NORTH CAROLINA REPORTS

VOLUME 313

SUPREME COURT OF NORTH CAROLINA

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RALEIGH
1986

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Kieran Joseph Shanahan	Stone Mountain, Georgia
William Timothy Sharpe	Graham
Barbara A. Sloan	Greensboro
Carolyn Mullenax Smith	Fayetteville
Jerry Neal Smith	Monroe
Spencer Aubrey Smith	Durham
Teresa Dawn Smith	Colfax
Donald Redford Soule	Wake Forest
Jeffrey David Sternklar	Greensboro
Rebecca Lynne Stevens	Buies Creek

ROBERT JOHN STIEHL III ..... Kinston
FRANCIS EVANS SWAIN ..... Siler City
DURRYL D. TAYLOR ..... Marshall
DAVID SHELTON TEDDER ..... Whiteville
FRANKLIN ENNIS WELLS, JR. ..... Benson
JOYCE WETHINGTON WHEELER ..... High Point
JAY KEVIN WHITE ..... Mooresville
KATHERINE RUSSELL WHITE ..... Raleigh
MARY ELLEN CHILDS WHITEMAN ..... Winston-Salem
THOMAS FLETCHER WIGGINS ..... Winston-Salem
JAMES EDWARD WILES ..... North Wilkesboro
HELEN PARIS WILEY ..... Rocky Mount
MARY E. HOLLAND WILSON ..... Eden
VAUGHAN SHARP WINBORNE, JR. ..... Raleigh
JAY ALAN YOUNG ..... Chattanooga, Tennessee

Given over my hand and Seal of the Board of Law Examiners this the 7th day of April, 1986.

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

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 individuals were admitted to the practice of law in the State of North Carolina:

On April 10, 1986, the following individuals were admitted:

JOHN S. BURGIN ..... Raleigh, applied from the State of Kentucky
KENNETH WOOD ..... Hudson, Ohio, applied from the State of Ohio
JOHN ROBERT LONG ..... Durham, applied from the District of Columbia
STEPHEN D. LOWRY ..... Raleigh, applied from the State of Ohio
MARK CLIFFORD KURDYS ..... Charlotte, applied from the State of Michigan
CAROL A. SCHWAB ..... Durham, applied from the State of Missouri
H. LEE TOWNSEND III ..... Emporia, Virginia, applied from the State of Virginia

Given over my hand and Seal of the Board of Law Examiners this 25th day of April, 1986.

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

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 11th day of April, 1986, and said persons have been issued certificates of this Board:

BEVERLY GLENN BLOW	Fort Myers, Florida
HELEN RICE BRADFORD	Charlotte
NEIL CLARK DALTON	Detroit, Michigan
MARY CATHERINE HIGGINS	Greenville
ELIZABETH ELLEN HOYT	Beijing, China
MICHELLE CRABTREE JONES	Charlotte
D. MITCHELL KING	Brandon, Florida
DOROTHY RAINE LEE	Chapel Hill
CLAUDIA FORT MANNING	Pinehurst
LORI BRUCE MILLBERG	Wendell
PHYLLIS MARIE MOORE	Roanoke Rapids
WILLIAM HUNTER MORGAN, JR.	Sunbury
SONIA M. PAWLUC	Jensen Beach, Florida
ERIC PETER TURNER	Greensboro
RICHARD JANNEY WASHBURNE	Durham

Given over my hand and Seal of the Board of Law Examiners this the 25th day of April, 1986.

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

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 individuals were admitted to the practice of law in the State of North Carolina:

On June 4, 1986, the following individuals were admitted:

MARK CLIFTON CRAMER ..... Charlotte, applied from the District of Columbia
WALTER S. FELDMAN ..... Charlotte, applied from the State of Illinois
MARSHA LYN WOLOWIC FLOYD ..... Greensboro, applied from the States of Ohio and Texas
WILLIAM P. GRIFFIN III ..... Kure Beach, applied from the State of New York 2nd Department
ROBERT POWELL JOYCE ..... Chapel Hill, applied from the State of New York 1st Department
RICHARD W. STONE
Beckley, West Virginia, applied from the State of West Virginia

Given over my hand and Seal of the Board of Law Examiners this 10th day of June, 1986.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. GEORGE R. KORNEGAY, JR.

No. 500PA84

(Filed 27 February 1985)

1. **Searches and Seizures § 2— search by a private party**

When a private party has engaged in a search and has seized property or information, the protections of the Fourth Amendment apply only if the private party in light of all the circumstances of the case must be regarded as having acted as an instrument or agent of the State.

2. **Searches and Seizures § 2— private search—subsequent involvement of government agents**

Once a private search has been completed, subsequent involvement of government agents does not transform the original intrusion into a governmental search, and mere acceptance by the government of materials obtained in a private search is not a seizure so long as the materials are voluntarily relinquished to the government.

3. **Searches and Seizures § 2— defendant's business records—copies furnished to State by secretary—no unreasonable search and seizure**

In a prosecution of an attorney for embezzlement, false pretense and corporate malfeasance, a secretary in defendant's law office was not acting as an agent of the State when she handed over copies of defendant's business and personal records to the S.B.I. prior to the issuance of a search warrant, and the copied records were thus not obtained through an unreasonable search and seizure conducted by the State or its agents, where the trial court found that the secretary acted entirely on her own and for the purpose of protecting herself when she made the copies of defendant's records and that she voluntarily turned these records over to the S.B.I. and the district attorney. The mere fact that the secretary was given immunity from prosecution does not indicate that she was coerced into giving copies of the records to the State where there was no evidence that she was charged or would be charged with a crime.

4. Searches and Seizures § 22— probable cause for search warrant

When the facts as set forth in the supporting affidavit would lead a reasonable man of prudence and discretion to believe that the offense charged has been committed, there is probable cause sufficient to support the issuance of a search warrant.

5. Searches and Seizures § 23— affidavit for search warrant—probable cause to believe crime committed

An affidavit was sufficient to establish probable cause to believe that a search of the records of a law firm and defendant's personal records would reveal that defendant had fraudulently misappropriated corporate funds of the law firm, embezzled trust account funds and obtained money from a client by false pretense or embezzlement.

6. Searches and Seizures § 31— search warrant—item to be seized—facts establishing probable cause in another portion of warrant

It was immaterial that statements charging a specific offense and facts establishing probable cause were not included in the particular portion of an affidavit attached to a search warrant designating a law firm's savings account passbook as an item to be seized where other portions of the affidavit established probable cause to believe that the passbook would tend to show that defendant had fraudulently converted or embezzled the interest on $100,000 belonging to a client.

7. Searches and Seizures § 31— search warrant—description of items to be seized

Warrants which do not specify items to be searched for or persons to be arrested and which are not supported by showings of probable cause that a particular crime has been committed are general warrants banned by the Fourth Amendment to the U. S. Constitution and Art. I, § 20 of the N. C. Constitution.

8. Searches and Seizures § 31— search warrant—description of items to be seized

A warrant describes items with sufficient particularity when it enables the officer executing the warrant reasonably to ascertain and identify the items to be seized. However, the degree to which a warrant must particularly describe the items to be seized depends on the nature of the items, and a description of property is sufficient when it is as specific as the circumstances and nature of the activity that is under investigation permit.

9. Searches and Seizures § 31— search warrant—description of items to be seized—business records

When the State is aware that certain business records relating to a crime exist but cannot give their precise titles or quantity, neither the Fourth Amendment of the U. S. Constitution nor Art. I, § 20 of the N. C. Constitution requires that the warrant enumerate each individual paper.

10. Searches and Seizures § 30— search warrant—description of place and items—attached applications as part of warrants

Although search warrants did not state specifically that the applications were incorporated by reference, applications attached to the warrants were a

part thereof where each warrant clearly stated that the location of the place to be searched and the description of the items to be seized were set forth in the application attached to it.

