the only evidence of record which supports the Board's findings tends to show that once or twice a year petitioner has an epileptic seizure and that with one exception when petitioner blacked out while driving and ran off the road, all the seizures have occurred in his sleep, and all the other evidence tends to show that his seizures are controlled and that he has exercised reasonable and ordinary control over his vehicle while operating it upon the highways. Therefore, the Division of Motor Vehicles was without authority to deny or withhold petitioner's license to operate a motor vehicle upon the highways of the State.

RESPONDENT appeals from decision of the Court of Appeals, 44 N.C. App. 484, 261 S.E. 2d 223 (1980), affirming judgment of *Braswell, J.*, entered 10 January 1979 in WAKE Superior Court.

Petitioner is a single, twenty-five-year-old male who has suffered epileptic seizures since age seventeen. Prior to May 1978 all seizures occurred at night during sleep. In 1976 he went to Duke University Medical Center for examination and treatment. Prior to that time he had been taking Dilantin and phenobarbital. The Duke physicians increased the dosages of the drugs he had been taking and also prescribed Mysoline. Petitioner has taken the prescribed medications since the Duke examination. Following the work-up at Duke, he had suffered only one or two seizures in his

sleep until 7 May 1978 when he blacked out while driving on U.S. 421 and ran off the road. No one was injured, and the damage to his vehicle was minimal.

The patrolman who investigated the accident recommended that petitioner be given a re-examination to determine whether his license to drive should continue.

Petitioner was re-examined by Dr. Neil A. Worden, and in August 1978 respondent cancelled petitioner's driver's license. *See* G.S. 20-9(e). Upon petitioner's request for administrative review, the North Carolina Driver License Medical Review Board conducted a hearing on 26 September 1978 and thereafter entered an order setting out Dr. Worden's findings and concluding that petitioner was afflicted with an uncontrolled seizure disorder that prevented him from exercising reasonable and ordinary control over a motor vehicle while operating it upon the highways. The Board thereupon sustained respondent's order cancelling petitioner's driving privileges. The Board further ordered that petitioner not be licensed to drive "until it has been demonstrated that his seizures are likely to remain controlled, by his having remained totally free of seizures, convulsions and blackout spells" for at least twelve months.

Petitioner sought judicial review pursuant to G.S. 150A-45 and Judge Braswell, finding that the evidence did not support the conclusion of the Medical Review Board that petitioner's condition was not controlled, reversed the Board's decision and restored petitioner's driving privilege. Respondent appealed to the Court of Appeals. That court affirmed with Judge Webb dissenting. Respondent appealed to this Court as of right pursuant to G.S. 7A-30(2).

A. Maxwell Ruppe, attorney for petitioner appellee.

Rufus L. Edmisten, Attorney General, by William W. Melvin, Deputy Attorney General, and Jane P. Gray, Associate Attorney, for respondent appellant.

HUSKINS, Justice.

Does the entire record, considered as a whole, support the conclusion of the Medical Review Board that petitioner is afflicted with an uncontrolled seizure disorder that prevents him from ex-

ercising reasonable and ordinary control over a motor vehicle? If so, the Court of Appeals erred. If not, its decision must be upheld.

G.S. 20-9(e) authorizes the Division of Motor Vehicles to deny an operator's or chauffeur's license "to any person when in the opinion of the Division such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways. . . ."

"Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant. . . ." G.S. 20-9(g)(4). The composition and quorum requirements of the reviewing board are specified in G.S. 20-9(g)(4). The actions of the reviewing board are subject to judicial review in the Superior Court of Wake County. G.S. 20-9(g)(4)f; G.S. 150A-43, 45.

The evidence before the Medical Review Board consisted of the testimony of petitioner Ronnie Gene Chesnutt, the testimony of his mother Mrs. Mary Chesnutt, and a letter from Dr. Neil A. Worden.

Petitioner testified that he is twenty-five years of age, lives at home with his mother, works regularly as a carpenter at a place twenty miles from home and drives to his work five days a week. He neither smokes nor drinks alcoholic beverages. He drives around 1100 miles a month, has been driving for eight years and has never been involved in an automobile accident. He has never had a seizure or a blackout while at work or while driving until the episode on 7 May 1978 when he blacked out while driving on U.S. 421 and ran off the road. Petitioner further stated that he had suffered one or two seizures in his sleep since 1976; that he takes his medication regularly. Petitioner said he was on medication before he went to Duke for a work-up in 1976; that he was taking Dilantin and phenobarbital prior to that examination and the doctors added Mysoline and changed his dosage of the other medicines.

Petitioner's mother testified that her son had suffered seizures since age seventeen; that he had suffered two seizures to her knowledge since his work-up at Duke in 1976.

Dr. Worden's letter states that Ronnie Chesnutt had a history of seizures since age seventeen. His medications include "Dilantin Grs. 1½ twice a day, phenobarbital Grs. ½ three times a day and Mysoline 200 mgm. three times a day. On this regimen he has been very well controlled until May of 1978 at which time, the patient apparently had a seizure and ran off the side of the road. . . . The patient does not have a history of alcoholism or drug abuse. . . . In addition, he has had no further seizures since the one in May 1978 and he had been seizure free for a long period of time prior to this. . . . [H]is physical examination is completely within normal limits. He shows no evidence of mental deterioration or incoordination and he appears perfectly normal in every way. He has an excellent work record and has been gainfully employed for many years. To the best of my knowledge, he takes his medications faithfully. . . . The ability to lead a busy, creative life is a necessity for most people and goes a long way towards aiding in control of seizures in those people who are so afflicted. . . . It is the opinion of neurologists at the present time that very few fields should be closed to the patient because of his seizures. . . . [I]f he has any further premonitions of seizures his medications could be so altered to adequately control the condition."

The scope of judicial review is governed by G.S. 150A-51 which provides in pertinent part that the court "may reverse or modify the decision if the substantial rights of the [petitioner] may have been prejudiced because the agency findings, inferences, conclusions, or decisions are: * * * * (5) Unsupported by substantial evidence . . . in view of the entire record as submitted. . . ." The legal test, therefore, applicable here is "the entire record as submitted." This means that when the action of an administrative agency, as here, is subjected to judicial review, the judge must apply "the entire record" test as distinguished from a review *de novo* or a review based upon the "any competent evidence" standard. "The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo* . . . . On the other hand, the 'whole record' rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in

the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977).

Application of the foregoing principles impels the conclusion that the entire record does not support the findings of the Medical Review Board. There is no substantial evidence that petitioner has any mental or physical disability except epilepsy; and there is no substantial evidence to support the finding that petitioner's epilepsy prevents him from exercising reasonable and ordinary control in the operation of a motor vehicle on the highways. The only evidence of record which supports the Board's findings tends to show that once or twice a year petitioner has an epileptic seizure and that, with one exception, all the seizures have occurred in his sleep. Otherwise, all the evidence tends to show that his seizures are controlled and that he has exercised reasonable and ordinary control over the vehicle while operating it upon the highways. Thus, upon the entire record as submitted, the findings of the Medical Review Board are not supported by substantial evidence, and the Commissioner of the Division of Motor Vehicles was without authority to deny or withhold petitioner's license to operate a motor vehicle upon the highways of the State.

For the reasons stated the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. WALTER LEE JONES

No. 5

(Filed 3 June 1980)

1. Criminal Law § 113.4— jury charge—failure to define intent

The trial court in a prosecution for common law arson did not err in failing to define the word "intent."

2. Criminal Law § 113.2— involuntary intoxication—instruction not required

The trial court in a common law arson case did not err in failing to submit an issue of involuntary intoxication to the jury where there was no evidence that defendant's intoxication, if any, was other than voluntary.

Justice BROCK took no part in the consideration or decision of this case.

APPEAL by defendant from *Rouse, J.*, 5 February 1979 Criminal Session of WILSON Superior Court.

Defendant was charged in an indictment proper in form with the crime of common law arson. Defendant entered a plea of not guilty. This is the second time this case has been before us. In 296 N.C. 75, 248 S.E. 2d 858 (1978), we found error in the failure of the prosecutor to furnish certain laboratory results to defendant and granted defendant a new trial.

At trial, evidence for the State tended to show that on 3 March 1978 defendant was residing at an apartment with Wallace Eatmon. Mr. Eatmon had lived at the apartment for about two years. The lease was in his name, and he had paid the rent during the time he had lived there. On the evening of 3 March 1978, defendant and Eatmon went to a tavern where defendant consumed two or three beers. Upon their return home, the two began to argue concerning a debt which defendant owed Eatmon. During the course of the argument, defendant picked up a bottle of kerosene and poured the contents on the floor of the apartment. He then threw lighted matches onto the floor, igniting the kerosene. After trying unsuccessfully to extinguish the flames, Eatmon left to call the fire department. Upon his return home, he found that the apartment and its contents were almost totally consumed.

Defendant did not testify but offered evidence that the reputation of prosecuting witness Eatmon for truth and veracity was not good.

The jury returned a verdict of guilty, and defendant was sentenced to life imprisonment. He appealed pursuant to G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

E. J. Kromis, Jr., for defendant.

BRANCH, Chief Justice.

Defendant in his brief expressly abandons all of his assignments of error. Under Rule 10 of the North Carolina Rules of Appellate Procedure, review is foreclosed except insofar as exceptions are made the bases of assignments of error and those assignments are brought foward. Nevertheless, due to the gravity of the sentence imposed, we elected, pursuant to our inherent authority and Rule 2, to consider defendant's arguments as presented in his brief. *See State v. Adams*, 298 N.C. 802, 260 S.E. 2d 431 (1979).

[1] Defendant's brief is addressed solely to the failure of the judge to charge on all substantial features of the case. Defendant first contends that the jurors were confused over the meaning of the word "intent" and that the judge erred in failing to explain its meaning.

It is well settled that it is not error for the court to fail to define and explain words of common usage in the absence of a request for special instructions. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970); *State v. Jones*, 227 N.C. 402, 42 S.E. 2d 465 (1947). The word "intent" is self-explanatory, and we see "no point in elaborating the obvious." *State v. Plemmons*, 230 N.C. 56, 58, 52 S.E. 2d 10, 11 (1949). We find no error in the court's failure to define the word "intent."

[2] Defendant next argues that the judge erred in failing to submit the issue of intoxication to the jury. He maintains that the jury should have been permitted to determine whether he was intoxicated at the time of the commission of the offense and, if so, whether that intoxication was sufficient to negate criminal intent.

The crime of common law arson does not require a showing of specific intent. *State v. McLaughlin*, 286 N.C. 597, 213 S.E. 2d 238 (1975), *death sentence vacated*, 428 U.S. 903 (1976); *State v. Thomas*, 241 N.C. 337, 85 S.E. 2d 300 (1955). "Except where a crime requires a showing of specific intent, voluntary intoxication is not a defense to a criminal charge. *State v. Bunn*, 283 N.C. 444, 196 S.E. 2d 777 (1973); *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968)." *State v. McLaughlin, supra* at 606, 213 S.E. 2d at 244.

Even so, defendant contends the jury should have been permitted to decide whether he was *involuntarily* intoxicated so as

to negate even the general intent necessary to commit the crime of arson.

It is true that the court is required to instruct on all substantial features of a case, G.S. 15A-1232; and it is equally settled that defenses raised by the evidence constitute substantial features requiring an instruction. *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974). However, it is error for the court to instruct on a set of hypothetical facts not presented by the evidence. *State v. Ferdinando,* 298 N.C. 737, 260 S.E. 2d 423 (1979). In the instant case, there is no evidence that defendant's intoxication, if any, was other than voluntary. Mr. Eatmon testified that he and defendant went to a tavern early in the evening and that defendant consumed two or three beers. "[I]t is only when alcohol has been introduced into a person's system without his knowledge or by force majeure that his intoxication will be regarded as involuntary." *State v. Bunn, supra* at 457, 196 S.E. 2d at 786. There was no evidence to support a charge on involuntary intoxication, and we hold that the trial judge committed no error in failing to instruct on that defense.

Defendant received a fair trial free from prejudicial error.

No error.

Justice BROCK took no part in the consideration or decision of this case.

DOROTHY HYLER SHIELDS v. BOBBY MURRAY CHEVROLET, INC.

No. 106

(Filed 3 June 1980)

Appeal and Error § 64— evenly divided Court—decision affirmed—no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent.

Justice BROCK took no part in the consideration or decision of this case.

PLAINTIFF appeals from a judgment of the Court of Appeals, one judge dissenting, affirming summary judgment for defendant entered as amended by *Barnette, Judge*, at the 3 October 1978 session of District Court, WAKE County. The Court of Appeals' decision is printed at 44 N.C. App. 427, 261 S.E. 2d 238 (1980).

Plaintiff purchased a 1973 Ford Torino station wagon from defendant on 3 July 1975 for $2,995.00, making a cash down payment of $1,500.00. The balance of the price plus finance charges, insurance premiums and fees was financed by the defendant. Plaintiff was to repay defendant in 24 monthly installments of $87.76 each for a total of $2,106.24. As collateral for this purchase money loan, defendant took a purchase money security interest in plaintiff's car.

A year previous to the sale of this car to plaintiff, defendant had contracted with First Citizens Bank and Trust Company (First Citizens), agreeing for valuable consideration to assign to First Citizens any purchase money security interest it had in any car it sold. This contract, referred to as "Retail Protection Agreement" or the repurchase agreement, also provided that if any car buyer defaulted on his car loan and First Citizens repossessed, First Citizens could return the car to defendant and receive from defendant the amount of money owing on the car at the time of repossession.

Specifically, the repurchase agreement provided:

> [Bobby Murray Chevrolet] shall purchase form [sic] [First Citizens] each repossessed or recovered car tendered at [its] place of business or if [it is] out of business or in default to [First Citizens] cars may be tendered by registered mail notice sent to [its] last known address. The purchase price, payable on demand and in any event within 30 days after tender, shall be as follows: the unpaid balance due on the car (a) if tendered within 90 days after maturity of the earliest installment still unpaid, or (b) if tender is delayed by a redemption period, litigation, or any existing or future law or executive proclamation then within 30 days after such delay has terminated.

Pursuant to the terms of the repurchase agreement, defendant assigned its purchase money security interest in plaintiff's car

to First Citizens at the moment the car was sold. Thereafter plaintiff made several payments to First Citizens totaling some $787.84. However, plaintiff subsequently defaulted and First Citizens repossessed her car 6 July 1976.

First Citizens attempted to sell plaintiff's car by means of a public sale and mailed plaintiff notice of the sale which was scheduled for 19 July 1976 at the Wake County Courthouse. No bidders appeared at the sale.

Thereafter, on 26 July 1976 pursuant to the terms of the repurchase agreement, First Citizens transferred the car back to defendant and received from defendant the balance owing on plaintiff's contract.

Defendant put the car on its premises for resale and ultimately sold it to P & S Auto Service for $1,550.00. It never gave plaintiff notice of this private sale nor did it return to her some $276.45 plaintiff alleges it made above and beyond the amount it paid First Citizens for the return of the car.

Plaintiff instituted this action 8 July 1977, on behalf of herself and all others similarly situated pursuant to Rule 23, North Carolina Rules of Civil Procedure. She asserted (1) that defendant had violated G.S. 25-9-504(2), G.S. 25-9-504(5) and the terms of the contract of sale in failing to account for and return to her any surplus it had made on resale of the car to P & S Auto Service, (2) that defendant had violated G.S. 25-9-504(3), G.S. 25-9-504(5) and the contract of sale in failing to notify plaintiff of the private sale of the car to P & S Auto Service and (3) that defendant had violated G.S. 75-1.1, the unfair or deceptive commercial practice statute, in keeping any surplus monies on resale, and failing to notify her of resale.

On 4 August 1977, defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted. This motion was denied on 10 May 1978.

Defendant then answered the complaint 6 June 1978 denying its material allegations and further asserting the defense that it had been high bidder at the public sale held by First Citizens on 19 July 1976 at the Wake County Courthouse.

Defendant filed motion of summary judgment on 18 August 1978 and attached the affidavit of William E. Smith, Assistant Vice-President of First Citizens Bank and Trust Company. Smith stated that because of the repurchase agreement, First Citizens treated the defendant as having placed a bid in the amount due upon the contract at the public sale held on 19 July 1976. It was the defendant's position that it was therefore a purchaser at the public sale of the repossessed car and thus had no further duty to notify plaintiff or to return any surplus to her when it resold the car to P & S.

A hearing on the summary judgment motion was held 8 September 1978. As to the auction held 19 July 1976, the judge presiding found as a fact:

> On July 19, 1978, [sic] the sale advertised was held by the Bank and no third persons bid; at such sales the Bank, because of the Retail Protection Agreement, [repurchase agreement] treats the dealer as having placed a bid in the amount due upon the contract; the fact that the Bank transferred title to the automobile to Defendant through the N.C. Department of Motor Vehicles, rather than merely reassigning the Purchase Money Security Agreement to Defendant bears out the fact *the Bank treated Defendant as having placed a bid in the amount of the balance due. Defendant paid the Bank the balance due of $1,255.39 and the Bank transferred title to Defendant as a purchase[r] at the sale.* (Emphasis added.)

He concluded that there was no genuine issue as to any material fact and therefore the plaintiff was not entitled to recover from the defendant.

Plaintiff appealed to the Court of Appeals. Before that court, plaintiff relied primarily upon the words of G.S. 25-9-504(5) to negate the trial court's finding that the transfer of the car from First Citizens to defendant was a proper public sale. G.S. 25-9-504(5) provides:

> (5) A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights

and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

The Court of Appeals, one judge dissenting, held that G.S. 25-9-504(5) was inapplicable to the facts of this case. It held that First Citizens had not executed a "transfer of collateral" to defendant but instead First Citizens had executed a change of title. There had been, therefore, no transfer of a security interest and, in fact, this change of title discharged any security interest anyone had in the car. Thus the Court of Appeals in essence held that the defendant had purchased the car at public sale and had no continuing obligation to account to plaintiff for surplus funds on resale, or to notify her of resale.

Plaintiff appealed to this Court as a matter of right.

Wake-Johnston-Harnett Legal Services, Inc. by Leonard G. Green for plaintiff appellant.

Gulley, Barrow & Boxley by Jack P. Gulley for defendant appellee.

PER CURIAM.

Because of illness, Justice Brock did not participate in this case. The remaining six justices are equally divided as to whether the defendant's evidence when considered in the light most favorable to the plaintiff shows as a matter of law that there has been no violation of G.S. 25-9-504 or G.S. 75-1.1. Accordingly, the opinion of the Court of Appeals is affirmed without precedential value. *See, e.g., State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974) and cases cited therein.

Affirmed.

Justice BROCK took no part in the consideration or decision of this case.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BROOKS, COMR. OF LABOR v. BEST

No. 131 PC.

Case below: 45 N.C. App. 540.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

BROWNING v. LEVIEN & CO.

No. 83 PC.

Case below: 44 N.C. App. 701.

Petitions by plaintiffs and defendants for discretionary review under G.S. 7A-31 denied 3 June 1980.

CASEY v. WAKE COUNTY

No. 150 PC.

Case below: 45 N.C. App. 522.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

CHEATHAM v. DILLAHUNT

No. 136 PC.

Case below: 45 N.C. App. 713.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

CHRIS v. HILL

No. 119 PC.

Case below: 45 N.C. App. 287.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 June 1980. Appeal dismissed 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

CODY v. DEPT. OF TRANSPORTATION

No. 142 PC.

Case below: 45 N.C. App. 471.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

COLVIN v. SHERMAN

No. 10.

Case below: 46 N.C. App. 348.

Motion of defendants to dismiss plaintiff's appeal allowed 3 June 1980 without prejudice to plaintiff to petition Court of Appeals for writ of certiorari.

DICKENS v. PURYEAR

No. 169 PC.

No. 42 (Fall Term).

Case below: 45 N.C. App. 696.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 June 1980.

FOWLER-BARHAM FORD v. INSURANCE CO. and
FOWLER v. INSURANCE CO.

No. 159 PC.

Case below: 45 N.C. App. 625.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 3 June 1980.

GAMBLE v. BORDEN, INC.

No. 140 PC.

Case below: 45 N.C. App. 506.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

GLOBE, INC. v. SPELLMAN

No. 166 PC.

Case below: 45 N.C. App. 618.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

HAMMON v. HAMMON

No. 174 PC.

Case below: 46 N.C. App. 348.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

IN RE JOHNSON

No. 167 PC.

Case below: 45 N.C. App. 649.

Petition by respondent for discretionary review under G.S. 7A-31 denied 10 June 1980. Appeal dismissed 10 June 1980.

IN RE LAWS

No. 117 PC.

Case below: 45 N.C. App. 554.

Petition by Employment Security Comm. for discretionary review under G.S. 7A-31 denied 3 June 1980.

IN RE SMITH

No. 122 PC.

No. 38 (Fall Term).

Case below: 45 N.C. App. 123.

Petition by respondent for discretionary review under G.S. 7A-31 allowed 3 June 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

IN RE TAXABLE STATUS OF PROPERTY

No. 156 PC.

Case below: 45 N.C. App. 632.

Petition by Board of Commissioners for discretionary review under G.S. 7A-31 denied 3 June 1980.

KAHAN v. LONGIOTTI

No. 149 PC.

Case below: 45 N.C. App. 367.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

KING v. FORSYTH COUNTY

No. 130 PC.

Case below: 45 N.C. App. 467.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 June 1980.

LEASING CORP. v. MILLER

No. 139 PC.

Case below: 45 N.C. App. 400.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 June 1980.

LYNCH v. LYNCH

No. 141.

Case below: 45 N.C. App. 391.

Appeal by defendant based on substantial constitutional question allowed 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

MALONEY v. HOSPITAL SYSTEMS

No. 125 PC.

Case below: 45 N.C. App. 172.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

MURPHY MFG. CO. v. DEPOSIT CO.

No. 116 PC.

Case below: 45 N.C. App. 321.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

PIERCE v. PIVER

No. 88 PC.

No. 19 (Fall Term).

Case below: 45 N.C. App. 111.

Motion of defendant to dismiss appeal (see 300 N.C. 198) on ground case settled allowed 23 June 1980.

QUESTOR CORP. v. DuBOSE

No. 236 PC.

Case below: 46 N.C. App. 612.

Petition by plaintiff Mathis for discretionary review under G.S. 7A-31 denied 3 June 1980.

REALTORS, INC. v. KINARD

No. 148 PC.

Case below: 45 N.C. App. 545.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ROBERTSON v. SMITH

No. 153 PC.

Case below: 45 N.C. App. 535.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

ROBESON FURNITURE v. McKAY

No. 179 PC.

Case below: 46 N.C. App. 122.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

STATE v. BARKER

No. 118 PC.

Case below: 45 N.C. App. 554.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

STATE v. BERGER

No. 214 PC.

Case below: 46 N.C. App. 348.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 June 1980.

STATE v. BONDS

No. 78 PC.

Case below: 45 N.C. App. 62.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 June 1980. Appeal dismissed 10 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. CARTER

No. 221 PC.

Case below: 46 N.C. App. 606.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 June 1980.

STATE v. CHAVIS and STATE v. BULLARD and STATE v. BARTON and STATE v. OXENDINE

No. 154 PC.

Case below: 45 N.C. App. 438.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 June 1980.

STATE v. DIAL

No. 176 PC.

Case below: 46 N.C. App. 122.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

STATE v. HILL

No. 97 PC.

Case below: 45 N.C. App. 136.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980. Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 June 1980.

STATE v. McCOY

No. 165 PC.

Case below: 45 N.C. App. 686.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980. Motion of Attorney General to dismiss appeal for lack of significant public interest allowed 3 June 1980.

STATE v. McDUFFIE

No. 185 PC.

Case below: 34 N.C. App. 750.

Petition by defendant for further review denied 3 June 1980.

STATE v. McNAIR

No. 140.

Case below: 45 N.C. App. 555.

Motion of Attorney General to dismiss defendant's appeal allowed 3 June 1980.

STATE v. PITTARD

No. 172 PC.

Case below: 45 N.C. App. 701.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 June 1980.

STATE v. ROUSSEAU

No. 183 PC.

Case below: 45 N.C. App. 321.

Petition by defendant for further review denied 3 June 1980.

STATE v. SUMMITT

No. 152 PC.

No. 41 (Fall Term).

Case below: 45 N.C. App. 481.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 3 June 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

TARKINGTON v. TARKINGTON

No. 147 PC.

No. 40 (Fall Term).

Case below: 45 N.C. App. 476.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 June 1980.

TAYLOR v. DELIVERY SERVICE

No. 157 PC.

Case below: 45 N.C. App. 682.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 June 1980.

THOMAS v. DELOATCH and LONG v. DELOATCH

No. 141 PC.

Case below: 45 N.C. App. 322.

Petition by defendant and third party plaintiff for discretionary review under G.S. 7A-31 denied 3 June 1980.

THOMAS v. POOLE

No. 98 PC.

Case below: 45 N.C. App. 260.

Petition by defendant for reconsideration of the case denied 3 June 1980.

TRUST CO. v. SMITH

No. 155 PC.

Case below: 44 N.C. App. 685.

Petition by defendants Smith for discretionary review under G.S. 7A-31 denied 3 June 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WING v. TRUST CO.

No. 31 PC.

No. 37 (Fall Term).

Case below: 44 N.C. App. 402.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 3 June 1980.

PETITIONS TO REHEAR

BELL v. MARTIN

No. 62.

Reported: 299 N.C. 715.

Petition by plaintiff to rehear denied 3 June 1980.

MANSFIELD v. ANDERSON and RAILWAY CO. v. ANDERSON

No. 13.

Reported: 299 N.C. 662.

Petition by Railway Co. to rehear denied 3 June 1980.

MacDONALD v. UNIVERSITY OF NORTH CAROLINA

No. 36.

Reported: 299 N.C. 457.

Petition by plaintiff to rehear denied 3 June 1980.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, NORTH CAROLINA REINSURANCE FACILITY, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND THE SHELBY MUTUAL INSURANCE COMPANY

IN THE MATTER OF A FILING DATED NOVEMBER 29, 1977, AS AMENDED, BY THE NORTH CAROLINA RATE BUREAU FOR REVISED PRIVATE PASSENGER MOTOR VEHICLE INSURANCE RATES, DOCKET NO. 260

No. 85

(Filed 15 July 1980)

1. **Administrative Law § 8— N.C. Administrative Procedure Act—adequate procedure for judicial review**

Pursuant to G.S. 150A-43, which provides that a person aggrieved by a final agency decision is entitled to judicial review under the N.C. Administrative Procedure Act unless adequate procedure for judicial review is provided by some other statute, "adequate procedure for judicial review" exists only if the scope of review is equal to that under Article 4 of G.S. Chapter 150A.

2. **Insurance § 79.1— automobile insurance ratemaking case—judicial review—applicable statutes**

G.S. 150A-51 is the controlling judicial review statute in insurance ratemaking cases; however, to the extent that G.S. 58-9.6(b) adds to the judicial review function and in light of the virtually identical thrust of the two statutes, the Court applies the review standards of both G.S. 58-9.6 and G.S. 150A-51 to this automobile rate case where those standards may be construed as being consistent with each other.

3. **Insurance § 79.2— automobile insurance rate filing—requirement that data be audited within powers of Commissioner**

An order of the Commissioner of Insurance that data submitted in a ratemaking case be audited was not in excess of his statutory powers as contemplated by G.S. 58-9.6(b)(2) or G.S. 150A-51(2).

4. **Administrative Law § 8; Insurance § 79.1— automobile insurance ratemaking—judicial review—whole record test**

The "whole record" test is applicable to judicial review of administrative decisions in N.C., and both G.S. 58-9.6(b)(5) and G.S. 150A-51(5) put forth that test as a proper standard of judicial review of these insurance ratemaking proceedings.

5. Insurance § 79.2— credibility of witness—determination by Commissioner proper

It is for the administrative body in an adjudicatory proceeding to determine the weight and sufficiency of the evidence and credibility of the witnesses, and it may accept or reject in whole or in part the testimony of any witness; therefore, the Commissioner of Insurance could properly rely on the uncontested testimony of an expert witness that "unaudited reports cannot be relied upon" in finding and concluding that unaudited data was unreliable.

6. Administrative Law § 3; Insurance § 79.1— agency action in excess of statutory authority—agency action made upon unlawful procedure—distinction

The prohibition against agency action "in excess of statutory authority," G.S. 58-9.6(b)(2) and G.S. 150A-51(2), refers to the general authority of an administrative agency properly to discharge its statutorily assigned responsibilities, while the prohibition against agency action "made upon unlawful procedure," G.S. 58-9.6(b)(3) and G.S. 150A-51(3), refers to the procedures employed by the agency in discharging its statutorily authorized acts.

7. Administrative Law § 4— rules of administrative agency—categories

Administrative agency rules may be grouped into three categories: (1) procedural rules which describe how the agency will discharge its assigned functions and the requirements others must follow in dealing with the agency; (2) legislative rules which are established by an agency as a result of a delegation of legislative power to the agency; and (3) interpretive rules which interpret and apply the provisions of the statute under which the agency operates.

8. Administrative Law § 4; Insurance § 79.2— automobile insurance ratemaking case—order requiring audited data—applicability of N.C. Administrative Procedure Act

A requirement by the Commissioner of Insurance that audited data be submitted in a ratemaking case was a legislative rule and therefore subject to the rule making provisions of the N.C. Administrative Procedure Act.

9. Administrative Law § 4; Insurance § 79.1— rules established by administrative agency—method of establishing—automobile insurance rate filing—requirement that data be audited

Though administrative agencies can establish rules through the case-by-case process of administrative adjudication, requiring audited data in this ratemaking case was not a proper method of establishing such a requirement, since the lack of unaudited data was not a problem unforeseen by the Commissioner; absence of a relevant general rule did not prohibit this ratemaking; the Commissioner had sufficient experience with the problem; and the problem of auditing was not so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.

10. Insurance § 79.1— automobile insurance rate filing—rule requiring audited data—method of establishing rule improper

The Commissioner's attempt to establish a rule requiring audited data in an insurance ratemaking hearing was "made upon unlawful procedure" as contemplated by G.S. 58-9.6(b)(3) and G.S. 150A-51(3) where the Commissioner

sought to establish the rule on an *ad hoc* adjudication basis rather than following normal N.C. Administrative Procedure Act rulemaking requirements, since the process of rulemaking would have presented no danger that its use would frustrate the effective accomplishment of the agency's functions.

11. Insurance § 79.2— automobile insurance rate filing—audited data ordered—order arbitrary and capricious

The Commissioner's action ordering audited data in a ratemaking case was arbitrary and capricious as contemplated by G.S. 58-9.6(b)(6) and G.S. 150A-51(b), since the order was vague and uncertain in that it did not establish the extent to which examination of "original source documents" was required; it did not make clear whether the auditing must be performed by certified public accountants, other accountants, or actuaries; it did not specify the degree of precision and reliability required of "statistical sampling"; it generally did not provide adequate guidelines for compliance with the general conclusion that data in a ratemaking hearing be audited; it included no determination by the Commissioner as to the possibility of performance of his new rule nor whether implementation of the rule would be economically feasible; it included no determination whether the statutory time limits could be complied with in face of the new rule; and it included no determination whether the "original source date" contemplated by the new rule was even available for the past years involved in this filing or whether such data, if available, was located in N.C. or outside the State in the case of the several hundred companies writing insurance in this State.

12. Appeal and Error § 3— no constitutional question raised in lower court

Appellants' assignment of error to the order of the Insurance Commissioner disapproving a 10% surcharge on Reinsurance Facility policyholders because it was unfairly discriminatory is not decided on constitutional grounds by the Supreme Court, since no constitutional question was raised and passed upon in the court below, and since appellants made no assertion that their rights were prejudiced because any of the Commissioner's findings or conclusions were in violation of any constitutional provisions.

13. Insurance § 79.3— automobile insurance rates—differential for risks ceded to Reinsurance Facility—no unfair discrimination

The conclusion of the Commissioner of Insurance that a 10% increase in automobile insurance rates for insureds ceded to the Reinsurance Facility above the rates for voluntary business would be unfairly discriminatory was not supported by the evidence where the Commissioner found that 62.3% of those in the Facility had no SDIP points nor had they caused claim payments to be made, but the data relied on by the Commissioner covered only a one year period rather than a three year period required by the definition of a "clean risk" under which the parties to the hearing proceeded; the Commissioner's findings and conclusions concerning these statistics indicated that he based his conclusions primarily on what he considered unfair discrimination between a "clean risk" in the Facility and those in the voluntary market; and the Commissioner failed to consider material and substantial evidence that the proposed differential for the rate increase between ceded and voluntary business was actuarially justified in that there were, for example, 1.42 claims

per hundred cars involving bodily injury and 5.70 accidents per hundred cars involving property damage for voluntary risk policyholders in contrast with 2.95 accidents per hundred cars involving bodily injury and 10.21 accidents per hundred cars involving property damage for ceded risk policyholders.

14. Insurance § 79.1— automobile insurance rates—Reinsurance Facility rates higher—propriety

The plain legislative intent is that Reinsurance Facility rates can be higher than those for the voluntary market if a higher Facility rate is actuarially indicated.

15. Insurance § 79.3— automobile insurance rates—Reinsurance Facility insureds charged higher acquisition and service costs—insufficiency of evidence

The Commissioner's findings and conclusion that because acquisition and service costs are charged and accounted for as a percentage of the premium, a Reinsurance Facility rate 10% higher than the proposed rate for insureds voluntarily retained would result in ceded risks paying disproportionately higher acquisition and service costs were unsupported by the evidence.

16. Insurance § 79.3— automobile insurance rates—cap on rate increase—effect of change in Reinsurance Facility individuals—insufficiency of evidence

Conclusion by the Commissioner of Insurance that any increase in the total number of insureds in the Reinsurance Facility would increase the overall rate level by more than 6% in contravention of G.S. 58-124.26, though mathematically correct, was erroneous as a matter of law, since the Legislature intended that any overall rate increase should be limited to 6% given the same book of business as for the experience period, the ratemaking process being premised on the underlying assumption that the book of business throughout the period for which rates are to be made will be the same as that which existed during the experience period.

17. Insurance § 79.2— automobile insurance rates—income on invested capital improperly considered

In finding and concluding that income on invested capital should be considered as a factor in insurance ratemaking, the Commissioner misconstrued the law in this jurisdiction.

18. Insurance § 79.2— automobile insurance rates—underwriting profit margin—capital asset pricing model improperly used

The Commissioner of Insurance erred in ordering that a "capital asset pricing model" be used to calculate underwriting profit margins, since the formula involved consideration of income on invested capital, and such consideration is not presently allowed by N.C. law; furthermore, the Commissioner's requirement for the use of a hypothetical "risk free" rate of return would clearly violate the intent of the Legislature in authorizing insurance companies operating in N.C. to invest in certain securities.

19. Insurance § 79.2— automobile insurance rates—underwriting profit margin—use of capital asset pricing model—Commissioner's order arbitrary and capricious

Order of the Insurance Commissioner requiring that a "capital asset pricing model" be used to calculate underwriting profit margins was arbitrary and capricious as contemplated by G.S. 58-9.6(6) and G.S. 150A-51(6), since the Commissioner based his adoption of the complicated and novel formula for determining underwriting profit solely on the testimony of an insurance department employee in a sister state which had adopted the policy but was still refining it, and on a decision of the Supreme Court of Massachusetts which gave the policy only limited approval.

20. Insurance § 79.1— rate case—burden of proof

Under present insurance laws it is the clear intent of the Legislature that the proponent of a rate increase, the Rate Bureau, is to shoulder the burden of showing the reasonableness of the proposed increase, and there is no burden on the Commissioner of Insurance to disapprove a filing.

21. Insurance § 79.1— rejection of rate increases by Commissioner—specifics required in order

G.S. 58-124.21 requires the Commissioner of Insurance to be mathematically specific in rejecting proposed rate increases, and future orders of the Commissioner should specify "wherein and to what extent" the proposed filings are deemed improper.

22. Insurance § 79.1— automobile insurance rate filing—failure to comply with statutes—specifics required in notice of public hearing

When the Commissioner of Insurance knows prior to the giving of public notice in what respect and to what extent he contends such filing fails to comply with the requirements of the statutes, then he must give the specifics in his notice of public hearing; the Commissioner failed to do this with respect to the reliability of unaudited data in this case, and for that reason his order should be set aside.

Justice BROCK took no part in the consideration or decision of this case.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 41 N.C. App. 310, 255 S.E. 2d 557 (1979), one judge dissenting, affirming in part and reversing in part the order of the North Carolina Commissioner of Insurance dated 27 February 1978 which had ordered that the 29 November 1977 filing by the North Carolina Rate Bureau and the North Carolina Reinsurance Facility be disapproved. The filing involved proposed revised premium rates for bodily injury and property damage liability, medical payments, and physical damage insurance for non-fleet private passenger automobiles.

The issues on this appeal all involve the propriety of the proceedings before the Commissioner and his resulting order of 27 February 1978. This case was docketed and argued as No. 73 at the Fall Term 1979.

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INDEX

CARLTON, Justice.

This opinion deals extensively with certain provisions of the North Carolina Administrative Procedure Act and the powers of State administrative agencies generally, as well as with our general insurance laws.

Historical Background

Numerous opinions of this Court cited in the body of this opinion contain a summary of the history and framework of North Carolina's insurance laws, codified as Chapter 58 of the General Statutes. *See especially In re Filing by Automobile Rate Administrative Office*, 278 N.C. 302, 180 S.E. 2d 155 (1971). We therefore find it necessary to present only a limited summary here.

It has been long established that the insurance business is charged with a public interest, and that its regulation is constitutional. *German Alliance Insurance Co. v. Lewis*, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011 (1914). Likewise, it has been long recognized that regulation of insurance is a function of the states rather than the federal government. Indeed, for many years no effort was made in any court proceedings to apply the Sherman Anti-Trust Act, 15 U.S.C. § 1 *et seq.*, and other acts of Congress to insurance, on the grounds that insurance was not interstate

commerce, and that Congress did not intend its acts to relate to insurance. However, in 1944, the Supreme Court of the United States held that insurance companies which conducted their activities across state lines were within the regulatory power of Congress under the Commerce Clause of the Federal Constitution, and that insurance was subject to the Sherman Anti-Trust Act. *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).

Shortly thereafter, Congress enacted the McCarran-Ferguson Act of March 9, 1945, 59 *Stat.* 33, 15 U.S.C. §§ 1011-1015. The Act, as finally amended, provided, *inter alia*, that the business of insurance should be subject to the laws of the several states, and not to the acts of Congress (unless such acts relate specifically to insurance), except that the Sherman Act, and certain other acts should be applicable to the business of insurance after 30 June 1948 *to the extent such business is not regulated* by state law. 15 U.S.C. § 1012.

The North Carolina Legislature responded by enacting Chapter 381 of the 1945 Session Laws codified as G.S. § 58-248.1. The statute vested broad review powers in the Commissioner of Insurance to insure that insurance rates not be unreasonable, inadequate, unfairly discriminatory nor harmful to the public interest. Under the 1945 statute, the Commissioner could act "upon his own motion or upon petition of any aggrieved party." *Id.* No periodic filings by the industry were required. However, the 1965 Legislature incorporated such a requirement into G.S. 58-248 by providing in pertinent part that

> On or before July 1 of each calendar year the . . . Rate . . . Office shall submit to the Commissioner the data hereinabove referred to for bodily injury and property damage insurance on private passenger vehicles and a rate review based on such data. *Such rate proposals shall be approved or disapproved by the Commissioner.* . . . (Emphasis added.)

Both appellate courts in this State have had numerous occasions throughout the years to review proceedings before and orders by the Commissioner in ratemaking cases. During the years prior to 1977 the typical case on appeal involved the Commissioner's disapproval of a rate filing. In most of those cases, this Court or the Court of Appeals found no legal basis for the Com-

missioner's disapproval and upon remand the Commissioner would find yet another ground for disapproving a proposed rate increase. A stalemate was thus created by the statute's "prior approval" requirement.

Seemingly in response, the 1977 Legislature enacted significant changes in our insurance laws. *See* 1977 N.C. Sess. Laws 1119, Ch. 828 (codified in various sections of Ch. 58, Cum. Supp. 1979). The new legislation effected major changes in three general areas of insurance regulation.

1.

Insurance ratemaking was changed from a "prior approval" system to a "file and use" system. To promulgate new or revised rates, the insurer or rating organization is required only to file the rates and accompanying supportive data with the Commissioner prior to the effective date of the rates. The rates then take effect automatically and remain in effect until revised rates are filed. The Commissioner's prior approval is not required for rates to take effect. *See* G.S. 58-124.20 (essential lines), G.S. 58-131.39 and G.S. 58-131.41 (nonessential lines).

The statutes also outline procedures by which the Commissioner may contest such rates after they are filed. He must hold a hearing. G.S. 58-124.21 (Cum. Supp. 1979) for essential lines of insurance and G.S. 58-131.42 for nonessential lines. If he finds that rates are not in compliance with statutory standards, G.S. 58-124.19 (essential lines) and G.S. 58-131.37 (nonessential lines), he may disapprove the rates and declare them ineffective. G.S. 58-124.21 (essential lines) and G.S. 58-131.42 (nonessential lines). His decision is subject to judicial review, G.S. 58-124.22(a) (essential lines) and G.S. 58-131.54(b) (nonessential lines), but the insurers may continue to use the rates pending such review if the purportedly excessive premiums are placed in an escrow account. G.S. 58-124.22(b) (essential lines) and G.S. 58-131.42(b) (nonessential lines).

In abandoning the prior approval system for the file and use system, North Carolina has joined the general trend of regulatory programs among the states. R. Keeton, *Basic Text on Insurance Law* § 8.4(b) (1971). Some states have even eliminated the filing requirement. *Id.*

2.

For ratemaking purposes, the 1977 legislation divided insurance into two categories called essential and nonessential lines. *Survey of Developments in North Carolina Law—Insurance*, 56 N.C.L. Rev. 1084, 1085 (1978). Previously, the types of insurance subject to rate regulation had been divided into five categories, each regulated in a different manner—fire, casualty, miscellaneous lines, automobile liability and workers' compensation. Rate regulation patterns for the two new categories are established based upon the mandatory or voluntary Rating Bureau membership. The new file and use system applies to both.

A.

Nonessential lines of insurance, including certain fire and property insurance, casualty insurance and inland marine insurance are governed by Chapter 58, Article 13C. This statute establishes a system of voluntary rating bureau membership. It provides that insurance rates should not be "excessive, inadequate or unfairly discriminatory," G.S. 58-131.34(1), and that the most effective way to achieve rates is through "reasonable price competition among insurers." G.S. 58-131.34(3). Detailed provisions and factors to be considered are set out. Rating organizations, available to all insurers operating in the State, are authorized, G.S. 58-131.34(2), but insurers are not required to join a rating bureau and may use their own rates. G.S. 58-131.41. However, while recognizing that cooperation among insurers is desirable, the statute provides that regulation is necessary to prevent restraint of competition. G.S. 58-131.34(4).

B.

Chapter 58, Article 12B governs the essential lines of insurance. These include certain residential fire and property insurance, automobile theft and physical damage insurance, automobile liability insurance and allied lines, and workers' compensation and employers' liability insurance. G.S. 58-124.17(1). The North Carolina Rate Bureau is established and all insurance companies writing any of the essential lines in North Carolina are required to be members. G.S. 58-124.17(1); G.S. 58-124.18. Hence, the major distinguishing factor in rate regulation between essential and nonessential lines is mandatory Bureau membership and man-

datory adherence to rules established by the Bureau. Moreover, no price competition is provided for among the companies in the essential lines, unlike the plan for nonessential lines which allows competition. G.S. 58-131.41.

G.S. 58-124.19 sets out the factors to be considered in establishing rates for essential lines. The basic standard for essential lines is the same as for nonessential lines—rates are not to be "excessive, inadequate or unfairly discriminatory." G.S. 58-124.19(1). Risks may be classified for ratemaking purposes, but the classification plan for automobile insurance may not be based upon the age or sex of the persons insured. G.S. 58-124.19(4). Some of these and other factors to be considered in ratemaking are discussed in the body of this opinion.

3.

The 1977 Legislature also made significant changes in the statutory scheme for dealing with high-risk insureds in motor vehicle insurance. G.S. 58-248.26 to .40. All insurance companies licensed to write motor vehicle insurance in North Carolina are required to participate in the North Carolina Reinsurance Facility, a statutory reinsurance pool for the high-risk driver of motor vehicles. G.S. 58-248.34(e).

The most far-reaching change in the operation of the Facility was the establishment of procedures to make the Facility self-sustaining. Under the new law, losses sustained by the Facility are to be recouped according to a statutory prescription. G.S. 58-248.34(e). A detailed discussion of statutes relating to the Facility is included in Section III. of this opinion.

* * * *

We note that all of our discussion in summary above involves only the 1977 insurance legislation. The 1979 Legislature also made significant changes in our insurance laws. We parenthetically mention some of these in our opinion. However, we issue the caution that, since all four insurance ratemaking decisions handed down today are based on pre-1979 legislation, reference should be made to the later changes for applicable rate filings.

I.

SUMMARY OF FACTS AND HOLDINGS

On 29 November 1977 the North Carolina Rate Bureau, on behalf of its member companies and the North Carolina Reinsurance Facility, filed with the Commissioner of Insurance a proposed revised premium rate schedule for automobile insurance, including bodily injury and property damage liability, medical payments, and physicial damage insurance for non-fleet private passenger automobiles. The filing stated that calculations substantiated the need for a statewide average rate increase of 23.2%, but in accordance with the requirements of G.S. 58-124.26 the filing had been limited to an overall increase of 6%. The filing also proposed that rates for risks ceded to the North Carolina Reinsurance Facility be 10% higher than rates for risks voluntarily retained, and that ± 5% territorial rate differences be established.

The Commissioner gave notice of public hearing, contending that the filing failed to comply with statutory requirements in a number of respects. After the hearing, the Commissioner made extensive findings of fact and conclusions of law and disapproved the filing in its entirety. In his disapproval order, he allowed the Bureau 60 days to submit an amended filing consistent with his findings and conclusions and ordered that the Bureau by its amended filing submit the exact data and information he had requested in the notice of public hearing.

The Rate Bureau appealed to the North Carolina Court of Appeals. That court, speaking through Arnold, Judge, affirmed in part and reversed in part.

We note the various holdings of the Court of Appeals and our response on review:

(1) The Court of Appeals held that the Commissioner may require that company data in this insurance ratemaking hearing be audited. We reverse. We hold that while such a requirement, as a general rule, does not exceed the Commissioner's statutory authority, the Commissioner here failed to comply with lawful procedures and his actions were arbitrary and capricious.

(2) The Court of Appeals held that the proposed 10% rate differential for insureds ceded to the North Carolina Reinsurance

Facility was unfairly discriminatory. We reverse. Applying the whole record test, we hold that there was insubstantial evidence in the record to support the Commissioner's findings and conclusions of unfair discrimination.

(3) The Court of Appeals held that the Commissioner may require the consideration of income on invested capital in an insurance ratemaking case. We reverse. We hold that the Commissioner erred as a matter of law in concluding that the law of this jurisdiction allows consideration of income from invested capital in an insurance ratemaking case.

(4) The Court of Appeals held that the Commissioner's implementation of a "capital asset pricing model" to calculate underwriting profit margins was erroneous. We affirm. We hold that the Commissioner's attempted implementation of a "capital asset pricing model" to calculate underwriting profit margins was erroneous as a matter of law and was arbitrary and capricious.

(5) The Court of Appeals held that the enactment of G.S. 58-124.21 did not transfer the burden of proof in a ratemaking hearing to the Commissioner of Insurance. We affirm. We hold that the burden of proving the need and reasonableness of an insurance rate increase continues to rest with the Rate Bureau.

(6) The Court of Appeals held that the Commissioner did not fail to comply with the statutory requirement that in his order disapproving a filing he indicate "wherein and to what extent such filing is deemed to be improper." G.S. 58-124.21(a). We affirm, albeit for different reasons than those noted by the Court of Appeals.

(7) The Court of Appeals held that the Commissioner complied with the notice requirements of G.S. 58-124.21(a). We reverse. We hold that the Commissioner failed to comply with the notice requirements of this statute because no notice was served upon appellants questioning the reliability of the data submitted.

(8) We hold that the Commissioner erroneously found and concluded that the appellants acted in bad faith.

(9) We leave undisturbed those portions of the Court of Appeals' decision finding (a) that projections of territorial rate differences did not consider the new classification plan and that the

alleged failure to consider the new classification plan resulted in excessive rates was not supported by the evidence, (b) that there was no evidence to support the Commissioner's disapproval of deductible collision rates as being excessive, and (c) that the appeal by the Rate Bureau nullified the Commissioner's order to submit an amended filing. These holdings were not brought before us on this appeal.

(10) While several portions of our decision are supportive of certain positions and apparent general goals of the Commissioner, the magnitude of the multiple legal errors in the proceedings before the Commissioner and in his order compel us to reverse the order, declare it null and void and order the filing approved. Moreover, we order that the escrowed premium funds representing this proposed rate increase be remitted to the member insurers pursuant to G.S. 58-124.21(b).

Other facts important to an understanding of our decision are noted below.

II.
AUDITED DATA

Appellants first contend that the Commissioner erred in finding and concluding that unaudited data in an insurance ratemaking hearing is unreliable and incredible. By this assignment of error, appellants compel our consideration of the several subsections of our judicial review statutes applicable to insurance ratemaking.

A. Standards of Judicial Review

G.S. 150A-43, a part of the North Carolina Administrative Procedure Act (NCAPA), provides in pertinent part that, "[a]ny person who is aggrieved by a final agency decision . . . is entitled to judicial review of such decision under this Article, *unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute.*" (Emphasis added.) The Department of Insurance is an "agency" subject to the provisions of the NCAPA. G.S. 150A-2(1). The question, therefore, is whether "some other statute" provides "adequate procedure for judicial review" such that the NCAPA review statutes become inapplicable.

[1] In determining what is "adequate procedure for judicial review," as those words appeared in our former statute, G.S. 143-307, this Court held that an adequate procedure for judicial review exists "only if the scope of review is equal to that under G.S. Chapter 143, Article 33, 143-306 *et seq.*" *Jarrell v. Board of Adjustment*, 258 N.C. 476, 480, 128 S.E. 2d 879, 883 (1963). Effective 1 February 1976, G.S. 143-307 was replaced by G.S. 150A-43. Law of March 24, 1975, 1975 N.C. Sess. Laws 44, Ch. 69, s. 4; Law of April 12, 1974, 1973 N.C. Sess. Laws 691, Ch. 1331, s. 2. We now hold that "adequate procedure for judicial review," as those words appear in present G.S. 150A-43, exists only if the scope of review is equal to that under present Article 4 of G.S. Chapter 150A.

While it has been held that the scope of review provided by the NCAPA is substantially broader than that provided by other sections of G.S. Chapter 58 such that the NCAPA should control, *Occidental Life Insurance Co. v. Ingram*, 34 N.C. App. 619, 240 S.E. 2d 460 (1977), we find the applicable Chapter 58 provision for judicial review of the ratemaking cases to be practically identical to the NCAPA provisions. *Compare* G.S. 58-9.6(b) with G.S. 150A-51.

[2] There are of course subtle differences. For example, G.S. 150A-51 provides that an agency decision may be reversed or modified if the substantial rights of petitioners "*may* have been prejudiced." (Emphasis added.) The comparable provision in G.S. 58-9.6 provides that such rights "*have* been prejudiced." *Id.* 9.6(b). (Emphasis added.) For this reason, and in the interest of uniformity in judicial review of administrative decisions, *see* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833, 899 (1975) (hereinafter *Daye*), we hold that G.S. 150A-51 is the *controlling* judicial review statute in insurance ratemaking cases. However, to the extent that G.S. 58-9.6(b) adds to the judicial review function as noted below and in light of the virtually identical thrust of the two statutes, we elect to proceed by applying the review standards of both G.S. 58-9.6 and G.S. 150A-51, where those standards may be construed as being consistent with each other. *Both* provide that the court may (1) affirm, or (2) reverse, (3) modify, or (4) remand the case for further proceedings. G.S. 58-9.6 also provides the court may declare the Commissioner's order null and void if the

substantial rights of the appellants "have been"[1] prejudiced because the Commissioner's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commissioner, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

G.S. 58-9.6(b). *See also* G.S. 150A-51.

G.S. 58-9.6(b) also provides that "[s]o far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner."

Here, appellants rely on G.S. 58-9.6(b)(2), (3) and (6) above, contending that the Commissioner has only such powers as are given him by statute and, absent specific statutory authority for the audited data requirement, the Commissioner is without authority to order this particular form of evidence.

1. Excess of Statutory Authority

We first address the question whether the Commissioner's action was "in excess of statutory authority as contemplated by G.S. 58-9.6(b)(2) and G.S. 150A-51(2). Turning to the applicable statutory provisions, G.S. 58-9 sets out the general powers and duties of the Commissioner of Insurance and confers upon him the duty to

> [s]ee that all laws of this State governing insurance companies . . . or bureaus relating to the business of insurance are faithfully executed, and to that end he shall have power and authority to make rules and regulations, not inconsistent

1. G.S. 150A-51 reads "may have been" and does not specifically provide that the court may declare a Commissioner's order null and void.

> with law, to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provisions of this Chapter which will prevent practices injurious to the public by insurance companies. . . .

G.S. 58-9(1).

G.S. 58-124.19 sets out the standards and factors to be considered in ratemaking. It provides that "[r]ates shall not be excessive, inadequate or unfairly discriminatory." At the time of the Commissioner's order, G.S. 58-124.19(2) provided that:

> Due consideration shall be given to past and prospective loss experience, within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers; to past and prospective expenses specially applicable to this State; and to all other relevant factors including judgment factors, deemed relevant, within this State. . . .

Our Legislature has generally addressed the question of data collection and availability in two other statutes. G.S. 58-124.18(d) provides:

> The Commissioner of Insurance is hereby authorized to compel the production of all books, data, papers and records and any other data necessary to compile statistics for the purpose of determining the underwriting experience of lines of insurance referred to in this Article, and this information shall be available and for the use of the Bureau for the capitulation and promulgation of rates on lines of insurance as are subject to the rate-making authority of the Bureau.

G.S. 58-124.20(c) provides that:

> The Bureau shall maintain reasonable records, of the type and kind reasonably adapted to its method of operation, of the experience of its members and of the data, statistics or information collected or used by it in connection with the rates, rating plans, rating systems, underwriting rules, policy or bond forms, surveys or inspections made or used by it.

With this statutory background, we turn to the appellants' contention that the Commissioner exceeded his statutory authority in ordering that data be audited. Appellants contend that none of the statutes require that data be audited and the Commissioner has no power to interpolate that requirement into the statutes. Moreover, appellants assert that G.S. 58-124.20 vests the authority to promulgate insurance rates in the Rate Bureau and G.S. 58-124.21 gives the Commissioner only a limited power of disapproval. The latter statute provides that: "If the Commissioner after hearing finds that the filing *does not comply with the provisions of this Article*, he may issue his order *determining wherein and to what extent* such filing is deemed to be improper. . . ." (Emphasis added.) Because Article 12B nowhere specifically states that data be audited, appellants argue, the Commissioner improperly rejected the filing in finding appellants failed to "comply with the provisions of [the] Article."

Appellants rely on previous statements of this Court that the Commissioner has, in the regulation of insurance rates, only such authority as has been conferred upon him by statute. *State ex rel. Commissioner of Insurance v. North Carolina Fire Insurance Rating Bureau*, 292 N.C. 471, 234 S.E. 2d 720 (1977); *State ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975); *In re North Carolina Fire Insurance Rating Bureau*, 275 N.C. 15, 33, 165 S.E. 2d 207, 220 (1969).

In limited context, appellants correctly cite the established rule in this jurisdiction. In *State ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, *supra*, Justice Huskins, writing for the Court, stated:

> While the Office of Commissioner of Insurance is created by Article III, sec. 7(1) of the North Carolina Constitution, sec. 7(2) of that Article says his duties shall be prescribed *by law.* Hence, the power and authority of the Commissioner emanate from the General Assembly and are limited by legislative prescription. The only power he has to fix rates is such power as the General Assembly has delegated to and vested in him.

287 N.C. at 202, 214 S.E. 2d at 104 (emphasis in original).

The stated rule is in accord with well-established principles of administrative law. The powers and authority of administrative officers and agencies are derived from, defined and limited by constitution, statute, or other legislative enactment. 73 C.J.S., Public Administrative Bodies and Procedure § 49 (1951 and Cum. Supp. 1980) and cases cited therein. Thus, "[i]n fixing by law the premium rate, it is the legislative power of the State which is being exercised." *In re Filing by North Carolina Fire Insurance Rating Bureau, supra* at 32, 165 S.E. 2d at 219. It is beyond question that the Legislature may so delegate this authority to an administrative officer provided it prescribes sufficiently clear standards to control his discretion. *In re Filing by North Carolina Fire Insurance, supra; State ex rel. Utilities Commission v. North Carolina and Southern Bell Telephone and Telegraph Company,* 239 N.C. 333, 80 S.E. 2d 133 (1954).

We note that appellants do not contend that the Legislature improperly delegated its authority to the Commissioner nor that it failed to prescribe sufficiently clear standards to control his discretion. They contend only that the Commissioner exceeded his existing statutory authority.

An issue as to the existence of power or authority in a particular administrative agency is one primarily of statutory construction. *Joseph Burstyn, Inc. v. Wilson,* 303 N.Y. 242, 101 N.E. 2d 665 (1951), *rev'd on other grounds,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).

In construing the laws creating and empowering administrative agencies, as in any area of law, the primary function of a court is to ensure that the purpose of the Legislature in enacting the law, sometimes referred to as legislative intent, is accomplished. *In re Filing by the N.C. Fire Insurance Rating Bureau, supra; In re Dillingham,* 257 N.C. 684, 127 S.E. 2d 584 (1962). The best indicia of that legislative purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham,* 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). In addition, a court may consider "circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied." *State ex rel. N.C. Milk Commission v. National Food Stores, Inc.,* 270 N.C. 323, 332, 154 S.E. 2d 548, 555 (1967).

We should be guided by the rules of construction that statutes *in pari materia*, and all parts thereof, should be construed together and compared with each other. *Redevelopment Commission v. Security National Bank of Greensboro*, 252 N.C. 595, 114 S.E. 2d 688 (1960). Such statutes should be reconciled with each other when possible, and any irreconcilable ambiguity should be resolved so as to effectuate the true legislative intent. *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951).

Applying the foregoing, we first note that neither G.S. 58-124.18(d) nor G.S. 58-124.20(c), the statutes dealing with data collection and availability, mentions a requirement that data be audited. However each section requires that certain data be collected, and the Commissioner is given a certain statutory flexibility in determining what and how that data is to be gathered. G.S. 58-124.18(d) authorizes the Commissioner to require "*any other data necessary* to compile statistics." Former G.S. 58-124.19(2), under which this proceeding took place, set out the factors to be considered in ratemaking, and also referred to "*all other relevant factors* including judgment factors, deemed relevant" in addition to the factors specially named. G.S. 58-9(1) provides that the Commissioner "shall have power and authority to make rules and regulations, not inconsistent with law . . . and *to make such further rules and regulations* not contrary to any provision of this Chapter which will prevent practices injurious to the public by insurance companies."

[3] Viewing these statutes *in pari materia*, we think it without question that our Legislature intended for the Commissioner of Insurance to promulgate such reasonable rules and regulations as he deems necessary to discharge the functions of his office in seeing "that all laws of this State governing insurance companies . . . or bureaus relating to the business of insurance are faithfully executed." Thus the desire of the Commissioner that data submitted in a ratemaking case be audited is not, in our interpretation, in excess of the statutory powers so construed.

Our view is, we think, consistent with the weight of authority in other jurisdictions.

It is generally recognized that investigatory or inquisitorial powers, power to inspect, or to require the disclosure of information by means of accounts, records, reports, or statements are

conferred on practically all administrative agencies. Indeed, such powers constitute functions which distinguish an administrative agency from a court. 1 Am. Jur. 2d, *Administrative Law* § 85. Administrative agencies often have the duty to inquire into the management of regulated businesses and in order to perform their functions efficiently it is essential that the agency have access to many facts, often not voluntarily supplied. *State ex rel. Railroad and Warehouse Commission v. Mees*, 235 Minn. 42, 49 N.W. 2d 386 (1951).

The fact that an asserted power is novel and unprecedented does not mean that it does not exist as a statutory power. *United States v. Morton Salt Company*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1950).

The United States Supreme Court addressed this issue in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 88 S.Ct. 1344, 20 L.Ed. 2d 312 (1968). There, the Federal Power Commission had, contrary to years of custom, set rates for a geographical area of natural gas producers instead of setting rates for individual companies within that geographical area. The Court held that the Federal Power Commission did not abuse or exceed its statutory authority in adopting the system of area price regulation, supplemented by a provision for moratorium upon certain price increases and for exceptions for smaller producers. In interpreting the provisions of the act creating the agency, the Court stated:

> This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; [citations omitted]. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.
>
> Such a construction is consistent with the view of administrative rate making uniformly taken by this Court. The Court has said that the "legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself." [Citations omitted.] It follows that rule-making agencies are not bound to the service of any single regulatory formula; they are permitted, *unless their statutory authority otherwise plainly indicates*, "to make the pragmatic ad-

justments which may be called for by particular circumstances. [Citations omitted.]"

Id. at 776-77, 88 S.Ct. at 1364-65, 20 L.Ed. 2d at 341-42. (Emphasis added.)

Contrary to the reasoning in the Permian Basin cases, *supra*, that unless a statute forbids a practice, a ratemaking body should have authority to make pragmatic adjustments, appellants strenuously argue that had the Legislature intended the Commissioner to have the power to require audited data, it would have expressly given it to him. We think appellants expect too much of our Legislature and too little of our state administrative agencies.

One of the primary problems in the case before us, and in other cases involving the interpretation of an administrative agency's power, results from the established law that legislative power may not be delegated to an administrative agency unless adequate standards are included in the delegating legislation. The Legislature can obviously not anticipate every problem which will arise before an administrative agency in the administration of an act. The legislative process would be completely frustrated if that body were required to appraise beforehand the myriad situations to which it wished a particular policy to be applied and to formulate specific rules for each situation. Clearly, then, we must expect the Legislature to legislate only so far as is reasonable and practical to do and we must leave to executive officers the authority to accomplish the legislative purpose, guided of course by proper standards. *See, e.g., American Power and Light Company v. Securities and Exchange Commission,* 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946). The modern tendency is to be more liberal in permitting grants of discretion to administrative agencies in order to ease the administration of laws as the complexity of economic and governmental conditions increases. The realities of modern legislation dealing with complex economic and social problems have led to judicial approval of broad standards for administrative action. Detailed standards are not required, especially in regulatory enactments under the police power. 1 Am. Jur. 2d, *Administrative Law* § 118 (1951).

North Carolina cases have long been consistent with this "modern tendency." *Pue v. Hood,* 222 N.C. 310, 22 S.E. 2d 896 (1942), reviewed the action of the Commissioner of Banks in denying an application for a bank charter. There the Court stated,

> It cannot be questioned that the Legislature would have the authority to investigate and decide this question before authorizing incorporation of a bank. But surely the Legislature cannot meet in session and determine the existence or nonexistence of this condition precedent which it has prescribed every time an application for a [bank] charter is received by the Secretary of State.
>
> It may, instead, create an administrative investigatory, fact-finding agency to perform this function, administrative and not judicial in nature.

222 N.C. at 314, 22 S.E. 2d at 899.

In *State ex rel. North Carolina Utilities Commission v. Atlantic Coast Line Railroad Company*, 224 N.C. 283, 29 S.E. 2d 912 (1944), this Court considered *inter alia* the question whether the Utilities Commission had authority to require certain utilities give 30 days' written notice of rate increases. This Court held that under general authority to formulate regulations, an administrative agency of the State may prescribe by rule the procedure by which a right granted may be exercised.

In *Burton v. City of Reidsville*, 243 N.C. 405, 90 S.E. 2d 700 (1956), it was said:

> The acts of administrative or executive officers are not to be set at nought by recourse to the courts. Nor are courts charged with the duty or vested with the authority to supervise administrative and executive agencies of our government. However, a court of competent jurisdiction may determine in a proper proceeding whether a public official has acted capriciously or arbitrarily or in bad faith or in disregard of the law. *Pue v. Hood, Comr. of Banks, supra.* And it may compel action in good faith in accord with the law. But when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abused his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice. If the officer acted within the law and in good faith in the exercise of his

> best judgment, the court must decline to interfere even though it is convinced the official chose the wrong course of action. The right to err is one of the rights—and perhaps one of the weaknesses—of our democratic form of government. In any event, we operate under the philosophy of the separation of powers, and the courts were not created or vested with authority to act as supervisory agencies to control and direct the action of executive and administrative agencies or officials. So long as officers act in good faith and in accord with the law, the courts are powerless to act—and rightly so.

Id. at 407-08, 90 S.E. 2d at 702-03.

In interpreting the authority of the former State Highway Commission, this Court in *C. C. T. Equipment Company v. Hertz Corporation*, 256 N.C. 277, 123 S.E. 2d 802 (1962), stated:

> The Legislature has not set out in detail every incidental power belonging to and which may be exercised by the Commission. As a practical matter the Legislature could not foresee all the problems incidental to the effective carrying out of the duties and responsibilities of the Commission. Of necessity it provided for those matters in general terms. Where a course of action is reasonably necessary for the effective prosecution of the Commission's obligation to supervise the construction, repair and maintenance of public highways, the power to take such action must be implied from the general authority given and the duty imposed. *Mosteller v. Southern R. R. Company*, 220 N.C. 275, 280, 17 S.E. 2d 133. "Administrative boards, commissions and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication. . . . In determining whether a board or commission has a certain power, the authority given should be liberally construed in the light of the purposes for which it was created and that which is incidentally necessary to a full exposition of the legislative intent should be upheld as being germane to the law. In the construction of a grant of power, it is a general principle of law that where the end is required the appropriate means are given. . . . However, powers should not be extended by implication beyond what may be necessary for their just and reasonable execution." 42 Am. Jur., Public Administrative Law, 26, pp. 316-318.

Id. at 282-83, 123 S.E. 2d at 806-07.

Appellants also argue that the Commissioner improperly found and concluded that unaudited data was unreliable. They assert there is a lack of sufficient evidence to support this finding and conclusion because only one witness, qualified at the hearing as an expert in accounting and financial reporting, testified that "unaudited reports cannot be relied upon." This evidence was uncontested.

[4] In asserting their position, appellants correctly argue that the "whole record" test is applicable to judicial review of administrative decisions in North Carolina, citing *In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979); *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). Moreover, both G.S. 58-9.6(b)(5) and G.S. 150A-51(5) put forth that test as a proper standard of judicial review of these proceedings. They argue that review of the record as a whole reveals insufficient evidence for the Commissioner's finding that unaudited data is unreliable.

Unlike *Thompson v. Wake County, supra*, and *In re Rogers, supra*, where the Court was concerned with conflicting and contradictory evidence, the expert witness's testimony here with respect to unaudited data was not contradicted. Indeed, the witness was not even cross-examined on this point.

Appellants further argue, however, that the whole record discloses "that the collection of insurance statistical data is an unbelievably complex process which has been painstakingly developed and meticulously documented;" and that the methods by which the statistics are collected and assembled are the same in North Carolina as in 47 other states. Appellants' brief presents a lengthy explanation of how the statistical agents and the Rate Bureau compile and evaluate statistical data.

We are not concerned, however, with either the number of states who do things this way or the complexity of the data collection process. We are concerned with the amount of evidence in the record which supports the Commissioner's order.

What appellants seem to be arguing is that we hold as error the Commissioner's reliance on uncontested evidence presented to him. This we are unwilling to do.

[5] North Carolina is in accord with the well-established rule that it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. 73 C.J.S., *Public Administrative Bodies and Procedure* § 126. *See, e.g., State ex rel. Commissioner of Insurance v. N.C. Automobile Rate Administrative Office, supra; State ex rel. Commissioner of Insurance v. N.C. Fire Insurance Rating Bureau, supra.* The credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or part the testimony of any witness. 73 C.J.S., *supra* at § 126. Hence, applying the whole record test to the issue of audited data, we find no error in the Commissioner's election to accord the necessary weight and credibility to the testimony of the single uncontested expert witness testifying on auditing.

Finally, appellants' reliance on previous decisions of this Court as authority for the position that the Commissioner exceeded his statutory authority in ordering audited data is misplaced. In each of the cases relied upon by the appellants, the Commissioner clearly exceeded his statutory authority in fixing premium rates in factual situations clearly distinguishable from that disclosed by this record. For example, in *State ex rel. Commissioner of Insurance v. N.C. Automobile Rate Administrative Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977), the Commissioner ordered that private passenger automobile insurance rates be decreased by 23.8% for bodily injury and increased by 2.5% for property damage. This Court found that the statute applicable at that time allowed the Commissioner to (1) either approve all of the increase proposed by the rate office, (2) approve a part of the proposed increase or (3) disapprove the entire proposed increase. The statute did not authorize the Commissioner to order a reduction in then-existing rates. Therefore, he clearly exceeded his statutory authority when he ordered a reduction of a rate. In that same case, we note, Justice, now Chief Justice, Branch used language far more pertinent to the issue before us than that relied on by appellants: "The language of G.S. 58-248 does not restrict the Commissioner's consideration to the statistical data furnished by the Rate Office and he may consider evidence from

other sources if it is otherwise competent." *Id.* at 18, 231 S.E. 2d at 876.

Moreover,

> The Commissioner of Insurance is considered to be a specialist in the field of insurance and his projection of past experience and present conditions into the future is assumed to be correct and proper if supported by substantial evidence. Expert testimony, otherwise competent, that a trend upward or downward may reasonably be expected to continue into the future is evidence of "reasonable and related factors" which the Commissioner may consider in making his projections. *The statute does not require that procedures and methods for trending loss experience for the future shall be frozen.*

Id. at 21-22, 231 S.E. 2d at 878. (Emphasis in original.)

Therefore, the Court held that the Commissioner did not err when, rather than measuring automobile property damage insurance trends separately from paid claim costs and paid claim frequency as the automobile rate administrative office had done in its filing according to its usual methodology, he chose instead to apply trending factors to the composite of average paid claim costs and frequency or average loss cost per automobile.

Indeed, in many of our previous decisions on insurance, we have stressed the Commissioner's statutory ability to compel special statistical data.

In *In re N.C. Fire Insurance Rating Bureau, supra,* Justice Lake said:

> It is, of course, within the sound discretion of the Commissioner to require complex statistical exhibits to be made available to the adverse party prior to the hearing, to restrict or deny the use of newly developed statistical data sprung suddenly at the hearing by either party to the surprise of the other, and to grant such recess of the hearing as he may deem necessary to permit reasonable opportunity to study such data and to prepare evidence to refute it.

275 N.C. at 37-38, 165 S.E. 2d at 223.

In *State ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 293 N.C. 365, 239 S.E. 2d 48 (1977), this Court held, *inter alia*, that the fact that orders were based in part on calculations derived from operator license statistics maintained by the Department of Motor Vehicles and from the penalty point system was not a basis for disturbing the Commissioner's orders. Justice Exum noted that the credibility of testimony is for the Commissioner to determine. He added, "There is nothing sacrosanct about so-called 'insurance statistics.' " *Id.* at 384, 239 S.E. 2d at 60. And, "Insurance data compiled by the Rate Office, insofar as it is shown to be reliable and fairly compiled, is valuable and should be considered. *The Commissioner may also consider evidence, otherwise competent, from other sources.*" *Id.* at 384-85, 239 S.E. 2d at 60 (emphasis added).

The Commissioner's statutory authority to require certain kinds of data submission is therefore unquestioned.

[3] In light of the foregoing, we hold that the Commissioner's findings and conclusions that data submitted in an insurance rate-making case be audited were not "in excess of statutory authority" as contemplated by G.S. 58-9.6(b)(2) or G.S. 150A-51(2).

2. Unlawful Proceedings (Procedures)

[6] We next address the question whether the Commissioner's action was "made upon unlawful proceedings" or "procedures" as contemplated by G.S. 58-9.6(b)(3) and G.S. 150A-51(3). We first note that, while the prohibition against agency action "in excess of statutory authority," G.S. 58-9.6(b)(2) and G.S. 150A-51(2), and one "made upon unlawful procedure," G.S. 58-9.6(b)(3), *see also* G.S. 150A-51(3), appear redundant, the distinction is significant indeed. The former refers to the *general authority* of an administrative agency to properly discharge its statutorily assigned responsibilities. The latter refers to the *procedures employed* by the agency in discharging its statutorily authorized acts. We have held above that the Commissioner had the general statutory authority to require audited data in this proceeding. We are now compelled to hold, however, that he did not follow lawful procedure in attempting to do so.

The rulemaking power of an administrative agency is restricted by law apart from the statute conferring power and an agency having authority to effectuate the policies of a particular statute may not effectuate such policies so singlemindedly that it wholly ignores other and equally important legislative objectives. 1 Am. Jur. 2d, *Administrative Law* § 72. *See also Edgerton v. International Company,* 89 So. 2d 488, 490 (Fla. 1956). This is especially true in the case of agencies which have both accusatorial and judgmental powers. The potential for unfairness and abuse is obvious in a situation in which an administrative officer is vested with broad rulemaking powers, determining the admissibility and weight of evidence in hearings and making the final determination on the merits of an action, as is the Commissioner of Insurance in ratemaking cases. Indeed, one of the fundamental purposes in the creation of administrative procedure acts was to minimize the potential of unfairness in embodying in one person or agency these various functions. *See generally* 1 Am. Jur. 2d, *Administrative Law* § 78. Since an administrative agency is vested with powers both quasi-judicial and quasi-legislative, such procedural safeguards are essential.

Our Legislature, in providing that agency action is unauthorized if "made upon unlawful procedure" was clearly sensitive to the potential abuse mentioned above. "This provision authorizes a court to reverse or modify agency action that is not in accordance with the procedural requirements specified in the NCAPA; or with those required under another statute governing agency procedure." Daye, *supra* at 914. We therefore turn to a consideration of lawful agency procedures in general and the North Carolina Administrative Procedure Act in particular.

Appellants argue, albeit briefly and without citation of authority, that the Commissioner converted a ratemaking case into a rulemaking hearing and thereby violated the terms of the North Carolina Administrative Procedure Act (NCAPA), G.S. 150A-1 *et seq.* The Commissioner's response is equally terse: He argues that this proceeding is exempt from the NCAPA by virtue of certain of its provisions. A determination of the applicability of the NCAPA to this proceeding is therefore necessary to resolve the question whether the Commissioner acted "upon unlawful procedure" in finding and concluding that unaudited data presented in a ratemaking hearing is unreliable and incredible. We think

that the NCAPA is applicable and that the Commissioner violated its rulemaking requirements.

G.S. 150A-9 provides in pertinent part:

> It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for emergency rules . . ., the provisions . . . are applicable to the exercise of any rulemaking authority conferred by any statute, ... No rule hereafter adopted is valid unless adopted in substantial compliance with this Article.

G.S. 150A-10 then defines "rule" to mean "each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule. . . ."

The statute then lists six exclusions to the rule definition including the following two, interpretations of which are crucial to the issue before us:

"(4) Statements of policy or interpretations that are made in the decision of a contested case; . . .

(6) Interpretative rules and general statements of policy of the agency."

The Commissioner argues that either of the quoted exclusions would relieve him of NCAPA requirements with respect to his determination that audited data is essential in a ratemaking hearing. G.S. 150A-2(2) does specifically provide that a ratemaking proceeding is a "contested case" within the meaning of the NCAPA. The primary question, therefore, revolves around the meaning of "interpretative" rules and "statements of policy."

It becomes readily apparent from the statutory definition of "rule," which includes six exceptions, that *different types* of rules were contemplated. This is crucial in the issue confronting us here for two reasons: (1) The distinction is important in determining the requirements that will be imposed in establishing the procedures used in adopting and promulgating the rule, and (2) the distinction between different types of rules is important in determining the validity and legal effect of a challenged rule.

[7] While the distinctions are sometimes blurred and rules often serve two or more purposes simultaneously, agency rules may be grouped into three general categories: procedural rules, interpretative rules, and legislative rules. 1 F. Cooper, *State Administrative Law* 173 (1965); Daye, *supra* at 851-53.

(1) Procedural rules are those which describe *how* the agency will discharge its assigned functions and the requirements others must follow in dealing with the agency. These are the fundamental rules of agency procedures and are essential to efficient agency operation. Generally these rules deal with such matters as forms, instructions and availability for public inspection of all agency rules and policy. *See, e.g.*, G.S. 150A-11(1). Clearly, then, the requirement that data presented in a ratemaking hearing be audited is more than a procedural rule.

(2) Legislative rules are those established by an agency as a result of a delegation of legislative power to the agency. "Legislative rules fill the interstices of statutes. They go beyond mere interpretation of statutory language or application of such language and within statutory limits set down additional substantive requirements." Daye, *supra* at 852-53.

(3) Interpretative rules have been defined as

> those that interpret and apply the provisions of the statute under which the agency operates. No sanction attaches to the violation of an interpretative rule as such; the sanction attaches to the violation of the statute, which the rule merely interprets. Thus, for example, most of the regulations of the Internal Revenue Service are interpretative.

1 Cooper, *supra* at 174-75.

The crucial determination to be made here is whether the Commissioner's conclusion that data be audited is a legislative or interpretative rule. This is so because interpretative rules and general policy statements of agencies are excluded from the NCAPA rulemaking provisions by G.S. 150A-10(6) and statements of policy or interpretations made in the decision of a contested case are excluded by G.S. 150A-10(4). On the other hand, substantive legislative rules are not excluded from the NCAPA, unless one of the other exclusions applies. We note that none of the remaining exclusions is applicable here.

The Commissioner contends that the auditing requirement is interpretative and therefore within the stated exclusions. However, we are not limited to the label placed on a rule by an agency, but must look instead to the substance of the rule in question. *Lewis-Mota v. Secretary of Labor*, 469 F. 2d 478 (2d Cir. 1972); *Pharmaceutical Manufacturers Association v. Finch*, 307 F. Supp. 858 (D. Del. 1970); *Gibson Wine Company v. Snyder*, 194 F. 2d 329 (D.C. Cir. 1952). As Professor Daye stated in his helpful article analyzing the NCAPA: "It should be emphasized that careful scrutiny of the substance of the rule in question is critical, since the interpretative-rule exclusion, if not confined to proper boundaries, could well subsume the rulemaking provisions." Daye, *supra* at 853.[2]

[8] In applying the stated definitions to the record before us, we conclude that the Commissioner's requirement of audited data amounts to a legislative rule and is therefore subject to the rulemaking provisions of the NCAPA. We are so persuaded because his new requirement clearly goes beyond a mere interpretation of the statute under which the agency he heads operates and sets up new substantive requirements. One has only to read the lengthy and learned briefs of appellants and *amici curiae* to know this is true. Furthermore, unlike an interpretative rule, this is certainly a rule with sanctions. Indeed, the Commissioner has dramatized the sanction for violation of his auditing rule: He has denied the requested rate increase for failure of appellants to comply with his newly established rule.

Put another way, the Commissioner's enunciated rule was established as a result of a delegation of legislative power to his agency. G.S. 58-9(1) empowers the Commissioner to "make rules and regulations . . . to enforce, carry out and make effective the provisions of this Chapter, and to make such further rules and regulations not contrary to any provision of this Chapter. . . . The Commissioner may likewise, from time to time, withdraw,

2. For a more detailed analysis of the nature of the distinction between interpretative rules and legislative rules, see K. Davis, 1 *Administrative Law Treatise* §§ 5.03, 5.04 (1958 and Supp. 1970).

modify or amend any such regulation." Hence, the Commissioner's rule here is clearly legislative in nature. It fills "the interstices of the statute," and within the statutory limits, it sets down "additional substantive requirements."

[9] Our holding that the Commissioner's auditing requirement is tantamount to a legislative rule and therefore not excluded from the NCAPA is not, however, dispositive of the issue. The Commissioner correctly argues that a second mode by which administrative agencies can establish rules is through the case-by-case process of administrative adjudication. He relies primarily on the following language in the landmark case of *Securities & Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947):

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> * * *
>
> There is thus a very definite place for case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

Id. at 202-03, 67 S.Ct. at 1580, 91 L.Ed. at 2002.

> The scope of our review of an administrative order wherein a new principle is announced and applied is no different from that which pertains to ordinary administrative action. The wisdom of the principle adopted is none of our concern [citations omitted]. Our duty is at an end when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress. [Citations omitted.]

Id. at 207, 67 S.Ct. at 1582, 91 L.Ed. at 2004-05.

Clearly, the consequences of the choice between general rulemaking and *ad hoc*, case-by-case adjudication is of enormous significance. 1 Cooper, *supra* at 177-78. As noted by one com-

mentator, the "whole tenor" of APA procedures is different when establishing rules in the adjudication of contested cases, rather than following rulemaking procedures:

(1) The type of notice is different.

(2) The form of hearing is different.

(3) The mechanics of decision-making are different.

(4) The scope of judicial review is different.

(5) Most importantly, APA-established rules are normally prospective in operation, while decisions in adjudicatory matters are normally (like judicial decisions) retroactive. *Id.*

The discretion vested in administrative agencies in choosing between the two methods of establishing rules is not, however, unbridled. Indeed, the U.S. Supreme Court in *Chenery* provided qualifying guidelines in stating the quoted general rules. *Ad hoc* rulemaking in adjudication is necessary where:

> problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule.
>
> Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.

332 U.S. at 202-03, 67 S.Ct. at 1580, 91 L.Ed. at 2002.

Applying the foregoing to the record before us, we note: (1) the lack of unaudited data was not a problem unforeseen by the Commissioner, (2) "absence of a relevant general rule was not prohibitive of this ratemaking," (3) here, the Commissioner had "sufficient experience" with the problem, and (4) certainly the problem of auditing is not so specialized and varying in nature as to be "impossible of capture within the boundaries of a general rule." Indeed, with respect to the latter, one of the problems with the Commissioner's sudden order to audit data was its vagueness, a problem which could have been avoided had the rule been promulgated in the orderly NCAPA process.

The *Chenery* Court also added:

> Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

332 U.S. at 202, 67 S.Ct. at 1580, 91 L.Ed. at 2002.

Decisions by the U.S. Supreme Court subsequent to *Chenery* have been less than helpful. For example, on the question whether an administrative agency can, through adjudication, overrule its prior clear rules when private parties have acted in reliance on the overruled decisions, *NLRB v. Wyman-Gordon Company*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed. 2d 709 (1969), goes in one direction while *NLRB v. Bell Aerospace Company*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed. 2d 134 (1974), goes in the opposite direction. Moreover, the Court has held that an agency, even when it had opened the way by first adopting an interpretative rule, could make law only through a legislative rule and not through *ad hoc* decisions based on the interpretative rule. *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 39 L.Ed. 2d 270 (1974). Yet, just two months later, in *NLRB v. Bell Aerospace Company, supra*, the Court unanimously held that the NLRB, even without first issuing an interpretative rule, could make new law in an adjudication. It has been stated that the *Morton v. Ruiz* decision was clearly excessive, though "in the right direction." 2 K. Davis, *Administrative Law Treatise* § 7.27 at 140 (2d ed. 1979).[3]

We think the superior rule was stated by Professor Cooper some fifteen years ago and generally adopted by numerous court decisions since:

> The general rule that should guide the agencies in making the choice between rule making and *ad hoc* adjudication might be formulated as follows: where an agency faces the

3. For an excellent case summary in this area, see 2 K. Davis, Administrative Law Treatise § 7.25 *et seq.* (2d ed. 1979).

alternative of proceeding by rule making or by adjudication, the process of rule making should be utilized except in cases where there is a danger that its utilization would frustrate the effective accomplishment of the agency's functions. Where such danger exists, *e.g.*, where the "agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," or where the problem is so "specialized and varying in nature as to be impossible of capture within the boundaries of a general rule," the advantages to the agency of utilizing the *ad hoc* adjudication technique must be balanced against the possible deleterious public consequences resulting from the retroactive application of a new standard of general application to large numbers of parties who have had no opportunity to be heard as to what the standard should be. Unless the balance clearly preponderates in favor of the *ad hoc* adjudication method, the agency should utilize rule-making procedures.

The suggestion was well phrased in an A.B.A. committee report which recommended that:

Administrative agencies shall (1) as a fixed policy prefer and encourage rule making to reduce to the minimum the necessity for case-by-case administrative adjudications; and . . . (4) shall promptly formulate, incorporate and promulgate as a rule or statement of policy any and all general principles, not otherwise published as rules or specified in statutes, enumerated in any specific case decision.

More specifically, it has been well suggested that while the practice of working out policy piecemeal by *ad hoc* adjudication may be justified in the initial stages of administrative regulation of a new field, yet when time and experience have served to sharpen and focus the problems involved, then the agency should utilize rule-making procedures to lay down general rules for the future guidance of all parties affected.

1 Cooper, *supra* at 181-82 (footnotes omitted).

For decisions in accord with the stated rule, *see generally, NLRB v. E. & B. Brewing Company*, 276 F. 2d 594 (6th Cir. 1960),

cert. denied, 366 U.S. 908 (1961); *NLRB v. Guy F. Atkinson Company*, 195 F. 2d 141 (9th Cir. 1952); *Gonzalez v. Freeman*, 334 F. 2d 570 (D.C. Cir. 1964); *Harnett v. Board of Zoning, Subdivision and Building Appeals*, 350 F. Supp. 1159 (D.V.I. 1972).

We think the policy favoring rulemaking rather than *ad hoc* adjudication comports with the intent of our Legislature in enacting G.S. 150A-10. The exclusion of policy statements or interpretations "made in the decision of a contested case" included in G.S. 150A-10(4) clearly was not intended to embrace substantive rules with anticipated future applicability. This is so because of the difference between interpretative and legislative rules discussed above and because G.S. 150A-10(6) which excludes "interpretative rules and general statements of policy of the agency" would be unnecessary if G.S. 150A-10(4) were intended to apply to matters beyond the contested case in question. Professor Daye has correctly analyzed the exclusion:

> [I]t would appear that if the agency, based on the result in a contested case, desired to promulgate a general rule to govern a matter in the future based on a given set of facts, the promulgation would constitute a rule subject to rulemaking requirements unless within another exclusion.