11. Searches and Seizures § 31— search warrant—description of items to be seized

Description of items to be seized, including directions to seize all checkbooks, cancelled checks, deposit slips, bank statements, trust account receipts, check stubs, books and papers which would tend to show a fraudulent intent or any elements of the crime of false pretense or embezzlement, was as specific as the circumstances and nature of defendant attorney's activities permitted and was sufficiently particular to meet the requirements of the Fourth Amendment to the U. S. Constitution and Art. I, § 20 of the N. C. Constitution, where many of the crimes with which defendant was charged were accomplished by numerous transfers of monies between the trust account of a law firm, the law firm's operating account, and defendant's personal account, and in many instances the State was only aware that funds had been diverted from client trust accounts or had not been deposited in the firm's operating account.

12. Judges § 3; Searches and Seizures § 28— search warrants—issuance by emergency judge—opening of court—presumption of regularity

Defendant failed to show that search warrants were invalid on the ground that the emergency judge who signed them had not opened court at the time he issued the warrants in chambers since defendant's evidence that no one was seen in the courtroom, no files were prepared to be sent to court by the clerk's office, the judge did not direct anyone to make notes of what transpired in court, and all proceedings occurred in the judge's chambers was insufficient to overcome the presumption of regularity of the acts of public officials and testimony by the district attorney and the clerk of court tending to show that the judge had opened court prior to issuing the search warrants.

13. Indictment and Warrant § 8.4— pretrial election between offenses not required

Charges against defendant for embezzlement and for malfeasance of a corporate agent constituted charges of separate and distinct offenses although the same funds were involved in both cases, and the trial court did not err in waiting until the close of all the evidence to require the State to make an election between the two offenses. G.S. 14-90; G.S. 14-254.

14. Criminal Law § 26.5— double jeopardy—separate offenses—different elements

When a defendant is charged in the same trial with separate offenses and each offense charged has an element different from any element of the other charged offense, considerations of double jeopardy do not arise.

15. Criminal Law § 92.4— consolidation of charges against defendant

The trial court did not abuse its discretion in granting the State's motion to join a false pretense charge against defendant attorney with charges against defendant for embezzlement of funds from his law firm and malfeasance of a corporate agent where the evidence showed that defendant's act

of obtaining $21,000 from a client by false pretense was part of his scheme to embezzle funds from his law firm. G.S. 15A-926.

16. Corporations § 15.1; Embezzlement § 1.1— malfeasance of corporate agent—attorney's depositing of legal fees in own account

Defendant attorney's act of depositing legal fees in his own account rather than in the account of his law firm, a professional corporation, if done with the intent to injure, defraud or deceive another, was a violation of the malfeasance of corporate agents statute, G.S. 14-255(a), although defendant was the sole shareholder of the corporation, and associates in the law firm were properly permitted to testify that they had not authorized defendant to deposit legal fees generated by the corporation in his own account.

17. Embezzlement § 4— indictment—ownership of embezzled property

An indictment alleging embezzlement or misappropriation of the property of another is not limited to alleging ownership in the legal owner but may allege ownership in anyone else who has a special property interest recognized in law.

18. Embezzlement § 4— special property interest in embezzled funds—no fatal variance between indictment and evidence

An incompetent's wife had a special property interest in funds which had been recovered for the incompetent and deposited in a law firm's trust account so that there was no fatal variance between the evidence and an indictment charging defendant attorney with embezzlement of funds belonging to the wife "individually" where the evidence showed that the wife, as guardian ad litem for the incompetent, endorsed checks from an insurance company and authorized their deposit in the trust account of defendant's law firm; the wife had been paying the incompetent's bills and thus had a claim for reimbursement from the trust account; the wife was a "person in loco parentis" as defined by G.S. 35-1.7(20); and payments of the recovered funds were made at a time when the wife was acting pursuant to a power of attorney from her husband because of his incapacity. An allegation in the indictment that the funds belonged to the wife "as guardian ad litem" was irrelevant and will be treated as surplusage.

19. False Pretense § 3.1— attorney obtaining money from client—sufficiency of evidence to support conviction

The evidence would support inferences that defendant attorney's misrepresentation to his client that a suit had been settled for $125,000 was calculated and intended to deceive the client and that the amount of $104,000 had been in fact agreed to on or before 27 April 1982 as alleged in the indictment so as to support defendant's conviction of obtaining $21,000 from his client by false pretense where the evidence tended to show: defendant and the attorney for the plaintiff in an action against defendant's client had agreed to a final settlement of $104,000 between 20 and 30 April 1982; on 27 April defendant advised his client that the suit had been settled for $125,000, and the client delivered to defendant that day a cashier's check made out to him for $125,000; on 28 April defendant caused a check to be issued to the attorney for the other party in an amount of $104,000 and delivered this check to the other attorney

on 3 May; and $104,000 was the only figure ever agreed on by the attorneys to settle the suit against defendant's client.

20. Embezzlement § 5; Corporations § 15.1— embezzlement from law firm—malfeasance of corporate agent—agreement by attorneys for sharing legal fees—attorneys' right to shares of corporate stock

In a prosecution of defendant attorney for embezzlement of funds of a professional corporation and malfeasance of a corporate agent by misapplying funds, evidence of an agreement that all legal fees generated by defendant and his two associates would be property of the corporation and distributed pro rata was relevant to show the revenue to which the corporation was entitled. Furthermore, evidence that defendant's two associates were entitled to shares of the corporate stock was relevant to the determination of whether defendant had acted with criminal intent to defraud the corporation and the two associates by his diversion of legal fees and embezzlement of trust account funds.

21. Embezzlement § 6.1; Corporations § 15.1— embezzlement—malfeasance of corporate agent—instruction on corrupt intent

In a prosecution for embezzlement and malfeasance of a corporate agent by misapplying funds, the trial court's instruction that the State must prove that "defendant wilfully, fraudulently and dishonestly used the money for some purpose other than that for which he received it" was adequate to inform the jury that they must find that defendant acted with a corrupt intent when he converted the monies in question, and the trial court did not err in refusing to give defendant's requested instruction on corrupt intent.

22. False Pretense § 2— attorney's misrepresentation of case settlement—precise date of settlement mere surplusage

In a prosecution of defendant attorney for obtaining $21,000 by false pretense by telling a client that he had settled a case against her for $125,000 when the case had been settled for $104,000, it was only necessary for the State to prove that defendant had settled the case on or before 27 April 1982, the date on which defendant allegedly told the client the case had been settled for $125,000, and an allegation in the indictment that the settlement was completed on 14 April 1982 was mere surplusage and did not have to be proven.

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

APPEAL by defendant from *Martin, J.*, at the 3 October 1983 Criminal Session of Superior Court, WAYNE County.

The grand jury of Wayne County returned a bill of indictment charging defendant, a practicing attorney in Wayne County, with twenty-nine separate counts in the nature of embezzlement or false pretense. The trial court, however, submitted only three counts to the jury: count XVII: Embezzlement of $14,500 on or about 13 April 1982 of monies of a client, Carolyn Stallings (in-

dividually and as guardian ad litem for John J. Stallings, incompetent) [a violation of G.S. 14-90]; count XXII: Obtaining $21,000 from Mrs. Estelle Sutton on or about 29 April 1982 by means of a false pretense [a violation of G.S. 14-100]; count XXV: Malfeasance as a corporate officer by the embezzlement of $6,000 on 27 April 1982 of monies belonging to Kornegay, Rice and Edwards, P.A. [a violation of G.S. 14-254].

The State offered evidence tending to show that in 1979 Mrs. Estelle Sutton was involved in an automobile accident in Sampson County in which she was seriously injured. Mr. Seals, the occupant of the other car involved in the accident, died as a result of injuries received in the collision. While she was still in the hospital, Mrs. Sutton, a 72-year-old widow, sent for Mr. Kornegay to talk to him about representing her in the criminal matters pending against her in which she was charged with the death by motor vehicle and failure to yield the right of way. After consulting with Mrs. Sutton defendant Kornegay advised her that he would charge her $3,500 for this appearance in criminal court and at that time obtained an authorization from her to investigate her financial condition. After making this investigation, he thereafter told Mrs. Sutton that his fee would be $5,500. Mrs. Sutton attended the trial on the day that she was discharged from the hospital. The court dismissed the charge of death by motor vehicle and a satisfactory plea bargain on the charge of failure to yield the right of way was arranged. On the day of the trial Mrs. Sutton paid defendant his fee of $5,500.

During their trip home, Mr. Kornegay advised her that she would probably be sued in a civil action. Several months later she received the summons and complaint in the civil action and carried them to Mr. Kornegay's office. At trial her insurance company, which had a liability of only $25,000, retained Mr. I. Edward Johnson of Raleigh, North Carolina. Defendant Kornegay was retained by Mrs. Sutton to represent her for liability in excess of coverage. Mrs. Sutton did not attend the civil trial because of illness and was advised by defendant Kornegay that the jury had returned a verdict against her in excess of $200,000 and that he had given notice of appeal. At that point, Mrs. Sutton paid Mr. Kornegay $10,000 for his representation in the civil action.

After some months, Mr. Kornegay obtained a settlement in the matter and he told Mrs. Sutton that the agreement was "to pay the Seals' estate $125,000." He then instructed her to bring him two checks: one in the amount of $125,000 in settlement of the Seals suit and the other in the amount of $6,000 to finish paying his legal fee. On 27 April 1982 Mrs. Sutton delivered the checks to a secretary in Mr. Kornegay's office. Several weeks later she called Mr. Kornegay and asked for something to show that the case was settled. She received a letter dated 1 June 1982 from Mr. Kornegay which in part read: "Pursuant to our telephone conversation, I am writing you this letter to tell you that your case has been settled. As you know, we paid $125,000 to them in full settlement of this matter. As I told you, the judgment against you was recorded in four counties which includes Wayne, Duplin, Johnston and Sampson. It will take some time to get this settled. You do not have anything to worry about." At her request, Mr. Kornegay wrote her a letter in which he stated: "This is to advise you that you have paid my fees in full concerning the wreck." There was no specification as to the exact amount of the legal fees nor as to how these fees were determined.

In October 1982 Mrs. Sutton was contacted by the S.B.I. and at that time she learned that defendant Kornegay had retained $21,000 from the $125,000 check which she had delivered to him for settlement of the judgments against her in favor of the Seals estate. She testified that she had never authorized defendant Kornegay to take any money out of the $125,000 check for himself or his law firm.

In January 1982 the law firm of Kornegay, Rice and Edwards, P.A. opened an office in Kenansville, North Carolina where Mrs. Diane Grubbs was employed as secretary, bookkeeper and receptionist. That office kept two bank accounts in the Bank of North Carolina, N.A., Kenansville. One account was a firm trust account and the other was the firm's operating account. The first money received by Mrs. Grubbs was a $5,000 check from State Farm Insurance Company payable to Carolyn Stallings, and she thereafter received a $25,000 check payable to Carolyn Stallings. Mrs. Stallings endorsed both checks and Mrs. Grubbs deposited them in the firm's trust account in Kenansville. On 8 March 1982, upon Mr. Kornegay's instructions, she wrote checks on the firm's trust account as follows: Carolyn T. Stallings—

$3,000.00; T. LaFontine Odom—expenses $469.48; Bernard I. Scherer—attorney's fee $3,000.00; T. LaFontine Odom—attorney's fee $4,200.00 and George R. Kornegay—attorney's fee $3,000.00. Messrs. Odom and Scherer were attorneys of Charlotte, North Carolina who had associated defendant Kornegay in the trial and settlement of claims which grew out of a personal injury Mrs. Stallings' husband had suffered when struck by an automobile operated by Bruce Blanton, Jr.

Several months later Mrs. Grubbs noted that Mr. Kornegay had written a check in the amount of $14,525 to one Ray Amon from the trust account which then contained only money belonging to Carolyn Stallings. In October 1982 police officers came to the office and obtained records from Mrs. Grubbs, including the trust account cards. Several weeks thereafter defendant Kornegay gave her cash to put in the trust account and she thereafter prepared a check in the amount of $16,280.25 payable to Attorney Odom of Charlotte, North Carolina. There was also evidence that at about this time defendant had borrowed $50,000 from Mr. E. J. Pope, Jr. who received as security stock in the Mount Olive Nursing Home.

The State also presented testimony through Mr. Joseph Marion, an attorney who represented the Seals estate. He testified that on 5 May 1982 he received a check dated 28 April 1982 from defendant Kornegay in the amount of $104,000 in full settlement of the claim against Mrs. Sutton. This settlement had been reached "about the last week or ten days of April 1982."

Ray Amon testified that he is a used car dealer in Mount Olive and that he sold certain property to Mr. Kornegay for $100,000. Amon stated that he received a down payment in the amount of $16,000 which was written on the trust account of the firm of Kornegay, Rice and Edwards, P.A. Mr. Kornegay paid him the second installment of $14,000 by another check drawn on the firm's trust account. He testified that he knew nothing about Carolyn Stallings or her case and that he received no further payment from defendant Kornegay on the note.

Mrs. Elnora Whetsell, who was a secretary in the Mount Olive office of the firm of Kornegay, Rice and Edwards, P.A., testified that she noticed some unusual transactions in the office and in 1981 began copying records and taking them home. She

told no one but her husband what she was doing. She stated that "the reason I took those copies home with me was because he [Kornegay] had been very dishonest and when something dishonest happened then I said well what kind of position can I eventually get in and I took the copies home strictly to protect myself." In 1982, after conferring with Judge Michael Bruce, Attorney Edwards and Attorney Rice, she did copy additional papers but did so without the knowledge of any of these people or of defendant Kornegay. After a search warrant was issued in October, she left the law firm. She testified that defendant Kornegay deposited $6,000 belonging to the firm into his personal bank account. She also corroborated the testimony of the witness Amon to the effect that Kornegay wrote checks on the trust fund to Amon, and at that time there was no money in the trust fund which belonged to Mr. Amon. Checks to Amon were down payments and subsequent payments on a debt against the Ramblewood Corporation in which defendant Kornegay owned stock.

The State offered other evidence from Attorney Rice in the nature of corroboration.

Defendant offered no evidence.

The jury returned verdicts of guilty as charged on all three counts. The trial judge pronounced judgment as follows: count XVII—Embezzlement, the court sentenced defendant to imprisonment for eighteen months and recommended work release privileges; count XXII—False Pretense, the court imposed a sentence of imprisonment for a term of thirty months and recommended work release upon condition that defendant make restitution to Estelle Sutton in the amount of $21,000; count XXV—malfeasance by a corporate officer, defendant was sentenced to thirty months imprisonment to begin at the expiration of the sentences imposed in count XVII and XXII. The execution of this sentence was suspended and the defendant was placed on supervised probation for a period of three years. The trial judge also disbarred defendant from the practice of law and profession as an attorney in the State of North Carolina. Defendant appealed to the North Carolina Court of Appeals and we certified the case for discretionary review *ex mero motu* prior to a determination by the Court of Appeals pursuant to N.C.G.S. § 7A-31(a) and Rule 15(e)(2).

Rufus L. Edmisten, Attorney General, by Donald W. Stephens, Special Deputy Attorney General and Christopher P. Brewer, Assistant Attorney General, for the State.

Hulse & Hulse, by Herbert B. Hulse and Duke & Brown, by John E. Duke, for defendant-appellant.

BRANCH, Chief Justice.

I.

Defendant assigns as error the court's denial of his motion to suppress the documentary evidence that agents of the State Bureau of Investigation obtained from Elnora Whetsell prior to the issuance of search warrants. Defendant contends that when Mrs. Whetsell, without a warrant, handed over copies of his business and personal records to the State that she was acting as an agent of the State and thereby violated his right to be free from unreasonable searches and seizures under the fourth and fourteenth amendments to the United States Constitution. We hold that Mrs. Whetsell was not acting as an agent of the State and that defendant's constitutional rights were not violated.

[1, 2] When a private party has engaged in a search and has seized property or information, the protections of the fourth amendment apply only if the private party "in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the State." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Once a private search has been completed, subsequent involvement of government agents does not transform the original intrusion into a governmental search. *United States v. Sherwin*, 539 F. 2d 1, 6 (9th Cir. 1976). Mere acceptance by the government of materials obtained in a private search is not a seizure so long as the materials are voluntarily relinquished to the government. *Coolidge*, 403 U.S. at 488-89; *United States v. Ziperstein*, 601 F. 2d 281, 289 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *Sherwin*, 539 F. 2d at 7-8. The fact that private parties are subject to forces which encourage them to aid law enforcement officials does not alone render their actions involuntary. *Sherwin*, 539 F. 2d at 8.