Daye, *supra* at 851, note 84.

The rationale for the rule we adopt has been stated as follows:

> Rule-making provides the agency with a forum for soliciting the informed views of those affected in industry and labor before adopting a new policy. Giving the agency discretion to embark on the new course in an adjudication limits the views presented to those of the parties in the particular case.
>
> . . . *Chenery [supra]* may allow adjudication as a vehicle for formulation of new agency policy. But the same license should not exist where the new policy revolutionizes long-established patterns of conduct. Where those affected have justifiably relied upon an agency-engendered belief in an established policy, the agency should not be permitted to change the policy except through rule-making. An agency decision branding as "unfair" the conduct always previously

stamped "fair" should raise judicial hackles sufficiently to lead the court to refuse to follow *Chenery* and order the agency to engage in rule-making.

B. Schwartz, *Administrative Law* § 66 at 189-90 (1976).

[10] Applying the stated rule to the record before us, we first note that the Commissioner clearly intended for the auditing requirement contemplated in his order to apply both retroactively to the case at bar and prospectively to future filings. This is apparent from his finding of fact No. 32 which prescribes the minimum reasonable audit features "*to be performed* by ISO, NAII and the *Bureau*." (Emphasis added.) Moreover, he rejected another automobile insurance rate filing on the same grounds only seven months after this filing. *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 41 N.C. App. 327, 255 S.E. 2d 567 (1979), on appeal to this Court and decided today as No. 86, and in other subsequent filings, *see State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 44 N.C. App. 191, 261 S.E. 2d 671 (1979), decided by this Court today as No. 54; *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 44 N.C. App. 75, 259 S.E. 2d 926 (1979), decided by this Court today as No. 74.

Moreover, we find that in attempting to establish the auditing requirement the Commissioner's following of normal NCAPA rulemaking requirements would have presented no "danger that . . . utilization [of the NCAPA] would frustrate the effective accomplishments of the agency's functions." In this connection, we note:

(1) This is not a situation where the Commissioner "may not have had sufficient experience with a particular problem" to warrant an NCAPA established rule. Indeed, the record discloses that the Commissioner intended to establish a "hard and fast rule."

(2) The rules was not "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." Present regulations filed by the Commissioner pursuant to the NCAPA are easily adaptable to accomplish the Commissioner's desired goal. *See* 11 NCAPA 10.301.

(3) In balancing the advantages of the Commissioner's application of the *ad hoc* technique against the possible "deleterious public consequences resulting from the retroactive application of a new standard of general application to a large number of parties who have had no opportunity to be heard as to what the standard should be," we think the scales tip in favor of appellants. The record discloses that the new requirement would be far reaching. It would instantly require a change in long-established procedure in this State and one utilized in practically every other state in the nation. No attempt has been made to determine the ultimate cost of the new requirement, an expense we suspect would ultimately be borne by rate payers in one way or another. No attempt was made to determine if the order was even capable of performance. For example, the audit requirement would obviously require an examination of "original source documents" of the many member groups reporting to the Rate Bureau. No attempt was made to determine where such records are kept by the national companies involved, whether the required information could possibly be retrieved within the time limits required by statute in rate filings or for what period of time such records are or should be maintained. These and other critical questions could properly be answered at a rulemaking hearing held pursuant to the NCAPA. We think it the only orderly and legally proper way to approach the promulgation of a rule so far reaching as that the Commissioner seeks to establish.

In summary, we hold that the practical operation of the Commissioner's change of policy, when incorporated in the order now before us, is to work hardship upon appellants altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of policy upon appellants presents a striking example of the very reason for the enactment of administrative procedure acts across the land. The Commissioner has ample ways of instituting, through the Legislature or pursuant to the NCAPA, rules he deems essential for the proper discharge of his duties.

We therefore hold that the Commissioner's attempt to establish a rule requiring audited data in this ratemaking hearing was "made upon unlawful procedure" as contemplated by G.S. 58-9.6(b)(3) and G.S. 150A-51(3).

3. Arbitrary and Capricious Actions

[11] We next address the question whether the Commissioner's action ordering audited data was "arbitrary and capricious" as contemplated by G.S. 58-9.6(b)(6) and G.S. 150A-51(6).

Agency decisions have been found arbitrary and capricious, *inter alia*, when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they fail to indicate "any course of reasoning and the exercise of judgment," *Board of Education v. Phillips*, 264 Ala. 603, 89 So. 2d 96 (1956), or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements, 2 Cooper, *supra* at 761-69, note 8, and cases cited therein. "The ultimate purpose of rulemaking review is to insure 'reasoned decisionmaking' . . . ." Daye, *supra* at 922, citing Verkuil, Judicial Review of Informal Rulemaking, 60 Va. L. Rev. 185, 230 (1974).

We agree with appellants that the Commissioner's order with respect to audited data is arbitrary and capricious for these reasons: The order is vague and uncertain in that (1) it does not establish the extent to which examination of "original source documents" is required, (2) it does not make clear whether the auditing must be performed by Certified Public Accountants, other accountants, or actuaries, (3) it does not specify the degree of precision and reliability required of "statistical sampling," (4) it generally does not provide appellants with adequate guidelines for compliance with the general conclusion that data in a ratemaking hearing be audited, (5) it includes no determination by the Commissioner as to the possibility of performance of his new rule nor whether implementation of the rule would be economically feasible, (6) it includes no determination whether the statutory time limits could be complied with in face of the new rule, and (7) it includes no determination whether the "original source data" contemplated by the new rule is even available for the past years involved in this filing or whether such data, if available, is located in North Carolina or outside the State in the case of the several hundred companies writing insurance in this State.

In view of these omissions we hold the Commissioner's order is grossly imprecise in attempting to enunciate a substantive rule

involving sweeping ramifications and is therefore "arbitrary or capricious" as contemplated by G.S. 58-9.6(b)(6) and G.S. 150A-51(6).

B. Summary

The Court of Appeals affirmed the Commissioner's conclusion that unaudited data is not a credible basis for justifying a proposed rate increase on the sole ground that there was "material and substantial evidence in view of the entire record as submitted" as contemplated by G.S. 58-9.6(b)(5) to support the Commissioner's order. Had this been the only criterion for appellate review, the Court of Appeals' decision would be correct as we have noted above. *See* Section I.A. above. That court erred, however, in failing to review the Commissioner's order in light of subsections (3) and (6) of G.S. 58-9.6(b) and G.S. 150A-51, as we have done above. Therefore, and for the reasons stated above, this portion of the Court of Appeals' decision is reversed.

We declare null and void all portions of the Commissioner's order referring to the requirement of audited data, including but not limited to, findings of fact 22 through 35, conclusions of law 1 through 4 and usage of the phrase "purported to show" in all portions of the order wherein the phrase was obviously inserted to question otherwise undisputed and uncontradicted evidence but for the lack of formal audit.

Finally, we note that the issue presented here is not an isolated one. The proliferation of administrative agencies throughout the last several decades, both in federal and state governments, has created controversy and confusion over the question of proper legislative delegation of authority and the appropriateness of standards to guide effective agency action. The various treatises cited in this opinion are replete with citations to decisions from state and federal courts adopting practically every position imaginable. We agree generally that:

> Power should be delegated [to an administrative body] where there is agreement that a task must be performed and it cannot be effectively performed by the legislature without the assistance of a delegate or without an expenditure of time so

> great as to lead to the neglect of equally important business. Delegation is most commonly indicated where the relations to be regulated are highly technical or where their regulation requires a course of continuous decision.
>
> . . . .
>
> Where not only technical skill but continuous judgment is demanded the legislature is helpless. This is true of rate regulation which requires a vast number of individual determinations, a body of technical material, and an expert staff. Decisions must make a pattern, integrated yet flexible. [The legislature] could not frame a delegation which would settle all vital questions of policy.

Jaffe, *Judicial Control of Administrative Action* 35, 37 (1965).

The North Carolina General Assembly has effectively and properly delegated insurance ratemaking to the Rate Bureau with review by the Commissioner of Insurance. It can, and perhaps should, review the statutes with the view to providing clarity on such significant substantive matters as that presented here. In the meantime, it is incumbent on the Commissioner, in discharging the broad powers he possesses as head of a major State administrative agency, to follow the clear lawful procedures prescribed by our Legislature to guide all administrative agencies.

III.

NORTH CAROLINA REINSURANCE FACILITY

In its filing letter of 29 November 1977 to the Commissioner, the Rate Bureau stated, "This filing proposes also that the rates for risks ceded to the North Carolina Reinsurance Facility be 10% higher than the proposed rates for risks voluntarily retained, subject to all applicable provisions of law."

Based on several findings of fact, the Commissioner concluded, *inter alia*, as follows:

> (20) That as the filing does not propose any fixed set of objective criteria for deciding which risks may be ceded to the Facility, the decision to cede a given risk is based entirely on the subjective judgment of the individual insurer.

(21) That the exercise of subjective judgment regarding cessions by insurers has resulted in a Facility population in which 475,704 (86.9%) of the ceded exposures have not caused a claim payment to be made, 389,111 (71.0%) have never been assessed SDIP points, and 341,273 (62.3%) have neither been assessed any SDIP points nor caused a claim payment to be made.

(22) That in view of the current composition of the Facility, a 10% increase in the Facility Rate [sic] above the rates for voluntary business would be excessive and unfairly discriminatory.

(23) That because acquisition and service costs are charged and accounted for as a percentage of premium, a Facility rate 10% higher than the proposed rates for insureds voluntarily retained will result in ceded risks paying disproportionately higher acquisition and service costs, and that the higher Facility rate is therefore excessive and unfairly discriminatory.

(24) That were the proposed 10% higher Facility rate approved, any increase in the percentage of total insureds ceded to the Facility would result in an overall rate level increase in excess of 6%, which is in contravention of G.S. 58-124.26.

The Court of Appeals agreed with the Commissioner, stating,

[T]here appears in the record material and substantial evidence to support the Commissioner's finding of fact. The figures and percentages are drawn directly from the Bureau's Exhibit # RB 33. And based upon the finding that there are no objective criteria for cession to the Facility, and the Commissioner's finding that 62.3% of the insureds ceded to the Facility have neither assessed any SDIP points nor caused a claim payment to be made, we find that there is ample support for the Commissioner's conclusion that a 10% rate increase for insureds in the Facility would be unfairly discriminatory.

41 N.C. App. at 320-21, 255 S.E. 2d at 564.

By their second assignment of error, appellants contend that the Court of Appeals erred in approving the findings and the conclusions of the Commissioner that the reinsurance rate differential is unfairly discriminatory.

This assignment of error presents to this Court the first substantial challenge to the North Carolina Motor Vehicle Reinsurance Facility created in 1973 by the General Assembly to replace the Assigned Risk Plan. Basically, the Facility represents a pool which insures risks which companies determine they do not want to individually insure. A review of the significant provisions of Article 25A, Chapter 58, N.C. General Statutes, will prove helpful to our disposition of this assignment of error.

G.S. 58-248.27 created the North Carolina Motor Vehicle Reinsurance Facility ("Facility") in 1973 as a nonprofit entity to consist of all insurers licensed to write motor vehicle insurance in the State. All insurers within the State are required to be members of the Facility and to be bound by its rules of operation which are determined by the statute or promulgated by its board of governors. G.S. 58-248.31(a) is particularly significant. It provides that all insurers "as a prerequisite to the further engaging in this State in the writing of motor vehicle insurance . . . *shall accept and insure any otherwise unacceptable applicant therefor who is an eligible risk if cession of the particular coverage and coverage limits applied for are permitted in the Facility.*" (Emphasis added.)

This statute also provides that all insurers "shall equitably share the results of such otherwise unacceptable business through the Facility" and that each company shall be bound by the acts of its agents in accordance with the provisions of the Article. *Id.*

G.S. 58-248.32(a) provides in part that no licensed agent of an insurer shall refuse to accept any application from an eligible risk for such insurance and to immediately bind the coverage applied for if cession of the particular coverage and limits are permitted in the Facility. The 1977 Legislature added a provision to this statute providing that agents shall write the coverage applied for at what the agent believes to be the appropriate rate level. G.S. 58-248.32(b).

G.S. 58-248.33 defines the Facility's functions and administration. It first provides that the Facility shall assure the availability of motor vehicle insurance to any "eligible risk" and *that the Facility shall accept all placements made in accordance with the Article.* G.S. 58-248.33(a). It then sets forth the minimum coverage provisions for which the Facility shall provide reinsurance.

Subsections (d), (e), (f) and (g) of G.S. 58-248.33 spell out the composition, responsibilities and powers of the Facility's board of governors.

The 1977 Legislature amended G.S. 58-248.33 by adding, *inter alia*, subsections (l) and (m). Former subsection (l), under which this proceeding occurred, provided in pertinent part:

> The classifications, rules, rates, rating plans and policy forms used on motor vehicle insurance policies reinsured by the Facility may be made by the Facility by any licensed or statutory rating organization or bureau on its behalf and shall be filed with the Commissioner. *The Commissioner may establish separate subclassifications within the Facility for clean risks as defined by the Commissioner. . . . Rates shall be neither excessive, inadequate nor unfairly discriminatory. . . .* If the Commissioner finds, after a hearing, that a rate is either excessive, inadequate or unfairly discriminatory, he shall issue an order specifying in what respect it is deficient and stating when, within a reasonable period thereafter, such rate shall be deemed no longer effective. Said order is subject to judicial review as set out in Article 2 of this Chapter. Pending judicial review of said order, the filed classification plan and the filed rates may be used, charged and collected in the same manner as set out in G.S. 58-131.42 of this Chapter. . . . *All rates shall be on an actuarially sound basis and shall be calculated, insofar as is possible, to produce neither a profit nor a loss. . . . Rates shall not include any factor for underwriting profit on Facility business, but shall provide an allowance for contingencies. There shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive.*[4]

4. The current version of G.S. 58-248.33(l) provides basically the same except (1) clean risks ceded to the Facility cannot be charged higher premiums than clean risks voluntarily insured, (2) the board of governors of the Facility, not the Commis-

Law of May 24, 1973, 1973 N.C. Sess. Laws 1215, Ch. 818, as amended by Law of June 30, 1977, 1977 *N.C. Sess. Laws* 1119, Ch. 828, s. 19.

G.S. 58-248.34 sets forth the requirements for the Facility's "plan of operation."

G.S. 58-248.35 provides that, "Upon receipt by the company of a risk *which it does not elect to retain*, the company shall follow such procedures for ceding the risk as are established by the plan of operation." (Emphasis added.)

The 1977 amendments applicable to this case, and incorporated in the statutory summary noted above, made several significant changes to the original 1973 legislation. The most significant was the establishment of the procedures designed to make the Facility self-sustaining. Prior to 1977, a high-risk insured whose coverage was ceded to the Facility paid the same amount for insurance as the high-risk insured whose coverage was not ceded. Law of March 6, 1945, Ch. 381, s. 2, 1945 N.C. Sess. Laws 461, formerly G.S. 58-248.2 (1975) (repealed 1977). Under the 1977 statute, losses sustained by the Facility are to be recouped "either through surcharging persons reinsured by the Facility or by equitable pro rata assessment of member companies." G.S. 58-248.34(e). The member companies, in turn, are to recoup any such investment by surcharging policyholders. G.S. 58-248.34(f). This surcharge is to be assessed "on motor vehicle insurance policies issued by the member or through the Facility." *Id.* Conversely, should the Facility realize any gain, any balance remaining after losses are covered is to be distributed to persons reinsured by the Facility. G.S. 58-248.34(e).

In commenting on the 1977 changes, the Legislative Research Commission's report to the 1979 General Assembly stated:

> Under the old law the participating company could not transfer more than 50% of their risks to the Facility, had to share Facility losses, and could not charge higher rates for automobile liability policies ceded to the Facility. House Bill 658 [1977 revision of insurance law] changed all of that by eliminating the 50% limitation on cessions, by permitting

sioner, establishes the subclass for clean risks, and (3) a definition is provided for "clean risks."

higher rates or surcharges to recover losses of the Facility, and by providing for distribution of Facility gains to policyholders reinsured by the Facility. The apparent intent behind the new provisions is to make the Facility self-sustaining, whereas under the old system the insurance industry in effect subsidized the Facility by absorbing its losses.

Legislative Research Commission, *Report to the 1979 General Assembly of North Carolina* 12-13 (1979).

That same report also stated:

House Bill 658 provided for a "clean risk" subclassification in the Facility (those drivers without points for the previous three years whose policies were ceded to the Facility), to be defined by the Commissioner. In his supplemental order of November 30, 1978, the Commissioner directed the Rate Bureau to submit a plan whereby no driver in the Facility would be surcharged more than a driver outside the Facility if they had the same number of driving record points or chargeable accidents. This was coupled with his October 30, 1978, order to eliminate the separate Facility rate in the classification plan submitted earlier, and was intended to compensate for any revenue shortfalls resulting from that elimination. Both orders have been appealed. It is arguable as to whether or not the Commissioner's orders come within the letter or intent of the new provisions, but deference must be made to the courts for judgment on this matter. There is, however, implication in the language of G.S. 58-248.34(e) that the surcharge does not necessarily have to apply exclusively to drivers whose policies are ceded to the Facility.

Id. at 47-48.

A. Scope of Review

Turning to appellants' contentions under this assignment that the Commissioner's order disapproving a 10% surcharge on Facility policyholders should be voided, we first note that we have not been cited to any of the standards for judicial review of insurance actions in either G.S. 58-9.6 or G.S. 150A-51. We must therefore first determine the appropriate scope of review for this assignment of error.

The thrust of the arguments presented by both appellants and the Commissioner is concerned with the evidence presented at hearing on this issue. We think the appropriate subsection of our judicial review statutes thus invoked is that which calls for appropriate judicial action when the Commissioner's findings and conclusions are "[u]nsupported by material and substantial evidence in view of the entire record as submitted," G.S. 58-9.6(b)(5) or are "[u]nsupported by substantial evidence in view of the entire record as submitted," G.S. 150A-51(5). However, because the Commissioner's brief relies on certain cases from other jurisdictions involving constitutional determinations and because the phrase "unfairly discriminatory" carries constitutional implications, we first explain our decision not to consider this assignment of error on constitutional grounds.

[12] It is well established in this jurisdiction that the constitutionality of a statute will not be reviewed in the appellate court unless it was raised and passed upon in the proceedings below, *City of Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974), usually by the trial court. "[W]e will not pass upon a constitutional question unless it affirmatively appears that such question was raised *and passed upon* in the court below." *State v. Dorsett & Yow*, 272 N.C. 227, 229, 158 S.E. 2d 15, 17 (1967) (emphasis in the original). In *State v. Cumber*, 280 N.C. 127, 185 S.E. 2d 141 (1971), the constitutional question was not raised in the trial court but for the first time in the Court of Appeals. This Court held that it was not properly before the Court of Appeals nor this Court. We stated:

> That belated constitutional question was injected for the first time on appeal to the Court of Appeals and therefore came too late. It was not properly before that court and is not now properly before us. "The attempt to smuggle in new questions is not approved. *Irvine v. California*, 347 U.S. 128, 129. Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. *State v. Jones*, 242 N.C. 563, 564, 89 S.E. 2d 129. This is in accord with the decisions of the Supreme Court of the United States. *Edelman v. California*, 344 U.S. 357, 358." *State v. Grundler*, 251 N.C. 177, 111 S.E. 2d 1 (1959). *Accord, State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968).

Id. at 131-32, 185 S.E. 2d at 144. *See also State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Hudson*, 281 N.C. 100, 187 S.E. 2d 756 (1972), *cert. denied*, 414 U.S. 1160 (1974).

Here, the Commissioner's original order denying the Reinsurance Facility rate increase stated only that such rates are "unfairly discriminatory" presumably in the statutory sense. He never held that any of the statutes or actions were unconstitutional. In his brief, however, he does make vague assertions that it would be "constitutionally suspect" to interpret the statutes contrary to his findings and conclusions. He states, "The governing statutes should be construed so as to avoid serious doubts as to constitutionality." Moreover, the Commissioner relies strongly on a recent holding of the Supreme Court of Michigan, *Shavers v. Attorney General Kelley*, 402 Mich. 554, 267 N.W. 2d 72 (1978), *cert. denied*, 442 U.S. 934 (1979). There, it was held that Michigan's No-Fault Insurance Act was constitutional insofar as it provided benefits as a substitute for tort remedies it partially abolished. However, certain ratemaking mechanisms were constitutionally deficient in failing to provide due process. That court delineated several deficiencies of the Michigan statute, similar to deficiencies alleged here. However, the Michigan court unquestionably based its holding on constitutional due process considerations. Indeed, the Michigan action was a declaratory judgment action specifically brought to determine the constitutionality of the Michigan No-Fault Insurance Act. The constitutional question was the basis for the action from trial court to final appellate adjudication. This is completely unlike the case before us where the record discloses no constitutional question presented or passed on in the Commissioner's original order.

Moreover, our judicial review statutes do not contemplate constitutional review in the present posture of the matter before us. G.S. 58-9.6(b)(1) provides essentially that the *Commissioner's findings and conclusions* may be affirmed, reversed, modified, etc. if the *substantial rights of the appellants* have been prejudiced "in violation of constitutional provisions," and G.S. 150A-51(1) provides the same standard if the appellants' rights "may have been prejudiced." Here, appellants, the Rate Bureau and member companies make no assertion that their rights have been prejudiced because any of the Commissioner's findings or conclusions were in violation of any constitutional provisions. This is only the belated

argument of the Commissioner. Accordingly, we think no constitutional issues are before us.

B. Material and Substantial Evidence

We next address the question whether the Commissioner's findings and conclusions with respect to this portion of his order were "unsupported by material and substantial evidence *in view of the entire record as submitted*" as contemplated by G.S. 58-9.6(b)(5) and G.S. 150A-51(5). (Emphasis added.)

We reiterate the rule stated in Section II. A. 1 of this opinion that it is for the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. 73 C.J.S., *Public Administrative Bodies and Procedure*, *supra* at § 126. It is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. However, as also indicated above, when evidence is conflicting, the standard for judicial review of administrative decisions in North Carolina is that of the "whole record" test. *Thompson v. Wake County Board of Education*, *supra; In re Rogers*, *supra*. As Justice Exum stated in *In re Rogers*: "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence. *See* Jaffe, Judicial Control of Administrative Action . . . 601 [(1965)]; Daye, *supra* at 920-921." 297 N.C. at 65, 253 S.E. 2d at 922.

In *Thompson v. Wake County*, Justice Copeland clearly explained the "whole record" test:

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L.Ed. 456, 71 S.Ct. 456 (1951); *Underwood v. Board of Alcoholic Control*, 278 N.C. 623, 181 S.E. 2d 1 (1971); Hanft, *Some Aspects of Evidence in Adjudication by Administrative Agencies in North Carolina*, 49 N.C.L. Rev. 635, 668-74 (1971); Hanft, *Administrative Law*, 45 N.C.L. Rev. 816, 816-19 (1967). The "whole record" test does not allow the

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

292 N.C. at 410, 233 S.E. 2d at 541.

[13] Applying the foregoing, we proceed to review the evidence to determine whether it is substantial in view of the entire record to support the Commissioner's findings and conclusions. We first note that G.S. 58-248.33(l) which prohibits rates which are "excessive, inadequate or unfairly discriminatory" contains no definition of the latter phrase. That same statute provides, however, that "[a]ll rates shall be on an actuarially sound basis." *Id.* Moreover, it provides that "[t]here shall be a strong presumption that the rates and premiums for the business of the Facility are neither unreasonable nor excessive." *Id.* While the Commissioner's findings with respect to the numbers and percentages of ceded exposures which had not had assessed any SDIP points nor caused claim payments to be made are supported by the record, the Commissioner has made no findings with respect to the statutory standard "actuarially sound." This is so even though the record is replete with evidence indicating that the proposed differential for the rate increase between ceded and voluntary business is actuarially justified. For example, the evidence for the Rate Bureau indicated there were only 1.42 claims per hundred cars involving bodily injury for voluntary risk policyholders in contrast with 2.95 accidents per hundred cars involving bodily injury for ceded risk policyholders. For property damage, the corresponding figures for voluntary risk were 5.70 accidents per hundred cars as compared to 10.21 for ceded risk.

The statistics revealed in the following chart indicated the pure premium or average loss per car was also significant:

	Bodily Injury	Property Damage
Voluntary Risks	$22.17	$23.85
Ceded Risks	56.12	47.59

In other words, the claim frequency for Facility business for bodily injury was 108% higher than for a voluntary insured. For property damage, the claim frequency was 79% higher for a Facility insured than for a voluntary insured. On an average loss per car basis, the pure premium for a Facility insured for bodily injury liability was 153% higher and for property damage liability the Facility insured had a loss cost of 99.5% higher than a voluntary insured.

The Commissioner's order also relies heavily on the percentage of insureds who had no SDIP points or claims assessed. The record indicates extensive questioning concerning what are referred to as "clean risks." As we understand it from the record, parties to the hearing proceeded under the understanding that a "clean risk" was one who had neither SDIP points nor a claim assessed during the preceding three-year period.[5] The Commissioner's findings and conclusions concerning these statistics and the "current composition of the Facility" indicate that he based his conclusions primarily on what he considers unfair discrimination between a "clean risk" in the Facility and those in the voluntary market. Again, however, in following the statutory guide that the rates be "actuarially sound," the statistics are significant. The following chart from the Rate Bureau's exhibits indicates the claim frequency per hundred cars:

	Bodily Injury	Property Damage
Voluntary "Clean Risks"	1.30	5.46
"Clean Risks" in Facility	2.73	9.56
Increased Claim Frequency of Ceded Risks	(110% higher)	(75% higher)

5. A clean risk is currently defined by G.S. 58-248.33(l).

Moreover, the comparable pure premium statistics (average loss per car) indicate:

	Bodily Injury	Property Damage
Voluntary "Clean Risks"	$20.41	$22.52
"Clean Risks" in Facility	51.96	43.93
Increased Average Loss of Ceded Risks	(155% higher)	(95% higher)

We also note that, while as indicated above, the Commissioner's alarming statistical finding that 62.3% of those in the Facility had neither SDIP points nor claims paid is supported by the evidence, the record indicates that his statistics were based on the experience for all carriers writing in North Carolina *for the accident year* ending June 30, 1976. Clearly, these statistics would not reveal the SDIP record or claims made for these insureds for the three-year period which we glean from the record to be contemplated by the definition of a "clean risk." Apparently, the data relied upon by the Commissioner covers only the one-year period. We assume that data for the preceding accident year is that most commonly relied upon when a filing is made. However, it is obviously inconsistent to show concern about the composition of a Facility with respect to its high percentage of "clean risks" and not include statistics covering a three-year period; while the high percentage of insureds in the Facility might not have had any SDIP points assessed or claims made during the preceding year, this certainly does not mean that these insureds are "clean risks." Some of them, perhaps many of them, might well not be "clean risks" if the three-year period were considered.

Therefore, on the basis of our review of the entire record, we are compelled to conclude that the Commissioner failed to consider material and substantial evidence concerning the actuarial soundness of the statistics and that the findings which the Commissioner made, while supported by the evidence, are legally irrelevant in light of the limitation to a one-year period. The

evidence supporting the Commissioner's findings and conclusions is, therefore, in our view, insubstantial.

C. Statutory Scheme

It is also helpful in addressing the question presented here to analyze the statutory scheme from the provisions set forth in the introductory section to this portion of our opinion. Insurance companies doing business in North Carolina are required to write policies for all qualified applicants with exceptions not pertinent here. A company which has written a policy it does not wish to retain has the *absolute right* to cede that policy to the Facility. The rates and classifications for the Facility risk are to be made by the Facility and there is a strong presumption that these rates are neither unreasonable nor excessive. Facility rates are to be on an actuarially sound basis and can produce *neither a profit nor a loss.*

[14] The Commissioner's finding and conclusion therefore "that the filing does not propose any fixed set of objective criteria for deciding which risk may be ceded to the Facility" is simply not persuasive. Indeed, the setting of objective criteria by insurance companies would be legally unenforceable; G.S. 58-248.35 allows ceding merely upon the criterion that the *company does not elect to retain the business.* It is presumed the Legislature acted with reason and common sense and did not require an unjust and absurd result. *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12 (1970). We think the plain legislative intent is that Facility rates can be higher than those for the voluntary market if a higher Facility rate is actuarially indicated. *See* G.S. 58-248.32(b). We simply do not believe that the Legislature would require companies to insure *all* applicants, regardless of the risk they present, direct the Facility to accept unlimited policy cessions from insurance companies, direct the Facility to fix rates on an actuarially sound basis that will produce neither a profit nor a loss, and then provide that the Facility may not do precisely what it was directed to do because such actions would be "unfairly discriminatory."

We are not inadvertent nor insensitive to the Commissioner's concern that our statutory scheme allows insurance companies to cede any insured they elect not to retain without any criteria established by law. The answer is, first of all, that such a scheme

is the obvious legislative intent and we perceive no constitutional attack, as indicated earlier, on the statute itself. The Legislature has obviously elected to leave the establishment of criteria for ceding to the individual companies, anticipating their awareness that the Facility is a non-profit, unincorporated legal entity, G.S. 58-248.27, and not allowed to make a profit. G.S. 58-248.33(l). Since the premium of an insured ceded to the Facility goes to the Facility and there is no profit to the company, the only way the company can possibly make an underwriting profit is by voluntarily retaining the risk. Such incentive, we think our Legislature reasoned, is sufficient to safeguard abuse of the ceding privilege and prevent "unfair discrimination."

We further note that the 1979 amendments to G.S. 58-248.33(l) provide even more protection to clean risks ceded to the Facility. They can be charged rates no higher than clean risks voluntarily retained.

D. Acquisition and Service Costs

[15] We next turn to the Commissioner's findings and conclusion that because acquisition and service costs are charged and accounted for as a percentage of the premium, a Facility rate 10% higher than the proposed rate for insureds voluntarily retained would result in ceded risks paying disproportionately higher acquisition and service costs. We simply find no evidence in the record to support the Commissioner's bare assertion. The Rate Bureau's Exhibit No. 1 states the acquisition cost figure for voluntary business to be 19.5%, plus 5% for profit on automobile liability insurance. The acquisition for Facility business, on the other hand, is stated to be 16.8%, with no figure for profit. Moreover, in the only testimony we find on this point, one witness testified that there is more general administration expense for the 12-point driver than for a driver with no points. We are therefore compelled to conclude that the Commissioner's finding of fact No. 92 and conclusion of law No. 23 are unsupported by any material or substantial evidence.

E. Cap on Rate Increase

[16] We next turn to the Commissioner's conclusion that any increase in the total number of insureds in the Facility would increase the overall rate level by more than 6% in contravention of

G.S. 58-124.26. While this finding and conclusion is mathematically correct, it is erroneous as a matter of law. As noted above, the statutes permit insurers to cede any unwanted business to the Facility. Indeed, the previous limitation for cessions to the Facility at 50% without specific approval of the board of governors was repealed by the 1977 Legislature. At present, there is no limit to the number of insureds who may be ceded to the Facility. Consequently, as appellants correctly note, should the Commissioner approve the overall rate level increase of 6% and thereafter *one single* additional insured were ceded to the Facility, everything else being equal, an increase in the overall rate level above the 6% cap imposed by G.S. 58-124.26 would result. Under the Commissioner's conclusion, all rate increases would be impossible to justify since there is no way to ascertain what the total future cessions to the Facility might be and thus whether, at some time in the year, additional cessions to the Facility might push the overall rate level above 6%.

Moreover, if an additional cession to the Facility resulted in an increase in "the general rate level" the same result would follow when other factors not directly related to the ratemaking process cause an increase or decrease in total premium collections. For example, premium variations are established by such factors as the number of SDIP points and territory in which a car is principally garaged. If we adopt the Commissioner's contention here, a general rate increase would occur anytime any insured in the State is convicted of a traffic violation or moved into a territory with a higher risk factor. Such was clearly not the legislative intent.

Construing the applicable statutes *in pari materia* and interpreting each in a way as would give meaning and effect to each provision and thus carry out the legislative intent, *State ex rel. Commissioner of Insurance v. Automobile Rate Bureau Administrative Office, supra*, we believe the Legislature did not intend a result impossible to obtain in practical terms, but instead intended that any overall rate increase should be limited to 6% *given the same book of business* as for the experience period.

The ratemaking process is premised on the underlying assumption that the book of business throughout the period for which rates are to be made will be the same as that which existed during the experience period.

Finally, we note again that the Commissioner's statistical findings, *to the extent stated,* are supported by the evidence. However, the Rate Bureau's exhibits tend to establish that while the statistical data in the filing support and justify an overall 11.8% increase in liability insurance rates for voluntary business, the corresponding data with respect to Facility insureds support and justify an overall 63.4% increase for insureds who have been ceded to the Facility. As explained earlier, the evidence clearly supports the assertion that the differential in rates between the voluntary market and the Facility are actuarially justified, the standard established by statute. Again, it is not our task to substitute our judgment for the Commissioner's where evidence is conflicting. However, under the "whole record" test, which we are bound to apply, we do not merely consider the evidence which in and of itself justifies the Commissioner's conclusion without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn. Applying the whole record test, as explained above, we hold that the evidence to support the Commissioner's findings and conclusions that the 10% rate differential was unfairly discriminatory was insubstantial in view of the entire record.

F. Summary

Before leaving this assignment of error, we deem it appropriate to note that until clear guidelines are established either by the Legislature or by the Commissioner, confusion will continue to abound over the phrase "unfair rate discrimination." The phrase is not defined in our statutes nor, for that matter, in the model laws and is a source of continuing controversy. *See* S. Kimball and H. Denenberg, Insurance, Government and Social Policy 209-242 (1969).

Moreover, those in the profession and the industry are unable to agree when unfair price discrimination exists. As noted earlier in this opinion, for some it connotes constitutional consideration; others consider it in purely economic terms. "A widely accepted economic definition of price discrimination states that unfair price discrimination exists if, allowing for practical limitations, there are price differences that do not correspond to differences in cost or cost differences that are not reflected in price differences." *Kimball and Denenburg, supra* at 210. It has been

othewise stated that "rate equity exists where each insured's net premium is exactly sufficient to defray the expenses of his expected losses (and loss adjustment expenses). Conversely, rate equity is absent where the premium dollar of some insureds must be used for the payment of losses suffered by other insureds in the same risk category. Applicants for insurance must be classified for purposes of premium computations in order that each applicant need carry only the expected cost of his own coverage. Procaccia & Shafton, *Coinsurance Clauses and Rate Equity*, Insurance L.J., February 1978 at 69 (No. 661).

We can understand the reluctance to define such a complex term as "unfair discrimination." However, the vagueness now present will continue, in our opinion, to create severe operational problems for the persons charged with the application of the law. It is obvious that the insurance business, being essentially mutual in character, should provide for all policyholders to be treated fairly with respect to other policyholders. However, the formula for determining what that fairness is should be established by the policymaking body in lieu of reliance on case-by-case adjudications.

It should also be observed that the Commissioner does not contend that the rates charged to those in the Facility are excessive. His order deals only with unfair discrimination. It is apparent, therefore, that the Commissioner's primary concern in this instance is with the composition of the Facility. Our Legislature, however, has determined that the makeup of the Facility should be determined by the insurers with the protective device that the insurers will not be allowed to make a profit on Facility business. The Commissioner's recourse, therefore, is to request the Legislature to set the objective criteria for ceding insureds to the Facility which he desires. Moreover, we note that at the time of this proceeding the Commissioner was already authorized to establish separate subclassifications for clean risk in the Facility. The record discloses that he did not do so.

Finally, we think it worthwhile to note recent legislative action pertaining to the Facility.

The 1979 Legislative Research Commission Report to the General Assembly made several recommendations to the 1979 session. It expressly recommended that there should be a statutory

definition of a "clean risk" subclassification within the Facility, in which subclassification the insureds would pay Facility rates but would not be subject to the Facility surcharge. The Commission stated that it would be unfair for motorists in the "clean risk" classification to subsidize other motorists in the Facility. The Commission also recommended that the Legislature consider the possibility of adding automobile physical damage (collision), theft, and comprehensive insurance coverages to the coverages provided by the Facility.

The 1979 Legislature responded to these recommendations with several changes in Article 25. G.S. 58-248.31 was amended by adding two subsections. These provided essentially that each company will provide the same type of service to ceded business that it provides for its voluntary market. *Id.* 58-248.31(b). The records of agents and brokers shall indicate that the business is ceded. *Id.* When an insurer cedes a policy to the Facility and the premium for that policy is higher than the insurer would normally charge for the policy if retained by the insurer, the policyholder shall be informed (1) that his policy is ceded, (2) that the coverages are written at the Facility rate, which rate differential must be specified, (3) what the reason or reasons are for the cession to the Facility, (4) that the specific reason or reasons for his cession to the Facility will be provided upon the written request of the policyholder to the insurer, and (5) that the policyholder may seek insurance through other insurers who may elect not to cede his policy. *Id.* Upon the written request of a person notified that his policy has been ceded to the Facility, the insurer ceding the policy must provide in writing to the insured the specific reason for the decision to cede. G.S. 58-248.31(c).

The 1979 Legislature also amended G.S. 58-248.33. Subsection (l) of that statute formerly provided that "the Commissioner may establish separate subclassifications within the Facility for clean risk as defined by the Commissioner." That sentence was deleted and the following language inserted in lieu thereof:

> The Board of Governors [of the Reinsurance Facility] shall establish a separate subclassification within the Facility for "clean risks" as herein defined. For the purpose of this Article, a "clean risk" shall be any owner of a motor vehicle classified as a private passenger non-fleet motor vehicle as

> defined under Article 13C of this Chapter if the owner and the principal operator and each licensed operator in the owner's household have two years' driving experience and if neither the owner nor any member of his household nor the principal operator had had any chargeable accident or any conviction for a moving traffic violation pursuant to the subclassification plan established by the provisions of G.S. 58-30.4, during the three-year period immediately preceding the date of application for motor vehicle insurance or the date of preparation for a renewal motor vehicle insurance policy.

That subsection was also significantly amended to provide, "*However, the rates made by or on behalf of the Facility with respect to 'clean risks,' as defined above, shall not exceed the rates charged 'clean risks' who are not reinsured in the Facility.*" (Emphasis added.) Finally, the subsection was amended to provide that the "difference between the actual rate charged and the actuarially sound and self-supporting rates for 'clean risks' reinsured in the Facility may be recouped in similar manner as assessments pursuant to G.S. 58-248.34(f)."

IV.

INCOME ON INVESTED CAPITAL

The Commissioner concluded in his order that the proposed rate increase was "excessive to the extent that *investment income* is not properly taken into account in any of the rate level calculations contained in the filing." (Emphasis added.) He also concluded that "it has long been recognized that investment income is an integral part of the return on any insurance transaction."

Appellants contend that the Commissioner's conclusions were erroneous to the extent that they contemplated a consideration of investment income on *invested capital.*

Appellants correctly note that the 1979 Legislature amended G.S. 58-124.19(2) to require consideration of investment income on *unearned premium* and *loss reserves* in reviewing rate filings. Because investment income on unearned premium and loss reserves *were* included in this filing and because the Legislature

has clarified consideration of these items for the future, we are not concerned here with appellants' investment income on unearned premium and loss reserves. The question before us relates solely to consideration of investment income *on invested capital.*

On this point, the Court of Appeals held:

> [T]his Court has recently decided that investment income may be considered in evaluating the reasonableness of a filing. *State ex rel. Comr. of Ins. v. N.C. Rate Bureau,* 40 N.C. App. 85, 252 S.E. 2d 811 (1979). It is thus proper for the Commissioner to consider investment earnings *on capital invested* by insurers in reviewing the rate making formula.

41 N.C. App. at 318, 255 S.E. 2d at 562-63 (emphasis added).

We first note that the Court of Appeals misconstrued its earlier decision. A careful review of the earlier decision reveals that the question was whether the Commissioner might properly consider profits on investment income from *unearned premium and loss reserves.* The court there made no mention of the propriety of the consideration of income from *invested capital* and thus reliance on that decision was misplaced.

A. Error of Law

[17] We therefore turn to the propriety of the Commissioner's determination that income on invested capital must be considered in a rate increase filing. In addressing this question, we think the applicable statutes of judicial review are G.S. 58-9.6(b)(4) and G.S. 150A-51(4), *i.e.,* whether the Commissioner's findings and conclusions in this respect were "[a]ffected by other error(s) of law."

The statute enumerating the factors to be considered in ratemaking, G.S. 58-124.19, quoted *supra,* referred in 1977 "to a reasonable margin for underwriting profit and to contingencies" and "to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders. . . ." We note that the statute at that time made no mention of a consideration of investment income on either unearned premium and loss reserves or invested capital. We therefore review the pertinent case authority in this jurisdiction.

In *In re N.C. Fire Insurance Rating Bureau, supra,* the question whether investment income on *capital* should be properly

considered in a rate hearing was not correctly before the Court. However, in discussing matters to be determined upon remand to the Commissioner in fixing appropriate premium rates, Justice Lake stated:

> G.S. 58-131.2 imposes upon the Commissioner the duty of fixing such rates as will produce "a fair and reasonable profit" and no more. In the statutory plan for the regulation of insurance premium rates, there is nothing comparable to the procedure prescribed by G.S. 62-133 for the fixing of rates by public utility companies for their services. The statutes conferring authority upon the Commissioner of Insurance, and directing his use of it, do not use the term "fair return on fair value" of the property devoted to the insurance business in North Carolina. Here, the direction is to prescribe rates which will yield a "reasonable profit." [Citation omitted.]

275 N.C. at 38, 165 S.E. 2d at 223.

The question of consideration of income from invested capital was more directly addressed by Chief Justice Bobbitt in *In re North Carolina Automobile Rate Administrative Office*, 278 N.C. 302, 180 S.E. 2d 155 (1971), wherein it was said:

> In the absence of a legislative formula or standards, the Commissioner has had no alternative but to look at the ratemaking procedures recognized in the industry and in other States. The words "pure cost" and "expense loading" as used, without explanation, in G.S. 58-248, facilitated this course. Thus, the Rate Office and the Commissioner adopted the industry view that the reasonableness of a profit to be allowed to a company writing automobile liability insurance was determinable on the basis of a percentage of the gross premium rather than on the basis of a rate of return on invested capital. Underlying this view is the fact that the required capital assets of a casualty insurance company are primarily reserves to guarantee its ability to discharge its liability rather than for use as working capital in the prosecution of its business. Such a company has no significant inventory of assets which are used and useful in the prosecution of its business. The primary function of such a company is to render a service. It is noted that the 5% of premium allowed for underwriting profit and contingencies in computing the

> rates proposed by the 1969 Filing is the same as that used in preceding filings and is the same as that generally approved in the industry.

Id. at 314, 180 S.E. 2d at 164.

In *State ex rel. Commissioner of Insurance v. State ex rel. Attorney General*, 16 N.C. App. 724, 193 S.E. 2d 432 (1972), Judge, now Chief Judge, Morris stated, "The statute . . . clearly requires the Commissioner to determine whether the *rates charged* are adequate to produce a fair and reasonable profit. This, it seems to us, refers to underwriting profit and does not include investment income." *Id.* at 728-29, 193 S.E. 2d at 435 (emphasis in original).

The issue was more pointedly addressed in *State ex rel. Commissioner of Insurance v. State ex rel. Attorney General*, 19 N.C. App. 263, 198 S.E. 2d 575, *cert. denied*, 284 N.C. 252, 200 S.E. 2d 659 (1973). There, it was said:

> This contention [that the Commissioner should have required the presentation of evidence relating to the amount of capital necessary to engage in workers' compensation insurance business] has been rejected in several North Carolina cases. [Citations omitted.] Evidence of this type is commonly used in fixing utility rates. [Citations omitted.] It is much less relevant in determining insurance rates, because as the Court explained in the *Automobile Rate Office case* [278 N.C. 302, 180 S.E. 2d 155], an insurance company "has no significant inventory of assets which are used and useful in the prosecution of its business. The primary function of such a company is to render a service." 278 N.C. at 315, 180 S.E. 2d at 164. Utility companies own large quantities of expensive equipment, which is necessary for them to provide their services. To purchase this equipment, large amounts of capital must be invested; and thus it is possible to determine utility rates by reference to the amount of capital invested in the company and the fair value of its property. Insurance companies, on the other hand, do not require so much costly equipment or so large a capital investment. The importance of the service they provide is not in proportion to the value of their property or the amount of their capital investment. *For this reason the courts have determined that proper profit levels for in-*

surance companies may be more appropriately ascertained by taking a percentage of their premiums than by specifying a certain rate of return on their capital investment.

Id. at 267-68, 198 S.E. 2d at 579 (emphasis added).

These and other decisions establish clearly that it has never been the law in this jurisdiction that income from invested capital is to be considered in an insurance ratemaking case.

B. The Majority Rule

We also find our view consistent with that prevailing in other jurisdictions. In 2 Couch, *Insurance Law* § 21:38 at 494 (Anderson ed. 1959) it is said:

> In determining whether an insurer has made a reasonable profit, the amount of business done rather than its capital should be considered, and profits should be determined by subtracting losses and expenses from the total of premiums actually received, *to the exclusion of profit on capital and surplus*, and excess commissions paid to agents *but considering interest on unearned premiums and related elements.* (Emphases added.)

As long ago as *Aetna Insurance Company v. Hyde*, 315 Mo. 113, 285 S.W. 65 (1926), *cert. dismissed*, 275 U.S. 440, 48 S.Ct. 174, 72 L.Ed. 357 (1928), the court stated:

> The law relating to the public service corporations contains features unlike anything in the rating act for insurance companies. The public service corporations are regulated in a way to insure them a reasonable return on their capital invested after defraying expenses. Often they are monopolies having no substantial competition. Insurance companies always have active competition among each other. The Rating Act was intended to remove the temptation to pool in violation of the anti-trust laws and to prevent ruinous competition. The statute contemplates that the rates shall be fixed with a view of the aggregate earnings and profits for the insurance business in the State. Each company may make as much money as it can. Some may make enormous profits, some may do a losing business, but the average profit, that is, the aggregate profit on the aggregate business, must be

> reasonable. That seems to be sufficient reason for taking the business done and not the capital invested, as a basis for measuring a reasonable profit.

Id. at 128, 285 S.W. at 68-69.

Returning to G.S. 58-124.19(2), we note again that it provides that due consideration shall be given "to a reasonable margin for *underwriting profit* and to contingencies." This precise phraseology has been interpreted by several courts. Illustrative is *Pennsylvania Insurance Department v. Philadelphia*, 196 Pa. Super. 221, 173 A. 2d 811 (1961). There, the court stated:

> The accepted meaning of "underwriting profit" is stated in *Bullion v. Aetna Insurance Company*, supra, 151 Ark. 519, 237 S.W. 716, 718 (1922), as follows: "We think the undisputed evidence shows that the term 'underwriting profit' has long had a definite, certain, and well-known meaning in insurance circles. A number of witnesses of highest authority in the insurance business testified that the term was understood alike by all insurance men, and that the word 'underwriting' refers to operations of the companies in accepting and carrying risks on the writing of insurance, and refers to that branch of the insurance business in contradistinction to the investment or banking end of the business, and that underwriting profit or loss is arrived at by deducting from earned premiums all incurred losses and incurred expenses.

Id. at 250, 173 A. 2d at 825. *Accord: Application of Insurance Rating Board*, 55 N.J. 19, 258 A. 2d 892 (1969).

C. Statutory Authority

As explained in subsections A. and B. above, we think the Commissioner, in finding and concluding that income on invested capital should be considered as a factor in insurance ratemaking, misconstrued the law in this jurisdiction and the prevailing law in other jurisdictions. Accordingly, the Commissioner's findings and conclusions in this respect were "affected by other error(s) of law" as contemplated by G.S. 58-9.6(b)(4) and G.S. 150A-51(4) and those portions of his order must be vacated and set aside.

D. Summary

Our review of the cases and other authority cited above leads us to conclude that the issue presented here has historically resulted from confusion over the difference in income from unearned premiums and loss reserve funds and in income from invested capital. The industry's position has been and is that the insurance business is divided into two separate and distinct branches, (1) the underwriting business and (2) the investment business. The industry argues that in establishing an appropriate rate for policyholders, only income from investments in the underwriting portion of the business should be considered. It argues that it is required to segregate certain of its assets in order to show its ability to pay claims from its policyholders and that it would be foreign to the arrangement to expect the corporate investors to donate the income from their investments. In other words, income from assets in excess of the assets required to conduct its underwriting business should not be pertinent in a ratemaking case.

The opposing view is that the business of insurance should be regarded as a whole. So far as the real owners of the business, the stockholders, are concerned, all income arising from the business, and all expenses and loss incident thereto, should be considered, and must of necessity be considered in determining whether or not there has been a profit, and the extent and amount thereof. *Aetna Insurance Company v. Travis*, 124 Kan. 350, 259 P. 1068 (1927), *cert. denied*, 276 U.S. 628 (1928).

North Carolina clearly appears to distinguish between the different categories of insurance company income. As stated earlier, prior decisions in this State have sustained the view that investment income from unearned premiums and loss reserve funds are appropriately considered in a ratemaking hearing. Indeed, the 1979 Legislature amended G.S. 58-124.19(2) to make this abundantly clear. Neither prior cases nor statutes, however, have permitted consideration of invested income from investment capital.

Other sections of Chapter 58 further argue against considering income on investment capital. G.S. 58-35 provides that companies "shall maintain unearned premium reserves equal to the

unearned portions of the gross premiums charged on unexpired or unterminated risks and policies. . . ." It provides other details in this respect and authorizes the Commissioner to calculate a company's unearned premium reserves "upon the monthly pro rata fractional basis, or, if necessary, on each respective risk from the date of the issuance of the policy" if he is unsatisfied with the company's conformance with the statutory formula. G.S. 58-35.2 provides that "[i]n determining the financial condition of any casualty insurance or surety company . . . there shall be included in the liabilites of such company *loss reserves and loss expense reserves* at least equal to the amounts required under . . . this section." (Emphasis added.) That section also sets out an elaborate scheme for loss reserve requirements. Among these is the requirement that "[f]or all such liability policies written during the three years immediately preceding the date of determination, such reserves shall be the sum of the reserves for each such year, which shall be *60% of the earned premiums* on liability policies written during such year." G.S. 58-35.2(c)(2). (Emphasis added.)

G.S. 58-79.1 deals with investment requirements for fire, casualty, and miscellaneous lines. Subsection (a) requires certain types of investments on "minimum capital investment." Subsection (b) addresses "reserve investments required." It provides that after satisfying requirements for minimum capital investments, companies may invest funds as specified in subsection (c) of the statute "unless it shall at all times have and maintain cash and such reserve investments (including its minimum capital investments), . . . which, when valued, . . . shall be at least equal in amount to fifty per centum (50%) of the aggregate amount of its unearned premium and loss reserves as shown by its last sworn statement. . . ." Subsection (d), entitled "Residue and Surplus Fund Investment," then provides that after satisfying minimum capital investments and reserve investments required in subsection (b), a company may invest its residue and surplus fund investments except *as prohibited* by the various divisions of that subsection.

We believe this statutory scheme indicates that our Legislature has differentiated between the income earned on capital and income earned on loss reserves and premium reserves of insurance companies operating in North Carolina. The strict requirements pertaining to unearned premium reserves and loss

reserves indicate an appropriate legislative concern with insuring that policyholders will be paid when claims are filed. Beyond insuring that minimum level of capitalization, the Legislature has been unconcerned with income on capital investments. In construing the statute otherwise, the Commissioner erred.

V.

UNDERWRITING PROFIT

The next question presented is one argued by the Commissioner in his brief. Unfortunately he failed to give any notice of appeal from the Court of Appeals' determination adverse to his position, and appellants have consequently filed a motion to this Court to strike that portion of the Commissioner's brief. In view of the importance of the question presented for future ratemaking hearings, however, we elect to address the question on its merits, depsite the procedural irregularity.

Among the factors to which "due consideration" is to be given in determining a proper insurance rate is "a reasonable margin for underwriting profit and . . . contingencies." G.S. 58-124.19(2). In his order, the Commissioner in essence rejected the traditional five percent of gross premium allowed for underwriting profit and contingencies. In lieu thereof, the Commissioner adopted a complicated, lengthy and novel formula for determining underwriting profit allowance. Among his conclusions were the following:

> 18. That the determination of underwriting profit margins should be calculated in accord with contemporary concepts of risk and return as understood in financial theory, specifically the capital asset pricing model as testified to by expert witness Dr. William Bishop Fairley and detailed in the attached appendix[,] the use of which theory and methodology in automobile insurance ratemaking has been upheld by the Supreme Judicial Court of Massachusetts.
>
> 19. That, to determine the level of underwriting profit allowance which, if earned along with minimum reasonable investment results, would produce for the average carrier a rate of return on capital expressed, as a percentage of premium volume, equal to that achieved by a typical business

of similar risk characteristics[.] [F]ive sequential steps are involved: . . . .

Following the above, the Commissioner's order sets out the detailed "five sequential steps," comprising three pages of the record. We think the Court of Appeals correctly and succinctly presented the issue. Judge Arnold wrote:

> William Fairley qualified as an expert in economics and statistics, and testified as to the proper method of calculating appropriate rates of return in the insurance industry. His theory, in essence, requires that a "target rate of return" to the insurance companies be established. This is done by considering the "systematic risk" in the industry, that is, the degree to which the variability in return on an investment in that industry moves with the stock market, and adding the necessary "reward" to encourage investors to hold those securities. (For example, a stock that went down twenty percent when the market went down ten would have a high systematic risk and would require a higher reward.) This target rate of return is then used to calculate the appropriate underwriting profit as follows:
>
> $$\text{Target Return} = \text{Underwriting Profit} + \text{Investment Return on Cash Flow} + \text{Investment Return on Capital}$$
>
> or
>
> $$\text{Underwriting} = \text{Target Return} - \text{Investment Return on Cash Flow} - \text{Investment Return on Capital}$$
>
> The Commissioner ordered that this "capital asset pricing model" be used to calculate underwriting profit margins.

41 N.C. App. at 318, 255 S.E. 2d at 562.

We first observe that we do not reject the Commissioner's formula because it is either complicated, lengthy, or novel. As explained fully in Section II. of this opinion, we do not interpret prevailing law to require that administrative agencies be unimaginative in the discharge of their duties. Indeed, within the general guidelines of the statutes, administrative agencies are to work out the details in order to effectuate the general policy set forth by the applicable statutes. The expertise of the administrative agency is absolutely essential in dealing with

technical and complicated matters such as that presented by this issue. However, for the reasons stated below, we agree with the Court of Appeals' conclusion that this portion of the Commissioner's order must be reversed.

A. Error of Law

We first address the question whether this portion of the Commissioner's order was "affected by other error(s) of law" as contemplated by G.S. 58-9.6(b)(4) and G.S. 150A-51(4). We find this portion of the Commissioner's order erroneous as a matter of law for the two reasons stated below.

[18] First, our holding in Section IV. of this opinion, above, forecloses use of the "capital asset pricing model." The capital asset pricing formula, as noted in the Court of Appeals' summary set out above, clearly contemplates consideration of income on invested capital. We held in Section III., above, that consideration of income from invested capital is not presently allowed by North Carolina law. Obviously, striking such an integral part of the formula causes it to fall in its entirety.

Secondly, the Commissioner's requirement for the use of a hypothetical "risk free" rate of return would clearly violate the intent of our Legislature in authorizing insurance companies operating in North Carolina to invest in certain securities. G.S. 58-79.1 specifically requires casualty insurance companies to invest reserve funds in one or more of ten different categories of investments. Included are government bonds, municipal bonds, corporate bonds, preferred bonds, bankers' acceptances, first mortgage bonds, ground rents and certain stocks and real estate.

We are not inadvertent to that portion of Dr. Fairley's testimony in which he made it clear that, under the proposed formula, companies would not be required to actually invest in risk free U.S. treasury securities. Clearly, the proposed formula only contemplates that the rate of return would be computed on the hypothetical assumption that the companies did so invest their funds. In other words, implementation of the proposed formula would not preclude companies from investing pursuant to G.S. 58-79.1. It is, however, our function to interpret the legislative intent. It is inconceivable to us that our Legislature intended that insurance companies invest their funds in certain designated

securities and then require that those companies' underwriting profits shall be computed on the hypothetical assumption that they were invested in something else. Such an interpretation would, as appellants suggest, "make a mockery of the statute."

B. Arbitrary and Capricious Actions

[19] There is yet another reason this portion of the Commissioner's order must be set aside. We think it arbitrary and capricious as contemplated by G.S. 58-9.6(6) and G.S. 150A-51(6).

It is apparent from a review of the record and the Commissioner's order that he based his new formula solely on the basis of the testimony of Dr. William B. Fairley, an employee of the Division of Insurance, State Rating Bureau of Massachusetts, and a decision of the Supreme Judicial Court of Massachusetts which generally affirmed this approach to determining underwriting profit. We, of course, are not bound by a decision of our counterparts in a sister state. Moreover, after reviewing the Massachusetts decision and Dr. Fairley's testimony, we find that the Commissioner has simply copied a complicated equation of an experiment in another state without proceeding with the careful and deliberate manner that had been employed in that state. Hence, we are compelled to conclude that the Commissioner's actions were arbitrary and capricious.

A review of *Attorney General v. Commissioner of Insurance*, 370 Mass. 791, 353 N.E. 2d 745 (1976), reveals that the court did indeed give general approval to the complicated formula adopted by the Commissioner in his order in this proceeding. There, however, we find these significant distinguishing factors: First, the court expressly stated that none of the parties in that hearing challenged the Commissioner's general method of setting the profit allowance but that the figures used in applying the method provoked disagreement. In a footnote, the court stated:

> The Bureau is careful in its brief to limit its acceptance of the Commissioner's procedure. It claims that its acquiescence in the new procedure was the result of a "pragmatic" decision to allow a "full discussion of the method." The Bureau does not attempt to defend the traditional method nor does it propose any alternative.

370 Mass. 816 at note 29, 353 N.E. 2d 762 at note 29.

Also, the Massachusetts court had several criticisms of its commissioner's reasoning. For example, it stated, "[T]he Commissioner's approach seems suspect because it fails to confront and to consider all the elements of risk of an investment in such an insurer." *Id.* at 817, 353 N.E. 2d at 762. The court went on to note, however, that it would not require a remand because "we feel [the] testimony [of expert witnesses], in its cumulative effect, provides adequate support for the Commissioner's figure." *Id.* at 819-20, 353 N.E. 2d at 764. Unlike the situation before us, three experts testified before the Massachusetts Commissioner.

Indeed, we take particular note of that court's cautious approval of its commissioner's action. The court stated,

> [T]he judgmental estimate of the Commissioner of the proper adjustment is of the type that can be expected on the initial application of a novel methodology. Crude estimation could not be tolerated in normal circumstances, and we observe that the Commissioner called on future participants in the hearing process to present "more formal data and analysis."

Id. at 821, 353 N.E. 2d at 764 (footnotes omitted).

In other words, while the Massachusetts court approved its commissioner's adoption of the formula ordered by the Commissioner in this case, it expressly made clear that it was willing to do so only because its commissioner had satisfied the court that he would continue to refine the application of the "novel methodology." In contrast, the Commissioner here has blindly adopted a novel approach with no such assurance.

That the Commissioner of Insurance of Massachusetts did not arbitrarily and capriciously attempt to inject this novel methodology into the ratemaking process in that state is made even clearer by reviewing the testimony of the witness Fairley. This witness's testimony establishes clearly that the Massachusetts commissioner gave notice in an earlier decision that he was suggesting a new approach to rate-of-return regulation to take into account investment income and risk-free investments. All parties therefore had an opportunity to study and respond to it. Moreover, this witness was employed for the very purpose of helping to develop the novel approach. He testified with respect to the decision of the Massachusetts court discussed above:

> Towards the end of their decision they noted that there were a number of unanswered questions and it was a novel procedure and that somewhat more refinement would be expected in its application in future years than in the beginning, but they accepted it and his numbers for that year. Well, now I came to work in the department just at that time and I began to work immediately on this issue in order to respond to the court's suggestion that additional research was necessary.

The witness also testified that several economic experts had testified that the formula was "on the right track" but that they disagreed with certain aspects of it. Hence, work continues towards refining the formula in Massachusetts. Moreover, while testifying that, in his opinion, following the traditional approach in determining underwriting profit would probably result in excessive insurance rates in most states, Fairley stated, "Now I'm not—I have not made a study of North Carolina experience. I certainly cannot testify that the profit allowance, traditional allowance here in North Carolina is making rates excessive in this State."

Other portions of this witness's testimony are equally as revealing with respect to the non-refinement of the proposed method. The point is simply that the Commissioner of Insurance of North Carolina did nothing more, in adopting a complicated and novel formula for determining underwriting profit, than listen to one employee of an insurance department in a sister state which is refining the policy adopted and which was given only limited approval by the Supreme Court of Massachusetts. We think such an approach a clear example of an arbitrary and capricious action by an administrative agency as contemplated by our Legislature in establishing that criterion for judicial review.

VI.

BURDEN OF PROOF

[20] Appellants next contend that the Court of Appeals erred in holding that there is no burden of proof on the Commissioner, in a proceeding of this nature, to disapprove a filing.

Appellants correctly note that prior to the 1977 changes in Chapter 58 of our General Statutes, *prior approval* by the Com-

missioner of Insurance was a condition precedent to any increase or decrease in insurance rates. Following the 1977 rewrite, the "prior approval" system was abandoned and a "file and use" system became effective. By this is simply meant that the Rate Bureau files proposed rate changes with the Commissioner of Insurance for coverages within the Bureau's jurisdiction and those rates automatically go into effect unless they are disapproved by the Commissioner in accordance with specific statutory rules and procedures. G.S. 58-124.20(a); G.S. 58-124.21. Appellants argue that file and use rates are set by the Bureau and, nothing else appearing, are fully effective. If the Commissioner desires to challenge a rate, the burden is on him to take affirmative action. It necessarily follows, appellants contend, that when the Rate Bureau has made out a *prima facie* case, as here, the burden of proof shifts to the Commissioner to show by a preponderance of the evidence that the proposed rates are either excessive or unfairly discriminatory.

We think the Court of Appeals correctly rejected appellants' contention. While the 1977 changes in our insurance laws were substantial, we discern not the slightest intent on the part of our Legislature to shift the burden of proof in insurance ratemaking hearings. We do not think our Legislature would have been silent had it intended such a radical change from past procedure. We also note that the original version of Chapter 828 of the 1977 Session Laws did contain a provision (Section 3[e]) which would have clearly placed the burden of proof on the Commissioner. This portion of the proposed legislation was deleted prior to final passage of our present statutes.

We are not inadvertent to our language in *In re Rogers*, *supra*, that "such a procedure [not requiring the burden of proof to shift to the administrative agency] would be in conflict with our usual civil practice on assignment of burden of proof. As a general rule in this jurisdiction, the party who substantially asserts the affirmative of an issue bears the burden of proof on it." 297 N.C. at 59, 253 S.E. 2d at 919. While the general language in *Rogers* is supportive of appellants' position here, we must agree with the Commissioner that had the Legislature intended such a drastic change in procedure, it would have said so. Under our present insurance laws, it is the clear intent of the Legislature that the proponent of a rate increase, the Rate

Bureau, is to shoulder the burden of showing the reasonableness of the proposed increase. While the statutes place other burdens on the Commissioner, such as making findings of fact and conclusions of law, they leave no room for any other construction but that the underlying burden of proving the need and reasonableness of a rate increase rests upon the Rate Bureau.

We affirm the Court of Appeals' holding that "[t]here is no burden upon the Commissioner to disprove the filing."

VII.

SPECIFICITY OF COMMISSIONER'S ORDER

Appellants next contend that the Court of Appeals erred in holding that the Commissioner complied with that portion of G.S. 58-124.21(a) which requires that "[i]f the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order *determining wherein and to what extent such filing is deemed to be improper. . . .*" (Emphasis added.) In so holding, the Court of Appeals simply noted that the Commissioner in his order had set out 99 findings of fact and 32 conclusions of law and that such were sufficient compliance with the statute.

Appellants argue that one of the purposes of G.S. 58-124.21 was to require the Commissioner's order to show exactly how much a filing is affected by a proposed deficiency in order to allow for effective judicial review and to reduce the long-standing necessity for constant remand to the Commissioner. Appellants correctly note that the sheer number of purported findings and conclusions in a Commissioner's order should not be determinative of the question whether the order complied with the statutory requirement.

Appellants also note that their evidence clearly supported a 23.2% increase, that only a 6% increase was allowed by statute and that an error or errors totaling in excess of $30 million in overall loss experience would have to have been made in the filing in order to justify the Commissioner's rejection. Hence, appellants contend, the Commissioner has shown no justification for rejecting any of the proposed increases.

[21] It is obvious, as indicated by the extensive discussion in the first sections of this opinion, that the Commissioner rejected this

proposed rate increase primarily on the basis of his finding that the data presented by the Rate Bureau was unreliable. Though we have held this basis of the Commissioner's order to be improper, based on the record before us, we think the Commissioner's order would be in compliance with G.S. 58-124.21 had the conclusion been justified that the data was indeed unreliable and had none of the other errors discussed in the preceding sections been committed. Hence, we find no merit in this assignment of error. However, appellants' point is well taken that the present statute requires the Commissioner to be mathematically specific in rejecting proposed rate increases and future orders should specify "wherein and to what extent" the proposed filings are deemed improper.

VIII.

ADEQUACY OF NOTICE

[22] Appellants next contend that the Commissioner failed to comply with that portion of G.S. 58-124.21(a) which provides: "At any time within 30 days from and after the date of any filing, the Commissioner may give written notice to the Bureau *specifying in what respect and to what extent* he contends such filing fails to comply with the requirements of this Article. . . ." (Emphasis added.) The Court of Appeals held that the Commissioner did comply with this portion of the statute.

The Court of Appeals based its holding on a finding that the filing did not indicate whether the data had been audited and that it could not assume that which is not supported by the record. Finding that the filing nowhere stated that the data was unaudited, the Court of Appeals held that the Commissioner complied with this portion of G.S. 58-124.21(a). The inference is that the Commissioner was surprised at the hearing to find the data was unaudited. He therefore had no opportunity to notify appellants of this deficit.

With this reasoning of the Court of Appeals, we disagree. It is perfectly clear from the record that the Commissioner knew the data was not audited. The filing made clear the extent to which the data was verified and that the verification methodology was consistent with that employed in previous years. The record is equally clear that previous filings had not required audited

data. Since the Commissioner knew the data was not audited and his subsequent rejection of the filing was based primarily on that ground, both fundamental fairness and the quoted portion of G.S. 58-124.21(a) mandated that he give notice of his dissatisfaction with the quality of the data in his notice of hearing. For this reason alone, and absent any other assignment of error, we would be bound to vacate and set aside the Commissioner's order.

We wish to emphasize the narrow holding in this portion of our opinion. The Commissioner correctly notes that it was clearly not the intent of the Legislature to prevent the Commissioner from disapproving a filing if matters coming to his attention during the course of a hearing would compel such disapproval. Obviously, matters relating to credibility or other factors might arise during the course of a hearing for which the Commissioner could not have provided notice prior to the hearing. What we hold here, and all that we hold here, is that when the Commissioner knows prior to the giving of public notice "in what respect and to what extent he contends such filing fails to comply with the requirements of [the] Article," then he must give the specifics in his notice of public hearing. Here, the Commissioner clearly failed to do this with respect to the reliability of the data.

IX.

BAD FAITH OF APPELLANTS

Appellants finally contend that the Commissioner improperly included in his order findings and conclusions that they were guilty of bad faith because of dilatory action with regard to the filing in several instances.

We do not find it necessary to enumerate the various data which the Commissioner found was not supplied by appellants. It involves such matters as an alleged failure by appellants to break down incurred losses into paid losses, cash reserves, and IBNR (incurred but not reported losses) and a failure to produce claim loss and frequency trend factors. Suffice it to say that we have carefully examined the record and believe that much of the data referred to by the Commissioner was difficult, if not impossible, to obtain in the short period of time between the notice of public hearing and the convening of the hearing. Moreover, in a number of instances, the Commissioner failed to inform the Bureau that it

had not complied with his order to produce data to his satisfaction until the time of hearing.

We find no evidence of bad faith on the part of appellants and those findings and conclusions of the Commissioner's order referring to bad faith on the part of appellants are vacated and set aside.

X.

OTHER HOLDINGS OF COURT OF APPEALS

To assist in understanding the result of our review of the Court of Appeals' holdings, we here note the remaining portions of the Court of Appeals' decision not argued by the parties on this appeal:

(1) The Bureau in its filing proposed that future premium rates vary within a range of plus or minus 5% according to the "territory" or geographical area of the State in which an insured is located. The Commissioner found that the projections of territorial rate differences did not take into consideration the new statutory classification plan and did not reflect reasonably anticipated territorial loss experience. He concluded that this made the proposed rate changes excessive and unfairly discriminatory. He also entered other findings and conclusions with respect to territorial rate differences. The Court of Appeals held that the evidence did not support the Commissioner's findings and conclusions and these portions of his order were set aside.

(2) The Commissioner's order included findings concerning collision insurance deductibles and a conclusion that the rate proposed for $25.00 deductible collision insurance was excessive in relation to the coverage provided. Again, the Court of Appeals found no evidence in the record to support the conclusion and those portions of the Commissioner's order were set aside.

(3) In his order disapproving the filing, the Commissioner further ordered that the Bureau be allowed 60 days within which to file an amended filing consistent with his findings and conclusions. The Court of Appeals held that, since the Bureau excepted to and appealed from the Commissioner's order, the appeal removed the matter from the Commissioner to that court and that part of the Commissioner's order therefore became a nullity.

With respect to these three holdings, we do not disturb the Court of Appeals' decision. None of the parties have raised these points on appeal to this Court.

XI.

FINAL DISPOSITION

In accordance with our discussion above of the various portions of the Court of Appeals' opinion, the decision of that court is

Affirmed in part and reversed in part.

G.S. 58-9.6(b) provides that we may "affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced. . . ." G.S. 150A-51 provides that we "may affirm the decision of the agency or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced." In cases involving narrow and specific error in the Commissioner's order such as the Commissioner exceeding his authority or failing to set forth specific findings of fact, we would ordinarily remand the case to the Commissioner for further proceedings. *Commissioner of Insurance v. Automobile Rate Administrative Office*, 292 N.C. 1, 231 S.E. 2d 867 (1977); *Commissioner of Insurance v. Automobile Rate Administrative Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975). Here, however, it is apparent that the multiple errors committed by the Commissioner in the proceedings and order before us are of such magnitude as to make remand futile. The order of the Commissioner dated 27 February 1978 is therefore

Reversed and declared null and void.

The former version of G.S. 58-124.22(b), under which this proceeding is governed, provided in pertinent part that:

> Whenever a Bureau rate is held to be unfairly discriminatory or excessive and no longer effective by order of the Commissioner issued under G.S. 58-124.21, the members of

the Bureau shall have the option to continue to use such rate for the interim period, pending judicial review of such order, provided each such member shall place in escrow account the purportedly unfairly discriminatory or excessive portion of the premium collected during such interim period and the court, upon a final determination, *shall order the escrow funds to be distributed appropriately* . . . . (Emphasis added.)

Accordingly, all escrowed premium funds representing this proposed rate increase shall be remitted to the member insurers forthwith.

It is so ordered.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, NORTH CAROLINA REINSURANCE FACILITY, NATIONWIDE MUTUAL INSURANCE COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, THE AETNA CASUALTY AND SURETY COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, GREAT AMERICAN INSURANCE COMPANY, THE TRAVELERS INDEMNITY COMPANY, UNITED STATES FIRE INSURANCE COMPANY, THE SHELBY MUTUAL INSURANCE COMPANY, AMERICAN MOTORIST INSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE COMPANY v. CAROLINA ACTION, INTERVENOR

IN THE MATTER OF A FILING DATED JUNE 30, 1978, AS AMENDED, BY THE NORTH CAROLINA RATE BUREAU FOR REVISED PRIVATE PASSENGER MOTOR VEHICLE INSURANCE RATES, DOCKET NO. 280

No. 86

(Filed 15 July 1980)

1. **Insurance § 79.2— automobile insurance rate hearing—requirement of audited data—failure to follow lawful procedures—arbitrary and capricious actions**

While a requirement by the Commissioner of Insurance that data in an insurance ratemaking hearing be audited does not, as a general rule, exceed the Commissioner's statutory authority, the Commissioner failed to comply with lawful procedures in attempting to implement the auditing requirement in this hearing, and his actions in this respect were arbitrary and capricious.

2. Insurance § 79.3— automobile insurance—differential for rates ceded to Reinsurance Facility—no unfair discrimination

A determination by the Commissioner of Insurance that a 10% rate differential in automobile insurance for insureds ceded to the N.C. Reinsurance Facility was unfairly discriminatory was not supported by substantial evidence in view of the entire record.

3. Insurance § 79.1— rate case—burden of proof

The enactment of G.S. 58-124.21 did not transfer the burden of proof in a ratemaking hearing to the Commissioner of Insurance, and the burden of proving the need and reasonableness of a rate increase still rests upon the Rate Bureau.

4. Insurance § 79.2— automobile insurance rates—income from invested capital

The Commissioner of Insurance erred as a matter of law in concluding that the law of this jurisdiction allowed consideration of income from invested capital in an insurance ratemaking case.

5. Insurance § 79.3— automobile insurance rates—disapproval of filing—findings indicating wherein filing is deemed improper

The Commissioner of Insurance did not fail to comply with the requirement of G.S. 58-124.21(a) that in his order disapproving a rate filing he indicate "wherein and to what extent such filing is deemed improper."

6. Insurance § 79.3— automobile insurance rates—increase in cessions to Reinsurance Facility—no violation of cap on rate increase

The Commissioner of Insurance erred in concluding that the Rate Bureau had failed to carry its burden of proving that the increase in the percentage of cessions to the Reinsurance Facility during the latest reported accident year and the latest rate increase had not resulted in a rate level which violated the statutory "cap" established by G.S. 58-124.26.

7. Insurance § 79.1— automobile insurance rates—incomplete data in original filing—no deprivation of Commissioner's statutory review period

The Commissioner of Insurance erred in concluding that the Rate Bureau's submission of an automobile insurance rate filing contained incomplete North Carolina data which unfairly deprived the Commissioner of a portion of his statutory period of review where the original filing on 30 June was accompanied by a letter stating that essential data requested with respect to liability insurance was totally complete but only 98% complete with respect to physical damage; when complete expense data was received, minor adjustments were made to certain expense ratios and amended filing sheets were filed on 21 August; the adjustments were of no consequence in the hearing process since the overall rate increase actuarially indicated amounted to 15.7% in the original filing and 15.5% on the basis of the final data submitted and the proposed increase was only 5.6%; the Commissioner did not question the expense data in any way other than his challenge to its reliability on the ground it had not been audited; and the Commissioner made no reference to supplementing the incomplete data in his notice of public hearing.

8. **Insurance § 79.1— automobile insurance rate filing—no bad faith or dilatory action**

The Commissioner of Insurance erred in determining that appellants were guilty of bad faith and dilatory action with regard to an automobile insurance rate filing.

9. **Insurance § 79.1— automobile insurance rate case—intervention by consumer group—hearings throughout State**

The Commissioner of Insurance acted within his discretion in permitting a consumer group to intervene in an automobile insurance rate case and in allowing hearings to be held throughout the State.

10. **Insurance § 79.3— automobile insurance rates—underwriting profit—business ceded to Reinsurance Facility**

A finding by the Commissioner of Insurance that a Rate Bureau filing proposed a margin for underwriting profit and contingencies of 5% of earned premium must be set aside to the extent that it finds that a profit margin is proposed on business ceded to the Reinsurance Facility.

11. **Insurance § 79.3— automobile insurance rate hearing—admissibility of various documents**

The Commissioner of Insurance erred in refusing to admit into evidence in an automobile insurance rate hearing the original rate filing, amended pages of the filing showing revised expense data, a composite of the original filing with the amended pages, a document showing physical damage expense data on a countrywide basis for a five-year period, and charts comparing loss experience of Reinsurance Facility risks and voluntary risks.

12. **Insurance § 79.2— automobile insurance rate filing not in accordance with earlier order on appeal—no bad faith**

The Commissioner of Insurance erred in finding that the Rate Bureau acted "deliberately" and "in bad faith" in not preparing an automobile insurance rate filing in accordance with the requirements of an earlier order where the earlier order was on appeal to the Court of Appeals at the time such filing was made, since no order of the Commissioner is enforceable pending appeal. G.S. 58-9.5(10).

13. **Insurance § 79.2— automobile insurance rates—underwriting profit margin—capital asset pricing model**

Use by the Commissioner of Insurance of a "capital asset pricing model" to calculate underwriting profit margins was erroneous as a matter of law and arbitrary and capricious.

14. **Insurance § 79.3— automobile insurance—territorial rate differentials**

The Commissioner of Insurance erred in finding that territorial rate differentials for automobile insurance violated former G.S. 58-30.4.

Justice BROCK took no part in the consideration or decision of this case.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 41 N.C. App. 327, 255 S.E.

2d 567 (1979), one judge dissenting, affirming in part and reversing in part the order of the North Carolina Commissioner of Insurance dated 27 September 1978 which had ordered that the 30 June 1978 filing by the North Carolina Rate Bureau and the North Carolina Reinsurance Facility be disapproved. The filing involved proposed revised premium rates for bodily injury and property damage liability, medical payments, and physical damage insurance for non-fleet private passenger automobiles.

The issues on this appeal all involve the propriety of the proceedings before the Commissioner and his order of 27 September 1978. This case was docketed and argued as No. 74 at the Fall Term, 1979.

Attorney General Rufus L. Edmisten by Assistant Attorney General Isham B. Hudson, Jr., and Hunter, Wharton & Howell by John V. Hunter III for the plaintiff-appellee.

Young, Moore, Henderson & Alvis by Charles H. Young, R. Michael Strickland and Charles H. Young, Jr., for appellants.

Bailey, Dixon, Wooten, McDonald & Fountain by J. Ruffin Bailey, John N. Fountain and Gary S. Parsons, for American Insurance Association, amicus curiae.

Maupin, Taylor & Ellis, P.A., by Armistead J. Maupin and John Turner Williamson, for Insurance Services Office, amicus curiae.

Broughton, Wilkins, Ross & Crampton, P.A., by J. Melville Broughton, Jr. and Charles P. Wilkins for National Association of Independent Insurers, amicus curiae.

CARLTON, Justice.

I.

On 30 June 1978 the North Carolina Rate Bureau, on behalf of its member companies and the North Carolina Reinsurance Facility, filed with the Commissioner of Insurance a proposed revised premium rate schedule for automobile insurance, including bodily injury and property damage liability, medical payments and physical damage insurance for non-fleet private passenger automobiles. The filing stated that calculations substantiated the need for a statewide average increase of 15.7% over

rates then in effect. The filing noted that rates effective at that time had become effective on 1 April 1978 as a result of a filing submitted 29 November 1977 proposing an overall level increase of 6%. We note that pursuant to G.S. 58-124.22(b) the latter had been implemented over the Commissioner's disapproval while his order was on appeal to this Court. We have reversed the Commissioner's disapproval of the 29 November 1977 filing in Case No. 85 filed today. Pursuant to G.S. 58-124.26, the proposed increase *sub judice* was limited to 5.6%. The filing specifically noted that data requested with respect to liability insurance was totally complete but only 98% complete with respect to physical damage insurance. The filing noted that complete data would be available by the time of the hearing. On 21 August 1978, the Rate Bureau submitted another letter to the Commissioner indicating that the completed data indicated the need for a statewide average increase of 15.5% over rates presently in effect. This letter noted that the proposed rate level changes shown in the earlier filing were not affected by the amended calculations. The filing of 30 June 1978 also noted that supporting data justified territorial rate differences within the State according to newly available loss experience within each territory. Territorial rate differences would be limited to plus or minus 5%.

The Commissioner gave notice of public hearing, contending that the filing failed to comply with statutory requirements in a number of respects. The notice also advised that the filing "incorporates and perpetuates" several alleged errors which were contained in various portions of the 1977 filing the Commissioner had rejected in his disapproval order of 27 February 1978. After the hearing, the Commissioner made extensive findings of fact and conclusions of law and disapproved the filing in its entirety. In his disapproval order he also allowed the Bureau 60 days to submit an amended filing consistent with his findings and conclusions and ordered that the Bureau by its amended filings submit the exact data and information he had requested in the notice of public hearing. From the Commissioner's disapproval order, the Rate Bureau appealed to the North Carolina Court of Appeals. That court, Judge Arnold writing, affirmed in part and reversed in part. Judge Arnold simply stated, "Our determination of this appeal is controlled by our decision in *State ex rel. Comr. of Ins. v. N.C. Rate Bureau* (No. 78101NS625, filed 5 June 1979), heard to-

day." 41 N.C. App. at 327, 255 S.E. 2d at 567. On appeal of that earlier case dealing with the 1977 filing, No. 85 filed today, we affirmed in part and reversed in part the Court of Appeals' decision and reversed the Commissioner's order, declared it null and void and ordered the 1977 filing approved. Moreover, we ordered that the escrowed funds representing this proposed rate increase be remitted to the member insurers pursuant to G.S. 58-124.22(b). We hold likewise with respect to this 1978 filing.

Other facts important to an understanding of our decision are noted below.

II.

[1] The Court of Appeals held that the Commissioner may require that data in this insurance ratemaking hearing be audited. We reverse. We hold that such a requirement does not, as a general rule, exceed the Commissioner's statutory authority. We also hold, however, that the Commissioner failed to comply with lawful procedures in attempting to implement the auditing requirement in this hearing and that his actions in this respect were arbitrary and capricious. This portion of our holding is controlled by Section II. of our opinion in Case No. 85 filed today.

III.

[2] The Court of Appeals held that the proposed 10% rate differential for insureds ceded to the North Carolina Reinsurance Facility was unfairly discriminatory. We reverse. Applying the whole record test, we hold that the evidence to support the Commissioner's findings and conclusions of unfair discrimination was insubstantial in view of the entire record. This portion of our holding is controlled by Section III. of our opinion in Case No. 85 filed today.

IV.

[3] The Court of Appeals held that the enactment of G.S. 58-124.21 did not transfer the burden of proof in a ratemaking hearing to the Commissioner of Insurance. We affirm. We hold that the burden of proving the need and reasonableness of a rate increase rests upon the Rate Bureau and that there is no burden upon the Commissioner to disapprove the filing. This portion of our holding is controlled by Section VI. of our opinion in Case No. 85 filed today.

V.

[4] The Court of Appeals held that the Commissioner may require the consideration of income on invested capital in an insurance ratemaking case. We reverse. We hold that the Commissioner erred as a matter of law in concluding that the law of this jurisdiction allowed consideration of income from invested capital in an insurance ratemaking case. This portion of our holding is controlled by Section IV. of our opinion in Case No. 85 filed today.

VI.

[5] The Court of Appeals held that the Commissioner did not fail to comply with the statutory requirement that in his order disapproving a filing he indicate "wherein and to what extent such filing is deemed to be improper." G.S. 58-124.21(a). We affirm albeit for different reasons from those noted by the Court of Appeals. This portion of our holding is controlled by Section VII. of our opinion in Case No. 85 filed today.

VII.

[6] The Commissioner concluded in his order that the Bureau had failed to carry the burden of proving that the increase in the percentage of cessions to the Reinsurance Facility during the latest reported accident year and the rate increase which became effective 1 April 1978 had not resulted in a rate level which violated the statutory "cap" established by G.S. 58-124.26. We reverse. This portion of our holding is controlled by Section III. E. in Case No. 85 filed today.

VIII.

[7] The Commissioner concluded that the Rate Bureau's submission of a filing on 30 June 1978 contained incomplete North Carolina expense data which unfairly deprived the Commissioner of a portion of his statutorily allotted period of review. We vacate this portion of the Commissioner's order and set it aside. It is apparent from the record that the original filing made on 30 June 1978 was accompanied by a letter of transmittal stating, as indicated above, that essential data requested in the filing was virtually complete with respect to automobile liability and approximately 98% complete with respect to physical damage in-

surance. The record also discloses that when complete expense data was received, processed and verified by the Rate Bureau it was determined that certain of the expense ratios required minor adjustments. These adjustments were made and "amended filing sheets" were submitted to the Commissioner on 21 August 1978. It is obvious from the record that these adjustments were insignificant and of little consequence. The overall rate increase actuarially indicated amounted to 15.7% in the original filing and 15.5% on the basis of the final data submitted. Since the proposed increase was only 5.6%, clearly the adjustments were of no significance in the hearing process. Moreover, at no time did the Commissioner question the expense data in any way other than his challenge to its reliability on the basis of its not having been audited. Finally, the Commissioner made no reference to supplementing the incomplete data in his notice of public hearing. This assignment of error is overruled.

IX.

[8] The Commissioner found and concluded that appellants were guilty of bad faith and dilatory action with regard to the filing in several instances. We vacate and set aside those portions of the Commissioner's order. This portion of our decision is controlled by our holding in Section IX. in Case No. 85 filed today.

X.

[9] Prior to the public hearing in connection with this matter, Carolina Action, a consumer group, filed a petition to intervene in the proceeding. That petition was granted by the Commissioner over objection by the appellants. Appellants contend that the Commissioner erred in this respect in that G.S. 114-2(8)(a) specifically authorizes intervention by the North Carolina Attorney General "for and on behalf of the using and consuming public" in administrative proceedings and court cases where it appears that intervention would be in the public interest. Moreover, appellants argue that, assuming the Commissioner may permit intervention in a proper case, the Commissioner may not permit such intervention unless some showing is made that the intervenor seeks to represent an interest that will not or cannot be adequately represented by existing parties or the Attorney General. There was in this instance, appellants contend, no such showing made.