[3] The trial court found as a fact that Mrs. Whetsell acted entirely on her own and for the purpose of protecting herself when

she made the copies of defendant's records that were later turned over to the S.B.I. This finding is supported by competent evidence and is binding on appeal. *State v. Chamberlain*, 307 N.C. 130, 143, 297 S.E. 2d 540, 548 (1982). Defendant does not challenge this finding, but argues that Mrs. Whetsell did not act voluntarily when she turned the records over to the State because she had intended to give the records to the State only if that was necessary to protect herself from charges of wrongdoing. Defendant further argues that the records were given in exchange for a grant of immunity from prosecution by the district attorney which made Mrs. Whetsell an instrument of the State. An examination of the facts shows that Mrs. Whetsell was not an agent of the State and that her act of turning the copied records over to the S.B.I. was wholly voluntary.

Mrs. Whetsell had expressed her concerns about defendant's conduct to his law partners, Robert Rice and John Edwards, on a number of occasions. In the summer of 1982 she had twice attempted to bring the matter to Judge Bruce's attention. When Judge Bruce called her on 21 September 1982 she did not hesitate to inform him of the information she had and willingly attended a meeting with him, Robert Rice and John Edwards on 26 September 1982. Mrs. Whetsell testified that Judge Bruce indicated that he had a duty to report what he knew about defendant's conduct and that she as well as the others present at the meeting had agreed. Following their meeting with the district attorney on 27 September 1982, defendant's partners and Judge Bruce stopped at Mrs. Whetsell's house, informed her that a meeting with the district attorney and S.B.I. agents had been scheduled for 28 September 1982 and told her to attend. It was at that time that Mrs. Whetsell told them about the records she had copied. Mrs. Whetsell also expressed to Judge Bruce and defendant's partners her fear that she might be held liable for the discrepancies in the trust account records. At the start of the meeting of 28 September 1982 the district attorney granted Mrs. Whetsell immunity from prosecution. She then turned the copied records over to the district attorney. In the days before the search of the offices of Kornegay and Rice, P.A. Mrs. Whetsell met with the S.B.I. agents a number of times to interpret records for the agents and to inform them of where the originals were kept in defendant's offices. She also prepared a detailed handwritten statement.

These facts fully support the trial court's finding that Mrs. Whetsell was not coerced into giving her copies of defendant's records to the State. She volunteered information to John Edwards and Robert Rice about irregularities and acquiesced in the decision of Rice, Edwards and Judge Bruce to report their suspicions to the authorities. Obviously this act made it probable that her role as bookkeeper would be investigated. She had made the copies to protect herself, and once suspicions had been raised about the disposition of funds in the trust account, showing the records to the district attorney and explaining them was simply a logical extension of her original purpose in making the records. There is no evidence that Mrs. Whetsell was coerced into meeting with the district attorney or forced to turn over her records. The mere fact that she was given immunity from prosecution does not indicate coercion where there is no evidence that she was charged or would be charged with a crime. Mrs. Whetsell may have hoped that she would obtain a grant of immunity by cooperating with the district attorney, but this alone does not render her actions involuntary. *See United States v. Sherwin*, 539 F. 2d at 7, 8. The copied records given by Mrs. Whetsell to the State were not obtained through an unreasonable search and seizure conducted by the State or its agents and were properly admitted into evidence.

We note that Mrs. Whetsell continued to make copies of defendant's records after her meeting with the district attorney and the S.B.I. agents and later turned these copies over to the State. As the State did not use these copied records at trial or rely on them in its application for a search warrant, we do not deem it necessary to rule on whether or not Mrs. Whetsell acted as an agent of the State in procuring them.

Lastly, defendant contends that subsequent to her meeting with the district attorney Mrs. Whetsell had the Kenansville branch of the firm mail originals of check stubs to the Mount Olive office so that they would be available for seizure by officers executing the search warrant on 11 October 1982. Defendant relies on the fact that the envelope in which the stubs were found was postmarked 6 October 1982. However, Mrs. Whetsell testified that she requested the check stubs solely for the purpose of balancing her books and that the stubs, which were already in the Mount Olive office, may have been placed in a different envelope than they originally came in while she was balancing her books.

In any case, the date on which the stubs were mailed to the Mount Olive office is irrelevant. The Kenansville office was searched at the same time as the Mount Olive office so that discovery of the stubs was inevitable. *See Nix v. Williams*, --- U.S. ---, 104 S.Ct. 2501, 2510-11 (1984).

II.

Defendant next assigns as error the trial court's denial of his motion to suppress evidence obtained through the execution of search warrants issued to Wayne County and to Wayne and Duplin Counties jointly on 11 October 1982. He argues that the warrants were not supported by showings of probable cause that any particular crime had been committed. He also contends that the warrants are fatally defective because they do not sufficiently specify the property to be seized or the crimes to which the property relates. After a careful review of the warrants and the documents attached to them, we hold that the warrants are sufficiently specific and that the applications for issuance of the warrants disclose probable cause to believe that the particular crimes listed had been committed by defendant.

A.

[4] An affidavit is sufficient to establish probable cause if it "supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in apprehension or conviction of the offender." *State v. Reddick*, 291 N.C. 399, 406, 230 S.E. 2d 506, 511 (1976) (quoting *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973)). When the facts as set forth in the supporting affidavit would lead a reasonable man of prudence and discretion to believe that the offense charged had been committed, there is probable cause sufficient to support the issuance of a search warrant. *State v. Campbell*, 282 N.C. 125, 129, 191 S.E. 2d 752, 755 (1972).

[5] The search warrants in question direct the seizure of various records tending to show that money was obtained with a fraudulent intent from the trust account of Kornegay, Rice and Edwards, P.A. The records were also pertinent to show that defendant had obtained money from Estelle Sutton by false pre-

tense and had embezzled funds from Estelle Sutton, and, or Kornegay, Rice and Edwards, P.A. While defendant was not named in the portion of the affidavit charging the offenses, other portions of the affidavit make it clear that defendant is the one accused of committing the offenses.

Defendant's position that there was insufficient evidence in the affidavit to show probable cause to believe that he had committed the offenses charged is untenable. The affidavit discloses that Mrs. Whetsell, Robert Rice, Judge Bruce and John Edwards had over a period of years, beginning in the fall of 1976, noticed numerous instances of defendant's improper handling of trust accounts of clients and funds of the professional association. Their examination of the firm's books revealed that defendant had withdrawn funds from trust accounts and from the firm's operating account without authorization in order to pay his creditors and had deposited fees generated by the firm into his personal account. On several occasions Mrs. Whetsell recounted having written checks drawn on Kornegay, Rice and Edwards, P.A. to defendant's creditors. Mrs. Whetsell and John Edwards were both aware that defendant, who had defended Estelle Sutton in a wrongful death suit, had advised her that the suit had been settled for $125,000 when in fact the settlement was for $104,000. Both had seen an unsigned copy of a letter dated 1 June 1982 from George R. Kornegay, Jr. to Estelle Sutton stating that the suit had been settled for $125,000. Mrs. Whetsell noted that Estelle Sutton paid $125,000 to Kornegay, Rice and Edwards, P.A. and that only $104,000 was paid to the estate of Roland H. Seals while defendant transferred $21,000 from the firm's trust account to the firm's operating account. This appears to have been done to make up a deficit of $21,500 in the operating account resulting from earlier transactions of the defendant. Mrs. Whetsell also stated that $6,000 paid to defendant by Estelle Sutton for legal services was deposited in defendant's personal account rather than the firm's operating account. The payment by Mrs. Sutton of $125,000 according to the terms of the letter and the fact that defendant only paid out $104,000 while transferring $21,000 to the firm's operating account is sufficient to establish probable cause to believe that defendant had informed Mrs. Sutton that the case was being settled for $125,000 in order to obtain $21,000 by false pretense. Mrs. Whetsell, Robert Rice, John Edwards, and to a

lesser extent, Judge Bruce, all had access to documents concerning defendant's financial dealings. The information obtained from each individual source tends to corroborate the others and when added to Mrs. Whetsell's copies of defendant's records is sufficient to establish the basis of knowledge and the veracity of Whetsell, Rice, Edwards and Bruce. *See Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983). Any reasonable and prudent person faced with this evidence would have ample reason to conclude that a search of the records of Kornegay and Rice, P.A. and defendant's personal records would reveal that defendant had fraudulently misappropriated corporate funds, embezzled trust account funds and obtained money from Estelle Sutton by false pretense or embezzlement.