We think the Commissioner's findings and conclusions in this respect were proper. Today we hold in Case No. 85, *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, that the review provisions of the North Carolina Administrative Procedure Act (NCAPA), G.S. 150A-1 *et seq.*, control insurance ratemaking cases. One provision of the NCAPA, G.S. 150A-23(d), provides:

> Any person may petition to become a party [to a contested case, here an insurance ratemaking] by filing a motion to intervene as provided in G.S. 1A-1, Rule 24. In addition, any person interested in an agency proceeding may intervene and participate in that proceeding to the extent deemed appropriate by the hearing agency.

While Rule 24 contains specific requirements which control and limit intervention, the second sentence in the statute quoted above clearly provides discretionary intervention in the Commissioner by providing that the agency may permit any interested person to intervene "and participate in [the] proceeding to the extent deemed appropriate." In other words, this discretionary intervention is without limitation and this language has been construed to provide intervention broader than the permissive intervention under Rule 24. *See* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C. L. Rev. 833, 874 at note 199.

Appellants also contend that the Commissioner erred in allowing Carolina Action's petition to hold hearings throughout the State in order to give interested persons an opportunity to present testimony. Again, we find no error in the Commissioner's action. G.S. 150A-33(3) provides that a hearing officer may "[p]rovide for the taking of testimony by deposition." In a matter so important to all the citizens of the State as the determination of automobile insurance rates, we think the Commissioner was clearly within his discretion in allowing the intervention of a consumer group and in allowing hearings to be held throughout the State. This is especially so in light of a complete failure by appellants to show any prejudice to their rights as a result of the intervention and several hearings.

XI.

[10] The commissioner found that the Bureau filing proposed a margin for underwriting profit and contingencies of 5% of earned premium in addition to investment income. Appellants correctly note that the filing shows the 5% profit and contingency margin is proposed only with respect to business voluntarily retained by the companies and that no profit margin is proposed on business ceded to the North Carolina Reinsurance Facility. Appellants concede that the Commissioner's failure to limit the scope of this finding of fact to voluntary business was probably an inadvertence. However, we agree with appellants that to the extent it was not or to the extent the Commissioner's denial of the rate adjustment proposed in the filing was based on a mistaken belief that a profit margin was proposed on Facility business, the finding of fact must be vacated and set aside.

XII.

[11] During the course of the hearing, the Commissioner refused to admit into evidence numerous exhibits offered by the Rate Bureau. These included the original rate filing, certain amended pages of the filing showing revised expense data, a composite of the original filing with the amended pages, a document showing physical damage expense data on a countrywide basis for a five-year period from 1972-1976, and charts comparing loss experience of Facility risks and voluntary risks.

All of the offered exhibits were properly authenticated and clearly admissible in a hearing of this nature and the Commissioner erred as a matter of law in refusing to admit them.

XIII.

[12] Appellants finally contend that the Commissioner's order from which this appeal is taken contains several findings of fact and conclusions of law concerning the contents of a prior order dated 27 February 1978 with respect to an entirely separate rate filing. The latter order is the subject of our decision in Case No. 85 filed today. The Commissioner's findings and conclusions here, however, do not reveal that the earlier order was on appeal to the North Carolina Court of Appeals at the time these findings were entered. Appellants therefore argue that the validity of the findings and conclusions in the 27 February 1978 order to which

the Commissioner made repeated reference were contested and had not as yet been finally adjudicated. Despite this, appellants contend, the Commissioner determined that the Rate Bureau's failure to take certain actions "constituted a refusal, in bad faith, to adhere to a lawfully promulgated order of the Commissioner."

Such findings and conclusions by the Commissioner were clearly erroneous. Today, we hold in Case No. 85, *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, that while the NCAPA controls judicial review of insurance ratemaking procedures, the review provisions of G.S. 58-9 through G.S. 58-27.2 should also apply insofar as those provisions are compatible with the NCAPA. G.S. 58-9.5(10) provides:

> An appeal under this section shall operate as a stay of the Commissioner's order or decision until said appeal has been dismissed or the questions raised by the appeal determined according to law.

The intent of this statute is clearly that no order of the Commissioner shall be enforced pending appeal. Here, the Commissioner attempted to do indirectly what the statute plainly prohibited, *i.e.*, he attempted to enforce compliance with the requirements of the 27 February 1978 order by finding that the Bureau acted "deliberately" and "in bad faith" in not preparing the present filing in accordance with the requirements of the earlier order. Such action, we hold, was erroneous as a matter of law.

XIV.

[13] The Court of Appeals held that the Commissioner's implementation of a "capital asset pricing model" to calculate underwriting profit margins was erroneous. We affirm. We hold that the Commissioner's attempted implementation of a "capital asset pricing model" to calculate underwriting profit margins was erroneous as a matter of law and arbitrary and capricious. This portion of our decision is controlled by our holding in Section V. of our opinion in Case No. 85 filed today.

XV.

[14] The filing in this action proposed by inference that territorial rate differentials established in the 29 November 1977 rate filing be continued. The Court of Appeals held, in the action

represented by our opinion in Case No. 85 filed today, that the findings that projections of territorial rate differences did not consider new classification plans and that the alleged failure to consider new classification plans resulted in excessive rates were not supported by the evidence. The Commissioner did not contend that the Court of Appeals erred in that decision and our opinion in Case No. 85 left undisturbed that portion of the Court of Appeals' decision. Here, however, the Commissioner contends that the Court of Appeals erred in not affirming his conclusion of law that the use of territorial rate differentials in the filing is contrary to G.S. 58-30.4.

Since this contention was not before us in Case No. 85, a brief overview of the territorial approach is necessary. Data as to premiums and losses throughout the State are coded and collected on a territorial basis. Each insured vehicle is assigned to the territory *where it is principally garaged* and all premiums and losses with respect to each such vehicle are reported in that territory. The territorial demarcations were established by the Rate Bureau's predecessor organizations and were filed with and approved by the Commissioner. The record also discloses that territorial rates are presently in common usage in automobile insurance throughout the country.

Territorial rates proposed in the filing are statistically calculated on the basis of loss history of the approved territories in the State. The Bureau limited territorial rate differentials in each line of coverage of three levels: (1) five percent over the indicated statewide base rate; (2) five percent under the indicated statewide base rates; and (3) the indicated statewide base rate. Accordingly, for each line of coverage, the loss experience of each territory was computed in one of the three territorial rates assigned to it.

The Commissioner's conclusion of law was to the effect that the use of territorial rate differentials is contrary to G.S. 58-30.4. The former version of that statute under which this ratemaking took place provided:

> The North Carolina Rate Bureau shall promulgate a revised basic classification plan and a revised subclassification plan for coverages on private passenger (nonfleet) motor vehicles in this State affected by the provisions of G.S. 58-30.3. Said revised basic classification plan will provide for the following

> four basic classifications to wit: (i) Pleasure use only; (ii) pleasure use except for driving to and from work; (iii) business use; and (iv) farm use. The North Carolina Rate Bureau shall promulgate a revised subclassification plan which appropriately reflects the statistical driving experience and exposure of insureds in each of the four basic classifications provided for above, except that no subclassification shall be promulgated based, in whole or in part, directly or indirectly, upon the age or sex of the person insured. Such insureds having less than two years' driving experience . . . and shall provide for premium surcharges for drivers having a driving record consisting of a record of a chargeable accident or accidents, or having a driving record consisting of a conviction or convictions for a moving traffic violation, or any combination thereof. . . . The classification plans and subclassification plans so promulgated by the Bureau shall be subject to the filing, hearing, disapproval, review and appeal procedures before the Commissioner and the courts as provided for rates and classification plans in G.S. 58-128, 58-129, and 58-130.

The Commissioner, in his order, did not indicate in what respect he contends the use of territorial rates violates the quoted statute. The statute makes no mention of territorial rates. We assume the Commissioner's contention to be that because the statute does not specifically authorize the use of territorial rates, it impliedly prohibits their use. We disagree. First of all, the statute contains a specific prohibition against the establishment of subclassifications based on the age or sex of the person insured. There is no such specific prohibition of territorial rates. More importantly, the Commissioner's interpretation of the quoted statute is in direct conflict with G.S. 58-124.25. That statute provides:

> Rates, rating systems, *territories*, classifications and policy forms lawfully in use on September 1, 1977, may continue to be used thereafter, notwithstanding any provision of this Article. (Emphasis added.)

It is clear from this statute that territories are not "classifications" and that their use is therefore not prohibited by G.S. 58-30.4. Moreover, we find absolutely no intent on the part of our Legislature to abolish territories as rating factors.

We therefore affirm that portion of the Court of Appeals' decision reversing that portion of the Commissioner's order prohibiting the use of territorial differentials and rates.

XVI.

In accordance with our discussion above of the various portions of the Court of Appeals' opinion, the decision of that Court is

Affirmed in part and reversed in part.

G.S. 58-9.6(b) provides that we may "affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or [we] may reverse or modify the decision if the substantial rights of the appellants have been prejudiced . . . ." G.S. 150A-51 provides substantially the same powers. In cases involving narrow and specific error in the Commissioner's order, we would ordinarily remand the case to the Commissioner for further proceedings. *See* Case No. 85 filed today. Here, however, it is apparent that the error committed by the Commissioner in the proceedings and resulting order before us are of such magnitude as to make remand futile. The order of the Commissioner dated 27 September 1978 is therefore

Reversed and declared null and void.

Accordingly, all escrowed premium funds representing this proposed rate increase shall be remitted to the member insurers forthwith pursuant to G.S. 58-124.22(b). *See* Case No. 85 filed today.

It is so ordered.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, CENTRAL MUTUAL INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, STATE CAPITAL INSURANCE COMPANY, AND UNITED STATES FIRE INSURANCE COMPANY

IN THE MATTER OF A FILING DATED JUNE 30, 1978, BY THE NORTH CAROLINA RATE BUREAU FOR A PREMIUM LEVEL REVISION ON THE HOMEOWNER'S PROGRAM, DOCKET NO. 281

No. 54

(Filed 15 July 1980)

1. **Insurance § 116.2— homeowners' insurance rate filing—unaudited data**

The Commissioner of Insurance erred in concluding that unaudited data submitted in a rate filing for homeowners' insurance was not reliable.

2. **Insurance § 116.2— homeowners' insurance rates—underwriting profit—reduction for theoretical income on unearned premium and loss reserves**

The Commissioner of Insurance erred in concluding that underwriting profit should be reduced by an amount for theoretical income on unearned premium reserves and loss reserves in determining rates for homeowners' insurance.

3. **Insurance § 116.2— homeowners' insurance rates—income from invested capital**

The Commissioner of Insurance erred in concluding that income from invested capital should be considered in determining rates for homeowners' insurance.

4. **Insurance § 116.2— homeowners' insurance rates—underwriting profit margins—use of capital asset pricing model**

Use by the Commissioner of Insurance of a "capital asset pricing model" to calculate underwriting profit margins for homeowners' insurance was erroneous as a matter of law.

5. **Insurance § 116— homeowners' insurance—rate hearing—burden of proof**

The burden in a homeowners' insurance ratemaking hearing rests with the Rate Bureau.

6. **Insurance § 116.2— homeowners' insurance rate hearing—consideration of paper presented by witness in another proceeding**

While it is the better practice to produce a witness in a ratemaking hearing rather than to rely on exhibits furnished by the witness in earlier hearings, the Commissioner of Insurance did not commit prejudicial error in a homeowners' insurance rate hearing in taking official notice of a paper presented by a witness in a hearing on a prior rate filing and made a part of the order disapproving the prior filing where the Commissioner gave the Rate

Bureau adequate notice in the Notice of Public Hearing that he would rely on the paper in the present hearing.

7. **Insurance § 116.3— homeowners' insurance—rate level adjustment—data of all companies**

The Commissioner of Insurance erred in finding that a filing for a statewide rate level adjustment in homeowners' insurance was not based on the data of all member companies of the Rate Bureau.

8. **Insurance § 116.3— homeowners' insurance rates—adjustment in "relativities" —experience of less than 100% companies**

The Commissioner of Insurance erred in concluding that it was improper to base a filing for an adjustment in the "relativities" used in homeowners' insurance rates on the experience of less than 100% of all companies writing homeowners' insurance in the State where expert witnesses presented by the Rate Bureau testified that the procedures utilized in establishing the relativities were conventional and actuarially sound methods of determining homeowners' rates and that the entire filing and rates proposed were actuarially sound and fully justified, and there was no evidence in the record to the contrary.

9. **Insurance § 116.2— homeowners' insurance rates—weighting of rate level loss ratios by years**

The Commissioner of Insurance erred in finding that the weighting of the rate level loss ratios by years so that more weight was attached to the most recent years was arbitrary where the record established that the weights were standard weights used by experts on a nationwide basis and that the procedures utilized were in common usage throughout the country and were appropriate and reliable for ratemaking, and where the Commissioner's Notice of Public Hearing gave no notice of his intention to challenge the weighting process.

10. **Insurance § 116— homeowners' insurance rate filing—no bad faith or dilatory action by Rate Bureau**

Findings and conclusions by the Commissioner of Insurance that the Rate Bureau was guilty of bad faith and dilatory action with regard to a homeowners' insurance rate filing were not supported by material and substantial evidence in view of the entire record.

Justice BROCK took no part in the consideration or decision of this case.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 44 N.C. App. 75, 259 S.E. 2d 926 (1979), one judge dissenting, vacating and setting aside the order of the North Carolina Commissioner of Insurance dated 21 September 1978 which had ordered that the 30 June 1978 filing by the North Carolina Rate Bureau be disapproved. The filing involved proposed revised premium rates for homeowners' in-

surance and changes in the amount of relativities, as well as rate changes by territory.

The issues on this appeal all involve the propriety of the proceedings before the Commissioner and his order of 21 September 1978.

Attorney General Rufus L. Edmisten by Assistant Attorney General Isham B. Hudson, Jr. for the plaintiff-appellant.

Young, Moore, Henderson & Alvis by Charles H. Young and William M. Trott for defendant-appellants.

CARLTON, Justice.

I.

On 30 June 1978 the North Carolina Rate Bureau, on its own behalf and on behalf of its member companies writing homeowners' insurance in North Carolina, filed with the Commissioner of Insurance a proposed revised premium rate schedule for homeowners' insurance. The filing stated that statistical information substantiated the need for an average increase of "+9.1%" in premiums. Included in the filing were proposed changes in the amount of insurance, form and protection/construction relativities, as well as rate changes by territory based upon a review of experience by territory. Changes were also proposed in the optional coverages.

The Commissioner gave notice of public hearing, contending that the filing failed to comply with statutory and other requirements and was otherwise incomplete in a number of respects. After the hearing, the Commissioner made extensive findings of fact and conclusions of law and disapproved the filing in its entirety. From the Commissioner's disapproval order, the Rate Bureau appealed to the North Carolina Court of Appeals. That Court, in a brief opinion by Judge Vaughn with Judge Hill concurring and Judge Erwin dissenting, vacated and set aside the Commissioner's order. Judge Vaughn wrote:

> The dissent in this case makes it reasonably certain that the final disposition of the appeal will be determined by the Supreme Court. We will not, therefore, attempt to recapitulate the evidence or set out a detailed statement of the reasoning that leads us to the conclusion that the order is so affected by errors of law that it must be vacated.

44 N.C. App. at 76, 259 S.E. 2d at 927.

In light of this rather cursory treatment of a complicated and important case to the citizens of North Carolina, we deem it necessary to review all assignments of error and arguments presented to the Court of Appeals. However, in summary, we hold that because of the magnitude of error in the Commissioner's order, we affirm the decision of the Court of Appeals. We also declare the Commissioner's order void and further order that the escrowed premium funds representing this proposed increase be remitted to the member insurers pursuant to G.S. 58-124.22(b).

Other facts important to an understanding of our decision are noted below.

II.

[1] The Court of Appeals held that the Commissioner erred as a matter of law in concluding that unaudited data submitted in a filing of this nature is not reliable. We affirm. This portion of our decision is controlled by Section II. of our decision in Case No. 85, *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, filed today.

III.

[2] The Court of Appeals held that the Commissioner erred as a matter of law in concluding that underwriting profit be reduced by an amount for theoretical investment income on unearned premium reserves and loss reserves. We affirm. This portion of our holding is controlled by Section V. of our opinion in Case No. 85 filed today.

IV.

[3] The Commissioner's order concluded that investment income was not properly taken into account in this ratemaking. We reverse. This portion of our decision is controlled by Section IV. of our opinion in Case No. 85 filed today.

V.

[4] The Commissioner concluded that:

> [T]he determination of underwriting profit margins should be calculated in accord with contemporary concepts of risk and return as understood in financial theory, specifically the capital asset pricing model as testified to by expert witness

> Dr. William Bishop Fairley . . . the use of which theory and methodology in insurance ratemaking has been upheld by the Supreme Judicial Court of Massachusetts.

We reverse. This portion of our decision is controlled by Section V. of our opinion in Case No. 85 filed today.

VI.

[5] Appellees raise again on this appeal the question whether the burden of proof in a ratemaking hearing has been shifted to the Commissioner by virtue of changes made by the 1977 Legislature. We reaffirm our holding in Section VI. of our opinion in Case No. 85 filed today. The burden of proof, as that term is ordinarily understood in civil litigation, rests with the Rate Bureau in a ratemaking hearing of this nature.

VII.

[6] In his order, the Commissioner concluded that "official notice was taken of the methodology of Dr. William Fairley as adopted by the Commissioner in his order of February 27, 1978 . . . pursuant to North Carolina General Statute 150A-30." The earlier order was then incorporated by reference into the order in the instant case.

Dr. William Fairley was not present at the hearings in the instant case. He had testified at the 1977 automobile rate filing hearing, the subject of our opinion in Case No. 85 filed today. During the course of the earlier hearing, this witness had presented a paper setting forth his theory with respect to automobile insurance ratemaking. That paper was attached to and made a part of the 27 February 1978 order disapproving the 1977 filing. Appellees contended to the Court of Appeals and again on this appeal, that this manner of allowing Dr. Fairley's testimony resulted in the Rate Bureau having no opportunity to cross-examine the witness. It correctly cites the general rule that:

> Ordinarily, testimony given by a witness in a preliminary hearing, or former trial, will not be admitted as substantive evidence in a trial unless it is impossible to produce the witness. The witness himself, if available, must be produced and testify *de novo*.

State v. Cope, 240 N.C. 244, 248-49, 81 S.E. 2d 773, 777 (1954). *See also, Smith v. Moore*, 149 N.C. 185, 62 S.E. 892 (1908).

While we agree with the rules cited by appellees for trials and believe it the better practice to produce a witness in an administrative hearing of this nature, in lieu of relying on past exhibits furnished in earlier hearings, we do not find prejudicial error in the Commissioner's action in this respect in this hearing. G.S. 150A-30 provides that:

> Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the agency. The noticed fact and its source shall be stated and made known to affected parties at the earliest practicable time, and any party shall on timely request be afforded an opportunity to dispute the noticed fact through submission of evidence and argument.

The record reveals that the Commissioner was sensitive to this provision of our Administrative Procedure Act. In his Notice of Public Hearing dated 28 July 1978, the Commissioner stated in part:

> You are hereby notified that pursuant to North Carolina General Statute 150A-30 the Commissioner takes official notice of the methodology of Dr. William Fairley as adopted by the Commissioner in his order of February 27, 1978 to the North Carolina Rate Bureau. You are hereby directed to furnish revised rate calculations in conformity with the methodology of Dr. Fairley no later than August 23, 1978.

Clearly, the Rate Bureau had adequate notice that Dr. Fairley's paper would be relied upon by the Commissioner in the hearing, and the Rate Bureau certainly had sufficient time to make a "timely request [for] an opportunity to dispute the noticed fact through submission of evidence and argument." Indeed, appellees could have attempted to have Dr. Fairley present had they desired to cross-examine him. We therefore find no error in this respect with the Commissioner's actions.

VIII.

In his findings of fact, the Commissioner found that in several respects the filing was not based upon the data of all

member companies of the Rate Bureau. In his conclusions of law, the Commissioner concluded that rates based on the experience of less than all companies writing homeowners' insurance in North Carolina could be excessive or inadequate and further concluded that basing relativities and other factors on the experience of less than all companies writing homeowners' insurance is improper.

In this connection, it is important to note that the filing which is the subject of this appeal is composed of two separate and distinct parts: (1) A rate level adjustment, and (2) an adjustment in the "relativities" used in homeowners' insurance.

[7] With respect to the statewide rate level adjustment, we note that the record reveals that the Rate Bureau's witness Murphy testified that *all* companies' data was utilized. Moreover, the evidence established that the data was collected in accordance with generally accepted methods and procedures for the collection of such data and that the filing, methods and calculations contained in the filing were actuarially sound. Hence, the Commissioner erred in finding and concluding that less than all company data was employed with respect to the filing for a rate level increase.

[8] We next turn to the contention that it is improper to base relativities on the experience of less than 100% of all companies writing homeowners' insurance in the State. The number of variables involved in the writing of a homeowners' insurance policy precludes the possibility of establishing a rate which would be applicable to a single policy having every combination of the variables involved. Therefore, to simplify pricing, the homeowners' premium rate structure utilizes what is commonly referred to as "relativities." For example, the amount of insurance being written on a particular home is one of the variables involved. A specific type of homeowners' insurance is not written at a fixed dollar premium rate per $1,000.00 of coverage, but each amount of insurance is written at a premium rate that, based upon statistical experience, is appropriate for that amount of insurance. Hence, the premium for a $20,000.00 policy on a given risk would not necessarily be twice the premium for a $10,000.00 policy on the identical risk. The amount would depend upon the statistical experience involved. The record reveals that, in establishing the "policy amount relativities," a certain sum of in-

surance was used as the base or standard and was assigned a "relativity" of 1.00. Factors were then developed to determine the comparable premium for other amounts of insurance. Using $30,000.00 as the base amount of insurance, some of the "policy amount relativities" in effect prior to the filing were as follows:

Policy Amount	Relativity
$20,000.00	.65
$25,000.00	.82
$30,000.00	1.00
$35,000.00	1.21
$40,000.00	1.42

In the same manner, relativities are established for the particular form of insurance being written, the type of construction, the type of protection available to the home, and the type of occupancy.

The Commissioner concluded that it would be improper to base these relativities and other factors on the experience of less than 100% of all companies writing homeowners' insurance in North Carolina. Appellees concede that, in establishing the relativities, less than 100% of company data was utilized. In some instances, countrywide data was employed in lieu of using North Carolina data only.

We think it unnecessary to our decision to include a detailed discussion of the complicated factors involved in establishing "relativities." Suffice it to say that expert witnesses on behalf of the appellees testified that the procedures utilized in establishing the relativities were conventional and actuarially sound methods of determining homeowners' rates and that the entire filing and rates proposed were actuarially sound and fully justified. We find no evidence in the record to the contrary. Hence, we find the Commissioner's findings and conclusions that less than 100% data utilization is improper in establishing relativities to be unsupported by material and substantial evidence in view of the entire record as submitted. G.S. 58-9.6(b)(5) and G.S. 150A-51(5). Moreover, we note that there is no requirement in Chapter 58 of our General Statutes requiring that data from all companies be utilized in a filing. G.S. 58-124.20(c) requires the Bureau to maintain "reasonable records . . . of the experience of its members

and of the data, statistics or information collected or used by it in connection with the rates . . . made or used by it." We do not believe that "reasonable records" require, absent evidence of possible error, that all company data be presented. Hence, we find that the Commissioner erred as a matter of law in concluding that all company data is required. G.S. 58-9.6(b)(4); G.S. 150A-51(4).

IX.

[9] An exhibit submitted with the filing indicated that the yearly rate level loss ratios for the five years of experience data were weighted as follows: The earliest year of experience, 1972, was weighted by a factor of .10; 1973, by .15; 1974, by .20; 1975, by .25; and 1976, by .30. As a result of multiplying these loss ratios by their weights, a composite rate level loss ratio was developed. In one of his findings of fact, the Commissioner found that the weighting of the rate level loss ratios by years was arbitrary and that the Rate Bureau's witness was unable to explain the derivation of the weights. The Commissioner argues that "the losses used in the filing have already been adjusted and trended for inflation." He contends that the weighting procedure, whereby more weight is attached to experience for 1975 and 1976, means that more weight is being given to the frequency and severity of losses in those years. Also, he contends there is no explanation in the record why experience for the years 1975 and 1976 better reflect the severity and frequency of losses for policies to be issued in 1979 than do the years of experience for 1972, 1973 and 1974.

We first note that, except for his general conclusion of law that the evidence presented in support of the filing was not credible, we find no specific conclusion of law supported by the finding of fact mentioned. Moreover, the finding must simply fall. The record clearly shows that the reason for the weighting procedure was to give more recognition or emphasis to recent years of experience, and that the weights were not arbitrarily selected but were standard weights used by experts on a nationwide basis. The record also established that the methods and procedures utilized in this respect were in common usage throughout the country and were appropriate and reliable for ratemaking and that such methods and calculations were actuarially sound. There is no evidence to the contrary to support the Commissioner's finding of fact in this respect.

Finally, we note that the Commissioner's Notice of Public Hearing made no mention of this alleged deficiency. G.S. 58-124.21(a) provides in part that "the Commissioner may give written notice to the Bureau specifying in what respect and to what extent he contends such filing fails to comply with the requirements of this Article. . . ." Here, the Commissioner gave no notice of his intention to challenge the weighting process utilized in this filing which was set forth clearly and prominently in the filing. Such omission clearly violates the quoted portion of G.S. 58-124.21(a).

X.

[10] In his findings of fact the Commissioner found that the Rate Bureau failed to provide complete data regarding number of paid claims, number of claims with cash reserves, average paid claim and average reserved claim, and a showing as to how weights attributed to the Boeckh Residential Index (BRI) and the Modified Consumer Price Index and a county-by-county breakdown of premium and loss experience with unadjusted or trended loss ratios and also found that the Rate Bureau did not maintain reasonable records of the experience of its members and that county-by-county experience is necessary to properly review the territorial groupings and rates. From these findings, the Commissioner concluded that the failure to furnish the aforementioned data was a dilatory action and constituted bad faith on the part of the Bureau, that the Bureau did not carry its burden of proving that the territorial rating was not unfairly discriminatory by its failure to provide county-by-county experience, and that the Rate Bureau did not maintain reasonable records in compliance with North Carolina General Statute 58-124.20(c). Suffice it to say that the Commissioner's findings in these respects are unsupported by material and substantial evidence in view of the entire record and that the findings do not support his conclusions of law. This portion of our holding is also controlled by Section IX. of our opinion in Case No. 85 filed today.

XI.

Other issues were raised by the Rate Bureau in its appeal to the Court of Appeals but these issues were not specifically discussed by the Court of Appeals and have not been raised in the Commissioner-appellant's brief to this Court. All such issues

are deemed abandoned. Rule 28(a), North Carolina Rules of Appellate Procedure.

XII.

In accordance with our discussion above, the decision of the Court of Appeals is

Modified and affirmed.

As in Cases No. 85 and No. 86 filed today, it is apparent that the errors committed by the Commissioner in the order before us are of such magnitude as to make remand for further proceedings futile. The order of the Commissioner dated 21 September 1978 is therefore

Reversed and declared null and void.

Accordingly, all escrowed premium funds representing this proposed rate increase pursuant to G.S. 58-124.22(b) shall be remitted to the member insurers forthwith.

It is so ordered.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, STANDARD FIRE INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FIDELITY & GUARANTY INSURANCE UNDERWRITERS, TRAVELERS INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

IN THE MATTER OF A FILING DATED OCTOBER 12, 1978, BY THE NORTH CAROLINA RATE BUREAU FOR REVISED WORKERS' COMPENSATION INSURANCE RATES DOCKET NO. 288

No. 74

(Filed 15 July 1980)

1. **Master and Servant § 80— workers' compensation insurance rates—unaudited data**

The Commissioner of Insurance erred as a matter of law in concluding that unaudited data submitted in a workers' compensation rate filing was not reliable.

2. **Master and Servant § 80— workers' compensation insurance rates—income on unearned premium and loss reserves**

The Commissioner of Insurance erred in concluding that underwriting profit should be reduced by an amount for theoretical investment income on unearned premium reserves and loss reserves in determining rates for workers' compensation insurance.

3. **Master and Servant § 80—workers' compensation insurance rates—investment income on invested capital**

The Commissioner of Insurance erred in concluding that investment income on invested capital should be considered in determining rates for workers' compensation insurance.

4. **Master and Servant § 80— workers' compensation insurance rates—underwriting profit margin—use of capital asset pricing model**

Use by the Commissioner of Insurance of a "capital asset pricing model" to calculate underwriting profit margins for workers' compensation insurance was erroneous as a matter of law.

5. **Master and Servant § 80— workers' compensation insurance rate hearing—testimony from prior unrelated hearing**

The Commissioner of Insurance did not commit prejudicial error in a workers' compensation insurance rate hearing in admitting into evidence the

testimony of a witness given at a prior unrelated hearing concerning automobile insurance rates.

6. **Master and Servant § 80— workers' compensation rate hearing—burden of proof**

The burden of proof in a workers' compensation insurance rate hearing rests with the Rate Bureau.

7. **Master and Servant § 80— workers' compensation rates—use of expense experience of stock companies only**

Conclusion by the Commissioner of Insurance that proposed workers' compensation insurance rates were excessive because the expense allowance in the ratemaking formula was based solely on the experience of stock companies was unsupported by the evidence and erroneous as a matter of law.

8. **Master and Servant § 80— workers' compensation rate filing—no bad faith in failing to furnish certain data**

The Commissioner of Insurance erred in finding that the Rate Bureau acted dilatorily and in bad faith in not furnishing certain data pursuant to the notice of public hearing in a workers' compensation rate case.

Justice BROCK took no part in the consideration or decision of this case.

ON appeal as a matter of right pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, 44 N.C. App. 191, 261 S.E. 2d 671 (1979), one judge dissenting in part and *Chief Judge Morris* concurring specially, vacating and setting aside the order of the North Carolina Commissioner of Insurance dated 9 January 1979 which disapproved the 12 October 1978 filing by the North Carolina Rate Bureau in its entirety. The filing involved proposed revised premium rates, rating values and miscellaneous values for workers' compensation insurance.

The issues on this appeal all involve the propriety of the proceedings before the Commissioner and his order of 9 January 1979.

Attorney General Rufus L. Edmisten by Assistant Attorney General Isham B. Hudson, Jr. for the plaintiff-appellant.

Young, Moore, Henderson & Alvis by Charles H. Young and George M. Teague for defendants-appellees.

CARLTON, Justice.

I.

On 12 October 1978 the North Carolina Rate Bureau, on its own behalf and on behalf of its member companies writing workers' compensation insurance in North Carolina, filed with the North Carolina Commissioner of Insurance a proposed revised premium rate schedule for workers' compensation insurance. The filing also involved a proposed change in rating and miscellaneous values. The filing stated that statistical information substantiated the need for an average increase of 19.8% in the overall level of workers' compensation insurance rates and rating values presently enforced.

The Commissioner filed notice of public hearing on 14 November 1978 contending that the filing failed to comply with statutory and other requirements and was otherwise incomplete in a number of respects. After the hearing, the Commissioner made extensive findings of fact and conclusions of law and disapproved the filing in its entirety. From the Commissioner's disapproval order, the Rate Bureau appealed to the North Carolina Court of Appeals. That court, Judge Clark writing, vacated the Commissioner's order. Judge Arnold dissented on the limited ground that, in his view, there was substantial evidence to support the Commissioner's conclusion that unaudited data was not reliable. Chief Judge Morris, not a member of the panel in this case, concurred for the purpose of clarifying the holding of the Court of Appeals in that court's opinion in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 41 N.C. App. 310, 255 S.E. 2d 557, affirmed in part and reversed in part by our Case No. 85 filed today, pertaining to investment income on invested capital as a factor to be considered in ratemaking. Judge Erwin, who had dissented in an earlier opinion reversing the Commissioner's conclusion that unaudited data was not reliable, 44 N.C. App. 75, 259 S.E. 2d 926 (1979), filed a concurring opinion in the instant case stating that he found a "marked distinction compelling the vacating of the order in the instant case which did not appear of record" in the earlier case. 44 N.C. App. at 209, 261 S.E. 2d at 682.

While Judge Arnold's dissent was limited only to one question, in light of widespread public interest and the importance of

the issues here raised to the people of North Carolina, we exercise our supervisory and discretionary power and review all assignments of error and arguments presented to the Court of Appeals. As in the other three insurance ratemaking decisions we file today, in light of the magnitude of error in the Commissioner's order, we agree with the conclusion of the Court of Appeals that the order must be voided. We also order the filing approved and order the escrowed premium funds representing this proposed increase remitted to the member insurers pursuant to G.S. 58-124.22(b).

Other facts important to an understanding of our decision are noted below.

II.

[1] The Court of Appeals held that the Commissioner erred as a matter of law in concluding that unaudited data submitted in a filing of this nature is not reliable. We affirm. This portion of our decision is controlled by Section II. of our decision in Case No. 85 filed today.

III.

[2] The Commissioner found and concluded that underwriting profit should be reduced by an amount for theoretical investment income on unearned premium reserves and loss reserves. We disagree. This portion of our holding is controlled by Section V. A. of our opinion in Case No. 85 filed today.

IV.

[3] The Court of Appeals held that the Commissioner erred in concluding that investment income on invested capital should be considered in a ratemaking hearing of this nature. We affirm. This portion of our decision is controlled by Section IV. of our opinion in Case No. 85 filed today.

V.

[4] The Commissioner's conclusion of law No. 19 provided:

> That the determination of underwriting profit margins should be calculated in accord with contemporary concepts of risk and return as understood in financial theory, specifically the capital asset pricing model as testified to by expert

witness Dr. William Bishop Fairley and detailed in the attached appendix the use of which theory and methodology in insurance rate-making has been upheld by the Supreme Judicial Court of Massachusetts.

We reverse. This portion of our decision is controlled by Section V. in our opinion in Case No. 85 filed today.

VI.

[5] Appellees here argued before the Court of Appeals that the Commissioner erred in admitting into evidence the testimony of Dr. William Fairley at a prior unrelated hearing concerning automobile insurance rates. We have discussed this argument in Section VII. of our opinion in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, Case No. 54, filed today and reaffirm that portion of our holding.

VII.

[6] Appellees raise again on this appeal the question whether the burden of proof in a ratemaking hearing has been shifted to the Commissioner by virtue of changes made by the 1977 Legislature. We reaffirm our holding in Section VI. of our opinion in Case No. 85 filed today. The burden of proof, as that term is ordinarily understood in civil litigation, rests with the Rate Bureau in a ratemaking hearing of this nature.

VIII.

[7] We next turn to the sole question presented on this appeal not presented in one of our three other insurance ratemaking decisions handed down today. In his findings of fact, the Commissioner stated:

> 10. That the expense allowance in the rate-making formula is based solely on the expense experience of stock companies.
>
> 11. That stock companies have greater expenses than other companies.
>
> 12. That using the expense experience of stock companies purportedly allows a margin for other companies to pay dividends.
>
> 13. That there has been no study conducted to determine the extent of a correlation, if any, between stock company ex-

penses and non-stock company dividends or whether the non-stock companies paid dividends during the period upon which the filing is based.

14. That the proposed rates are excessive due to basing the expense allowance in the rate-making formula solely on the expense experience of stock companies.

Based on the foregoing findings of fact, the Commissioner concluded as a matter of law, "That the proposed rates are excessive due to basing the expense allowance in the rate-making formula solely on the expense experience of stock companies when stock companies have greater expenses than other companies."

The Commissioner correctly argues that the record establishes that expenses for the operation of stock companies exceed that of mutual companies. The record also discloses that it is the use of stock company expenses which is employed in a ratemaking filing and not the lesser expense factor of the mutual companies. The Commissioner strenuously argues, therefore, that the use of stock company expense only creates a higher rate indication than if all expenses were combined equivalent to the composite of all the operating companies' actual expenses.

We think the Commissioner's conclusion from the quoted findings of fact, a portion of which are technically correct, is both unsupported by the evidence and erroneous as a matter of law.

The record discloses that insurance companies writing workers' compensation insurance in North Carolina are divided into two general categories, stock companies owned by stockholders and mutual companies owned by the policyholders. Stock companies market insurance through commissioned agents and do not pay dividends to policyholders. Mutual companies, on the other hand, generally do not have the personalized service of the insurance agent so that a reduction in commission and acquisition costs results. The difference between the premium paid and the actual cost of the insurance to the policyholder is returned by way of a dividend.

The witness Kallop, an actuary with an insurance service corporation, testified:

Only stock company expense experience was utilized because the manual rates are geared to stock company levels. These

> rates are also applicable to mutual insurance companies as well, because the differences in the expenses between stocks and mutuals is used by the mutuals to grant dividends to policyholders. This is the same methodology utilized by the National Council in all the jurisdictions in which it makes rate filings.

The same witness testified on cross-examination:

> The correlation of dividends paid out by mutual companies with the expenses of stock companies is shown in the insurance expense exhibit. There is a line there that refers to dividends to policyholders . . . . We are saying that the expense provisions were geared to stock company levels and that's the basis upon which the rates are based. I think that also the mutual companies who may have lower operating costs, that that differential and cost provides leverage so that they can give dividends to policyholders and, therefore, the use of rates geared to stock company expenses is also appropriate for the use by mutual carriers. *We determine that this was appropriate because of the fact that they do give dividends to policyholders and that the expense level of the stock companies gives them that leverage. We know that the mutual companies have indeed given dividends to policyholders.* The insurance expense exhibit tells you that. As to whether they relate to the expenses of stock companies, I think you can take that into account when you take their operating costs plus the dividend return. (Emphasis added.)

We note that the quoted testimony is undisputed in the record. The Commissioner's findings and conclusion to the contrary are therefore unsupported by material and substantial evidence in view of the entire record as contemplated by G.S. 58-9.6(b)(5). *See also* G.S. 150A-51(5).

As we noted in our opinion in Case No. 85 handed down today, we do not reject any portion of the Commissioner's order because it is novel or unprecedented. While the quoted testimony establishes that nearly all jurisdictions utilize the method presently employed in North Carolina, the head of an administrative agency in the executive branch of our government clearly has the power, provided he follows legal means, to chart new courses in discharging the functions of his office. Here,

however, the Commissioner has attempted to change a long-established approach on the spur of the moment and without proper foundation. It may well be, as the Commissioner's finding No. 13 suggests, that insufficient studies have been conducted with respect to the issue here involved. However, the Commissioner has explicit means at his disposal, pursuant to both our insurance and administrative procedure laws, to implement those studies.

Moreover, we note the practical aspect of the Commissioner's conclusion. Based on our understanding of the difference in stock and mutual companies which we glean from the record as noted above, it would appear that the consuming public has the choice between purchasing its insurance from a stock company with services for which the consumer is willing to pay and mutual companies with less services provided but at a lower premium. Clearly, the mathematics would indicate that the operating expense of the company providing additional services will be greater than the company which does not provide these services. The Commissioner's approach, at first glance, appears sound. If, as this Court has stated on numerous occasions, a filing by the Rate Bureau is to be considered a filing by a composite of all insurers, then why not take the average expense of all of them? The answer is that, with respect to the question here addressed, insurers are divided into two distinct and separate groups. More importantly, the result of the Commissioner's approach, it seems to us, would mean that a filing utilizing the average expense of all companies, both stock and mutual, would result in a lower industry-wide expense factor. However, at the same time the expense factor so utilized would result in an insufficient amount to cover stock company expenses, resulting in the inability of such companies to provide services apparently demanded by certain consumers. The expense factor so utilized with respect to mutual companies would, on the other hand, be artificially inflated in that it would reflect an expense factor not actually employed by the mutual companies. The present policy of refunding dividends to mutual company policyholders would undoubtedly be affected by this process. In other words, the present system provides the consuming public with a choice between purchasing its insurance from companies providing personal services at higher costs and those providing less service at a lower cost. This long-established

nationwide approach is entitled to more careful scrutiny than that provided by the Commissioner in the proceedings below.

This portion of the Commissioner's order is therefore reversed.

IX.

[8] We also hold that the Commissioner erred in finding that the Rate Bureau acted dilatorily and in bad faith in not furnishing certain data pursuant to the notice of public hearing. This portion of our decision is controlled by our holding in Section IX. in Case No. 85 filed today.

X.

Other issues were raised by the Rate Bureau in its appeal to the Court of Appeals but these issues were not specifically discussed by the Court of Appeals and have not been raised in the Commissioner-appellant's brief to this Court. All such issues are deemed abandoned, Rule 28(a), North Carolina Rules of Appellate Procedure.

XI.

Accordingly, the decision of the Court of Appeals is

Modified and Affirmed.

As in Case No. 85, No. 86 and No. 54 filed today, it is apparent that the errors committed by the Commissioner in the proceedings below and the resulting order are of such magnitude as to make remanding for further proceedings futile. The order of the Commissioner dated 9 January 1979 is therefore

Reversed and declared null and void.

Accordingly, all escrowed premium funds representing this proposed rate increase pursuant to G.S. 58-124.22(b) shall be remitted to the member insurers forthwith.

It is so ordered.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. DAVID RAY WHITE

No. 90

(Filed 15 July 1980)

1. **Criminal Law § 32.1— use of presumption—due process—examination of words spoken to jury**

In determining whether the use of a presumption in a criminal case violates due process, the nature of the presumption must first be determined by careful examination of the actual words spoken to the jury by the trial judge in the light of whatever definition of the presumption may be provided by applicable statute or case law and in the context of how a reasonable juror might interpret the words.

2. **Criminal Law § 32.1— presumption—due process—permissive inference**

If, in the contemplation of a reasonable juror, the court's instructions on a presumption describe a mere *permissive* inference, due process is not violated so long as (1) there is a rational connection between the basic and elemental facts such that upon proof of the basic facts, the elemental facts are more likely than not to exist, and (2) there is other evidence in the case which, taken together with the inference of presumption, is sufficient for a jury to find the elemental facts beyond a reasonable doubt. Whether the necessary rational connection between the basic and elemental facts exists depends not on an examination of the permissive presumption in the abstract but rather on how the presumption is applied in the context of the particular facts of the given case.

3. **Criminal Law § 32.1— mandatory presumption—due process**

If the words of an instruction describe an inference which must be drawn upon the proof of basic facts, then the presumption is *mandatory* in nature. Mandatory presumptions which conclusively prejudice the existence of an elemental issue or actually shift to defendant the burden to disprove the existence of an elemental fact violate the Due Process Clause.

4. **Criminal Law § 32.1— mandatory presumptions—requirement of rebutting evidence—due process**

Mandatory presumptions which merely require defendant to come forward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts do not violate the Due Process Clause so long as in the presence of rebutting evidence (1) the mandatory presumption disappears, leaving only a mere permissive inference, and (2) the other requirements for permissive inferences are then met.

5. **Criminal Law § 32.1— mandatory presumption—quantum of rebutting evidence**

Mandatory presumptions which require defendant to come forward with a quantum of evidence significantly greater than "some evidence" may run afoul of due process by shifting the burden of persuasion to defendant. In the

absence of *any* rebutting evidence, however, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt.

6. Criminal Law § 32.1— mandatory presumption—examination upon face

A mandatory presumption is generally examined upon its face, and its validity depends ultimately upon its hypothetical accuracy in the general run of cases in which it might be applied.

7. Criminal Law § 32.1— prosecution's reliance solely on presumption—rational connection between basic and elemental facts

If the prosecution relies solely upon a presumption, whether mandatory or permissive, to make out its case, then the rational connection between the basic and elemental facts must be such that a jury could infer the existence of the elemental facts beyond a reasonable doubt.

8. Parent and Child § 1.1— mandatory presumption of husband's paternity—*instruction shifting* burden of persuasion—violation of due process

In a prosecution for willful failure to provide support for a child conceived while defendant and the child's mother were living together as husband and wife, an instruction requiring defendant husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption of legitimacy of the child gave the State the benefit of a mandatory presumption of defendant's paternity and placed upon him a burden of production so stringent that, in effect, it unconstitutionally shifted the burden of persuasion to him, since due process precluded requiring defendant, in order to rebut the mandatory presumption, to do more than offer some evidence which was sufficient to raise a factual issue as to the paternity of the child.

9. Parent and Child § 1.1— presumption of legitimacy—necessary rebutting evidence

In order to raise a factual issue as to paternity, the evidence rebutting the presumption of legitimacy of a child born in wedlock must at least tend to show: (1) that defendant could not be the father because, for example, he did not in fact have sexual relations with his wife at a time when conception could have occurred; or (2) that even if defendant could be the father, some other man also could be the father because that other man had sexual relations with the mother at a time when conception could have occurred.

10. Parent and Child § 1.1— child born during wedlock—permissible inference of paternity—burden of persuasion

Upon the production of sufficient rebuttal evidence in a criminal case to raise an issue as to the paternity of a child, the presumption of legitimacy disappears and the State is left to prove paternity beyond a reasonable doubt from all the facts and circumstances. If, however, there is evidence in the case that the child was born or conceived during wedlock, the jury may be permitted, but not required, to infer paternity of the husband provided under all the facts and circumstances of a given case there is a rational connection between the facts proved and the elemental facts inferred. Furthermore, the State may rely entirely on the inference to make out its case provided under

all the facts and circumstances of a given case the rational connection is strong enough to permit the jury to make the inference beyond a reasonable doubt, but the burden of persuasion beyond a reasonable doubt remains with the State.

11. Parent and Child § 1.1— presumption of husband's paternity—absence of rebutting evidence—proof child conceived or born in wedlock—peremptory jury instruction

In absence of evidence rebutting the presumption of the husband's paternity, the State need only prove beyond a reasonable doubt that the child was conceived or born in wedlock, and the jury may then be instructed to find the issue of paternity against the husband, for there would be no evidence in the case raising an issue of his paternity.

12. Parent and Child § 1.1— presumption of legitimacy—sufficiency of rebutting evidence—question of law

Whether sufficient evidence has been offered to rebut the presumption of legitimacy becomes a question of law for the court if undisputed facts in a given case establish conclusively when conception could or could not have occurred and there is no dispute regarding when the husband had or could have had sexual relations with the mother or when some other man had sexual relations with her.

13. Parent and Child § 1.1— presumption of husband's paternity—instruction requiring showing of physical impossibility to rebut presumption—improper shifting of burden of persuasion—absence of any rebutting evidence—no prejudice to husband

Although the trial court's instruction requiring defendant husband to offer evidence of the physical impossibility of his fatherhood of a child born to his wife in order to rebut the presumption of legitimacy of the child placed too high a burden on defendant to rebut the presumption, defendant was not prejudiced by this error where there was no evidence in the case sufficient to raise an issue of paternity and thereby rebut the presumption since all the evidence showed that conception must have occurred when defendant was living with and could have had sexual relations with his wife and before her sexual encounters with another man, and neither the State nor defendant produced evidence that defendant could not be the father of the child or that someone other than defendant could be.

14. Parent and Child § 1.1— presumption of husband's paternity—no showing wife living in open adultery

The presumption of defendant husband's paternity of a child born to his wife was not rebutted by evidence that the wife was "notoriously living in open adultery" where the evidence showed that the wife had an affair with another man but did not show that the affair was notorious, open, or that she and the other man were living together at the time, and the evidence did not show that these events occurred at a time when conception could have occurred.

Justice CARLTON did not participate in the consideration or decision of this case.

Justice COPELAND dissenting.

BEFORE *Strickland, J.*, at the 4 December 1978 Session of JONES Superior Court, defendant was convicted by a jury of willfully refusing to provide adequate support for his child in violation of G.S. 14-322. From a judgment suspending a six-months term of imprisonment upon the condition, among others, that defendant support the child, defendant appealed to the Court of Appeals. In an opinion by *Judge Clark, Judge Vaughn* concurring, that Court found no error. *Judge*, now *Justice, Carlton*, dissented. Defendant appeals pursuant to G.S. 7A-30(2). This case was docketed and argued as No. 91, Fall Term 1979.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis, and Associate Attorney James C. Gulick for the State.

Ward & Smith, P.A., by Thomas E. Harris and C. H. Pope, Jr., for defendant appellant.

EXUM, Justice.

The child in this case was conceived while defendant and her mother were living together as husband and wife. She was born after they had separated but during wedlock. There was some evidence that her mother had sexual relations with another man after conception and during the period of gestation. The question presented is whether under these circumstances a jury instruction on our common-law presumption of the child's legitimacy violated defendant's right to a trial by due process of law. We answer in the negative and affirm the Court of Appeals.

The State's evidence tended to show as follows: Dawn White and defendant were married on 9 January 1976 and have never been divorced. They separated several times but did live together as husband and wife in Jones County from 10 June 1977 until 12 August 1977, on which date they separated for the last time. Dawn White missed her menstrual cycle in July 1977, and a child, named Crystal White, was born to her on 4 May 1978, approximately nine calendar months after the month in which she first missed her menstrual cycle. The child weighed eight pounds, ten ounces at birth. Defendant has not provided any financial support for the child. Defendant is capable of providing such support and demand for support has been made upon him.

Dawn White admitted in her testimony that on 15 August 1977 she went to Asheville "to be with Carl Pinnley." While in Asheville she had sexual relations with Pinnley. Pinnley was Dawn White's former boyfriend whom she had known before her marriage to defendant. She also admitted that at some unspecified time she had an occasion to "get with Mike Saunders" in her home.

Defendant himself did not testify. He offered other witnesses including Carl Pinnley. Pinnley's testimony tended to show as follows: On 14 August 1977 he received a telephone call in Asheville, where he lived, from Dawn White, notifying him that she was coming to Asheville. She arrived there on 15 August. They "had an affair" which began on 15 August. He saw her "on a regular basis for the months of August, September, and October." She left Asheville and returned to Jones County shortly after Thanksgiving. He returned to Jones County to visit in Dawn White's family's home during Christmas 1977, but returned to Asheville in February 1978. He then visited Dawn White after the child was born; she told him that defendant was the child's father. He had written "love letters" to Dawn White both before and after her marriage to defendant.

On this evidence the trial judge instructed the jury, in part, as follows:

> "Now ladies and gentlemen of the jury let me instruct you that when a child is born in wedlock, that is when a child is born during the marriage, of the mother, the law presumes that this child is the child of the husband of the mother at the time the child was born. Now the presumption of legitimacy of the child cannot be rebutted except by evidence tending to show the husband could not have access to the mother during the period of time the law recognizes as the period of time the child could have been conceived. This period of time which the law recognizes is the period of time sometimes referred to in the law as normal period of gestation. May be anywhere from seven, eight, nine, nine and a half or ten months from the date of birth of the child, and the only way the assumption of legitimacy may be rebutted is by evidence tending to show the husband could not have had access to the wife during the period of time referred to.

> In the absence of evidence to the contrary the term pregnancy is ten lunar months or 280 days. The state contends that the defendant had access to the mother of the child during the period of conception and that this child is the defendant's child. The defendant on the other hand, contends that others had access to the mother and this child is another's child and not the defendant's."

He also instructed the jury that before it could find defendant guilty of abandonment of the child, the State must prove beyond a reasonable doubt: (1) defendant was the father of the child; (2) defendant failed to provide the child with adequate support (properly defining these terms); and (3) such failure was "willful, that is intentional, and without justification or excuse." Thus, although the trial judge instructed the jury that the State must prove beyond a reasonable doubt that defendant was the father of the child, he also gave the State the benefit of our common-law presumption of defendant's paternity which, the trial judge said, could not be "rebutted except by evidence tending to show [the defendant] could not have had access to the mother" during the period of time in which the child could have been conceived. Since neither the State nor defendant offered evidence of such lack of access, the effect of the trial judge's instructions was to require the jury to find the issue of paternity against defendant, provided the jury found that the child was born during the marriage of the mother and the defendant.

Defendant's only assignments of error relate to the trial court's instructions on the presumption of legitimacy of the child. Defendant argues first that the instructions violate those principles of due process of law which require the State to prove beyond a reasonable doubt every essential element of the crime charged and which preclude placing upon a defendant any burden to prove the nonexistence of any such element. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Re Winship*, 397 U.S. 358 (1970). The impact of these principles upon the use of certain presumptions in North Carolina's law of homicide was fully explored by this Court in *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975). More recently, the United States Supreme Court has considered the due process implications of the use of presumptions by the prosecution in criminal cases in *Sandstrom v. Montana*, --- U.S. ---,

61 L.Ed. 2d 39 (1979) and *Ulster County Court v. Allen*, --- U.S. ---, 60 L.Ed. 2d 777 (1979).

Winship, a juvenile proceeding, held that the Fourteenth Amendment's Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. In *Mullaney* the Supreme Court dealt with a Maine jury instruction in a homicide case to the effect "that if the prosecution established that the homicide was both intentional and unlawful, malice of aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." 421 U.S. at 686. The jury instruction went on to explain "malice aforethought and heat of passion on sudden provocation are two inconsistent things" and that a defendant who proved the latter would thereby negate the former and reduce the homicide to manslaughter. The Supreme Court concluded that this kind of instruction violated the principle announced in *Winship* in that it impermissibly relieved the prosecution of the burden of proving malice, an essential element of murder under the law of Maine, beyond a reasonable doubt.

In *Hankerson* this Court considered the effect of *Mullaney* on this State's law of homicide. Like Maine, our law gave the prosecution the benefit of a presumption of malice when it proved that the defendant intentionally inflicted a wound upon a deceased with a deadly weapon which proximately caused death. The presumption had the effect of requiring the defendant to satisfy the jury of that legal provocation which would negate the element of malice and reduce the crime to manslaughter. In North Carolina the prosecution was also entitled to rely on a presumption of unlawfulness upon proof of the same facts which raised the presumption of malice. This presumption placed upon the defendant the burden of satisfying the jury that he killed in self-defense in order to negate unlawfulness and excuse the crime altogether. This Court held that the *Mullaney* decision precluded using our presumptions of malice and unlawfulness in such a way as to shift the burden of persuasion on these elements to the defendant. In other words, the State must, where the issues of malice and unlawfulness are raised by the evidence, bear the burden of persuading the jury of their existence beyond a reasonable doubt.

The defendant can be given no burden of persuading the jury of the nonexistence of these elements. This Court summarized the effect of *Mullaney* on our law of homicide as follows, 288 N.C. at 649-50, 220 S.E. 2d at 588:

> "The *Mullaney* ruling does not, however, preclude all use of our traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the state of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and, we believe, constitutional. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974), pet. for cert. filed, 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669). Neither, by reason of *Mullaney*, is it unconstitutional to make the presumptions mandatory in the absence of contrary evidence nor to permit the logical inferences arising from facts proved (killing by intentional use of deadly weapon), *State v. Williams*, *supra*, to remain and be weighed against contrary evidence if it is produced. The effect of making the presumptions mandatory in the absence of any contrary evidence is simply to impose upon the defendant a burden to go forward with or produce some evidence of all elements of self-defense or heat of passion on sudden provocation, or rely on such evidence as may be present in the State's case. The mandatory presumption is simply a way of stating our legal rule that in the absence of evidence of mitigating or justifying factors all killings accomplished through the intentional use of a deadly weapon are deemed to be malicious and unlawful. The prosecution need not prove malice and unlawfulness unless there is evidence in the case of their nonexistence. *Cf.* McCormick, Evidence § 346, n. 91 (2d Ed. 1972). We find this perceptive language in G. Fletcher, 'Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion-Practices in Criminal Cases,' 77 Yale L.J. 905 (1968) (cited in *Mullaney v. Wilbur*, *supra*, n. 16):
>
> > " 'The critical step in the conceptual evolution of malice is *MacKally's Case* [9 Co. Rep. 65b, 77 Eng. Rep. 828 (1611)]. That early 17th century decision, as reported and interpreted by Coke, stands for the principle that the prosecution need not prove the element of malice to con-

> vict of murder. The judges realized that malice does not lend itself to affirmative proof; by and large, the malicious killing is defined by reference to what it is not, not by what it is. As agreed by all, one type that was not malicious was a killing provoked by a sudden quarrel. Thus, to have a triable issue of malice, one had to have a triable claim that the defendant killed in the course of a sudden quarrel.'
>
> "The same, we believe, may be said of the element of unlawfulness. There is no suggestion in *Mullaney* that placing such a burden of producing evidence upon a defendant violates Fourteenth Amendment Due Process. 'Many States do require the defendant to show that there is "some evidence" indicating that he acted in the heat of passion before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt. (Citations omitted.) Nothing in this opinion is intended to affect that requirement.' *Mullaney v. Wilbur, supra*, n. 28."

In *Ulster County Court v. Allen, supra*, --- U.S. ---, 60 L.Ed. 2d 777, the Supreme Court considered New York's statutory presumption which provided with certain exceptions that the presence in an automobile of any firearm "is presumptive evidence of its possession by all persons occupying" the automobile at the time the weapon is found. Defendants, all passengers in an automobile, were convicted of the possession of certain handguns found in the car when it was stopped for speeding. The trial judge instructed the jury on the effect of the statutory presumption. The New York Court of Appeals found no error and summarily rejected the argument that the presumption was unconstitutional. 40 N.Y. 2d 505, 354 N.E. 2d 836 (1976). In a federal habeas corpus proceeding, the Second Circuit Court of Appeals ordered a new trial on the ground that the statutory presumption, being mandatory in nature, was unconstitutional on its face. The Supreme Court reversed. Recognizing that "[i]nferences and presumptions are a staple of our adversarial system of factfinding," --- U.S. at ---, 60 L.Ed. 2d at 791, the Court stressed that their

> "value . . . and . . . validity under the Due Process Clause vary from case to case . . . depending on the strength of the

connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Id.* at ---, 60 L.Ed. 2d at 791 (citations omitted).

The *Allen* Court then distinguished mandatory and permissive presumptions in the context of due process requirements. It noted that a *permissive presumption,* or inference: (1) permits but does not require the factfinder "to infer the elemental fact from proof by the prosecutor of the basic one and . . . places no burden of any kind on the defendant;" (2) may operate so that the basic fact constitutes "prima facie evidence of the elemental fact;" (3) is analyzed in the context of the specific factual situation of the case in which it is used, the Court requiring the party challenging it "to demonstrate its invalidity as applied to him;" and (4) must under the facts of the case employ some rational connection between the basic fact and the inferred elemental fact to comport with due process. *Id.* at ---, 60 L.Ed. 2d at 792. On the other hand, a *mandatory presumption:* (1) *requires* the factfinder to "find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts;" (2) may be subdivided into two classes: those that "merely shift the burden of production to the defendant, following the satisfaction of which the ultimate burden of persuasion returns to the prosecution; and [those] that entirely shift the burden of proof [persuasion] to the defendant;" (3) is generally examined *on its face* "to determine the extent to which the basic and elemental facts coincide;" and (4) turns, for its constitutional validity, on its "accuracy in the run of cases" to which it might be applied. *Id.* at ---, 60 L.Ed. 2d at 792-93. Furthermore, "[i]n deciding what type of inference or presumption is involved in a case, the jury instructions will generally be controlling, although their interpretation may require recourse to the statute involved and the cases decided under it." *Id.* at ---, n. 16, 60 L.Ed. 2d at 792.

Applying these principles to the case before it, the *Allen* Court concluded that New York's statutory presumption was permissive rather than mandatory. As instructed upon by the trial judge, the presumption described for the jury "a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession," which could be ignored by the jury "even if there was no affirmative proof offered by defendants in rebuttal." The instructions as given made it clear that the prosecution's case rested only partly on the force of the presumption. Thus, the Court of Appeals erred in treating the presumption as a mandatory one, examining it on its face and trying to determine how it might operate in hypothetical situations. The presumption being permissive, the proper course was to analyze its application to the case at hand. And, "[a]s applied to the facts of this case, [facts which indicated that the passengers in the vehicle knew of the existence of the weapons and were in a position to exercise control and dominion over them] the presumption of possession is entirely rational." *Id.* at ---, 60 L.Ed. 2d at 795. It comported with the standards earlier laid down in *Leary v. United States*, 395 U.S. 6 (1969), and *Tot v. United States*, 319 U.S. 463 (1943), that there be a " 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." *Id.* at ---, 60 L.Ed. 2d at 797.

Finally, the *Allen* Court rejected defendants' argument that the statutory presumption must be rejected unless a jury could infer the elemental fact (possession) from the proven fact (presence in automobile) beyond a reasonable doubt. The Court said that this argument

> "overlooks the distinction between a permissive presumption on which the prosecution is entitled to rely as one not-necessarily-sufficient part of its proof and a mandatory presumption which the jury must accept even if it is the sole evidence of an element of the offense.
>
> "In the latter situation, since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt. But in the former situation, the prosecution may rely on all the

evidence in the record to meet the reasonable doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary.

"The permissive presumption, as used in this case, satisfied the Leary test. And, as already noted, the New York Court of Appeals has concluded that the record as a whole was sufficient to establish guilt beyond a reasonable doubt." *Id.* at ---, 60 L.Ed. 2d at 797-98.

In *Sandstrom v. Montana, supra*, --- U.S. ---, 61 L.Ed. 2d 39, defendant Sandstrom was prosecuted for deliberate homicide, an essential element of which was that the homicide be "committed purposely or knowingly." Defendant admitted killing the deceased but denied that he did so deliberately. Basing his argument upon the testimony of two mental health experts who described defendant's mental state at the time of the killing, defendant's attorney contended that defendant, "due to a personality disorder aggravated by alcohol consumption, did not kill [the victim] 'purposely or knowingly.' " *Id.* at ---, 61 L.Ed. 2d at 44. However, the trial judge instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." He did not further elaborate on the presumption. The Supreme Court concluded that this instruction violated "the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt." *Id.* at ---, 61 L.Ed. 2d at 43.

As in the *Allen* case, the *Sandstrom* Court noted that its first task was to determine the nature of the presumption described by the jury instructions. Such determination "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Id.* at ---, 61 L.Ed. 2d at 45. The Court then rejected the State's argument that the instruction described a mere

permissive inference or at most a mandatory presumption which placed upon the defendant the burden only to produce "some" contrary evidence. Instead, the Court noted that in the absence of further elaboration by the trial judge, a reasonable juror could have interpreted the instruction as either "an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption" or "a direction to find intent upon proof of the defendant's voluntary actions . . . unless *the defendant* prove the contrary by some quantum of proof which may well have been considerably greater than 'some' evidence—thus effectively shifting the burden of persuasion on the element of intent." *Id.* at ---, 61 L.Ed. 2d at 47. (Emphasis original.) If considered as a conclusive, irrebuttable presumption, the instruction could not stand under the holding in *Morissette v. United States*, 342 U.S. 246, 274 (1952) that where intent is an element of the crime "the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." *Quoted in id.* at ---, 61 L.Ed. 2d at 49. If interpreted as shifting the burden to defendant to disprove the requisite mental state, the presumption runs afoul of the decision in *Mullaney v. Wilbur, supra*, 421 U.S. 684.

[1-7] The analysis employed in *Allen* and *Sandstrom* reinforces this Court's determination in *State v. Hankerson, supra*, 288 N.C. 632, 220 S.E. 2d 575, of the effect of *Mullaney* on our old presumptions of malice and unlawfulness in homicide cases. Furthermore, regarding presumptions generally, the following principles emerge from *Mullaney, Allen* and *Sandstrom:* The nature of the presumption must first be determined by careful examination of the actual words spoken to the jury by the trial judge in the light of whatever definition of the presumption may be provided by applicable statute or case law and in the context of how a reasonable juror might interpret the words. If, in the contemplation of a reasonable juror, these words describe a mere *permissive* inference, due process is not violated so long as (1) there is a rational connection between the basic and elemental facts such that upon proof of the basic facts, the elemental facts are more likely than not to exist, and (2) there is other evidence in the case which, taken together with the inference of presumption, is sufficient for a jury to find the elemental facts beyond a reasonable doubt. Whether the necessary rational connection be-

tween the basic and elemental facts exists depends not on an examination of the permissive presumption in the abstract but rather on how the presumption is applied in the context of the particular facts of the given case. If the words of instruction describe an inference which must be drawn upon the proof of basic facts, then the presumption is *mandatory* in nature. Mandatory presumptions which conclusively prejudge the existence of an elemental issue or actually shift to defendant the burden to disprove the existence of an elemental fact violate the Due Process Clause. Mandatory presumptions which merely require defendant to come forward with *some evidence* (or take advantage of evidence already offered by the prosecution) to rebut the connection between the basic and elemental facts do not violate the Due Process Clause so long as in the presence of rebutting evidence (1) the mandatory presumption disappears, leaving only a mere permissive inference, and (2) the other requirements for permissive inferences described above are then met. Mandatory presumptions which require defendant to come forward with a quantum of evidence significantly greater than "some evidence" may run afoul of due process by shifting the burden of persuasion to defendant. In the absence of *any* rebutting evidence, however, no issue is raised as to the nonexistence of the elemental facts and the jury may be directed to find the elemental facts if it finds the basic facts to exist beyond a reasonable doubt. A mandatory presumption is generally examined on its face; its validity depends ultimately upon its hypothetical accuracy in the general run of cases in which it might be applied. Finally, if the prosecution relies solely upon a presumption, whether mandatory or permissive, to make out its case, then the rational connection between the basic and elemental facts must be such that a jury could infer the existence of the elemental facts beyond a reasonable doubt.

[8] We turn now to an application of these principles to the presumption involved in the case before us. Examining the language of the trial judge's instructions in light of our case law on the subject and in light of the likely effect the language had upon the minds of reasonable jurors, we are confident that the instructions gave the State the benefit of a mandatory presumption of defendant's paternity. The jury must have understood that it would find the issue of paternity against defendant upon proof that the child was born during the marriage of her mother and

defendant, unless there was some evidence in the case that defendant could not have had access to the mother during a reasonable period of gestation. The instructions thus described, in pertinent part, the definition of our common-law presumption of legitimacy. "When a child is born in wedlock, the law presumes it to be legitimate [*i.e.*, the child of the mother's husband], and the presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife." *Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E. 2d 562, 568 (1968).

There is strong public policy supporting this presumption. The law, as it ought, favors the legitimacy of children. Children of a married woman ought to be, and almost always are in fact, fathered by her husband. The presumption recognizes this. It presumes and promotes the integrity of the family—the seminal unit of society as we know it. Nonetheless the presumption must comport with the Due Process Clause of the Fourteenth Amendment. The question is whether the nature of the rebutting evidence traditionally required, *i.e.*, that the husband could not *possibly* be the father because of impotency or his lack of physical access to the mother, is so stringent and so inherently convincing on the issue of paternity that, in effect, the burden of persuasion is impermissibly shifted to defendant.

The United States Supreme Court has not definitively determined the exact quantum of evidence which a defendant, within the dictates of due process, may be required to produce in order to avoid the effect of a mandatory presumption. It has spoken approvingly of a requirement that defendant come forward with "some evidence" contrary to the presumed fact, *Mullaney v. Wilbur*, *supra*, 421 U.S. at 701, n. 28, or "some evidence to rebut the presumed connection between the [basic and elemental] facts." *Ulster County Court v. Allen*, *supra*, --- U.S. at ---, 60 L.Ed. 2d at 792. The Court has cautioned, however, against requiring a defendant to produce a quantum of evidence "considerably greater than 'some' evidence," in order to rebut a mandatory presumption. *Sandstrom v. Montana*, *supra*, --- U.S. at ---, 61 L.Ed. 2d at 47. We noted in *State v. Hankerson*, *supra*, 288 N.C. 632, 220 S.E. 2d 575, that to require a defendant to produce enough evidence to "satisfy the jury" of the nonexistence of the

presumed elemental facts (malice and unlawfulness) impermissibly shifted to defendant the burden of persuasion on the issue of the existence of these facts. We held in that case that a defendant could rebut the presumption merely by offering evidence (or relying on evidence offered by the State) *sufficient to raise a factual issue* as to the existence of the elemental facts. Our view in *Hankerson* was that due process would not permit giving defendant a greater burden of production.

[8] So it is here. We hold that to require a defendant-husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption of paternity places upon him a burden of production so stringent that, in effect, it unconstitutionally shifts the burden of persuasion to him on this issue. Due process precludes requiring that the defendant, in order to rebut the mandatory presumption, do more than offer some evidence which is sufficient to raise a factual issue as to the paternity of the child.

[9] What, then, constitutes sufficient evidence to raise such a factual issue? We hold that the rebutting evidence must at least tend to show: (1) that defendant could not be the father because, for example, he did not in fact have sexual relations with his wife at a time when conception could have occurred; or (2) that even if defendant could be the father, some other man also could be the father because that other man had sexual relations with the mother at a time when conception could have occurred.

[10] Upon the production of the type of rebuttal evidence referred to above, the presumption of legitimacy disappears and the State is left to prove paternity beyond a reasonable doubt from all the facts and circumstances in the case. If, however, there is evidence in the case that the child was born or conceived during wedlock, then the jury may be permitted, but not required, to infer paternity of the husband provided under all the facts and circumstances of a given case there is a rational connection between the basic facts proved and the elemental facts inferred. The State, furthermore, may rely entirely on the inference to make out its case provided under all the facts and circumstances of a given case the rational connection is strong enough to permit the jury to make the inference beyond a reasonable doubt. The burden of persuasion beyond a reasonable doubt on the case of paternity remains with the State.

[11] In the absence of the required rebutting evidence the State need only prove beyond a reasonable doubt that the child was conceived or born in wedlock. The jury may then be instructed to find the issue of paternity against the husband, for there would be no evidence in the case raising an issue of his paternity.

[12] The time when conception could have occurred will vary from case to case. The average, or normal, time between conception and birth is generally accepted to be 266 to 270 days, but whether a particular pregnancy could have extended for a longer or shorter period may be a proper subject for expert medical opinion. *See* 2 Taylor, Principles and Practices of Medical Jurisprudence 24 (12th Ed. 1965); 5B Lawyer's Medical Cyclopedia, § 37.2a (1972); *Eubanks v. Eubanks, supra*, 273 N.C. at 196, 159 S.E. 2d at 568. Even without expert testimony, however, *undisputed* facts in a given case—such as the child's being full term or the time of the mother's last menstruation prior to birth—may establish conclusively when conception could or could not have occurred. If this time is so established and if there is likewise no dispute regarding when the husband had or could have had sexual relations with the mother or when some other man had sexual relations with her, whether sufficient evidence has been offered to rebut the presumption becomes a question of law for the court.

[13] Such is the case here. The evidence was insufficient as a matter of law to rebut the mandatory presumption of defendant's paternity. Although the trial judge's instructions placed too high a burden on defendant to rebut this presumption, defendant was not prejudiced by the error because there was no evidence in the case sufficient to raise an issue of paternity and, thereby, rebut the presumption. It is undisputed that the mother first missed menstruation in July 1977 and that a full term, eight pound, ten ounce baby was born some nine calendar months thereafter. There is no evidence suggesting that anything other than pregnancy caused the missed menstruation or that the mother menstruated at any time between July 1977 and the birth. Absent such evidence, which defendant has the burden to produce, conception must have been the cause of and preceded the missed menstruation. 2 Taylor, *supra* at 22. Conception, therefore, according to all the evidence, must have occurred at a time when defendant was living with and could have had sexual relations with his wife and before her sexual encounters with the witness Carl

Pinnley. Neither the State nor defendant, consequently, produced any evidence that defendant could not be the father of the child or that someone other than defendant could be.

We are not inadvertent to, but decline to follow, the rationale of *People v. Thompson*, 152 Cal. Rptr. 478, 89 Cal. App. 3d 193 (1979), which sustained a statutory conclusive presumption of paternity that provided: ". . . [t]he issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be the child of the marriage." The California Court of Appeals held that it was not violative of due process to preclude a defendant-husband faced with the presumption from offering evidence designed to raise a reasonable doubt as to his paternity and thus rebut the presumption. Defendant's wife, had she been permitted to testify, would have said she was "unsure" whether defendant was the biological father of the child. The California Court of Appeals held that this testimony was properly excluded. It reasoned that the statutory presumption was not really a presumption at all but rather a statement of substantive law that any potent and virile husband cohabiting with his wife is deemed to be the legal "father" of issue born of the wife notwithstanding that he may not be the biological "father." The Court concluded that the California Legislature did not intend "to limit criminal responsibility [for nonsupport] to the 'biological' or 'natural' . . . father" and that "proof of biologic parenthood is not an essential element of proof of guilt [under the nonsupport statutes.]" 152 Cal. Rptr. at 483, 484, 89 Cal. App. 3d at 201. It relied on a California Supreme Court decision which, according to the Court of Appeals, "held blood tests . . . inadmissible where the conclusive presumption applied." 152 Cal. Rptr. at 481, 89 Cal. App. 3d at 196.

We do not understand our common-law presumption of the husband's paternity to be a rule of substantive law making biological paternity irrelevant in a prosecution under G.S. 14-322. That traditionally the presumption could be rebutted by showing impossibility of biological paternity or even that the wife was "notoriously living in open adultery," *Eubanks v. Eubanks, supra*, 273 N.C. at 197, 159 S.E. 2d at 568, militates against such an understanding. Furthermore, our Legislature has specifically provided that blood grouping test results are admissible "[i]n the trial of any criminal action or proceeding in any court in which

the question of parentage arises, regardless of any presumptions with respect to parentage;" and if the results show that "defendant cannot be the natural parent of the child," then, in effect, the presumption is not only rebutted but the jury is to be peremptorily instructed in defendant's favor on the issue. G.S. 8-50.1.

While we do not choose to follow the rationale of *Thompson*, we note that the evidence sought to be proffered in *Thompson* would, standing alone, be insufficient to rebut our presumption of paternity under the construction we have given it here.

[14] Defendant argues, finally, that the presumption of paternity was rebutted in the case under our traditional rules by evidence that the wife was "notoriously living in open adultery." *See Eubanks v. Eubanks, supra*, 273 N.C. at 197, 159 S.E. 2d at 568. We do not believe the evidence was sufficient to establish this fact. All it shows is that at some time after conception the mother moved to Asheville where she "had an affair" with the witness Carl Pinnley. The evidence does not show that the affair was notorious, open, or that she and Pinnley were living together at the time. More importantly, however, the evidence does not show that these events occurred at a time when conception could have occurred.

In the trial, therefore, we find no prejudicial error, and the decision of the Court of Appeals is

Affirmed.

Justice CARLTON did not participate in the consideration or decision of this case.

Justice COPELAND dissenting.

I fully agree with the majority that the burden of persuasion was impermissibly shifted to the defendant in this case because in order to rebut the presumption of legitimacy he was required to prove nonaccess during the period of conception. The burden of *persuasion* on any element of a criminal offense may not through the use of presumptions be shifted to a defendant; however, the burden of *production* may be placed on the defendant to produce some evidence to raise a factual issue on the question involved. If the defendant fails to produce such evidence then the presump-

tion remains in the case and is mandatory. If the defendant does produce such evidence then the presumption disappears but the natural inferences arising from the proven facts from which the jury may or may not draw a certain conclusion remain in the case.

The majority holds that shifting the burden of persuasion to the defendant was harmless error since defendant did not meet the burden of production as it is defined in the majority opinion. Under the rule announced today a defendant can meet his burden of production sufficient to rebut the presumption of legitimacy and leave only the inferences that arise from the proven facts if he has some evidence that although he had access to his wife he in fact did not have sexual relations with her or that someone else had sexual relations with her during the period of conception.

Defendant produced such evidence. The majority holds that he did not produce such evidence because the evidence conclusively shows that

> "[c]onception . . . according to all the evidence, must have occurred at a time when defendant was living with and could have had sexual relations with his wife and before her sexual encounters with the witness Carl Pinnley."

The conclusive evidence relied upon by the majority is as follows:

> "The mother first missed menstruation in July 1977 and . . . a full term, eight pound, ten ounce baby was born some nine calendar months thereafter."

I dissent because I find the evidence to be far from conclusive. The majority is without evidence as to what time during the month of July she should have had her normal cycle. If it was July 1, nine calendar months later would be April 1 and the baby was born on May 4, 1978. If it was the last day of July then nine calendar months later would be the last day of April which is much closer to the baby's date of birth.

The trial judge in this case relied upon instructions regarding the period of conception that are quoted with approval in *State v. Hickman*, 8 N.C. App. 583, 174 S.E. 2d 609 (1970) in instructing the jury as follows:

> "This period of time which the law recognizes is the period of time during which the child could have been conceived is a

period of time sometimes referred to in the law as *normal* period of gestation. *May be anywhere from seven, eight, nine, nine and a half or ten months from the date of birth of the child,* and the only way the assumption (presumption) of legitimacy may be rebutted is by evidence tending to show the husband *could not have had access to the wife during the period of time referred to.*" [Emphasis added.]

This rule stretches the parameters for the period of conception for a normal pregnancy to its maximum but it is a possibility and it was employed in the trial of this case. It would certainly include the time after defendant and his wife separated and she began her relations with Pinnley. If this period of time for conception were to be used then defendant did meet his burden of production.

The average term of pregnancy is 280 days. *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968). This term includes both the period of time from last menstruation to conception (an average of 14 days) and the time from conception to birth (an average of 266 and not 280 days). As stated in 5B *Lawyer's Medical* Cyclopedia § 37.2a (1972):

"The average duration of pregnancy is 266 days. This means that delivery should occur ten lunar months (280 days) following the first day of the last menstrual period. The calculation of the expected delivery date employs Naegele's rule, as follows:

A. Subtract three months from the first day of the last menstrual period.

B. To the date obtained in A, add seven days.

. . .

In clinical practice, only 4% of women deliver on their due date, but 80% deliver within the period of two weeks before and two weeks after the calculated date."

Starting with the date of birth, May 4, 1978, and counting back 266 days, the date obtained is August 11, 1977. The 280th day would be July 28, 1977. Defendant separated from his wife on August 12, 1977 (the 265th day) and she began sexual relations with Pinnley on August 15, 1977 (the 262nd day).

It may be far more likely that conception occurred in July of 1977 while defendant and his wife were living together but the evidence is not conclusive on that point. This is a criminal case and I do not believe that the constitutional error committed was harmless beyond a reasonable doubt. Since the *average* number of days from conception to birth is 266 days and the calculations are no more accurate than plus or minus two weeks from the woman's last menstruation even for a full term, normal pregnancy, there is at least a reasonable possibility that conception occurred at the point when she separated from her husband and began relations with Pinnley. The conception of the child may have been the last product of her relationship with her husband or the first product of her sexual affair with Pinnley. Pinnley, and not her husband, was the more likely object of her affections at that point in time.

For these reasons I believe that scrupulous concern for the fairness of the process and of the result requires that there be a new trial at which the jury would be applying the law as set forth in this opinion to the evidence as presented. Under the majority's conclusion that will not be achieved in this case due to the conclusive evidence the majority discerns from the record.

STATE OF NORTH CAROLINA v. FLETCHER LEE ROYAL

No. 115

(Filed 15 July 1980)

1. Criminal Law § 66.9— photographic identification—no suggestiveness of procedure

The trial court did not err in failing to suppress the photographic identification of defendant by victims of an armed robbery and assault where the evidence on voir dire tended to show that the victims were positive about their identification at the time they viewed the photographs and selected defendant's picture from among the group; they were not told that the robber was one of the persons in the photographic lineup; there was no evidence that the officer suggested the choice which the victims made; the men portrayed in the photographs were similarly dressed and were photographed in casual surroundings; and all of the evidence on voir dire pointed to the conclusion that the photographs themselves and the procedure surrounding their use did not in any way point to defendant as the perpetrator of the crimes of which he stood accused.

2. **Criminal Law § 66.7— photographic identification—method of obtaining photograph—defendant allowed to make inquiry**

There was no merit to defendant's contention that the trial court erred by not permitting him to inquire into the manner in which his photograph was obtained for use in a photographic lineup, since defendant was permitted to inquire fully into the circumstances surrounding the obtaining of his photograph by law enforcement authorities during the voir dire to determine the propriety of a pretrial photographic identification; that this inquiry was permitted within the context of an ongoing voir dire concerning a related matter was irrelevant to the question of prejudice provided that a complete examination of the challenged facts and circumstances was permitted; and on the basis of evidence presented by defendant, the court specifically found that the photograph in question had been voluntarily given to police by defendant's mother-in-law.

3. **Criminal Law § 66.1— in-court identification of defendant—opportunity for observation**

In a prosecution for assault and armed robbery, the trial court did not err in allowing the three victims to make an in-court identification of defendant, since each of them was able to view the intruder at close range in familiar surroundings which were well lighted over a period of about 45 minutes, and that the observations occurred within the context of confusion and uproar while the crimes were taking place did not render them inherently incredible and thus incompetent as a matter of law.

4. **Criminal Law § 87.1— leading questions**

There was no merit to defendant's contention that the trial court expressed an opinion by overruling his objections to leading questions since most of the questions to which defendant objected did not suggest the answer desired by the interrogator and thus were not leading questions; two of the questions were addressed to an investigator who was subpoenaed by the State but called by defendant, so that it was not an abuse of discretion for the judge to allow the State to ask him leading questions; and defendant did not object to the one truly leading question until after the witness had answered, and even then there was no motion to strike.

5. **Criminal Law § 87.3— use of radio log to refresh recollection—procedure proper**

In a prosecution for assault and armed robbery, the memory of a deputy sheriff was refreshed in a permissible manner where he was handed a radio log sheet for the night of the crimes in question; he identified the document, and then he testified that he was at the sheriff's office when the report came in, and that the dispatcher gave him the call at the time it was logged; moreover, that the document which served to refresh the recollection of the witness had not been made by him did not render the method incompetent.

6. **Criminal Law § 88— limitation of cross-examination—defendant's right to confront accusers not abridged**

The trial court did not deny defendant his right to confront his accusers by sustaining objections by the district attorney to questions propounded by

defense counsel on cross-examination, since the court sustained objections to questions which called for answers which would have been incompetent hearsay, or for expert opinions for which no foundation had been laid, and since much of the questioning was unduly repetitive or argumentative.

7. Criminal Law § 86.5— impeachment of defendant—prior criminal acts

In an armed robbery and assault prosecution the trial court did not err in permitting the district attorney to question defendant concerning his kidnapping and robbery of a named person on a certain date, since defendant could be questioned for the purpose of impeachment concerning prior specific criminal acts or degrading conduct for which there had been no conviction.

8. Criminal Law § 89.3— corroborative evidence—admissibility

The trial court did not err in admitting testimony of a law enforcement officer concerning his conversation with another law officer about defendant and his statement made while he was in the hospital shortly after commission of the crimes with which he was charged, since the evidence was admissible for corroborative purposes only, and the court properly instructed the jury how they could use it.

Justice BROCK did not participate in the consideration or decision of this case.

Justice EXUM dissenting.

Justice CARLTON joins in the dissenting opinion.

APPEAL by defendant from judgment of *Brown, J.*, imposed at the 8 October 1979 Session of WAYNE Superior Court.

Upon pleas of not guilty, defendant was tried upon bills of indictment proper in form which charged him with the crimes of armed robbery, first-degree burglary, and two counts of assault with intent to kill.

The state introduced evidence summarized in pertinent part as follows:

On the night of 18-19 June 1979 William Nelson Smith lived near Dudley, North Carolina. He owned and operated a used car lot and a service station in Mount Olive, approximately four miles from his home. Three people lived with Smith in his home: his wife, Edna; his fourteen-year-old daughter, Nancy; and his seventy-one-year-old mother, Maybelle.

On the evening of said date, the family retired for bed at about 11:30. Mr. Smith had closed the family business for the night at about 11:00. Upon arriving home, he entered the house

through a storm door and then a back door which opened into the kitchen. The bottom half of the second door was made of wood; the top half consisted of glass panes. After entering the house and locking both doors, Smith proceeded to count out sufficient change for the next day's business activities. That day, he had attended a car show in Kenly, North Carolina, and he had sold six automobiles. At the time he arrived home, Smith had in his possession approximately $20,000 in cash and checks.

At approximately 3:00 the next morning, Smith was awakened by his wife who told him that someone was at the back door, beating on the door and ringing the door bell. As the noise continued, Smith put on a pair of pants and procured a .22 caliber pistol which was not loaded at the time.

When he entered the kitchen, Smith turned on a fluorescent light which brightened the entire room. Upon going to the back door, he pulled the curtain back and looked through the window panes and saw a black man standing on the back steps of the house. The entire backyard was illuminated by a yard light. Immediately thereafter the door was forced open, and Smith was slammed against a kitchen wall. The intruder and Smith scuffled for a few moments. The intruder then shot Smith at close range, wounding him in his jaw. The bullet shattered his jawbone and extensively damaged his gums.

After he shot Smith, the assailant jumped on him and began beating him with a small caliber revolver. In the course of the tussle, Smith was able to look at his assailant. Smith testified that he was able to visualize the image of his attacker several times a day and positively identified defendant as the assailant.

Before he passed out, Smith called out for his wife. Mrs. Smith went into the kitchen, observed the scuffle then in progress, and quickly left the room. She returned to the kitchen carrying a .22 caliber rifle. She tried to shoot the attacker but the weapon would not fire. She then began to beat the man about the head with the rifle. Despite her efforts, the assailant took the rifle away from her and began struggling with her. Defendant then shot Mrs. Smith.

The commotion in the kitchen had awakened Smith's mother who had been sleeping in an upstairs bedroom. As she came down

the stairs and saw the fighting in the kitchen she went into the kitchen, picked up a chair, and hit the man over the head twice with the chair. The blows apparently did not injure defendant because he then turned to the elderly woman and began slapping her about, demanding money. By this time, Mr. Smith and his wife had lost consciousness.

Mrs. Edna Smith regained consciousness after a short while, got up off of the floor, and tried to reach the telephone in the hallway. When she picked up the receiver and began to call for help, defendant jerked the telephone away from her and knocked her to the floor. He struck her several times.

By this time Mr. Smith had regained consciousness and made his way into the bedroom where he procured another .22 caliber revolver. Mr. Smith ran toward the assailant, put the gun up against the intruder's stomach, and fired at least two times. Though the attacker was wounded, he was able to force Mr. Smith back into the bedroom where they resumed fighting. After struggling with defendant for a short while, Mr. Smith gave the intruder all of the money that was in a dresser drawer, more than $12,000.00. The attacker then fled out the back door.

Later that morning, at approximately 5:45, Officer K. R. Edwards of the Goldsboro Police Department was leaving the police station when he observed a brown 1964 Chevrolet drive into the parking lot. The horn was blowing continuously. Officer Edwards walked over to the car where he saw defendant slumped over in the front seat. Defendant got out of the car and the officer was able to see two bullet wounds in the area of defendant's stomach. Defendant's clothes were bloody and his vest was unbuttoned. The interior of the car was bloody, especially near the door on the driver's side. The officer called for the rescue squad and defendant was taken to Wayne Memorial Hospital for treatment.

Defendant offered evidence, including his own testimony which tended to show that:

Defendant was 28 years old at the time of his trial and worked as a loom fixer and mechanic at a textile mill. He was married and lived with his wife and their three children in a trailer park near Goldsboro.

On 18 June 1979 defendant worked at his job from 8:00 a.m. until 4:00 p.m. After he left work he went to a local garage to check on the progress of repairs he was having made to his car, a 1973 Vega. While his car was being repaired, he was driving a brown 1964 Chevrolet which belonged to his friend, David Best. Later on that evening, at approximately 8:00, defendant and his wife went with their children to the home of her mother. The couple stayed about thirty minutes before they left, leaving the children behind to spend the night. Defendant drove his wife to the Mt. Olive Pickle Company where she worked on the night shift. After dropping Mrs. Royal off at the factory, defendant returned home to their trailer and changed clothes after washing himself. He then went to visit his sister-in-law, Eva Blake, at about 11:00 p.m. He stayed there briefly before driving to the Peacock Lounge in Goldsboro, where he stayed until it closed at 3:00 a.m. He then drove around Goldsboro until he came to a self-service gasoline station. Before he could drive away, after filling his tank, a car carrying two men drove in. One of the men asked defendant for change for a five dollar bill. As he searched his pockets for the change, defendant was shot by the driver of the car. After he was shot, defendant was searched by the passenger in the car. The car and its two passengers then left the area. Defendant got back into the car he had been driving and drove to the Goldsboro Police Department where he was found by Officer Edwards.

Defendant was found guilty of armed robbery and two counts of assault with a deadly weapon with intent to kill. The jury was unable to reach a verdict on the charge of burglary, and a mistrial was declared as to that case. Defendant was sentenced to life imprisonment on the armed robbery conviction and two twenty year sentences on the assault convictions. The sentences were to run consecutively.

Defendant appealed and we granted his motion to bypass the Court of Appeals on the assault convictions.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

George F. Taylor for defendant-appellant.

BRITT, Justice.

[1] Defendant contends that the trial court erred in failing to suppress the photographic identification of him by Mr. and Mrs. Nelson Smith on the ground that the procedure was unduly suggestive. This contention is without merit.

Four or five days after the incident at the Smith home, Officer J. S. Flowers, a Special Investigator with the Wayne County Sheriff's Department, went to the Smith's place of business in Mount Olive. While there he produced five photographs, each one of which portrayed black men in casual dress and settings. Officer Flowers asked Mr. Smith if he could identify the robber from among the men portrayed in the photographs. Smith immediately picked out defendant's picture. Though she was in the office at the time, Mrs. Smith was unable to see which photograph her husband had selected. She, in turn, was shown the same five photographs and she too picked out defendant's picture.

A photographic lineup is a constitutionally acceptable component of a criminal investigation. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *State v. Bundridge*, 294 N.C. 45, 239 S.E. 2d 811 (1978); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). Such a pretrial identification procedure is inadmissible if it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States, supra; State v. Davis*, 294 N.C. 397, 241 S.E. 2d 656 (1978); *State v. Bundridge, supra; see generally* Annot., 39 A.L.R. 3d 1000 (1971).

The evidence in the case at bar reveals no infirmity in the photographic identification procedure employed. The evidence elicited on *voir dire* establishes that at the time they viewed the photographs and selected defendant's picture from among the group, Mr. and Mrs. Smith were positive about the identification. The evidence further tends to show that the couple was not told that the robber was one of the persons in the photographic lineup. Nor is there any evidence that the officer suggested the choice which the couple made. In addition, the evidence is uncontroverted that the men portrayed in the photographs were similarly dressed and were photographed in casual surroundings. All of the evidence on *voir dire* points to the conclusion that the photographs themselves and the procedure surrounding their use

did not in any way point to defendant as the perpetrator of the crimes of which he stood accused.

In a related assignment, defendant contends that the trial court erred in denying his motion to sequester witnesses who were to testify on *voir dire* as to the photographic identification described above. Defendant argues that the denial of his motion to sequester amounted to an abuse of discretion and a denial of his right to a fair and impartial trial. This argument is without merit.

Upon motion of a party, the trial judge may order all or some of the witnesses other than the defendant, to remain outside of the courtroom until they are called to testify. G.S. § 15A-1222 (1978). A motion to sequester witnesses is addressed to the sound discretion of the trial judge and will not be reviewed on appeal absent a showing of an abuse of discretion. *E.g., State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); *see generally* J. Van Camp & D. Gill, *Criminal Law Symposium: The Trial*, 14 Wake Forest L. Rev. 949 (1978). The record in the present case reveals no abuse of discretion nor does it demonstrate how the denial of defendant's motion to sequester deprived him of his right to a fair trial by an impartial tribunal.

[2] Defendant makes the further contention that the trial court erred by not permitting him to inquire into the manner in which his photograph was obtained for use in the photographic lineup. Defendant made a pretrial motion to suppress the in-court identification of him by Nelson Smith, Edna Smith and Maybelle Smith. During the *voir dire* concerning the identification, defendant moved for a *voir dire* concerning the method by which investigating officers had obtained the photograph of him which had been used in the photographic lineup. The trial judge overruled defendant's motion. We perceive no error.

The record does not support defendant's contention. While it is true that the trial judge denied defendant's motion for a separate *voir dire* on the issue of the procuring of the photograph in question, the record establishes that during the *voir dire* that was held defendant was able to present witnesses, including Officer Flowers, who gave testimony concerning the manner in which the photograph was obtained. At the conclusion of the hearing, the court made findings of fact and conclusions of law. The

court specifically found that the photograph in question had been voluntarily given to the police by defendant's mother-in-law. There is competent evidence in the record to support this finding, and it is conclusive on appeal. *E.g., State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908 (1976). A separate hearing would have been superfluous. The record indicates that defendant was permitted to fully inquire into the circumstances surrounding the obtaining of his photograph by law enforcement authorities. That this inquiry was permitted within the context of an ongoing *voir dire* concerning a related matter is irrelevant to the question of prejudice provided that a complete examination of the challenged facts and circumstances was permitted. By conducting the procedure in this manner, the trial court was in a position to examine the propriety of the photographic lineup in a contextual fashion rather than as a segmented portion of a larger criminal investigation.

[3] Defendant makes the further contention that the trial court erred by failing to suppress the in-court identification of him by the state's witnesses, Mr. Smith, his wife and his mother arguing that none of the witnesses had a sufficient opportunity to adequately observe the intruder in their home. This contention is without merit.

Before admitting the evidence challenged by this assignment, the trial judge conducted a *voir dire*. At that hearing, Mr. Smith, speaking with reference to his opportunity to observe defendant, testified that when he went into the kitchen because of the knocking at the back door and the ringing of the door bell, he turned on two fluorescent lights; that a yard light was burning at the time which shone upon the back door; that he saw a black man standing outside the back door; that the man burst through the door upon him; that he and the intruder fought; that the intruder was in the house about forty-five minutes; that he saw the assailant about half of that time; and that he described the attacker to law enforcement officers as being 25 to 30 years old, weighing 185 pounds, with a chocolate complexion.

With respect to her opportunity to observe defendant, Mrs. Maybelle Smith testified that she had awakened about four a.m. on the night in question to go to the bathroom; that she heard

someone beating on the back door; that she went downstairs to the kitchen and found that her son, Nelson, had been shot; that a man was beating him about the head with a pistol; that the man was in the house between 35 and 45 minutes; and that she had been close enough to the intruder to touch him.

Mr. Smith's wife testified that she had been awakened by someone beating on the back door and ringing the door bell; that after her husband had gotten up to see what was happening, she heard a loud commotion; that she then got out of bed and went to the kitchen; that she saw defendant; that she went back to the bedroom and got a rifle; that the rifle would not fire; that she turned the rifle around and began beating defendant about his head with it; that defendant took the rifle away from her; and that she was able to look at defendant in the face for "quite awhile."

The trial judge made detailed findings of fact and concluded that the in-court identification of defendant by the state's witnesses was of an independent origin and based solely upon what they had seen at the time of the incident in their home. The state was thereupon permitted to elicit in-court identifications of defendant by its principal witnesses.

In bringing forward this assignment of error, defendant relies upon the case of *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967). *Miller* stands for the proposition that while the question of whether the identification testimony of the prosecuting witness has any probative value is for the jury to decide, the rule has no application where the only evidence which tends to identify a defendant as the perpetrator of the offense is inherently incredible because of undisputed facts clearly established by the state's evidence. 270 N.C. at 731, 154 S.E. 2d at 905.

In *Miller*, the evidence for the state tended to show that the Hall Oil Company in Charlotte was broken into and entered on the evening of 28 September 1966. The exterior of the building and its surrounding grounds were illuminated by nearby streetlights, floodlights at the front and back and spotlights which were attached to its eaves. A vacant lot separated the oil company from a service station by a distance of 286 feet. The only identification evidence was that provided by a sixteen-year-old boy who had picked defendant Miller out of a lineup. Before the night

of the break-in, the witness had never seen the defendant, and he stated that he saw a man run once in each direction, stop in front of the oil company building, peep around it, and then look in the direction of the witness. The witness was unable to describe the color of the man's eyes or hair. Nor was he able to describe the color of the man's clothing except to say that his clothes were dark.

The rule which was enunciated in *Miller* is grounded in sound considerations of logic and policy, and we reaffirm its continued viability in the law of our state. It has no application, however, where there is a reasonable opportunity of observation which is sufficient to permit a subsequent identification. In that event, the credibility of the witness and the probative force of his identification testimony are questions for the jury to resolve. *E.g., State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977); *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977); *State v. Cox*, 289 N.C. 414, 222 S.E. 2d 246 (1976).

Miller cannot be applied to control the facts of the case at bar. The rationale of *Miller* springs from the obligation of the courts to insure the right of a criminal defendant to a fair and impartial trial. To that end, the *Miller* rule seeks to minimize the possibility of that right being infringed by a misidentification caused by a patently inadequate opportunity for observation.

In the present case the opportunities for observation which were afforded to the state's witnesses were not patently inadequate. Each of them was able to view the intruder at close range, in familiar surroundings which were well lighted, over a period of about 45 minutes. That the observations occurred while a break-in and a series of assaults were in progress does not render them incompetent as a matter of law. The observations occurred within the context of confusion and uproar which is inherent in the nature of violent criminal acts for which defendant stands accused of committing. To require that such observations be made in a casual manner, as defendant argues should be the case, would be unreasonable.

[4] Defendant contends next that the trial judge expressed an opinion by overruling his objections to leading questions of the district attorney to such an extent and degree so as to deny him a fair and impartial trial. We disagree.

A leading question is a question which suggests its desired answer. *E.g., State v. Davis*, 294 N.C. 397, 241 S.E. 2d 656 (1978); 1 Stansbury's North Carolina Evidence § 31 (Brandis Rev. 1973). It remains the general rule that leading questions may not be asked on direct examination. *E.g., State v. Davis, supra; State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977). However, it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and, in the absence of a showing of abuse, the exercise of such discretion will not be disturbed on appeal. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); 2 Wharton's Criminal Evidence 412 (13th ed. 1972). In exercising his discretion, the trial judge is aided by guidelines which have evolved over the years in our reported cases. Writing for the court in *State v. Greene, supra*, Justice (now Chief Justice) Branch stated that

> . . . counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth.

285 N.C. at 492-93, 206 S.E. 2d at 236.

It would serve no useful purpose for us to set out in detail the multitudinous questions about which defendant now complains. Upon examining each of them in light of the guidelines enunciated in *State v. Greene, supra*, we conclude that there was no abuse of discretion. The bulk of the questions which defendant characterizes as leading in nature cannot be so portrayed in that they do not suggest the answer desired by the interrogator. Insofar as the other questions are concerned, two of them were asked

of Officer Flowers on cross-examination by the assistant district attorney. The investigator had been called as a witness by defendant even though he had been subpoenaed by the state. It is well established that a party does not make a witness his own by subpoenaing him and not calling him, *see State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954), and if he is later interrogated by another party, he becomes the latter's witness. 1 Stansbury's North Carolina Evidence § 41 (Brandis Rev. 1973). That being the case, it was not an abuse of discretion for the judge to allow the state to ask the investigator leading questions. In the remaining instance of a truly leading question, defendant did not object until after the witness had answered. Even then, there was no motion to strike. There was no error.

Nor was it error for the trial court to permit Nelson Smith to testify concerning his wife's actions during the robbery. Our examination of the record leads us to conclude that Smith was testifying from first-hand knowledge as to what his wife did during the course of the incident in their home. That he cast his testimony in terms of shorthand statements of fact concerning her movements does not mean that it was incompetent. *See generally* 1 Stansbury's North Carolina Evidence § 125 (Brandis Rev. 1973). By so doing, Smith was attempting to convey to the jury in a comprehensible fashion his recollections of the events of 19 June. It would be unreasonable to require a witness to recount in minute detail all of the events which he had observed during the commission of a violent crime. To do so would be to fly in the face of the inherent confusion and disorientation of such incidents. That Smith testified that he was intermittently unconscious during the robbery is a relevant consideration only insofar as it relates to the questions of credibility and probative weight, both of which are considerations to be made by the jury subject to proper instructions.

[5] Defendant contends that it was error to receive into evidence the radio log for 19 June 1979 of the Wayne County Sheriff's Department. We disagree. When the log itself was received into evidence after being properly authenticated, *see generally* 1 Stansbury's North Carolina Evidence § 153 (Brandis Rev. 1973), defendant made no objection. The exceptions which are preserved for our review deal only with the log sheet being handed to Deputy Sheriff Fane S. Greenfield while he was on the witness stand.

Deputy Greenfield was dispatched to the Nelson residence when the incident was reported to law enforcement authorities. At the time the report came in, he was at the sheriff's department. On redirect examination, the officer was handed a document which he recognized as the radio log sheet for 19 June 1979. Upon identifying the document, Deputy Greenfield stated that it served to refresh his recollection as to the time that the call for help came into the sheriff's office; that the call came in at 3:41; and that the dispatcher gave him the call at the time it was logged. By this procedure, the memory of the deputy was refreshed in a permissible manner. *E.g., State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *see generally* 1 Stansbury's North Carolina Evidence § 32 (Brandis Rev. 1973). That the document which served to refresh the recollection of the witness had not been made by him does not render the method incompetent. *State v. Smith, supra.* The right of cross-examination and the right to examine the document used in the practice are sufficient safeguards against improper practices or suspicious circumstances which may be associated with refreshing the memory of a witness. McCormick's Handbook of the Law of Evidence § 9 (2d ed. 1972).

[6] Defendant also contends that the trial court erred by denying his fundamental right to confront his accusers by cross-examination when it sustained objections by the district attorney to questions propounded by defense counsel on cross-examination of the state's witnesses. We disagree.

While defendant brings forward twenty-one exceptions within this assignment of error, the governing principle remains the same as to each: The scope of cross-examination rests in the discretion of the trial judge, and his rulings thereon will not be disturbed absent a showing of abuse of discretion. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). While it is axiomatic that the cross-examiner ought to be allowed wide latitude, the trial judge has the responsibility to exercise his discretion in such a way that unduly repetitive and argumentative questioning, as well as inquiry into matters which are only peripherally relevant, are banned. *E.g., State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972); 1 Stansbury's North Carolina Evidence § 35 (Brandis Rev. 1973). The record in the case at bar reveals that defendant cross-examined each of the state's witnesses at great length. In numerous instances where the trial judge sustained objections of

the district attorney to questions by defense counsel, the questions called for answers which would have been incompetent hearsay or expert opinions for which there had been no foundation laid. At other times, the questioning was unduly repetitive or argumentative. There was no abuse of discretion.

[7] Defendant contends that the trial court erred by permitting the district attorney to question him concerning prior acts of misconduct. This contention is without merit. On recross-examination the district attorney asked defendant if he had kidnapped and robbed Mr. Robert Knowles of $1,125.00 on 24 May 1979. Defendant denied having committed the specified acts. On redirect examination, defendant testified that he had been arrested and charged with the crimes of kidnapping and robbing Knowles but that there had been a finding of no probable cause and the charges had been dismissed.

It is an established principle of the law of evidence that when a criminal defendant elects to testify in his own behalf, he is subject to cross-examination, for the purpose of impeachment, with respect to prior specific criminal acts or degrading conduct for which there has been no conviction. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979); *State v. Purcell*, 296 N.C. 728, 252 S.E. 2d 772 (1979). Such questions are permissible provided that they are asked in good faith. *State v. Herbin, supra; State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

In the present case there was no error. The question was directed at a matter within the defendant's own personal knowledge and was asked for the purpose of impeachment. Defendant denied having committed the acts in question and the prosecutor was bound by the answer. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977).

[8] Defendant contends that the trial court erred by admitting over his objection the testimony of Officer Edwards as to a conversation he had with Officer Edwin O. Bundy of the Goldsboro Police Department. There was no error. After defendant had been taken to Wayne Memorial Hospital for treatment of his gunshot wounds, Officer Bundy talked with him. At that time the policeman was not involved in the investigation of the incident at the Smith residence. Defendant told the officer that he had been

robbed and shot at a self-service gasoline station. Defendant gave the location of the station to the officer. Thereupon, Officer Bundy determined that the station was located outside the Goldsboro city limits and was within the jurisdiction of the Wayne County Sheriff's Department. Having made that determination, he informed defendant that the investigation would thereafter have to be handled by the sheriff's department and that he would report it to them. Shortly thereafter, the policeman had occasion to talk with Officer Edwards. At that time, Bundy told Edwards what defendant had said about the location of the service station. Bundy went on to tell Edwards that he had turned the investigation over to the sheriff's department because the purported crime had occurred outside of the Goldsboro city limits. On rebuttal, both officers testified: Bundy as to the conversation he had with defendant in the hospital; Edwards as to the conversation he had with Bundy.

Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980). The introduction of prior consistent statements is an accepted manner of corroborating the testimony of a witness. *E.g., State v. Medley*, 295 N.C. 75, 243 S.E. 2d 374 (1978); *see generally* 1 Stansbury's North Carolina Evidence § 51 (Brandis Rev. 1973). Prior consistent statements are admissible if they are generally consistent with the witness' own testimony. *State v. Britt, supra; State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

In the case at bar, the threshold test of consistency was met. Furthermore, the trial judge properly instructed the jury that Officer Edwards' testimony was offered for corroborative purposes only, and they were to use it for that purpose only if they found that it did so.

Defendant lastly contends that the trial court erred by denying his motions to dismiss, for judgment notwithstanding the verdict, for a new trial, and for arrest of judgment. These motions are formal in nature and dependent upon the substantive assignments of error brought forward in the brief. There was sufficient evidence at trial to withstand these motions and they were properly denied.

No error.

Justice BROCK did not participate in the consideration and decision of this case.

Justice EXUM dissenting.

The trial court erred prejudicially, in my view, when it permitted cross and recross examination of defendant regarding his alleged kidnapping and robbery of Robert Knowles. The incident occurred at the very end of defendant's testimony as follows:

"Q. Did you not on the 24th day of May, 1979, kidnap and rob one Robert Knowles of $1,125.00?

MR. TAYLOR: Objection.

COURT: Overruled.

EXCEPTION NO. 55.

A. No, sir.

REDIRECT EXAMINATION (By Mr. Taylor)

I was charged with kidnapping and robbing Mr. Knowles. Mr. Knowles testified under oath that he could not identify me as the man who robbed him. He did testify to that and no probable cause was found in the District Court of Wayne County. The charges were dismissed. Those charges were brought against me after I was arrested on these charges.

RECROSS EXAMINATION (By Mr. Jacobs)

Mr. Knowles did testify that I looked like the man but he wasn't a hundred percent sure. He told the court that. He said he wouldn't stake his life on it. He didn't say I looked like the man. He said, the officer, Officer Stan Flowers brought him some photographs and said I had been charged with something that happened, was a suspect and he asked him to look at the photographs to recognize me. No, sir, he didn't say that I looked like him."

Our rules have long been that a criminal defendant who testifies may be cross-examined about prior criminal convictions

or other acts of misconduct provided (1) the questions are asked in good faith, *i.e.*, the questioner reasonably believes that defendant actually was convicted or actually committed the act of misconduct asked about, and (2) defendant's unequivocal denials are conclusive; although some "sifting" of an evasive answer is permitted. *See, generally, State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980); *State v. Currie*, 293 N.C. 523, 238 S.E. 2d 477 (1977); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). The examination of the witness, however, must not be permitted to evolve into a mini-trial on the question of defendant's guilt of the collateral misconduct. *See State v. Monk*, 286 N.C. 509, 517, 212 S.E. 2d 125, 132 (1975); 1 Stansbury's North Carolina Evidence, § 112 (Brandis Rev. 1973). The jury should not be distracted nor the defendant prejudiced by injecting into the trial the collateral question of whether defendant is guilty of some other crime for which he is not then being tried. A defendant may not, furthermore, be cross-examined about mere charges, indictments, or accusations of crime which have not resulted in convictions. *State v. Williams, supra.*

It is undisputed here that defendant had been at some prior time charged with kidnapping and robbing one Robert Knowles. It is likewise undisputed that at a probable cause hearing on the charges Knowles could not identify defendant as his assailant and the charges were consequently dismissed for want of probable cause. It is obvious from the prosecutor's recross examination that he knew of the dismissal and the reason for it. The prosecutor so far as the record reveals had no reason to believe that defendant actually kidnapped or robbed Knowles. His asking about the incident must have been motivated by his desire to put before the jury the fact that defendant had been charged with an offense similar to the one for which he was being tried. The prosecutor did not ask the question in good faith. He was also permitted, in effect, to ask defendant about mere charges or accusations in violation of the holding in *Williams.*

The trial judge, furthermore, permitted the matter to deteriorate, impermissibly, into a mini-trial on the question of defendant's guilt of the kidnapping and robbery of Knowles. The prosecutor was permitted to violate our rule that defendant's unequivocal denial is conclusive. This is a likely result whenever cross-examination is permitted concerning an incident which has

already been the subject of a criminal prosecution against defendant and which has terminated on the merits in his favor.

I have consistently urged, unsuccessfully, that the court not permit cross-examination concerning alleged acts for which defendant has been formally charged and acquitted. *See State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979) (Exum, J., concurring); *State v. Ross*, 295 N.C. 488, 246 S.E. 2d 780 (1978) (Exum, J., dissenting, joined by Sharp, C.J., and Lake, J.); *see also, State v. Leonard*, No. 96, Spring Term 1980 (filed 3 June 1980) (Copeland, J., dissenting, joined by Exum, J., and Carlton, J.). In *Ross* then Chief Justice Sharp and Justice Lake joined in my dissent expressing this view. I continue to believe as I wrote in my concurring opinion in *State v. Herbin, supra*, 298 N.C. at 453, 259 S.E. 2d at 271:

> "When one has been tried for and acquitted of a particular crime that should end the matter for all purposes. A person so acquitted should not be required continually to defend himself against the charge in subsequent criminal proceedings in which he may become involved."

In most cases, albeit not all, *see, e.g., State v. Herbin, supra*, this kind of cross-examination will severely prejudice the defendant. It is all too tempting for a jury, particularly in a close case such as the one now before us, to resolve against defendant whatever doubt it may have when it believes that defendant may have previously committed acts of criminal misconduct or, for that matter, may have merely been charged with having committed them. The jury reasons that a man who has previously been implicated in criminal activity is more likely than not to be guilty in the case before it. Our law, recognizing the fallacy of this reasoning, has long prohibited the State from offering defendant's earlier criminal acts as evidence against him when the sole purpose is to predispose the jurors to convict him of the crime for which he is then being tried. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

Those experienced in criminal trials know well that placing this kind of information before a jury even on cross-examination for purposes of impeachment has the same devastating effect as if the evidence had been offered in the State's case in chief. A defendant's past criminal record is quite often the major con-

sideration in determining that he should not testify and subject his case to the revelation of his prior criminal acts even if he maintains and would testify to proclaim his innocence in the case on trial. It is for this reason that prosecutors continue to seek every way imaginable to get such information before the jury, and defense lawyers try mightily to keep it out of the trial. Courts should be assiduous to guard against permitting its admission unless it truly serves some legitimate purpose and clearly comports with our well-established rules limiting its use.

In this case, as in *Ross*, *Herbin* and *Leonard*, I fear the Court has gone too far in permitting the introduction of this kind of evidence in disregard of heretofore well-established principles limiting its use.

I am satisfied defendant was prejudiced by the improper introduction of the evidence; therefore, I vote for a new trial.

Justice CARLTON joins in this dissent.

STATE OF NORTH CAROLINA v. MICHAEL SALVADOR LYNCH, ALIAS MICHAEL SALVADOR WILSON

No. 17

(Filed 15 July 1980)

1. **Criminal Law § 166— incorporating material from another case in brief—necessity for filing material with present case**

When incorporating material from another case by reference in a brief, a copy of the incorporated material should be filed with the immediate case under reivew so that the Court and the opposing party will have access to this material without having to retrieve it from the clerk's file on the other case.

2. **Indictment and Warrant § 15— motion to quash indictment—timeliness**

Defendant's motion to quash the indictments on the ground of racial discrimination in the selection of the grand jury was not timely where it was not made at or before arraignment but was made after a mistrial was declared in defendant's first trial. G.S. 15A-952(e).

3. **Grand Jury § 3.3— racial discrimination in grand jury selection—no prima facie showing**

Evidence that 10.8% to 11.3% of the population of the county was black and that 7.4% of the names on the jury list were of blacks, resulting in a

disparity of no more than 3.9%, was insufficient to make out a *prima facie* case of racial discrimination in the selection of the grand jury.

4. Criminal Law § 86.5— impeaching defendant's character—remarks by defendant to prosecutor during trial

The district attorney could properly ask defendant on cross-examination if, during the trial as he passed by the district attorney's table, he had called the district attorney a "punk" and had mouthed the word "mother" to him, since any prior act which tended to impeach defendant's character could be asked about as a prior act of misconduct, and the questions were asked in good faith because the district attorney had personal knowledge of the instances of misconduct.

5. Criminal Law § 86.3— cross-examination of defendant—violation of criminal law—prior conviction or specific act of misconduct

When misconduct is in violation of the criminal law and has resulted in a conviction, the questioning on cross-examination may be phrased either in terms of a prior conviction or of a prior specific act of misconduct.

6. Criminal Law § 86.5— cross-examination of defendant—prior acts of misconduct—good faith by prosecutor

The defendant in a kidnapping and rape prosecution could properly be asked on cross-examination if he had previously broken into a trailer to rape the woman who lived there and if he had broken into the trailer of another woman on another date and raped her where the district attorney asked the questions in good faith in that, in asking the first question, the district attorney relied on a police report stating that officers found defendant lying on the trailer floor "shot with a hood on his head and a gun on his body" and that the woman had lived alone in the trailer next to defendant's house for two months, and, in asking the second question, the district attorney relied on information that the rape victim had identified defendant in a lineup and by photograph.

7. Criminal Law § 33.3— having woman stand for identification—no evidence as to collateral matter

The district attorney's action in having a woman stand to determine whether defendant could recognize her after defendant was asked if he had raped the woman on the front row with a black blouse and defendant stated while she was seated that he did not recognize her did not constitute the improper introduction of extrinsic evidence on a collateral matter. Furthermore, defendant was not prejudiced if the woman "gave a nod with her head" when she stood where there was no evidence that the jury observed this alleged occurrence and there was no objection at the point when she was asked to stand.

8. Jury § 7.14— peremptory challenges—use to exclude blacks from jury

The district attorney's use of his peremptory challenges to exclude blacks from the jury in his case was not improper.

9. Jury §§ 7.6, 7.9— State's reopening of questioning of juror after passing him—excusal for cause

The trial court did not err in permitting the State to reopen its questioning of a juror after the State had passed him, and the court properly excused the juror for cause when he stated that he would be a little biased against the State because the district attorney peremptorily challenged all black jurors.

10. Jury § 7.9— more value on officer's testimony—denial of challenge for cause

The trial court did not err in denying defendant's motion to excuse for cause a juror who stated that he would put more value on the testimony of a law officer than on the testimony of other witnesses where the juror then stated that he could be fair to both sides and would base his verdict on the evidence presented and the law as given by the trial judge.

11. Criminal Law § 87.1— leading questions—no abuse of discretion

The trial court did not abuse its discretion in permitting the State to ask its chief witness four questions which were somewhat leading where, in each instance, the district attorney was directing the witness's attention to the next subject of inquiry, and the witness elaborated upon his "yes" answer with additional testimony in response to two of the questions.

12. Criminal Law § 33— defendant's possession of gun on other occasions—relevancy

Testimony in a kidnapping and rape trial that the State's witness had seen defendant with a gun on days previous to the alleged offenses was relevant to an understanding of the conduct of the witness and defendant since the witness had just testified that when his gun was jammed the defendant said, "Use mine" although defendant did not ultimately produce a gun.

13. Criminal Law § 88.1— cross-examination—no improper restriction

Defendant's right to cross-examine the State's chief witness was not improperly restricted when the court sustained the State's objections to repetitious and argumentative questions.

14. Criminal Law § 87.4— mistrials for failure of jury to agree—no rehabilitation of witness

Where the State referred to two federal trials of defendant in impeaching him on cross-examination, the trial court's refusal to permit defendant to testify on redirect that mistrials had been declared in those trials because of the jury's inability to agree upon a verdict did not constitute the erroneous refusal to permit defendant to rehabilitate his credibility, since the jury's failure to agree did not amount to an acquittal or invoke the doctrine of double jeopardy, and the testimony thus would not serve to rehabilitate the witness.

15. Criminal Law § 102.6— prosecutor's jury argument—no impropriety

In this prosecution for kidnapping and rape, the district attorney properly argued the evidence and the reasonable inferences deductible therefrom in arguing that the State would have no case against an accomplice who testified for the State without his confession, in arguing defendant's prior act of misconduct in raping another woman, in arguing that the State learned of a witness

from the accomplice when the accomplice had not directly so testified, and in arguing that the testifying accomplice would not want to be in the same prison with defendant.

16. Constitutional Law §§ 28, 50— delay of trial—no prosecutorial oppression

There was no prosecutorial oppression amounting to a denial of due process in this prosecution for kidnapping and rape where defendant was indicted in November 1977 at a time when he was in federal custody; he was tried twice in federal court for kidnapping, and both trials resulted in mistrials because of hung juries; defendant was delivered into the State's custody on 17 February 1978; the State was granted a continuance from the scheduled trial date of 17 April 1978; the State attempted to prosecute defendant on other charges, but those charges were dismissed for violation of defendant's right to a speedy trial; this case was tried in July 1978 but the jury was unable to reach a verdict and a mistrial was declared; defendant was granted a change of venue to another county on 13 September 1978; the State then relinquished custody of defendant to South Carolina; the South Carolina charges were dismissed on 23 March 1979 and defendant was returned to North Carolina; defendant's motions to dismiss the charges against him in this State for lack of a speedy trial and for prosecutorial oppression were entered on 23 April 1979; and defendant was tried and convicted in July 1979.

17. Constitutional Law § 50— no denial of right to speedy trial

Defendant was not denied his right to a speedy trial by the delay between his indictment in November 1977 and his trial in July 1979 where he was either in federal custody or in custody in South Carolina except from February to September 1978 and March to July 1979, and the remaining time falls short of denying defendant his constitutional right to a speedy trial because there is no evidence that any of the delay for which the State of North Carolina was responsible prejudiced his case or his ability to present his defense.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant from *Snepp, J.* at the 9 July 1979 Session of MECKLENBURG County Superior Court.

Defendant was charged in indictments, proper in form, with the kidnapping of Edward E. McGinnis and the kidnapping and rape of Cecilia Ann Smith.

The evidence for the State tended to show that on 11 October 1977 defendant and Larry Benton went to Rankin Lake, drank some beer, "smoked some pot," and discussed the idea of committing an armed robbery. Defendant asked Benton if he knew of a place that they could rob and Benton replied that M & M's Grocery on Mauney Road would be a good place to rob. They

left the lake and rode around "just . . . killing time." They picked up a friend, Butch Nichols, "and the conversation came up about getting some pot." When they were unable to buy any marijuana from a friend, they visited an ABC store and purchased a fifth of gin. They went to the defendant's house where they spent an hour and a half drinking the gin they had purchased and shooting about ten games of pool. Then they got into the defendant's car, a 1971 Dodge Charger, and drove to Dallas, North Carolina to pick up a friend of Nichols and then to Gastonia where Nichols and his friend got out of the car.

At this point, defendant and Benton resumed their planning to commit a robbery. They drove to Stanley and on the way stopped at a Family Dollar Store where Benton purchased a ski mask. Benton had a pistol in his possession which he intended to use in the robbery. When checking it, he discovered that it "had jammed up." They pulled over to the side of the road and Benton "got the pistol unjammed and fired two rounds into the ground." Defendant stated, "We ought not to use that gun. Use mine." However, defendant did not produce a gun and Benton insisted on using his own pistol. They rode by the store they intended to rob several times but there were so many cars and people there they decided not to try to rob the store. Defendant then stated, "If we can't get some money, then we'll get . . . [a woman]."

They drove to Stanley and noticed that there were two or three cars parked at Stanley Junior High School. Benton looked in the window to see how many people were there and reported to the defendant that there were three males and three females in the building. Defendant told Benton to let the air out of one of the tires on one of the cars and Benton did so.

This car belonged to Cecilia Ann Smith who was eighteen years old and lived with her parents, Rev. and Mrs. Cecil Smith, in Stanley. That evening she attended a youth revival at the junior high school. Her boyfriend, Edward E. McGinnis, was one of the speakers at the revival. As Miss Smith was leaving the building she discovered she had a flat tire and reported this to McGinnis who prepared to change the tire. Miss Smith then went back in the building to call her parents to tell them that she would be late getting home.

Benton then walked up to McGinnis, held a gun to his head, took his wallet and waited for Miss Smith to return. When she returned, Benton took the keys to her car and locked McGinnis in the trunk. He then took Miss Smith over to the defendant's car and they drove off. Benton raped Miss Smith in the back seat of the car after they had passed through Ranlo (Gaston County) and were travelling down Union Road in the area of Ashbrook High School. Defendant raped Miss Smith in the parking lot of a church in South Carolina, after forcing her to perform oral sex on him first.

A witness for the State testified that in July, 1978 he had a conversation with the defendant and stated to him "that I knowed he did it, but . . . I hope you get out of it." Defendant replied, "[y]eah, but they'll catch hell proving it."

Defendant's evidence tended to show that pubic hair and head hair similar in characteristics to pubic and head hair samples from Miss Smith were found in the back seat of defendant's car. Green and brown beggar's lice—"a seedpod from some type of plant"—were found on Miss Smith's dress and in defendant's car and palm prints identified as Benton's were found on McGinnis' car. Also, pubic hair similar in characteristics to pubic hair samples from Benton were found on Miss Smith's dress. However, the samples found on the victim's dress were "dissimilar to the pubic hair of . . . [defendant] and in all probability could not have come from his pubic area." Defendant's fingerprints were found on items in his own car but none of the fingerprints lifted from the car itself matched defendant's, Benton's or Miss Smith's fingerprints. Soil samples taken from the church yard in South Carolina and from the area around Stanley Junior High School did not match soil samples taken from a pair of defendant's trousers found in his house or a pair found in the trunk of his car. Miss Smith gave only a general description of her assailants and could not make a positive identification.

Defendant testified that on 11 October 1977 he took his children to his mother-in-law's house between 8:30 and 9:00 a.m. and then went to Benton's home. The two ran errands and Benton borrowed a pistol from a friend. They then went to Rankin Lake Park, drank some beers, and "messed around" for a while. In the afternoon, they drank a fifth of gin and shot pool at the defend-

ant's house. At 7:00 p.m. Benton asked to borrow defendant's car. Defendant then took Benton home, went to his mother-in-law's house and picked up his children, and then went back to Benton's house to pick him up. According to the defendant, Benton left defendant's house in defendant's car at 8:30 p.m. and returned at 2:00 a.m. He awakened defendant and asked him to take him home because he had not been home all evening and "he figured his wife was mad at him." Defendant awakened his children, put them in the car and took Benton home.

On the morning of 18 October 1977 police officers awakened defendant and when he opened the door, "they run in and knocked . . . [him] in the floor" and took him into custody. The prosecutrix did not mention seeing the defendant wearing leg braces and he testified that he always wore them when he left the house because he is partially paralyzed from the waist down. At another point in his testimony defendant said he sometimes went outside with a cane only. Defendant receives total disability insurance from the Social Security Administration of approximately $750.00 per month.

Defendant was found guilty of second degree rape and was sentenced to life imprisonment. He was found guilty as charged of kidnapping Miss Smith and the trial judge stated in the judgment that the victim had been sexually assaulted before being released; therefore, he imposed a consecutive life sentence for this conviction. Defendant was also found guilty of kidnapping McGinnis and the trial judge stated in the judgment that the victim was released in a safe place and had not been sexually assaulted; therefore, a sentence of twenty-five years was imposed to run concurrently with the sentences imposed for the other kidnapping conviction.

Defendant's motion to bypass the Court of Appeals on his appeal of the case involving the twenty-five year sentence was allowed by this Court on 19 February 1980. Defendant appealed his other two convictions directly to this Court.

Other facts necessary to the decision of this case will be related in the opinion.

James E. Ferguson II and C. Yvonne Mims for the defendant.

Attorney General Rufus L. Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

COPELAND, Justice.

[1] At the outset, we note that it was unnecessary for defense counsel to include in the record on appeal their closing arguments before the jury which consume 68 pages of the second addendum to the record. Defense counsel sought to incorporate in their first argument in their brief an argument presented to this Court by another member of their firm in another case in which the same issue was raised. When incorporating material by reference at one point in a brief, a copy of the incorporated material should be filed with the immediate case under review so that the Court and the opposing party will have access to this material without having to retrieve it from the clerk's file on another case. (For example, when an argument presented in a brief filed in the Court of Appeals is incorporated into the argument section of the new brief filed with this Court, the Court of Appeals' brief is filed in the case with our Court. *See*, Rule 28(d), Rules of Appellate Procedure.) Finally, defense counsel failed to follow Rule 28(d)(3) of the Rules of Appellate Procedure which requires that immediately following each question presented in the brief there shall be a reference to the assignments of error pertinent to that question. These problems with the record and defendant's brief have complicated our review in this case. More care should be exercised in presenting a client's case on appeal. *See, State v. Detter*, 298 N.C. 604, 260 S.E. 2d 567 (1979).

Due to the seriousness of the convictions and sentences in this case we have examined the entire record for errors and have considered the questions presented in defendant's brief despite defense counsel's failure to reference the assignments of error in the brief. For the reasons which follow, we find that defendant had a fair trial free from prejudicial error.

Defendant argues in his brief that it was error to deny his motion to quash the petit jury venire in Mecklenburg County since the selection procedure there is racially discriminatory.

Defendant was arraigned and tried on the same charges involved in this case on 17 July 1978 in Gaston County Superior Court. A mistrial was declared on 27 July 1978 when the jury was unable to reach a verdict. The State announced its intention to retry the defendant. On 28 August 1978 defendant, for the first time, moved to quash the indictments which were returned by a

Gaston County Grand Jury in November 1977 and to quash the petit jury venire on the grounds of a racially discriminatory selection procedure. On this same date, defendant also moved for a change of venue to Mecklenburg County on the ground of adverse pretrial publicity and the motion was granted on 13 September 1978. When the case came on for trial on 9 July 1979, defendant made an oral motion to substitute Mecklenburg County in place of Gaston County in the motion he had filed earlier to quash the petit jury venire in the latter county. The trial judge treated this as a motion made pursuant to G.S. 15A-1211(c)(1). Such a motion must be made and decided before any juror is examined. G.S. 15A-1211(c)(4).

Defense counsel stated that his evidence on this motion was the same evidence that another member of his law firm had presented in the case of *State v. Avery* tried by Judge Snepp in December, 1978. Judge Snepp incorporated his ruling on the identical motion in that case into his ruling on the motion in this case. At the time of trial *State v. Avery* was on appeal to this Court and our decision, reported in 299 N.C. 126, 261 S.E. 2d 803 (1980), was announced on 1 February 1980 almost two months before defendant filed his brief in the case *sub judice*. Our decision on this motion is identical to our decision in *Avery* as set forth in a thorough and well reasoned analysis by Justice Brock of the relevant decisional law and constitutional principles.

Defendant also argues that it was error to deny his motion to quash the indictments returned in Gaston County on the ground that the selection procedure for grand jury duty in that county is racially discriminatory.

[2, 3] G.S. 15A-955(1) allows the trial judge on defendant's motion to dismiss an indictment when there is ground for a challenge to the array. This motion must be made at or before the time of arraignment, G.S. 15A-952(b)(4) and G.S. 15A-952(c), or it is waived. G.S. 15A-952(e). *State v. Duncan*, 30 N.C. App. 112, 226 S.E. 2d 182, *cert. denied*, 290 N.C. 779, 229 S.E. 2d 34 (1976). Defendant was arraigned on 17 July 1978 and this motion was made on 28 August 1978 after the first mistrial in state court; therefore, the motion was not timely made. Furthermore, the trial judge was also correct in overruling the motion based on defendant's evidence. The evidence is that 10.8% to 11.3% of the popula-

tion of Gaston County is black and that 7.4% of the names on the jury list when indictments were returned were black. This disparity of no more than 3.9% is insufficient to make out a case under the Sixth or Fourteenth Amendment. *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). The evidence is that the jury list was prepared in conformity with G.S. 9-2 *et seq.* which we held to be constitutional in *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972).

[6] Defendant maintains that it was error to allow the district attorney to ask him on cross-examination if he had broken into Danny Ledford's trailer on 12 December 1974 in order to rape the woman who lived there; if he had broken into the trailer of Leigh Mangum Smith on 18 September 1973 and raped her; and if, during the trial as he passed by the district attorney's table, he had called the district attorney a "punk" and had mouthed the word "mother" to him.

A defendant who takes the witness stand can be cross-examined for impeachment purposes about prior convictions. *State v. Herbin*, 298 N.C. 441, 259 S.E. 2d 263 (1979); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972); *State v. Miller*, 281 N.C. 70, 187 S.E. 2d 729 (1972). A defendant may also be cross-examined for impeachment purposes about prior specific acts of misconduct so long as the questions are asked in good faith. *State v. Herbin, supra; State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). The district attorney may not ask about or refer in his questions to prior arrests, indictments, charges, or accusations. *State v. Herbin, supra; State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

[4] Prior specific acts of misconduct do not have to be violations of the criminal law. Any prior act which tends to impeach defendant's character may be asked about as an act of misconduct. *State v. Mack, supra;* 1 Stansbury's N.C. Evid. § 111, notes 9, 11 and 12 (Brandis Rev. 1973 and Cum. Supp. 1979) and the numerous cases cited therein. Therefore, it was proper for the district attorney to question defendant on cross-examination about words defendant had spoken to the district attorney when passing by his table. Those questions were asked in good faith because the district attorney had personal knowledge of those alleged instances of misconduct.

If the misconduct does constitute a violation of the criminal law, the questioning concerning prior specific acts of misconduct does not have to be restricted to prior acts that have resulted in a criminal conviction. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976). If such were the case, there would be no category of impeachment material relating to prior specific acts of misconduct. The category would be wholly subsumed within the category of prior convictions.

[5] When the misconduct is a violation of the criminal law and has resulted in a conviction, the questioning on cross-examination may be phrased in terms of a prior conviction or still in terms of a prior specific act of misconduct. We held in *State v. Mack*, *supra* that a question may be phrased in terms of a prior specific act of misconduct even though there has been a conviction. Of course, the reverse is not true. The questioning cannot be phrased in terms of a prior conviction when there is misconduct but there has been no conviction. This apparently was the error in the case cited by the defendant, *Foster v. Barbour*, 613 F. 2d 59 (4th Cir. 1980), and for this reason the case is wholly unpersuasive in the determination of the issue at hand. We are dealing with the category listed above of prior specific acts of misconduct which are violations of the criminal law but for which there have been no convictions. The defendant was asked if he had in fact committed two previous acts of rape and not what he had been convicted of. The issue is whether the district attorney had reason to believe that defendant had in fact committed two previous rapes so the questions asked in terms of prior specific acts of misconduct were asked in good faith.

Defendant cites *Watkins v. Foster*, 570 F. 2d 501 (4th Cir. 1978), in an effort to persuade this Court that the district attorney did not act in good faith because he did not have a factual basis to believe that defendant had committed those two prior acts of misconduct. In *Watkins* the defendant was asked about six prior instances of breaking and entering in an effort to impeach his trial testimony. Defendant had been indicted for those six offenses; however, the court held that the indictments were insufficient to supply the prosecutor with good faith because at the time of trial one of those six indictments had already been dismissed and after trial the remaining five were dismissed for insufficient evidence.

[6] The situation in this case is entirely different. In asking about the rape of Ledford's wife on 28 December 1974, the district attorney relied on a police report which stated that police officers found the defendant "in the floor shot with a hood on his head and a gun on his body." The woman had lived alone in the trailer next to defendant's house for two months. On the night defendant was shot the woman's husband was in the trailer when defendant entered.

With respect to asking about the rape of Leigh Mangum Smith on 18 September 1973, the district attorney took the stand and testified on a *voir dire* hearing regarding the question of good faith. He testified that the rape occurred in a trailer park next to defendant's house. Defendant was picked up at the time as a suspect and was placed in a lineup. The victim identified the defendant and another member of the lineup. She told the district attorney that when she went to the lineup in 1973 the police had told her that she would be able to look at the suspects through a two-way mirror. However, they took her into a small room where she directly confronted the suspects. She told the district attorney that she had no doubt about who had raped her but she would not identify only the defendant because a few hours before the lineup he had threatened to kill her. The district attorney showed her a display of eight photographs of black males and made no suggestions to her. She immediately picked out the defendant's picture. On the facts of this case, we hold that questions about both rapes were asked in good faith. The questions were asked for impeachment purposes and involved a collateral matter. Thus, the district attorney was bound by the defendant's answer which in both instances was a denial. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

[7] Defendant maintains that by having Leigh Mangum Smith stand while the defendant was asked if he had raped the woman on the front row with the black blouse amounted to improperly introducing extrinsic evidence on a collateral matter. We hold that on the facts of this case it was not error for her to stand up because she was asked to stand only after defendant stated that he didn't know anyone on that row "but the Ledfords." When she stood, defendant stated, "I think I've seen her, but I didn't break in her trailer and rape her."

At a much later point in the record defense counsel stated that when the lady stood up she "gave a nod with her head." The trial judge stated that he did not observe her nod her head and it was not called to his attention at the time it allegedly occurred. This Court held in *State v. Carey*, 288 N.C. 254, 218 S.E. 2d 387 (1975), *death sentence vacated*, 428 U.S. 904 (1976), that the defendant must adequately place in the record what the expression was and how it was prejudicial to him before there is an issue for this Court to decide. There is no evidence that the jury observed this alleged occurrence and there was no objection at the point when she was asked to stand. We find no prejudicial error. This case is distinguishable from *State v. Broom*, 222 N.C. 324, 22 S.E. 2d 926 (1942), in which it was held to be error to allow abortion instruments to be introduced into evidence after defendant had been asked on cross-examination for impeachment purposes if he had performed certain abortions. This was impermissible introduction of extrinsic evidence on a collateral matter. Here, the lady was asked to stand to determine whether defendant could recognize her after he had stated while she was seated that he did not recognize her. This was not introduction of extrinsic evidence or the equivalent of it.

[8] Defendant's next argument relates to the selection of the jury in this case. He first argues that the district attorney improperly used his peremptory challenges to exclude blacks from the jury. He challenges the exclusion of blacks solely in this case and not in relation to any allegation of a long-term systematic practice by the State of excluding Blacks from service on petit juries in Mecklenburg County.

His argument is wholly devoid of merit and the answer to his argument was provided fifteen years ago by the United States Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824, *rehearing denied*, 381 U.S. 921 (1965). That court held:

> "The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . .

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . [V]eniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in the light of the limited knowledge counsel has of them, which may include their group affiliations [race, religion, nationality, occupation, etc.] in the context of the case to be tried.

With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterward. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial the trial jury was properly denied in this

case." *Id.* at 219-222, 13 L.Ed. 2d at 772-774, 85 S.Ct. at 835-837. [Citations omitted.]

[9] Defendant asserts that it was error to allow the State to reopen its questioning of juror Shipley after the State had passed him and that it was error for the trial judge to subsequently excuse the juror for cause. It was not error to allow the State to reopen its questioning of this juror. *State v. McKenna, supra.* The juror stated that he questioned why the district attorney had peremptorily challenged all black jurors and further stated, "I say in all honesty, I would be a little prejudiced against the State for that question." When the trial judge asked the juror if he felt any bias against the State he replied, "I would say to a very small degree, yes." The juror was properly excused for cause.

[10] Defendant further asserts that it was error to deny his motion to excuse juror Henderson for cause after he stated that he would put more value on the testimony of a law enforcement officer than on the testimony of other witnesses. The juror then stated that he would be fair to both sides and would base his verdict on the evidence as presented and the law as given by the trial judge. His final statement regarding the weight he would give a police officer's testimony was that he would "support a police officer in whatever testimony . . . [he] gave on the stand . . . [i]f I thought he was right. I got a police ticket one time that I didn't think was right, so I took it to Court. But I've gotten others that . . . were right." The motion to excuse the juror for cause was properly denied. Challenges for cause are directed to the sound discretion of the trial judge and are reviewable only for abuse of discretion or "some imputed error of law." *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). There is no error of law or abuse of discretion here.

[11] Defendant argues in his brief that his objections to four leading questions asked by the State of its principal witness, Larry Benton, were improperly overruled. The substance of each question was as follows:

1. "Did you have any conversation with each other whether or not you all would be armed during the robbery and who would do what at the time of the robbery?"

2. "On days previous to this had you ever seen him with a weapon?"

3. "Had you and the defendant had any conversation about what you would do with any female that you took into your custody?"

4. "Did you say anything to him about where to go or to pull off?"

While the questions may have been somewhat leading, this is a matter within the trial judge's discretion, *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974), and there was no abuse of that discretion. In each instance, the district attorney was directing the witness' attention to the next subject of inquiry and in response to two of the questions the witness elaborated upon his "yes" answer with additional detailed testimony. There was no prejudicial error.

Defendant alleges that testimony regarding other criminal activity of the defendant was improperly admitted when Benton testified at one point that the conversation came up "about getting some pot" and "they went looking for some pot." The error, if any, in admitting this testimony over defendant's objection was not prejudicial error because substantially similar testimony came in from the same witness without objection and also from the defendant himself. Benton had already testified that he and the defendant had smoked some marijuana at Rankin Lake before the conversation came up about getting some more marijuana. Also, defendant testified that he remembered an occurrence "on October 3rd because it was my birthday and we was hunting marijuana at the time." Therefore, defendant lost the benefit of his objection to this testimony. *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971).

Defendant further argues that testimony regarding the most direct route from defendant's house to Kiser Elementary School in Stanley and the time it takes to travel that route was improperly admitted because the testimony was irrelevant. The testimony that it takes twenty-nine minutes and thirty seconds to travel the most direct route between those two points was properly admitted to cast doubt on defendant's testimony that Benton left defendant's house with his car at 8:30 p.m. when there was other testimony that Benton arrived at the school shortly before a ball game ended which ended before 9:00 p.m.

[12] Defendant also alleges that irrelevant and prejudicial testimony was admitted over his objection when Benton was allowed to testify that he had seen the defendant with a gun on days previous to the alleged offense. Evidence is relevant and admissible if it has any logical tendency to prove a fact in issue; if it throws any light upon the supposed crime; and if it is one of the circumstances surrounding the parties necessary to be known to properly understand their conduct or motives or allows the jury to draw an inference as to a disputed fact. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973). This testimony was relevant to an understanding of the conduct of Benton and the defendant because Benton had just stated in response to a previous question that when his gun was jammed the defendant said "[u]se mine" although defendant did not ultimately produce a gun.

[13] Defendant contends that his right to cross-examine Benton was improperly restricted. This contention is devoid of merit. Benton answered a question from defense counsel as follows:

> "I was asked under oath whether I was testifying falsely in federal court when I said that she hadn't scratched me. Even though I had given a directly opposed answer to what I had given before, I said I was not testifying falsely under oath in federal court."

Defense counsel then asked if Benton's answer "would be today that you weren't testifying falsely in federal court. . .?" This question was a complete repetition of the preceding question and it was not error to sustain the State's objection. *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958).

In the second episode, Benton had stated that he had seen the defendant walking outside his home with a cane and that "a cane could be a brace." Then, defense counsel sought essentially the same answer again by asking: "You are not trying to tell this jury now that you call a cane a brace are you?" It was not error to sustain the State's objection to this repetitious and argumentative question. *Id.* Defendant himself testified that he had been outside his home "with just a simple wooden cane" without the use of his braces.

[14] Defendant maintains that it was error to refuse to allow him to rehabilitate his credibility on redirect examination by

testifying as to the disposition of the federal charge he had faced growing out of the same incident. The State had referred to the federal cases in impeaching the defendant on cross-examination. Defendant testified that at the time of the state trial there were no federal charges pending against him. Both of the trials in federal court resulted in a mistrial due to the jury's inability to agree upon a verdict but the defendant was not allowed to so testify. Since the jury's failure to agree does not constitute an acquittal or invoke the doctrine of double jeopardy, such testimony does not serve to rehabilitate the witness. Thus, it was not reversible error to refuse to permit this testimony.

[15] Defendant alleges that it was error to overrule his objections to certain portions of the district attorney's closing argument. Defendant argues that it was inflammatory for the district attorney to remark that without Benton's confession the State would have no case against him; that the district attorney improperly argued defendant's prior act of misconduct in raping Leigh Mangum Smith; that it was not a proper inference from the record that the State learned of a witness from Benton when Benton had not directly so testified; and that Benton would not want to be in the same prison with the defendant.

Argument of counsel is largely within the control and discretion of the trial judge. Counsel must be allowed wide latitude in the argument of hotly contested cases. Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. King*, 299 N.C. 707, 264 S.E. 2d 40 (1980); *State v. Monk, supra.*

Counsel may not argue to the jury incompetent and prejudicial matters and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). Upon objection, the trial judge has a duty to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. *State v. Monk, supra* and cases cited therein.

There is no reversible error in this case. The district attorney did not transcend the boundaries of the wide latitude permitted in closing arguments. He argued the evidence and the

reasonable inferences deducible therefrom. He was properly arguing defendant's credibility when he referred to the prior act of misconduct. His remarks were not misleading or prejudicial and do not warrant a new trial.

Finally, defendant argues that the State's conduct in this case violates due process because it offends those canons of decency and fairness which express the notions of justice of English-speaking peoples citing *Rochin v. California*, 342 U.S. 165, 96 L.Ed. 183, 72 S.Ct. 205 (1952).

Defendant was indicted on these charges in November, 1977. At that time he was in federal custody and was tried twice in federal court for kidnapping a person and taking her across a state line. Both trials resulted in a mistrial due to a hung jury. The State has absolutely no responsibility for those proceedings against the defendant or the time it took for those two trials to be conducted. Defendant was delivered into the State's custody on 16 February 1978 and the case was scheduled to be tried on 17 April 1978. The case was not tried on that date because the State was granted a continuance. The State then attempted to prosecute the defendant on other unrelated charges but those charges were dismissed because defendant's right to a speedy trial had been denied.

This case was then tried in July of 1978 in Gaston County. The jury was unable to reach a verdict and a mistrial was declared. Defendant then filed numerous motions on 28 August 1978. Defendant's motion for a change of venue to Mecklenburg County was granted on 13 September 1978. The remaining motions came on for a hearing on 18 September 1978. At that time, the motions were not heard because the State relinquished custody of the defendant to South Carolina authorities. Those authorities dismissed their charges against the defendant on 23 March 1979 and defendant was returned to custody in North Carolina. Defendant moved to dismiss the charges pending against him in this State for lack of a speedy trial and for prosecutorial oppression. These motions were heard on 12 April 1979 and an Order denying them was entered on 23 April 1979. The case was tried and defendant was convicted of all three charges in July 1979.

[16] There was no prosecutorial oppression in this case amounting to a denial of due process. Defendant committed offenses involving three jurisdictions. Therefore, the process of coordinating the prosecutions in those three jurisdictions necessarily would involve a substantially greater period of time then if only one jurisdiction was involved. Also contributing to the increase of time involved was the fact that there were two mistrials in federal court and one in state court. Double jeopardy did not bar the second prosecution in federal court or the second trial in state court and these new trials necessarily involved the consumption of more time. Defendant did not file any motions to contest his extradition to South Carolina or to avail himself of the procedures and protections afforded him by G.S. 15A-730 relating to arrests upon Governor's warrants and his right to apply for a writ of habeas corpus to test the legality of the arrest.

[17] In addition, the delay did not violate defendant's right to a speedy trial. The present statutory right to a speedy trial does not apply to cases pending in the trial court on 1 October 1978 and therefore is inapplicable here. G.S. 15A-701 *et seq.*

Defendant was not denied his constitutional right to a speedy trial. He originally made a motion to dismiss for lack of a speedy trial on 9 May 1978 but the motion was apparently not heard and the case was tried in Gaston County in July 1978. The time involved in bringing him to trial in North Carolina, excluding the time that he was in federal custody and in custody in South Carolina, was from February to September 1978 and March to July 1979. Defendant had motions filed and pending in August and September 1978 and in April 1979. The remaining time falls far short of denying defendant his constitutional right to a speedy trial because there is no evidence that any of the delay for which the State of North Carolina was responsible prejudiced his case or his ability to present his defense in any manner whatsoever. *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972); *State v. Tindall*, 294 N.C. 689, 242 S.E. 2d 806 (1978); *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043 (1972); *cf. State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978) (charges ordered dismissed due to denial of defendant's constitutional right to a speedy trial). Therefore, defendant's constitutional rights were not violated by the length of time involved in this case.

There were numerous exceptions that were not brought forward in defendant's brief or that were brought forward but not argued and these are deemed abandoned. Rule 28(a)(b)(3), Rules of Appellate Procedure.

Defendant's convictions are affirmed because in the trial we find

No error.

Justice BROCK did not participate in the consideration or decision of this case.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

AGEE v. AGEE

No. 197 PC.

Case below: 46 N.C. App. 122.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

BECKER v. BECKER

No. 222 PC.

Case below: 46 N.C. App. 348.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

BUSHNELL v. BUSHNELL

No. 218 PC.

Case below: 46 N.C. App. 348.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

DeCARLO v. GERRYCO, INC.

No. 211 PC.

No. 68 (Fall Term).

Case below: 46 N.C. App. 15.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 15 July 1980.

GOFORTH v. GOFORTH

No. 175 PC.

Case below: 45 N.C. App. 554.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980. Appeal dismissed 15 July 1980.

HAND v. HAND

No. 193 PC.

Case below: 46 N.C. App. 82.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

HARRIS v. BRIDGES

No. 180 PC.

Case below: 46 N.C. App. 207.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980.

HINTON v. CITY OF RALEIGH

No. 195 PC.

Case below: 46 N.C. App. 305.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980. Motion of defendants to dismiss appeal for lack of substantial constitutional question allowed 15 July 1980.

HOBBY & SON v. FAMILY HOMES

No. 246 PC.

No. 72 (Fall Term).

Case below: 46 N.C. App. 741.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 15 July 1980.

HOME PRODUCTS CORP. v. MOTOR FREIGHT, INC.

No. 212 PC.

Case below: 46 N.C. App. 276.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

IN RE CRADDOCK

No. 205 PC.

Case below: 46 N.C. App. 113.

Petition by respondent for discretionary review under G.S. 7A-31 denied 15 July 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 July 1980.

JOHNSON v. JOHNSON

No. 274 PC.

Case below: 46 N.C. App. 316.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980. Motion of plaintiffs to dismiss.

JORDAN v. SAUNDERS

No. 245 PC.

Case below: 42 N.C. App. 504.

Petition by defendant Saunders for writ of certiorari to North Carolina Court of Appeals denied 15 July 1980.

LA GRENADE v. GORDON

No. 215 PC.

Case below: 46 N.C. App. 329.

Petition by defendants for discretionary review under G.S. 7A-31 denied 15 July 1980. Appeal dismissed 15 July 1980.

LAING v. LOAN CO.

No. 177 PC.

Case below: 46 N.C. App. 67.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980. Appeal dismissed 15 July 1980.

LaROQUE v. LaROQUE

No. 220 PC.

Case below: 46 N.C. App. 578.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980.

LOWDER v. MILLS, INC.

No. 164 PC.

No. 67 (Fall Term).

Case below: 45 N.C. App. 348.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 15 July 1980.

McBRYDE v. FEREBEE

No. 207 PC.

Case below: 46 N.C. App. 116.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980.

NUNAN v. CHESHIRE

No. 79 PC.

Case below: 44 N.C. App. 730.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980.

PARKER v. PARKER

No. 178 PC.

Case below: 45 N.C. App. 554.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

SPIVEY v. MOTOR CORP.

No. 196 PC.

Case below: 46 N.C. App. 313.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 15 July 1980. Motion of defendant to dismiss appeal for lack of substantial constitutional question allowed 15 July 1980.

STATE v. ADAMS

No. 160 PC.

Case below: 46 N.C. App. 57.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 15 July 1980.

STATE v. DAUGHTRY

No. 171 PC.

Case below: 45 N.C. App. 713.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

STATE v. GATEWOOD

No. 163 PC.

Case below: 46 N.C. App. 28.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 15 July 1980.

STATE v. LANG

No. 235 PC.

No. 69 (Fall Term).

Case below: 46 N.C. App. 138.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 15 July 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 15 July 1980.

STATE v. McLAURIN

No. 209 PC.

Case below: 41 N.C. App. 552.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 15 July 1980.

STATE v. McNEIL

No. 273 PC.

Case below: 46 N.C. App. 533.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 15 July 1980.

STATE v. MITCHELL

No. 250 PC.

Case below: 46 N.C. App. 607.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 July 1980.

STATE v. MOORE

No. 144 PC.

Case below: 45 N.C. App. 555.

Petition by defendants for discretionary review under G.S. 7A-31 denied 15 July 1980. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 July 1980.

STATE v. PHIFER

No. 248 PC.

Case below: 45 N.C. App. 321.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 15 July 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. PUCKETT

No. 55.

Case below: 46 N.C. App. 719.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 July 1980.

STATE v. RICE

No. 204 PC.

Case below: 46 N.C. App. 118.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

STATE v. SPRINKLE

No. 254 PC.

Case below: 46 N.C. App. 802.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

STATE v. WATKINS

No. 168 PC.

Case below: 45 N.C. App. 661.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

STATE v. WILLIAMS

No. 74.

Case below: 34 N.C. App. 502.

Motion of defendant's counsel to dismiss appeal allowed 31 July 1980.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

WAYFARING HOME v. WARD

No. 121 PC.

No. 66 (Fall Term).

Case below: 45 N.C. App. 555.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 15 July 1980.

WILLETTS v. INSURANCE CORP.

No. 146 PC.

Case below: 45 N.C. App. 424.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 July 1980.

PETITIONS TO REHEAR

BARHAM v. FOOD WORLD

No. 123.

Reported: 300 N.C. 329.

Petition by plaintiff to rehear denied 15 July 1980.

CONCRETE CO. v. BOARD OF COMMISSIONERS

No. 93.

Reported: 299 N.C. 620.

Petition by plaintiff to rehear denied 15 July 1980.

In re University of North Carolina

IN THE MATTER OF THE APPEAL OF THE UNIVERSITY OF NORTH CAROLINA AND THE STATE OF NORTH CAROLINA FROM THE LISTING AND ASSESSMENT OF CERTAIN PROPERTIES BY ORANGE COUNTY AND THE TOWNS OF CHAPEL HILL AND CARRBORO FOR THE YEARS 1969, 1970, 1971, 1972, 1973 AND 1974

No. 67

(Filed 15 July 1980)

Taxation § 21.1— ad valorem taxes—exemption of State property—public purpose not required

Property owned by the State is exempt from ad valorem taxation by Art. V, § 2(3) of the N. C. Constitution solely by reason of State ownership, and the statute requiring property owned by the State to be held exclusively for a public purpose in order to be exempt from taxation, G.S. 105-278.1, is unconstitutional. Therefore, the Towns of Chapel Hill and Carrboro and the County of Orange may not assess ad valorem taxes against any property owned by the University of North Carolina, an agency of the State, regardless of the purpose for which the property is held.

THIS case is before us upon petition by all parties to review judgment entered by *Judge McKinnon* in the Superior Court, ORANGE County, on 10 July 1979, prior to determination by the Court of Appeals. The petition was allowed by order of this Court in Conference on 11 January 1980.

In brief summary the facts pertinent to this litigation are as follows: Petitioners, the State of North Carolina and the University of North Carolina (UNC), appealed to the North Carolina Property Tax Commission (Commission) from an order by the Orange County Board of Commissioners and the Carrboro and Chapel Hill governing boards (respondents) requiring listing, valuation, and taxation of certain property belonging to UNC for the years 1969, 1970, 1971, 1972, 1973 and 1974. The Commission determined that the property belonging to UNC was subject to ad valorem taxation unless used for public or governmental purposes as provided by G.S. 105-278.1. The Commission then determined that all the properties listed by Orange County, Chapel Hill and Carrboro for taxation were exempt, except: (1) parcel 86-G-1, the Carolina Inn and the personal property used in its operations; (2) parcel 86-D-12, 13 and 14, the first floor of the Hill Building; (3) parcel 29-1A, the portion of the airport property leased to the private airplane maintenance and repair firm and storage space rented to

individual airplane owners. The Commission held that the aforementioned properties were being used for commercial purposes which had no logical relation to the University's educational activities. However, the Commission held these properties were to be taxed for the year 1974 only. From this order all parties petitioned the Superior Court, Orange County, for further review.

In considering the parties' petitions, Judge McKinnon found all of the Commission's findings of fact to be supported by substantial evidence and sustained them. Based on these findings, he adopted the Commission's first four conclusions of law. Judge McKinnon reversed that part of the Commission's conclusion number 5 involving the University's off-campus electric and telephone utilities, and the Horace Williams Airport, as arbitrary and not supported by substantial evidence in the entire record. He therefore made the following conclusions of law: (1) that parcel 86-G-1, the Carolina Inn and the personal property used in its operation, were subject to ad valorem taxation; (2) that parcel 86-D-12, 13 and 14, the first floor of the Hill Building, was subject to ad valoren taxation; and (3) that the off-campus University electric and telephone systems were subject to ad valoren taxation. Judge McKinnon affirmed the Commission's conclusion of law that these properties were subject to taxation only for the year 1974. From this judgment all parties appealed to the Court of Appeals, and we granted discretionary review prior to that court's determination.

Rufus L. Edmisten, Attorney General, by Myron C. Banks, Special Deputy Attorney General, for the State of North Carolina and the University of North Carolina.

Michael B. Brough for the Town of Carrboro.

Haywood, Denny and Miller, by Emery B. Denny, Jr. and Michael W. Patrick for the Town of Chapel Hill.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Geoffrey E. Gledhill and Alonzo Brown Coleman, Jr. for Orange County.

BROCK, Justice.

This appeal involves an attempt by the Towns of Chapel Hill and Carrboro and by Orange County to tax certain real and per-

sonal properties owned by the University of North Carolina. As a preface to our discussion of the issues raised by the appeal, we note that the University of North Carolina is a constitutionally created body. It was established by Section 41 of the (1776) North Carolina Constitution, and was incorporated as a body politic with perpetual succession and a common seal, pursuant to the laws of North Carolina. *See* North Carolina Public Laws 1789, c. 305, s. 1.

The first question raised on this appeal, and the only question which will be addressed by this opinion, is whether or not personal and real property belonging to the University of North Carolina can be taxed by the Towns of Chapel Hill and Carrboro and Orange County. UNC claims exemption from taxation by virtue of Article V, Section 2(3) of the North Carolina Constitution which in its pertinent part provides as follows:

> "Property belonging to the State, counties and municipal corporations shall be exempt from taxation . . . ."

Chapel Hill, Carrboro and Orange County contend that the property belonging to UNC is subject to ad valorem taxation unless the University property is held exclusively for public purpose as provided by G.S. 105-278.1. For the reasons which follow we hold that the North Carolina Constitution, Article V, Section 2(3), prohibits the Towns of Chapel Hill and Carrboro and Orange County from assessing ad valorem taxes against any property owned by UNC *regardless of the purpose* for which the property is held. We are not unaware of previous decisions of this Court holding that for property owned by the State or a municipality to be exempt from taxation, it must be held for a public or governmental purpose. *See, e.g., Board of Financial Control v. Henderson County*, 208 N.C. 569, 181 S.E. 636 (1935); *Town of Benson v. County of Johnston*, 209 N.C. 751, 185 S.E. 6 (1936); and *Town of Warrenton v. Warren County*, 215 N.C. 342, 2 S.E. 2d 463 (1939). However we note also a divergent line of cases in this State which have held that State ownership alone suffices to bring property within the Constitution's tax exemption for State owned property. *See, e.g., Town of Andrews v. Clay County*, 200 N.C. 280, 156 S.E. 855 (1931); *Town of Weaverville v. Hobbs*, 212 N.C. 684, 194 S.E. 860 (1938). Having now had an opportunity to more fully consider both lines of cases and Article V, Section 2(3) of our Constitution, we have concluded that all property of the University of North

Carolina is tax exempt due solely to its ownership by the State of North Carolina. This conclusion is first supported by a review of the development of the property tax in North Carolina.

In 1868 the North Carolina Constitutional Convention provided for a uniform tax by the State on ". . . all real and personal property, according to its true value in money." North Carolina Constitution (1868) Article V, Section 3. However the Convention also provided that "[p]roperty belonging to the State, or to municipal corporations shall be exempt from taxation. . . ." North Carolina Constitution (1868) Article V, Section 5. Prior to the Constitutional Convention of 1868, the Revenue Acts of North Carolina had consistently exempted "all lands or other property belonging to this State" or "to any county in this State." *See* N.C. Public Laws 1866-67, c. 72, *Exemptions*, s. 8. This exemption of State owned property mandated by our Constitutional Convention in 1868 simply made compulsory the long-standing policy of this State not to tax its own property.[1]

The first authority to tax real property in North Carolina exempted sovereign property and came in 1665 when the Lord's Proprietors authorize:

> "Equall taxes and assessments eqyally to rayse moneyes or goods upon all Lands (excepting the lands of us, the Lords Propryators before setling). . . ." [2]

Therefore, upon tracing the history of the property tax in North Carolina, it is clear that from the inception of such a tax, property belonging first to the sovereign and then to the State was automatically exempted from taxation. The State's ownership alone provided tax exemption. Not until 1885, nearly 20 years after the adoption of Article V, Section 5 of the 1868 North Carolina Constitution, did the Legislature narrow its interpretation of this exemption to include only State owned property held for "public purposes." N.C. Pub. Laws 1885, c. 177, s. 16(1). *See also*, A. Coates, *supra*, at 168. This legislative "public purpose" gloss on the North Carolina Constitution is presently contained in G.S. 105-278.1.

1. A. Coates, *The Battle of Exemptions*, 19 N.C. Law Rev. 154 (1941).

2. Thorpe, *American Charters, Constitutions and Organic Laws*, 2758 (1909).

Preceding our Legislature's restrictive interpretation of Article V, Section 5 of the 1868 North Carolina Constitution, (*hereinafter* Article V, Section 2(3) (1969) North Carolina Constitution), was the decision of this Court in *Atlantic and N.C.R.R. Co. v. Commssioners of Carteret Co.*, 75 N.C. 474 (1876). The facts of that oft-cited case are as follows: The State of North Carolina owned ⅔ of the Atlantic and North Carolina Railroad's capital stock. Despite the State's stock ownership, Carteret County levied an ad valorem property tax upon all of the Railroad's real and personal property. The Railroad contended that ⅔ of its property was tax exempt by virtue of the constitutional exemption for State-owned property. In ruling that the State's stock holdings did not exempt the Railroad's property from taxation, this Court held:

> "Although this language [granting State property a tax exemption] is general, yet we do not think it was intended to embrace this case. . . .
>
> [W]e do not think the exemption in the Constitution embraces the *interest* of the State in business enterprises, but applies to the property of the State held for *State purposes.*" *Id.* at 476. (Emphasis added.)

Upon examination of the facts in *Atlantic and N.C.R.R. Co. v. Commissioners*, it is important to note that none of the taxed property *belonged* to the State of North Carolina entitling it to any exemption from taxation. Even though the State held a controlling interest in the Railroad Company's common stock, the property, both real and personal, belonged to Atlantic and N.C.R.R. Co. and was therefore properly subjected to ad valorem taxation.

The case of *Atlantic and N.C.R.R. Co. v. Commissioners*, was correctly decided on its facts, since the property which was taxed was owned *not* by the State but by the Railroad. The Court was correct in its narrow holding that merely because the State maintained a stock interest in the Company, the *Company's property* was not exempt from taxation. The distinction drawn by *Atlantic and N.C.R.R. Co. v. Commissioners* was between the State's ownership of property and the State's ownership of stock in a corporation. The former entitles the property to tax exemption, the latter does not. However since *Atlantic and N.C.R.R. Co. v. Com-*

missioners, both our Legislature and this Court have on numerous occasions misapplied the holding in that case as mandating a "public purpose" requirement for the exemption of State owned property under the North Carolina Constitution. Two lines of cases developed after *Atlantic and N.C.R.R. Co. v. Commissioners*. The following discussion shows the development of the "public purpose" doctrine by this Court through its misplaced reliance on *Atlantic and N.C.R.R. Co. v. Commissioners*.

In *Board of Financial Control v. Henderson County*, 208 N.C. 569, 181 S.E. 636 (1935), plaintiff, a State agency, owned property in Henderson County which it rented to various private businesses as a commercial undertaking. Henderson County levied property taxes against the agency's property. The agency attempted to sell the property without paying these taxes, claiming exemption from tax pursuant to the North Carolina Constitution. In holding the State agency fiscally responsible for the taxes on the property, Justice Clarkson writing for the Court noted:

> "that the Atlantic and N.C.R.R. Co. case, *supra*, decides that under the Constitution of North Carolina, the property is taxable unless devoted to a public use." *Id.* at 573.

Following *Board of Financial Control v. Henderson County*, this Court decided *Town of Benson v. County of Johnston*, 209 N.C. 751, 185 S.E. 6 (1936). In that case, the Town of Benson, a municipality, had acquired certain property within its corporate limits by tax foreclosure. After acquiring the property in fee simple, the Town of Benson rented the property solely for commercial purposes. Johnston County levied an ad valorem tax against the property which the Town of Benson refused to pay. This Court held the municipally owned property subject to ad valorem taxation, citing *Village of Watkins Glen v. Hager*, 252 N.Y.S. 146 as "directly in point." Since under the taxing statutes of New York, the only property exempted from ad valorem tax was "[p]roperty of a municipal corporation of the State *held for a public use* . . . ", (emphasis ours), Village of Watkins Glen should not be considered as authority for interpretation of our Constitution. The language of North Carolina's constitutional exemption contains no comparable public use requirement for tax exemption of State or municipally owned property. Again Justice Clarkson, writing for the Court, was not unaware that the "terms of the

[N.Y.] exemption statute were not as broad as the constitutional exemption in North Carolina"; however, relying directly on its previous holding in *Atlantic and N.C.R.R Co. v. Commissioners*, the Court held the North Carolina Constitution did not exempt State or municipally owned property unless it was "devoted to a public use or to some purpose or function of government." *Id.* at 755, 185 S.E. at 9.

Three years later this Court decided the case of *Warrenton v. Warren County*, 215 N.C. 342, 2 S.E. 2d 463 (1939). The facts of that case are as follows: At foreclosure sale, the Town of Warrenton acquired and held in fee simple the Warrenton Hotel. In order to protect its prior investment in the bankrupt hotel corporation, the Town rented the hotel for $200.00 per month plus a small percentage of the room rentals. Warren County levied ad valorem tax on the hotel property which the Town of Warrenton refused to pay. The Court ruled that "[t]his case is governed by *Railroad v. Commissioners*, 75 N.C. 474; *Board of Financial Control v. Henderson County*, 208 N.C. 569; and *Benson v. Johnston County*, 209 N.C. 751. . . . The words 'Property belonging to the State or to municipal corporations, shall be exempt from taxation,' . . . have been interpreted in this jurisdiction since 1876 as meaning property used for governmental or public purposes. . . ." *Id.* at 344, 345, 2 S.E. 2d at 464. Chief Justice Stacy concurring in *Warrenton v. Warren County* noted that no public use requirement could be found in the constitutional exemption for State or municipally owned property. However, based on this Court's prior interpretation in *Atlantic and N.C.R.R. Co. v. Commissioners* and subsequent legislative action (citing N.C. Pub. Laws 1937, c. 291, s. 600) he concluded that "it will be *implied* that the intention was to exempt such [State or municipally owned] property only when devoted to a public purpose." (Emphasis added.) *Id.* at 346, 2 S.E. 2d at 465.[3]

In 1940, the year following *Warrenton v. Warren County*, the Court decided *Winston-Salem v. Forsyth County*, 217 N.C. 704, 9 S.E. 2d 381 (1940). In an opinion written by Chief Justice Stacy,

3. Chief Justice Stacy's concurring opinion was joined by Justices Barnhill and Winborne, with Justice Clarkson concurring, agreeing with Chief Justice Stacy, in a separate opinion. Justices Devin and Seawell dissented in separate opinions. The majority opinion, written by Justice Schenck was not joined in its entirety by any other justice.

the Court refused to exempt from taxation certain lots owned by the City of Winston-Salem and held by the City for resale. The Court ruled the lots were not held for a "public purpose" and therefore were subject to taxation, relying directly on *Benson v. Johnston County* and *Warrenton v. Warren County.*

The above cases indicate a direct reliance by this Court on the decision in *Atlantic and N.C.R.R. Co. v. Commissioners.* Our present analysis of *Atlantic and N.C.R.R. Co. v. Commissioners* clearly points out that when read in its factual context, that case should not be relied on as precedent for a "public purpose" requirement before State owned property is tax exempt. Therefore, since the foundation for the reasoning underlying this line of early cases is factually incorrect, their holdings requiring a "public purpose" before property belonging to the State will be exempted from taxation must also be considered not in keeping with the rationale expressed herein and in opinions of this Court, discussed below.

As previously noted the decisions of this Court have created a second line of authority developing nearly simultaneously with the cases just discussed. These cases hold that State or municipal ownership alone bring property within the constitutional exemption from ad valorem taxation. A discussion of this line of authority follows.

In *Town of Andrews v. Clay County,* 200 N.C. 280, 156 S.E. 855 (1931), this Court in holding property owned by the Town of Andrews, a municipal corporation, per se exempt from taxation by Clay County, noted:

> "The provision in the first clause of Section 5, of Article V, of the Constitution of North Carolina [*see* Article V, Section 2(3) (1969) North Carolina Constitution] by which property belonging to or owned by a municipal corporation is exempt from taxation, *is self-executing, and by its own force without the aid of legislation, exempts such property from taxation . . .* [by the State or county in which it is located] *because of its ownership, without regard to the purpose for which such property was acquired and held by the corporation. . . .* The language of the constitutional provision is so clear and unambiguous that there is no room for judicial construction." (Em-

phasis added.) *Id.* at 282, 156 S.E. at 856. *See also Latta v. Jenkins*, 200 N.C. 255, 258, 156 S.E. 857, 858 (1931).

This construction of North Carolina's constitutional exemption for State and municipally owned property was also applied in the case of *Weaverville v. Hobbs*, 212 N.C. 684, 194 S.E. 860 (1938). In *Weaverville* the State of North Carolina obtained title to property located in the Town of Weaverville through foreclosure of a loan by the North Carolina World War Veterans' Loan Fund. This Fund was created by Legislative Act to assist world war veterans in purchasing homes, and upon non-payment by the mortgagor and foreclosure by the Veterans' Loan Fund, title to the foreclosed property passed to the State. Upon acquisition of the property, North Carolina paid all property taxes for the period which the former owners had held the property. However, following acquisition by the State, the property was no longer listed for tax assessment. The State contended its property was constitutionally exempt from taxation by Buncombe County and the Town of Weaverville. Suit was instigated by the Town of Weaverville against Hobbs, the Director of the Veterans' Loan Fund, in an attempt to collect the past due property taxes. This Court concluded that the property was exempt from taxation relying directly on language taken from *Andrews v. Clay County*, and therefore held the property was exempt under our Constitution, " 'because of its ownership, and without regard to the purpose for which the property was acquired and held' . . . ." 212 N.C. at 687, 194 S.E. at 862.

In *Town of Andrews v. Clay County* and *Weaverville v. Hobbs* this Court did not regard the particular purpose for which the property was held to be determinative. The opinions based their holdings, exempting State and municipally owned property from taxation, squarely on the express language found in Article V of our Constitution. Justice Seawell dissenting in *Warrenton v. Warren County*, 215 N.C. 342, 2 S.E. 2d 463 (1939), *supra*, made the following observation:

> "It may be good policy to limit tax exemptions to property used for governmental and public purposes only. A number of states have thought so and such restrictions have been clearly expressed in their constitutions. . . . Naturally, I do not object to that mode of expressing and enforcing the

popular feeling upon the subject, but I insist that this Court has no right to engraft such a policy upon the present Constitution which speaks otherwise . . . .

'A written Constitution, framed by men chosen for the work by reason of their peculiar fitness . . . implies a degree of deliberation and a carefulness of expression proportioned to the importance of the transaction, and the words are presumed to have been used with the greatest possible discrimination.' *People v. New York Central Railroad Co.*, 24 N.Y. 485, 487." 215 N.C. at 356, 364, 2 S.E. 2d at 471, 476-77.

As this opinion has previously noted, Article V, Section 2(3) of our Constitution provides that "[p]roperty belonging to the State, counties and municipal corporations shall be exempt from taxation. . . ." This plain language chosen by the framers of our Constitution remains in our present Constitution, as rewritten in 1970, and continues to expressly exempt property belonging to the State from all taxation. It places no requirement, other than ownership, upon State property to entitle it to this exemption. Since our Constitution prescribes State ownership as the sole criteria for tax exemption, the property belonging to the University of North Carolina, an agency of the State of North Carolina, must therefore be tax exempt. This exemption follows by virtue of the property's ownership and occurs irrespective of the purposes for which the property is held. We therefore expressly overrule the first line of cases discussed in this opinion which require State owned property be held for a "public purpose" before it is tax exempt. We adopt this Court's rationale as expressed in *Town of Andrews v. Clay County, supra*, and *Weaverville v. Hobbs, supra*, and hold that under our Constitution State ownership alone exempts property from taxation. In *Sutton v. Phillips*, 116 N.C. 502, 504, 21 S.E. 968 (1895), this Court noted:

"While the courts have the power, and it is their duty in proper cases to declare an act of the legislature unconstitutional it is a well recognized principle that the court will not declare that . . . [a] coordinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case."

In the case at bar we hold that our Legislature clearly exceeded its authority in statutorily placing a public purpose requirement

upon State owned property before exempting it from taxation. As previously noted, Article V, Section 2(3) of the Constitution of North Carolina sets out State ownership as the *sole test* for State owned property's exemption from tax. Therefore, G.S. 105-278.1 which requires that State owned property be held exclusively for public purpose before it is tax exempt must be considered ineffective because it is in direct conflict with the plain language of our Constitution. *State v. Williams*, 209 N.C. 57, 182 S.E. 711 (1935); *Railroad v. Cherokee County*, 177 N.C. 86, 97 S.E. 758 (1919); *Nash v. Tarboro*, 227 N.C. 283, 42 S.E. 2d 209 (1947); *see also* 16 Am. Jur. 2d, *Constitutional Law*, § 81 (1979). We recognize that the action of the Legislature in statutorily providing for tax exemption only when State owned property "is used wholly and exclusively for public purposes" was originally prompted by this Court's opinion in *Atlantic and N.C.R.R. Co. v. Comm. of Carteret Co.*, 75 N.C. 474 (1876), *supra*, and has been perpetuated by other decisions of this Court. However, having now concluded that the holdings in *Atlantic and N.C.R.R. v. Comm.*, and other cases relying upon it, inappropriately required a public purpose use before exempting State owned property from taxation, we must also conclude that such a public purpose use imposed by statute is violative of our Constitution.

We note with interest, that courts in other jurisdictions with nearly identical constitutional tax exemptions for property belonging to the State and municipalities have also concluded that State or municipal ownership alone entitles property to a tax exemption. The California Constitution, Article XIII, Section 1, provides in part as follows:

> "property . . . such as may belong to this State, or to any county, city and county, or municipal corporation within this State, shall be exempt from taxation. . . ."

In 1915 the District Court of Appeal for the Third District of California interpreted this constitutional provision when the County of San Francisco attempted to tax certain properties located in the County, but owned by the City of San Francisco. The City claimed the properties exempt under the Constitution, but the County argued the properties were not used for governmental or public purpose and therefore did not qualify for exemption. The California Court held:

> "The condition here seems only to be that it (the property) shall 'belong' . . . to the United States, etc. Its location or use is not made a condition of its exemption. The word 'belong' is applied alike and with the same force and meaning to the United States, this state and to counties and municipalities and . . . denote[s] an unqualified ownership of the property, not an ownership of the property, subject to the condition that it was to be used exclusively for governmental purposes." *City and County of San Francisco v. McGovern*, 28 Cal. App. 491, 500, 152 P. 980, 984 (1915).

New Mexico, whose constitutional exemption for State owned property is strikingly similar to our own, has also adopted ownership as the only requirement for tax exemption. In *Church of the Holy Faith, Inc. v. State Tax Commission*, 39 N.M. 403, 409-10, 48 P. 2d 777, 781 (1935), the Supreme Court of New Mexico noted:

> "The constitutional provision before us reads: 'the property of the United States, the State and all counties, towns, cities, and school districts and other municipal corporations . . . shall be exempt from taxation.' Art. 8, § 3 [Constitution of New Mexico]. Here ownership seems plainly the sole test.
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> * * *
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> There would seem to be a logic in making ownership the test as to exemptions of property of the United States, the State and all counties, towns, cities and school districts and other municipal corporations. . . For the State to tax its own property would simply be taking money out of one pocket and putting it in another."