[6] Defendant notes that the portion of the affidavit attached to the warrant issued to Wayne County directing the seizure of the law firm's savings account passbook on the account maintained at Southern Bank and Trust Company does not state how this item relates to a criminal offense or how its seizure will aid in the apprehension or conviction of anyone in connection with a criminal offense. Therefore, defendant argues that the passbook was not properly subject to seizure.

In making this argument defendant overlooks the statement in the affidavit attached to the warrant that Mrs. Whetsell knew that $100,000 had been taken from the trust account of Hope W. Wiggins and deposited in the savings account maintained by Kornegay, Rice and Edwards, P.A. at the Southern Bank and Trust Company in Mount Olive. The interest received on these funds for a three month period was retained in the firm's savings account. Obviously, this passbook would tend to show that defendant had fraudulently converted or embezzled the interest on the $100,000 from Hope W. Wiggins and so was properly subject to seizure. It is immaterial that the statements charging a specific offense and the facts establishing probable cause were not included in the particular portion of the affidavit designating the passbook as an item to be seized. The affidavit is to be considered as a whole in determining whether a specific offense was charged and whether probable cause has been shown to believe that seizure of the item would aid in the conviction of the offender. It is the better practice in drafting an affidavit to be used as part of a warrant to list together the crimes charged and the facts establishing probable

cause. The affidavit and warrants before us nonetheless are sufficient as written to meet the requirements of the law.

B.

[7-9] Warrants must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Warrants which do not specify items to be searched for or persons to be arrested and which are not supported by showings of probable cause that a particular crime has been committed are general warrants banned by the fourth amendment to the United States Constitution and article I, section 20 of the North Carolina Constitution. A warrant describes items with sufficient particularity when it enables the officer executing the warrant reasonably to ascertain and identify the items to be seized. *United States v. Wuagneux*, 683 F. 2d 1343 (11th Cir. 1982), *cert. denied*, --- U.S. ---, 104 S.Ct. 69 (1983). However, the degree to which a warrant must particularly describe the items to be seized depends on the nature of the items. *Id.* at 1349. A description of property is sufficient when it is as specific as the circumstances and nature of the activity that is under investigation permit. *Id.* "The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession." *Andresen v. Maryland*, 427 U.S. 463, 480 n. 10 (1976). When complex white-collar crimes are under investigation it is often necessary for the State to assemble a "paper puzzle" from a mass of evidence. *Id.* In dealing with such a case the courts must give due consideration to the difficulty faced by the State in particularly describing each item of evidence sought and its relation to a specific crime. *See Andresen*, 427 U.S. 463; *Wuagneux*, 683 F. 2d 1343. In cases involving a complex scheme and numerous records the investigators executing a search warrant will have to exercise some discretion in separating innocuous material from incriminating evidence. *State v. Louchheim*, 36 N.C. App. 271, 279, 244 S.E. 2d 195, 201 (1978), *aff'd*, 296 N.C. 314, 250 S.E. 2d 630, *cert. denied*, 444 U.S. 836 (1979). This is especially true when the State is aware that certain business records relating to a crime exist but cannot give their precise titles or quantity. *See United States v. Zanche*, 541 F. Supp. 207, 209-10 (W.D.N.Y. 1982). In such cases the fourth amendment does not require that the warrant

enumerate each individual paper, *id.* at 210, and we do not interpret article I, section 20 of the North Carolina Constitution to require more particularity in warrants than does the fourth amendment as applied to the states through the fourteenth amendment.

[10] The affidavit of S.B.I. Agent Curtis L. Ellis is attached to both search warrants. The only difference in the two copies of the affidavit concern the identity of the place to be searched and the items to be seized. The Wayne County warrant directs the seizure of certain items from the offices of Kornegay and Rice, P.A. while the warrant issued to Wayne and Duplin Counties jointly concerns items located in the Kenansville office of the firm. Defendant contends that the warrants are general warrants because the search warrant forms issued by the superior court do not themselves describe the place to be searched or property to be seized but refer to the attached warrant applications. Defendant argues that the applications are not part of the warrants because the warrants do not state that the applications are incorporated by reference. This argument is without merit. Each warrant clearly states that the location of the place to be searched and the descriptions of the items to be seized are set forth in the application attached to it. It is not necessary that the warrants use the magic words "incorporated by reference" in order to make the attached application a part of the warrants. The clear import of the language used in the warrants is that the attached applications are part of the warrants. Search warrants are presumed to be regular when irregularity does not appear on the face of the record. *State v. Spillars*, 280 N.C. 341, 350, 185 S.E. 2d 881, 887 (1972). Defendant has offered no evidence to show that the applications were not in fact attached to the warrants and therefore has not rebutted the presumption of the warrants' regularity. *Id.*

[11] Defendant next asserts that when the search warrant applications are viewed as part of the warrants, the warrants still fail to describe particularly the property to be seized and in effect authorize the State to seize any type of record which may prove helpful. After examining the warrants and supporting affidavits, we hold that the warrants are sufficiently particular to meet the requirements of the fourth amendment and article I, section 20 of the North Carolina Constitution.

It is true that in several places the warrants direct the seizure of all checkbooks, cancelled checks, deposit slips, bank statements, trust account receipts, check stubs, books and papers, etc. which would tend to show a fraudulent intent or any elements of the crime of false pretense or embezzlement. In this case we hold that the description by the State of the items to be seized was as specific as the circumstances and nature of defendant's activities permitted. *United States v. Wuagneux*, 683 F. 2d 1343, 1349.

In the course of his law practice, defendant handled money for many clients and generated voluminous records. Many of the crimes with which defendant was charged were accomplished by numerous transfers of monies between the trust account of Kornegay, Rice and Edwards, P.A., defendant's personal account and the operating account of the professional association. Defendant's act of defrauding Kornegay, Rice and Edwards, P.A. was accomplished by his deposit of legal fees generated by the firm into his own account. In many instances the State was only aware that funds had been diverted from client trust accounts or had not been deposited in the firm's operating account. While the record is silent on this point we think it unlikely that Mrs. Whetsell, defendant's bookkeeper, had a photographic memory and, it is clear that she did not copy every document in defendant's accounting records. That being the case, it is unreasonable to believe that she, Judge Bruce, Robert Rice, or John Edwards could particularly identify every document or writing which would tend to show defendant's guilt. It is too much to expect the State to have fully charted defendant's tortuous trail of financial misdealings until his records had been secured for inspection. Otherwise, defendant would be able to shield himself behind the complexity of his schemes. *See Andresen v. Maryland*, 427 U.S. 463. The warrants and applications show the rough outline of defendant's activities which is all that can be reasonably expected from the State in a case of this nature. The fourth amendment and article I, section 20 of the North Carolina Constitution require no more.

C.

Defendant contends that even if the warrants are technically correct they were improperly issued for other reasons.

First, defendant argues that certain copied records attached to the search warrant applications were obtained in violation of defendant's right to be free from unreasonable searches and seizures, rendering the evidence seized by execution of the search warrants inadmissible as being fruit of the poisonous tree. Inasmuch as we have already held that the records copied by Mrs. Whetsell were not obtained through an unreasonable search and seizure by the State or its agents defendant's argument is without merit.

[12] Second, defendant argues that the trial court erred in denying his motion to quash the search warrants on the ground that Emergency Judge Fountain had no authority to issue them. Defendant does not dispute the trial court's finding of fact that Judge Fountain had been duly assigned, pursuant to N.C.G.S. § 7A-46, to hold a special session of the Superior Court of Wayne County on 11 October 1982.

> An emergency judge duly assigned to hold the courts of a county or judicial district has the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later.