The Supreme Court of Nebraska has also held ownership by a municipality to be the sole criteria for property to come within Nebraska's constitutional provision for exclusion of State and municipal property from taxation. In *Platte Valley P.P. & I. District v. Lincoln County*, 144 Neb. 584, 587, 14 N.W. 2d 202, 204, 155 A.L.R. 412, 416 (1944), that court held:

> "Under the provisions of Section 2, Article VIII of the [Nebraska] Constitution, as amended in 1920, which reads in part as follows: 'The property of the State and its governmental subdivisions shall be exempt from taxation' . . . ,

ownership and not *use* of the property is the basis of exemption."

The court found that the language of the constitution was clear, and was not subject to interpretation· "until the people of the State change the Constitution to make the use [of property] rather than the ownership the basis of exemption . . . ." *Id.* at 587, 14 N.W. 2d at 204, 155 A.L.R. at 416.[4]

The decisions of these jurisdictions represent the better reasoned and the general rule that "where property owned by the State or its governmental subdivisions is exempted from taxation by express and unqualified constitutional or statutory provision, . . . no tax can be levied against the property of the State or such subdivision, regardless of whether it [the property] is used in a governmental or proprietary capacity." Annot., 155 A.L.R. 423, 424 (1945).

The Towns of Chapel Hill and Carrboro and Orange County argue that *Redevelopment Commission v. Guilford County*, 274 N.C. 585, 164 S.E. 2d 476 (1968) controls the case at bar and requires State or municipal property be used for a governmental or public purpose before it is tax exempt. We disagree. In *Redevelopment Commission*, plaintiff, a municipal corporation, instituted an action to prohibit the collection of ad valorem taxes upon certain real property held by it. Following the Rules of Civil Procedure in effect at the time, each defendant demurred to plaintiff's complaint. The trial court sustained the demurrers, ruling plaintiff's properties were not as a matter of law exempt from Taxation. The Court of Appeals in an opinion reported at 1 N.C. App. 512, 162 S.E. 2d 108 (1968) reversed, holding plaintiff's income-producing property was subject to tax, while its non-income-producing property was exempt. On discretionary review of the Court of Appeals' opinion, this Court held that plaintiff had alleged sufficient facts from which it might be reasonably inferred that *all plaintiff's property was held primarily for a public or governmental purpose.* The fact that income was incidentally derived from the property did not destroy its public use status. Therefore this Court held that both defendants' demurrers, first

4. For a compilation of other jurisdictions following this line of reasoning *see* Annot., 3 A.L.R. 1439; supplemented in Annot., 101 A.L.R. 787; Annot., 129 A.L.R. 480, and cases cited therein.

as to the non-income-producing property, as well as to the income-producing property should have been overruled. Since the decision in *Redevelopment Commission* was based on the premise that all of the Commission's property was held for public or governmental purposes, it was not necessary for this Court to reach the question as to whether or not the Commission's property would have been constitutionally tax exempt if *not* held for such purposes. Therefore the opinion's review of the prior cases interpreting our constitutional exemption for State and municipally owned property, and the court's conclusion that allowing the exemption only for property used for public or governmental purposes was a correct constitutional interpretation, must be characterized as obiter dictum. Since the Court determined that the Commission alleged sufficient facts from which it could be inferred that all the Commission's property was held for a public purpose, the Court's discussion of the public purpose requirement for the tax exemption of State and municipally owned property was dictum, as this question of constitutional interpretation was not actually presented nor was it involved in determining the case. As obiter dictum it does not constitute precedent controlling our determination of this appeal. *Cemetery, Inc. v. Rockingham County*, 273 N.C. 467, 160 S.E. 2d 293 (1968); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956); *see also* 20 Am. Jur. 2d, *Courts*, § 190 (1965) and cases cited therein.

Orange County, Chapel Hill and Carrboro also argue that taxation of the University's property is necessary; first out of a "sense of fair play and . . . concern for equity between similarly situated taxpayers," and secondly to prevent UNC from obtaining an unfair competitive advantage over the Chapel Hill area's private businesses. We disagree with both contentions. We note first that property owned by the University of North Carolina and property owned by private taxpayers is in no way similarly situated. The University is an agency of the State of North Carolina; thus property owned by UNC is in effect owned by the State. Orange County, Chapel Hill and Carrboro are governmental entities organized pursuant to the laws of the State of North Carolina. G.S. 160A-1; G.S. 153A-10 and 11. To allow Orange County, Chapel Hill and Carrboro to tax University property would be to allow entities created by the State to tax their creator. Such a

tax would be in no way comparable to the local governing body's tax on privately owned property.

Secondly, with regard to the contention that UNC's tax free status provides the University with an unfair competitive advantage over private enterprise, we note the case of *Mitchell v. Financing Authority*, 273 N.C. 137, 156, 159 S.E. 2d 745, 758 (1968). In that case Justice Sharp (later Chief Justice), writing for the Court, stated:

> "The rule in North Carolina is that it is not the function of government to engage in private business."

This rule is codified in North Carolina General Statute 66-58 which specifically prohibits (with certain exceptions) the State of North Carolina or any agency thereof from rendering services or selling goods ordinarily and customarily rendered by *private enterprise*. However, Orange County, Chapel Hill and Carrboro, governmental units created by the State, have no duty or authority to attempt to enforce the provisions of this statute by ad valorem taxation of State property. It is also apparent that if the State chose to compete with private enterprise, ad valorem taxes levied by the State's political subdivisions would not in themselves deter the State from competition nor significantly undercut the State's competitive advantage over private enterprise. Finally, absent constitutional authorization, we can find no logic to justify taxation of State property by local entities created by the State. The authority of these local entities to levy taxes is derived from the State which they now seek to tax. Truly this is an effort by the local entities to bite the hand which nurtured and fed them.

Based on the language of Article V, Section 2(3) of our Constitution, which exempts State owned property from taxation without qualification, we adopt as the law of this jurisdiction the majority rule in States which have by constitution, as does North Carolina, unqualified tax exemption for State-owned property. That is: State owned property is exempt from ad valorem taxation solely by reason of State ownership, regardless of the property's use.

The judgment of the Superior Court is reversed and this cause is remanded to the Superior Court, Orange County, for entry of judgment in conformity with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. RICHARD LEVI JENKINS

No. 52

(Filed 15 July 1980)

1. **Criminal Law § 29— mental capacity to proceed—ability of defendant to assist in defense**

Testimony by a psychiatrist that defendant could assist in his defense was tantamount to a statement that defendant could assist in his defense in a rational and reasonable manner, and such testimony was sufficient to support the trial court's conclusion that defendant could assist in his defense in a rational and reasonable manner.

2. **Criminal Law § 29— mental capacity to proceed—cooperation with counsel—specific finding not required**

In determining defendant's mental capacity to proceed, the trial judge was not required to make a specific finding that defendant was able to cooperate with his counsel to the end that any available defense could be interposed. G.S. 15A-1001(a).

3. **Criminal Law § 75.14— defendant with low IQ—right to counsel—effectiveness of waiver**

Evidence was sufficient to support the trial court's findings of fact and conclusions of law that defendant knowingly and intelligently waived his right to counsel, though such evidence tended to show that defendant had a low IQ and impaired memory, since the evidence tended to show that defendant's rights were slowly read to him and defendant stated that he understood each right as it was explained to him.

4. **Homicide § 20.1; Criminal Law § 43.1— photographs of deceased and defendant—admissibility for illustration**

The trial court in a murder prosecution did not err in admitting photographs of the victim's body taken at the scene of the crime, since the photographs were fair and accurate representations of the body of the victim and thus were admissible to illustrate the testimony of witnesses; they were material and relevant as tending to show malice on the part of defendant; and they were admissible to corroborate defendant's statement as to how blood came to be on his shirt. Furthermore, a photograph of defendant was admissible to illustrate a witness's testimony that defendant had a reddish tint to his hair on the date of the crime while his hair was darker at trial.

5. **Criminal Law § 81— SBI lab report—authentication**

There was no merit to defendant's contention that the trial judge erred in admitting an SBI laboratory report, since the report was an original document, and its authenticity was proved by the custodian of the records kept in the latent evidence section of the SBI laboratory.

6. Criminal Law § 101— defense witness taken into custody—jury not present—defendant not prejudiced

Defendant failed to show that he was prejudiced by the court's failure to take some action when a defense witness was taken into custody by a deputy sheriff after the witness had testified, since defendant did not lodge an objection to this occurrence at trial or move for a mistrial, and since the action complained of occurred outside the presence of the jury.

7. Criminal Law § 102.5— defendant's statement called confession by district attorney—defendant not prejudiced

Though a statement made by defendant might have been more appropriately called an inculpatory statement and it might have been the better practice for the trial court to instruct the jury to disregard the district attorney's use of the word "confession" in referring to the statement, defendant was not prejudiced since the questions to which objections were sustained did not place before the jury any incompetent or otherwise inadmissible evidence, and it was improbable that the district attorney's improper characterization of defendant's statement might have affected the outcome of the case.

8. Homicide § 21.7— second degree murder—sufficiency of evidence

Evidence was sufficient to sustain defendant's conviction of second degree murder where it tended to show that defendant and deceased left a bar and rode in a taxi to a little road which led through some woods into a grassy field; according to defendant's statement to police officers, he and deceased went into the woods, started drinking, and had sexual intercourse; defendant went to sleep and when he awoke, deceased was not breathing and her heart was not beating; defendant had put his hands on deceased's neck but did not remember squeezing; defendant went to the bus station, but then took a taxi back to the crime scene to see if deceased was dead; when defendant returned to the taxi, he had blood on his shirt; defendant returned to the bus station and took a bus to a city out of the State, returning to N. C. the next day; and defendant admitted to a friend that on the day he met deceased, he was drinking "pretty bad," that he thought he had killed her, that he grabbed her by the neck, and that she was dead when he left her.

Justice BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant from *Mills, J.*, 30 July 1979 Session of BUNCOMBE Superior Court.

Defendant was charged in an indictment proper in form with the murder of Mary F. Burdette. His attorney filed a motion questioning defendant's capacity to proceed pursuant to G.S. 15A-1002, and a hearing was held on the motion prior to the selection of the jury.

At trial the State presented evidence tending to show that on 11 October 1978 the nude body of the deceased was found in a

grassy clearing off Broadway Street in Asheville. The body was in an advanced stage of decomposition, but a pathological examination indicated that the deceased had received a tremendous blow or blows to the head and neck area and died from the resulting injury. Defendant made a statement to Detectives Anarino and Medford of the Asheville Police Department tending to show that on 4 October 1978 he encountered Mary Burdette in the B & R Bar in Asheville. They left in a taxicab and went to a grassy field where they drank gin and engaged in sexual intercourse. Defendant stated that he then went to sleep, and when he awakened Mary Burdette was dead. He thought he had killed her and remembered putting his hands around her neck but did not remember squeezing.

The testimony of several of the State's witnesses corroborated defendant's statement to the police.

Defendant presented evidence tending to show that shortly past 2:30 p.m. on 4 October 1978, the deceased was seen drunk with two men on Lexington Avenue. Ms. Molly T. Buckner testified for defendant that she was driving on Broadway between 6:00 and 7:00 on the evening of 4 October 1978 when she saw Jack Luther, the deceased's boyfriend, with the deceased. Both appeared to be intoxicated, and Luther was in the process of dragging the deceased across the street. Ms. Buckner further stated that every day she saw these two drunk and fighting on Broadway Street, and that she had seen Luther hit the deceased and knock her to the ground. Walter Gregg, the deceased's son, testified that Luther had told him that "I killed your mother. . . ." Jack Luther took the stand and denied that he had made that statement or had ever fought with the deceased.

The jury returned a verdict finding defendant guilty of second-degree murder. Defendant appealed to this Court from a judgment imposing a sentence of life imprisonment.

Other facts pertinent to the decision of this case will be set forth in the opinion.

Rufus L. Edmisten, Attorney General, by W. A. Raney, Jr., Special Deputy Attorney General, for the State.

Floyd D. Brock for defendant appellant.

BRANCH, Chief Justice.

Defendant first assigns as error the trial court's ruling that defendant had the mental capacity to stand trial.

The trial court conducted a pretrial hearing on defense counsel's motion questioning defendant's capacity to proceed to trial. At this hearing, Dr. John D. Patton, a psychiatrist, testified for the defense that he examined defendant for a total of three hours on several different occasions. He concluded that defendant was mildly mentally retarded with an I.Q. of less than 60 and a markedly impaired memory. The witness also testified that in his opinion defendant was able to understand the nature and object of the proceedings against him. He concluded, however, that in his opinion defendant was unable to assist in his defense in a rational and reasonable manner. This opinion was based on defendant's ability to understand only simple words and on his limited memory.

The State presented on *voir dire* the testimony of Dr. James Groce, a psychiatrist, who stated that he had an opportunity to observe and examine defendant for about three weeks commencing on 17 November 1978 when defendant was admitted to Dorothea Dix Hospital. After conducting psychological tests and a series of interviews, Dr. Groce was of the opinion that while defendant suffered from mild mental retardation, he could nonetheless understand the nature and object of the proceedings against him and could assist his attorney in his defense. Dr. Groce further testified that he found defendant to have a limited vocabulary and an I.Q. of 59. Defendant had had problems with alcoholism in the past.

[1] At the conclusion of the hearing, the trial court made findings of fact and conclusions of law resolving the conflicting testimony. The court concluded that defendant was "able to assist in his defense in a rational and reasonable manner."

By this assignment defendant first contends that insufficient evidence was presented to support the court's conclusion of law that defendant could assist in his defense "in a rational and reasonable manner." Dr. Groce testified only that defendant "can assist his attorney in his defense," and defendant claims that this was insufficient to support the court's conclusion. We disagree. In

our opinion, Dr. Groce's statement was tantamount to stating that defendant could assist in his defense in a rational and reasonable manner.

"When the court, as here, conducts the inquiry without a jury, the court's findings of fact, if supported by evidence, are conclusive on appeal." *State v. Taylor*, 290 N.C. 220, 228, 226 S.E. 2d 23, 27 (1976). Here the evidence amply supports the judge's findings of fact.

[2] Defendant also contends by this assignment that the trial court erred in failing to determine whether defendant was able to "cooperate with his counsel to the end that any available defense may be interposed." For this requirement he relies on the following langauge of *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975):

> The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interprosed. *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433; *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560; *State v. Sullivan*, 229 N.C. 251, 49 S.E. 2d 458; Strong, N. C. Index 2d, Criminal Law, § 29, 21 Am. Jur. 2d, Criminal Law, § 65.

Id. at 565-66, 213 S.E. 2d at 316.

G.S. 15A-1001(a) was enacted in 1973 providing in pertinent part:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

This statutory provision expresses a legislative intent to alter the existing case law governing the determination of whether a defendant is mentally incapable of proceeding to trial. In contrast to our former case law, the new statute clearly sets forth in the dis-

junctive three tests of mental incapacity to proceed, and the failure to meet any one would suffice to bar criminal proceedings against a defendant. The statute does not, however, require the trial judge to make a specific finding that defendant is able "to cooperate with his counsel to the end that any available defense may be interposed," and the failure of Judge Mills to so find did not constitute error.

[3] In his second assignment of error, defendant contends that the trial court erred in ruling that defendant made a knowing, understanding and intelligent waiver of his right to counsel and in admitting into evidence his statement to police.

Again the trial court conducted a lengthy *voir dire* hearing to determine whether defendant had been fully informed of his constitutional rights and had knowingly and voluntarily waived his right to counsel before making the inculpatory statement to police. The testimony of Officer W. R. Anarino tended to show that when defendant was placed into custody at the Asheville Police Department, Officer Anarino read him his *Miranda* rights from a waiver form, going over it very slowly and carefully with defendant. While reading him his rights, Officer Anarino repeatedly asked defendant whether he understood them, and defendant replied that he understood and did not want a lawyer present while he talked with the officers. Defendant then placed his signature upon the document. He told the officers that he wanted to get this thing off his chest and be a Christian, because when he went to heaven he wanted to be able to see his mother and sister.

The State also offered the testimony of Dr. James Groce, who testified much as he had at the pretrial hearing concerning defendant's capacity to proceed. He also stated that in his opinion defendant could understand the *Miranda* waiver form used by the police, and that going over it slowly and asking defendant after each paragraph whether he understood it would increase his understanding.

On *voir dire* Dr. John Patton testified for defendant that he examined defendant on three occasions and found him to have an I.Q. of less than 60 and a grossly impaired memory capacity. Dr. Patton stated his opinion that a number of words in the *Miranda* warning would not have been in defendant's vocabulary. In his

opinion, defendant could not have had a clear understanding of the consequences of his decision to sign the statement after the warning had been read to him. Nor could defendant have made a knowing and intelligent waiver of his right to counsel.

Upon this conflicting evidence, the trial judge found that defendant was taken into custody on 25 October 1978 and told the police detectives that he wanted to make a statement; that defendant was read his constitutional rights from a prepared form, and defendant said that he understood each right as it was explained to him; that he did in fact understand his rights; that his statement was freely and voluntarily made without coercion by the officers and that he understood the consequences thereof; that the typewritten statement was an accurate representation of defendant's conversation with the officers, and defendant indicated that the statement was correct; and that it was given after a full and understanding waiver of his constitutional rights. The trial court concluded that although defendant was mildly retarded, he was able to appreciate the consequences of giving such a statement and to understand his constitutional rights, which were fully and adequately explained to him by the police officers. The court thereupon ruled that defendant's statement was admissible into evidence.

It is well settled in this jurisdiction that when a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a *voir dire* hearing to determine whether defendant has been informed of his constitutional rights and has knowingly and voluntarily waived his right to counsel before making the challenged admissions. When the *voir dire* evidence is conflicting, as here, the trial judge must weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. When supported by competent evidence, his findings are conclusive on appeal. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976); *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934 (1971).

In the instant case there was ample evidence to support the trial judge's findings of fact and conclusions of law that defendant knowingly and intelligently waived his right to counsel. Although the *voir dire* evidence regarding defendant's mental capacity to

make a knowing waiver was in conflict, the trial juge resolved the dispute and made the appropriate findings of fact. *State v. Biggs, supra.* A defendant's subnormal mental capacity is a factor to be considered, but such lack of intelligence, standing alone, does not render an in-custody statement incompetent if it is in all other respects voluntary and understandingly made. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated,* 428 U.S. 908 (1976). Consequently, we hold that the trial judge properly overruled the motion to suppress defendant's inculpatory statement.

[4] By his third assignment of error, defendant contends that the court erred by admitting into evidence photographs identified as State's exhibit numbers 13, 14, 15 and 16. State's exhibits 13 and 14 are photographs of the victim's body from different angles which were taken at the scene of the crime. The State's exhibit 15 depicts a multilated portion of the victim's body, and State's exhibit 16 is a photograph of human flesh and hair found at the scene of the crime.

On *voir dire* and before the jury, S.B.I. Agent Elliott testified that these photographs were fair and accurate representations of the body of the victim and the human flesh and hair as he observed them at the crime scene. He further stated that the exhibits could be used to illustrate his testimony. Upon admitting the exhibits into evidence, the trial judge properly instructed that the exhibits were admitted for the sole purpose of illustrating the testimony of the witness.

The rule concerning the admission of similar exhibits was set forth in *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds,* 403 U.S. 948 (1971), where Justice Lake speaking for the Court stated:

> The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated as a correct portrayal of conditions observed by and related by the witness who uses the photograph to illustrate his testimony. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104; *State v. Gardner,* 228 N.C. 567, 46 S.E. 2d 824; Stansbury, North Carolina Evidence,

2d Ed., § 34. For a collection of authorities to the same effect from other jurisdictions, see Annot., 73 A.L.R. 2d 769.

"Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything it is competent for him to describe in words." *State v. Gardner, supra.* The fact that the photographs are in color does not affect their admissibility. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329; *People v. Moore,* 48 Cal. 2d 541, 310 P. 2d 969; *Commonwealth v. Makarewicz,* 333 Mass. 575, 132 N.E. 2d 294; Annot., *supra,* p. 811. Thus, in a prosecution for homicide, photographs showing the condition of the body when found, the location where found and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray. *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196; *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7.

Id. at 311, 167 S.E. 2d at 255.

Malice is an essential element of the crime of murder in the second degree, and the exhibits here offered were material and relevant as tending to show malice on the part of defendant. The photographs also tended to corroborate defendant's statement as to how blood came to be on his shirt. Further, the exhibits illustrated the testimony of the witness concerning the crime scene. We note that the State only offered four of twenty-nine similar photographs that were available and, therefore, did not violate the rule set out in *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328 (1969), *overruled on other grounds in State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975), proscribing the introduction of an excessive number of gory photographs which add nothing in the way of probative value but tend solely to inflame the jurors.

This assignment of error is overruled.

Defendant next contends that the trial court erred in admitting into evidence a photograph of defendant for the purpose of illustrating the testimony of witness Bob Wally Creasman.

It is well settled in this jurisdiction that photographs are admissible to illustrate the testimony of a witness. "[W]here there is evidence of the accuracy of a photograph, a witness may use it for

the restricted purpose of explaining or illustrating to the jury his testimony relevant and material to some matter in controversy." *State v. Hatcher*, 277 N.C. 380, 388, 177 S.E. 2d 892, 898 (1970); *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916 (1955); *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948); 1 Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973).

Here the State's witness Grady Ward, a taxicab driver, testified that he drove defendant to the scene of the crime on the afternoon of 4 October 1978 and later returned him to the bus station. Defendant sought to impeach the witness' identification of defendant by cross-examining him about his prior statement that his passenger had blond hair. At the time of trial, defendant's hair was black.

The State then recalled Bob Wally Creasman and showed him a photograph which he identified as being of defendant. The following questioning then occurred:

> Q. Can you describe the color of his hair there in the photograph?
>
> MR. MILLER: Objection.
>
> THE COURT: Overruled.
>
> DEFENDANT'S EXCEPTION NO. 7
>
> A. Go ahead?
>
> Q. Yes sir.
>
> A. It is to me. It looks like the sun has bleached it out, sort of a reddish tint to me. It is a reddish blonde. I don't know. I can't—it is dark red where it has been bleached out to me.
>
> That's the way his hair appeared on October 4, 1978, and is a fair and accurate representation on my testimony as to how Richard Jenkins looked on October 4, 1978.

The photograph was subsequently received into evidence for the purpose of illustrating the testimony of the witness and for no other purpose.

Defendant contends that the initial question and answer set forth above were improper and rendered the subsequent founda-

tion testimony inadmissible. However, the witness had just testified that defendant had a reddish tint to his hair on October 4 while his hair was darker at trial, and the witness had identified the man in the photograph as defendant. It is clear that the photograph did in fact illustrate the witness' testimony and that the judge gave the proper limiting instruction.

The trial judge properly admitted defendant's photograph into evidence.

Defendant assigns as error the ruling of the trial judge admitting photographs of Mary Burdette and Jack Luther into evidence. He argues that these exhibits were not admissible because the respective witnesses who identified them did not testify that the photographs illustrated his or her testimony.

The witness Esta Ratcliff testified that she had known Mary Burdette for several years and that she could identify State's exhibit 17 as a photograph of Mary Burdette. The witness Otis Lee Mims stated that he knew Jack Luther and that he could identify State's exhibit 19 as a photograph of Jack Luther. When these exhibits were admitted into evidence over defendant's objection, the court gave a proper instruction limiting the use of the exhibits to illustrate the witnesses' testimony.

In our opinion, the testimony of each of these witnesses amounted to a statement that the photograph was an accurate representation of the person depicted. The relevancy of the photographs is illustrated by the use of exhibit 17 during the examination of the witness Wally Creasman, who identified that exhibit as being a photograph of the woman who left his taxi with defendant near the scene of the crime on the morning of 4 October 1978. Even had there been error in the admission of these exhibits, it is inconceivable that the admission of the photographs would have altered the result reached in this trial.

[5] We find no merit in defendant's argument that the trial judge erroneously admitted an S.B.I. laboratory analysis report. This report was an original document, and its authenticity was proved by the custodian of the records kept in the latent evidence section of the S.B.I. laboratory. Thus, the document was properly authenticated and was admissible into evidence. 1 Stansbury's North Carolina Evidence, *supra* at § 153. Even had the document

been erroneously admitted, defendant failed to show that he was prejudiced by the introduction of the record. To the contrary, the record was favorable to defendant in that it revealed that none of the fingerprints lifted at the scene of the crime matched defendant's fingerprints.

[6] Defendant next contends that the trial judge erred by failing *ex mero motu* to take some action when a defense witness was taken into custody by a deputy sheriff after the witness had testified.

It was stipulated that immediately after defense witness Ocel Haney left the witness stand, the chief investigator for the district attorney who was also a deputy sheriff took the witness into custody and placed him on the prisoners' bench. This occurred out of the presence of the jury and before court resumed, and Mr. Haney was discharged from custody before the jury returned to the courtroom.

The record discloses that defendant did not lodge an objection to this occurrence at trial. Neither did he move for a mistrial. Thus, this assignment presents no question for appellate review since it is not supported by an exception duly taken at trial. *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977); *see* Rule 10(b)(1), N.C. R. App. Pro. Even had the assignment been properly presented, the action complained of occurred out of the presence of the jury. Defendant has failed to carry his burden of showing prejudice because of the court's inaction. G.S. 15A-1443.

[7] Defendant assigns as error the failure of the trial judge on his own motion to instruct the jury to disregard the district attorney's use of the word "confession" in referring to the statement made by defendant to police officers.

On three occasions, the district attorney characterized defendant's statement to the police officers as a confession.

On one occasion defendant interposed no objection. Since the question did not involve evidence precluded by reason of public policy, defendant waived his right to the objection and had no proper basis for appeal. *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973).

On the two other occasions when the district attorney used the word "confession" in the same context, defendant objected

and the trial judge sustained the objections without giving any cautionary instruction. Defendant did not request such instruction or move to strike the answer. Neither did he request the court to clarify this matter in his charge to the jury.

A confession is an acknowledgment in express words by an accused of his guilt of the crime charged or of some essential part of it. *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). Here the statement made by defendant did not amount to a clearcut acknowledgment of his guilt of the crime charged; however, it was extremely inculpatory in that it placed him at the scene of the crime in an intoxicated condition. It disclosed that he remembered putting his fingers around the neck of the deceased and that she was dead when he left her. He thereafter told another person that he thought he had killed the deceased.

We concede that the statement made by defendant might have been more appropriately called an inculpatory statement and that it would have been the better practice for the trial court to have accompanied his ruling with an instruction to the jury to disregard the challenged word. Nevertheless, other than the questioned characterization of defendant's statement, the questions to which objections were sustained did not place before the jury any incompetent or otherwise inadmissible evidence. Under these circumstances, we think it improbable that the district attorney's improper characterization of defendant's statement might have affected the outcome of this case. Our conclusion is buttressed by defendant's failure to move to strike or to request a cautionary or clarifying instruction at any stage of the trial.

Defendant next assigns as error the trial court's denial of his motions to dismiss.

A motion to dismiss tests the sufficiency of all the evidence to carry the case to the jury in the same manner as does a motion for nonsuit. *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977). We stated the familiar rules governing consideration of evidence when a motion for judgment as of nonsuit is lodged in *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975), as follows:

> A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the

> State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. *State v. Cutler, supra; State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Norggins*, 215 N.C. 220, 1 S.E. 2d 533 (1939).

Id. at 117, 215 S.E. 2d at 581-82.

[8] We turn to the question of whether there was sufficient evidence to sustain defendant's conviction of the lesser included charge of murder in the second degree.

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). The requisite element of malice was aptly defined in *Wilkerson* in the following language:

> "Malice has many definitions. To the layman it means hatred, ill will or malevolence toward a particular individual. To be sure, a person in such a state of mind or haboring such emotions has actual or particular malice. *State v. Benson*, 183 N.C. 795, 111 S.E. 869. In a legal sense, however, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse; 'whatever is done "with a willful disregard of the rights of others, whether it be to compass some unlawful end, or some lawful end by unlawful means constitutes legal malice." ' *State v. Knotts*, 168 N.C. 173, 182-3, 83 S.E. 972, 976. It comprehends not only particular animosity 'but also wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless

> of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person.' 21 A. & E. 133 (2d Edition 1902). *Accord, State v. Long,* 117 N.C. 791, 798-9, 23 S.E. 431."

Id. at 578, 247 S.E. 2d at 916.

In the instant case the State presented evidence tending to show that around 11:00 a.m. on 4 October 1978, defendant left the B & R Bar in Asheville with the deceased, Mary Burdette. According to the testimony of John Ingle, a taxicab driver, they rode in a taxi to a point on Broadway Street where it intersects a little road leading through some woods into a grassy field.

Defendant's statement made to police officers tended to show that defendant and the deceased got out of the taxicab, walked up into the woods and started drinking. Defendant stated that they had sexual intercourse, and defendant went to sleep for about twenty minutes. When he awoke, the deceased was not breathing and her heart was not beating. Defendant had been drinking heavily and did not know whether he had killed her or not; although he had put his hands on her neck, he did not remember squeezing. Defendant walked to the bus station and bought a ticket to Knoxville, Tennessee. He then asked the ticket agent to call a taxicab for him, because he wanted to return to where he had left the deceased and make sure that she was dead. Once on Broadway Street, defendant told the taxi driver to go down the road and wait for him, while defendant walked to where the body lay. When her returned to the taxi, he had blood on his shirt. He told the driver that it was his night to get drunk. He rode back to the bus station where he took a bus to Knoxville, returning to Asheville on the following evening. Defendant also admitted that he told a friend on October 6 that on the day he met the deceased he was drinking "pretty bad." He said that he thought that he had killed her; he had grabbed her by the neck, and she was dead when he left her.

Grady Ward testified that on 4 October 1978 he was operating a taxi in Asheville. On that day at about 2:30 p.m. he picked defendant up at the bus station and drove him to a path near Broadway. Defendant told him to return in about twenty minutes. He complied, and when defendant returned, he had blood

on his shirt and remarked "the bitch was sick." The witness then carried defendant back to the bus station.

The State's evidence further tended to show that the nude body of the deceased was found on 11 October 1978 in a grassy clearing off Broadway Street. Items of clothing, assorted papers and a brown pocketbook were found near the body. Dr. Charles Bruce Alexander, a forensic pathologist, testified that the body was in an advanced stage of decomposition including the partial skeletonization of the head and neck. The jawbone had been recently fractured in two places, and there was evidence of trauma in the neck area and an incised wound in the genital area measuring approximately five by five and one-half inches. In the physician's opinion, the deceased received a tremendous blow or blows to the head and neck area and died from the resulting injury. Dr. Alexander was also of the opinion that the genital wound had probably been inflicted after death, due to the apparent lack of bleeding in that area.

Applying the above-stated principles of law to the evidence presented in this case, we are of the opinion that there was ample evidence from which the jury could reasonably find that the crime of second-degree murder had been committed and that the defendant was the perpetrator of that crime. We, therefore, hold that the trial judge correctly denied defendant's motions to dismiss.

By his assignments of error numbers 12 and 13, defendant challenges the admission of certain testimony during *voir dire* hearings. None of the challenged testimony was before the jury, and it is therefore presumed that if the evidence was incompetent, the trial judge would disregard it in making his findings. Therefore, defendant has failed to show how the admission of the testimony prejudiced him. *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

We have carefully considered the entire record and find no error warranting a new trial.

No error.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ELI FLORIST EASTERLING

No. 25

(Filed 15 July 1980)

1. **Constitutional Law § 31— indigent defendant—appointment of investigator**

An indigent defendant's constitutional and statutory right to a State appointed investigator arises only upon a showing that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense.

2. **Criminal Law § 91.1— motion for continuance—discretion of court**

A motion for continuance which does not implicate constitutional rights is ordinarily addressed to the discretion of the trial court, and its denial will not be held error on appeal in the absence of an abuse of discretion.

3. **Constitutional Law § 31— indigent defendant—denial of funds for private investigator**

In a prosecution for first degree murder, armed robbery and first degree burglary, the trial court did not abuse its discretion in the denial of an indigent defendant's motion for funds to hire a private investigator where, at the hearing on the motion, defendant's counsel did little more than assert that "hours of inquiry" were still required into "the possible testimony of witnesses" who had not yet been contacted some three months after defendant's arrest, since such a statement does not rise to the level of showing a reasonable likelihood that the efforts of an investigator would discover additional evidence helpful to defendant.

4. **Constitutional Law § 31— indigent defendant—denial of funds for private psychiatrist**

The trial court did not err in the denial of defendant's motion for funds to hire a private psychiatrist where defendant was examined by a psychiatrist at Dorothea Dix Hospital upon motion of the State; the psychiatrist's report indicated that defendant was capable of proceeding to trial and that he was legally sane at the time of the trial; the trial court's hearing on the motion was fully adequate to determine defendant's capacity to proceed pursuant to G.S. 15A-1002(b)(3); and there was no evidence in the motion or at the hearing which tended to support even a suspicion, much less a reasonable likelihood, that defendant could establish a meritorious defense of insanity.

5. **Constitutional Law § 40— capital case—failure to reappoint associate counsel**

In this prosecution for first degree murder, armed robbery and first degree burglary, the trial court did not abuse its discretion in the denial of defendant's motion made shortly before trial to reappoint or affirm the appointment of associate counsel where the district court on its own motion appointed associate counsel for defendant shortly after his arrest; associate counsel worked closely with defendant's chief counsel until shortly before trial when the motion was denied; defendant's chief counsel stated at the hearing only that he anticipated generally that associate counsel would share with him

during the course of the trial the responsibilities of trial counsel and that "it may be running and looking up an item of law, or doing something in the way of investigation"; and no evidence was presented to the trial court which would tend to establish that defendant's case was so lengthy, factually or legally complex, or fraught with other legal difficulties such as to require the appointment of more than one attorney to ensure a fair trial and an adequate defense. G.S. 7A-459.

6. Indictment and Warrant § 13.1— exact time of offenses—denial of motion for bill of particulars

In this prosecution for first degree murder, armed robbery and first degree burglary, the trial court did not err in the denial of defendant's motion for a bill of particulars requesting the State to specify the exact time the offenses were allegedly committed where the warrant and indictment for burglary advised defendant from the outset that the series of offenses allegedly took place during the evening of 21 March; the State adduced no evidence at trial which tended to specify the exact time of the offenses with greater particularity; defendant's trial testimony presented an alibi as to his whereabouts throughout the evening in question and the early morning hours of the next day, but there was no corroboration as to any part of his account; the State presented no evidence at trial of which defendant was unaware; and it does not appear likely that defendant's tactics at trial would have varied in the slightest had he been privy to an estimate of the exact time the offenses allegedly occurred.

7. Criminal Law § 75.2—admissibility of confession—no request for attorney—no pressure by police

The trial court properly refused to suppress defendant's in-custody statement to the police where the evidence, although conflicting, supported the court's findings that defendant did not request an attorney during questioning and was not pressured by police comments about plea bargaining and the possibility of the death sentence, and the evidence supported the court's findings and conclusions that defendant's statement was made voluntarily after an understanding waiver of his right to counsel.

8. Criminal Law § 89.5— pretrial statement by accomplice—admission for corroboration—slight variances

An accomplice's pretrial statement did not differ so substantially from his in-court testimony that the statement was incompetent for corroborative purposes where the statement was generally and substantially consistent with the accomplice's trial testimony; for the most part, the statement was less complete than the trial testimony; the only "new" material presented by the statement was the mention of defendant asking the accomplice whether he had been cut; and this item alone added nothing of import to the State's case in chief in light of competent testimony by the accomplice that he held the deceased while defendant assaulted him with a knife.

9. Criminal Law § 102.6— jury argument—reference to corroborative evidence as substantive evidence—harmless error

The trial court erred in permitting the prosecutor, over defendant's objection, to allude to portions of a corroborative statement as substantive evidence

in his closing jury argument; however, such error was not prejudicial to defendant since the statement as compared to the corroborative witness's trial testimony was relatively benign.

10. Burglary and Unlawful Breakings § 5; Homicide § 21.6; Robbery § 4.3— first degree burglary—armed robbery—first degree murder—sufficiency of evidence

The State's evidence was sufficient for the jury on issues of defendant's guilt of first degree burglary, armed robbery and first degree murder where it tended to show that defendant and two companions went to deceased's apartment with the intention to rob; defendant and his male companion "busted the door open and went in" deceased's apartment in the nighttime; defendant and his male companion assaulted the deceased in his bedroom, the defendant using a knife; the male companion left the apartment after taking a tape recorder; and deceased died as the result of wounds inflicted in the course of the robbery with a dangerous weapon.

11. Criminal Law § 101.2— jurors' inspection of gun not introduced into evidence—curative instructions

Although it was technically improper for the prosecution to pass among the jurors a gun belonging to deceased which was not introduced into evidence, defendant was not prejudiced thereby where the error was quickly noticed by the trial court and the court on its own motion promptly instructed the jury not to consider the gun in any manner.

12. Burglary and Unlawful Breakings § 5.8— sufficient evidence of "breaking"

There was sufficient evidence of a "breaking" to support the trial court's charge on burglary where the State's evidence tended to show that defendant and a male accomplice gained access to deceased's dwelling by pushing a female accomplice out of the way as she left the dwelling, "busting" the door open, and rushing into the dwelling.

13. Homicide § 25.1— submission of felony murder and underlying felony

It was not error for the court to submit both a felony murder count and the underlying felony count of armed robbery to the jury since it was remotely possible that the jury could have found defendant guilty of the felony of armed robbery but not of the murder, the defendant's rights having been protected when the trial court properly arrested judgment on the charge of armed robbery after the jury returned a verdict of guilty on the felony murder charge.

14. Criminal Law § 122.2— instruction on expense of retrying case—prohibition by statute—harmless error in this case

Under G.S. 15A-1235, a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree. However, the trial court's instruction to such effect in this case did not constitute prejudicial error where the record contains no indication that the jury was in fact deadlocked in its deliberations, or in any other way open to pressure by the trial judge to "force" a verdict, at the time the charge was given, and the charge made it clear that the trial court did not intend that any juror surrender his conscientious convictions or judgment and contained no such element of coercion as to warrant a new trial.

Justice BROCK did not participate in the consideration or decision of this case.

BEFORE *Judge Seay*, at the 16 July 1979 Session of RICHMOND Superior Court and on bills of indictment proper in form, defendant was tried and convicted of first-degree (felony) murder, robbery with a dangerous weapon, and first-degree burglary. From judgments imposing consecutive life sentences on the murder and burglary counts (judgment arrested as to the robbery count), defendant appeals pursuant to G.S. 7A-27(a).

Attorney General Rufus L. Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney John F. Maddrey for the State.

Joseph G. Davis, Jr., for defendant appellant.

EXUM, Justice.

By this appeal defendant, an indigent, raises numerous assignments of error. The most important of these relate to the adequacy of defendant's representation provided by the State under G.S. 7A-450(b), and to the permissible bounds of the charge which may be given by the trial court to a jury which appears stalled in its deliberations. We find no prejudicial error in any aspect of defendant's trial and we affirm his conviction.

The State's evidence tended to show that the deceased, Harlee Leak, was found in his apartment bleeding from a fatal wound about 1:00 a.m. on the morning of 22 March 1979. Defendant's in-custody statement to the police, introduced at trial against him, indicated that defendant, along with his girlfriend Mary Ann Bennett and his cousin Charlie Harris, went to Leak's apartment on the evening of 22 March with the intention of robbing him, but that defendant and Bennett ran from the scene during a scuffle between Harris and Leak. Harris testified on the other hand that he and defendant tried to subdue Leak, that defendant had a knife and Harris saw him "swing" it, and that Harris left the apartment while defendant and Leak were still fighting in the bedroom. Harris further testified that upon leaving the apartment, he took a tape recorder belonging to Leak which he later pawned. A bracelet belonging to defendant was found lying on the bed in Leak's apartment.

Defendant testified in his own behalf that on the evening of 21 March he persuaded Mary Ann Bennett to borrow some money from Leak, after which he went to a party about 11:30 p.m. He stayed at the party until 1:00 a.m. He further testified that he saw Charlie Harris later that evening and that Harris told of taking a tape recorder from Leak after "mess[ing] him up." Defendant's sister testified that several days prior to the murder she had mistakenly left defendant's bracelet at Leak's apartment while visiting him.

The jury found defendant guilty of first-degree murder, first-degree burglary and armed robbery. At a separate sentencing proceeding in the first-degree murder conviction, the jury was unable to agree on a sentence recommendation. The trial judge, as required by G.S. 15A-2000(b), imposed a life sentence on the conviction.

Defendant first assigns error to the trial court's denial of his motions for a continuance and for funds to hire a private investigator to assist in the preparation of his case. He argues that his case would have undoubtedly been improved by a "better investigation" of the jury venire for voir dire purposes, and by the "extra help" an investigator would have afforded in finding witnesses to support his alibi defense. He bases his entitlement to such help upon G.S. 7A-450(b), which sets forth the responsibility of the State to provide an indigent defendant "with counsel and the *other necessary expenses of representation.*" (Emphasis supplied.)

[1, 2] The questions raised by assignments similar to this one have been thoroughly discussed by this Court in *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); and *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). The gist of these cases is that "an indigent defendant's constitutional and statutory right to a State appointed investigator arises only upon a showing that there is a *reasonable likelihood* that such an investigator *would discover* evidence which would materially assist defendant in the preparation of his defense." *State v. Alford*, 298 N.C. 465, 469, 259 S.E. 2d 242, 245 (1979). (Emphasis supplied.) Moreover, it is well established that a motion for continuance which does not implicate constitutional rights is ordinarily addressed to the discretion of the

trial court, and its denial will not be held error on appeal in the absence of an abuse of discretion. *State v. Thomas,* 294 N.C. 105, 240 S.E. 2d 426 (1978).

[3] The record reveals that defendant's counsel, Mr. Joseph Davis, was appointed on 27 March 1979. The motions for a private investigator and for a continuance were not made until 3 July. These motions speak generally of the need for defendant's counsel to interview additional witnesses and investigate thoroughly the circumstances of the alleged crimes. At the hearing on these motions, however, counsel for defendant did little more than assert that "hours of inquiry" were still required into "the possible testimony of witnesses" who had not yet been contacted some three months after defendant's arrest. We do not think such a statement rises to the level of showing a reasonable likelihood that the efforts of an investigator would discover additional evidence helpful to defendant. Absent a more specific indication of the need for the testimony of particular witnesses or the need for the investigatory development of a particular item of evidence, the motions were directed to the sound discretion of the trial court. We find no abuse of discretion in their denial. "[T]he State is not required by law to finance a fishing expedition for defendant in the vain hope that 'something' will turn up." *State v. Alford, supra,* 298 N.C. at 469, 259 S.E. 2d at 245.

[4] These same considerations apply to defendant's contention of error in the trial court's denial of his motion for funds to hire a private psychiatrist. Upon motion by the State, defendant was in fact sent to Dorothea Dix Hospital and there examined by a psychiatrist on 20 April 1979. The psychiatrist's report, made available to defendant's counsel shortly after the examination, indicated that defendant was capable of proceeding to trial and that he was legally sane, albeit somewhat intoxicated, at the time of the alleged crimes. Defendant nevertheless moved on 3 July that funds be made available to hire a private psychiatrist for a more thorough investigation of defendant's state of mind at the time of the alleged offenses. This motion was denied by the trial court after a hearing in which defendant's own appearance and testimony indicated that he was fully capable of understanding his rights and assisting in his own defense.

We find no error in the denial of defendant's motion for further psychiatric assistance. The trial court's hearing on the mo-

tion was fully adequate to determine defendant's capacity to proceed, *see* G.S. 15A-1002(b)(3); *State v. Taylor*, 298 N.C. 405, 259 S.E. 2d 502 (1979); and the court's conclusion that defendant was competent to stand trial is supported by adequate findings of fact which are in turn supported by evidence adduced at the hearing and appearing in the record. We are not persuaded by defendant's contention that further psychiatric inquiry could have revealed expert information "as to the possibility of insanity as a defense." There was simply no evidence presented in the motion or at the hearing which tended to support even a suspicion, much less a reasonable likelihood, that defendant could establish a meritorious defense of insanity. Under these circumstances, the court's refusal to require the State to pay for an additional psychiatric evaluation was not error. *See, e.g., State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *death sentence vacated*, 428 U.S. 904 (1976).

[5] Finally, we see no merit to defendant's argument that the trial court erred in refusing to reappoint or affirm the appointment of associate counsel. Apparently on its own motion, the district court appointed Mr. Alden Webb assistant counsel for the defendant shortly after his arrest. Mr. Webb worked closely with defendant's chief counsel, Joseph Davis, until shortly before trial, when defendant's motion to have the court verify Mr. Webb's continued involvement in the case was denied.

Sections 4.8 and 4.9 of Appendix VIII to the North Carolina General Statutes (1979 Cum. Supp.), promulgated by the State Bar Council and adopted pursuant to G.S. 7A-459, provide that "in appropriate cases in the discretion of the Court" an additional counsel may be appointed for an indigent defendant charged with a capital offense. Since such an appointment is clearly discretionary with the trial or appellate court, a failure to appoint or continue the appointment of associate counsel will be held error only when it amounts to a clear abuse of that discretion, *i.e.*, only when it is denied in the face of a showing by defendant of a reasonable likelihood that additional counsel would materially assist in the preparation of his defense, or that without such help it is probable that defendant will not receive a fair trial. *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). In the instant case, there is no doubt that the additional efforts of Mr. Webb helped considerably to reduce the workload of Mr. Davis in the prepara-

tion of defendant's case. However, no evidence was presented to the trial court which would tend to establish nor does the record reveal that defendant's case was so lengthy, factually or legally complex, or fraught with other difficulties such as to *require* the appointment of more than one attorney to ensure a fair trial and an adequate defense. At the hearing on the motion, Mr. Davis himself indicated little more than the fact that he felt Mr. Webb's involvement in the case was "appropriate." As to the material need for the continued assistance of Mr. Webb, Mr. Davis stated only that, "I anticipated generally that he would share with me during the course of the trial the responsibilities of trial counsel; it may be running and looking up an item of law, or doing something in the way of investigation. I can't be more specific than that." In the absence of some more specific showing that defendant's case would be materially prejudiced without the assistance of an extra attorney, the trial court did not err in refusing to continue the appointment of Mr. Webb as associate counsel.

[6] Defendant next assigns error to the trial court's denial of his motion for a bill of particulars requesting the State to specify the exact time the offenses were alleged to have occurred. He argues that the State's failure to pinpoint the precise time of the offenses impaired his ability to prepare an adequate alibi defense. This contention is without merit.

The grant or denial of a bill of particulars is generally within the discretion of the trial court and is not subject to review "except for palpable and gross abuse thereof." *State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E. 2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903 (1976). The court *must* order the State to respond to a request for a bill of particulars only when the defendant shows that the information requested is *necessary* to enable him to prepare an adequate defense. G.S. 15A-925(c). Stated otherwise, a denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case. No such prejudice is evident from this record.

The warrant and indictment for the crime of burglary served to advise defendant from the outset that the series of offenses

with which he was charged allegedly took place some time during the evening of 21 March. At trial, the State adduced no evidence which tended to specify the exact time of the offenses with any greater particularity; indeed, it is not even apparent that more specific information was even available. Defendant's trial testimony presented an alibi as to his whereabouts throughout the evening in question and the early morning hours of the next day. There was, however, no corroboration as to *any* part of his account. In light of these circumstances, we are not persuaded that defendant was prejudiced or his defense in any way impaired by the failure of the State to allege the precise time of the offenses. The State presented no evidence at trial of which defendant was unaware. It does not appear likely that his defense tactics would have varied in the slightest had he been privy to an estimate of the exact time the offenses allegedly occurred. There was no error in the trial court's denial of defendant's motion for the bill of particulars.

[7] Defendant's contention that his in-custody statement to the police should have been suppressed is equally without merit.

At the voir dire hearing conducted on the motion to suppress, the State's evidence tended to show that before defendant made the statement to the police, he had been fully informed of his constitutional rights, had twice signed express waivers of these rights, and had been allowed access to a telephone on several occasions. Defendant himself testified that he had been advised of his rights "maybe five or six times" and that he understood the import of the waiver he signed just before making the statement. The voir dire evidence is conflicting as to whether defendant requested an attorney during questioning and whether he was pressured by police comments about plea bargaining and the possibility of the death sentence. The trial court chose not to believe defendant's version on these points, and the court's findings and conclusions that defendant's statement was made voluntarily after an understanding waiver of his right to counsel are amply supported by the record. The findings are therefore conclusive on appeal. *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977); *State v. Jackson*, 292 N.C. 203, 232 S.E. 2d 407, *cert. denied*, 434 U.S. 850 (1977). This assignment of error is overruled.

[8] At trial, police Detective Harold Napier was allowed to read the statement made to the police by Charlie Harris, defendant's

alleged accomplice and one of the chief witnesses for the State. Harris had previously testified and his credibility had been attacked on cross-examination. His statement was offered only for the purposes of corroborating his prior testimony. The trial court gave proper limiting instructions to the jury both before and after the statement was read. Defendant nevertheless contends that Harris's pretrial statement differed so substantially from his in-court testimony that the statement was wholly incompetent for corroborative purposes. He further argues that it was prejudicial error for the trial court to allow the prosecutor to refer to the substance of the statement in the course of jury argument. We disagree with both of these contentions.

Harris's pretrial statement indicated that he had not seen what defendant had in his hand during the assault on the deceased. Harris testified before the jury, however, that defendant had used a butcher knife. The pretrial statement also mentioned that after the fatal assault, defendant had asked Harris whether defendant had accidentally cut him during the affray with the deceased; no mention of this was elicited during Harris's in-court testimony. Finally, the pretrial statement said nothing either about the tape player Harris took or the sweater defendant allegedly gave Harris to wear during the incident, whereas both these matters were brought out in Harris's trial testimony.

We do not find these variances to be so material as to render Harris's prior statement inadmissible to corroborate his account given from the stand. The statement is generally and substantially consistent with the testimony it is intended to buttress, and the fact that slight variations exist between the two goes only to the statement's corroborative weight, not its admissibility. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978); *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). For the most part, the statement is less complete than the trial testimony it confirms. As such it is underinclusive rather than overinclusive and introduces little in the way of "new" evidence under the guise of corroboration. *Cf. State v. Rogers*, 299 N.C. 597, 605-08, 264 S.E. 2d 89, 94-96 (1980) (Exum, J., concurring). Indeed, the only "new" material worth noting that can be said to have been evidenced by the reading of the statement was the mention of defendant asking Harris whether he had been cut. In light of the competent testimony by Harris that he held the deceased while

defendant assaulted him with a knife, this item alone added nothing of import to the State's case in chief. The embellishment which it occasioned was minimal, immaterial, and only collaterally significant. We thus find no error in the use of the statement as corroboration.

[9] There was technical error, however, in the trial court's allowing, over defendant's timely objection, the prosecutor to argue portions of the corroborative statement to the jury. The statement having been offered only corroboratively, it was improper for the State to allude to it as substantive evidence during closing argument. *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939 (1972). Nevertheless, since the statement as compared with the witness's trial testimony was relatively benign, we cannot see how defendant was prejudiced by this aspect of the prosecutor's argument. This assignment of error is therefore overruled.

[10] We find no merit to defendant's contention that the trial court erred in denying his motion to dismiss at the close of the evidence. It is elemental that in ruling upon a motion by defendant to dismiss a criminal action at the close of the State's evidence, the court must consider all the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference of fact arising from the evidence. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). On the charge of robbery with a dangerous weapon, evidence was presented that defendant, Charlie Harris, and Mary Ann Bennett went to the deceased's apartment with the intention to rob; that defendant and Harris together assaulted the deceased in his bedroom, the defendant using a knife; and that Harris left the apartment after taking a tape recorder. As to the charge of first-degree burglary, the State's evidence tended to show that defendant and Harris "busted the door open and went in the house" of the deceased in the nighttime with the intent to commit armed robbery, and that the deceased was then present in his dwelling. Regarding the charge of felony murder, the evidence was plenary that the deceased died as the result of wounds inflicted in the course of the robbery with a dangerous weapon. The evidence was clearly sufficient to go to the jury on all charges.

[11] Defendant next contends that he should have been granted a mistrial after State's Exhibit No. 20, a gun not introduced into evidence, was passed among the jurors. We disagree.

The gun had been identified at trial as one belonging to the deceased and found at the scene of the crime by Detective Napier. Defendant's pretrial statement to the police, read to the jury by Napier, had indicated that defendant had been aware of the fact that the deceased possessed a gun. However, the gun was never formally introduced into evidence and its relevance to the State's case was minimal. Although it was technically improper for the prosecution to allow the jurors to handle this exhibit, the error was quickly noticed by the trial court and the court on its own motion promptly instructed the jury not to consider the gun in any manner. Under these circumstances, we cannot see how the outcome of the trial was in any way affected adversely to defendant. An insubstantial technical error which could not have affected the result of the trial will not be held prejudicial on appeal. G.S. 15A-1443; *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971).

Defendant alleges several instances of error in the trial judge's charge to the jury. We find no merit to any of his arguments in this regard.

[12] First, defendant asserts in effect that there was insufficient evidence of a "breaking" to support the trial court's charge on burglary. As noted above, however, the State's evidence indicated that defendant and Harris gained access to the deceased's dwelling by pushing Mary Ann Bennett out of the way, "busting" the door open, and rushing into the apartment. Such an act constitutes a "breaking" in the law of burglary. *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979).

[13] Second, defendant contends the instructions impermissibly allowed the jury to find defendant guilty of both felony murder and armed robbery. Suffice it to say that the defendant's rights were protected when the trial court properly arrested judgment on the charge of armed robbery after the jury returned a verdict of guilty on the felony murder charge. It was not error for the court to submit both the murder count and the underlying felony count to the jury since it was remotely possible that the jury could have found defendant guilty of the felony of armed rob-

bery but not of the murder. *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972).

Third, defendant assigns error to the mention in the trial judge's recapitulation of the evidence of the pretrial statement of Charlie Harris. As noted above, the statement was read to the jury for the limited purpose of corroborating Harris's narrative on the stand. An examination of the trial judge's charge on this point reveals that the jury was fully and adequately instructed to consider the statement only insofar as it bore upon the credibility of Harris's in-court testimony. This was not error.

The record reveals that the jury began its guilt phase deliberations on Friday afternoon, 20 July. Verdicts were reached shortly before noontime the next day. During its deliberations on Saturday morning, the trial judge on his own motion brought the jury back to the courtroom and instructed them as follows:

> "Members of the jury, I realize what a disagreement means, and I presume you understand and realize what a disagreement means. *It means that there will be another week or more of the time of the Court that will have to be consumed in the trial of these actions again.* I do not want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and to reach a verdict, if it can be done, without any surrender of anyone's conscientious convictions. You have heard the evidence in this case, and all of it; *and a mistrial will mean that another jury will have to be selected to hear the case or these cases, and the evidence again.* I recognize that there are reasons sometimes why jurors cannot agree. The Court wants to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable men, reasonable women, and to reconcile your differences, if such is possible without the surrender of your conscientious convictions, and to reach a verdict. . . ." (Emphasis supplied.)

Upon authority of the Court of Appeals' decision in *State v. Lamb*, 44 N.C. App. 251, 261 S.E. 2d 130 (1980), defendant contends that the emphasized portions of this instruction violate applicable law and require this Court to grant him a new trial.

We note that substantially the same charge as was given here was approved in *State v. Thomas*, 292 N.C. 527, 541, 234 S.E.

2d 615, 623 (1977). Furthermore, the charge as given tracks almost verbatim that approved in the Pattern Jury Instructions, N.C.P.I.—Crim. 101.40. In *State v. Alston*, 294 N.C. 577, 594, 243 S.E. 2d 354, 365 (1978), Justice (now Chief Justice) Branch pointed out that "the general rule appears to be that the trial judge may state to the jury the ills attendant upon disagreement including the resulting expense . . . and that the case will in all probability have to be tried by another jury in the event that the jury fails to agree." Thus, under the standards approved in *Alston*, *Thomas*, and the Pattern Jury Instructions, the charge is clearly acceptable. However, effective 1 July 1978, the Legislature enacted G.S. 15A-1235, which provides:

> "*Length of deliberations; deadlocked jury.*—(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

This statute is now the proper reference for standards applicable to charges which may be given a jury that is apparently unable to agree upon a verdict. *State v. Alston, supra*, 294 N.C. 577, 243 S.E. 2d 354. The statute itself borrows from standards approved by the American Bar Association. *See* American Bar Association Standards Relating to Trial by Jury, Section 5.4 (Approved Draft 1968). The Official Commentary to G.S. 15A-1235 notes that the statute represents a choice of the "weak" charge approved in the ABA Standards, as opposed to the "strong" charge traditionally used in federal courts and the "even stronger charges authorized under North Carolina case law." Indeed, in the course of approving the draft of G.S. 15A-1235 that was submitted to the General Assembly for enactment, the Criminal Code Commission deleted a "provision previously sanctioned under North Carolina case law which would have authorized the judge to inform the jurors that if they do not agree upon a verdict another jury may be called upon to try the case." G.S. 15A-1235, *Official Commentary.*

[14] Thus, as of 1 July 1978, charges propounded to a deadlocked jury must conform to those standards set out in the statute. In its enactment the Legislature approved a deletion from that statute which would have expressly authorized trial judges to do that which was formerly allowed—*i.e.*, instruct the jury that its inability to agree may require the additional expense of retrial. This leads us to conclude that the Legislature intended to provide that a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree. It was thus error for the trial court to mention this fact to the jury.

We do not agree with defendant, however, that this error necessarily requires a new trial. Not every violation of the procedures embodied in Chapter 15A amounts to prejudicial error. Although the Court of Appeals in *State v. Lamb, supra*, 44 N.C. App. 251, 261 S.E. 2d 130, granted a new trial upon finding that the judge's charge in that case exceeded the bounds of G.S. 15A-1235, we see no reason to dispense with the usual require-

ment that an error in the judge's instructions to the jury must be to the prejudice of defendant in order to warrant corrective relief by the appellate division. G.S. 15A-1442(4)(d). Such prejudice will normally be deemed to be present, in cases relating to rights arising other than under the Federal Constitution, *only* "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." G.S. 15A-1443(a). Furthermore, the burden of showing that such a possibility exists rests upon the defendant. *Id.*

Considering as we must the circumstances under which the erroneous instruction was given and its probable impact upon the jury, *see State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977), we do not think defendant in the instant case has met his burden of showing prejudice. The record provides not the slightest indication that the jury was in fact deadlocked in its deliberations, or in any other way open to pressure by the trial judge to "force" a verdict, at the time the charge was given. Furthermore, the charge itself makes clear that the trial court did not intend that any juror surrender his conscientious conviction or judgment and contains no such element of coercion as to warrant a new trial. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975). Thus, although the charge itself was in part impermissible under G.S. 15A-1235, we do not believe its use prejudiced defendant in the case before us.

We caution the trial bench, however, that our holding today is not to be taken as disapproval of the contrary result reached in *State v. Lamb, supra*, a case in which initial jury disagreement preceded the offending instruction. Clear violations of the procedural safeguards contained in G.S. 15A-1235 cannot be lightly tolerated by the appellate division. Indeed, it should be the rule rather than the exception that a disregard of the guidelines established in that statute will require a finding on appeal of prejudicial error.

Defendant's remaining assignments of error deserve no discussion. We have carefully considered each of them and find them totally without merit. In defendant's trial we find

No error.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. HAROLD DANIEL McCRAW

No. 47

(Filed 15 July 1980)

1. **Criminal Law § 66.16— pretrial photographic identification procedure—confrontation in courtroom—totality of circumstances—reliability of in-court identification**

A robbery victim's in-court identification of defendant as the robber was not tainted by out-of-court identification procedures, including the victim's misidentification of another person as the robber from mug books, the victim's statement that he was only 80% sure when he picked defendant's photograph from a photographic lineup, and his viewing of defendant in a courtroom through no arrangement of law officers, since, viewing the totality of circumstances, there was sufficient evidence of the reliability of the victim's in-court identification where the evidence tended to show that the victim had ample opportunity to view the robber in a well lighted store at 8:30 a.m. on a sunny summer morning; the victim attentively viewed the robber both before and during the robbery and had in fact visually measured the robber's height against items in the store; the victim's description included the essential identifying characteristics of height, slender build and some degree of facial hair; the photographs which the victim originally picked out resembled defendant in facial shape, hair style and bone structure; the victim unhesitatingly and with certainty identified defendant once he confronted him in person; and there were only four months between the crime and the confrontation with defendant.

2. **Criminal Law § 99.3— court's questions concerning evidence—no expression of opinion**

The trial court did not improperly express an opinion to defendant's prejudice (1) where the court either misunderstood or incorrectly remembered earlier testimony and on that basis improperly corrected defense counsel while he was cross-examining the robbery victim, since the witness corrected the misapprehension without prompting from defense counsel, and (2) where the court questioned defendant concerning the location of the George Washington bridge in N.Y., since the question did not challenge defendant's credibility, defendant adequately explained his testimony, and the judge's and defendant's understanding of the location of the bridge was not of any importance in the case.

3. **Robbery § 3— evidence concerning another alleged suspect—evidence admissible**

In a prosecution for robbery with a dangerous weapon, defendant was not prejudiced by testimony concerning another alleged suspect in the case since

evidence of the suspect's presence near the scene of the crime was relevant to explain details and events surrounding that occurrence, particularly since an eyewitness testified that the robber resembled the suspect but was not the suspect, and evidence that defendant was subsequently found in the suspect's presence in N.Y. was not prejudicial in light of earlier evidence which established the connection between defendant and the suspect.

4. Criminal Law § 96— evidence withdrawn from jury's consideration—defendant not entitled to mistrial

Defendant was not entitled to a mistrial where a witness made reference to defendant's arrest in N.Y., defendant objected and moved to strike, and the judge instructed the jury to disregard the testimony, since there was nothing in the record to suggest that the jury would have considered the stricken testimony.

DEFENDANT appeals from sentence imposed by *Bailey, James H. Pou, Judge,* at the 20 August 1979 Criminal Session of Superior Court, CUMBERLAND County.

Defendant was charged in an indictment, proper in form, with the crime of robbery with a dangerous weapon, a violation of G.S. 14-87. He entered a plea of not guilty.

Prior to trial, defendant made a motion to suppress the victim's identification of him. After a *voir dire* hearing, at which the State presented two witnesses, the judge made findings of fact and conclusions of law and denied the motion.

At trial, State's evidence tended to show that on Saturday, 15 July 1978, at approximately 8:15 a.m., Donald Steven Plummer, then aged 32, was working in his father's convenience store in Fayetteville. A lone customer came into the store, walked to the back, picked up a carton of milk, then proceeded to the counter and robbed Mr. Plummer of some $430.00 at gunpoint. Mr. Plummer identified the defendant in court as the man who had robbed him and testified as to the pre-trial identification procedures in which he had participated.

The State also presented the corroborating testimony of several Fayetteville police officers.

Defendant presented his own testimony and that of two friends. His testimony tended to show that he was a sergeant in the Army receiving a take home pay of some $600.00 per month. He also testified that at the time of the robbery on 15 July 1978, he was sleeping late at a friend's house after attending an O'Jays

concert in the Cumberland County Arena the night before. The testimony of his two friends corroborated this alibi.

The State rebutted the defendant's alibi with the testimony of the assistant manager of the Cumberland County Arena. The assistant manager testified that on 14 July 1978, the O'Jays had not played at the Cumberland County Arena.

The jury returned a verdict of guilty of robbery with a dangerous weapon. Defendant was sentenced to a term of 16 years to life.

Other pertinent facts will be discussed in the body of this opinion.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Alan S. Hirsh and Special Deputy Attorney General John R. B. Matthis, for State appellee.

John G. Britt, Jr., and Fred J. Williams, Assistant Public Defenders, for defendant appellant.

CARLTON, Justice.

Defendant groups several assignments of error into six arguments. We find no prejudicial error and affirm.

I.

Defendant first asserts that the trial court erred in failing to suppress the victim's in-court identification. Defendant argues this in-court identification was tainted by impermissibly suggestive out-of-court identification procedures. He argues this taint was not removed by any showing that the in-court identification was based on a recollection independent of those improper out-of-court procedures. Defendant cites *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3202, 49 L.Ed. 2d 1205 (1976), in contending that such tainted in-court identification is inadmissible.

The record reveals that the victim in this case, Donald Steven Plummer, made a misidentification prior to his initial out-of-court identification of this defendant. Soon after the robbery, on 17 July 1978, Plummer was shown several mug books. At this time he identified the photo of one man he was "99% sure" was

the robber. Investigation by the Fayetteville police department, however, revealed that the pictured individual had been incarcerated on the date of the robbery and could not have participated in it. Plummer was told his choice was wrong.

Thereafter, in early September, he saw a picture of Norris Taylor in a Fayetteville paper and called police to tell them that Taylor "looked very similar to the man . . . picked out in the mug book."

Subsequently, on 27 October 1978, Plummer was shown another photographic lineup and again picked out a picture, this time of the defendant. However, he stated then that he was only 80% sure of his identification and wanted to see the pictured individual in person before making conclusive identification.

On 28 November 1978, Plummer went to the Cumberland County Courthouse in answer to two subpoenas. Although defendant's name was on one of the subpoenas, Plummer testified on *voir dire* that he thought that both subpoenas concerned an unrelated break-in at the convenience store which did not involve this robbery. While waiting in the courtroom, he heard defendant's name called. He knew the name was on one of the subpoenas, so he looked around the courtroom and eventually saw a man he recognized as the robber in this case. When called by court officials to a conference room, he informed them that he had seen the individual who had robbed him at gunpoint in July. Defendant contests this sequence of events as being impermissibly suggestive.

As a general rule, evidence unconstitutionally obtained is excluded from testimony in both state and federal courts. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961); *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978); *State v. Rogers*, 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. denied*, 396 U.S. 1024, 90 S.Ct. 599, 24 L.Ed. 2d 518 (1970).

What constitutes unconstitutionally suggestive identification evidence, however, has been subjected to changing standards of admissibility. In *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967), the United States Supreme Court held that if, considering the totality of circumstances, a pretrial identification procedure is found to be unnecessarily suggestive and con-

ducive to irreparable mistaken identification, submission of the identification at trial violates due process. The Court held that a two-step process had to be used in applying this standard:

(1) First, a reviewing court had to determine whether the out-of-court procedure was unnecessarily suggestive. If so, testimony regarding the out-of-court procedure was inadmissible.

(2) Second, in-court identification was still permissible, only if the out-of-court suggestiveness was *not* "conducive to irreparable mistaken identity." In this jurisdiction, this often meant that the in-court identification was admissible if the State could show that the in-court identification was of independent origin from the suggestive pre-trial procedures. *See, e.g., State v. Headen, supra; State v. Henderson, supra.*

Applying this analysis, the Supreme Court in *Stovall* held that in-court identification was permissible where a critically injured witness had been shown defendant alone and handcuffed at her hospital bedside. In *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed. 2d 402 (1969), however, the Supreme Court held that an in-court identification procedure was inadmissible where it was preceded by repeated pre-trial confrontations which eventually elicited a positive identification of the defendant. Such pre-trial suggestiveness was "so arranged to make the resulting identification inevitable," 394 U.S. at 443, 89 S.Ct. at 1129, 22 L.Ed. 2d at 407, and the identification testimony was inadmissible.

And in *State v. Headen, supra*, this Court held an in-court identification inadmissible where twenty months after a crime, a Cumberland County deputy sheriff identified the defendant to an eyewitness, indicated the defendant was implicated in the crime and apparently repeatedly assured the eyewitness of the defendant's complicity. Considering this unnecessary suggestiveness along with the fact that the witness had viewed the crime on a dark night, was not at the time particularly concerned with getting a clear visual sighting of the criminal, could not identify a photograph without prompting and could provide only a general description, this Court concluded that the impermissible pre-trial procedure gave rise to a substantial likelihood of irreparable misidentification at trial.

The *per se* approach to identification evidence, however, is no longer the law of the land. In *Neil v. Biggers*, 409 U.S. 188, 93

S.Ct. 375, 34 L.Ed. 2d 401 (1972), the United States Supreme Court first cast doubt on the analysis by holding that testimony about even suggestive pre-trial identification procedures was admissible if, considering the totality of the circumstances, the identification procedure was reliable. It thus moved the focus of the inquiry away from the pre-trial procedures used and toward the totality of the circumstances surrounding the actual crime. If identification was reliable, it was admissible despite the suggestiveness of out-of-court procedures.

The Court set out five indicia of reliability: (1) the opportunity of the witness to view the criminal, (2) the witness's degree of attentiveness, (3) the accuracy of the witness's principal description, (4) the level of certainty at confrontation, and (5) the length of time between the crime and the confrontation. In *Neil v. Biggers*, however, the Supreme Court observed that the challenged procedure had occurred before the facts involved in *Denno v. Stovall, supra.* The implication was that the *Denno v. Stovall per se* rule still controlled cases arising after the Supreme Court handed down that earlier decision.

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977) negated the implication and removed any doubt whether to apply the *per se* standard or the totality of circumstances standard. In *Manson v. Brathwaite*, the Supreme Court conclusively held that due process did not compel exclusion of pre-trial identification evidence obtained by suggestive and unnecessary police identification procedures so long as, under the totality of circumstances, the identification was reliable.

There, the defendant in a drug case claimed that a one-photograph "lineup" was impermissibly suggestive. Explicitly applying the totality of circumstances analysis, the Supreme Court held that the five reliability factors had all been met adequately and the suggestive pre-trial identification procedure was admissible.

Thus, after *Manson v. Brathwaite, supra*, "[i]t is the strong probability of misidentification which violates a defendant's right to due process. Unnecessarily suggestive circumstances alone do not require the exclusion of identification evidence." *State v. Nelson and Jolly*, 298 N.C. 573, 601, 260 S.E. 2d 629, 649 (1979). *See also, State v. Green*, 296 N.C. 183, 250 S.E. 2d 197 (1978).

Like the defendant in *Manson v. Brathwaite*, defendant here cannot successfully protest the in-court identification of him in this case. There is sufficient evidence of the reliability of the victim's in-court identification here to withstand any attempt by defendant to show that any alleged impermissible pre-trial procedure raised the strong likelihood of misidentification.

[1] Viewing the totality of the circumstances here, it is unmistakable that:

(1) The witness Plummer had ample opportunity to view the robber in a well-lighted store at 8:30 a.m. on a sunny summer morning.

(2) The witness had attentively viewed the robber both before and during the robbery and had in fact had the foresight to visually measure the robber's height against items in the store.

(3) The witness's description, while not ideal nor particularly detailed, did include the essential identifying characteristics of height, slender build and some degree of facial hair. Furthermore, the photographs this witness initially picked out resembled the defendant in facial shape, hair style and bone structure. While this is admittedly the least sure of the several factors, considered along with others, it is an indication of the reliability of this witness' identification.

(4) The witness unhesitatingly and with certainty identified the defendant once he confronted the defendant in person. There was nothing impermissibly suggestive in the unarranged pre-trial courtroom procedure. *See State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977).

(5) There were only four months between the crime and the confrontation with the defendant.

Given these factors, we do not believe that the out-of-court procedures used here resulted in an unrealiable in-court identification. *Neil v. Biggers, supra.* Short of that, it is for a jury to determine the credibility of this witness's identification of the defendant. *Manson v. Brathwaite, supra.* We find nothing prejudicial in the identification procedures used and this assignment of error is overruled.

II.

Defendant next contends that the trial judge twice unfairly interjected his opinion into the defendant's trial by interposing and sustaining an objection and by questioning the defendant about an irrelevant matter. Both of these actions, he contends, were in violation of G.S. 15A-1222.

G.S. 15A-1222 provides, "The judge may not express during any stage of the trial any opinion in the presence of the jury on any question of fact to be decided by the jury."

[2] Defendant argues that the judge made such an impermissible opinion statement during the following exchange which occurred while defense counsel cross-examined the victim Plummer about his previous misidentification of the robber:

> Q. And I believe that you have testified that at the time that you picked that photograph out on July 17, 1978 you were 99% sure that . . .
>
> COURT: Objection is sustained, he did not say 99%, if you are going to quote him, quote him correctly.
>
> MR. WILLIAMS: Thank you, Your Honor.
>
> Q. Do you recall what statement you made to police officers as to your certainty concerning the individual you had picked out?
>
> A. Right. Well, I believe at the time I did say something like 99%, but I was reasonably certain that it was him.

We fail to see how the quoted proceeding constituted an opinion by the court in violation of G.S. 15A-1222. It does appear from the record that the trial court misunderstood or misremembered previous testimony. The witness had testified that he was 99% sure of the particular photograph. However, this misapprehension was corrected by the witness without prompting from defense counsel. We do not believe the trial judge's mistake here amounted to prejudicial error.

Defendant secondly argues that the trial court's questioning of him as to the location of the George Washington Bridge in New York City amounted to an opinion casting doubt on his credibility. While it is true that a judge is not allowed to question a witness's

credibility, *State v. Kirby*, 273 N.C. 306, 160 S.E. 2d 24 (1968), it is also true that it is proper and occasionally necessary for a trial court to examine a witness. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied*, 393 U.S. 1087, 89 S.Ct. 876, 21 L.Ed. 2d 780 (1969). Here the defendant testified during cross-examination that while on a trip to Philadelphia, he fell asleep in a car driven by a man named Charles Butler and was awakened 25 or 30 miles outside of New York City on the George Washington Bridge. The judge broke in to ask, "Doesn't the George Washington Bridge go right out on Riverside Avenue in New York, in New York City?" The defendant answered, "No. That's as far as I know. My understanding is in the outside of New York in New Jersey, so I figured it's twenty-five miles, thirty miles away from New York." Again, in this colloquy, we see nothing prejudicial. Apparently the judge and defendant did not have a common understanding of the location of the George Washington Bridge. The defendant adequately explained his answer. Furthermore, the understanding of the location of the bridge was not of any importance in this case. Thus, we find no prejudicial error in this assignment of error.

III.

[3] Defendant thirdly argues that in admitting testimony about another alleged suspect in this case, the trial court committed prejudicial error.

The record reveals that immediately after the robbery, the victim Plummer observed a man he knew as Charles Butler lurking in the area. Butler was accosted and questioned on the street by police at the time but was never arrested. The defendant was subsequently stopped by police in the company of this same Charles Butler while crossing the George Washington Bridge in New York. Defendant contends that the evidence linking Butler to the scene of the crime and to friendship with defendant was irrelevant and prejudicial.

The standard of admissibility of evidence based on relevancy and materiality is so elastic and the variety of possible fact situations so numerous that an exact rule of admissibility is impossible to precisely formulate. 1 *Stansbury's North Carolina Evidence* § 78 (Brandis rev. ed. 1973) citing *Bell v. Walker & Herrington*, 48 N.C. 320 (1856). *See also State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979). Generally, however, no fact or circumstance in any

way connected with the matter in issue or from which any inference of the disputed fact can reasonably be drawn ought to be excluded from the jury. *Abbitt v. Bartlett*, 252 N.C. 40, 112 S.E. 2d 751 (1960). Evidence of Charles Butler's presence near the scene of the crime is thus relevant to explain details and events surrounding that occurrence particularly since the eyewitness Plummer testified the robber resembled Butler but was not Butler. *Cf. State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976) (in criminal cases, "[e]very circumstance that is calculated to throw any light upon the supposed crime is admissible;" the weight of such evidence is for the jury). *Accord, State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Sneeden*, 274 N.C. 498, 164 S.E. 2d 190 (1968).

Evidence of defendant's presence with Butler later in New York City, however, is not so "connected with the matter in issue," as to be necessarily relevant. Ordinarily the admission of irrelevant evidence is considered harmless error. *State v. Shaw*, 284 N.C. 366, 200 S.E. 2d 585 (1973); *Deming v. Gainey*, 95 N.C. 528 (1886); 1 *Stansbury's North Carolina Evidence* §§ 77, 80 (Brandis rev. ed. 1973). Here defendant argues that because of the weakness of the State's case against him, this evidence must have substantially contributed to defendant's conviction. Defendant apparently forgets, however, that earlier in his testimony, he had admitted knowing Charles Butler as the brother-in-law of defendant's girl friend. Thus the connection between Butler and defendant was already established before this testimony was admitted. Defendant also apparently forgets that the State's case in main depended upon the identification of the eyewitness Plummer. In view of these facts, we do not find there is a reasonable possibility that the evidence complained of might have contributed to defendant's conviction. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). Accordingly, we overrule this assignment of error.

IV.

[4] Defendant fourthly asserts that the trial court erred in denying defendant's motion for a mistrial. During direct examination of the State's witness Nash, a police officer, the officer made reference to defendant's arrest on the George Washington Bridge. Defendant argues that evidence that he had been arrested placed his good character in issue and forced him to take the stand in his

own behalf, rendering it impossible for him to receive a fair trial. Defense counsel objected and moved to strike, which objection was properly sustained. The judge instructed the jury to disregard the testimony. Thereupon defense counsel moved for a mistrial.

Ruling on a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court. *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966). However, this discretionary power is not unlimited; a motion for mistrial must be granted if there occurs an incident of such a nature that it would render a fair and impartial trial impossible under the law. *State v. Crocker*, 239 N.C. 446, 80 S.E. 2d 243 (1954). We see the occurrence of no such incident here.

When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony. Lacking other proof—of which there is none here—a jury is presumed to be rational. There is nothing in this record which leads us to believe the jury would have considered the stricken testimony and defendant's motion for mistrial was properly denied.

V.

Defendant next contends that the trial court erred in denying his request that a State's rebuttal witness be required to produce further evidence. This ignores well-settled law. It is clearly within the discretion of a trial judge to reopen a case to admit additional evidence. *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971), *cert. denied*, 406 U.S. 928, 92 S.Ct. 1805, 32 L.Ed. 2d 130 (1972). There is nothing in this case to indicate an abuse of that discretion. Apparently the only thing this further evidence would have shown was that the O'Jays concert—defendant's rebutted alibi—had taken place in Cumberland County some two weeks after the armed robbery. We do not believe this information would have been helpful in reestablishing defendant's alibi.

We have carefully considered all further errors assigned by defendant and have reviewed the entire record before us. We are convinced that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. NORMAN EUGENE SATTERFIELD

No. 113

(Filed 15 July 1980)

1. **Criminal Law § 55; Searches and Seizures §§ 4, 43— analysis of blood and saliva samples—failure to advise defendant of right to counsel—insufficient and untimely motion to suppress—no substantial violation of statutes**

The trial court did not err in the denial of defendant's general objection to testimony of the results of an expert's analysis of blood and saliva samples taken from defendant pursuant to a nontestimonial identification order because the record fails to show that defendant was advised of his right to counsel before being subjected to the tests as required by G.S. 15A-279(d) since (1) defendant's objection, treated as a motion to suppress, failed to allege a legal or factual basis for his contention that the blood and saliva samples were illegally taken as required by G.S. 15A-977(a), (c) and (e); (2) the motion to suppress should have been made before trial and was not timely made at trial; and (3) the nontestimonial identification order delivered to defendant three days prior to the withdrawal of the fluid samples advised defendant fully as to his right to counsel, and any failure to remind defendant of his right to counsel prior to the taking of the fluid samples would not likely constitute a "substantial" violation of G.S. 15A-279(d) requiring suppression of the evidence obtained.

2. **Criminal Law § 86.4— cross-examination of defendant about prior criminal charge—evidence first elicited by defense counsel**

While ordinarily it would have been improper for the district attorney to ask defendant on cross-examination whether he had been previously *charged* with assault with intent to rape, the trial court did not err in directing defendant to answer a question relating to the prior criminal charge where defendant's counsel, in his cross-examination of a police officer, was the first to elicit evidence that defendant had been previously charged with assault with intent to commit rape.

3. **Criminal Law § 88.2— meaningful cross-examination not prevented by court**

The trial court did not prevent meaningful cross-examination of the State's witnesses in sustaining objection to six questions asked by defense counsel on cross-examination where two of the questions contained erroneous statements of fact and were difficult to understand; three questions inquired into matters of tenuous relevance; and one question was unduly argumentative and repetitious.

4. **Criminal Law § 51— exclusion of expert testimony by barber—failure to qualify as expert**

The trial court properly excluded a question propounded by defendant calling for the expert opinion of a barber as to whether defendant's facial hair growth was fast or slow where the barber was never tendered or qualified as an expert in the field of facial hair growth.

5. **Criminal Law § 66.14— in-court identification—no taint from voice, photographic and lineup identifications**

A rape victim's in-court identification of defendant as her assailant was of independent origin and not tainted by pretrial voice, photographic and lineup identifications where the victim testified that her in-court identification of defendant was based on seeing him in her apartment on the night of the assault, that a strong light from her bedroom shone into the kitchen where she was assaulted, and that she observed defendant the five to ten minutes he spent with her in the kitchen; the officers who conducted the various identification procedures never suggested to the victim whom she should pick, nor did the officers ever suggest that the person whose voice she had identified would be in the photographic showing or physical lineup; and none of the identification procedures was impermissibly suggestive and conducive to irreparably mistaken identification.

6. **Criminal Law § 66.6— lineup identification—viewing of one participant in isolation—no suggestiveness**

A lineup was not impermissibly suggestive and conducive to irreparably mistaken identification so as to render inadmissible a rape victim's lineup identification of defendant because the victim, after identifying defendant, told officers that one of the black males in the lineup, defendant's brother, appeared to be very nervous, and officers had the victim confront this person in isolation, where the victim testified that viewing this male in isolation did not change her initial identification of defendant from the physical lineup. Furthermore, defendant had no standing to complain of a possible violation of his brother's constitutional rights.

7. **Criminal Law § 67— voice identification—failure to hold voir dire**

The trial court did not err in admitting a rape victim's identification of defendant's voice from a number of tape recorded voices without a voir dire examination where defendant acquiesced in the trial court's decision not to hold a voir dire on the voice identification and failed to object to testimony concerning the victim's identification of defendant's voice, and where the record shows that the voice identification procedure was not conducted in an impermissibly suggestive manner.

Justice BROCK did not participate in the consideration and decision of this case.

APPEAL by defendant from judgments of *Walker (Hal Hammer), J.*, 15 October 1979 Criminal Session, IREDELL Superior Court.

Defendant was tried upon indictments charging him with second degree rape and first degree burglary.

The State offered evidence tending to show, in pertinent part, that on 14 March 1979, Frances Jane Fletcher finished work at 10:45 p.m., picked up her children, and returned to her apart-

ment at 11:10 p.m. Mrs. Fletcher was married and lived in the apartment with her husband and children. She put one of her children in bed upstairs and sat down to watch television while waiting for her husband to return from work. A younger child stayed downstairs with her.

After speaking with a neighbor, Mrs. Fletcher noticed the kitchen door was ajar. The door lock was broken and the door would not stay closed. Mrs. Fletcher put a chair against the door in order to secure it. She then turned the kitchen lights off and returned to the living room to watch television. About fifteen minutes later she heard a "scooting" sound. Thinking her six-year-old sleeping upstairs had kicked a laundry bag off the foot of his bed, she went to check and saw the laundry bag was still on the bed. She then went to the kitchen to fix coffee and saw the kitchen door standing open and a black man standing in the doorway, a step or two inside the kitchen. The man pointed what appeared to be a weapon at Mrs. Fletcher, told her to be quiet and to do what he wanted if she wanted to live. He grabbed her by the throat, backed her into the wall, pressed the weapon into her side and then proceeded to rape her. After he finished he wiped the wall with a shirt to remove his fingerprints. The intruder then asked Mrs. Fletcher for money. She replied she had none and he left, saying he would be back the next night.

During this time the light in the kitchen was turned off, but Mrs. Fletcher testified there was sufficient light from a downstairs bedroom for her to see the assailant's face. Moreover, she had been pushed against the light switch on the wall and during the assault the kitchen light kept coming on for short periods of time. Mrs. Fletcher identified defendant as her assailant.

Evidence was also offered tending to show that semen stains on the victim's clothing came from someone with defendant's blood type.

Defendant testified that on the night in question he shot pool with his uncle until 10:30; that he stayed at his girl friend's house from 11 p.m. to 12 midnight; that from 12 midnight to 12:30 a.m. he spoke to a friend in front of his house; that he came home at 12:30 a.m. and stayed there the rest of the night. Defendant's testimony was corroborated by several witnesses.

The jury found defendant guilty as charged, and he was sentenced to life imprisonment for the second degree rape and twenty to thirty years for the first degree burglary, to run consecutively. Defendant appeals as of right to this Court.

Rufus L. Edmisten, Attorney General, by Barry S. McNeill, Associate Attorney, for the State.

Albert F. Walser, attorney for defendant appellant.

HUSKINS, Justice.

Defendant was served with a nontestimonial identification order on 30 March 1979 directing him to submit to procedures for collection of saliva, blood and pubic hair samples at the Iredell Memorial Hospital Emergency Room. The procedures were conducted on 2 April 1978, and the samples were personally delivered by an officer of the Statesville Police Department to David Hedgecock, a forensic serologist employed by the SBI, for analysis and comparison.

[1] At trial, defendant sought to suppress the results of Mr. Hedgecock's analysis by interposing a general objection to Hedgecock's testimony. This objection was overruled and Mr. Hedgecock was permitted to testify. Defendant contends the trial court erred in admitting this testimony without a showing of compliance with G.S. 15A-279(d), which requires that defendant be advised of his right to counsel before being subjected to any tests pursuant to a nontestimonial identification order issued under G.S. 15A-271, *et seq.* This contention is without merit. The record indicates that defendant failed to challenge the admissibility of the blood and saliva tests by a proper motion to suppress as required by G.S. 15A-971, *et seq.* Such failure constitutes a waiver of the objection that the blood and saliva samples were obtained in violation of a provision of Chapter 15A or the United States or North Carolina Constitutions. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Drakeford*, 37 N.C. App. 340, 246 S.E. 2d 55 (1978).

A defendant who seeks to suppress evidence upon a ground specified in G.S. 15A-974 must comply with the procedural requirements outlined in G.S. 15A-971, *et seq. See* G.S. 15A-972 and 979(d). Moreover, such defendant has the burden of establishing

that his motion to suppress is timely and proper in form. *Accord, State v. Drakeford*, supra. Specifically, a motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion. *Compare* G.S. 15A-977(e) *with* G.S. 15A-977(a). If the motion fails to allege a legal or factual basis for suppressing the evidence, it may be summarily dismissed by the trial judge. *Compare* G.S. 15A-977(e) *with* G.S. 15A-977(c).

In the instant case, defendant merely lodged a general objection to Mr. Hedgecock's testimony as to the results of tests conducted on defendant's blood and saliva samples. The objection did not say what specific statutory or constitutional provision had been violated by the State in obtaining the blood and saliva samples from defendant. Nor were any facts presented in support of defendant's general assertion that the State had failed to inform him of his rights prior to taking his blood and saliva samples. In sum, defendant's general objection fails to allege a legal or factual basis for his contention that the blood and saliva samples were illegally taken. It follows therefore that the trial judge had statutory authority to summarily deny defendant's objection. G.S. 15A-977(c).

In addition to being proper in form, the motion to suppress must be timely made. As a general rule, motions to suppress *must be made before trial.* G.S. 15A-975(a) and Official Commentary. A defendant may move to suppress evidence at trial only if he demonstrates that he did not have a reasonable opportunity to make the motion before trial; or that the State did not give him sufficient advance notice (twenty working days) of its intention to use certain types of evidence; or that additional facts have been discovered after a pretrial determination and denial of the motion which could not have been discovered with reasonable diligence before determination of the motion. G.S. 15A-975. In the instant case, defendant failed to bring himself within any of the exceptions to the general rule. Thus, defendant's objection at trial to the admissibility of the blood and saliva tests is without merit because the objection, treated as a motion to suppress, was not timely made.

Finally, we note that defendant's primary contention on this assignment is not that the State actually failed to advise him of

his right to counsel prior to withdrawing his blood and saliva but, rather, that the record fails to indicate whether defendant was advised of his rights immediately prior to having the fluid samples removed. However, the failure of the record in this respect is entirely attributable to defendant, who, as previously noted, bears the burden of presenting facts in support of his motion to suppress. In any event, the nontestimonial identification order personally delivered to defendant three days prior to the withdrawal of the fluid samples advised defendant fully as to his right to counsel. Given such advance notice, any failure to remind defendant of his right to counsel prior to the taking of the fluid samples would not likely constitute a "substantial" violation of G.S. 15A-279(d) requiring suppression of the evidence obtained. *See* G.S. 15A-974.

For the reasons stated, we hold that defendant's objection to Mr. Hedgecock's testimony was properly overruled. Defendant's first assignment has no merit.

[2] Defendant contends the trial court erred in allowing the district attorney to ask defendant on cross-examination whether he had been previously *charged* with assault with intent to commit rape. His second assignment rests on this contention.

Ordinarily, the challenged question would be improper. "A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime [citations omitted], but he may be asked if he in fact committed the crime." *State v. Poole*, 289 N.C. 47, 220 S.E. 2d 320 (1975). However, in the instant case, defendant's counsel, in his cross-examination of a police officer, was the first to elicit evidence that defendant had been previously charged with assault with intent to commit rape. Moreover, prior to being asked the question to which objection was made, defendant had testified on cross-examination, without objection, that he had once been accused of assault with intent to commit rape. The well established rule is that the benefit of an objection is lost when evidence of like import is admitted without objection. *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971). This rule is especially applicable here where defendant, the objecting party, was responsible for introducing the subject of prior criminal *charges* in the first place. *See State v. Williams*, 255 N.C. 82, 120 S.E. 2d 442 (1961); 1

Stansbury, N.C. Evidence § 30 n. 59 at 81 (Brandis rev. 1973). Accordingly, the trial court did not err in instructing defendant to answer the question relating to a prior criminal charge made against him. Defendant's second assignment of error is overruled.

[3] Defendant contends the trial court prevented meaningful cross-examination of the State's witnesses on matters relevant to the defense. He asserts six instances in which the trial court improperly sustained objections to questions asked by defendant in his cross-examination of the State's witnesses. We have carefully examined these exceptions and find no prejudicial error. Two of the questions to which objection was sustained (Exceptions 5 and 11) contained erroneous statements of fact and were difficult to understand; three questions (Exceptions 3, 4 and 9), as phrased, inquired into matters of tenuous relevance; one question (Exception 10) was unduly argumentative and repetitious. Defendant made no attempt to rephrase these questions and make proper inquiry. We cannot say from an examination of this record that the trial judge abused his discretion or deprived defendant of a fair trial by the rulings here challenged. The wide latitude accorded the cross-examiner "does not mean that all decisions with respect to cross-examination may be made by the cross-examiner." 1 Stansbury, supra, § 35 at 108. Rather, the scope and duration of cross-examination rest largely in the discretion of the trial judge. *State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978). "The judge has discretion to ban unduly repetitious and argumentative questioning, as well as inquiry into matters of only tenuous relevance." 1 Stansbury, supra, § 35 at 108. *Accord, State v. Abernathy, supra; State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). Defendant's third assignment of error is overruled.

[4] Defendant contends the trial court erred in refusing to allow him to qualify a barber as an expert witness on the subject of facial hair and facial hair growth. For reasons which follow, we hold this contention has no merit.

When objection is made to a question calling for the expert opinion of a witness not previously tendered and qualified as an expert, "the party offering the expert should request a finding of his qualification; and if there is no such request, and no finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed on appeal." 1 Stansbury, *supra*,

§ 133 at 432. *Accord, Dickens v. Everhart*, 284 N.C. 95, 199 S.E. 2d 440 (1973); *Lumber Co. v. R.R.*, 151 N.C. 217, 65 S.E. 920 (1909). In the instant case, objection was made to a question propounded by defendant calling for the expert opinion of a barber who had not been tendered and qualified as an expert. Notwithstanding the State's objection, defendant did not tender the barber as an expert and failed to request that the witness be qualified as an expert in the field of facial hair growth. Accordingly, the trial court sustained objection to the barber's opinion as to whether defendant's facial hair growth was fast or slow. Since the barber was never qualified as an expert, the objection to his testimony was properly sustained.

In any event, the record is silent as to what the barber's opinion would have been had he been permitted to testify. Thus, it is impossible on appellate review to determine whether exclusion of this testimony was prejudicial error. "A showing of the essential content or substance of the witness's testimony is required before this Court can determine whether the error in excluding evidence is prejudicial." *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978). Otherwise stated, "[w]hen evidence is excluded, the record must sufficiently show what the purport of the evidence would have been, or the propriety of the exclusion will not be reviewed on appeal." 1 Stansbury, *supra*, § 26 at 62. Defendant's fourth assignment of error is overruled.

[5] Defendant contends the trial court erred in failing to suppress the in-court identification of defendant by the victim.

Upon defendant's objection, the court conducted a voir dire in the absence of the jury at which the testimony of the victim and two police officers was taken. This testimony tends to show, in pertinent part, that on 20 March 1979, six days after commission of the offense, Officer Shawver visited the victim at her home, played a recording of six black male voices, and the victim picked out defendant's voice. The officer then spread out ten large color photographs of black males, and the victim picked out photographs of defendant and his brother. The officer took up these photographs without comment and spread out a second set of smaller photographs. The victim picked out a photograph of defendant. The photograph of defendant in the first photographic display was different from the one shown in the second display.

On 27 March 1979, the victim viewed a physical lineup of six black males of similar height and weight. The men wore identical green coveralls. The victim identified defendant as the man who had raped her. Defendant's brother was also in the physical lineup; however, the victim eliminated him from consideration.

The officers who conducted the various identification procedures never suggested to the victim who she should pick. Nor did the officers ever suggest that the person whose voice she had identified would be in the photographic showing or physical lineup. The victim testified that her in-court identification of defendant was based on seeing him in her apartment on the night of the assault; that a strong light from her bedroom shone into the kitchen where she was assaulted; that she observed defendant the five to ten minutes he spent with her in the kitchen.

Following the hearing the court made findings of fact and concluded, in pertinent part, "that there were no improper or illegal identification procedures or lineups involving this defendant; that the in-court identification made this day of defendant as the perpetrator is of independent origin, based solely on the prosecuting witness seeing the defendant at the time of the crime and does not result from any out-of-court confrontation or identification nor from any photograph or from any pretrial identification procedures which were suggestive or conducive in nature to a mistaken identification. . . ." Accordingly, the court held that the in-court identification of the victim "was made in accordance with the law, and [that] the legal and constitutional rights of defendant have been properly protected and afforded him."

Careful review of the record indicates that the findings of fact made by the trial court are supported by competent evidence and thus are conclusive on this Court. *State v. Gibbs*, 297 N.C. 410, 255 S.E. 2d 168 (1979). The findings of fact fully support the conclusion of law that none of defendant's constitutional rights were violated in the identification procedures and that the evidence was admissible.

[6] At the physical lineup on 27 March 1979, the victim noticed that one of the black males in the lineup, defendant's brother, appeared to be nervous and would not look her in the face. After identifying defendant as the perpetrator of the crime, the victim noted to police officers that one of the men in the lineup seemed

extremely nervous. The officers then asked the victim to confront this individual as he stood alone in the lineup. The victim complied with this request. The victim was not asked to make an identification on the basis of this confrontation. The victim testified that looking at this man in isolation did not change her prior identification of defendant as the perpetrator. Defendant argues that the confrontation was impermissibly suggestive and conducive to an irreparably mistaken identification. This contention is without merit. The confrontation took place after the victim had positively identified defendant from a lineup of six black males. Moreover, the victim testified that viewing this male in isolation did not change her initial identification of defendant from the physical lineup. In any event, defendant has no standing to complain of a possible violation of his brother's constitutional rights.

[7] Defendant argues that the court erred in admitting, without a voir dire examination, testimony concerning the victim's identification of defendant's voice from a number of tape recorded voices played to her by police officers. Defendant, however, acquiesced in the trial court's decision not to hold a voir dire on the voice identification and failed to lodge objection to testimony concerning the victim's identification of defendant's recorded voice. In any event, review of the record indicates that the voice identification procedure was not conducted in an impermissibly suggestive manner. Under these circumstances, a voir dire examination was not necessary, especially since defendant filed no objection and did not request a further voir dire with respect to the state's references to the voice identification. *See State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975).

We note finally that any discrepancies or inconsistencies in Mrs. Fletcher's identification of defendant went to the weight rather than the competency of her testimony and is thus a matter for the jury. *State v. Gibbs*, supra; *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). Defendant's fifth assignment is overruled.

After careful review, we find no prejudicial error in the trial. The verdicts and judgments must therefore be upheld.

No error.

Justice BROCK did not participate in the consideration and decision of this case.

STEEL CREEK DEVELOPMENT CORPORATION, PLAINTIFF, AND R. S. SMITH AND WIFE, EVELYN L. SMITH, ADDITIONAL PARTY PLAINTIFFS v. EARL TERRY JAMES AND WIFE, MARTHA S. JAMES, D/B/A TERRY'S MARINA, DEFENDANTS

No. 130

(Filed 15 July 1980)

1. **Appeal and Error § 6.2— interlocutory order for removal of boathouse anchors—substantial right affected—order appealable**

In an action for trespass where plaintiff sought a mandatory injunction requiring defendants to remove floats and boat slips constructed by defendants and allegedly anchored to plaintiffs' submerged lands, defendants had the right to appeal from the trial court's order which granted summary judgment for plaintiffs except on the issue of damages, ordered that the matter be placed on trial before a jury on the sole issue of damages, and ordered that defendants immediately remove concrete anchors which they had placed on the submerged lands of plaintiffs, since the order to remove was not delayed pending trial on the issue of damages; defendants would immediately suffer the consequences of complying with the order that they remove the anchors; and a substantial right of defendants was thereby affected, giving them the right to appeal from the interlocutory order.

2. **Trespass § 7; Estoppel § 4.7— boathouse anchored on plaintiffs' land—sufficiency of evidence of trespass—notice to defendants—insufficiency of evidence of equitable estoppel**

In an action for trespass where plaintiffs claimed that defendants constructed concrete anchors for their boathouses on plaintiffs' submerged land, and where defendants claimed equitable estoppel, the trial court properly entered summary judgment for plaintiffs since defendants admitted in their answers to interrogatories that the two encroachments of which plaintiffs complained did extend beyond the boundaries of the property owned by defendants and the trespass was thus established beyond genuine dispute; and since defendants' deposition indicated that they were aware of plaintiffs' objections as soon as some of the boat slips were placed in the water, but they went ahead and completed the first boathouse and built the second one after plaintiffs had brought suit, thus showing that defendants did not rely to their detriment on plaintiffs' actions or inaction and so could not rely on the defense of equitable estoppel.

3. **Rules of Civil Procedure § 26— taking of deposition prohibited—no prejudice**

The trial court did not err in refusing to allow defendants to take the deposition of one of the plaintiffs since the parties had had approximately

seven years to conduct discovery in this case, and the time for discovery was not unjustifiably, unfairly or inequitably cut short to the prejudice of defendants.

ON defendants' petition for discretionary review pursuant to G.S. 7A-31 from an order entered in the Court of Appeals allowing plaintiffs' motion to dismiss the appeal as an improper interlocutory appeal.

Plaintiff Steel Creek Development Corporation (corporation) brought this action seeking to obtain a mandatory injunction requiring defendants to remove the floats and boat slips constructed and launched by defendants in 1971. Plaintiff alleges that the floats and boat slips trespass on its property. The complaint was filed on 21 April 1972 and on 17 December 1973 it was amended to include the additional floats and boat slips constructed and launched by the defendants after institution of the suit and to include a claim for damages resulting from the trespasses.

From the pleadings, interrogatories, and affidavits contained in the record and the briefs submitted the following fact situation emerges. Duke Power Company as successor to the Wateree Power Company has easements to back, pond or raise the waters of the Catawba River in connection with a dam located on the river. An area that was flooded is now known as Lake Wylie. Plaintiff R. S. Smith purchased certain of the dry and submerged land in the area in 1930. On 20 July 1960 Smith and his wife, Evelyn L. Smith, formed the corporation and the land Smith had purchased was transferred to the corporation on 31 August 1960.

In March of 1961 defendants leased 6.74 acres of dry and submerged land from the corporation (with an option to purchase) leaving the corporation with approximately 42 acres of submerged land and 12 acres of dry land. The pilings from the old Pine Harbor Club which burned in 1956 are located in the leased area and extend into the submerged area owned by the corporation which was not leased to the defendants. Defendants constructed a marina on these pilings which they continue to operate. Defendants exercised their option to purchase the land in 1963. By this time they had constructed the following structures which they admit extend beyond the boundaries described in the survey which was made of the land they leased and then purchased: (a) a

deck and floating pier erected in front of their restaurant in 1961; (b) a floating pier with gas pumps built in 1961; (c) a floating boathouse built in 1961 with eight covered slips for the storage of boats; (d) a floating boathouse with eleven covered slips built in 1962; and (e) a floating boathouse with ten covered slips built in 1963. After purchasing the land they built the following structures which they also admit extend beyond the boundaries described in the survey made of the land they leased and then purchased: (a) a stationary pier built in 1964; (b) a floating boathouse with sixteen covered slips built in 1968; (c) a floating boathouse with twenty-four covered slips built in 1971; and (d) a floating boathouse with twenty-four covered slips built in 1972. Plaintiffs' action is concerned solely with the boathouse built in 1971 and the one built in 1972 after suit had been brought.

Defendants defended on the grounds that their boat slips and floats do not touch in any manner on the submerged land allegedly owned by the plaintiff and that plaintiff cannot maintain an action in trespass because it is not in actual or constructive possession of the property it purports to own; that the floats and boat slips are located upon the waters of Lake Wylie which the defendants allege are public waters and they have a right to use the public waters fronting the dry land that they own; and that plaintiff should be equitably estopped from complaining of any trespass because plaintiff knew of defendants' intentions to build the boathouse in 1971 and nothing was said until after it was placed in the water. Later, defendants amended their answer to include the defense of laches because plaintiff knew in 1961 that defendants intended to build improvements upon the land and operate a business and plaintiff brought no suit until 1972.

While the suit was pending in the trial court, the corporation was dissolved and the land owned by it was conveyed to Smith and his wife. On 13 August 1976 the complaint was amended to include Smith and his wife as additional parties plaintiff. These two parties adopted the pleadings of the corporate plaintiff and reiterated the prayer for injunctive relief contained in the original complaint and the claim for damages contained in the first amendment to the complaint.

Defendants answered the amended complaint and raised the same defenses contained in their original answer except for the

defense of laches. Defendants also counterclaimed for damages in the amount of $500,000.

Plaintiff moved to strike these further defenses and counterclaim on the ground that defendants were only entitled to "answer any new matters arising from the . . . [addition of] two parties plaintiff." Judge Graham so ordered on 14 January 1977 but this order was reversed by the Court of Appeals in an opinion by Judge Webb with Judge Hedrick concurring and Judge Britt noting his dissent. The decision is reported at 35 N.C. App. 272, 241 S.E. 2d 122 (1978). No appeal was taken to this Court.

Defendant Earl Terry James' deposition was taken on 2 January 1975. In it he stated that the boathouses built in 1971 and 1972 are anchored in the lake by means of pyramid shaped concrete anchors attached to the boathouses with cables. Each anchor is four feet square on the bottom side and there are six anchors for each of the two boathouses. Defendant admitted that:

> "I would say that there are at least four of these concrete anchors which hold down the ends of the boat house over Lake Wylie rest on the land that is beyond the boundary of the land that is described in the Deed. There are at least eight anchors holding these two buildings in place out into Lake Wylie resting on land under Lake Wylie beyond the front boundary of land described in the Deed. In addition there are four other structures that extend beyond the boundary (indicating on the Exhibit) out into Lake Wylie. I am referring to the storehouse and four other boat houses that extend beyond my boundary line out into Lake Wylie. They are located adjacent beyond the yellow line that encompasses the land bought from Steel Creek Development Corporation."

In 1979 both sides moved for summary judgment and plaintiffs moved to dismiss defendants' counterclaim. On 30 May 1979 Judge Snepp entered judgment in the case denying defendants' motion for summary judgment; granting plaintiffs' motion for summary judgment except with respect to the issue of damages resulting from the trespass; ordering that the matter "be placed on for trial before a jury as to the sole issue of damages;" ordering that defendants' counterclaim for damages be dismissed; and ordering that:

"defendants remove forthwith the concrete anchors which they have placed on the submerged land of the plaintiffs, and that they be permanently enjoined from using the land of the plaintiffs in such manner."

Defendants appealed to the Court of Appeals. The order dismissing the appeal was entered on 29 January 1980 and we allowed defendants' petition for discretionary review on 1 April 1980.

Other facts relevant to the decision of this case will be related in the opinion.

Richard A. Cohan for the defendant-appellants.

Fairley, Hamrick, Monteith & Cobb by Laurence A. Cobb and F. Lane Williamson for the plaintiff-appellees and additional party appellees.

COPELAND, Justice.

Plaintiffs have moved this Court to dismiss the appeal due to defendants' failure to comply with Rule 28(b)(3) of the Rules of Appellate Procedure. Defense counsel has failed to comply with an elementary rule of appellate procedure requiring that he reference the exceptions and assignment(s) of error immediately following each question presented in the brief.

Failure to follow the rules jeopardizes a client's case and we caution members of the bar to scrupulously follow the rules because appeals are subject to dismissal for such failures. However, this case will be decided on its merits and the motion is overruled.

[1] Plaintiffs moved to dismiss the appeal in the Court of Appeals on the ground that it was an improper interlocutory appeal citing *Whalehead Properties v. Coastland Corp.*, 42 N.C. App. 198, 256 S.E. 2d 284 (1979). The Court of Appeals agreed and the appeal was dismissed. We reversed that court's decision in *Whalehead* and the case is reported at 299 N.C. 270, 261 S.E. 2d 899 (1980).

An interlocutory appeal may be taken when a substantial right of the appealing party has been affected. G.S. 1-277(a). In *Whalehead* we held that such a right had been affected because

although summary judgment was granted for the defendant on its counterclaim thus establishing plaintiffs' liability for breach of contract, it was also ordered that defendant was not entitled to specific performance and the case was set for trial on the issue of damages. Denial of defendant's appeal would have eliminated its opportunity to obtain specific performance. Therefore, a substantial right was affected and pursuant to G.S. 1-277(a) and G.S. 7A-27(b) defendant had the right to appeal.

In *Tridyn Industries, Inc. v. American Mutual Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979), we held that defendant had no right to take an interlocutory appeal from an order granting plaintiff partial summary judgment on the issue of defendants' liability and setting the case for trial on the issue of damages. No substantial right of the defendant had been affected because he could wait until after trial on the issue of damages to appeal the question of liability (and any questions arising upon the trial on the issues of damages). The most that he would suffer in waiting to take an appeal only after final judgment had been entered at the conclusion of the trial would be the trial itself on the issue of damages.

Here, a mandatory injunction has been entered ordering defendants to remove the concrete anchors placed on plaintiffs' submerged lands. Unlike the situation in *Tridyn*, the defendants here will suffer more than a trial on the issue of damages. They will immediately suffer the consequences of complying with the order that they remove the anchors from plaintiff's land. This order was not delayed pending the trial on the issue of damages; therefore, a substantial right of the defendants has been affected and they have the right to appeal. However, rather than remand the case to the Court of Appeals for consideration of the merits, we treat the papers filed in this appeal as a motion to bypass the Court of Appeals and allow the motion. Thus, we now turn to the merits of the appeal.

[2] Defendants contend that it was error to grant summary judgment in plaintiffs' favor on the question of defendants' liability for trespass.

A party is entitled to summary judgment "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." Rule 56(c), N.C.R. Civ. Pro.

The party moving for summary judgment has the burden of proof on the motion. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972). In order for the plaintiffs to obtain summary judgment they must establish that defendants have trespassed on their land and that there is no genuine issue of material fact with respect to one or more of the essential elements of defendants' defense of equitable estoppel. We will deal with these two parts of the summary judgment issue separately.

Plaintiffs have the burden of proof on their cause of action for trespass. When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor and that there is no genuine issue of material fact with respect to any one of the essential elements of his claim. In other words, the party must establish his claim beyond any genuine dispute with respect to any of the material facts. An issue is genuine if it may be maintained by substantial evidence. *Id.* An issue is material if the facts as alleged would constitute a legal defense, would affect the result of the action or would prevent the party against whom it is resolved from prevailing in the action. *Id.* If the movant carries his burden of establishing *prima facie* that he is entitled to summary judgment then his motion should be granted unless the opposing party responds and shows either that a genuine issue of material fact exists or that he has an excuse for not so showing. *Moore v. Fieldcrest Mils, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). If the movant fails to carry his burden, the opposing party does not have to respond and summary judgment is not proper regardless of whether he responds or not. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5 (Supp. 1970).

Defendants admitted in their answers to interrogatories that the two encroachments of which plaintiffs complain do extend beyond the boundaries of the property owned by the defendants. However, defendants deny that they are trespassing on the submerged land owned by the plaintiffs. However, in James' deposition he admits that many of the anchors holding down the boathouses launched in 1971 and 1972 are beyond the boundaries of the property owned by him and his wife. Furthermore, Judge

Snepp stated in an order filed on 27 March 1979 that an "interrogatory with respect to ownership of the land in question by the Additional Parties Plaintiff is moot in that the Defendants have never answered Paragraph 13 of the Plaintiffs' cause of action as set forth in the Amendment to Complaint filed August 13, 1976 and that, therefore, the allegations contained in that paragraph are deemed to be admitted."

Paragraph 13 of the Amendment to the Complaint reads as follows:

> "That since the institution of this suit, the Plaintiff Steel Creek Development Corporation has conveyed the land in question to the Additional Parties Plaintiff, R. S. Smith and wife, Evelyn L. Smith, by deed duly recorded in the Office of the Register of Deeds for Mecklenburg County, and the Plaintiff corporation has been dissolved."

From all of the evidence contained in the record we hold that plaintiffs have established beyond genuine dispute that anchors connected to the boathouses built and launched by defendants in 1971 and 1972 trespass on submerged land owned by the plaintiffs. This showing does not alone entitle plaintiffs to summary judgment on the issue of liability because defendants raised the defense of equitable estoppel.

Plaintiffs have the burden of proof on their motion for summary judgment, *Koontz v. City of Winston-Salem, supra*, and defendants have the burden of proof on their defense. When the party without the burden of proof on the substantive claim or defense moves for summary judgment he is entitled to it if he can meet the burden of proving that any one or more of the essential elements of the opposing party's claim or defense is nonexistent. *Moore v. Fieldcrest Mills, Inc., supra.* This is true because the party with the burden of proof on the claim or defense must have evidence on each and every one of the essential elements of his claim or defense before he can get to the jury. If his proof is lacking on any one of those essential elements then he has not made out his claim or defense.

There are several ways in which the movant may show that he is entitled to summary judgment. He may produce his own evidence, often through affidavits, of the nonexistence of one or

more of the essential elements of the opposing party's claim or defense. As noted above, when the movant does not carry his burden of producing such evidence summary judgment is inappropriate whether or not the opposing party responds. When the movant does carry his burden, he is entitled to summary judgment unless the opposing party responds with evidence showing that a genuine issue of material facts exists or that he has an excuse for not so showing. When the movant carries his burden of producing evidence on the motion and the opposing party responds, often with affidavits, then movant will obtain a forecast of the opposing party's evidence and such a forecast may reveal that that party does not have sufficient evidence to support one or more of the essential elements of his claim or defense. 2 McIntosh, *supra.* The movant may show through the evidence produced through discovery that the opposing party cannot produce evidence to support one or more of the essential elements of his claim or defense. *Moore v. Fieldcrest Mills, Inc., supra.* This is another manner in which to obtain a forecast of the opposing party's evidence. Thus, a party may succeed on a summary judgment motion upon the strength of his own evidence or upon the weakness of the opposing party's evidence when such a forecast of that evidence can be obtained in discovery or in response to movant's *prima facie* showing on the motion.

Here, both parties moved for summary judgment at the conclusion of the discovery process and relied upon the evidence produced during discovery. From this evidence, a forecast of defendants' evidence on his estoppel defense was obtained. The trial judge was correct in granting plaintiffs' motion for summary judgment on the issue of liability because in addition to adequately establishing the trespass plaintiffs showed that defendants' evidence was insufficient with respect to one or more of the essential elements of the estoppel defense.

> "The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result.
>
> "Equitable estoppel arises when an individual by his acts, representations, admission, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist,

and such other person rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484 486-87, 263 S.E. 2d 599, 602 (1980) (citations omitted).

Defendant James stated in his deposition that he discussed the plans for the boathouses, their construction and the purchasing of the materials with Smith before he started to work. Smith knew the length of the boathouse built in 1971 because he looked at the construction plans. That boathouse has twenty-four boat slips. Between eight and ten of them had been completed and were in the water when surveyors came at Smith's request to locate the boundary between plaintiffs' land and defendants' land. Prior to that, but still at a point after actual construction had begun, Smith "walked out on the boathouse and says 'you're going to have to cut this thing in two right here.' . . . [James] asked him what he was talking about and he said 'this is my property out here over the lake.' "

The following then appears in the record in the narrative of defendant's deposition:

> "After . . . [the surveyors left] I went ahead and completed the erection and the placement of all the boat slips located in boat house 'A' [built in 1971] over Lake Wylie. I increased the number of boat slips from eight to ten to forty-eight. That is both boat house 'A' and 'B' [built in 1972]. [Two boathouses with twenty-four slips in each one.] Boat house 'B' was built after suit was brought. When you built all of the slips that constituted boat house 'B' you knew Mr. Smith objected and I figured that he would object to anything that I built."

Defendants were informed of Smith's objections as soon as some of the slips were placed in the water. Defendant went ahead and completed the first boathouse and built the second one after plaintiff had brought suit. Thus, it is clear that defendants did not rely to their detriment on plaintiffs' actions or inaction. They proceeded in the face of plaintiffs' objections which were lodged soon enough to put defendants on notice to stop construction until the issue of trespass was resolved. Summary judgment was properly entered for the plaintiffs on the issue of liability and it was proper to order defendants to remove the anchors from plaintiffs'

submerged land and to set the case for trial on the issue of damages.

[3] Defendants also contend that it was error to refuse to allow him to take R. S. Smith's deposition. On the facts of this case, there was no error.

The lawsuit was filed in 1972 and was still pending in 1979. The parties engaged in various forms of discovery during this seven year period. On 9 October 1978 plaintiffs submitted two interrogatories to the defendants. On 16 January 1979 Judge Snepp entered an order stating that the matter had been heard and that the case would be ready for trial as soon as defendants answered those two interrogatories. He ordered that defendants file their answer to those interrogatories on or before 1 February 1979 and that the case be placed on the ready calendar as soon as the answers to the interrogatories were filed.

On 13 February 1979 plaintiff sought to have defendants' answer sticken due to their failure to comply with the judge's order that they file answers to the interrogatories. Defendants served a "Subpoena for Oral Deposition" on R. S. Smith which was received on 24 February 1979. Defendants' answers to plaintiffs' interrogatories were verified by James on 16 February 1979. Defendants also moved on that date that plaintiffs be sanctioned due to Smith's failure to appear for the taking of his deposition.

In an order entered 27 March 1979 this request for a sanction against plaintiffs were denied. Judge Snepp ordered that defendants not be allowed to take Smith's deposition and he noted in the order "that this is one of the oldest cases pending in . . . [the trial court], and that this matter should be brought on for trial without further delay."

There was no abuse of discretion in the actions of the trial judge. As a matter of fact, Judge Snepp is to be commended for the manner in which he sought to expedite the proceedings. *Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307, *cert. denied* 285 N.C. 233, 204 S.E. 2d 23 (1974). The parties had approximately seven years to conduct discovery in this case. After a hearing, it was ordered on 16 January 1979 that the case be placed on the ready calendar as soon as the answers to interrogatories were filed because the case would then be ready for trial. Judge Snepp

was justified in refusing to tolerate a further delay tactic on the part of the defendants. Ample opportunity for discovery was allowed. The time for discovery was not unjustifiably, unfairly or inequitably cut short to the prejudice of the defendants.

For the reasons stated, we hold that the Court of Appeals' decision to dismiss the appeal was erroneous. The judgment of Judge Snepp is affirmed and the case is remanded to the trial court for trial on the issue of damages.

Remanded.

STATE OF NORTH CAROLINA v. JACKIE RICHARD WEIMER

No. 136

(Filed 15 July 1980)

1. **Criminal Law § 66.10— suggestive pretrial identification at police headquarters—suppression of in-court identification—improper identification questions by prosecutor—harmless error**

In a prosecution for conspiracy to commit armed robbery and murder committed in the perpetration of an armed robbery wherein the trial court granted defendant's motion to suppress a witness's in-court identification of defendant on the basis of a prior impermissibly suggestive identification at police headquarters, the prosecutor acted improperly in asking the witness on two occasions to look at defendant and to state whether he could identify defendant as the driver of the getaway van; however, defendant was not prejudiced by such impropriety where the trial court in each instance sustained defendant's objection and directed the witness not to answer the question; defense counsel failed to request that the court instruct the jury to disregard the prosecutor's questions; the witness was allowed to give a detailed description of the driver of the van which corresponded to defendant's appearance; and there was strong evidence of defendant's guilt of the crimes charged.

2. **Criminal Law § 91.2— denial of continuance because of pretrial publicity**

The trial court did not err in denying defendant's motion for a continuance based upon publicity surrounding a female accomplice's trial and references to defendant in certain news articles where prospective jurors who indicated they had read or heard about the case stated that they had not formed or expressed an opinion about the case and could render a fair and impartial verdict based on the evidence and the law as presented at trial; and the record fails to show that defendant ever requested the removal for cause of any venireman who eventually sat on the impaneled jury or that defendant exhausted his peremptory challenges before he passed the jury.

3. **Criminal Law §§ 66.9, 66.16— pretrial photographic procedure—in-court identification—independent origin—no unnecessary suggestiveness**

The evidence supported the trial court's finding that a witness's in-court identification of defendant's alleged female accomplice as the person who shot a supermarket manager was of independent origin and not tainted by a pretrial identification procedure in which the witness was shown a photograph of the accomplice in the district attorney's office where the witness, a supermarket employee, testified that she heard the manager call for help, heard the sound of two gunshots, and saw a person leave the manager's office and walk out of the store; this person faced the witness at all times before leaving the store; she described the person as being about five feet six inches in height and as having a husky build, dark brown hair, and a pale, rounded face with no facial hair; although at the time the witness believed the person she saw to be a male, she told people the night of the crime that she would never forget the person's face as long as she lived; and the witness stated that her identification of the accomplice was independent of any photograph she had seen. Furthermore, the pretrial procedure was not so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny defendant due process of law where the witness, while meeting with the district attorney in his office, saw a photograph of defendant's accomplice lying on the desk and asked to see it; and although she recognized the person in the photograph as the assailant, no one asked her to identify the person depicted in the photograph, and she made no statement about it.

APPEAL by defendant from *Rousseau, J.*, 29 October 1979 Criminal Session of FORSYTH Superior Court.

Defendant was charged in separate indictments proper in form with conspiracy to commit armed robbery, armed robbery and the murder of Paul Steven Miller. He entered a plea of not guilty to each charge. The charges were consolidated for trial.

At trial the State presented evidence tending to show that at approximately 8:30 p.m. on 30 June 1978, several persons standing at the check-out counters of the Food World supermarket near Stanleyville, North Carolina, heard Steven Miller, the night manager, call for help. They saw an individual in the manager's office fire two shots at Mr. Miller, drop the gun and run out of the store. The assailant was described as being stocky in build, about five feet six inches tall, between eighteen and twenty-two years old, weighing from 150 to 160 pounds and wearing jeans, a striped shirt, tennis shoes, sunglasses and a small-brimmed hat. After a *voir dire* had been conducted and the trial court had ruled her identification testimony to be admissible, witness Betty Ballard identified the assailant as Dharlene Frances Moore.

Harold Dennis Turbyfill testified for the State that he followed the assailant outside to the parking lot and into a blue car, where they struggled and Mr. Turbyfill succeeded in taking the car keys away from the assailant. After the two had gotten out of the car, a white Chevrolet van drove toward them, stopped, and the assailant climbed in. The person driving the van told Mr. Turbyfill to "leave him alone." Mr. Turbyfill described the driver as a man between forty and forty-five years old, approximately six feet tall, weighing from 145 to 150 pounds and having a narrow, clean-shaven face, dark hair and a hawk bill nose. A white van, registered in the name of defendant's wife and matching the description and license tag number given by Mr. Turbyfill, was later found.

Wallace Alvarian Turner testified for the State, and his testimony tended to show that he had known defendant since 1966 and had known Dharlene Moore, whom he knew as "Sam," for about two years. The witness testified that on several occasions he had been involved in criminal activities with defendant. On 30 June 1978 the witness and his wife arrived at their home around 9:15 in the evening. Almost immediately defendant and Dharlene Moore drove up in a Chevrolet van. Defendant told witness Turner that he had come by looking for him three times earlier that evening. Defendant stated, "Well, really messed up. I guess they'll give me the chair this time. Sam went to Food World and really made a mess of things." Defendant also told the witness that a man was chasing "Sam" through the parking lot and defendant had shouted to him, "Leave that damn man alone." Defendant had picked "Sam" up in the van because her car would not start. Defendant told the witness that Ms. Moore was wearing an Ace bandage around her chest to alter her appearance. Turner also said that when Ms. Moore came to his home on 30 June 1978, she was wearing a T-shirt, blue tennis shoes and overalls, with her hair put up in a cap.

Dr. Modesto Scharyj testified that, in his opinion, Mr. Miller died of a gunshot wound in the abdomen.

The jury returned verdicts of guilty of conspiracy to commit armed robbery, guilty of attempted armed robbery and guilty of first-degree murder, with a recommendation that defendant be sentenced to life imprisonment on the murder charge. The trial

court arrested judgment on the attempted armed robbery conviction and imposed a sentence of life imprisonment on the first-degree murder charge and a consecutive sentence of ten years on the charge of conspiracy. Defendant appealed to this Court from the sentence imposed on the verdict of guilty of murder and we allowed his motion to bypass the Court of Appeals on the conspiracy charge on 15 April 1980.

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr. and Jane Rankin Thompson, Assistant Attorneys General, for the State.

Robert Dennis Hinshaw and Charles J. Alexander, II, for defendant appellant.

BRANCH, Chief Justice.

[1] Defendant first contends that the assistant district attorney committed reversible error when, on direct examination, he asked witness Turbyfill to look at defendant and to state whether he could identify defendant as the driver of the van.

A *voir dire* hearing was held at trial on defendant's motion to suppress witness Turbyfill's in-court identification of defendant. At the conclusion of the *voir dire*, the trial court granted defendant's motion to suppress on the basis of a prior, impermissibly suggestive identification at police headquarters. After the jury returned, direct examination of the witness continued and Mr. Turbyfill described the driver of the van in detail. The assistant district attorney, Mr. Yeatts, then asked the following questions:

> Q. All right, sir. Would you look at the defendant here in the courtroom today?
>
> A. I beg your pardon, sir?
>
> Q. Would you look at the defendant here in the courtroom today?
>
> (The witness looks in the direction of the defense table.)
>
> Q. Would you state whether or not you can identify that individual as the individual you saw in the van?
>
> MR. ALEXANDER: Objection.
>
> COURT: Sustained.
>
> MR. YEATTS: Do not answer that question.

After a brief cross-examination, the assistant district attorney asked again on redirect examination:

> Q. Did you get a good look at the individual that was driving that van?
>
> A. Yes, sir, I did.
>
> Q. Did you look at him?
>
> A. Yes, sir, I did.
>
> Q. State whether or not you see him here today.
>
> MR. ALEXANDER: Objection, Your Honor.
>
> COURT: Sustained.
>
> MR. YEATTS: Don't answer that. I have no further questions.

Defendant contends that by these questions the prosecutor placed incompetent and prejudicial matter before the jury.

In light of the court's prior ruling, the prosecutor's line of questioning was clearly improper. However, in each instance the trial court correctly sustained defendant's objection, and the witness was directed not to answer the question. We have held that when the trial court promptly sustains an objection to a question asked by the prosecutor, no prejudice results. *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Butler*, 269 N.C. 483, 153 S.E. 2d 70 (1967). Ordinarily, merely asking a question will not be held to be prejudicial. *State v. Barrow, supra; see State v. Williams*, 255 N.C. 82, 120 S.E. 2d 442 (1961). Moreover, defense counsel failed to request that the court instruct the jury to disregard the prosecutor's questions. Mr. Turbyfill was allowed at trial to give a detailed description of the driver of the van which corresponded to defendant's appearance. In view of the strong evidence of defendant's guilt and the court's prompt action in sustaining defendant's objections, we cannot say that defendant has shown that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." G.S. 15A-1443(a); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Temple*, 269 N.C. 57, 152 S.E. 2d 206 (1967).

[2] Defendant next contends that the trial court erred in denying defendant's motion for a continuance based upon pretrial publicity.

Although defendant and Dharlene Moore were originally to be tried jointly, the court on 19 October 1980 granted Ms. Moore's motion for severance. Ms. Moore's trial was set for 22 October 1980, and defendant's trial was continued to the following week of 29 October. Defendant subsequently filed motions for a change of venue and for a continuance in his case, claiming that the extensive publicity surrounding Ms. Moore's trial and particularly the references to defendant in certain news articles made it impossible for him to receive a fair trial in Forsyth County. Both motions were denied by the trial court.

A motion for a continuance is ordinarily within the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion. *State v. Rigsbee*, 285 N.C. 708, 208 S.E. 2d 656 (1974); *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970).

During jury selection, several prospective jurors indicated that they had previously read or heard about the case. When questioned individually by the court, however, each of the jurors stated that he had not formed or expressed an opinion about the case and could render a fair and impartial verdict based on the evidence and the law as presented at trial. The record reveals that defendant was given an opportunity to examine prospective jurors on *voir dire*, but it fails to show that defendant ever requested the removal for cause of any venireman who eventually sat on the impaneled jury. Neither does the record show that defendant had exhausted his peremptory challenges before he passed the jury.

In *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977), this Court upheld the trial judge's refusal to order a continuance, change of venue or separate trials based on facts similar to those in the instant case and in part stated:

> "Where the record discloses, as it does in the instant case, that the presiding judge conducted a full inquiry, examined the press releases and the affidavits in support of the motion, and where the record fails to show that any juror objectionable to the defendant was permitted to sit on the trial panel, or that defendant had exhausted his peremptory challenges before he passed the jury, denial of the motion for change of venue was not error. (Citations omitted.)"

Id. at 142, 232 S.E. 2d at 441.

We hold that the trial court did not err in denying defendant's motion for a continuance.

[3] By his final assignment, defendant contends that the trial court erred in allowing witness Betty Ballard to identify Dharlene Moore as the person who shot Miller. He claims that Ms. Ballard's identification was tainted by an impermissibly suggestive pretrial identificaiton procedure in which she was shown a photograph of Ms. Moore in the district attorney's office.

It is now well settled that an in-court identification is competent evidence, even if the witness took part in an illegal pretrial confrontation or photographic identification, where it is first determined by the trial judge on clear and convincing evidence that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902 (1976); 1 Stansbury's North Carolina Evidence § 57 (Brandis Rev. 1973).

In the instant case, Ms. Ballard, a supermarket employee, testified that she was standing at a cash register near the exit of Food World when she heard Steven Miller call for help and the sound of two gunshots. She observed a person leave the manager's office and walk out of the store. This person faced Ms. Ballard at all times before leaving the store. Although the witness stated that she did not pay much attention to the clothing, she described the person as wearing blue jeans and tennis shoes. She could not recall whether the person was wearing sunglasses or a hat. The person had a husky build, dark brown hair, a pale, rounded face with no facial hair and was about five feet six inches in height. Ms. Ballard admitted that Ms. Moore appeared slimmer and had lighter hair at trial than Ms. Ballard had remembered. Although at the time the witness believed that the person she had seen was a young white male, she told people on the night of the crime that "I'll never forget the face as long as I live." Ms. Ballard further testified that her identification of Ms. Moore was independent of any photograph she had seen.

At the conclusion of the *voir dire* examination, the trial court made findings of fact consistent with the evidence set forth above and, *inter alia*, found "from clear and convincing evidence that the identification of Ms. Moore was based solely on the observation of having seen Mrs. Moore immediately after Mr. Miller was shot in the Food World Grocery Store on June 30, 1978." The trial judge's finding that the identification testimony was based solely on the witness' observation of defendant on 30 June 1978 was supported by competent evidence and is binding on this court. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974). Any discrepancies or contradictions in her testimony go to the weight rather than the competency of the testimony. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). Thus, the trial court's ruling admitting Ms. Ballard's identification testimony was without error.

Although not necessary for determination of this assignment of error, we further note that the challenged pretrial procedure was not "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to deny defendant due process of law. *Stovall v. Denno*, 388 U.S. 293, 302, 87 S.Ct. 1967, 1972, 18 L.Ed. 2d 1199, 1206 (1967).

In *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968), the United States Supreme Court set forth the standard for determining whether an in-court identification following an allegedly suggestive pretrial identification procedure satisfies the requirements of due process. There the Court stated,

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Id. at 384, 88 S.Ct. at 971, 19 L.Ed. 2d at 1253; *accord, State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977); *State v. Smith*, 278 N.C. 476, 180 S.E. 2d 7 (1971); *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970).

Ms. Ballard testified on *voir dire* that the week prior to the trial of Dharlene Moore she met with the district attorney. While

in his office, Ms. Ballard saw a photograph lying on the desk and asked to see it. Although she recognized the person in the photograph as being the assailant, no one asked her to identify the person depicted in the photograph, and she made no statement about it.

Concerning the suggestiveness of the pretrial photographic procedure, the trial court found "from clear and convincing evidence that the photographic show-up by one photograph was not so impermissibly suggestive as to cause Mrs. Ballard to identify Mrs. Moore on the basis of the photograph." The evidence supports this finding, and the finding would in turn support the trial judge's ruling admitting the identification testimony.

Our conclusion that the evidence was properly admitted is supported by decisions of this and other jurisdictions holding that the exhibition of a single photograph does not necessarily result in a substantial likelihood of misidentification. *See* Annot., 39 A.L.R. 3d 1000, 1013 (1971), *and cases cited therein.* Furthermore, it has been held that "unrigged" courtroom and station house confrontations which amount to single exhibitions of the accused do not necessarily violate due process. *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977); *State v. Tuggle, supra; State v. Bass, supra.*

Since we have concluded that the court's findings and conclusions are supported by competent evidence, we do not deem it necessary to determine whether defendant has standing to challenge Ms. Ballard's identification of Ms. Moore because of an allegedly suggestive pretrial identification. *See generally, United States v. Salvucci*, 48 U.S.L.W. 4881 (decided 25 June 1980); *United States v. Payner*, 48 U.S.L.W. 4829 (decided 23 June 1980).

We have carefully considered the entire record and find no error warranting a new trial.

No error.

CITY OF THOMASVILLE v. LEASE-AFEX, INC.

No. 107

(Filed 15 July 1980)

Sales § 22.2— fire suppressant system on bulldozer—alleged negligent design and installation—breach of warranty—summary judgment improper

In plaintiff's action to recover for damages to its bulldozer allegedly caused by defendant's defective design, construction and installation of a fire suppressant system on the bulldozer, granting summary judgment for defendant on plaintiff's claims for negligence and breach of warranties was improper, since plaintiff offered evidence that the standard of care of a reasonably prudent fire suppression system manufacturer was to manufacture a system which functioned properly, that such standard of care had been breached by the negligent design of the system, and that failure of the system to discharge its total chemical suppressant resulted in substantial fire damage to the bulldozer; whether plaintiff was contributorily negligent as a matter of law because of failure to use defendant's products solely or because of failure to perform proper maintenance was a question of fact to be resolved at trial; and a genuine issue was raised as to whether plaintiff received notice of a limited warranty accompanying each of defendant's products since such notice was included in defendant's service manual which all of plaintiff's employees denied ever having received.

Justice BROCK did not participate in the consideration or decision of this case.

PLAINTIFF appeals from a decision of the Court of Appeals, 44 N.C. App. 506, 261 S.E. 2d 253 (1980), one judge dissenting, affirming summary judgment for defendant entered by *McConnell, J.*, at the 22 January 1979 Session of Superior Court, DAVIDSON County.

Plaintiff owns an Allis Chalmers 12G bulldozer which it uses in its landfill operation. The bulldozer has been twice fitted with a fire suppression system supplied by defendant and has twice suffered subsequent major fire damage.

The first of these fires occurred in the spring of 1974. Plaintiff sued defendant at that time, but lost on defendant's motion for summary judgment. *See City of Thomasville v. Lease-Martin Afex, Inc.*, 38 N.C. App. 737, 248 S.E. 2d 766 (1978).

After the 1974 fire, defendant installed another Afex fire suppression system, model G-700B, in plaintiff's bulldozer. This system is apparently designed to be triggered by heat sensors

mounted in several places throughout the bulldozer. When temperatures rise to 300 degrees Fahrenheit, certain switches close and set off a small CO_2 cartridge. This small charge in turn causes a large pressurized cylinder of CO_2 to rupture, releasing pressurized CO_2. The gas sweeps into a cannister of chemical powder and blows this powder through various nozzles and tubes out over the bulldozer, blanketing any blaze.

On 18 May 1977 the rear portion of plaintiff's bulldozer erupted into flame from an unknown cause. The G-700B Afex fire suppression system did not contain the fire and plaintiff's bulldozer was damaged in the amount of some $14,000.00.

Plaintiff, having suffered a second fire loss on the same piece of equipment, filed complaint on 6 February 1978 against defendant alleging negligence in the design, manufacture and installation of the Afex model G-700B as well as breach of a warranty of merchantability, breach of a warranty of fitness for a particular purpose and breach of an express warranty.

Defendant answered, denying all material allegations and advancing, *inter alia*, the defense of notice of limitation of warranties.

A period of extensive discovery followed. Five of plaintiff's employees were deposed. All denied having received any notice from defendant of the limitation of warranties or of the service requirements of the model G-700B fire suppression system.

Daniel W. Smith, plaintiff's expert witness, also testified by deposition. He stated that he had examined the bulldozer and fire suppression system on 25 May 1977, some seven days after the fire. At that time he found approximately 45 to 47 percent of the chemical powder still within its container and found powder caked in nozzles not near the situs of the fire. In his expert opinion the system had failed to discharge all of its powder because of an inadequate CO_2 charge in the large CO_2 cylinder. Smith also stated that he had spoken by telephone with defendant's vice-president, William D. Lease, Jr., and had been told that the CO_2 cylinder could leak, that defendant knew this and that defendant recommended that the cylinders be weighed every six months or so and replaced if they dropped more than one-half ounce in weight. On examination by defendant's counsel, Smith stated that in his opin-

ion as an engineer, the seal around the large CO_2 cylinder was of inadequate design to contain the gas within the cylinder, and stated his opinion that there was another available seal design better suited to the purpose.

Defendant's president and vice-president were also deposed. Each stated they knew of no problem with CO_2 leakage from the large cylinder. President William Lease, Sr., further stated, however, that service manuals routinely delivered to owners of the fire suppression systems at the time of those systems' installations recommended that the CO_2 cylinder be weighed every six months. This officer stated he did not personally know whether a copy of this manual was ever delivered to plaintiff's employees.

Defendant moved for summary judgment on 17 November 1978. The record is unclear as to what documents it offered as support for the motion. On 26 January 1979, summary judgment was entered for defendant.

Plaintiff appealed to the Court of Appeals. A majority of that court held that the facts surrounding this case were virtually identical with the facts surrounding the 1974 case, *City of Thomasville v. Lease-Martin Afex, Inc., supra.* Just as summary judgment against the plaintiff was proper in that case, the Court of Appeals held, it was proper here. Judge Wells dissented.

Plaintiff appealed to this Court as a matter of right pursuant to G.S. 7A-30(2).

Richard M. Pearman, Jr., for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton & Robinson, by W. Thompson Comerford, Jr., for defendant-appellee.

CARLTON, Justice.

The sole question on this appeal is whether defendant, in this products liability case, is entitled to summary judgment. The Court of Appeals held that summary judgment was proper. We reverse.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law."

An issue is genuine if it "may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972). *See also Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972).

An issue is material if, as alleged, facts "would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem, supra* at 518, 186 S.E. 2d at 901. *See also Singleton v. Stewart, supra; Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971). More succinctly, a fact is material if it would constitute or would irrevocably establish any material element of a claim or defense. *See* M. Louis, A Survey of Decisions Under the New North Carolina Rules of Civil Procedure, 50 N.C. L. Rev. 729, 736 (1972).

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Incorporated*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Generally this means that on "undisputed aspects of the *opposing* evidential forecasts," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5 at 73 (emphasis added).

If the moving party meets this burden, the nonmoving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not so doing. *Moore v. Fieldcrest, supra; Zimmerman v. Hogg & Allen, supra.*

If the moving party fails in his showing, summary judgment is not proper regardless of whether the opponent responds. *See generally* McIntosh, *supra.*

The goal of this procedural flux is to allow penetration of an unfounded claim or defense before trial. McIntosh, *supra.* However, it is widely acknowledged that there are certain claims or defenses not well suited to summary judgment. This is because determination of essential elements of these claims or defenses rests within the peculiar expertise of fact finders. Thus if there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied. *Moore v. Fieldcrest, supra,* citing 3 Barron & Holtzoff, Federal Practice and Procedure § 1234 (Wright ed. 1958). Negligence actions, particularly, are rarely suited for summary disposition because one essential element of the action—the standard of care of a reasonably prudent person—is thought to be a matter within the special competence of the jury. 10 Wright and Miller, Federal Practice and Procedure § 2729 (1973). *See also Moore v. Fieldcrest, supra; Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975).

To return to the very first step in the summary judgment process with respect to the negligence claim, defendant as the moving party here must initially (1) prove than an essential element of plaintiff's claim of negligence is nonexistent or (2) show that a forecast of the opposing party's evidence—here the plaintiff's—indicates plaintiff will not be able to prove facts giving rise at trial to all essential elements of the claim of negligence. *Moore v. Fieldcrest, supra.*

Defendant asserts here that, as to the claim of negligence in the manufacture and installation of the system, plaintiff's own expert witness testified by deposition that the system was installed according to the schematics provided by the defendant. Apparently on its face, the inference is that plaintiff's evidence shows no negligence. As to the claim of negligent design, defendant points to that portion of the expert's testimony where he discussed the possibility of using a different seal on the CO_2 cylinder. At that time, the witness also stated, "I've made no contention that anyone was negligent because they did not use an o-ring seal." Again the inference is that plaintiff's own evidence shows a lack of negligence. Finally, defendant points to evidence in the depositions that plaintiff itself maintained the equipment and did not seek defendant's help in recharging the CO_2 cannisters as show-

ing plaintiff itself was contributorily negligent. In all these arguments, defendant is alleging that a forecast of plaintiff's own evidence shows it cannot prove facts to support essential elements of a claim of negligence.

As in any action for negligence, the essential elements of a suit for products liability sounding in tort must include

(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances;

(2) breach of that standard of care;

(3) injury caused directly or proximately by the breach, and;

(4) loss because of the injury.

W. Prosser, *Hornbook of the Law of Torts* § 30 (4th ed. 1971).

Viewing, as we must, the documents submitted at the hearing on the motion for summary judgment in a light indulgent to the plaintiff, *Kessing v. National Mortgage Corporation, supra*, we believe that the defendant has failed to meet its burden of showing undisputed aspects of plaintiff's evidentiary forecast, *see* McIntosh, *supra* at § 1660.5 at 73, do not support the essential elements of negligence.

First, as to the standard of care, the manufacturer of a chattel is under a duty to the purchaser to use reasonable care in its manufacture and when reasonable care so requires to give adequate direction for its use. Any injury to persons or property caused by a failure to follow this standard renders the manufacturer liable. *Corprew v. Geigy Chemical Corporation*, 271 N.C. 485, 157 S.E. 2d 98 (1967).

Here, plaintiff's expert witness Smith stated in his deposition that the purpose of having a fire suppression system was to have it function properly. The fair inference for the plaintiff from this evidence is that the standard of care of a reasonably prudent fire suppression system manufacturer is to manufacture a system which functions properly. While this inference may be successfully challenged at trial, at summary judgment stage there is sufficient evidence of the standard to forestall immediate disposition of the case and defendant has presented no other forecast of the evidence to undermine this.

Indeed, if as the Court in *Corprew v. Geigy Chemical Corporation, supra,* suggests, the duty of a manufacturer is to provide adequate direction for a product's use, then the deposition of five of plaintiff's employees that they were never instructed by the defendant to weigh the CO_2 cylinder to measure loss of CO_2 is more than sufficient to withstand summary judgment. Defendant's allegations to the contrary, we find nothing that suggests that the plaintiff cannot establish a requisite standard of care, or that plaintiff's own evidence shows the requisite standard of care was met.

Secondly, as to the breach of that standard of care, plaintiff's expert witness Smith again testified as to what in his opinion was the negligent design which caused the malfunction. While, as defendant points out, Smith also stated that he was not asserting anyone was negligent, we believe this statement came in the context of defense counsel's examination and may have been the product of leading the witness. At any rate, this was a conclusion of an ultimate fact, better left to a fact finder than an expert witness. The conflict between this conclusion and the inference of Smith's earlier statements that the malfunction of the device was due to faulty design is the sort of inconsistency or credibility assessment which should be tested by a trier of fact. Again, we find no merit to defendant's contention that plaintiff cannot show from its evidence forecast breach of a standard of care.

Thirdly, as to the injury caused by the inference of breach, the inference indulgent to the plaintiff from the fact that the bulldozer caught fire, that the system failed to discharge its total chemical suppressant and that the tractor was badly fire damaged, is that the system's failure to function properly caused at least some of the damage to plaintiff's bulldozer. And finally defendant has presented no forecast of the evidence showing a lack of loss.

Plaintiff's evidence forecasted by depositions supports each of the essential elements of negligence and is clearly adequate to survive summary judgment. The facts here, therefore, are much different from those involved in the earlier fire case between these two litigants, *Thomasville v. Lease-Martin Afex, supra.* There, plaintiff's complaint alleged that the fire suppression system failed to operate. An affidavit of plaintiff's employee

however, stated that the system *had* functioned. Thus the allegation of the breach of the duty of care there—defendant's manufacture and sale of a system that failed to operate—was clearly not a material fact that plaintiff was going to be able to prove at trial. Summary judgment was therefore properly granted.

Likewise, the facts here are distinguished from *Moore v. Fieldcrest, supra*, where this Court allowed summary judgment for a defendant on a plaintiff's allegation of negligence. There plaintiff alleged that defendant had breached a duty of care by loading a trailer load of textiles in such an imprudent manner that bales of textiles tumbled onto the plaintiff, injuring him. Plaintiff's own deposition, however, indicated that he had seen similar loading of textiles in other trucks. The inference was that custom was to load bales several ways, and a forecast of plaintiff's own testimony showed that the requisite standard of care did not involve loading a certain way. (For a view *contra*, see Justice Copeland's dissent, 296 N.C. at 474, 251 S.E. 2d at 424.) Defendant was not negligent.

Here, defendant's motion for summary judgment accompanied by its forecast of plaintiff's evidence, as that forecast was presented in depositions of plaintiff's employees and experts, reveals no such fatal inability of the plaintiff to prove the actual facts of the elements of negligence. It is for the trier of fact to evaluate the credibility of plaintiff's witnesses and to listen to any testimony the defendant may present contesting that evidence.

Defendant, however, is not content to rest on the argument that plaintiff's own evidence fails to reveal all the essential elements of negligence. It argues strenuously that the depositions of plaintiff's employees show plaintiff's own contributory negligence, barring recovery here as a matter of law. Just as in negligence actions, summary judgment for contributory negligence is rarely granted. Defendant's president stated in his deposition that he did not personally know whether plaintiff's employees had received the maintenance manual detailing proper procedures to follow when checking the G-700B fire suppression system. Furthermore, depositions of this witness and another of defendant's officers indicated that defendant had manufactured its system so that it could use chemical suppressants manufac-

tured by other producers and had in fact used another company's CO_2 cannisters in the design and production of its own product. Construing inferences from these facts indulgently for the plaintiff, it seems the defendant contemplated that users of its system would use other compatible equipment. Thus any question of improper maintenance because of a failure to use defendant's products solely or because of a failure to perform proper maintenance checks as a matter of contributory negligence becomes an issue of material fact and should be resolved at trial.

As defendant failed to make a showing that no genuine issue of material fact existed here, summary judgment on the negligence issue was improperly granted.

Plaintiff, of course, sued not only for negligence but also for breach of warranties. Defendant moved for summary judgment on these claims on the basis that the plaintiff had received notice of a limited warranty accompanying each of defendant's products. Exhibits appended to the record, which we presume were tendered at summary judgment, indicate that the notice of a limited warranty was included in the defendant's service manual. As all of plaintiff's employees deny ever having received this manual, a genuine issue of material fact exists as to the matter of warranty. This issue cannot be resolved at summary judgment. In view of this, we do not deem it necessary to consider the plaintiff's argument that, as a matter of law, defendant cannot limit his liability even with adequate notice of limited warranty.

For the foregoing reasons, we hold that granting summary judgment for defendant on negligence and breach of warranties was improper; genuine issues of material fact exist in each of these causes of action. The decision of the Court of Appeals is reversed and this case is remanded to that court to remand to the Superior Court of Davidson County for further proceedings in accordance with this opinion.

Reversed and remanded.

Justice BROCK did not participate in the consideration or decision of this case.

THOMAS J. HAWTHORNE, AND WIFE CHARLOTTE M. HAWTHORNE, JEROME MILTON, AND WIFE MARY SUE MOCK MILTON, C. CARL WARREN, JR., AND WIFE JOSEPHINE L. WARREN v. REALTY SYNDICATE, INC.; MARSH REALTY COMPANY; AND MARSH FOUNDATION, INC.

No. 103

(Filed 15 July 1980)

1. **Deeds § 20.6— restrictive covenants in subdivision—who may enforce**

When an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee; moreover, the right to enforce may be exercised by subsequent grantees against any purchaser who takes land in the tract with notice of restrictions, and a purchaser has such notice whenever the restrictions appear in a deed or in any other instrument in his record chain of title.

2. **Deeds § 20— subdivision developed pursuant to general plan of common restrictions—test**

That a subdivision has been developed pursuant to a general plan of common restrictions is a statement of legal conclusion that the grantor intended to impose a common servitude upon all the parcels conveyed for the mutual benefit of all the grantees and their successors, and the primary test of the existence of such intent is whether substantially similar restrictions were made to apply to all lots of like character or similarly situated.

3. **Deeds § 20— residential subdivision—restriction included in all deeds**

Evidence was sufficient to support the trial court's conclusion that the original grantors intended to develop their land as residential subdivisions where the evidence tended to show that the original deed to each and every parcel subdivided from the tracts comprising the two blocks in question contained the residential restriction at issue.

4. **Deeds § 20.6— restrictive covenants—enforcement not limited to adjoining landowners**

Language in the original deed to a lot to the effect that the restrictions imposed were for the "mutual protection" of "adjoining lot owners" did not limit enforcement of the restrictions to owners whose lot lines actually physically touched the bounds of the lot in question.

5. **Deeds § 20— restrictive covenants—two blocks developed as single unit**

Lot owners in Block 9 of a subdivision were proper parties to enforce a restrictive covenant affecting defendants' lot in Block 7 of the subdivision, since the two blocks were platted together; sales of the lots in each tract began at substantially the same time; the restrictions imposed by the deeds to the lots in both tracts were substantially similar; and it was thus shown that the two blocks were developed as a single unit.

6. Deeds § 20.1— residential restrictive covenants—commercial use of land around subdivision irrelevant

In an action to enjoin defendants from using a subdivision lot for any purpose other than residential purposes were defendants contended that such fundamental changes had occurred in the residential character of the neighborhood so as to render the continued enforcement of the residential restriction inequitable, the fact that adjoining or surrounding property had come to be used for commercial purposes had no bearing on the character of the subdivision itself, and the trial court therefore properly excluded defendants' proffer of evidence of changes occurring in the use of properties along a road which was adjacent to but outside the boundaries of the subdivision.

7. Deeds § 20.1— residential restrictive covenants—construction of apartments—covenant not violated

A restrictive covenant limiting the use of property to residential purposes did not, in the absence of further qualifying language, prohibit the erection of apartments.

8. Deeds § 20.6— residential restrictive covenant—waiver as to two lots—validity of restriction as to other lots

Neither acquiescence by subdivision property owners to the construction of a public library nor the express contractual waiver of enforcement rights by two of the plaintiffs to the use of a former residence as a branch bank office precluded the continued validity of a residential restriction as to all the remaining lots in a subdivision, since the lot owners contractually released their enforcement rights with an express reservation of the right to enforce the residential restriction as to all remaining lots in the subdivision; the library was an unobtrusive brick structure surrounded by trees and situated on a spacious lot at the southernmost corner of a block; the proposed home for the bank was a residence which had not been used for other than residential purposes; and the agreement waiving the residential restriction with respect to the use of the building provided that its exterior structural appearance would continue to be maintained.

9. Deeds § 20.1— restrictive covenants—racial restriction—separability of residential restriction

Defendants' contention that a residential restriction contained in deeds in a subdivision must fall because of its conjunction with an unenforceable racial restriction is meritless, since the two clauses, though expressed as part of the same covenant, were so clearly independent that one need not infect the other.

Justice HUSKINS and BRITT dissent.

DEFENDANTS appeal from a decision of the Court of Appeals (opinion by *Judge Erwin* with *Judges Clark* and *Wells* concurring) which reversed the judgment entered 27 April 1978 by *Judge David I. Smith* in MECKLENBURG Superior Court and remanded the case for issuance of injunctive relief sought by plaintiffs. The

decision of the Court of Appeals is reported at 43 N.C. App. 436, 259 S.E. 2d 591 (1979). This Court granted defendants' petition for discretionary review pursuant to G.S. 7A-31 on 6 February 1980.

Ruff, Bond, Cobb, Wade & McNair by Hamlin L. Wade for plaintiff appellees.

Helms, Mulliss & Johnston by Fred B. Helms, Robert B. Cordle and William H. Higgins for defendant appellants.

EXUM, Justice.

The basic questions raised by this appeal are: (1) whether the individual lots in Block 7 of the Myers Park Development in Charlotte remain subject to a covenant restricting their use to residential purposes, and (2) if so, whether the plaintiffs in this action may enforce the restriction. We answer both questions in the affirmative.

Plaintiffs instituted this action on 21 August 1972 to enjoin defendants from using Lot 6 in Block 7 of Myers Park for other than residential purposes. Defendant Realty Syndicate had purchased Lot 6 in December 1968 and had leased the house on the lot for office use beginning 1 September 1969. On 11 November 1975, the lot in question was conveyed to defendant Marsh Realty Company. Plaintiffs Thomas Hawthorne and wife are the owners of Lot 5A in Block 7. Plaintiffs Carl Warren and wife own Lot 3 in the same Block. Plaintiffs Jerome Milton and wife own Lot 10 in Block 9. Block 9 is separated from Block 7 by a four-lane road. None of the lots owned by plaintiffs touch the boundaries of defendants' Lot 6.

Plaintiffs contend that defendants' nonresidential use of Lot 6 violates the terms of a restrictive covenant contained in the original deed to the lot, which provides that:

> "The property shall be used for residence purposes only and shall be occupied and owned by only people of the white race. . . .
>
> * * *
>
> "The foregoing restrictions and covenants are substantially similar to those contained in deeds to adjoining lot owners and are for the mutual protection of such lot owners."

Substantially similar language is contained in all other deeds resulting from subdivision of Blocks 7 and 9 by the original owners, George Stephens and the Stephens Company. Plaintiffs argue that Blocks 7 and 9 were subdivided as part of one common plan restricting the use of the subdivided lots to residential purposes; that defendants had record notice of such a common plan; and that defendants' present use of Lot 6 in Block 7 for commercial purposes should therefore be enjoined.

Defendants respond that there is no common plan of development applicable to Blocks 7 and 9, and that even if there were, the restrictive covenant is enforceable only at the instance of those property owners whose lots physically adjoin the property subject to this dispute. Defendants contend furthermore that the erection of apartment houses and a branch public library in Block 7 has so fundamentally changed the residential character of the area as to render enforcement of the covenant inequitable. Finally, defendants argue that plaintiffs Thomas Hawthorne and wife have waived whatever rights they had to proceed on the covenant by signing a release and covenant not to sue with regard to the proposed development of a branch bank office on another lot in Block 7.

In his order of 27 April 1978, Judge Smith made the following pertinent findings of fact:

> "12. That the deeds conveying all lots in Blocks 7 and 9 contain restrictions that they should be used only for residential purposes and the defendants in this action and other owners and occupants, either directly or through mesne conveyances, hold their lots upon this condition;
>
> "13. That the restrictions in the various deeds differ only slightly with some deeds having ten paragraphs, some eleven, some twelve;
>
> "14. That some of the deeds provide that the restrictions 'are for the protection and general welfare of the community and shall be covenants running with the land'; some of the deeds provide that the restriction shall be a covenant running with the land only; other deeds provide 'that the foregoing restrictions are substantially similar to those contained in deeds to adjoining lot owners and are for the mutual protection of such lot owners';

"15. That the deeds contain the following paragraph: 'The property shall be used for residential purposes only and shall be occupied and owned by only people of the white race';

* * *

"17. That sometime during the period of 1954 the owners of lots in Block 7 acquiesced in the construction of a public library on Lot 10-A of Block 7. . . . Sometime during the period of 1969 and 1970 multi-family apartments . . . were constructed on Lots 8 and 9 of Block 7. . . .

"18. . . . [T]hat plaintiff Thomas Hawthorne and wife . . . executed documents entitled 'Release and Covenant Not to Sue' on the 29th day of October, 1975, allowing the use of Lot 4 Block 7 for a branch office of Mutual Savings and Loan Association. . . ."

Based upon these and other findings, none of which were excepted to by the parties, Judge Smith concluded as a matter of law: (1) The language of the deeds originally conveying the subdivided lots of Blocks 7 and 9 evidenced an intent of the grantors, George Stephens and the Stephens Company, to develop the lots in accordance with a uniform plan to establish "single family residences"; (2) the placement of the apartments and the library in Block 7 constituted fundamental departures from the general plan and thereby destroyed "the purposes of the restrictions"; (3) the 1975 release by the Hawthornes of their right to sue regarding the planned bank office constituted "a waiver of their respective rights"; and (4) Block 9 was separable from Block 7 and was not to be included in the judgment. Judge Smith then denied plaintiffs' prayer for injunctive relief.

The Court of Appeals reversed, 43 N.C. App. 436, 259 S.E. 2d 591 (1979). Although it agreed with the trial court's conclusion that Blocks 7 and 9 were subdivided subject to a common plan of residential restriction, the Court of Appeals held that no fundamental or radical changes had occurred in the area such as to preclude enforcement of the restrictive covenant. It also concluded that all plaintiffs had standing to maintain suit on the covenant and were entitled to injunctive relief. We agree with the Court of Appeals' opinion in all respects.

[1] The restriction imposed upon defendants' lot by virtue of the covenant placed in the original deed provides that the land "shall be used for residence purposes only." There is no express language in the deed that the covenant should run with the land. Thus, in the *absence* of indications that the land was subdivided and first conveyed as part of a general plan by the original grantor to impose uniform restrictions upon all the parcels conveyed, this covenant would stand merely as an obligation personal to and enforceable only by the original grantor. *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E. 2d 824 (1971); *Sheets v. Dillon*, 221 N.C. 426, 20 S.E. 2d 344 (1942). However, when an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee. Moreover, the right to enforce may be exercised by subsequent grantees against any purchaser who takes land in the tract with notice of the restrictions. A purchaser has such notice whenever the restrictions appear in a deed or in any other instrument in his record chain of title. These principles are well established in the common law of this and many other states. *See Sedberry v. Parsons*, 232 N.C. 707, 62 S.E. 2d 88 (1950); *Homes Co. v. Falls*, 184 N.C. 426, 115 S.E. 184 (1922); Annotation, 51 A.L.R. 3d 556, § 9(c) (1973).

[2, 3] That a subdivision has been developed pursuant to a "general plan" of common restrictions is, of course, a statement of legal conclusion that the grantor *intended* to impose a common servitude upon all the parcels conveyed for the mutual benefit of all the grantees and their successors. The primary test of the existence of such intent is whether substantially similar restrictions were made to apply to all lots of like character or similarly situated. *Sedberry v. Parsons, supra.* The record here reveals that the original deed to each and every parcel subdivided from the tracts comprising Blocks 7 and 9 contained the residential restriction at issue. This fact alone provides ample support for the trial court's conclusion that the original grantors, George Stephens and Stephens Company, intended to develop these tracts in Myers Park as residential subdivisions. *Cf. Brenizer v. Stephens*, 220 N.C. 395, 398, 17 S.E. 2d 471, 473 (1941), wherein this Court noted that the territory in Block 7 "is uniformly

covered by deeds containing, amongst other covenants, restrictions that the property shall be used only for residential purposes."

[4] Defendants however contend that the residential restrictions can be enforced against them only by those property owners whose lot lines physically "adjoin"—in the sense of touch—the bounds of defendants' Lot 6. Although it is true that the original deed to Lot 6, and those to several other lots in Block 7, contain language to the effect that the restrictions imposed are for the "mutual protection" of "adjoining lot owners," we do not read this language as limiting enforcement of the restriction to such owners. Deeds to some of the other lots in the block contain no such language; still others provide that the restrictions "shall be covenants running with the land." Such differences in the general phraseology embracing the restriction do not themselves defeat the inference of a common plan, *see Higdon v. Jaffa*, 231 N.C. 242, 250, 56 S.E. 2d 661, 667 (1949), nor do we believe that they should be interpreted to effect a difference in the enforcement rights of the respective owners in Block 7. Such a literal construction would fly in the face of the evident intent of the grantors to ensure the continuing residential character of the area. Under the precise factual circumstances of this case, then, we agree with the Court of Appeals that the grantors intended the residential covenant to be enforceable by *all* the owners in Block 7.

[5] Moreover, we approve the Court of Appeals' decision that the lot owners in Block 9 are entitled to the benefits of the covenants affecting the lot in Block 7. Although this Court has held on several occasions that various subdivisions in Myers Park should be treated as separable units, *see Tull v. Doctors Building, Inc.*, 255 N.C. 23, 37, 120 S.E. 2d 817, 826 (1961) and cases cited therein, these holdings merely emphasized that Myers Park, comprising some 1100 acres, was not planned as a single development. Whether the adjacent Blocks 7 and 9 were developed as a single unit depends, as the Court of Appeals correctly pointed out, upon whether the grantors treated the two tracts as one and intended to impose uniform and simultaneous restrictions on the use of the lots in both. *Craven County v. Trust Co.*, 237 N.C. 502, 75 S.E. 2d 620 (1953). Blocks 7 and 9 were platted together. Sales of the lots in each tract began at substantially the same time. The restrictions imposed by the deeds to the lots in both tracts are substan-

tially similar. These and other factors disclosed in the trial court's findings of fact support the conclusion that the two blocks were developed as one parcel, subject to common restrictions intended for the mutual benefit of the property owners in both tracts. We agree, therefore, with the holding that lot owners in Block 9 are proper parties to enforce a restrictive covenant affecting defendants' lot in Block 7.

Defendants strenuously contend that even if there was once a common plan of residential development in Block 7, there have now occurred such fundamental changes in the residential character of the neighborhood as to render the continued enforcement of the residential restriction inequitable. In support of this proposition, defendants point to the extensive commercial use of properties on Providence Road, adjacent to *but outside of* the boundaries of the Block 7 subdivision. The trial court furthermore made findings of fact to the effect that a public library and apartment houses had been constructed on certain lots within Block 7. None of these factors, however, provide a basis for the legal conclusion that the residential purpose of the subdivision's development has been frustrated.

Whether the growth and general development of an area represents such a substantial departure from the purposes of its original plan as equitably to warrant removal of restrictions formerly imposed is a matter to be decided in light of the specific circumstances of each case. "No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement." *Rombauer v. Compton Heights Christian Church*, 328 Mo. 1, 17-18, 40 S.W. 2d 545, 553 (1931), *quoted in Tull v. Doctors Building, Inc., supra*, 255 N.C. at 39, 120 S.E. 2d at 828.

[6, 7] In light of this general principle, we note first that the trial court properly excluded defendants' proffer of evidence of changes occurring outside the subdivision area. The fact that adjoining or surrounding property is now used for commercial purposes has no bearing on the character of the subdivision itself; an island is not made a swamp simply because waves lick at its shores. *Higdon v. Jaffa, supra*, 231 N.C. 242, 56 S.E. 2d 661; *Brenizer v. Stephens, supra*, 220 N.C. 395, 17 S.E. 2d 471. Next,

we cannot agree with the trial court's conclusion that placement in Block 7 of the apartment buildings violated the restrictive covenant. Our case law has followed the general rule that a restrictive covenant limiting the use of property to residential purposes does not, in the absence of further qualifying language, prohibit the erection of apartments. *Huntington v. Dennis*, 195 N.C. 759, 143 S.E. 521 (1928); Annotation, 99 A.L.R. 3d 985, § 4 (1980); *Cf. DeLaney v. VanNess*, 193 N.C. 721, 138 S.E. 28 (1927) ("dwelling" restriction permits apartment buildings).

[8] Finally, we agree with the Court of Appeals that neither acquiescence by the property owners in Block 7 to the construction of a public library nor the express contractual waiver of enforcement rights by plaintiffs Hawthorne to the use of a former residence as a branch bank office preclude the continued validity of the residential restriction. As to the public library, all the lot owners in Blocks 7 and 9 contractually released their enforcement rights with an express reservation of the right to enforce the residential restriction as to all the remaining lots in the subdivision. Similarly, the waiver agreement respecting the branch bank office expressly retained the right to enforce "any and all restrictions . . . which may be violated by the use of any other lots in Block 7 by the respective owners thereof." It is clear, then, that none of the lot owners who signed these agreements intended to waive generally and forever their legal right to maintain the restriction. Their acquiescence in these two changes within the covenanted area does not constitute a general waiver unless the changes themselves are so radical "as practically to destroy" the residential character of the neighborhood. *See Tull v. Doctors Building, Inc., supra.* Yet the facts disclosed by the record compel an opposite conclusion. Although obviously not a residence itself, the library building is an unobtrusive brick structure surrounded by trees and situated on a spacious lot at the southernmost corner of Block 7. The proposed home for the bank office is a gray stone residence which, at the time of the trial of the present action, had not been used other than for residential purposes. The agreement waiving the residential restriction with respect to the use of this building provides that its exterior structural appearance will continue to be maintained. Under these circumstances, the library and the proposed bank office represent no more than minor intrusions upon the quiet enjoyment of an area

otherwise residential in nature. That their presence might violate the letter of the covenant does not bar plaintiffs' efforts to prevent further erosion of the integrity of their neighborhood.

[9] Defendants' contention that the residential restriction must fall because of its conjunction with an unenforceable racial restriction is meritless. Although expressed as part of the same covenant, the two clauses are so clearly independent that one need not infect the other. The trial court and the Court of Appeals were correct in ignoring the racial restriction. *See, e.g., Callahan v. Weiland*, 279 So. 2d 451 (Ala. 1973); *Brideau v. Grissom*, 369 Mich. 661, 120 N.W. 2d 829 (1963).

A residential restriction such as that involved in the instant case is a distinct and valuable property right. Certainly it is so regarded by those who purchase realty in reliance upon it. When its purpose is clear, its operation clearly expressed, and its imposition violative of no rules of equity or public policy, it should be given effect to protect those who are entitled to its benefit. So it is in the case before us. Accordingly, the decision of the Court of Appeals that plaintiffs are entitled to injunctive relief should be and is hereby affirmed.

Affirmed.

Justice HUSKINS and BRITT dissent.

JAMES KEITH SMITH v. FIBER CONTROLS CORPORATION

No. 108

(Filed 15 July 1980)

1. Sales § 22— product liability—action barred by contributory negligence

Plaintiff's contributory negligence will bar his recovery in a product liability action founded on negligence to the same extent as in any other negligence case.

2. Negligence § 13— contributory negligence—when applicable

In order for contributory negligence to apply, it is not necessary that plaintiff be actually aware of the unreasonable danger of injury to which his conduct exposes him; rather, plaintiff may be contributorily negligent if his

conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.

3. **Sales § 22; Negligence § 34.1— negligent design and manufacture of machine—contributory negligence of person unclogging machine**

In an action to recover for injuries to plaintiff's left hand allegedly caused by defendant's negligence in the design and manufacture of a "fine opener" machine, there was sufficient evidence to carry the case to the jury on the issue of plaintiff's contributory negligence in placing his hand inside the fine opener soon after the power to it had been cut without first determining that no parts were moving inside it where it tended to show that plaintiff was employed as a picker tender; plaintiff noticed that material had clogged or wrapped up around the feeder rollers of a fine opener machine and told the operator of the fine opener to shut down the machine and he would clear the wrap-up; about a minute after power to the fine opener had been cut, plaintiff inserted his left hand into a narrow opening between the feeder rollers and a metal guard covering the beater roller; plaintiff's hand was struck by the beater roller, which was still coasting on its axle; plaintiff knew that the picker he normally operated utilized large, spiked cylinders to process stock and that these cylinders rotated at high speeds and continued to coast after power to the picker had been cut; plaintiff knew that the movement of these cylinders could be verified by observing the movement of a belt-pulley assembly on the outside of the picker; the morning before his accident plaintiff had observed the interior of a fine opener and was thus aware that the fine opener functioned in much the same manner as the picker and that a rapidly rotating spiked cylinder was located behind the feeder rollers; and, as in the picker, part of the belt-pulley assembly which turned the spiked cylinder in the fine opener was visible on the outside of the machine.

4. **Negligence § 13.1— contributory negligence not barred by failure to warn of danger**

The determination of contributory negligence cannot be predicated on the automatic application of per se rules which do not take into account the particular state of facts presented. Accordingly, the defense of contributory negligence is not invariably barred by defendant's failure to warn of a danger when the facts indicate that plaintiff, in the exercise of ordinary care, should have known of the danger of injury independent of any warning by defendant.

5. **Sales § 22— product liability case—strict liability inapplicable**

The doctrine of strict liability will not be applied in product liability cases.

Justice BROCK did not participate in the consideration and decision of this case.

APPEAL by plaintiff from decision of the Court of Appeals, 44 N.C. App. 422, 261 S.E. 2d 247 (1980) (*Wells, J.*, dissenting), affirming judgment of *Hairston, J.*, entered 30 September 1978 in IREDELL Superior Court.

Prior to 6 August 1975 plaintiff—who was nineteen years old—had been employed for three months at Carolina Mills, a yarn mill. On 6 August 1975 plaintiff received serious injuries to his left hand as he attempted to unclog a "fine opener" machine manufactured by defendant. Raw fiber enters the fine opener machine through two feeder rollers. Immediately behind the feeder rollers is a heavy cylinder covered with sharp, wire-wound teeth, a "beater roller," which spins at a high rate of speed, blending the fiber. The beater roller continues to rotate or "coast" on its axle for a few minutes after power to the machine is shut off. Prior to the accident, plaintiff noticed that material had clogged, or "wrapped up," around the feeder rollers on the fine opener machine. Plaintiff told the operator of the fine opener that if he would shut the machine down, plaintiff would take care of the wrap-up. About a minute after power to the machine had been cut, plaintiff inserted his left hand into a narrow opening between the feeder rollers and a metal guard which covered the beater roller. Plaintiff's hand was immediately struck by the beater roller, which was still coasting on its axle. As a result of this accident, most of plaintiff's left hand had to be amputated.

Plaintiff instituted this action to recover damages for his injuries, alleging, in pertinent part, that his injuries had been proximately caused by defendant's negligence in the design and manufacture of the fine opener.

Plaintiff presented evidence tending to show that the design of the fine opener did not adequately guard against contact with the beater roller; that defendant did not design the machine to comply with the recommendations of a national Textile Safety Code then in effect; that guards sufficient to make the fine opener safe could have been installed for under $100; that defendant had not affixed a warning on the fine opener which advised a user of the danger posed by the beater roller.

Evidence for the defendant tended to show, in pertinent part, that plaintiff failed to exercise ordinary care for his own safety and should have known, independent of any warning, that there was a danger that the beater roller would continue to coast after power to the fine opener was shut off. This evidence will be discussed in greater detail in the opinion.

The issues of negligence and contributory negligence were submitted, and the jury found defendant and plaintiff negligent and contributorily negligent, respectively, as alleged.

Plaintiff appealed to the Court of Appeals. That court affirmed with Judge Wells dissenting. Plaintiff appeals as of right to the Supreme Court pursuant to G.S. 7A-30(2).

Homesley, Jones, Gaines, Dixon & Fields, by Edmund L. Gaines, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray by James P. Crews, and Rodney A. Dean, for defendant appellee.

HUSKINS, Justice.

Since the result we reach is dictated by the jury's answer to the contributory negligence issue, we assume arguendo, without deciding, that there was sufficient evidence of defendant's negligence to carry the case to the jury and support an affirmative answer to the first issue. Moreover, by reason of the verdict on the contributory negligence issue, we find it unnecessary to determine whether the evidence shows that plaintiff was guilty of contributory negligence as a matter of law.

This is a product liability action tried upon a theory of negligence. Plaintiff seeks to recover for injuries which he alleges were proximately caused by defendant's negligence in the design and manufacture of a "fine opener," a machine used in the yarn industry to mix and blend fibers.

[1] In a product liability action 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." W. Prosser, Law of Torts § 102 at 670 (4th ed. 1971). *Accord,* 1 L. Frumer & M. Friedman, Products Liability § 13.01 (1979); *Douglas v. Mallison,* 265 N.C. 362, 144 S.E. 2d 138 (1965); G.S. 99B-4(3) (effective 1 October 1979). In the instant case, defendant's evidence, elicited through cross-examination, tended to show that plaintiff's contributory negligence was a proximate cause of the injury complained of. Accordingly, the contributory negligence issue was submitted to the jury, and plaintiff was found contributorily negligent as alleged.

The dispositive issue on this appeal is whether there was sufficient evidence to carry the case to the jury on the question of contributory negligence.

An apt statement of the doctrine of contributory negligence for purposes of this appeal is found *Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965):

> "Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury. [Citations omitted.]
>
> Plaintiff is subject to this universal rule, but his conduct on this occasion 'must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, *either actual or constructive*, or the danger of injury which his conduct involves.' [Citations omitted]" (Emphasis added).

[2] In order for contributory negligence to apply, it is not necessary that plaintiff be *actually aware* of the unreasonable danger of injury to which his conduct exposes him. Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety. *See* Restatement (Second) of Torts § 466(b) and Comment f, W. Prosser, *supra*, § 65 at 424. *Accord, Clark v. Roberts, supra.* Simply put, the existence of contributory negligence does not depend on plaintiff's *subjective* appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an *objective* standard of behavior—"the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Clark v. Roberts, supra.*

[3] Viewed in the light most favorable to defendant, the evidence pertinent to contributory negligence tends to show that

plaintiff had been employed at Carolina Mills, a yarn mill, for three months. The only job he held at the mill during this period was that of a picker tender. Plaintiff stood at a huge machine called a picker—a long machine that beat and fluffed the material as it passed through and, in the final stage, pressed it into a roll. Plaintiff's job was to remove the rolls of material as they emerged from the picker. Additionally, plaintiff was to make minor repairs on the picker. Among the minor repairs plaintiff engaged in was the removal of "wrap-ups" from the machinery. "A wrap-up is when material wraps around a roller or any part of a machine that prevents it from doing its job sufficiently." (Plaintiff's testimony, Record p. 70.)