N.C. Gen. Stat. § 7A-48 (1981). Defendant attacks Judge Fountain's authority to issue the warrants on the basis that the session of court had not begun because Judge Fountain had not opened court at the time he issued the warrants in chambers.

There is a presumption of regularity accorded the official acts of public officers. *State v. Watts*, 289 N.C. 445, 449, 222 S.E. 2d 389, 391 (1976). An appellate court will not assume error when none appears in the record on appeal, *State v. Phifer*, 290 N.C. 203, 212, 225 S.E. 2d 786, 792 (1976), *cert. denied*, 429 U.S. 1123 (1977), and the burden is on appellant to show error, *In re Moore*, 306 N.C. 394, 403, 293 S.E. 2d 127, 132 (1982).

At trial the State produced evidence tending to show that Judge Fountain had opened court prior to issuing the search warrants. District Attorney Donald Jacobs testified that Judge Fountain came by his office on 11 October 1982, and stated that he was

going upstairs to open the court. The Clerk of Superior Court for Wayne County testified that it was his impression that Judge Fountain had opened the court. Against the presumption of regularity and this evidence, defendant only offered evidence to the effect that no one was seen in the courtroom, no files were prepared to be sent to court by the clerk's office, Judge Fountain did not direct anyone to make notes of what transpired in court, and all proceedings occurred in Judge Fountain's chambers. Defendant produced no witnesses who could affirmatively state that Judge Fountain did not open court. This evidence is clearly insufficient to rebut the presumption of regularity and show that Judge Fountain did not open the session of court before issuing the warrants. Defendant's hypertechnical argument that Judge Fountain did not have the power to issue the warrants is without merit.

Lastly, in a related matter, defendant contends that the trial court erred in failing to suppress evidence obtained through use of orders for examination of records of Kornegay and Rice, P.A. directed to the Bank of North Carolina, N.A., Kenansville, North Carolina and Southern Bank & Trust Company, Inc., Mount Olive, North Carolina. Defendant concedes that the court had the authority to issue such orders under the rule of *In Re Superior Court Order*, 70 N.C. App. 63, 318 S.E. 2d 843 (1983), *disc. rev. allowed*, 312 N.C. 622, 323 S.E. 2d 926 (1984). Defendant's sole argument is that the orders were obtained through exploitation of prior unlawful searches and seizures so that any evidence obtained through them is fruit of the poisonous tree. Since we have already held that the State did not engage in any unlawful searches and seizures, defendant's argument is without merit.

III.

[13] Count XVII of the indictment charges defendant with the embezzlement of $14,525 from Kornegay, Rice and Edwards, P.A., John J. Stallings and Carolyn Stallings individually and as guardian ad litem for John J. Stallings, and count XXI charges him with the embezzlement of $6,000 from Kornegay, Rice and Edwards, P.A. Counts VIII and XXV charge defendant with malfeasance of a corporate agent by misapplying funds by embezzling the funds previously mentioned. Defendant contends that the trial

court erred in denying his pretrial motion to require the State to elect between the counts of embezzlement and malfeasance of a corporate agent. Defendant argues that allowing the State to duplicate charges prejudiced him by leading the jury to believe that he had committed two separate and distinct offenses. After examining the statutes we hold that two separate and distinct offenses were charged in each case and that the trial court did not err in waiting until the close of all the evidence to require the State to make an election between the offenses of embezzlement and malfeasance of a corporate agent.

In order for the State to prove that a defendant has embezzled money in violation of N.C.G.S. § 14-90 it must establish three distinct elements:

> (1) that the defendant, being more than sixteen years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity.

State v. Pate, 40 N.C. App. 580, 583, 253 S.E. 2d 266, 269, *cert. denied*, 297 N.C. 616, 257 S.E. 2d 222 (1979). The offense of malfeasance of a corporate agent is more complex and is defined as follows:

> (a) If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any person, or if any person shall aid and abet in the doing of any of these things, he shall be punished as a Class G felon.

(b) For purposes of this section, "person" means a natural person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization.

N.C. Gen. Stat. § 14-254 (1981).

The differences in the elements of these two offenses are significant: (1) A defendant charged with embezzlement must have received the property he embezzled in the course of his employment and by virtue of his fiduciary relationship with his principal. Under N.C.G.S. § 14-254 it is sufficient to show that a defendant as an agent or officer of a corporation abstracted or misapplied corporate funds. It need not be shown that he received such funds in the course of his employment. (2) A defendant charged with embezzlement must have intended to defraud his principal. By contrast, a defendant violates N.C.G.S. § 14-254 if he does any of the acts prohibited by the statute with an intent to defraud or deceive *any person.* (3) A defendant charged with embezzlement need not be an agent or fiduciary of a corporation. N.C.G.S. § 14-254 applies only to agents and officers of a corporation. (4) To be guilty of embezzlement a defendant must be sixteen or more years of age. There is no such age restriction in N.C.G.S. § 14-254. While not comprehensive, this list shows that the offenses in question are separate and distinct because each offense contains at least one element not found in the other. *See generally, State v. Brady*, 299 N.C. 547, 563, 264 S.E. 2d 66, 75 (1980); *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982).

When two separate and distinct offenses happen to arise out of the same course of conduct a defendant may be charged with more than one offense. *State v. Ward*, 301 N.C. 469, 476, 272 S.E. 2d 84, 88 (1980). In such cases it is proper for the trial court to defer its decision on the necessity for an election until evidence has been introduced. *Id.; State v. Summrell*, 282 N.C. 157, 173, 192 S.E. 2d 569, 579 (1972). Defendant's reliance on *State v. Griffin*, 239 N.C. 41, 79 S.E. 2d 230 (1953) is misplaced. That case held that the trial court should have granted defendant's pretrial motion to require the State to elect between a charge of larceny and a charge of embezzlement. The Court reasoned that both charges were based on the same act, and as a matter of law defendant could not be guilty of both by the same act, the definitions of the two crimes being mutually exclusive. *Griffin*, 239 N.C. at 45, 79

S.E. 2d at 233. On the other hand, it is possible for a defendant to be guilty of both embezzlement and malfeasance of a corporate agent by the same act. For that reason the rule of *Griffin* does not apply to this case, and the decision to defer ruling on defendant's motion until the close of all the evidence was within the sound discretion of the trial judge. For the same reason it was not error for the trial court in making its opening comments to the jury to inform them that defendant was charged with two counts of malfeasance of a corporate agent in addition to two counts of embezzlement.

[14] Before the case went to the jury the trial court required the State to elect between counts XVII and XVIII and between counts XXI and XXV. The State elected to proceed on counts XVII and XXV and the trial court then dismissed counts XVIII and XXI. At that point defendant moved to dismiss counts XVII and XXV on the grounds of double jeopardy. When a defendant is charged in the same trial with separate offenses and each offense charged has an element different from any element of the other charged offense, considerations of double jeopardy do not arise. *Brady*, 299 N.C. at 563, 264 S.E. 2d at 75. The trial court properly denied defendant's motion to dismiss counts XVII and XXV and to declare a mistrial.

IV.

[15] Prior to trial the trial court granted the State's motion to join the false pretense offense with the offenses of embezzlement and malfeasance of a corporate agent. Defendant assigns as error the granting of the State's motion and the denial of his motion to sever the false pretense offense.

"Two or more offenses may be joined in one pleading or for trial when the offenses, . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single plan or scheme." N.C. Gen. Stat. § 15A-926 (1983). The nature of the offense is a factor that may properly be considered in determining whether the acts or transactions on which the offenses are based were part of a single plan or scheme. *State v. Effler*, 309 N.C. 742, 751-52, 309 S.E. 2d 203, 209 (1983). "Motions to join for trial offenses which have the necessary transactional connection under G.S. 15A-926 are addressed to the discretion of the trial court and, absent a showing

of abuse of discretion, its ruling will not be disturbed on appeal." *State v. Avery*, 302 N.C. 517, 524, 276 S.E. 2d 699, 704 (1981).