Plaintiff knew that inside the picker were heavy, spiked cylinders which turned rapidly while the picker was operating and continued to turn for some time or "coast" after the picker was shut down. "The pickers do have wheels or rotors or boards or whatever inside that turn with these spikes on them to open the fibers. I knew that those heavy rollers were inside the pickers. When you would turn off the picker the heavy rollers and cylinders inside would continue to turn. I knew that on the machines that did this kind of job there were heavy rotors that continued to turn after the power was turned off. . . ." (Plaintiff's testimony, Record p. 106) Plaintiff further testified that the rotors were turned by leather belts on pulleys which were visible on the outside of the machine. When the picker was shut down, plaintiff could tell whether something was still moving inside the picker by observing whether the leather belt and pulley were still turning.

The machine on which plaintiff was injured, the "fine opener," was connected to the picker through ductwork. The material processed through the fine opener would pass through this ductwork to the picker. Together, the fine opener and picker constituted a "blendline." Plaintiff knew the fine opener did not look like a picker but knew it did essentially the same thing. He knew that the fine opener received unprocessed, raw stock through two "feeder rollers"; that immediately upon passing through these feeder rollers the stock was met by the "beater roller," or a large, rapidly rotating cylinder with thousands of steel spikes.

The beater roller was covered by a metal guard which came down to the feeder rollers located directly in front of the beater roller. There was an opening of one inch to one and one-eighth inches between the end of the metal guard and the feeder rollers. This opening was "certainly big enough to put your hand in." (Plaintiff's testimony, Record p. 176) The opening was sealed by a leather strip which rested on the top roller. The one and one-eighth inch clearance allowed the upper feeder roller to move upward as stock entered the feeder rollers on its way to the beater roller. The beater roller was located one and one-half inch behind the feeder rollers. Like the cylinders inside the picker, the beater roller continued to coast for several minutes after the power was shut off. Moreover, as in the picker, part of the belt-pulley assembly which turned the beater roller was visible on the outside of the fine opener. This belt and pulley assembly continued to move after power to the fine opener had been shut off.

On the morning of the accident, plaintiff had been called by his supervisor to unfasten a wrap-up on another fine opener. The cover of this fine opener had been removed. Thus, shortly before his accident, plaintiff had an opportunity to observe at close quarters the interior of a machine identical to the one on which he was injured. Plaintiff could see the spiked beater roller, the proximity of the beater roller to the feeder rollers where the material was wrapped, and could note that the fine opener processed stock in much the same manner as the picker, *i.e.*, through rapidly spinning spiked cylinders which opened, blended and fluffed the moving stock.

At 1 p.m. on the day of the accident, plaintiff noticed that the back hopper of the picker was not receiving sufficient stock from the fine opener. He proceeded to the fine opener and noticed a wrap-up on the feeder rollers. This wrap-up was impeding the flow of stock through the fine opener. Plaintiff told the operator of the fine opener that he would unfasten the wrap-up, and asked him to shut down the machine. About a minute after the machine had been shut down, plaintiff intentionally inserted his left hand through the narrow clearance between the feeder rollers and the metal guard. Plaintiff's hand was instantly caught in the rapidly turning beater roller. At no time prior to inserting his hand inside the fine opener did plaintiff check to see whether there were any moving parts inside the fine opener.

Plaintiff testified that he had no idea there were any parts moving inside the fine opener when he inserted his left hand through the narrow clearance between the feeder rollers and the metal guard. However, as previously noted, plaintiff's *subjective* awareness of danger is not determinative on the issue of his contributory negligence. Rather, the determinative factor is whether plaintiff's conduct conforms to the standard of behavior required of all persons having the capacity to care for their own safety—"the care an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury." *Clark v. Roberts, supra.*

In the instant case there is sufficient evidence from which a jury could conclude that in placing his hand inside the fine opener without pausing to check for moving parts inside, plaintiff failed to use the care that an ordinarily prudent person would have exercised under similar circumstances to avoid injury. The evidence indicates that plaintiff was aware of circumstances which would have alerted an ordinarily prudent person to the strong possibility that a large, steel spiked cylinder would continue to coast rapidly inside the fine opener after power to that machine had been shut off. Plaintiff knew that the picker he normally operated utilized large, spiked cylinders to process stock; that these cylinders rotated at high speeds and that they continued to coast rapidly after power to the picker had been cut; that the movement of these cylinders could be verified by observing the movement of the belt-pulley assembly mounted on the outside of the picker. Significantly, the morning before his accident plaintiff had observed the interior of another fine opener and thus was aware that the fine opener functioned in much the same manner as the picker, that one and one-half inches behind the feeder rollers was a large, rapidly rotating, spiked cylinder which opened and blended the raw stock. Finally, the evidence indicates that, as in the picker, part of the belt-pulley assembly which turned the spiked cylinder was visible on the outside of the fine opener.

In sum, the evidence permits a jury finding that plaintiff, in the exercise of ordinary care, should have been aware of the danger that the spiked beater roller inside the fine opener would continue to coast rapidly after power to that machine had been cut; that plaintiff was contributorily negligent in placing his hand inside the fine opener so soon after power to it had been cut

without first determining that no parts were moving inside it; and that plaintiff's negligence was a proximate cause of the injuries for which he seeks damages. Accordingly, we hold that the court did not err in submitting contributory negligence to the jury. The verdict conclusively bars plaintiff's recovery in this action.

[4] The issue of defendant's negligence was submitted to the jury and answered against defendant. On that issue, the trial judge instructed the jury, in pertinent part, that defendant would be guilty of negligence if it failed to exercise reasonable care in warning a user of facts which made the fine opener machine dangerous for use. Plaintiff and amicus curiae contend that the defense of contributory negligence is inapplicable as a matter of law where defendant's negligence consists of a failure to warn a user of latent dangers in a product. They argue that a defendant's failure to warn per se precludes a plaintiff from ever being in a position reasonably to ascertain that a danger of injury exists. This contention is without merit. The argument overlooks the fundamental principle that, like any standard requiring a determination of "reasonableness," the existence of contributory negligence depends upon the particular facts of each case. "When all is said, each case must be decided according to its own peculiar state of facts. This is true because the true and ultimate test is this: what would a reasonably prudent person have done under the circumstances as they presented themselves to the plaintiff." *Thomas v. Motor Lines*, 230 N.C. 122, 52 S.E. 2d 377 (1949). It follows, therefore, that the determination of contributory negligence cannot be predicated on the automatic application of per se rules which do not take into account the particular state of facts presented. Accordingly, the defense of contributory negligence is not invariably barred by defendant's failure to warn of a danger when, as in this case, the facts indicate that plaintiff, in the exercise of ordinary care, should have known of the danger of injury independent of any warning by defendant. *Accord, Parris v. M. A. Bruder & Sons, Inc.*, 261 F. Supp. 406 (E.D. Pa. 1966). *See generally*, L. Frumer and M. Friedman, *supra*, § 8.06.

Plaintiff brings forward several assignments relating to the judge's charge to the jury. We have carefully reviewed these assignments and find them to be without merit. Further discussion will serve no useful purpose. The charge correctly states the law and applies it to the varying aspects of the evidence in a man-

ner calculated to assist the jury in understanding the case and in reaching a correct verdict.

[5] Finally, plaintiff and amicus curiae urge this Court to adopt the doctrine of strict liability in product liability actions. In response to this request, we note that recent comprehensive legislation in this area by the General Assembly does not adopt strict liability in product liability cases. *See* G.S. 99B-1, *et seq.* (the 1979 Products Liability Act). Significantly, the Products Liability Act specifically reaffirms the applicability of contributory negligence as a defense in product liability actions. G.S. 99B-4(3). Suffice it to say, that given the recent legislative activity in this area, we are not presently inclined to consider adoption of the rule of strict liability in product liability cases.

In summary, the issue of contributory negligence was properly submitted to the jury after a trial free from prejudicial error. Accordingly, the verdict must stand.

For the reasons stated, the decision of the Court of Appeals is

Affirmed.

Justice BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JEROME PHILLIPS

No. 29

(Filed 15 July 1980)

1. Jury § 6.3— voir dire examination—collective examination of jurors required—no error

Defendant was not prejudiced where defense counsel, during selection of the jury, asked a juror if defendant would have to prove anything to her before he would be entitled to a verdict of not guilty, and the court requested counsel to direct questions of a general nature to all twelve jurors, since the question which prompted the court's intervention is disapproved; counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided; counsel should not argue the case in any way while questioning the jurors;

counsel should not engage in efforts to indoctrinate, visit with or establish "rapport" with jurors; jurors should not be asked what kind of verdict they would render under certain named circumstances; and questions should be asked collectively of the entire panel whenever possible.

2. Constitutional Law § 31— indigent defendant—provision of daily transcript not required

A daily transcript is not a necessary expense of representation which the State is required to provide an indigent defendant under G.S. 7A-450(b).

3. Arrest and Bail § 3.1— warrantless arrest—probable cause

An officer had probable cause to arrest defendant for first degree burglary where the officer was well acquainted with defendant; he had heard a resident of the burglarized home describe the intruder as a black male, 18-20 years old, wearing a dark coat, a tan cap and medium to dark pants, six feet tall and weighing about 185 pounds, with no facial hair; the officer knew that description fit defendant; he also knew that defendant had committed this type of crime in the same town on previous occasions and that he had been convicted of larceny at least six times and of breaking and entering and larceny three or four times; and the officer found defendant one block from the crime scene wearing a dark blue coat, medium blue pants and generally fitting the description of the intruder.

4. Searches and Seizures § 44— motion to suppress—voir dire hearing—findings of fact not made

Denial of defendant's motion to suppress items taken from him incident to his warrantless arrest without specific findings of fact did not constitute prejudicial error, since the evidence on voir dire was uncontradicted and since the court did specifically conclude that the officer had probable cause to effect the arrest.

5. Burglary and Unlawful Breakings § 5— first degree burglary—sufficiency of evidence

Evidence in a first degree burglary case was sufficient to be submitted to the jury where it tended to show that a witness awoke at 2:30 a.m. and saw a man standing in her bedroom; the description of the intruder given to police officers by the witness fit defendant; the witness screamed and the intruder, after unsuccessfully trying to cover the witness's mouth with his hands, dived out of the window; the window screen had been removed; the witness's watch and bracelet were missing from her bedroom; defendant was apprehended about one and one-half hours later one block from the crime scene; the watch and bracelet were found on defendant's person; and defendant's shoe soles and heels matched the shoe impressions on the ground under the witness's bedroom window.

Justice BROCK did not participate in the consideration or decision of this case.

DEFENDANT appeals from judgment of *Long, J.*, 2 July 1979 Session, PITT Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with first degree burglary.

Wendy Jones, fourteen-year-old daughter of Wilbur Jones, testified that on 28 April 1979 she awoke about 2:30 a.m. and saw a man standing in her bedroom. She screamed and he tried, without success, to cover her mouth with his hands. He was a black man about 6 feet tall, weighing 180 pounds and wearing a dark coat, a tan cap with a snap-on bill, and what appeared to be medium blue pants. When she continued to scream, the man dived out of the window. Wendy stated that the screen on the window to her room had been removed; and that her gold watch with a mesh band and her metal bracelet, together worth about $30, were missing from the bedroom. Miss Jones identified State's Exhibit 1 as her watch and State's Exhibit 2 as her bracelet. She could not identify defendant but said he was about the same size as the intruder.

Chief of Police Burney testified that in answer to a call he went to the Jones residence where Wendy Jones told him a young black male about eighteen to twenty years old, wearing a dark coat and a tan cap, had been in her room but fled through the window when she continued to scream. Chief Burney said he examined the premises and found that the intruder had entered Wendy's room on the west side where the window screen was lying out in the yard; that he found shoe prints around the garbage can in the shrubbery under the window.

Chief Burney further testified that after talking with the Jones family he began patrolling. About one and one-half hours later he saw three persons, including defendant Jerome Phillips, on East Third Street, only one block from the crime scene. He carried defendant to the police station, advised him of his rights, and asked to see the bottom of his shoes. He wanted to look at his shoe heels because he had observed shoe prints at the Jones residence. Defendant lifted his foot and Chief Burney caught defendant by the ankle to hold the shoe up while he looked at it. When he did so, Chief Burney felt some type of metal object at the side of defendant's leg under the sock. He ran his hand into defendant's sock to determine what the object was and found a

bracelet in the left sock and a watch in the right sock, State's Exhibits 1 and 2. Defendant offered no explanation as to how he came into possession of the bracelet but said the watch belonged to his "sister" Janice Taylor. Defendant first said he had been asleep at the residence of Helen Collins at the time the burglary was allegedly committed but later changed his story and said he had been sleeping in a truck behind Walter Gardner's house, next door to the Helen Collins residence.

Janice Taylor testified that defendant never got the watch, State's Exhibit 1, from her; that she had never seen that watch before the trial and had never conversed with defendant concerning it.

Further evidence for the State tends to show that Helen Collins lived with a man named Hosie Gordon at 822 East Third Street in Ayden; that no truck of any kind was parked on those premises on the night in question; that defendant had not slept there that night; that there was a truck at the Gardner residence but it was an old abandoned truck which was locked up and full of debris.

Defendant's shoe soles and heels matched the shoe impressions on the ground under the bedroom window of Wendy Jones.

Defendant offered no evidence. The jury convicted him of burglary in the first degree, and he was sentenced to life imprisonment. He appeals, assigning errors noted in the opinion.

Rufus L. Edmisten, Attorney General, by William F. Briley, Assistant Attorney General, for the State.

Robert L. White, for defendant appellant.

HUSKINS, Justice.

[1] When jury selection began, defense counsel asked Juror No. 2 if defendant would have to prove anything to her before he would be entitled to a verdict of not guilty. At that point, the court requested counsel to direct questions of a general nature to all twelve jurors. The court then permitted counsel to ask all twelve jurors if they would follow the court's instructions, the burden being on the State to prove the guilt of the defendant beyond a reasonable doubt. Nothing in the record indicates that

the court imposed any further restriction upon defense counsel's ability to examine each prospective juror individually. Defendant took exception to the ruling and this constitutes his first assignment of error.

No violation of G.S. 15A-1214(c) is shown. The action of the trial judge did not deprive defendant of his right to question each prospective juror personally and individually concerning his fitness and competency to serve as a juror and did not impair counsel's ability to determine whether there was a basis for a challenge for cause or whether a peremptory challenge should be exercised with respect to any particular juror. G.S. 15A-1214(c) does not preempt the exercise of all discretion by the trial judge during the jury selection process. It remains the prerogative of the court to expedite jury selection by requiring certain general questions to be submitted to the panel as a whole. *State v. Leonard*, 296 N.C. 58, 248 S.E. 2d 853 (1978). The presiding judge has the duty "to supervise the examination of prospective jurors and to decide all questions relating to their competency." *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975), *death sentence vacated*, 428 U.S. 903 (1976). *Accord, State v. Leonard, supra; State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). The trial judge has broad discretion "to see that a competent, fair and impartial jury is impaneled and rulings of the trial judge in this regard will not be reversed absent a showing of abuse of discretion." *State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979).

In the instant case, no abuse of discretion is shown. In fact, it is the duty of the judge to expedite the trial in every appropriate way. Here, the question which prompted the court's intervention is disapproved. Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by which the juror should be guided. Counsel should not argue the case in any way while questioning the jurors. Counsel should not engage in efforts to indoctrinate, visit with or establish "rapport" with jurors. Jurors should not be asked what kind of verdict they would render under certain named circumstances. Finally, questions should be asked collectively of the entire panel whenever possible. Here, the patient trial judge was simply trying to expedite jury selection by requiring *appropriate* interrogation. He is to be commended for it. Defendant's first assignment of error is overruled.

Defendant's motion for a daily transcript of the trial proceedings was denied. The ruling of the court in this respect constitutes his next assignment of error.

G.S. 7A-450(b) provides in pertinent part that when a defendant is determined to be indigent and entitled to counsel, as here, "it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." Defendant contends that a daily transcript comes within the ambit of "other necessary expenses." For reasons which follow, we find no merit in this contention.

[2] Defendant relies on the statute together with the holdings in *Douglas v. California*, 372 U.S. 353, 9 L.Ed. 2d 811, 83 S.Ct. 814 (1963), and *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956). Neither *Douglas* nor *Griffin*, nor the statute itself, nor any other authority of which we are aware, suggests that a daily transcript is a necessary element of defense which the State is required to supply to an indigent defendant. Moreover, the case before us is a very simple one. It was tried in two days. To suggest that a daily transcript was necessary to enable counsel to make an adequate defense is rather ludicrous. We hold that a daily transcript is not a necessary expense of representation which the State is required to provide an indigent defendant under G.S. 7A-450(b). Moreover, defendant has not been deprived of any of his constitutional rights by the State's failure to furnish a daily transcript. This assignment is overruled.

[3] Defendant moved to suppress the watch and bracelet (S-1 and S-2) on the ground that Chief Burney had no probable cause to arrest him and that the subsequent search of his person was therefore unlawful. Denial of this motion constitutes defendant's third assignment of error.

G.S. 15A-401(b) provides in pertinent part that an officer may arrest without a warrant for an offense committed out of his presence if he has probable cause to believe that the person arrested has committed a felony. The record in this case shows that Chief Burney was well acquainted with defendant; that he had heard Wendy Jones describe the intruder as a black male, eighteen to twenty years old, wearing a dark coat, a tan cap and medium to dark pants, 6 feet tall and weighing about 185 pounds, with no facial hair. *Chief Burney knew that description fit defend-*

ant Phillips. He also knew Phillips had committed this type of crime in the town of Ayden on previous occasions; that he had been convicted of larceny at least six times and of breaking and entering and larceny three or four times. Thus, when Chief Burney found defendant one block from the crime scene wearing a dark blue coat, medium blue pants and generally fitting the description of the intruder, he had probable cause to believe that defendant had committed the felony of burglary and to arrest him without a warrant. *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971).

Probable cause for an arrest has been defined as "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant." 5 Am. Jur. 2d, Arrest § 44. The existence of probable cause so as to justify an arrest without a warrant "is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved." 5 Am. Jur. 2d, Arrest § 48. *Accord, State v. Phifer*, 297 N.C. 216, 254 S.E. 2d 586 (1979); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971); *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949).

The totality of the facts and circumstances known to Chief Burney would have constituted probable cause for the issuance of an arrest warrant. It is immaterial that some of the information he possessed might not be competent in evidence at the trial. *State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970); *Brinegar v. United States, supra.*

[4] Defendant further contends in connection with this assignment that, even if probable cause for arrest without a warrant existed, the trial court failed to make the necessary findings of fact

and conclusions of law following the voir dire upon his motion to suppress and for that reason, if no other, the evidence should have been suppressed.

G.S. 15A-977(d) provides that if the motion to suppress is not determined summarily, the judge must make the determination after a hearing and findings of fact. Subparagraph (f) provides that "the judge must set forth in the record his findings of fact and conclusions of law."

The evidence on voir dire consisted only of the testimony of Chief Burney. His testimony was unrefuted. Following it, the court made the following entry:

> "The Court finds that under the undisputed evidence offered in this case, on this point, the officer had probable cause to effect the arrest and that the subsequent search was not outside of the scope of the permitted authority of the arresting officer. Therefore, I would deny the motion to suppress. Further findings will be made in due course when the Court has had time to prepare those in the absence of the jury."

No further findings appear of record, and we assume the trial judge simply forgot to make them.

When the competency of evidence is challenged and the trial judge conducts a voir dire to determine admissibility, the general rule is that he should make findings of fact to show the bases of his ruling. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975). If there is a material conflict in the evidence on voir dire, he *must* do so in order to resolve the conflict. *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934 (1971). If there is no material conflict in the evidence on voir dire, it is not error to admit the challenged evidence without making specific findings of fact, although it is always the better practice to find all facts upon which the admissibility of the evidence depends. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976); *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976). In that event, the necessary findings are implied from the admission of the challenged evidence. *State v. Whitley*, 288 N.C. 106, 215 S.E. 2d 568 (1975).

Here, although further findings were inadvertently omitted by the trial judge, he did specifically conclude that the officer had

probable cause to effect the arrest—a conclusion based upon the State's undisputed evidence. There was no evidence to the contrary. Under the circumstances of this case, we hold that denial of the motion to suppress without further specific findings of fact does not constitute prejudicial error. Defendant's third assignment of error is overruled.

During the cross-examination of State's witness Wendy Jones defense counsel asked her to "tell us everything that you told the Chief," and the witness replied that she had done so. Counsel then said: "Tell us again, Miss Jones, if you don't mind." The court intervened, saying: "In the interest of time, I would not want the witness to have to repeat everything she says she may have told him. If you have any specific other questions, you may ask her." Defendant's Exception No. 9 is based on that ruling. On redirect examination of this witness, the prosecutor asked her to "state for us again how the height, body build, of the man you saw in your room compared with the height and body build of the defendant." Defendant's objection was overruled, and the witness answered "about the same." Defendant's Exception No. 10 is based on this ruling. Defendant's Assignment of Error No. 4 is based on his Exceptions 9 and 10. Defendant contends that when the court would not permit him to elicit from the witness a repetition of her testimony but later permitted the prosecution to do so, it amounted to an expression of opinion by the court and was tantamount to judicial leaning.

There is no merit in this assignment. Repetitious questions are properly excluded, *State v. Coleman*, 215 N.C. 716, 2 S.E. 2d 865 (1939), and the admission or exclusion of answers to repetitious questions are matters within the sound discretion of the trial court. There is nothing in these rulings to show bias on the part of the court.

[5] Defendant's motion for nonsuit at the close of the State's evidence was overruled, and properly so. The motion required the trial court to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged had been

committed and that defendant committed it, the motion for nonsuit should be overruled. *State v. Jolly*, 297 N.C. 121, 254 S.E. 2d 1 (1979). The evidence in this case, when so considered, points unerringly to defendant as the burglar. There is substantial evidence of every material element of the offense, including the intent to steal. It was therefore a question for the jury. Defendant's fifth assignment is overruled.

Defendant's motions to set aside the verdict and for a new trial are merely formal and require no discussion. Such motions are addressed to the discretion of the trial court and refusal to grant them is not reviewable. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). These motions were properly denied. Defendant's sixth assignment of error is overruled.

Defendant has had a fair trial free from prejudicial error. The verdict and judgment must therefore be upheld.

No error.

Justice BROCK did not participate in the consideration and decision of this case.

JESSE H. JONES, JR. v. DEPARTMENT OF HUMAN RESOURCES

No. 105

(Filed 15 July 1980)

State § 12— State employee discharged—procedural due process denied—reinstatement without back pay proper

Where a permanent State employee is dismissed for inadequate performance of duty reasons, without sufficient warnings as required by G.S. 126-35, upon reinstatement of the employee, the decision of whether to award back pay and benefits is within the sound discretion of the Personnel Commission. The Commission did not abuse its discretion in this case by reinstating petitioner but failing to award him back wages where the Commission made no legal conclusion concerning the substantive grounds for petitioner's dismissal and concluded the only right of petitioner which was violated was his right to procedural due process, that is, to the warnings required by G.S. 126-35; petitioner's right to receive the warnings was safeguarded by the Commission's action in reinstating him to his prior position of employment; and the Commission could properly conclude that any award greater than reinstatement would be a windfall to petitioner rather than compensation.

ON the State's petition for discretionary review of an opinion of the Court of Appeals reported at 44 N.C. App. 116, 260 S.E. 2d 654 (1980) (opinion by *Judge Martin (Robert M.)*, with *Judges Arnold* and *Erwin* concurring in result), affirming judgment of the Superior Court, WAKE County, entered 23 August 1978, reversing a decision of the State Personnel Commission (Commission). The State's motion for discretionary review pursuant to G.S. 7A-31 was allowed on 6 February 1980.

In brief summary the facts pertinent to this action are as follows: Petitioner, Jesse Jones, was employed by the Governor Morehead School as a Boiler Room Operator I in June or July 1976. His job duties consisted of taking readings on the boiler gauges and water levels and recording them in a log book. Petitioner was employed on an 8:30 p.m. to 4:30 a.m. shift, and each hour he was to make rounds of the School's campus, and record the boiler readings in his log book. Petitioner was also required to make simple repairs on the boilers and to provide for their regular maintenance. Petitioner was given specific instructions that if he found unknown persons on the campus during his rounds he was to ask them to leave. If they refused to leave he was instructed to obtain license numbers and call the Raleigh Police or the State Security Force. The record indicates petitioner specifically failed to follow these instructions concerning trespassers on two separate occasions.

On 3 December 1976 petitioner was dismissed from his job following one oral warning concerning failure to keep the boiler room clean, and a written warning containing six areas in which petitioner's job performance needed to be improved. [The record is unclear as to whether or not petitioner ever received this written warning.] Petitioner appealed his dismissal through the departmental grievance machinery, and on 17 February 1978 was granted a hearing before E. D. Maynard III, hearing officer for the State Personnel Commission. Hearing officer Maynard concluded that the respondent, Department of Human Resources, had not presented sufficient evidence to justify petitioner's summary dismissal for inappropriate personal conduct on the grounds of intoxication, and that petitioner's dismissal for causes relating to performance of duties was ineffective due to the respondent's failure to provide petitioner with sufficient warnings as required by G.S. 126-35. Hearing officer Maynard therefore recommended:

(1) that petitioner be reinstated to his former position or to comparable employment in another agency, (2) that petitioner be reimbursed for his net pecuniary loss from December 3, 1976 through his re-employment, (3) and (4) that all petitioner's sick and vacation leave and other benefits be restored as if the petitioner had never been dismissed, and (5) that appropriate attorney's fees be awarded to counsel representing petitioner.

On 28 April 1978 the Commission considered petitioner's dismissal and adopted *in toto* the findings of fact and conclusions of law of the hearing officer. However the Commission failed to adopt in full the hearing officer's recommendations for relief. Refusing to adopt recommendations 2 through 4, the Commission recommended an award of appropriate attorney's fees and recommended that petitioner be reinstated to his former position as Boiler Room Operator I. The Commission ruled "[i]n view of Petitioner's work record . . . it would be inappropriate to award back pay in this matter. . . ."

Petitioner Jones appealed to the Superior Court, Wake County, which made its own findings of fact and concluded that "the Commission's failure and refusal to reimburse the Petitioner for his net pecuniary loss from December 3, 1976 to the date of reinstatement was arbitrary, capricious and contrary to the Commission's own findings and conclusions." Judge Bailey therefore reversed the Commission and ordered not only that petitioner be reinstated, but that he be compensated for his lost wages from December 3, 1976 to May 2, 1978.

From this order the Department of Human Resources appealed to the Court of Appeals which affirmed the Superior Court, Wake County, and we granted discretionary review of that opinion. Other facts necessary to the decision of this case will be discussed in this opinion.

Attorney General Rufus L. Edmisten by Ann Reed, Special Deputy Attorney General, and Robert R. Reilly, Assistant Attorney General, for the Department of Human Resources-appellant.

Hollowell, Silverstein, Rich and Brady, by Ben A. Rich, for the petitioner-appellee.

BROCK, Justice.

This petition presents for our review, the scope of discretion lodged with the North Carolina Personnel Commission in determining remedies for wrongfully discharged, permanent State employees. For the purposes of this action, all parties have recognized that the petitioner is entitled to the protections of Article VIII, Chapter 126, of the General Statutes. Also, the appellant, Department of Human Resources, does not take exception to the Commission's conclusion that the petitioner was dismissed for insufficient cause due to lack of warnings prior to dismissal. Appellant seeks our review of the Court of Appeals' holding that having found and concluded that petitioner was wrongfully discharged, the Commission's failure to grant to petitioner all of the relief authorized by statute constituted an arbitrary abuse of discretion.

For the reasons which follow we disagree with the Court of Appeals and hold that where a permanent State employee[1] is dismissed for performance of duty reasons, without sufficient warnings as required by G.S. 126-35, upon reinstating the employee the decision whether or not to award back pay and benefits is within the sound discretion of the Personnel Commission. We also hold that in this case the Commission's failure to award such benefits did not constitute an abuse of this discretion.

Pursuant to G.S. 126-35 a permanent State employee may be dismissed for one of two reasons: (1) Inadequate performance of duties, or (2) personal conduct detrimental to State service. An employee may be suspended without warning for causes relating to personal conduct. In this case, however, hearing officer Maynard concluded that there was insufficient evidence to warrant petitioner's summary dismissal on the grounds of personal conduct. The only other ground upon which petitioner could be discharged from his employment with the Governor Morehead School was for inadequacy in his job performance. Prior to

1. G.S. 126-39 Session Laws C. 866, S. 15 (1977) provides that for purposes of employee grievances brought pursuant to Article VIII of Chapter 126 of the General Statutes (except for appeals brought under G.S. 126-16 and 126-25), the term permanent State employee means one who has been employed continuously by the State of North Carolina for 5 years at the time of the act, grievance or employment practice complained of. Under the amended statute, petitioner, who was employed approximately 6 months, would not be protected by the act.

dismissal for causes relating to performance of duties, a permanent State employee is entitled to three separate warnings that his performance is unsatisfactory. He must receive: (1) an oral warning explaining how he is not meeting the job's requirements; (2) a second oral warning outlining his unsatisfactory performance with a follow-up letter reviewing the points covered by the oral warning; (3) a final written warning setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action, and the employee's appeal rights. Only after receiving these three separate warnings may an employee be dismissed for unsatisfactory performance of duties. G.S. 126-35; *see also* 1 N.C. A.C. 8 J. 0605. It was solely on the basis of inadequate warnings prior to dismissal that hearing officer Maynard concluded petitioner had been dismissed without sufficient cause. On this basis, he recommended petitioner's reinstatement as well as full back pay and benefits from the date of petitioner's employment termination. Whether or not the Commission, after adopting hearing officer Maynard's findings and conclusions, had the discretion not to follow his recommendations regarding restitution is the question now facing us.

G.S. 126-4 outlines the powers and duties of the State Personnel Commission. G.S. 126-4(9) provides that the Commission shall investigate complaints and hear appeals of employees, and issue "binding corrective orders or such other *appropriate action* concerning employment, promotion, demotion, transfer, discharge and reinstatement in all cases *as the Commission shall find justified.*" (Emphasis ours.) G.S. 126-37 also provides the Commission, or its designee, with power to investigate and conduct hearings upon any case appealed to the Commission. After such a hearing the Commission is *authorized* "to reinstate any employee to the position from which he has been removed . . . , to direct other suitable action to correct the abuse *which may include* the requirement of payment of any loss in salary. . . ." (Emphasis ours.) In *Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 479, 164 S.E. 2d 2, 6 (1968), Justice Huskins writing for the Court stated "[i]f the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. [Citation omitted.]" From the clear statutory language quoted above it is apparent the Legislature intended the Commission to have a certain degree of discretion in

the fashioning of remedies for wrongfully discharged, permanent State employees.

We must now turn to the question of whether or not on the facts of this case the Commission abused the discretion vested in it by the Legislature in refusing to award back wages and benefits to the petitioner. Pursuant to G.S. 126-37 and 126-4(9), noted above, the Commission has the authority to fashion appropriate remedies for unjustified dismissal of permanent State employees. In reviewing the Commission's choice, this Court, or any reviewing court, is limited to a review of whether or not the Commission acted capriciously, arbitrarily, in bad faith or disregard of the law. *Burton v. Reidsville*, 243 N.C. 405, 90 S.E. 2d 700 (1955). Chief Justice Barnhill writing for the Court in *Burton* noted:

> "when the jurisdiction of a court is properly invoked to review the action of a public official to determine whether he, in choosing one of two or more courses of action, abuses his discretion, the court may not direct any particular course of action. It only decides whether the action of the public official was contrary to law or so patently in bad faith as to evidence arbitrary abuse of his right of choice." *Id.* at 407, 90 S.E. 2d at 702, 703.

In the case *sub judice* the Commission found and concluded that petitioner was dismissed for insufficient cause because the employer failed to give petitioner sufficient warnings prior to dismissal. We are concerned in this case with the exercise of discretion by the Commission where a permanent State employee is discharged without adequate warnings as required by statute. Therefore we do not reach the question of the Commission's discretion in formulating remedies where an employee has been discharged without "just cause." *See* G.S. 126-35.

In *Carey v. Piphus*, 435 U.S. 247, 55 L.Ed. 2d 252, 98 S.Ct. 1042 (1978), parents of two elementary school students, acting as guardians ad litem, sought damages pursuant to 42 U.S.C. 1983, alleging that the suspension of their children from school for drug use without a prior hearing, violated the children's due process rights under the Fourteenth Amendment. The Supreme Court agreed that the dismissal constituted a violation of the students' due process rights and held that "the denial of procedural due

process should be actionable by nominal damages [not to exceed $1.00] without proof of actual injury." *Id.* at 266, 267, 55 L.Ed. 2d at 267, 98 S.Ct. at 1054. In so holding the court recognized the independent need to protect the procedural due process rights of an accused. However, the Supreme Court agreed with the 7th Circuit Court of Appeals and refused to award more than nominal damages, noting that the failure to accord procedural due process could not properly be viewed as the *cause* of the suspensions, and to award greater than nominal damages would "constitute a windfall rather than compensation. [Citations omitted.]" *Id.* at 260, 55 L.Ed. 2d at 263, 98 S.Ct. at 1050.

The Supreme Court's reasoning in *Piphus* is directly applicable to the case at bar. Failure on the part of the Governor Morehead School to provide petitioner with adequate warnings cannot be considered the *cause* of his dismissal. Petitioner's due process right to receive the warnings required by G.S. 126-35 was safeguarded by the Commission's action in reinstating petitioner to his prior position of employment. Based on the factual findings, without abusing its discretion, the Commission could properly conclude that any award greater than reinstatement would be a "windfall" to the petitioner. Since the Commission made no legal conclusion concerning the substantive grounds for petitioner's dismissal and concluded the only right of petitioner which was violated was his right to procedural due process, we cannot conclude that the Commission abused its discretion, acted in bad faith, or contrary to law by limiting petitioner's remedies for a solely procedural violation of the State employee's grievance procedure.

We therefore hold that pursuant to Article VIII of Chapter 126 of the General Statutes, the Personnel Commission has discretion in fashioning the remedies to be awarded to permanent State employees discharged without procedural due process. We also hold that in this case where the employee was dismissed without warnings as required by G.S. 126-35, the Commission did not abuse its discretion in refusing to award petitioner back pay and benefits. Due to this conclusion the decision of the Court of Appeals is reversed, and this cause is remanded to the Court of Appeals for further remand to the Superior Court for entry of an order vacating the judgment of Superior Court entered in this

cause on 23 August 1978, and entering in lieu thereof a judgment affirming the decision of the State Personnel Commission.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MICHAEL DENNIS MOORE

No. 119

(Filed 15 July 1980)

1. **Criminal Law § 90.2— impeachment of own witness by prior inconsistent statements**

In this prosecution for felonious burning of a dwelling house in which defendant's sister testified as a witness for the State that she told her landlord to call the fire department because his tenant house was on fire and that she did not know how the fire started, the trial court committed prejudicial error in permitting the State to impeach its own witness by presenting testimony by the landlord that defendant's sister told him to call the fire department and the sheriff because defendant was setting the house on fire.

2. **Criminal Law § 90.2— erroneous declaration of witness as hostile witness**

The trial court erred in declaring defendant's sister, who had been called as a witness for the State, a hostile witness and in permitting the State to impeach her testimony with prior inconsistent statements she had made to a police officer where the State was not misled, surprised or entrapped by the sister's testimony but was aware that she intended to repudiate statements she allegedly made to the officer.

3. **Arson § 5— felonious burning of dwelling—no necessity for instruction on attempted arson**

The evidence in a prosecution for felonious burning of a dwelling house did not require the court to instruct on the lesser included offense of attempted arson.

APPEAL by defendant from *Reid, J.* at the 12 November 1979 Session of NASH County Superior Court.

Defendant was charged in an indictment, proper in form, with the unlawful, willful, felonious and malicious burning of a dwelling house.

The State's evidence tended to show that on 14 March 1979 at approximately 8:00 p.m. Ms. Geraldine King was at home cooking supper for her family and there were ten other people in the

house. She went into the front room of the house and observed that the arm of the couch was on fire and that her brother, the defendant, was sitting on the couch. She touched him and asked him what was wrong and he told her to take her hands off him. She went into the bedroom to get her clothes and papers to take them out of the house and defendant followed her. In the bedroom, he kicked over a wood heater with fire in it but she did not know whether a fire started as a result of this event.

Ms. King went to the home of her landlord, Buck Baker, and reported to him that his tenant house was on fire. She testified that she told him that she did not know how the fire started. Baker testified that when Ms. King came to his home she "and Annette said call the fire department and the Sheriff that Mike [the defendant] was setting the house on fire." Baker told his wife to call the fire department and he went to the tenant house where he found everything "messed up" in every room.

A volunteer fireman who went to the scene testified that he had to push his way past the defendant who had told him that he should not go in because the premises were burning. Robbins observed the burning couch and flames in a room beyond the front room but he could not get to the other room. The fire was extinguished in about thirty minutes and each room was found to have been burned and to have been damaged by smoke and water.

Defendant's sister, Glenda Joy Moore, was called as a witness for the State and after a *voir dire* was conducted she was declared a hostile witness and the State was allowed to impeach her. In the presence of the jury, she testified that she did not remember giving Captain Reams of the Nash County Sheriff's Department a statement concerning her knowledge of how the fire started. She testified that she did not tell Officer Reams that she saw her brother strike several matches and "put the third match on the couch;" that she did not tell the officer that as she sat on the couch the defendant "struck a match and said he was going to set the house on fire;" and that she did not know that her brother set fire to the house.

Annette Moore testified for the defendant. She stated that she was in the kitchen and her nephew came in and told her that the house was on fire. She did not go into the front room and she

did not see the defendant set fire to the couch. She went with her sister, Geraldine King, to Buck Baker's house and told him that the house was on fire but she did not remember saying that anyone set the house on fire.

The jury found the defendant guilty as charged and upon imposition of a life sentence he appealed to this Court.

Other facts relevant to the decision will be related in the opinion.

Robert A. Evans for the defendant.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General Isaac T. Avery III for the State.

COPELAND, Justice.

Defendant maintains that it was error to permit Baker to testify over objection as to a prior statement made to him by Geraldine King when the prior statement impeached material portions of her testimony. Defendant further argues that the trial judge erred in ruling that Glenda Joy Moore was a hostile witness and that the State could impeach her when the State was not misled, surprised or entrapped by her testimony when it was well aware prior to calling her that she intended to deny making certain statements to Officer Reams. We agree with defendant's position on both grounds; therefore, he is awarded a new trial.

[1] The rule in criminal cases is that neither the district attorney nor the defendant can impeach his own witness by evidence that the character of the witness is bad or that he has made prior statements inconsistent with or contradictory to his trial testimony. *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973) (State cannot impeach its own witness in a criminal case); *State v. Austin*, 299 N.C. 537, 263 S.E. 2d 574 (1980) (defendant cannot impeach his own witness in a criminal case); *cf.* G.S. 1A-1, Rule 43(b) (a party may impeach an unwilling or hostile witness in a civil case).

Ms. King testified that she told Baker to call the fire department because his tenant house was on fire but she did not know how the fire started. Baker testified that Ms. King told him to call the fire department and the Sheriff because "Mike [the de-

fendant] was setting the house on fire." The trial judge instructed the jury to consider this testimony by Baker solely for the purpose of corroborating Ms. King's testimony if the jury found that it did so corroborate.

The rule is that prior consistent statements of a witness offered to strengthen his credibility are properly admitted with a limiting instruction when so requested. 1 Stansbury's N.C. Evidence §§ 51-52 (Brandis Rev. 1973) and cases cited therein. Such statements are admissible only when they are in fact consistent with the witness' testimony. *State v. Warren*, 289 N.C. 551, 223 S.E. 2d 317 (1976); *State v. Bagley*, 229 N.C. 723, 51 S.E. 2d 298 (1949); *State v. Melvin*, 194 N.C. 394, 139 S.E. 762 (1927). When the statements are generally consistent with the witness' testimony, slight variations will not render them inadmissible. *State v. Warren, supra.* Such variations affect only the weight of the evidence which is for the jury to determine. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972) *cert. denied sub nom.*, 410 U.S. 958 (1973); *State v. Norris*, 264 N.C. 470, 141 S.E. 2d 869 (1965).

Prior inconsistent statements do not corroborate a witness' testimony. To the contrary, such statements contradict and thus impeach the witness' testimony. The State is not entitled to offer such "new" evidence under the claim of corroboration. *State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). Additional and contradictory testimony is not admissible as corroborative evidence. *State v. Warren, supra; State v. Fowler*, 270 N.C. 468, 155 S.E. 2d 83 (1967).

The admission of this portion of Baker's testimony was prejudicial error because without this statement to directly implicate the defendant as the perpetrator of a crime, the State's case consisted solely of circumstantial evidence showing that the couch was on fire and that defendant was sitting there. Even though this is enough evidence to take the case to a jury, there is a reasonable possibility that a different result would have been reached had this direct testimony implicating the defendant not been admitted; therefore, its admission was prejudicial error. *State v. Warren, supra; State v. Fowler, supra.*

[2] It was also error for the trial judge to declare Glenda Joy Moore a hostile witness and allow the State to impeach her testimony with prior inconsistent statements.

There is an exception to the anti-impeachment rule and it provides that the State may impeach its own witness when it has been misled, surprised or entrapped to its prejudice. *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976); *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975). Surprise does not mean mere disappointment; it means taken unawares by the witness' testimony. *State v. Pope, supra.* The trial judges exercise their discretion on this issue when the State moves to have a witness declared hostile. A *voir dire* hearing is usually necessary in order to make this determination.

When there is no surprise, the State cannot impeach its own witness. However, the State is not bound by what that witness says. The district attorney may show by other witnesses or other competent and admissible evidence that the facts are different from those to which the witness has testified. *Id.* In availing itself of this opportunity the State cannot confront the witness with his prior inconsistent statements in order to impeach his credibility and the State cannot have another witness testify as to statements made to him by the first witness under the claim of corroboration when in fact the statements do not corroborate but instead contradict and impeach the first witness' trial testimony.

When the State has been misled, surprised or entrapped to its prejudice by the testimony of an evasive or hostile witness then, in the trial judge's sound discretion, the district attorney may call the witness' attention to his prior inconsistent statements for the purpose of refreshing his memory, awakening his conscience or impeaching his credibility. *Id.; State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954). When the witness "has treacherously induced the State to call him by representing that he will give testimony favorable to its contentions and then surprises the solicitor with testimony contra, cross-examination is not likely either to 'refresh his memory' or 'awaken his conscience.'" *State v. Pope, supra* at 512, 215 S.E. 2d at 145. The primary value of confronting the witness with his prior inconsistent statements when he has entrapped the State in this manner is to impeach his credibility. *Id.*

Here, the trial judge declared Moore a hostile witness and allowed the State to impeach her with prior inconsistent statements. There was no determination at the end of the *voir*

dire that the State had been misled, surprised or entrapped to its prejudice. Indeed, the record discloses that just the opposite is true. The trial judge stated in the absence of the jury when Moore was called to the stand:

> "For the purpose of the record, it is my understanding that the district attorney has been advised and the defense attorney is aware of the fact that there was a statement made by this witness to Captain Reams at some time following the fire. That there is some information in the possession of both the district attorney and the defense attorney that the witness intends to repudiate in whole or in part the statement which she made to Sheriff Reams, is that correct?
>
> [District attorney]: Yes.
>
> [Defense attorney]: Yes.
>
> And further the State by virtue of that repudiation intends to move the Court to have this witness declared to be a hostile witness, in order that the State may cross-examine and impeach the witness, is that correct?
>
> [District attorney]: Yes sir."

Thus, it is clear that the State was not misled, surprised or entrapped by the witness' trial testimony and the witness was improperly declared to be a hostile witness in violation of the rule as set forth in *Smith* and *Pope*. This impeachment testimony was prejudicial to the defendant because it tended to show that the witness was lying when she refused in her testimony to directly implicate the defendant as the one who started the fire. There is a reasonable possibility that without this testimony a different result would have been reached at the trial since without such evidence the State's case was wholly one of circumstantial evidence that the defendant started the fire. *See, State v. Fowler, supra.*

[3] Defendant further argues that the trial judge erred in refusing to instruct on the lesser included offense of attempted arson. There is no merit to this contention. There is a duty to charge on any lesser included offense raised by the evidence even in the absence of a request for the instruction. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). In *State v. Green*, 298 N.C. 793,

259 S.E. 2d 904 (1979) this Court found that there was sufficient evidence to warrant a charge on attempted arson. Defendant's statement to the police was that he had poured diesel fuel around the front door of the house and had trouble getting the fire to start when the occupants of the house caused him to run away. The occupants testified that they saw gas running under the *front* door and discovered fire at the *back* door. Here, there is evidence that the fire started on the couch where defendant was seated. There is no evidence of attempted arson. A fireman testified that every room in the house was damaged by fire. Defendant either did or did not start that fire; therefore, he is either guilty as charged or not guilty.

For the two reasons discussed above defendant is given a

New trial.

BOARD OF TRANSPORTATION v. TERMINAL WAREHOUSE CORPORATION; PILOT FREIGHT CARRIERS, INC., LESSEE

No. 57

(Filed 15 July 1980)

1. **Eminent Domain § 2.2— action to condemn portion of property—dead-ending of highway not compensable**

The trial court did not err in instructing the jury that defendant was not entitled to compensation for the decreased value of its land as a result of the dead-ending and reclassification of the roadway which abutted on its property, even if property belonging to defendant was appropriated, since noncompensable injuries to property values resulting from enactment of valid traffic regulations do not become compensable merely because some property was coincidentally taken in connection with a project which put the regulations into effect.

2. **Eminent Domain § 2.6; Waters and Watercourses § 1— change in surface water drainage—reasonable use rule inapplicable in condemnation proceedings**

The reasonable use rule, pursuant to which a possessor of land incurs liability for interference with the flow of surface waters only when such interference is unreasonable and causes substantial damage, governs the disposal of surface waters among private parties and has no application in condemnation proceedings, since the principle of reasonable use is superseded by the constitutional mandate that just compensation must be paid when private property is taken for public use.

3. **Evidence § 47.1 — expert testimony — necessity for statement of facts as basis for opinion**

Whether an expert testifying from personal knowledge must first relate the underlying facts before giving his opinion is a matter left to the sound discretion of the trial judge.

APPEAL by defendants from decision of the Court of Appeals, 44 N.C. App. 81, 260 S.E. 2d 696 (1979) (*Robert Martin, J.*, dissenting in part), affirming judgment of trial court.

This is a proceeding initiated by plaintiff to condemn a .16 acre strip of land from a 2.85 acre tract owned by defendant Terminal Warehouse Corporation.

Defendant Terminal Warehouse Corporation has a trucking terminal warehouse on its tract which it leases to defendant Freight Carriers, Inc. Since giving joint oral notice of appeal from the judgment of the trial court, defendants have proceeded as a single appellant under Rule 5, Rules of Appellate Procedure. Hereafter, we will refer to the parties appellant in the singular.

The tract owned by defendant was rectangular. On its western border the tract had a frontage of 296 feet on a roadway then known as U.S. Highway 74. Legal access to this roadway, which runs from north to south, was available along the entire 296 feet of frontage. Gashes Creek entered the tract from the west and flowed eastward on a course roughly parallel with and slightly north of its southern boundary.

The .16 acre strip taken is a narrow triangular strip lying along the southern boundary of the 2.85 acre tract. The strip fronted the roadway for 38 feet at the western boundary and ran back to a point at the southeast corner of the tract. A substantial portion of the condemned strip was covered by the stream bed of Gashes Creek.

The .16 acre strip was condemned as part of a project to relocate U.S. Highway 74 and to construct a portion of Interstate 40 and its connectors near Asheville in Buncombe County. Pursuant to this project, the portion of U.S. 74 which abutted on defendant's property was dead-ended at a point about 50 feet north of the southwest corner of defendant's 2.85 acre tract and reclassified as a secondary road. Additionally, it was necessary to divert the course of Gashes Creek as it entered defendant's tract

in order to accommodate the new drainage patterns resulting from the dead-ending of former U.S. 74 and the construction of Interstate 40. Accordingly, a concrete retaining wall was built on the appropriate strip which caused Gashes Creek to enter the strip from the south and make a 90 degree turn eastward onto the old stream bed. Formerly, Gashes Creek entered the appropriated strip from the west. The concrete retaining wall received runoff from new culverts installed to accommodate the runoff from Interstate 40 and relocated U.S. 74.

The sole issue tried in this proceeding was the just compensation due defendant for the taking of its property. Defendant presented evidence tending to show, in pertinent part, that in times of heavy rainfall occurring since construction of the project, water from Gashes Creek comes over the top of the concrete retaining wall and flows upon defendant's remaining land, hindering its use as a trucking terminal. Evidence was also presented tending to show that trucks from the freight terminal had to travel an extra mile over connector roads in order to reach relocated U.S. 74.

The matter was submitted to a jury which awarded compensation of $2,000. Defendant appealed to the Court of Appeals contending that the trial judge erroneously instructed the jury on how they were to assess damages from the relocation of U.S. 74 and the diverted flood waters of Gashes Creek in determining just compensation for defendant. The Court of Appeals affirmed with Judge Robert Martin dissenting in part. Defendant appealed as of right to the Supreme Court pursuant to G.S. 7A-30(2).

Rufus L. Edmisten, Attorney General; R. Bruce White, Jr., Senior Deputy Attorney General, by Frank P. Graham, Assistant Attorney General, for plaintiff appellee.

Bennett, Kelly & Cagle, P.A., by Harold K. Bennett, for defendant appellant.

HUSKINS, Justice.

Pursuant to its power of eminent domain, plaintiff initiated condemnation proceedings and took possession of a .16 acre strip of land from a 2.85 acre tract owned by defendant.

The sole issue tried in this condemnation proceeding was the just compensation due defendant for the taking of its property for public use. The questions raised concern the elements of damages which should be considered in determining the amount of compensation to be paid the landowner.

Defendant's property was taken pursuant to a project involving the relocation of U.S. Highway 74 and the construction of a portion of Interstate 40. Formerly, defendant's property abutted on a roadway which was a part of U.S. 74, a major traffic artery. As a result of the project, this roadway was dead-ended and downgraded into a secondary road. Highway 74 was relocated to the west. Defendant must now travel approximately one mile by connector roads to reach relocated Highway 74. Defendant's access to the roadway remains unchanged. Only the status of the roadway has changed.

[1] Defendant contends the trial court erred in instructing the jury that defendant was not entitled to compensation for the decreased value of its land as a result of the dead-ending and reclassification of the roadway which abuts on its property.

Defendant concedes the enactment of valid traffic regulations which change traffic patterns and cause circuity of travel but do not foreclose reasonable access to the roadway from abutting property are proper exercises of the police power for which no compensation need be made. *See Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E. 2d 376, *cert. denied*, 382 U.S. 822 (1965); *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E. 2d 732 (1962). Nor does defendant deny that the dead-ending and reclassification of the roadway on which its property abutted are valid traffic regulations for which no compensation is ordinarily required. Defendant does contend, however, that the above principles apply only where no land is taken in connection with a project to put the new traffic regulations into effect. If such a taking occurs, defendant argues, a landowner is entitled to be compensated for the decrease in value to his remaining land caused by the traffic regulations.

This contention was advanced and specifically rejected in *Barnes v. Highway Commission, supra*, 257 N.C. at 518. Noncompensable injuries to property values resulting from enactment of valid traffic regulations do not become compensable merely

because some property was coincidentally taken in connection with a project which put the regulations into effect. "The fact that [such] loss is coincident with an appropriation of land in no way changes the noncompensable character of the damage." *Richley v. Jones*, 38 Ohio St. 2d 64, 310 N.E. 2d 236 (1974). The decrease in land values attributable to diminished traffic flow or circuity of travel is not appreciably enhanced by the additional fact that property has been appropriated. Fairness dictates that the burden of such noncompensable injury be equally absorbed by all similarly situated landowners without regard to whether the property of some has been appropriated. In the instant case, the evidence indicated that the property values of neighboring landowners whose property was not appropriated were equally affected by the relocation of U.S. 74. It would be manifestly unfair to deny compensation to these landowners and yet allow defendant compensation for the same injury on the basis of a coincidental appropriation of land by the Board of Transportation.

Accordingly, we hold that the trial court did not err in instructing the jury that defendant was not entitled to compensation for the decreased value of its land as a result of the dead-ending and reclassification of the roadway which abuts on its property.

The .16 acre strip of land taken in this proceeding was used to redirect the course of Gashes Creek. A concrete retaining wall was built on this strip which caused Gashes Creek to enter the strip from the south and then caused it to make a 90 degree turn eastward. Gashes Creek was relocated in order to accommodate new drainage patterns resulting from the dead-ending of former U.S. 74, which ran along the western boundary of defendant's 2.85 acre tract and the construction of a portion of Interstate 40 and its connector roads.

Defendant's evidence indicated that in times of heavy rain Gashes Creek overflowed the retaining wall built by plaintiff. This water flowed on defendant's remaining land and hindered its use as a trucking terminal. Defendant's evidence further indicated that the retaining wall could not handle the increased volume of runoff being discharged into it at greater velocities from the altered drainage basin created by Interstate 40 and its connectors.

[2] The second question presented for review is whether the trial court correctly instructed the jury on how it should consider evidence of damage to defendant's remaining land caused by the diverted flood waters of Gashes Creek. The trial court instructed that such damages could be considered only if plaintiff had unreasonably interfered with the flow of surface waters. This instruction applies the rule of reasonable use with respect to surface water drainage adopted in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977). Under this rule, a possessor of land incurs liability for interference with the flow of surface waters only when such interference is "unreasonable and causes substantial damage." *Id.*, 293 N.C. at 216.

Defendant contends the reasonable use rule adopted in *Pendergrast* concerns itself with the balancing of conflicting private interests in the use of water resources and should have no application in a condemnation proceeding, which involves a taking of private property for public use. We agree. For reasons which follow, we hold that the reasonable use doctrine, which governs the disposal of surface waters among private parties, has no application in condemnation proceedings.

Pendergrast v. Aiken, supra, was a dispute between private landowners in which it was alleged that defendants had improperly diverted surface waters onto plaintiff's property and caused them damage. The discussion in that case related exclusively to the rights and duties among private landowners with respect to surface water drainage. Specifically, the doctrine of reasonable use adopted in *Pendergrast* defines the extent to which a private landowner may interfere with the flow of surface water on the property of another. This doctrine presupposes that all private landowners must accept a reasonable amount of interference with the flow of surface water by other private landowners if a fair and economical allocation of water resources is to be achieved. The conclusion reached in *Pendergrast* is that a rule of reasonable use with respect to water rights is the best way to promote the orderly utilization of water resources by private landowners.

In the instant case, however, the interference with the drainage of surface waters is attributed not to a private landowner but to an entity possessing the power to appropriate private property

for public use. Where the interference with surface waters is effected by such an entity, the principle of reasonable use articulated in *Pendergrast* is superseded by the constitutional mandate that "[w]hen private property is taken for public use, just compensation must be paid." *Eller v. Board of Education*, 242 N.C. 584, 89 S.E. 2d 144 (1955). It follows, therefore, "that a body possessing the right to exercise the power of eminent domain is required to make compensation for damages to land not taken resulting from the obstruction or diversion of, or other interference with, the natural flow of surface water, by a public improvement, *although a private landowner would not be liable in damages under the same circumstances*, upon the ground that such obstruction, diversion, or interference is a taking or damaging of such land within the meaning of a constitutional provision requiring compensation to be made on the taking or damaging of private property for public use." 26 Am. Jur. 2d, Eminent Domain § 195 at 877 (emphasis added). *Accord, Dunlap v. Light Co.*, 212 N.C. 814, 195 S.E. 43 (1938); 2A Nichols, Law of Eminent Domain § 6.446 (rev. 3d ed. 1979); Annot., 128 A.L.R. 1195 § 3 (1940).

Dunlap v. Light Co., supra, was an action by a private landowner against a power company having the power of eminent domain. It should be noted that at the time *Dunlap* was decided this Court had already adopted the rule of reasonable use with respect to riparian rights. *See* Aycock, Introduction to Water Use Law in North Carolina, 46 N.C. L. Rev. 1, 6 (1967). Plaintiff in *Dunlap* alleged two distinct causes of action against defendant power company: (1) unreasonable interference with his riparian rights, (2) appropriation or taking of his property without just compensation. Plaintiff's evidence tended to show that due to the peculiar location of his property, the release of water from defendant's hydroelectric dam on the Yadkin River was eroding the river bank of his property in a manner not common to other lower riparian owners. The sole issue on appeal was whether plaintiff's evidence was sufficient to survive nonsuit. After an extensive and illuminating discussion of the reasonable use rule, Justice Barnhill (later Chief Justice) concluded that plaintiff's evidence failed to show that defendant was making an unreasonable use of the Yadkin River to the hurt and detriment of plaintiff's riparian rights. Nonetheless, Justice Barnhill further

concluded that plaintiff's evidence was sufficient to establish a taking of property without just compensation:

> "The evidence tends to show that in this respect, to some extent at least, by reason of the peculiar location of the plaintiff's land not common to other lower riparian owners the defendant is taking or appropriating the property of the plaintiff without compensation. If these facts are established to the satisfaction of the jury the defendant is indebted to the plaintiff for the reasonable value of the land taken, or the damage so done, without regard to the reasonableness of the use it is making of the waters of Yadkin River in the operation of its plant. It cannot take the property of the plaintiff without just compensation, even though it is a result of a reasonable use of its own property."

Similarly, in the instant case, the Board of Transportation is indebted to defendant for any damages caused to defendant's remaining land by the diverted flood waters of Gashes Creek without regard to whether the diversion of Gashes Creek on the .16 acre strip appropriated constitutes a reasonable interference with the flow of surface waters. Application of the reasonable use rule in the present context precludes defendant from receiving the just compensation to which he is constitutionally entitled. Accordingly, we conclude that the trial court committed prejudicial error in instructing the jury to apply the rule of reasonable use as enunciated in *Pendergrast v. Aiken, supra*, when considering the damages caused to defendant's remaining land by the diverted flood waters of Gashes Creek.

Defendant has also brought forward a number of assignments relating to certain evidentiary rulings of the trial court.

Defendant contends the trial court erred in excluding the opinion of its expert witness as to how many times Gashes Creek would leave its banks in the area where its course had been diverted. Presumably, the challenged opinion would have been based on facts within the expert's own knowledge. However, prior to being asked for his opinion, the expert did not present the data he had utilized to arrive at his conclusions.

[3] The question presented is whether an expert who is testifying from personal observation is required to relate the underlying facts prior to giving his opinion.

In general, when the facts upon which an expert bases his opinion "are all within the expert's own knowledge, he may relate them himself and then give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination." 1 Stansbury, N. C. Evidence § 136 at 446 (Brandis rev. 1973). Conversely, the trial judge, in his discretion, may require the expert to state the supporting facts before expressing his opinion. *State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924). It thus appears that whether an expert testifying from personal knowledge must first relate the underlying facts before giving his opinion is a matter left to the sound discretion of the trial judge.

In the instant case, defendant's expert did not testify as to his knowledge of the average rainfall in the Gashes Creek watershed and other pertinent factors prior to giving his opinion as to how often Gashes Creek would leave its banks at the point where its course had been diverted. The better and safer practice dictates that the expert first testify to these underlying facts and then express his opinion. *See State v. Hightower, supra.* In any event, the trial judge properly exercised his discretion, as the rule permits, in sustaining objection to the challenged opinion.

The remaining evidentiary assignments are not likely to recur on retrial of this case and therefore merit no discussion.

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court where it will be certified to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

LARRY EUGENE COBLE v. CHERYL BANKS COBLE (KLASSETTE)

No. 70

(Filed 15 July 1980)

1. Divorce and Alimony § 24; Parent and Child § 7— support of child—duties of father and mother

G.S. 50-13.4(b) and (c) clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children

where circumstances preclude placing the duty of support upon the father alone.

2. Divorce and Alimony § 24.9— child support—income and needs of parties—insufficiency of findings to support conclusions

The trial court's finding of fact that defendant mother's monthly income was $483.32 plus an indeterminable amount earned from overtime work while her monthly expenses were approximately $510 and that plaintiff father's net monthly income was $825 while the financial needs of the children averaged $432 did not support the trial court's conclusion as to either plaintiff's financial need for child support assistance or defendant's financial ability to provide it; furthermore, while there was evidence in the record from which findings could be made which would support the conclusion that plaintiff was in need of financial assistance from defendant, what the evidence did show was a matter for the trial court to determine in appropriate factual findings.

3. Divorce and Alimony § 24.9— child support—expenses of parties—reasonableness—requirement of finding

The trial court in a child support case should be satisfied that personal expenses itemized in the parties' balance sheets are reasonable under all the circumstances before making a determination of need or liability, and though a lack of a specific conclusion as to reasonableness will not necessarily be held for error, the better practice is for the order to contain such a conclusion.

APPEAL pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals by *Judge Parker, Judge Robert Martin* dissenting, which upheld an order entered 21 December 1978 by *Judge Brown*, in MECKLENBURG District Court, awarding child custody to plaintiff-father and requiring defendant-mother to contribute partial child support. The decision of the Court of Appeals is reported at 44 N.C. App. 327, 261 S.E. 2d 34 (1979).

Levine, Goodman & Pawlowski by Paul L. Pawlowski for plaintiff appellee.

Bryant, Hicks & Sentelle by Richard A. Elkins for defendant appellant.

EXUM, Justice.

In this appeal from an order requiring her to provide partial child support, defendant challenges the trial court's "finding of fact" that she is capable of contributing support payments and its conclusion of law that plaintiff is entitled to contribution from her. We hold that the trial court's order is not supported by sufficient findings of fact and remand the cause for further proceedings.

Plaintiff Larry Coble and defendant Cheryl Banks Coble (Klassette) were married on 6 September 1969. They lived together as husband and wife until their separation on 9 June 1976. Pursuant to the terms of a separation agreement, plaintiff retained custody of the two minor children born of the marriage. After a decree of absolute divorce was entered on 28 March 1978, plaintiff filed a motion in the cause seeking custody of the minor children and praying for an award of child support from defendant.

At the hearing on the motion before Judge Brown, plaintiff's testimony together with his "affidavit of financial standing," indicated that his net monthly income was $825.00 and his average monthly expenses, including those in support of his minor children, were in excess of $1,000.00. Evidence offered by defendant tended to show that she was currently employed at a wage of $3.97 per hour on a 40-hour week, plus time-and-a-half for overtime which totaled as much as 32 hours per week. During the parties' separation, she bought the children clothes, shoes, toys, and other items which they needed as she was able to provide them. Defendant's "affidavit of financial standing" indicated that her monthly personal living expenses averaged $510.00.

In its order of 21 December 1978, the trial court awarded custody of the minor children to plaintiff, subject to defendant's visitation privileges. The court also made certain findings of fact regarding the financial standing of the parties as follows:

> "12. Defendant has an average monthly net income of approximately . . . *$483.32*, plus additional sums through her overtime wages. The additional amounts of income she derives from said overtime employment is not determinable at this time. Defendant's living expenses are approximately *$510.00* per month.
>
> "The Plaintiff's average net monthly income is approximately *$825.00* and the average monthly financial needs of said minor children are approximately *$432.00*.
>
> . . .
>
> "16. Plaintiff is in need of financial assistance from the Defendant for the partial support and maintenance of said children. Defendant is an able-bodied person and is capable of providing child support as herein ordered."

Based upon these findings of fact, Judge Brown concluded as a matter of law that plaintiff was entitled to an award of child support. Defendant was ordered to contribute $180.00 per month toward the partial support of the minor children until their majority.

[1] At the outset, we note our agreement with the Court of Appeals that G.S. 50-13.4(b) permits an order whereby both parents, although separated from the bonds of matrimony, are obligated to contribute to the support of their minor children. That statute provides in pertinent part:

> "In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all of the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs of the estate of the child. . . ."

Under this provision, in the *absence* of circumstances that "otherwise warrant," the father has the primary duty of providing child support. The mother's duty is secondary. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). However, the statute should be read in conjunction with its companion section, G.S. 50-13.4(c), which mandates that:

> "Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education and maintenance, *having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties*, and other facts of the particular case." (Emphasis supplied.)

Taken together, these two statutes clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. Thus, where the father cannot reasonably be expected to bear all the expenses necessary to "meet the reasonable needs of the child[ren]," the court has both the authority and the duty to order that the

mother contribute supplementary support to the degree she is able. *See, e.g., McKaughn v. McKaughn,* 29 N.C. App. 702, 225 S.E. 2d 616 (1976). The question remains in the instant case whether the trial judge, acting as the trier of fact, found circumstances sufficient to warrant an order compelling defendant to share in the financial responsibility of child support.

Where, as here, 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); *Coggins v. City of Asheville,* 278 N.C. 428, 180 S.E. 2d 149 (1971). The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." *Montgomery v. Montgomery,* 32 N.C. App. 154, 158, 231 S.E. 2d 26, 29 (1977); *see, e.g., Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967).

Under G.S. 50-13.4(c), quoted *supra,* an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. It is a question of fairness and justice to all concerned. *Beall v. Beall,* 290 N.C. 669, 228 S.E. 2d 407 (1976). In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. *Crosby v. Crosby, supra.* It is not enough that there may be evidence in the record sufficient to support findings which *could have been made.* The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to

be given to evidence disclosed by the record on appeal. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968); *Davis v. Davis*, 11 N.C. App. 115, 180 S.E. 2d 374 (1971).

[2] Applying these principles to the case before us, we note that Judge Brown's finding of fact No. 16, to which defendant excepted, states that plaintiff is in need of financial assistance for the support of the minor children and that defendant is capable of providing such assistance. This "finding" is more properly denominated a conclusion of law, since it states the legal basis upon which defendant's liability may be predicated under the applicable statutes, G.S. 50-13.4(b) and (c). As a conclusion of law, it must itself be based upon supporting factual findings. However, the only finding directly pertinent to the parties' relative ability to provide financial support for their children are those set forth in finding No. 12, the first part of which states that defendant's monthly net income is approximately $483.32, plus an "indeterminable" amount earned from overtime work, and yet her monthly expenses are approximately $510.00. To the degree that this finding indicates that defendant's living expenses tend to exceed her average income, it would seem to negate, rather than support, the conclusion that she is capable of providing support payments. Moreover, the next part of finding No. 12 shows that although the monthly financial needs of the children average approximately $432.00, plaintiff's net monthly income is approximately $825.00. Far from supporting the conclusion that plaintiff is in need of partial assistance in meeting his support obligation, this part of the finding suggests instead that he is capable of sufficiently providing for his children on his own. On the face of the order alone, therefore, finding No. 12 does not support the trial court's conclusions as to either plaintiff's financial need for support assistance or defendant's financial ability to provide it. In the absence of other findings which support these conclusions, then, the order awarding plaintiff partial child support cannot be sustained.

It is true that there is evidence in the record from which findings *could be* made which would in turn support the conclusion that plaintiff is in need of financial assistance from the defendant. For instance, the "affidavit of financial standing" submitted by plaintiff indicates that his own monthly expenses, including those in support of the children, far exceed his average

income. Additionally, there is evidence of record which could be interpreted to show that defendant's income may often be more than sufficient to meet her own personal expenses. What all this evidence *does* show, however, is a matter for the trial court to determine in appropriate factual findings.

[3] We note moreover that before liability or need may be predicated upon an analysis of the balance sheets of the respective parties, the trial court should be satisfied that the personal expenses itemized therein are reasonable under all the circumstances. We mention this consideration simply to remind the trial bench that a party's mere showing that expenses exceed income need not automatically trigger the conclusion that the expenses are reasonable, or that the party is incapable of providing support and in need of additional assistance. Indeed, the very fact that a party has a support obligation should always bear on the "reasonableness" of that party's personal expenses. *See, e.g., County of Stanislaus v. Ross*, 41 N.C. App. 518, 255 S.E. 2d 229 (1979). In the absence of contrary indications in the record, however, an appellate court will normally presume that a party's personal expenditures have been deemed reasonable by the trial judge. While a lack of a specific conclusion as to reasonableness will not necessarily be held for error, the better practice is for the order to contain such a conclusion.

Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Since the order appealed from does not contain findings of fact sufficient to support its judgment, the decision of the Court of Appeals is reversed and the judgment vacated. This cause is remanded to the Court of Appeals for further remand to Mecklenburg District Court for proceedings consistent with this decision.

Vacated and remanded.

ROSE D. GARDNER v. JONAS MELVIN GARDNER

No. 53

(Filed 15 July 1980)

1. **Divorce and Alimony § 3— plaintiff who becomes nonresident—venue change to county of defendant's residence—statute inapplicable where venue previously fixed by final judgment**

The amendment of G.S. 50-3 providing for the removal of an action for divorce or alimony, upon motion by defendant, to the county in which defendant resides where plaintiff has ceased to be a resident of this State is mandatory and generally should be construed to apply retrospectively to those cases pending at the time of its effective enactment. However, the amendment was not applicable to an action for divorce from bed and board where it became effective after plaintiff's right to venue in the county in which the action was instituted was firmly fixed by judgments which had passed beyond the scope of further judicial review.

2. **Statutes § 8— retroactive or retrospective statute**

The application of a statute is deemed "retroactive" or "retrospective" when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment.

3. **Statutes § 8— retroactivity**

A statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis.

4. **Venue § 9— final adjudication of venue—substantial right**

Although the question of venue is a procedural one, a right to venue established by statute is a substantial right. Its status is secure when finally adjudicated by a court of competent jurisdiction, and neither the courts nor the legislature can thereafter invalidate the right's exercise or annul the judgment which fixes its investiture.

Justice CARLTON did not participate in this decision.

APPEAL by defendant pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals by *Judge Hill*, *Judge Vaughn* dissenting, 43 N.C. App. 678, 260 S.E. 2d 116 (1979), reversing the order entered on 16 November 1978 by *Judge Hardy* in WAYNE District Court, which granted defendant's motion for change of venue.

Freeman, Edwards & Vinson by George K. Freeman, Jr., for plaintiff appellee.

Mast, Tew, Nall & Moore, P.A. by George B. Mast; and Taylor, Warren, Kerr & Walker by Lindsay C. Warren for defendant appellant.

EXUM, Justice.

The crux of this appeal is whether a statute may be applied retroactively to alter the effect of a final judgment which had previously established the proper venue for an action. We hold that it may not and affirm the decision of the Court of Appeals.

This appeal represents the fourth attempt by defendant to secure venue for this divorce case in Johnston County. The procedural history of the case is as follows:

Plaintiff Rose Gardner filed an action on 12 May 1976 in Wayne District Court seeking alimony without divorce from defendant Jonas Melvin Gardner. The complaint was amended on 28 June 1976 to state a cause of action for divorce from bed and board.

On 24 May 1976, defendant filed a Rule 12(b)(3) motion to remove for improper venue. Defendant, a resident of Johnston County, asserted that plaintiff was not a resident of Wayne County at the time suit was brought, and that venue in Wayne was therefore improper under G.S. 1-82's requirement that "the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. . . ." The district court ruled on 22 June that venue properly lay in Wayne County; this ruling was later affirmed by the Court of Appeals without published opinion. 34 N.C. App. 165, 237 S.E. 2d 357 (1977).

On 1 June 1976, defendant initiated a separate action for absolute divorce in Johnston County. Plaintiff thereupon moved to dismiss defendant's Johnston County action under Rule 13(a) on the ground that the claim constituted a compulsory counterclaim to her cause pending in Wayne County. Although the motion to dismiss was denied at the trial level, this Court reversed on appeal and held that defendant's suit could not be maintained as an

action separate to plaintiff's Wayne County action. *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978).

On 15 June 1976, defendant again moved to have the venue of the Wayne County suit changed on grounds relating to convenience of the parties. *See* G.S. 1-83(2). The motion was heard and denied on 15 October 1977 and an order was subsequently entered granting plaintiff alimony *pendente lite*. This judgment was affirmed by the Court of Appeals, *Gardner v. Gardner*, 40 N.C. App. 334, 252 S.E. 2d 867 (1979), and no appeal was perfected therein as to the denial of defendant's motion for change of venue.

Meanwhile, subsequent to the denial in Wayne District Court of defendant's motion under G.S. 1-83(2), defendant filed yet another motion for change of venue, this time pursuant to G.S. 50-3. That statute had been amended in June 1978 to provide:

> "Any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides. The judge, upon such motion, *shall order the removal of the action*. . . .
>
> Sec. 2. This act is effective upon ratification." (Emphasis supplied.)

In support of his motion, defendant submitted a verified copy of the foregoing amendment along with affidavits showing that plaintiff had removed her residence from Wayne County to Vidalia, Georgia, on or about 1 January 1978, some five months before the amendment took effect. Defendant contended that the amendment to G.S. 50-3 entitled him to removal as a matter of right. Concluding that he had no discretion under the amendment to refuse defendant's motion, Judge Hardy ordered the action transferred to Johnston County. The Court of Appeals reversed on the ground that the new venue statute could not be applied "where it becomes effective *after the trial court has made a decision* settling the question of venue." 43 N.C. App. at 681, 260 S.E. 2d at 118. (Emphasis original.)

[1] At the outset, we note our agreement with the Court of Appeals that the language of the amendment to G.S. 50-3 is clearly mandatory. When the particular situation to which it applies is shown to obtain, the trial court has no choice but to order removal upon proper motion by the defendant. We further agree that the statute *generally* should be construed to apply retrospectively to those cases pending at the time of its effective enactment. Venue is a procedural matter, and statutes or amendments pertaining to procedure are usually held to operate restrospectively, absent a clear expression of legislative intent to the contrary. *Smith v. Mercer*, 276 N.C. 329, 338, 172 S.E. 2d 489, 494 (1970). The question remains whether this general principle of construction should be applied under the particular facts of this case.

[2] The application of a statute is deemed "retroactive" or "retrospective" when its operative effect is to alter the legal consequences of conduct or transactions completed prior to its enactment. As was stated long ago by Justice Story in *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13, 156): "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, must be deemed retrospective. . . ." As applied in the instant case, G.S. 50-3 is clearly retroactive in that it "attaches a new disability"—the danger of having plaintiff's choice of venue defeated upon defendant's motion—to plaintiff's change of residence prior to the statute's enactment. More importantly the statute as applied alters the legal effect of previous rulings by the trial court that venue properly lay in Wayne County. It is this latter aspect of the statute's retroactivity which runs afoul of constitutional limitations.

[3] Regardless of its "procedural" subject matter, no rule of procedure or practice may be applied to abridge substantive rights. N.C. Constitution, Art. IV, Sec. 13(2); *Branch v. Branch*, 282 N.C. 133, 191 S.E. 2d 671 (1972). Hence, it is not enough to say that G.S. 50-3 affects only matters of procedure and therefore may freely apply with retroactive effect; such an argument does no more than play with conclusory labels. Instead, the proper question for consideration is whether the act as applied will interfere

with rights that have "vested." *Booker v. Medical Center*, 297 N.C. 458, 467, 256 S.E. 2d 189, 195 (1979). Stated otherwise, the statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis.

[4] Although the initial question of venue is a procedural one, there can be no doubt that a right to venue established by statute is a substantial right. *Casstevens v. Membership Corp.*, 254 N.C. 746, 120 S.E. 2d 94 (1961). Its grant or denial is immediately appealable. *Coats v. Hospital*, 264 N.C. 332, 141 S.E. 2d 490 (1965); *Roberts v. Moore*, 185 N.C. 254, 116 S.E. 728 (1923); *Cecil v. High Point*, 165 N.C. 431, 81 S.E. 616 (1914). When *finally* adjudicated by a court of competent jurisdiction, its status is secure. Neither the courts nor the Legislature can thereafter invalidate the right's exercise or annul the judgment which fixes its investiture. *Dellinger v. Bollinger*, 242 N.C. 696, 89 S.E. 2d 592 (1955); *Commissioners v. Blue*, 190 N.C. 638, 130 S.E. 743 (1925); *Morrison v. McDonald*, 113 N.C. 327, 18 S.E. 704 (1893). *See generally*, 16 C.J.S. *Constitutional Law*, Sec. 271.

We recognize, of course, that the phrases "vested right" or "substantive right" are themselves statements of legal conclusion. "Vested" rights may not be retroactively impaired by statute; a right is "vested" when it is so far perfected as to permit no statutory interference. The tautology is apparent. As was pointed out by Justice Holmes, "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that force will be brought to bear upon those who do things said to contravene it. . . ." Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 42 (1918). Our concern here, however, is less with the metaphysics of plaintiff's right to her chosen venue than with the constitutional requirement that the judgment which accords that right be stable. Article IV, Sec. 1 of the North Carolina Constitution vests the judicial power of the State, including the power to render judgments, in the General Court of Justice, not in the General Assembly. Under this provision, the Legislature has no authority to invade the province of the judicial department. *State v. Matthews*, 270 N.C. 35, 153 S.E. 2d 791 (1967). It follows, then, that a legislative declaration may not be given effect to alter or amend a final exercise of the courts' rightful jurisdiction. *Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332 (1942).

[1] In the instant case, the trial court twice ruled in plaintiff's favor on the venue question. The ruling of 22 June 1976, affirming Wayne County as the proper venue under G.S. 1-82, was sustained by the Court of Appeals upon defendant's appeal. The ruling of 15 October 1977, denying defendant's motion to change venue for convenience of the parties, was never questioned by defendant in his appeal from the subsequent judgment awarding plaintiff temporary alimony. Thus, by the time the Legislature amended G.S. 50-3 on 16 June 1978, plaintiff's right to venue in Wayne County was firmly fixed by judgments which had long since passed beyond the scope of further judicial review. No further challenge to venue by defendant was possible in the courts. The question was then settled, and it could not be reopened by subsequent legislative enactment.

Accordingly the decision of the Court of Appeals reversing Judge Hardy's order changing venue from Wayne to Johnston County is affirmed. The cause is remanded to Wayne District Court for further proceedings not inconsistent with this opinion.

Affirmed.

Justice CARLTON did not participate in this decision.

STATE OF NORTH CAROLINA v. CARL OXENDINE

No. 133

(Filed 15 July 1980)

1. **Homicide § 30.3— lesser offense of involuntary manslaughter—instruction not required**

The trial court did not err in refusing to submit the lesser included offense of involuntary manslaughter since the evidence was insufficient to raise an inference that the shooting was unintentional and, at most, resulted from the reckless use of a firearm where the evidence was overwhelming that, after the first altercation between defendant and deceased, defendant entered a trailer and remained inside for five to fifteen minutes; he then came out of the trailer with a rifle and walked over to where the victim was, using words which manifested a desire to continue the fight with weapons; and at very close range the rifle went off.

2. Homicide § 28.5— defense of others—instruction not required

The trial court in a homicide prosecution did not err in failing to instruct the jury on the principle of defense of others where the evidence tended to show that, five to fifteen minutes after the first altercation between defendant and deceased, defendant, alone and armed with a rifle, approached deceased; at that time deceased was no serious threat to anyone; though there were approximately 100 people at the crime scene, none testified that they were afraid of deceased; and the only evidence of a threat by deceased was defendant's statement that deceased said he would kill defendant.

3. Criminal Law § 114.2— court's summary of evidence—no expression of opinion

The trial court did not express an opinion in violation of G.S. 15A-1222 in his summarization of the evidence.

ON certiorari to review judgment of *Godwin, J.*, entered at the 24 April 1978 Criminal Session of Superior Court for HOKE County.

Upon a plea of not guilty, defendant was tried on a bill of indictment charging him with the murder of Eugene (Buddy) Locklear. The jury found him guilty of second-degree murder and from judgment imposing a prison sentence of 30 years, he gave notice of appeal to the Court of Appeals.

For the reason that defendant's record on appeal was not served or filed as provided by law and the Rules of Appellate Procedure, his appeal was dismissed. Thereafter, the Court of Appeals allowed defendant's petition for a writ of certiorari. Inasmuch as the record on appeal was not filed as required by the writ and the Rules of Appellate Procedure, on 16 October 1979 the appeal was dismissed again. 43 N.C. App. 391, 258 S.E. 2d 810 (1979).

Defendant petitioned this court for a writ of certiorari to review the trial proceedings. In the exercise of our discretion, we allowed the petition on 1 April 1980. We also treat the papers filed by defendant as a motion to bypass the Court of Appeals as provided by G.S. 7A-31(a) and allow that motion.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Moses, Diehl & Pate, by Philip A. Diehl, for defendant-appellant.

BRITT, Justice.

[1] Defendant contends first that the trial court erred in refusing to submit the lesser included offense of involuntary manslaughter as an alternative verdict. We find no merit in this contention.

The principle of law applicable to this contention is well stated by Justice Exum writing for the court in *State v. Wilkerson*, 295 N.C. 559, 579-80, 247 S.E. 2d 905 (1978), when he quoted from *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971), as follows:

> "Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony *or naturally dangerous to human life*, or (2) by an act or omission constituting culpable negligence. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889; *State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485; *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155. In *Foust*, it is said that ordinarily an unintentional homicide resulting from the reckless use of firearms 'in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances *not evidencing a heart devoid of a sense of social duty*, is involuntary manslaughter.' *Id.* at 459, 128 S.E. 2d at 893. (Emphasis added.) When the circumstances do show a heart devoid of a sense of social duty, the homicide cannot be involuntary manslaughter." *State v. Wrenn, supra*, 279 N.C. at 687-88, 185 S.E. 2d at 136 (Sharp, J., [later] C.J., dissenting); (*Foust* was also quoted with approval on this point by the majority in *Wrenn*, 279 N.C. at 683, 185 S.E. 2d at 133). . . .

Evidence presented by the state is summarized in pertinent part as follows:

The victim, Eugene (Buddy) Locklear, hereinafter referred to as Buddy, began drinking intoxicants around 3:30 p.m. on 1 October 1977. He went to a birthday party around 7:00 p.m. where he continued to drink beer. At around 9:00 p.m., he and others went to Lena Mae McMillan's club in rural Hoke County where he drank more beer.

While on the grounds outside of the club, Buddy engaged in an argument with Bonnie Locklear and slapped her. Lena Mae McMillan, defendant and his brother Bobby went to where Buddy was and a scuffle broke out between Buddy, defendant and Bobby. After the scuffle terminated Lena Mae, Bobby and defendant then went to her trailer which was located on the premises. As they were walking to the trailer, Buddy pulled a pistol and shot twice over their heads, the shots striking near the top of the club building.

A short while later, between five and fifteen minutes, defendant came out of the trailer with a .22 automatic rifle. He was holding the rifle in his right hand and resting it across his left arm which was in a cast. At that time Buddy, according to some witnesses, had put his pistol away; other witnesses testified that he was holding his pistol by his side and he never raised it. Defendant walked up to Buddy and said, "You've got yours, now I've got mine." Thereupon, Buddy grabbed the end of the rifle barrel to push defendant off and the rifle discharged either two or three shots. There was some testimony that after the second shot, Buddy let go of the rifle and had run several feet away when the third shot occurred.

After the shots, Buddy ran away for several feet and fell. Defendant left the scene in an automobile. Police arrived at the club around 11:00 p.m. and found Buddy lying in the highway with no vital signs. No weapon was found on him and three spent .22 caliber shells were found about 30 feet from his body. An autopsy revealed two gunshot entrance wounds in the front of Buddy's body, one in his upper chest which passed through his heart and left lung and another in his upper abdomen which passed through his abdominal aorta. The medical witness stated that, in his opinion, the wounds caused Buddy's death. Both wounds had powder burns around them indicating, in the opinion of the medical witness, that the weapon had been fired from a distance of twelve inches or less. The alcoholic content of the victim's blood was .32.

Defendant made a statement to the local sheriff on 3 October 1977. He indicated that Buddy had shot at him and his brother with a pistol; that someone had handed him a rifle and he had approached Buddy with the rifle pointed to the ground; that Buddy had had his pistol out and had said, "I'll kill you;" and that Buddy had grabbed the rifle barrel "and it fired twice."

Defendant argues that the evidence was sufficient to raise an inference for jury consideration that the shooting was unintentional, and, at most, it resulted from the reckless use of a firearm. We do not find this argument persuasive.

The evidence was overwhelming that after the first altercation between defendant and Buddy, defendant entered the trailer and remained inside for a period of five to fifteen minutes; that he then came out of the trailer with a rifle and walked over to where the victim was, using words which manifested a desire to continue the fight with weapons; and that, at very close range, the rifle went off.

In support of his position, defendant relies on the case of *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979), where we held that the trial judge had properly instructed the jury on the offense of involuntary manslaughter. In *Fleming*, the defendant testified in his own behalf and stated that he had no intention of hurting the victim. Similarly, in *State v. Wrenn, supra*, this court awarded a new trial because of the failure of the trial judge to charge the jury on involuntary manslaughter where the defendant testified that it had been his intention to only scare his wife (the victim) and to "make her do better." In the present case, all of the evidence establishes that defendant returned to the scene of the previous altercation armed and manifesting a desire to resume the affray which had been concluded for some time. These circumstances are sufficient to "show a heart devoid of a sense of social duty." Indeed, in his statement to Sheriff Barrington defendant does not declare that he had no intention of killing Buddy. Defendant's statement that he was pointing the rifle toward the ground at the time he approached Buddy does not establish an inference of a lack of an intention to kill in light of the circumstances which surrounded his advance with a weapon. *Cf.*, *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971) (Motion to dismiss charge of attempted armed robbery improperly denied where the evidence was uncontradicted that defendant's companion was carrying a breeched shotgun.)

[2] Defendant contends next that the trial court erred in not instructing the jury that he had a right to act in defense of other persons to protect them from an assault by the victim. This contention has no merit.

The court fully instructed the jury on defendant's right of self-defense and on accident. If there was evidence tending to show that the homicide was committed by defendant in defense of persons other than himself, he was entitled to instructions on that principle of law also. *State v. Hornbuckle*, 265 N.C. 312, 144 S.E. 2d 12 (1965).

Upon a careful review of the record, however, we are unable to find any evidence that would entitle defendant to instructions on the principle of defense of others. At the time defendant, armed with a rifle, approached Buddy, he was no serious threat to anyone. The slapping of Bonnie Locklear had long passed, defendant's brother apparently had left, and Lena Mae evidently was still in her trailer. While there were approximately one hundred people on the premises, no one testified that he or she was afraid of Buddy. The only evidence of a threat by Buddy was defendant's statement that Buddy said, "I'll kill *you*." (Emphasis added.)

We hold that the trial court did not err in failing to instruct the jury on the principle of defense of others.

Finally, defendant contends that the trial court expressed an opinion on the evidence in violation of G.S. 15A-1222. This contention has no merit.

[3] Defendant argues that the court expressed an opinion when, in summarizing the evidence, it gave "only one version of the incident when the state's evidence tended to reflect other and inconsistent factual versions."

While we recognize the principle stated in G.S. 15A-1222 that "the judge may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury", we do not think that principle was violated in the case at hand. In reviewing the evidence, the trial judge is not required to give a verbatim recital of the testimony, but only to the extent necessary to explain the application of the law thereto. Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with the re-

quirements of G.S. 15A-1222 (formerly G.S. 1-180). *State v. Sterling*, 200 N.C. 18, 156 S.E. 96 (1930).

The trial judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. *State v. Thompson*, 226 N.C. 651, 39 S.E. 2d 823 (1946). Furthermore, the court is not required to recapitulate all of the evidence, witness by witness. *State v. Guffy*, 265 N.C. 331, 144 S.E. 2d 14 (1965).

After a careful review of the jury charge in the instant case, we conclude that the trial judge did not express an opinion on the evidence.

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

No error.

STATE OF NORTH CAROLINA v. JAMES MILLER GOODE, JR.

No. 128

(Filed 15 July 1980)

Criminal Law §§ 103, 175.2— denial of recess to decide whether to present evidence—abuse of discretion

The trial judge abused his discretion to the prejudice of defendant when, at the close of the State's evidence, he denied unnamed motions in the presence of the jury before they were made and then immediately denied defense counsel's request for a recess to confer with defendant as to whether defendant should take the witness stand or otherwise offer evidence.

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 44 N.C. App. 498, 261 S.E. 2d 212 (1980), upholding judgments of *Bailey, J.*, entered 8 March 1979 in WAKE Superior Court.

Defendant was tried upon a two-count bill of indictment charging (1) felonious breaking and entering Swain's Charcoal Steak House in Raleigh and (2) felonious larceny of wine having a value of $108.00. He was convicted by a jury on both counts and

given a sentence of eight to ten years on each count, to run consecutively.

The State's evidence tends to show that at about 3:40 a.m. on 17 January 1979, the alarm was activated inside Swain's Charcoal Steak House. The company monitoring the alarm system notified the police and the manager of the steak house. In response to a call, Officer Holloway went to the steak house and saw a man, whom he later identified as defendant, emerge from the front door and run into the woods. The officer chased the man into a surrounding wooded area where he lost sight of him, although he could still hear footsteps during most, although not all, of the time in which he pursued him. Guided by the sound of footsteps, Officer Holloway followed the man until he entered Crabtree Creek. Then the officer heard nothing for three or four minutes, at the expiration of which the officer had reached a clearing on Milburnie Road. When the officer came out of the woods at that point, he saw Officer Weingarten's vehicle on the side of the road. Weingarten said: "I have the person who just came out of the woods." He turned on the interior light, and Officer Holloway noticed that the man was the same person Holloway had seen leaving Swain's Steak House and entering the woods. Officer Weingarten testified that he saw defendant emerge from the woods, arrested him, and seized some keys from defendant which fit the door lock of an automobile parked in the vicinity of the steak house.

Other matters necessary to an understanding of the assignments of error discussed will be narrated in the opinion.

Rufus L. Edmisten, Attorney General; Lucien Capone, III, Associate Attorney; Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Loflin, Loflin & Acker by Thomas F. Loflin III and James R. Acker, attorneys for defendant appellant.

HUSKINS, Justice.

We neither reach nor decide any of the constitutional questions raised on this appeal. In his brief filed in this Court, defendant presents five assignments of error. We find it necessary to discuss only one of them, to wit: Did the Court of Appeals err in

concluding that the trial judge did not abuse his discretion when, at the close of the State's evidence, he denied defense counsel's request for a recess to confer with his client as to whether defendant should take the witness stand or otherwise offer evidence?

The record reveals that when the State rested its case, the following colloquy took place:

COURT: Will there be evidence for the defense?

MR. RATLIFF: Your Honor, we have motions first, and then we—

COURT: They are denied. Will there be evidence for the defense?

MR. RATLIFF: Your Honor, we ask for a short recess.

COURT: Sir.

MR. RATLIFF: We ask for a recess.

COURT: Will there be evidence for the defense? Answer my question and I will answer yours.

MR. RATLIFF: Your Honor, I need to make that decision during recess, Your Honor.

COURT: Proceed.

MR. RATLIFF: The defendant's counsel offers no evidence, Your Honor.

COURT: The defendant will have the opening and the closing.

MR. GOODE: No. I'd like to testify in my behalf.

COURT: You said that he was offering no evidence.

MR. RATLIFF: That was my statement, Your Honor.

COURT: Well, then, have him sit down.

MR. GOODE: I want to testify in my own behalf.

COURT: Ladies and gentlemen, I will let you go out of the room.

(JURY RETIRES TO JURY ROOM.)

COURT: Mr. Goode, your lawyer has indicated that the defendant—that's you—does not intend to offer evidence. Is that—do you agree with that—

MR. GOODE: No, I don't.

COURT: —statement? Do you understand that you have the right to testify in your own behalf if you want to?

MR. GOODE: Yes, I do.

COURT: Do you understand that your lawyer is apparently advising you that you should not testify?

MR. GOODE: Yes, I do.

COURT: Huh?

MR. GOODE: Yes, I do.

COURT: You understand that?

MR. GOODE: Yes, sir, I do.

COURT: You understand that if you do take the stand and testify in your own behalf, the State will have the right and will exercise that right to cross examine you on all details concerning this occurrence and also on your criminal record?

MR. GOODE: Yes, sir, I do.

COURT: Do you understand that you will be taking the stand against the advice of your counsel?

MR. GOODE: Yes, I do.

COURT: All right, bring the jury back and you may take the stand. You will be sworn and you will be subject to examination by Mr. Ratliff and cross examination by Mr. Dombalis.

MR. RATLIFF: Your Honor, ask the Court's guidance. I don't intend to ask any questions.

COURT: Well, I'm not going to try the case, Mr. Ratliff.

MR. RATLIFF: All right.

COURT: Bring the jury back.

(JURY RETURNS TO JURY BOX.)

We now consider whether the quoted colloquy amounted to an abuse of discretion resulting in prejudice to defendant.

Matters relating to the actual conduct of a criminal trial are left largely to the sound discretion of the trial judge so long as defendant's rights are scrupulously afforded him. *State v. Perry*, 277 N.C. 174, 176 S.E. 2d 729 (1970). Thus, a trial court is given wide latitude, and rightly so, in making decisions affecting a variety of procedural matters which arise during the course of a trial. However, such discretion is not unlimited and, when abused, is subject to review. When a defendant seeks to establish on appeal that the exercise of such discretion is reversible error, he must show harmful prejudice as well as clear abuse of discretion.

State v. Young, 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968).

It is generally recognized, by Bench and Bar alike, that the decision whether a defendant in a criminal case will present evidence or will testify in his own behalf is a matter of paramount importance. Such matters can and should be discussed generally prior to trial, but the actual decision cannot intelligently be made until the close of the State's evidence.

Here, counsel made it perfectly clear that the recess was needed to discuss and decide whether defendant would offer evidence. Although the rules of criminal procedure have not dealt directly with this question, such recesses at the close of the State's evidence are deeply ingrained in the course and practice of our courts and, when requested, have been granted as a matter of course so long that "the memory of man runneth not to the contrary." The recess enables defendant and his counsel to evaluate their position. If the evidence offered by the State has made a strong case against defendant, he may decide to "throw in the towel" and tender a plea. If the State's case is weak, he may decide to rest and rely on that weakness for a verdict of acquittal. If defendant has a strong defense and credible witnesses, he may well decide to offer his evidence regardless of the strength of the State's case. For reasons entirely obscure, the defendant in this case and his counsel had no opportunity to weigh these important matters together and reach a considered judgment.

No defendant is *automatically* entitled to a recess at the close of the State's evidence because such motion is addressed to the sound discretion of the trial court. Even so, where, as here, the trial judge in the presence of the jury denies unnamed motions before they are made, and then immediately denies defense counsel's request for a short recess to decide whether defendant would offer evidence, a clear abuse of discretion prejudicial to defendant's cause is established. This requires a new trial.

We deem it unnecessary to discuss the remaining assignments. The trial court's question about "pulling defendant for speeding" was spoken in levity and was entirely harmless. His observations during the charge to the jury concerning the identity of the man Officer Weingarten had in custody are more serious but not likely to recur on retrial.

For the reasons stated, the decision of the Court of Appeals is reversed and the case remanded to Wake Superior Court for retrial according to law.

New trial.

STATE OF NORTH CAROLINA v. JAMES W. BROWN, JR.

No. 121

(Filed 15 July 1980)

1. **Homicide § 15.5— murder of stepchild—cause of death—expert opinion evidence properly admitted**

In a prosecution of defendant for the murder of his 18 month old stepdaughter, the trial court did not err in admitting the testimony of three doctors who opined that decedent's injury was probably not caused by a fall down a flight of stairs, since all three medical experts were in a better position to have an opinion on the cause of deceased's injuries than the jury because of their medical training and their experience in observing and treating skull fractures; the witnesses stated only their opinions as to the possibilities, not the certainties, of the cause of deceased's injuries; and none of the three experts made any statement as to their opinion of defendant's guilt or innocence.

2. **Homicide § 30.2— murder of stepchild—instruction on manslaughter not required**

In a prosecution of defendant for the murder of his 18 month old stepdaughter, the trial court did not err in failing to charge the jury on voluntary manslaughter since evidence for the State tended to show that defendant had killed the child—whom he termed "the little s.o.b."—with malice, while defendant's only explanation of deceased's fatal injury was that she accidentally and by herself fell down a flight of stairs, and there was therefore no evidence of voluntary manslaughter.

ON appeal from judgment of *Allsbrook, Judge*, entered at the October 1979 Session of Superior Court, SAMPSON County, sentencing defendant to life imprisonment for conviction of second degree murder.

Defendant was charged in an indictment, proper in form, with the murder of Amanda Beth Binks, his eighteen-month-old stepdaughter. He pled not guilty.

Evidence for the State tended to show that deceased was brought to the Sampson County Memorial Hospital Emergency Room on Sunday afternoon, 19 August 1979, in critical condition from a head injury. She was immediately transferred to Cape Fear Valley Hospital, where she was operated on for a badly fractured skull. She died 25 August 1979 from her injuries.

Defendant told hospital personnel that the child had been injured by a fall down a flight of wooden stairs in their home. Defendant had been alone with the deceased at the time of the accident.

Three doctors, accepted by the court as expert witnesses, testified for the State that in their opinion the extent, severity and location of the child's injuries were inconsistent with a fall down a flight of wooden stairs.

The State introduced into evidence a letter defendant wrote while in jail to his wife, who was the mother of the deceased child. In the letter defendant told his wife to get a friend to say that the friend had been present with defendant and had seen the child fall down the stairs. The State also presented the testimony of a jail cook who stated that the defendant had told the cook he had killed his stepdaughter.

Defendant presented a doctor who testified that in his opinion the injury to the deceased could have been caused by a fall down the stairs. Defendant also presented evidence of a civil engineer who testified the stairs in question were steep, of varying heights and widths and nonconforming in some respects with the North Carolina Building Code.

The jury returned a verdict of guilty of second degree murder. Defendant was sentenced to life in prison, from which sentence he now appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Joseph B. Chambliss for defendant.

CARLTON, Justice.

Defendant presents four arguments. We find no error and affirm.

[1] Defendant first asserts that the trial court improperly admitted the testimony of three doctors who opined that the decedent's injury was probably not caused by a fall down a flight of stairs. Such testimony, defendant argues, invaded the province of the jury and relieved the State of its burden of proof.

We disagree. The controlling case is *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). There, Justice Exum, speaking for the Court, delineated the circumstances under which expert medical testimony is permissible. Such testimony is properly admitted if

(1) the witness because of his expertise is in a better position to have an opinion on the subject than the trier of fact,

(2) the witness testifies only that an event *could* or *might* have caused an injury but does not testify to the conclusion that the event did in fact cause the injury, unless his expertise leads him to an unmistakable conclusion[1] and

(3) the witness does not express an opinion as to the defendant's guilt or innocence.

It is clear that the expert testimony the State presented at defendant's trial conformed to the *State v. Wilkerson* criteria.

First, all three medical experts were in a better position to have an opinion on the cause of deceased's injuries than the jury because of their medical training and their experience in observing and treating skull fractures. Dr. Keranen, the neurosurgeon who operated on the deceased, testified that he had been Chief Neurosurgeon at the Cape Fear Valley Hospital for ten years. Based on his observation of the extent and depth of the deceased's skull fracture, as he observed that fracture during surgery, he opined that "the child died from tremendous brain injury resulting from one blow of tremendous force to the right side of the head." In his opinion it was possible *but remote* that the injury was caused by a fall down a flight of wooden stairs. He based his opinion on the extent and severity of the child's injuries and the fact that she did not have the marks, bruises and abrasions associated with a fall down a flight of stairs.

1. *Mann v. Virginia Dare Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973).

Dr. Jerome Tift, pathologist at North Carolina Memorial Hospital in Chapel Hill, performed the autopsy on the deceased. In his opinion the deceased's injuries were caused by blunt trauma to the right side of the head, injuries incompatible with a fall down a flight of stairs. He, too, based this opinion on the location and severity of the skull fracture. On cross-examination, however, Dr. Tift testified that it was not impossible that the injury could have been caused by a fall down a flight of stairs.

Dr. Page Hudson, Chief Medical Examiner for the State of North Carolina who was present at the autopsy of deceased, testified that deceased died from blunt force injury to the right side of her head. In his opinion the injury could not have been caused by a fall down a flight of stairs. He based this opinion on his past experience with various types of blunt force injuries to the skull, including injuries caused by stair falls. On cross-examination he stated that he did not believe a 23-pound, eighteen-month-old infant could develop the speed or momentum to receive an injury of this sort while falling down stairs. In his opinion, it would have taken upwards of 100 pounds per square inch of pressure to produce the deceased's injuries.

Each of these experts explained the medical inferences arising from the location, severity and extent of the focal point and the fracture lines of deceased's skull injury. That their opinions, to a person, drew inferences from medical facts which were inconsistent with defendant's explanation of the child's injury in no way undercuts the validity of their testimony. This Court has long allowed a medical expert to testify as to the nature of the instrument producing a particular injury when that expert's training and experience put him in a better position to draw medical inferences from facts than a layman jury. *Cf. State v. Wilcox*, 132 N.C. 1120, 44 S.E. 625 (1903) (doctor testified victim's death caused by blow by blunt instrument and not by drowning). *See also State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976); *State v. Messer*, 192 N.C. 80, 133 S.E. 404 (1926). The average layman, lacking the training and experience these experts had in treating and observing skull fractures, could not, unaided, have drawn the necessary medical inferences from the evidence presented to them. Clearly the evidence here met the traditional test compelling expert testimony: "[the] opinion required expert skill or knowledge in the medical or pathologic field about which a person

of ordinary experience would not be capable of satisfactory conclusions, unaided by expert information from one learned in the medical profession." *State v. Powell*, 238 N.C. 527, 530, 78 S.E. 2d 248, 250 (1953). The expert testimony did not "invade the province of the jury."

Secondly, these witnesses stated only their opinions as to the probabilities, not the certainties, of the cause of deceased's injuries. All of them qualified these opinions by explaining the type of fall down a flight of stairs they envisioned the child suffering, and two of them expressly stated that the deceased's head injuries could possibly have resulted from a fall down the stairs.

In this respect, the testimony of these experts was much different from that disallowed by this Court in *Patrick v. Treadwell*, 222 N.C. 1, 21 S.E. 2d 818 (1942). There the expert testified that a second fracture of plaintiff's previously broken arm had *in fact* been caused by a car accident when there was no medical certainty this was so. Here, all three experts carefully limited their remarks to the probability that the deceased's injuries had been caused by a fall. As such, they did not violate the *Patrick v. Treadwell* medical certainty prohibition.

Finally, none of these three experts made any statement as to their opinion of defendant's guilt or innocence. Their testimony clearly met the criteria of *State v. Wilkerson, supra*, and was properly admitted.

[2] Defendant also assigns as error the trial court's failure to charge the jury on voluntary manslaughter.

Murder in the second degree, the crime of which defendant was convicted, is the unlawful killing of a human being with malice and without premeditation and deliberation. *State v. Montague*, 298 N.C. 752, 259 S.E. 2d 899 (1979).

Voluntary manslaughter is "the unlawful killing of a human being without malice, express or implied, and without premeditation or deliberation." *State v. Wynn*, 278 N.C. 513, 518, 180 S.E. 2d 135, 139 (1971), and is a lesser included offense of murder, *State v. Montague, supra*. Defendant, of course, is entitled to have the lesser included offense submitted to the jury under the proper instruction but only when there is evidence to support that

lesser included offense. *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971).

Here evidence of the lesser included offense of voluntary manslaughter is totally lacking. Defendant's only explanation of deceased's fatal injury was that deceased accidentally and by herself fell down a flight of stairs. Evidence for the State on the other hand tended to show that defendant had killed the child—whom he termed "the little s.o.b."—with malice. Neither view of the evidence, the State's nor the defendant's, tended to show defendant hurt the child without malice. Indeed, evidence of a commonly asserted circumstance of voluntary manslaughter—killing while under the influence of passion or killing while "in the heat of blood" produced by adequate provocation, *State v. Montague, supra; State v. Wynn, supra*—is totally absent from both defendant's and State's version of the facts. Where the evidence tends to show, as it does here, that the defendant committed the crime charged and where there is no evidence of a lesser included offense, the trial court is correct in not charging on the lesser included offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). In this assignment we find no error.

Defendant also argues that the trial court erred when it denied his motion to dismiss the case against him and when it denied his motion to set aside the verdict. We have carefully considered these further assignments and find no error. Defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LARRY BAGLEY

No. 37

(Filed 15 July 1980)

1. Burglary and Unlawful Breakings § 9— implement of housebreaking

An article may be deemed an implement of housebreaking, the possession of which is made criminal by G.S. 14-55, when (1) it is a picklock, key, bit, or any other instrument capable of being used for the purpose of housebreaking, and (2) at the time and place alleged, the person charged with its possession did in fact possess it for that purpose, *i.e.*, without lawful excuse.

2. Burglary and Unlawful Breakings § 10.1— possession of implement of housebreaking—burden of proof

Although a prosecution under G.S. 14-55 does not require proof of any specific intent to break into a particular building at a particular time and place, the burden rests on the State to show beyond a reasonable doubt that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking, and such a showing will of necessity depend upon the strength of circumstantial evidence.

3. Burglary and Unlawful Breakings § 10.3— tire tool as implement of housebreaking

The trial court did not err in permitting the jury to conclude that a tire tool was an "implement of housebreaking" within the meaning of G.S. 14-55 where there was plenary circumstantial evidence which would permit the jury to infer that defendant was in actual or constructive possession of the tire tool, that the tire tool was reasonably capable of use for the purpose of breaking into a building, and that defendant did in fact possess it for that purpose at the time and place of his arrest.

DEFENDANT appeals from a decision by the Court of Appeals, 43 N.C. App. 171, 258 S.E. 2d 427 (1979), affirming his conviction before *Judge Battle* at the 29 January 1979 Session of DURHAM Superior Court, of the crimes of felonious breaking and entering and felonious possession of implements of housebreaking. We allowed defendant's petition for discretionary review pursuant to G.S. 7A-31 on 4 December 1979.

Attorney General Rufus L. Edmisten by Associate Attorney Christopher P. Brewer for the State.

Lee A. Patterson II for defendant appellant.

EXUM, Justice.

The sole question presented by this appeal is whether a tire tool may be deemed an "implement of housebreaking" within the meaning of G.S. 14-55. We hold that it may and affirm the decision of the Court of Appeals.

In the early morning hours of 18 August 1978, defendant and his brother were apprehended by law enforcement officers a short distance outside of the rear of the Triangle Pharmacy on Highway 54 in Durham County. The front door of the pharmacy had been pried open. A search of the area around the store yielded a crowbar at the back door, two pairs of gloves and bottles of prescription drugs in the area where defendant and his

brother were apprehended, and a tire tool lying inside the building at the rear door.

Defendant's subsequent conviction of felonious possession of implements of housebreaking was predicated upon G.S. 14-55, which provides in pertinent part:

> "*Preparation to Commit Burglary or Other Housebreakings.*—If any person . . . shall be found having in his possession, without lawful excuse, any picklock, key, bit, *or other implement of housebreaking* . . . such person shall be guilty of a felony. . . ." (Emphasis supplied.)

At trial, Judge Battle instructed the jury on the offense defined by G.S. 14-55 as follows:

> "[F]or you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that the defendant was in possession of implements of housebreaking. A tire tool and crowbar are implements of housebreaking if you find from the evidence beyond a reasonable doubt that they are commonly carried and used by housebreakers or are reasonably adapted for such use. And second, the State must prove beyond a reasonable doubt that there was no lawful excuse for the defendant's possession of these items. That is, the State must prove circumstances which show beyond a reasonable doubt that the defendant intended to use the implements in breaking into a building, or did, in fact, so use them."

Defendant strenuously contends that this instruction was in error. He maintains that a tire tool, as a matter of law, cannot be held to be an "implement of housebreaking" within the intendment of G.S. 14-55. In support of this argument, he relies upon this Court's ruling in *State v. Garrett*, 263 N.C. 773, 140 S.E. 2d 315 (1965), and upon the Court of Appeals' decision in *State v. Godwin*, 3 N.C. App. 55, 164 S.E. 2d 86 (1968), *cert. denied*, 275 N.C. 341 (1969).

In *Garrett*, defendant was arrested in the early morning hours after he was seen walking along the street with a tire tool in his hand. An examination of the door to a nearby restaurant revealed marks on the jamb, indicating an attempted breaking. On the other hand, defendant's story was that he had stopped to

tighten a lug on his truck wheel and was carrying the tire tool for that purpose. Under these circumstances, this Court held that the evidence was insufficient to support a conviction for "possession, *without lawful excuse*, [of] an implement of housebreaking as contemplated in G.S. 14-55." 263 N.C. at 775, 140 S.E. 2d at 316-17. (Emphasis supplied.) Writing for this Court, Justice Higgins reviewed the elements of the crime defined by G.S. 14-55 and expressed some concern as to whether the simple possession of a tire tool, an instrument usually found in the tool kit of the average motorist, should ordinarily be deemed a criminal act:

> "We have some doubt whether a tire tool under the *ejusdem generis* rule is of the same classification as a pick lock, key, or bit, and hence, condemned by the statute. . . . A tire tool is a part of the repair kit which the manufacturer delivers with each motor vehicle designed to run on pneumatic tires. Not only is there lawful excuse for its possession, but there is little or no excuse for a motorist to be on the road without one." *Id.* at 775-76, 140 S.E. 2d at 317.

In *State v. Godwin, supra*, the Court of Appeals relied upon *Garrett* to hold that a conviction under G.S. 14-55 could not be sustained despite evidence that defendant had used tire tools to break into a building. In so holding, the *Godwin* Court apparently viewed the "doubt" expressed in *Garrett's* dictum as a rule of law forever excluding the possession of a tire tool from the ambit of G.S. 14-55. We disagree with this interpretation.

The language in *Garrett* was not intended to mean that a tire tool or other like instrument may never, under any circumstances, be considered an implement of housebreaking. Narrowed to its essence, the holding in *Garrett* was simply that the State had failed to produce evidence sufficient to show that defendant's possession of the tire tool was "without lawful excuse" as required by the statute. This much is made clear by the subsequent decision in *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968). Defendants in that case were apprehended in the middle of the night at the entrance to a restaurant. The entrance door showed evidence of tool marks around the lock. Alerted to the presence of police officers, one of the defendants attempted to throw away a hammer and a large screw driver. This Court sustained defendants' conviction for unlawful possession of

housebreaking implements. Writing for the Court, Justice Higgins, author of the *Garrett* decision, pointed out that the charges of criminal possession were warranted under the particular circumstances of the case:

> "The tools, *though capable of legitimate use, nevertheless under the circumstances disclosed by the evidence,* permitted a legitimate inference that they were intended for the purpose of breaking into the restaurant. Obviously, the attempt to hide them tends to show their possession was without lawful excuse. . . ." 272 N.C. at 498, 158 S.E. 2d at 625. (Emphasis supplied.)

For similar analyses tying the application of G.S. 14-55's prohibition to *both* the use to which a particular instrument may be put *and* the circumstances under which it is found to be in defendant's possession, *see State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967); *State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Nichols,* 268 N.C. 152, 150 S.E. 2d 21 (1966); *State v. McCall,* 245 N.C. 146, 95 S.E. 2d 564 (1956); *State v. Boyd,* 223 N.C. 79, 25 S.E. 2d 456 (1943).

[1, 2] The gravamen of the offense of possession of housebreaking implements, as defined by G.S. 14-55, lies in the possession, "without lawful excuse," of an implement or implements either enumerated in the statute or which fairly come within the meaning of the term "other implements of housebreaking." *State v. Vick,* 213 N.C. 235, 195 S.E. 779 (1938). Thus, an article may be deemed an implement of housebreaking, the possession of which is made criminal by the statute, when (1) it is a picklock, key, bit, *or any other instrument capable of being used for the purpose of housebreaking, and* (2) at the time and place alleged, the person charged with its possession did in fact possess it for that purpose, *i.e.,* without lawful excuse. *State v. Boyd, supra,* 223 N.C. 79, 25 S.E. 2d 456; *see generally,* Annot., "Validity, Construction, and Application of Statutes Relating to Burglars' Tools," 33 A.L.R. 3d 798 (1970). Possession alone of the article is not the crime; the gist of the offense is its possession for the unlawful purpose of breaking into a building. Hence, although a prosecution under G.S. 14-55 does not require proof of any specific intent to break into a particular building at a particular time and place, the burden rests on the State to show beyond a reasonable doubt

that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking. *State v. Baldwin*, 226 N.C. 295, 37 S.E. 2d 898 (1946). Such a showing will of necessity depend upon the strength of circumstantial evidence.

[3] Applying these principles to the instant case, we find Judge Battle's charge to the jury to be both well phrased and substantially correct. There was, moreover, plenary circumstantial evidence which would permit the jury to infer, as it must have, that defendant was in actual or constructive possession of the tire tool, that the tire tool was reasonably capable of use for the purpose of breaking into a building, and that defendant did in fact possess it for that purpose at the time and place of his arrest. Under the circumstances of the case, then, there was no error in the trial court's permitting the jury to conclude that the tire tool was an "implement of housebreaking" within the meaning of G.S. 14-55. The decision of the Court of Appeals upholding defendant's conviction is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JERRY EUGENE GIBSON

No. 134

(Filed 15 July 1980)

Criminal Law § 43— photographs of crime scene showing lighting conditions—admissibility

In a prosecution for rape, crime against nature, burglary and common law robbery where the victim identified defendant based on her observation of him at the crime scene, the trial court did not err in admitting into evidence photographs of the victim's apartment where the crimes took place, since the victim testified that the photographs accurately depicted the lighting conditions in her apartment as they appeared on the morning of the crimes, and the jury was instructed to consider the photographs only to the extent to which they illustrated and explained the witness's testimony.

APPEAL by defendant form *Ervin, J.*, 29 October 1979 Schedule "D" Session, MECKLENBURG Superior Court.

Defendant was charged in indictments, proper in form, with the crimes of rape, crime against nature, burglary, and common law robbery. A first trial ended in a mistrial when the jurors could not reach a verdict.

Upon retrial, evidence for the State tended to show that Barbara Crawford lived at Tryon House Apartments and worked as resident manager there. In addition, she worked as a hostess during the evenings at the Radisson Plaza Hotel. On 23 June 1979, she returned home around 12:30 or 12:45 a.m. and retired. She was subsequently awakened by a noise and saw a man standing in the li ing room. The man hit Ms. Crawford several times and then raped her and forced her to perform oral sex. Ms. Crawford testified that there were no lights on in the apartment but that the security light outside her window illuminated the apartment sufficiently for her to see the intruder and to recognize defendant. She estimated that defendant was present in the apartment for about two and one-half hours and that she was able to see him directly for approximately twenty minutes. During the time he was in the apartment, defendant took ten dollars from her purse.

The prosecutrix testified further that defendant had been employed three days prior to the incident as the maintenance man for the apartment building. She had seen him on numerous occasions during the three days and had given him work orders. As a maintenance man, defendant had access to a master key to all of the apartments in the building.

Defendant offered evidence tending to show that he was at a party at his cousin's house at the time of the alleged crimes. He testified that he arrived at his cousin's house around midnight, "had a few beers, a few drinks, and started dancing." According to defendant's evidence, he did not leave until daylight.

The jury returned a verdict of guilty as to each of the charged crimes. Defendant was sentenced to life imprisonment for rape and to life imprisonment for burglary. He received a sentence of ten years for crime against nature and ten years for common law robbery. Defendant appealed from the convictions for rape and burglary pursuant to G.S. 7A-27(a). We allowed defendant's motion to bypass the Court of Appeals in case number 79CR38499 (crime against nature) and in 79CR38501 (common law robbery) on 18 April 1980.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, and Douglas A. Johnston, Assistant Attorney General, for the State.

Theo X. Nixon, Assistant Public Defender, for defendant.

BRANCH, Chief Justice.

Defendant's sole assignment of error is addressed to the admission into evidence of certain photographs for the purpose of illustrating the testimony of the prosecuting witness. Ms. Crawford testified as to the lighting conditions in her apartment at the time of the commission of the crimes. She stated that because of a security light just outside her window, she was able to see defendant's face and that she was able to observe him for at least twenty minutes. She also stated that, at one point, "[t]here was enough light in the room to read the clock." Over defendant's objection, two photographs depicting the apartment were introduced into evidence to illustrate Ms. Crawford's description of the lighting conditions.

Defendant concedes that the long-standing rule in North Carolina permits the introduction of photographs into evidence for the limited purpose of illustrating the testimony of a witness. *See* 1 Stansbury's N.C. Evidence § 34 (Brandis Rev. 1973). Defendant also admits that the trial judge correctly charged the jury that the photographs were not competent as substantive evidence and were to be considered only to the extent that they illustrated or explained the witness's testimony. Defendant contends, however, that the determination of his guilt or innocence rested in large part on the identification of him by the prosecuting witness, which in turn depended on the amount and quality of illumination available in the apartment at the time of the alleged offenses. He argues that there was no way of knowing whether the lighting conditions were in fact the same in the photographs as they had been on the date in question, except for the prosecutrix's own statement to that effect.

Defendant's argument, stripped to its essentials, is whether these photographs were properly authenticated. In North Carolina, a photograph may be admitted into evidence to illustrate the testimony of a witness if it is identified as portraying the scene with accuracy. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d

214 (1975), *death sentence vacated,* 428 U.S. 903 (1976); *see* 1 Stansbury's, *supra.* The photograph need not have been made by the witness when he testified that it is an accurate representation of the scene. *Id.* Furthermore, "[p]osed photographs of the reconstructed scene . . . are admissible when properly identified by a witness as being accurate representations of the conditions as he saw them at the time in issue." 1 Stansbury's, *supra,* § 34, p. 97; *see also Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326 (1953); *State v. Matthews,* 191 N.C. 378, 131 S.E. 743 (1926).

Ms. Crawford described the lighting conditions in her apartment and then stated that the photographs accurately depicted those conditions as they appeared on the morning of 23 June 1979. The jury was instructed to consider the photographs only to the extent to which they illustrated and explained her testimony. We hold that the challenged photographs were properly admitted.

Our examination of the record discloses that defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. CECIL WAYNE RIDDLE AND CHARLES EDWARD RIDDLE

No. 69

(Filed 15 July 1980)

Burglary and Unlawful Breakings § 5; Crime against Nature § 3; Rape § 5— first degree burglary—first degree rape—crime against nature—sufficiency of evidence

The State's evidence was sufficient to support jury verdicts finding the first defendant guilty of first degree burglary, first degree rape and crime against nature and the second defendant guilty of first degree burglary and first degree rape.

APPEAL by defendants from *Allen, Judge.* Judgments entered 8 August 1979.

Defendants were tried jointly at the 6 August Criminal Session, Superior Court, BUNCOMBE County. Defendant Cecil Riddle was charged by indictments, proper in form, with: (1) the first

degree rape of Elizabeth Nelson on 21 February 1979, (2) committing a crime against nature with Elizabeth Nelson on 21 February 1979, and (3) committing first degree burglary of the dwelling house of Elizabeth Nelson on 21 February 1979. Defendant entered pleas of not guilty and the jury found defendant guilty of first degree rape, crime against nature and first degree burglary. Judge Allen sentenced defendant Cecil Riddle to life imprisonment for first degree rape, 10 years for crime against nature and 20-25 years for first degree burglary.

Defendant Charles Riddle was charged by indictments, proper in form, with: (1) the first degree burglary of the dwelling house of Elizabeth Nelson on 21 February 1979 and (2) the first degree rape of Elizabeth Nelson as of the same date. Upon pleas of not guilty, the jury also found defendant Charles Riddle guilty of both crimes charged. He was sentenced to life imprisonment for first degree rape and a 20-25 year sentence for first degree burglary.

Both defendants appealed the judgments of life imprisonment directly to this Court pursuant to G.S. 7A-27(A) and on 21 January 1980 we allowed both defendants' motions to bypass the Court of Appeals with regard to the remaining convictions.

The evidence for the State tended to show the following: On the evening of February 21, 1979 Elizabeth Nelson was in her home in Barnardsville, North Carolina. At approximately 9:30 p.m. she went into her bedroom, dressed for the night and went to bed. Prior to retiring, she had turned out the lights and locked the front door of her home. Around 9:45 or 9:50 p.m. Miss Nelson heard something at her front door. She turned on her bedroom light and went into the living room where the light had been turned on, and she saw the defendants Charles and Cecil Riddle. The defendants, at gunpoint, forced Miss Nelson to disrobe, and then with Cecil Riddle holding the gun, Charles Riddle forced Miss Nelson to have sexual intercourse with him. Following this, Cecil Riddle directed Miss Nelson to return to the bedroom where he forced her to perform oral intercourse.

After defendants were finished, they left Miss Nelson's home. Miss Nelson went to bed until the return of her friend Kevin Lynch, and at this point the police were called. Miss Nelson was taken to the hospital on the night of the 21st of February and she

also gave a statement to the police. On that evening she was able to describe both defendants, and later identified the defendants from a grouping of 10 photographs and picked both defendants from a lineup.

At the close of the State's evidence, defendants moved for dismissal of the charges on the grounds that the State failed to make out a prima facie case. The motion was denied. Defendants then presented evidence of an alibi which tended to show that they had been together at the home of their stepmother all evening, and that they did not know the prosecutrix. They also offered testimony that they knew nothing about the burglary or rape, and that they were not at the scene at the time the alleged offenses took place.

Upon hearing all the evidence, the jury returned verdicts of guilty of all charges as to both defendants.

Attorney General Rufus L. Edmisten by Assistant Attorney General J. Michael Carpenter for the State.

Assistant Public Defender Robert L. Harrell for defendant-appellants.

PER CURIAM.

The sole assignment of error presented by both defendants on this appeal is whether or not there was sufficient evidence in the record to support the jury's verdicts of guilty and the judgments and commitments entered thereon. In determining whether there is evidence sufficient for the judge to submit a case to the jury, "all admitted evidence favorable to the State, whether competent or incompetent, must be considered and must be deemed true. [Citations omitted.] The question for the Court is whether there is substantial evidence to support a finding both that an offense charged in the bill of indictment has been committed and that the defendant committed it [citations omitted]." *State v. Roseman*, 279 N.C. 573, 580, 184 S.E. 2d 289, 294 (1971).

After a thorough review of the record we are of the opinion there was sufficient, competent evidence of every essential element of the offenses charged, and sufficient, competent evidence for the jury to find that the defendants were the perpetrators of

these offenses. We conclude therefore that the verdicts are supported by the evidence and the judgments and commitments are supported by the verdicts.

In the defendants' trial we find

No error.

IN THE MATTER OF COLLINS ROGERS) ORDER

No. 85 PC

(Filed 4 August 1980)

THIS matter is before us by virtue of notice of appeal from the decision of the Court of Appeals recorded in 44 N.C. App. 713, 262 S.E. 2d 312 (1980). The Attorney General has moved to dismiss the appeal for lack of a substantial constitutional question which said motion is allowed. Alternatively, Collins Rogers also petitions our discretionary review of the Court of Appeals' decision pursuant to G.S. 7A-31. We allow the motion for discretionary review for the limited purpose of entering this final order in this cause.

Our review of the record reveals that the trial court's order of 31 August 1978 finding respondent to be mentally ill, imminently dangerous to himself or others, and in need of further hospitalization, and committing him to John Umstead Hospital, was not supported by clear, cogent and convincing evidence as required by G.S. 122-58.7(i). *In re Hatley*, 291 N.C. 693, 231 S.E. 2d 633 (1977); *In re Salem*, 31 N.C. App. 57, 228 S.E. 2d 649 (1976).

The decision of the Court of Appeals is therefore

Vacated.

That court is directed to remand to the District Court of Granville County which said court shall enter an order vacating the commitment order of 31 August 1978.

It is further ordered that this order be printed in the official reports of the decisions of this Court.

Done by the Court in conference, this 15th day of July, 1980.

CARLTON, J.
For the Court

APPENDIX

AMENDMENT TO GENERAL RULES
OF PRACTICE
FOR THE SUPERIOR AND DISTRICT COURTS

AMENDMENTS TO RULES RELATING TO
DISCIPLINE AND DISBARMENT OF ATTORNEYS

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS SUPPLEMENTAL TO THE RULES OF CIVIL PROCEDURE ADOPTED PURSUANT TO G.S. 7A-34

Effective July 1, 1980

Rule 2

CALENDARING OF CIVIL CASES

Subject to the provisions of Rule 40(a), Rules of Civil Procedure and G.S. 7A-146:

(a) The Senior Resident Judge and Chief District Judge in each Judicial District shall be responsible for the calendaring of all civil cases and motions for trial or hearing in their respective jurisdictions. A case management plan for the calendaring of civil cases must be developed by the Senior Resident Judge and the Chief District Court Judge. The Administrative Office of the Courts shall be available to provide assistance to judges in developing a case management program.

The plan must be promulgated in writing and copies of the plan must be distributed to all attorneys of record.

In districts with Trial Court Administrators, the responsibility for carrying out the case management plan may be delegated to the Trial Court Administrator.

The case management plan must contain a provision that attorneys may request that cases may be placed on the calendar.

(b) The civil calendar shall be prepared under the supervision of the Senior Resident Judge or Chief District Court Judge. Calendars must be published and distributed by the Clerk of Court to each attorney of record (or party where there is no attorney of record) and presiding judge no later than four weeks prior to the first day of court.

(c) Except in districts served by a Trial Court Administrator, a ready calendar shall be maintained by the Clerk of Court for the District and Superior Courts. Five months after a complaint is filed, the Clerk shall place that case on a ready calendar, unless the time is extended by written order of the Senior Resident Judge or the Chief District Judge for their respective jurisdictions. In districts with Trial Court Administrators, a case tracking system shall be maintained.

(d) During the first full week in January and the first full week following the 4th of July or such other weeks as the Senior

Resident Judge shall designate that are agreeable to the Chief Justice, the Senior Resident Judge of each district shall be assigned to his home district for administrative purposes. During such administrative terms, the Senior Resident Judge shall be responsible for reviewing all cases on the ready calendar, or all cases designated by the Trial Court Administrator, of each county in the judicial district. The Senior Resident Judge shall take appropriate actions to insure prompt disposition of any pending motions or other matters necessary to move the cases toward a conclusion. The Chief District Court Judge shall undertake periodically such an administrative review of the District Court Civil Docket.

(e) When an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(f) Requests for a peremptory setting for cases involving persons who must travel long distances or numerous expert witnesses or other extraordinary reasons for such a request must be made to the Senior Resident Judge or Chief District Judge. In districts with Trial Court Administrators, requests should be made to the Trial Court Administrator. A peremptory setting shall be granted only for good and compelling reasons. A Senior Resident Judge or Chief District Judge may set a case peremptorily on his own motion.

(g) When a case on a published calendar (tentative or final) is settled, all attorneys of record must notify the Trial Court Administrator (Clerk of Court in those counties with no Trial Court Administrator) within twenty-four (24) hours of the settlement and advise who will prepare and present judgment, *and when.*

The amendment to Rule 2 was adopted by the Court in conference on June 3, 1980 to become effective immediately. It shall be promulgated by publication in the Advance Sheets of the Supreme Court and of the Court of Appeals and by distribution of the amendment by mail to the Clerk of Court in each county of the state.

Britt, J.
For the Court.

AMENDMENTS TO RULES RELATING TO DISCIPLINE AND DISBARMENT OF ATTORNEYS

The following amendments to the Rules and Regulations and Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 16, 1980.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Sections 14(4), 14(6), 14(18) and 14(20) as appear in 288 N.C. 743 and as amended in 292 N.C. 743, 294 N.C. 753, 755 be and the same are hereby amended by rewriting said Sections, adding new Sections 10(4) and 14(18.1) and deleting 14(21) as follows:

§ 10 Secretary—Powers and Duties in Discipline and Disability Matters

The Secretary shall have the following powers and duties in regard to discipline and disability procedures.

(4) to perform all necessary ministerial acts normally performed by the Clerk of the Superior Court in Complaints filed before the Disciplinary Hearing Commission.

§ 14 Formal Hearing

(4) Within seven days of the receipt of return of service of a complaint in the office of the Secretary, the Chairman of the Disciplinary Hearing Commission shall designate a Hearing Committee from among the members of the Commission. The Chairman shall notify the Counsel and the Defendant of the composition of the Hearing Committee. Such notice shall also contain the time and place determined by the Chairman for the hearing to commence. The commencement of the hearing shall be initially scheduled not less than sixty nor more than ninety days from the date of service of the complaint upon the Defendant, unless one or more subsequent complaints have been served on the Defendant within ninety days from the date of service of the first or a preceding complaint.

When one or more subsequent complaints have been served on the Defendant within ninety days from the date of service of the first or a preceding complaint, the Chairman of the Disciplinary Hearing Commission may consolidate the cases for hearing, and the hearing shall be initially scheduled not less than sixty nor more than ninety days from the date of service of the last complaint upon the Defendant attorney.

(6) Failure to file an answer admitting, denying or explaining the complaint, or asserting the grounds for failing to do so, within the time limited or extended, shall be grounds for entry of the Defendant's default and in such case the allegations contained in the complaint shall be deemed admitted. The Secretary shall enter the Defendant's default when the fact of default is made to appear by motion of counsel for the Plaintiff or otherwise. The Plaintiff may thereupon apply to the Hearing Committee for a default order imposing discipline, and the Hearing Committee shall thereupon enter an order, make findings of fact and conclusions of law based on the admissions, and order the discipline deemed appropriate. The Hearing Committee may, in its discretion, hear such further or additional evidence as it deems necessary prior to entering the order of discipline. For good cause shown, the Hearing Committee may set aside the Secretary's entry of default. After an order imposing discipline has been entered by the Hearing Committee upon the Defendant's default, the Hearing Committee may set aside the order in accordance with Rule 60(b) of the Rules of Civil Procedure.

(18) If the Hearing Committee finds that the charges of misconduct are not established by clear, cogent and convincing evidence, it shall enter an order dismissing the complaint. If the Hearing Committee finds that the charges of misconduct are established by clear, cogent and convincing evidence, the Hearing Committee shall enter an order for discipline. In either instance, the Committee shall file a separate order which shall include the Committee's findings of fact and conclusions of law.

(18.1) The Secretary will provide that a complete record shall be made of the evidence received during the course of all hearings before the Disciplinary Hearing Commission as provided by N.C.G.S. 7A-95 for trials in the Superior Court. The Secretary will preserve the record and the pleadings, exhibits and briefs of the parties. The Secretary shall provide that the record will be transcribed as required.

(20) All reports and orders shall be signed by the members of the Hearing Committee and shall be filed with the Secretary. Copies of all reports and orders shall be delivered to the parties by the Secretary. The copy to the Defendant shall be served by registered or certified mail, return receipt requested. If the Defendant's copy mailed by registered or cer-

tified mail is returned as unclaimed, or undeliverable, then service shall be as provided in Rule 4 of the Rules of Civil Procedure.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at regular quarterly meeting unanimously adopt said amendments to the Rules and Regulations of the North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of the North Carolina State Bar, this the 31st day of October, 1980.

B. E. JAMES, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 13 day of November, 1980.

JOSEPH BRANCH
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the Minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 13 day of November, 1980.

CARLTON, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

Defendants could properly appeal from an interlocutory order requiring removal of concrete anchors since the order affected a substantial right. *Development Corp. v. James*, 631.

§ 24. Necessity for Objections and Exceptions

A general objection will not suffice to afford counsel the benefits of the rule which preserves the continued effect of a specific objection, once made, to a particular line of questioning. *Power Co. v. Winebarger*, 57.

Pursuant to G.S. 1A-1, Rule 46(a)(1) and Appellate Rule 10(b)(1), respondents' failure to object to two questions posed on cross-examination of their value witness concerning the sales prices of noncomparable lands did not constitute a waiver of respondents' objections to those questions or to similar questions posed to other value witnesses. *Ibid.*

§ 45.1. Effect of Failure to Discuss Exceptions and Assignments of Error in Brief

Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under G.S. 7A-32(c) or pursuant to Appellate Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. *Enterprises, Inc. v. Equipment Co.*, 286.

§ 64. Affirmance or Reversal

Where one member of the Supreme Court did not participate in the decision of a case and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without becoming a precedent. *Shields v. Bobby Murray Chevrolet*, 366.

ARREST AND BAIL

§ 3.1. Probable Cause for Arrest Without Warrant

An officer had probable cause to make a warrantless arrest of defendant for first degree burglary. *S. v. Phillips*, 678.

ARSON

§ 5. Instructions

Evidence in a prosecution for felonious burning of a dwelling house did not require the court to instruct on the lesser included offense of attempted arson. *S. v. Moore*, 694.

ATTORNEYS AT LAW

§ 7.4. Fees Based on Provisions of Notes or Other Instruments

A contract for lease of personalty constitutes an "evidence of indebtedness" within the meaning of G.S. 6-21.2, and a provision of the lease allowing the lessor reasonable attorney fees should the lease obligation be collected by an attorney after maturity is enforceable under the provisions of the statute. *Enterprises, Inc. v. Equipment Co.*, 286.

AUTOMOBILES

§ 2.2. Rights and Procedures in Suspension and Revocation Proceedings

The entire record does not support the conclusion of the Medical Review Board that petitioner, who suffers from epilepsy and blacked out while driving, is afflicted with an uncontrolled seizure disorder which prevents him from exercising reasonable and ordinary control over a motor vehicle while operating it upon the highways. *Chesnutt v. Peters, Comr. of Motor Vehicles*, 359.

BROKERS AND FACTORS

§ 6. Right to Commissions

Plaintiff was not entitled to refund of a placement fee from defendant mortgage broker who contracted to obtain permanent financing for plaintiff since defendant did in fact obtain a mortgage loan commitment for plaintiff with defendant lender which was accepted in a revised fashion. *Johnson v. Insurance Co.*, 247.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence Generally

Evidence was sufficient for the jury in a first degree burglary case. *S. v. Phillips*, 678.

State's evidence was sufficient to support the jury verdict finding two defendants guilty of first degree burglary. *S. v. Riddle*, 744.

Evidence was sufficient to support defendant's conviction of first degree burglary and second degree rape. *S. v. Williams*, 190.

§ 5.8. Sufficiency of Evidence of Breaking and Entering of Residential Premises

There was sufficient evidence of a breaking to support the court's charge on burglary where the State's evidence tended to show that defendant and a male accomplice gained access to deceased's dwelling by pushing a female accomplice out of the way as she left the dwelling, "busting" the door open, and rushing into the dwelling. *S. v. Easterling*, 594.

§ 10.3. Sufficiency of Evidence of Possession of Housebreaking Implements

Trial court did not err in permitting the jury to conclude that a tire tool was an implement of housebreaking within the meaning of G.S. 14-55. *S. v. Bagley*, 736.

CONSTITUTIONAL LAW

§ 23. Due Process in Civil Proceedings

Due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or otherwise to ensure fundamental fairness. *Jolly v. Wright*, 83.

§ 28. Due Process in Criminal Proceedings

There was no prosecutorial oppression amounting to a denial of due process in this prosecution for kidnapping and rape where defendant was indicted in November 1977 at a time when he was in federal custody and was not convicted until July 1979. *S. v. Lynch*, 534.

§ 31. Affording Accused the Basic Essentials for Defense

A daily transcript is not a necessary expense of representation which the State is required to provide an indigent defendant under G.S. 7A-450(b). *S. v. Easterling*, 594.

CRIMINAL LAW

CRIMINAL LAW — Continued

§ 34.5. Admissibility of Other Offenses to Show Identity of Defendant

There was no merit to defendant's contention in a homicide prosecution that the trial court erred in allowing into evidence testimony concerning the stealing of gas which was unrelated to the case under consideration. *S. v. Daniels*, 105.

§ 43. Photographs

Trial court properly admitted into evidence photographs of the crime scene showing the lighting conditions at the time of the crime for the purpose of illustrating the witness's testimony. *S. v. Gibson*, 741.

§ 51. Qualification of Experts

Trial court properly excluded a question calling for the expert oipinion of a barber as to whether defendant's facial hair growth was fast or slow where the barber was never tendered or qualified as an expert in the field of facial hair growth. *S. v. Satterfield*, 621.

§ 53. Medical Expert Testimony

While it was error for the court to permit a psychiatrist to testify as to conversations with defendant during his examination of defendant since the court excluded the psychiatrist's opinion on defendant's mental capacity at the time of the crime, such error was not prejudicial to defendant in this case. *S. v. Franks*, 1.

§ 55. Blood Tests

Trial court did not err in the denial of defendant's general objection to testimony of the results of an expert's analysis of blood and saliva samples taken from defendant pursuant to a nontestimonial identification order because the record fails to show that defendant was advised of his right to counsel before being subjected to the tests. *S. v. Satterfield*, 621.

§ 57. Evidence in Regard to Firearms

A robbery victim was properly permitted to testify that the gun used in the robbery "looked to me like it was probably about the caliber of a .38." *S. v. Smith*, 71.

An expert in ballistics was properly permitted to testify that the fatal bullet "could have" been fired from defendant's pistol. *S. v. Ward*, 150.

§ 62. Lie Detector Tests

Defendant's incriminating statements to an SBI agent were not the result of any polygraph test. *S. v. Stephens*, 321.

§ 63. Evidence as to Sanity of Defendant; Expert and Nonexpert Witnesses

A psychiatrist could properly give an opinion based on personal knowledge that defendant knew the difference between right and wrong at the time of a murder although the psychiatrist was not treating defendant but only observed and evaluated defendant to prepare himself to testify at defendant's trial. *S. v. Franks*, 1.

Testimony by the 47-year-old defendant's mother and sister regarding his childhood attitudes, school attendance, his father's drinking problems, and an episode when defendant was 30 years old was too remote for admission on the question of his mental competency at the time of the crime. *Ibid.*

In a robbery prosecution where defendant pled not guilty by reason of insanity, he was not prejudiced by the exclusion of his sister's testimony that defendant

CRIMINAL LAW — Continued

had told her he felt dizzy, felt like he was smothering, and did not know what had come over him. *S. v. Linville*, 135.

§ 66.1. Evidence of Identity by Sight; Opportunity for Observation

In a prosecution for assault and armed robbery, the trial court did not err in allowing the three victims to make an in-court identification of defendant, since each of them was able to view the intruder at close range in familiar surroundings which were well lighted over a period of about 45 minutes. *S. v. Royal*, 515.

§ 66.6. Suggestiveness of Lineup

A lineup was not impermissibly suggestive and conducive to irreparably mistaken identification so as to render inadmissible a rape victim's lineup identification of defendant because the victim, after identifying defendant, told officers that one of the black males in the lineup, defendant's brother, appeared to be very nervous, and officers had the victim confront this person in isolation. *S. v. Satterfield*, 621.

§ 66.9. Suggestiveness of Photographic Identification Procedure

Trial court did not err in failing to suppress photographic identification of defendant by victims of an armed robbery and assault. *S. v. Royal*, 515.

§ 66.10. Confrontation at Police Station or Jail

Where the trial court granted defendant's motion to suppress a witness's in-court identification of defendant on the basis of a prior impermissibly suggestive identification at police headquarters, the prosecutor acted improperly in asking the witness on two occasions to look at defendant and state whether he could identify defendant as the driver of the getaway van. *S. v. Weimer*, 642.

§ 66.14. Independent Origin of In-Court Identification as Curing Improper Pretrial Identification

A rape victim's in-court identification of defendant as her assailant was of independent origin and not tainted by pretrial voice, photographic and lineup identifications. *S. v. Satterfield*, 621.

§ 66.16. Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

A robbery victim's in-court identification of defendant was not tainted by out-of-court identification procedures, including the victim's misidentification of another person as the robber from mug books, the victim's statement that he was only 80% sure when he picked defendant's photograph from a photographic lineup, and his viewing of defendant in a courtroom through no arrangement of law officers. *S. v. McCraw*, 610.

The evidence supported the trial court's finding that a witness's in-court identification of defendant's alleged female accomplice as the person who shot a supermarket manager was of independent origin and not tainted by a pretrial identification procedure in which the witness was shown a photograph of the accomplice in the district attorney's office. *S. v. Weimer*, 642.

An in-court identification of defendant by the victim and an eyewitness of an armed robbery was based on observation at the crime scene and was not tainted by a photographic identification. *S. v. Daniels*, 105.

CRIMINAL LAW — Continued

§ 67. Evidence of Identity by Voice

Trial court did not err in admitting a rape victim's identification of defendant's voice from a number of tape recorded voices without a voir dire examination. *S. v. Satterfield*, 621.

§ 71. Shorthand Statements of Fact

A witness's testimony that he yelled to a passerby that "somebody had tried to rob [the prosecuting witness], and I would try to keep in sight of the car" was admissible as a shorthand statement of fact. *S. v. Smith*, 71.

§ 75.2. Admissibility of Confession; Effect of Statements of Officers

Trial court properly refused to suppress defendant's in-custody statement where the evidence, although conflicting, supported the court's finding that defendant did not request an attorney during questioning and was not pressured by police comments about plea bargaining and the possibility of the death sentence. *S. v. Easterling*, 594.

§ 75.4. Confessions Obtained in Absence of Counsel

Defendant was tricked into waiving his right to counsel and his privilege against self-incrimination where he made statements to an SBI agent following a polygraph test assuming the polygraph test was still in progress and that his attorney would be called when his interrogation began. *S. v. Stephens*, 321.

§ 75.9. Volunteered and Spontaneous Statements

Defendant's confession was properly admitted in a murder trial where defendant was advised of his Miranda rights but did not implicate himself in the murder in response to questioning, and defendant's confession was not the result of interrogation but was volunteered and spontaneous. *S. v. Franks*, 1.

§ 75.14. Mental Capacity to Confess; Retardation

Evidence was sufficient to support trial court's findings of fact and conclusions of law that defendant knowingly and intelligently waived his right to counsel, though such evidence tended to show that defendant had a low IQ and impaired memory. *S. v. Jenkins*, 578.

The State could introduce evidence of defendant's volunteered statements without a preliminary inquiry into defendant's mental competence to understand the nature and gravity of those statements. *S. v. Leonard*, 223.

§ 81. Best and Secondary Evidence

An SBI laboratory report was properly admitted into evidence since it was an original document and its authenticity was proved by the custodian of the records. *S. v. Jenkins*, 578.

§ 85.1. Defendant's Character Evidence

Where defendant testified in general terms about his volunteer work for a certain organization, it was not error to refuse to allow him to testify as to a specific act he performed concerning that work as evidence of his good character in order to show that he did not commit the crimes charged. *S. v. Handsome*, 313.

§ 86.4. Credibility of Defendant; Prior Convictions, Accusations

Defendant did not show error in the trial court's failure to instruct the jury to disregard the district attorney's cross-examination of defendant concerning whether he had ever been convicted of homicide. *S. v. Clark*, 116.

CRIMINAL LAW — Continued

It was not improper for the district attorney to ask defendant on cross-examination whether he had been previously charged with assault with intent to rape where defendant's counsel was the first to elicit evidence of the charge against defendant. *S. v. Satterfield*, 621.

§ 86.5. Cross-Examination of Defendant About Prior Acts of Misconduct

Defendant was properly questioned concerning prior criminal acts for the purpose of impeachment. *S. v. Royal*, 515.

Defendant in a kidnapping and rape case could properly be asked on cross-examination if he had previously broken into a trailer to rape the woman who lived there and if he had broken into the trailer of another woman on another date and raped her. *S. v. Lynch*, 534.

The district attorney could properly ask defendant on cross-examination if, during the trial, he had called the district attorney a "punk" and mouthed the word "mother" to him. *Ibid.*

The prosecutor was not precluded from cross-examining defendant about prior acts of misconduct on the ground that defendant's long history of mental disease shows that she was not mentally responsible for her prior acts of misconduct. *S. v. Leonard*, 223.

The State was entitled to cross-examine defendant for impeachment purposes as to whether she shot and killed a person in Florida in 1973 even if defendant was found not guilty by reason of insanity of a homicide charge arising out of the shooting. *Ibid.*

§ 87.3. Use of Writings to Refresh Recollection

The memory of a deputy sheriff was refreshed in a permissible manner where he was permitted to refer to a radio log sheet. *S. v. Royal*, 515.

§ 87.4. Redirect Examination

Where the State referred to two federal trials of defendant in impeaching him on cross-examination, the trial court's refusal to permit defendant to testify on redirect that mistrials had been declared in those trials did not constitute the erroneous refusal to permit defendant to rehabilitate his credibility. *S. v. Lynch*, 534.

§ 88. Right of Cross-Examination

Trial court did not deny defendant his right to confront his accusers by sustaining objections by the district attorney to questions propounded by defense counsel on cross-examination. *S. v. Royal*, 515.

§ 89.5. Slight Variances in Corroborating Testimony

An accomplice's pretrial statement did not differ so substantially from his in-court testimony that the statement was incompetent for corroborative purposes. *S. v. Easterling*, 594.

§ 90.2. Cross-Examination of Own Witness

Trial court erred in declaring defendant's sister, who had been called as a witness for the State, a hostile witness and in permitting the State to impeach her testimony with prior inconsistent statements. *S. v. Moore*, 694.

§ 91.2. Continuance on Ground of Publicity

Trial court did not err in denying defendant's motion for a continuance based on publicity surrounding a female accomplice's trial and references to defendant in certain news articles. *S. v. Weimer*, 642.

CRIMINAL LAW — Continued

§ 92.5. Severance of Charges

Trial court properly denied defendant's motion to sever various charges where the State contended that all the crimes were committed pursuant to a single scheme. *S. v. Brown*, 41.

§ 96. Withdrawal of Evidence

Defendant was not entitled to a mistrial where a witness made reference to defendant's arrest in N.Y., defendant objected and moved to strike, and the judge instructed the jury to disregard the testimony. *S. v. McCraw*, 610.

Defendant was not prejudiced because the jury heard testimony stricken by the court upon motions by defendant where the court instructed the jury at the beginning of the trial not to consider the answer of a witness when a motion to strike was allowed. *S. v. Franks*, 1.

§ 99.3. Expression of Opinion; Remarks in Connection With Admission of Evidence

Trial judge did not express an opinion when he asked a witness whether a photograph portrayed the way a robbery victim's store actually looked. *S. v. Smith*, 71.

§ 101. Conduct or Misconduct Affecting Jurors

Defendant failed to show that he was prejudiced by the court's failure to take some action when a defense witness was taken into custody by a deputy sheriff after the witness had testified. *S. v. Jenkins*, 578.

§ 101.2. Exposure of Jury to Evidence Not Introduced

Although it was technically improper for the prosecution to pass among the jurors a gun belonging to deceased which was not introduced into evidence, defendant was not prejudiced thereby. *S. v. Easterling*, 594.

§ 102.5. Improper Questions by District Attorney

Defendant was not prejudiced where the district attorney referred to his statement as a confession. *S. v. Jenkins*, 578.

§ 102.6. Comments by District Attorney in Jury Argument

The district attorney's argument that the State would have no case against an accomplice who testified for the State without his confession, and that the accomplice would not want to be in the same prison with defendant was not improper. *S. v. Lynch*, 534.

Trial court erred in permitting the prosecutor to allude to portions of a corroborative statement as substantive evidence in his closing jury argument, but such error was not prejudicial to defendant. *S. v. Easterling*, 594.

§ 103. Function of Court and Jury

Trial judge abused his discretion in denying unnamed motions in the presence of the jury before they were made and in then immediately denying defense counsel's request for a recess to confer with defendant as to whether defendant should take the stand or otherwise offer evidence. *S. v. Goode*, 726.

§ 111. Form and Sufficiency of Instructions in General

Evidence offered on the hearing of a post-trial motion for appropriate relief does not relate back so as to justify a holding that the trial judge erroneously instructed the jury at trial. *S. v. Leonard*, 225.

CRIMINAL LAW — Continued

§ 112.6. Instructions on Defense of Insanity

Trial court, in instructing on the defense of insanity in a first degree murder case, did not commit prejudicial error in refusing to give defendant's requested instruction that "criminal intent . . . is an essential element of murder, and if by reason of mental disease a person is incapable of forming any intent, he cannot be regarded by the law as guilty." *S. v. Franks*, 1.

Trial court was not required to define "satisfaction" after instructing that defendant had the burden of proving insanity to the satisfaction of the jury. *Ibid.*

Trial judge did not leave the jury with the impression that their only verdict choices were not guilty by reason of insanity or guilty of first degree murder when he instructed in the final mandate that the jury could return a verdict of first degree murder "if you have not previously found defendant insane at the time of the alleged shooting" but failed to include such an instruction in the final mandate as to the lesser included degrees of homicide. *S. v. Leonard*, 223.

§ 113.2. Charge on Substantive Features of Case; Defenses, Generally

Trial court did not err in failing to submit an issue of involuntary intoxication to the jury. *S. v. Jones*, 363.

Trial court in a second degree murder case erred in omitting any reference in the charge to defendant's testimony that he did not shoot at or near the deceased but fired his pistol away from deceased. *S. v. Ward*, 150.

§ 113.4. Definitions of Words Used in Charge

Trial court in a prosecution for common law arson did not err in failing to define the word "intent." *S. v. Jones*, 363.

§ 113.7. Charge on Acting in Concert

In a second degree murder prosecution of two defendants, there was no merit to defendant's contention that the trial court gave conflicting instructions on acting in concert. *S. v. Gadsden*, 345.

Though defendant presented evidence of duress, trial court did not err in charging on acting in concert. *S. v. Handsome*, 317.

§ 122.2. Additional Instructions Upon Jury's Failure to Agree

While an N.C. jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree, trial court's instruction to such effect in this case did not constitute prejudicial error. *S. v. Easterling*, 594.

§ 138.2. Cruel and Unusual Punishment

There was no merit to defendant's contention that consecutive sentences imposed upon him which made him eligible for parole only after 32 years constituted cruel and unusual punishment. *S. v. Handsome*, 317.

§ 138.7. Matters and Evidence Considered in Sentencing

In a post-trial hearing to determine the sentence to be imposed upon defendant for attempted armed robbery, trial court did not err in admitting an FBI fingerprint report which indicated defendant had a prior conviction for aiding and abetting an armed robbery. *S. v. Smith*, 71.

Defendant waived his right to assert that his privilege against self-incrimination was violated at his sentencing hearing when the trial judge asked him questions about his prior criminal record where he failed to assert the privilege or to object to the questions. *Ibid.*

HOMICIDE — Continued

§ 20.1. Photographs

Trial court in a murder prosecution did not err in admitting photographs of the victim's body taken at the crime scene and a photograph of defendant. *S. v. Jenkins*, 578.

§ 21.1. Sufficiency of Evidence Generally

Evidence was insufficient to support defendant's conviction for the murder of his partner in crime which took place while both were fleeing through a wooded area. *S. v. Daniels*, 105.

§ 21.5. Sufficiency of Evidence of First Degree Murder

The State's evidence was sufficient to support defendant's conviction of first degree murder of her sister. *S. v. Leonard*, 223.

§ 21.6. Sufficiency of Evidence of Homicide in Perpetration of Felony

State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder. *S. v. Easterling*, 594.

§ 21.7. Sufficiency of Guilt of Second Degree Murder

Evidence was sufficient to sustain defendant's conviction of second degree murder. *S. v. Jenkins*, 578.

§ 23. Instructions Generally

Trial court in a second degree murder case erred in omitting any reference in the charge to defendant's testimony that he did not shoot at or near the deceased but fired his pistol away from deceased. *S. v. Ward*, 150.

§ 25.1. Instructions on Felony Murder Rule

It was not error for the court to submit both a felony murder count and the underlying felony count of armed robbery to the jury. *S. v. Easterling*, 594.

§ 26. Instructions on Second Degree Murder

Trial court committed prejudicial error in instructing the jury in its final mandate that defendant would be guilty of second degree murder if he choked the victim "without malice." *S. v. Ferrell*, 157.

§ 28.1. Duty of Court to Instruct on Self-Defense

Trial court in a prosecution for second degree murder by strangling the victim erred in failing to instruct on the lesser included offense of voluntary manslaughter and on the defense of self-defense. *S. v. Ferrell*, 157.

§ 28.5. Instruction on Defense of Others

Trial court in a homicide prosecution did not err in failing to instruct the jury on the principle of defense of others. *S. v. Oxendine*, 720.

§ 30.2. Submission of Lesser Offense of Manslaughter

In a prosecution of defendant for murder of his infant stepdaughter, trial court did not err in failing to charge the jury on voluntary manslaughter. *S. v. Brown*, 731.

Trial court in a second degree murder case did not err in failing to charge the jury on voluntary manslaughter. *S. v. Gadsden*, 345.

HOMICIDE — Continued

§ 30.3. Submission of Lesser Offense of Involuntary Manslaughter

Trial court did not err in refusing to submit the lesser included offense of involuntary manslaughter since the evidence was insufficient to raise an inference that the shooting was unintentional and at most resulted from the reckless use of a firearm. *S. v. Oxendine*, 720.

HUSBAND AND WIFE

§ 9. Liability of Third Person for Injury to Spouse

A spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries. *Nicholson v. Hospital*, 295.

INDICTMENT AND WARRANT

§ 13.1. Discretionary Denial of Motion for Bill of Particulars

Trial court in a prosecution for first degree murder, armed robbery and first degree burglary did not err in the denial of defendant's motion for a bill of particulars requiring the State to specify the exact time the offenses were allegedly committed. *S. v. Easterling*, 594.

§ 15. Time for Making Motion to Quash

Defendant's motion to quash the indictments on the ground of racial discrimination in the selection of the grand jury was not timely where made after a mistrial had been declared in defendant's first trial. *S. v. Lynch*, 534.

INSURANCE

§ 79.1. Automobile Liability Insurance Rates; Approval or Disapproval by Commissioner of Insurance

G.S. 58-124.21 requires the Commissioner of Insurance to be mathematically specific in rejecting proposed rate increases, and future orders of the Commissioner should specify "wherein and to what extent" the proposed filings are deemed improper. *Comr. of Insurance v. Rate Bureau*, 381.

When the Commissioner of Insurance knows prior to the giving of public notice in what respect he contends such filing fails to comply with the requirements of the statutes, then he must give the specifics in his notice of public hearing. *Ibid.*

The Commissioner of Insurance acted within his discretion in permitting a consumer group to intervene in an automobile insurance rate case and in allowing hearings to be held throughout the State. *Comr. of Insurance v. Rate Bureau*, 460.

The Commissioner of Insurance erred in concluding that the Rate Bureau's submission of an automobile insurance rate filing contained incomplete N.C. data which unfairly deprived the Commissioner of a portion of his statutory period of review. *Ibid.*

The Commissioner's attempt to establish a rule requiring audited data in an insurance ratemaking hearing was "made upon unlawful procedure" as contemplated by G.S. 58-9.6(b)(3) and G.S. 150A-51(3). *Ibid.*

INSURANCE — Continued

§ 79.2. Automobile Liability Insurance Rates; Evidence Considered by Commissioner

An attempt by the Commissioner of Insurance to establish a rule requiring audited data in an automobile ratemaking hearing was made upon unlawful procedure, and his action ordering the audited data in this case was arbitrary and capricious. *Comr. of Insurance v. Rate Bureau*, 381; *Comr. of Insurance v. Rate Bureau*, 460.

In finding and concluding that income on invested capital should be considered as a factor in insurance ratemaking, the Commissioner misconstrued the law in this jurisdiction. *Ibid.*

The Commissioner of Insurance erred in ordering that a capital asset pricing model be used to calculate underwriting profit margins. *Ibid.*

The enactment of G.S. 58-124.21 did not transfer the burden of proof in a ratemaking hearing to the Commissioner of Insurance. *Comr. of Insurance v. Rate Bureau*, 460.

The Commissioner erred in finding that the Rate Bureau acted in bad faith in not preparing an automobile insurance rate filing in accordance with the requirements of an earlier order where the earlier order was on appeal at the time of the filing. *Ibid.*

§ 79.3. Automobile Liability Insurance Rates; Findings of Fact; Sufficiency of Evidence

The conclusion of the Commissioner of Insurance that a 10% increase in automobile insurance rates for insureds ceded to the Reinsurance Facility above the rates for voluntary business would be unfairly discriminatory was not supported by the evidence. *Comr. of Insurance v. Rate Bureau*, 381; *Comr. of Insurance v. Rate Bureau*, 460.

Conclusion by the Commissioner of Insurance that any increase in the total number of insureds in the Reinsurance Facility would increase the overall rate level by more than 6% in contravention of G.S. 58-124.26, though mathematically correct, was erroneous as a matter of law. *Ibid.*

The Commissioner erred in finding that territorial rate differentials for automobile insurance violated a former statute. *Comr. of Insurance v. Rate Bureau*, 460.

§ 116. Fire Insurance Rates; Approval by Commissioner of Insurance

The burden in a homeowners' insurance ratemaking hearing rests with the Rate Bureau. *Comr. of Insurance v. Rate Bureau*, 474.

Determination by the Commissioner that the Rate Bureau was guilty of bad faith and dilatory action with regard to a homeowners' insurance rate filing was not supported by the record. *Ibid.*

§ 116.2. Fire Insurance Rates; Evidence Considered in Determining Fair and Reasonable Profit

The Commissioner of Insurance erred in concluding that unaudited data submitted in a rate filing for homeowners' insurance was not reliable. *Comr. of Insurance v. Rate Bureau*, 474.

The Commissioner erred in concluding that income from invested capital should be considered in determining rates for homeowners' insurance. *Ibid.*

Use by the Commissioner of Insurance of a capital asset pricing model to calculate underwriting profit margins for homeowners' insurance was erroneous as a matter of law. *Ibid.*

MASTER AND SERVANT — Continued

Whether the 1963 version of G.S. 97-53(13) or the 1971 version of that statute applies to a claim for disability resulting from byssinosis depends upon the date when plaintiff's disablement or actual incapacity from byssinosis occurred. *Ibid.*

The 1963 version of G.S. 97-53(13) provides coverage for those persons suffering from byssinosis or brown lung disease or from occupational obstructive lung disease. *Ibid.*

§ 80. Workers' Compensation; Rates of Compensation Insurers

The Commissioner of Insurance erred in concluding that unaudited data submitted in a workers' compensation rate filing was not reliable. *Comr. of Insurance v. Rate Bureau*, 485.

The Commissioner erred in concluding that investment income on invested capital should be considered in determining rates for workers' compensation insurance. *Ibid.*

Use by the Commissioner of Insurance of a capital asset pricing model to calculate underwriting profit margins for workers' compensation insurance was erroneous as a matter of law. *Ibid.*

The Commissioner did not commit prejudicial error in admitting into evidence testimony of a witness given at a prior unrelated hearing concerning automobile insurance rates. *Ibid.*

The burden of proof in a workers' compensation insurance rate hearing rests with the Rate Bureau. *Ibid.*

Conclusion by the Insurance Commissioner that proposed workers' compensation insurance rates were excessive because the expense allowance in the ratemaking formula was based solely on the experience of stock companies was erroneous as a matter of law. *Ibid.*

The Commissioner of Insurance erred in finding that the Rate Bureau acted dilatorily and in bad faith in not furnishing certain data pursuant to the notice of public hearing in a workers' compensation rate case. *Ibid.*

§ 96.5. Workers' Compensation; Commission's Findings of Fact Sufficient

Evidence was sufficient to support the Industrial Commission's finding that plaintiff, a dock worker whose back was struck by a cart on a conveyor line, was injured as a result of an employment related accident. *Click v. Freight Carriers*, 164.

MUNICIPAL CORPORATIONS

§ 2.1. Annexation; Compliance with Statutory Requirements in General

A city complied with statutory requirements that a public hearing be held at which a representative of the municipality shall make an explanation of an annexation report where an officer read the entire report of the proposed annexation. *In re Annexation Ordinance*, 337.

In a proceeding attacking an annexation ordinance, evidence was sufficient to support the trial court's conclusion that maps supplied by respondent city substantially met the requirements of G.S. 160A-47, and there was no merit to petitioners' contention that the requirements of G.S. 160A-45 had not been met because a small, black residential area had not been annexed by respondent. *Humphries v. City of Jacksonville*, 186.

MUNICIPAL CORPORATIONS — Continued

§ 2.2. Annexation; Compliance with Statutory Requirements as to Use and Size of Tracts

In an action challenging the validity of an annexation ordinance, trial court did not err in determining that the city's method of counting lots in a subdivision for the purpose of establishing compliance with the requirements of G.S. 160A-48 was calculated to provide reasonably accurate results. *Food Town Stores v. City of Salisbury*, 21.

The fact that different methods of lot calculation have been used by a city in past annexations is of no import where the record establishes that the method utilized in the annexation under scrutiny complies with the requirements of G.S. 160A-54. *Ibid.*

Margins of error should be allowed with respect to the calculations made by a municipality to establish compliance with the population and subdivision tests of G.S. 160A-48(c) but not with respect to calculations made to establish compliance with the use test of that statute. *Ibid.*

Trial court did not have authority to amend an annexation ordinance by recognizing a previously uncounted lot for purposes of establishing compliance with G.S. 160A-48(c)(3). *Ibid.*

§ 2.6. Annexation; Extension of Utilities to Annexed Territory

A city complied with the requirements of G.S. 160A-47(3) pertaining to the extension of municipal services to an area to be annexed. *In re Annexation Ordinance*, 337.

§ 8.1. Standing to Challenge Ordinance

Plaintiff had standing to litigate the issue of the constitutionality of a city ordinance requiring all permanent employees to be residents of the city but permitting employees living outside the city when the ordinance was adopted to continue to do so. *Maines v. City of Greensboro*, 126.

§ 9. Rights, Powers and Duties of Employees

A city ordinance requiring all permanent city employees to be residents of the city but permitting employees living outside the city when the ordinance was adopted to continue to do so, and directing the city manager to implement the residency rules and prescribe other reasonable standards, did not unconstitutionally vest unlimited discretion in the city manager to enforce the ordinance. *Maines v. City of Greensboro*, 126.

§ 11. Discharge of Municipal Employees

A city ordinance requiring all permanent city employees to be residents of the city but permitting employees living outside the city on the date of the ordinance to continue to do so was not unconstitutionally applied to a city fireman who was discharged for moving his residence outside the city because the city manager permitted employees who had committed themselves to buying or leasing a residence outside the city prior to the date of the ordinance to move outside the city after the date of the ordinance. *Maines v. City of Greensboro*, 126.

Even if plaintiff city fireman's interest in his employment was sufficient to invoke constitutional requirements of notice and hearing before his discharge for moving his residence outside the city limits, plaintiff received adequate notice and hearing to comport with due process. *Ibid.*

NARCOTICS

§ 3. Presumptions and Burden of Proof

Evidence supported the trial court's ruling that the results of tests conducted on green vegetable matter were inadmissible in evidence because the tests were not scientifically accepted as a test for marijuana. *S. v. Tate*, 180.

NEGLIGENCE

§ 13.1. Contributory Negligence; Knowledge and Appreciation of Danger

The defense of contributory negligence is not invariably barred by defendant's failure to warn of a danger when the facts indicate that plaintiff, in the exercise of ordinary care, should have known of the danger of injury independent of any warning by defendant. *Smith v. Fiber Controls Corp.*, 669.

§ 34.1. Sufficiency of Evidence of Contributory Negligence

Evidence was sufficient for the jury on the issue of plaintiff's contributory negligence in placing his hand inside a fine opener machine soon after the power had been cut without determining that no parts were moving inside it. *Smith v. Fiber Controls Corp.*, 669.

PARENT AND CHILD

§ 1.1. Presumption of Legitimacy

In a prosecution for willful failure to provide support for a child conceived while defendant and the child's mother were living together as husband and wife, an instruction requiring defendant husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption of legitimacy of the child unconstitutionally shifted the burden of proof to him; however, defendant was not prejudiced by this error where neither the State nor defendant produced evidence that defendant could not be the father of the child or that someone other than defendant could be. *S. v. White*, 494.

In order to raise a factual issue as to paternity, the evidence rebutting the presumption of legitimacy of a child born in wedlock must at least tend to show (1) that defendant could not be the father because, for example, he did not have sexual relations with his wife at a time conception could have occurred, or (2) that even if defendant could be the father, some other man also could be the father because the other man had sexual relations with the mother at a time conception could have occurred. *Ibid.*

§ 7. Parental Duty to Support Child

G.S. 50-13.4(b) and (c) clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone. *Coble v. Coble*, 708.

RAPE

§ 5. Sufficiency of Evidence

Evidence was sufficient to support defendant's conviction of first degree burglary and second degree rape. *S. v. Williams*, 190.

State's evidence was sufficient to support jury verdicts finding two defendants guilty of first degree rape. *S. v. Riddle*, 744.

ROBBERY

§ 3. Competency of Evidence

A robbery victim was properly permitted to testify that the gun used in the robbery "looked to me like it was probably about the caliber of a .38." *S. v. Smith*, 71.

In a prosecution for robbery with a dangerous weapon, defendant was not prejudiced by testimony concerning another alleged suspect in the case. *S. v. McCraw*, 610.

§ 4. Sufficiency of Evidence

Evidence of felonious intent was sufficient to support a conviction of robbery with firearms where it tended to show that defendant took a stereo from its owner at gunpoint. *S. v. Brown*, 41.

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

Evidence was sufficient for the jury in an armed robbery case. *S. v. Daniels*, 105; *S. v. Handsome*, 317; *S. v. Easterling*, 594.

§ 4.4. Attempted Robbery Cases Where Evidence Held Sufficient

State's evidence was sufficient for the jury in a prosecution for attempted armed robbery of a grocery store employee. *S. v. Smith*, 71.

§ 4.7. Insufficiency of Evidence

Evidence was insufficient for the jury in a prosecution for aiding and abetting in a robbery with firearms. *S. v. Brown*, 41.

§ 5.1. Instructions on Felonious Intent

In a prosecution for robbery with firearms, trial court's instructions on the conflicting contentions arising from evidence as to the absence or presence of felonious intent were inadequate. *S. v. Brown*, 41.

§ 5.4. Instructions on Lesser Included Offenses

In a prosecution for robbery with firearms, trial court erred in failing to submit the lesser offense of assault with a deadly weapon since there was conflicting evidence as to felonious intent. *S. v. Brown*, 41.

RULES OF CIVIL PROCEDURE

§ 19. Necessary Joinder of Parties

In an action to recover for breach of trust by defendants as directors of a corporation, the corporation was not a necessary party plaintiff since plaintiff claimed an injury peculiar or personal to herself. *Snyder v. Freeman*, 204.

§ 26. Depositions in a Pending Action

Trial court did not err in refusing to allow defendants to take the deposition of one of the plaintiffs. *Development Corp. v. James*, 631.

§ 41.1. Voluntary Dismissal

When a case has proceeded to trial and both parties are present in court, the one year period in which plaintiff is allowed to reinstate a suit from a Rule 41 voluntary dismissal begins to run from the time of oral notice of voluntary dismissal given in open court. *Danielson v. Cummings*, 175.

RULES OF CIVIL PROCEDURE — Continued

§ 46. Objections

A general objection will not suffice to afford counsel the benefits of the rule which preserves the continued effect of a specific objection, once made, to a particular line of questioning. *Power Co. v. Winebarger*, 57.

Pursuant to G.S. 1A-1, Rule 46(a)(1) and Appellate Rule 10(b)(1), respondents' failure to object to two questions posed on cross-examination of their value witness concerning the sales prices of noncomparable lands did not constitute a waiver of respondents' objections to those questions or to similar questions posed to other value witnesses. *Ibid.*

§ 50.5. Motion for Directed Verdict; Appeal

Where a court on appeal reverses a trial court's determination that plaintiff's evidence is legally sufficient, nothing in the Rules of Civil Procedure precludes the Appellate Division from determining in a proper case that plaintiff appellee is nevertheless entitled to a new trial. *Harrell v. Construction Co.*, 353.

SALES

§ 22. Actions for Personal Injuries Based Upon Negligence

Evidence was sufficient for the jury on the issue of plaintiff's contributory negligence in placing his hand inside a fine opener machine soon after the power had been cut without determining that no parts were moving inside it. *Smith v. Fiber Controls Corp.*, 669.

The doctrine of strict liability will not be applied in product liability cases. *Ibid.*

§ 22.2. Actions for Personal Injuries Based Upon Negligence; Defective Goods or Materials; Sufficiency of Evidence

In plaintiff's action to recover for damages to its bulldozer allegedly caused by defendant's defective design, construction and installation of a fire suppressant system on the bulldozer, summary judgment was improperly granted for defendant on plaintiff's claims for negligence and breach of warranty. *City of Thomasville v. Lease-Afex, Inc.*, 651.

SEARCHES AND SEIZURES

§ 4. Physical Examination or Tests

Trial court did not err in the denial of defendant's general objection to testimony of the results of an expert's analysis of blood and saliva samples taken from defendant pursuant to a nontestimonial identification order because the record fails to show that defendant was advised of his right to counsel before being subjected to the tests. *S. v. Satterfield*, 621.

§ 33. Items Which May Be Searched for and Seized; Plain View Rule

Even if "inadvertent discovery" is required for a warrantless seizure of evidence of crime when the evidence is in plain view, an officer's discovery of a white Pinto car allegedly used in two robberies was inadvertent under the circumstances of this case. *S. v. Mitchell*, 305.

§ 34. Plain View Rule; Search of Vehicle

Officers had probable cause to believe that a white Pinto car had been used by defendant in a bank robbery and that the rear right wheel of the vehicle would aid

SEARCHES AND SEIZURES — Continued

in the conviction of defendant for armed robbery, and a warrantless seizure of the vehicle was lawful under the plain view doctrine. *S. v. Mitchell*, 305.

§ 44. Voir Dire Hearing; Findings of Fact

Denial of defendant's motion to suppress items taken from him incident to his warrantless arrest without specific findings of fact did not constitute prejudicial error. *S. v. Phillips*, 678.

STATE

§ 12. State Employees

Where a permanent State employee is dismissed for inadequate performance of duty without warnings as required by G.S. 126-35, upon reinstatement of the employee, the decision of whether to award back pay and benefits is within the sound discretion of the Personnel Commission. *Jones v. Dept. of Human Resources*, 687.

TAXATION

§ 21.1. Exemption of State's Property; Character and Purpose of Use

Property owned by the University of North Carolina is exempt from ad valorem taxation regardless of the purpose for which the property is held. *In re University of North Carolina*, 563.

TRESPASS

§ 7. Sufficiency of Evidence

In an action for trespass where plaintiffs claimed defendants constructed concrete anchors for their boathouse on plaintiffs' submerged land, and where defendants claimed equitable estoppel, trial court properly entered summary judgment for plaintiffs. *Development Corp. v. James*, 631.

TRUSTS

§ 13.1. Resulting Trusts; Express Agreements

Defendants' contention that they had no fiduciary duty as directors of a corporation to apply funds received by the corporation for the sale of stock in accordance with an agreement between defendants which earmarked a portion of the proceeds for plaintiff because the corporation itself did not sign the agreement and therefore was not bound by the agreement was without merit. *Snyder v. Freeman*, 204.

Plaintiff's complaint was sufficient to state a claim for breach of trust by defendants as directors of a corporation where plaintiff alleged that pursuant to a shareholder's agreement the corporation was bound to earmark for plaintiff a portion of the proceeds from sale of stock by the corporation. *Ibid.*

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The relationship of borrower and mortgage broker and the activities which are appurtenant thereto are components of the larger concept of trade or commerce within the meaning of G.S. 75-1.1. *Johnson v. Insurance Co.*, 247.

UNFAIR COMPETITION — Continued

In an action to recover from defendant who had been given the exclusive right to negotiate a permanent loan for plaintiff partners to construct a shopping center, defendant mortgage broker did not engage in any conduct which would amount to an unfair trade practice. *Ibid.*

WATERS AND WATERCOURSES

§ 1. Surface Waters; Interference with Natural Flow

The reasonable use rule pursuant to which a possessor of land incurs liability for interference with the flow of surface waters only when such interference is unreasonable and causes substantial damage has no application in condemnation proceedings. *Board of Transportation v. Warehouse Corp.*, 700.

§ 7. Marsh and Tidelands

The statute giving the Dept. of Natural Resources authority to deny an application for a dredge or fill permit in estuarine waters upon finding "that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners" does not constitute an unlawful delegation of legislative power and is a constitutional exercise of the police power. *In re Community Association*, 267.

In determining whether to deny an application for a dredge and fill permit in estuarine waters on the ground there would be a significant adverse effect on the value and enjoyment of the property of riparian owners, the review commission was not limited to a consideration only of the effects of the dredging and filling itself on adjacent landowners but could properly consider the effects of a boat ramp which was the ultimate purpose of the dredge and fill work. *Ibid.*

WORD AND PHRASE INDEX

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