After examining the circumstances surrounding the three offenses we conclude that the trial judge did not abuse his discretion in joining the offenses for trial. The common thread connecting the crimes is defendant's shortage of ready cash in April of 1982. An installment payment was due on the property defendant had purchased from Ray Amon, and on or about the thirteenth of April defendant removed $14,525 of the money credited to Carolyn Stallings from the trust account of Kornegay, Rice and Edwards, P.A. in Kenansville to pay Mr. Amon. Apparently in need of a fresh infusion of cash, defendant deposited the $6,000 check Estelle Sutton had sent to Kornegay, Rice and Edwards, P.A. as payment for legal services rendered by the firm into his own account. Since defendant had previously deposited checks from Mrs. Sutton into his personal account which were intended to cover legal fees in the amounts of $5,500 and $10,000 respectively, the firm's operating account was short $21,500. According to Elnora Whetsell the firm at that point had insufficient funds to satisfy its salary and operating expenses in April. At that time, 27 April or 28 April 1982, defendant transferred the $21,000 remaining from the $125,000 Mrs. Sutton had paid him to settle her lawsuit into the general operating account of Kornegay, Rice and Edwards, P.A. The relationship between these transactions indicates that defendant's act of obtaining $21,000 from Estelle Sutton by false pretense was part and parcel of his scheme to embezzle funds from his law firm. This evidence is more than sufficient to support joinder of the offenses. Defendant's assignment of error is overruled.

V.

[16] Defendant argues that the admission of testimony by John Edwards and Robert Rice that they had not authorized him to deposit legal fees generated by the corporation in his own account was error. Defendant contends that as sole shareholder of the corporation he had the right to dispose of assets of the corporation without the consent of Edwards and Rice who were only employees. He further argues that the trial court erred in allowing John Edwards to testify that he had not authorized defendant to deposit a check dated 10 December 1978 for $5,500 into defend-

ant's personal account and drawn on Estelle Sutton's account on the basis that that check was not the subject of any charge for which defendant was brought to trial. We find these arguments unpersuasive.

> If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation *with the intent in either case to injure or defraud or to deceive any person*, or if any person shall aid and abet in the doing of any of these things, he shall be punished as a Class G felon.

N.C. Gen. Stat. § 14-254(a) (1981) (emphasis added). Defendant's act of depositing $6,000 in legal fees in his own account rather than that of Kornegay, Rice and Edwards, P.A. is a clear violation of the statute. Defendant was a corporate officer who embezzled funds rightfully belonging to the corporation with the intent to deceive and defraud his associates, John Edwards and Robert Rice. Defendant, John Edwards and Robert Rice had agreed that all legal fees generated by them were property of the corporation and would be distributed on a pro rata basis. Defendant obviously intended to deceive them when he concealed the existence of legal fees due to the corporation. The fact that defendant owned all the stock of the corporation is irrelevant. "So long as the corporation is an entity and owns the money, and that money is withheld or taken and used for non-corporate purposes, . . . there is no escape from the conclusion that there has been a wrongful and intentional *misapplication of corporate funds*. . . . *State v. Stites*, 5 Utah 2d 101, 104, 297 P. 2d 227, 229 (1956) (defendant owned all but four shares of the corporation's stock). Having organized a corporation and conducted his business through it in order to obtain the benefits and protections of the corporate form defendant may not now ignore the corporate entity and treat corporate funds as his own. *State v. Harris*, 147 Conn. 589, 595, 164 A. 2d 399, 402 (1960). If the stockholders may legally convert all of a corporation's assets to their own use those dealing with the corporation on the faith of its property might be irretrievably in-

jured. *Taylor v. Commonwealth*, 119 Ky. 731, 747, 75 S.W. 244, 249 (1903) (all stockholders concurred in the misappropriation of corporate funds). The truth of this observation is borne out in the case at bar by the fact that at one point defendant's act of appropriating legal fees generated by the corporation left the corporation with insufficient funds to meet its obligations. Only a timely infusion of money obtained from Estelle Sutton by false pretense covered this deficit. Section 14-254(a) of the North Carolina General Statutes makes no exception for corporate agents or officers who own the entire stock of a corporation, and such persons violate the statute if they embezzle or misapply corporate funds with the intent to injure, defraud, or deceive another.

We next turn to defendant's argument that the trial court improperly admitted testimony of John Edwards concerning a 10 December 1978 check for legal services deposited by defendant into defendant's own account. It is true that the check was not the subject of any charge against defendant and defendant's appropriation of it is too remote in time from the crimes charged to be admissible as evidence of motive, opportunity, intent, preparation, plan, etc. *See* N.C. R. Evid. 404(b); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In light of the fact that John Edwards and Robert Rice gave identical testimony concerning other checks that were properly admitted into evidence, we hold that admission of the testimony concerning the 10 December 1978 check was harmless error.

VI.

Defendant moved pursuant to N.C.G.S. § 15A-1227 to dismiss count XVII of the indictment charging him with the embezzlement of $14,500 "belonging to Kornegay, Rice and Edwards, P.A. and Carolyn Stallings, individually and as guardian ad litem for John J. Stallings, and John J. Stallings, incompetent," on the basis that there is a fatal variance between the allegations charged in the indictment and the evidence offered by the State. Defendant points out that William Sturges, a member of the Charlotte law firm representing Mrs. Stallings, testified that Mrs. Stallings was not a fiduciary or general guardian of John J. Stallings and that defendant as local counsel negotiated the $30,000 settlement of her case with State Farm Insurance Company and

deposited the funds in the trust account of Kornegay, Rice and Edwards, P.A. Defendant argues that this evidence demonstrates that he did not appropriate any funds belonging to Carolyn Stallings, either individually or as guardian ad litem of John J. Stallings. Defendant is apparently relying on the rule that a guardian ad litem has no authority to receive money for a litigant or administer his property. *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 101, 165 S.E. 2d 490, 497 (1969). While defendant's recital of the facts is correct, his application of the law to the facts is flawed.

[17, 18] In an indictment for larceny the State is not limited to alleging ownership in the legal owner but may allege ownership in anyone else who has a special property interest recognized in law. *State v. Greene*, 289 N.C. 578, 584, 223 S.E. 2d 365, 369 (1976). The same rule may properly be applied to indictments alleging embezzlement or misappropriation of the property of another. In this case Carolyn Stallings, as guardian ad litem, received money for John J. Stallings, incompetent, endorsed the checks from State Farm Insurance Company, and authorized their deposit in the trust account of Kornegay, Rice and Edwards, P.A. Mrs. Stallings had been paying her husband's bills, which would give her a claim for reimbursement from the funds deposited in the trust account, and was a "person in loco parentis" as defined by N.C.G.S. § 35-1.7(20). Also, the funds in question were paid by State Farm Insurance Company, the insurer of the Strickland automobile, pursuant to the medical payment and uninsured motorist's provision of the policy. These payments were made at a time when Mrs. Stallings was acting pursuant to a power of attorney from her husband because of his incapacity. These facts are sufficient to create in Carolyn Stallings a special property interest in the $30,000 deposited in the trust account of Kornegay, Rice and Edwards, P.A. The fact that Mrs. Stallings had no interest in the property as guardian ad litem is irrelevant since that allegation in the indictment did not go to prove an essential element of the crime. "Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E. 2d 677, 680 (1972). The allegation in the bill of indictment that Mrs. Stallings was an owner of the $30,000 was supported by the evidence. There was no fatal variance between the allegation and proof, and

the trial court properly denied defendant's motion to dismiss count XVII.

Defendant also argues in regard to count XXII that there is a fatal variance between the indictment and the evidence and that the trial court incorrectly stated the charge set out in the indictment in its instructions to the jury. Defendant's argument that the trial court's charge to the jury incorrectly characterizes the charge of obtaining money by false pretense is without basis. The instructions merely paraphrase the language of the indictment and are sufficient to define the offense.

[19] Count XXII of the indictment alleges that the offense of obtaining $21,000 by false pretense took place on or about 27 or 28 April 1982. Defendant contends that the State's proof varies fatally from the indictment because the State has failed to prove when defendant settled the Seals suit with the attorneys for the Seals estate.

In order to prove that defendant obtained the $21,000 from Estelle Sutton by false pretense the State must prove that on 27 April 1982 when defendant represented to Mrs. Sutton that the Seals suit had been settled for $125,000 that this representation was false, that it was calculated and intended to deceive, that Mrs. Sutton was deceived, and that defendant thereby obtained $21,000 from Estelle Sutton. *See State v. Cronin*, 299 N.C. 229, 262 S.E. 2d 277 (1980). It is undisputed that this representation was false, that Mrs. Sutton was deceived by it and that defendant thereby obtained $21,000 from Estelle Sutton. The sole question is whether defendant's statement that the suit had been settled for $125,000 was calculated and intended to deceive Mrs. Sutton. An examination of the evidence demonstrates that it was.

Defendant and Joseph Marion, attorney for the Seals estate, agreed to the final settlement of $104,000 between 20 and 30 April 1982. On 27 April 1982 defendant advised Mrs. Sutton that the Seals suit had been settled for $125,000, and she delivered to him that day a cashier's check made out to him in the amount of $125,000. On 28 April 1982 defendant caused a check to be issued to Joseph Marion, the attorney for the Seals estate, in the amount of $104,000. Defendant delivered this check to Mr. Marion on 3 May 1982 who accepted it in settlement of the case. All the evidence indicates that $104,000 was the only figure ever agreed on

by the parties to settle the Seals suit. Based on this evidence the jury could reasonably infer that the amount of $104,000 had in fact been agreed to on or before 27 April 1982 and that defendant's misrepresentation as to the amount of the settlement had been calculated and intended to deceive Mrs. Sutton. The trial court properly denied defendant's motion to dismiss count XXII of the indictment.

Lastly, defendant contends that the trial court erred in denying his motion to dismiss count XXV of the indictment charging him with malfeasance of a corporate agent in violation of N.C.G.S. § 14-254(a) because there is a fatal variance between the indictment and the proof. It is defendant's position that he did not take any monies of Kornegay, Rice and Edwards, P.A. without the consent of the corporation because he is the sole stockholder and officer of the corporation. We have already held that a person owning all the stock of a corporation violates the law by diverting funds from the corporation in order to injure or deceive any person and we need not consider this issue again. Pursuant to the oral agreement of defendant, Robert Rice, and John Edwards, all legal fees generated by them were the property of the corporation, and defendant could not treat them as his own. This assignment of error is overruled.

VII.

We next consider defendant's argument that the trial court erred in denying his request for certain instructions in regard to the charges of embezzlement, malfeasance of a corporate agent through misapplying funds, and obtaining money by false pretense. We have reviewed the instructions given by the trial court as well as defendant's proposed instructions and hold that the trial court did not err in denying defendant's request for instructions.

[20] At trial defendant requested the court to instruct the jury that it was to disregard any evidence concerning a fee arrangement between John Edwards, Robert Rice and defendant and any evidence that Edwards or Rice were entitled to shares of stock in the corporation in evaluating the counts of embezzlement and malfeasance of a corporate agent. Defendant contends that this evidence would only be relevant to a charge of appropriation of

partnership funds by a partner to personal use in violation of N.C.G.S. § 14-97. We disagree.

Evidence of the agreement that all legal fees generated by defendant, Edwards and Rice would be property of the corporation to be distributed pro rata was necessary to show what revenue the corporation was entitled to. In order for defendant to be guilty of misappropriating legal fees it was necessary to prove that the corporation was entitled to legal fees generated by the members of the firm. Likewise, it was proper for the jury to consider the evidence that Rice and Edwards were entitled to shares of the corporate stock because it was relevant to the determination of whether defendant had acted with criminal intent to defraud the corporation and Edwards and Rice by the diversion of legal fees and the embezzlement of trust account funds.

[21] Defendant also argues that the trial court erred in failing to instruct the jury that

> [t]he conversion of funds by a person who has been entrusted with them becomes criminal as an embezzlement only by reason of his corrupt intent, and it is as necessary for the State to establish the intent as a fact independent of the conversion as it is to prove the bad intent in a prosecution for larceny as a fact apart from the taking.

This proposed charge is taken from the case of *State v. Cohoon*, 206 N.C. 388, 393, 174 S.E. 91, 93 (1934), and is a correct statement of the law. However, *Cohoon* does not indicate that this instruction is mandatory in cases where defendant is charged with embezzlement or offenses based on an embezzlement. In instructing on the charges of embezzlement of funds and malfeasance of a corporate agent by misapplying funds the trial judge instructed the jury that the State must prove that "defendant wilfully, fraudulently and dishonestly used the money for some purpose other than that for which he received it." This instruction is consistent with the definition of embezzlement set forth in N.C.P.I. —Crim. 218.10 and is adequate to inform the jury that they must find that defendant acted with a corrupt intent when he converted the monies in question. The trial judge did not err in refusing to give the requested instruction.

In regard to the charge of obtaining money by false pretense defendant requested the following instructions: (1) that the State must establish beyond a reasonable doubt that defendant had settled Mrs. Sutton's case with the attorney for Mrs. Seals for $104,000 on or about 14 April 1982; (2) that the State must establish beyond a reasonable doubt that defendant had settled Mrs. Sutton's case with the attorney for Mrs. Seals on or before 27 April 1982 when Mrs. Sutton delivered the check for $125,000 to defendant; and (3) that if the check for $125,000 was obtained from Mrs. Sutton before the settlement of the case, there was no false pretense. Defendant assigns as error the trial court's failure to give these instructions.

[22] It clearly was not error for the trial court to omit defendant's first requested instruction in its charge to the jury. The fact that the indictment alleged that defendant settled Mrs. Sutton's case with the attorneys for the Seals estate on or about 14 April 1982 is immaterial because it is not an essential element of the crime charged. *See Taylor*, 280 N.C. at 276, 185 S.E. 2d at 680. In this case it was only necessary that the State prove that defendant had settled the Seals case on or before 27 April 1982, and the allegation that the settlement was completed on 14 April 1982 is mere surplusage. For that reason no fatal variance between the indictment and the proof would occur if the jury found that the settlement was completed on or before 27 April 1982 rather than on 14 April 1982.

Defendant's proposed instructions two and three for count XXII in substance state that the jury must find defendant innocent of obtaining $21,000 from Estelle Sutton by false pretense unless the State proves that defendant had already settled the Seals case for $104,000 when he received the check for $125,000 from Mrs. Sutton on 27 April 1982. After instructing the jury on the elements of the charge of obtaining money by false pretense, the trial judge proceeded to deliver his final mandate and, among other things, charged the jury that they must find beyond a reasonable doubt that defendant had reached a settlement of the Seals suit in the amount of $104,000 before he told Mrs. Sutton that the suit had been settled for $125,000 and that she should bring him a check in that amount. This is the essence of what defendant requested in his prayer for instruction and is all that he was entitled to.

In his next three assignments of error defendant argues that the trial court failed to charge the jury on the offenses contained in the indictment. These assignments of error are baseless.

Defendant contends that the trial court's instruction on count XVII varied from the bill of indictment and the evidence offered by the State in regard to the ownership of the embezzled funds. Since defendant did not object to this portion of the jury instructions, he may not now assign it as error. N.C. R. App. P. 10(b)(2).

After the trial court had completed its instructions to the jury, defendant requested that the instructions on count XXII be changed by removing the reference to John J. and Carolyn Stallings as owners of the embezzled funds and instructing the jury that it find defendant guilty if it found that he had embezzled funds of Kornegay, Rice and Edwards, P.A. Such an instruction would have been at variance with the facts and the indictment and was clearly erroneous. The trial court properly denied defendant's request to modify the instructions.

Defendant also argues that there was a fatal variance between the allegations and the proof regarding counts XXII and XXV and the court's instructions. "It is a rule of universal observance in the administration of criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." *State v. Evans and State v. Britton and State v. Hairston*, 279 N.C. 447, 452, 183 S.E. 2d 540, 544 (1971) (quoting *State v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149 (1940)). "The allegation and proof must correspond." *Jackson*, 218 N.C. at 376, 11 S.E. 2d at 151. In regard to counts XXII and XXV, a comparison between the evidence and the language of the indictment and the instructions on these counts reveals that they are entirely consistent with each other. There is no fatal variance between the indictment, the jury instruction, and the proof. These assignments of error are overruled.

In his remaining assignments of error that are not merely formal, defendant argues that it was error for the trial court to admit into evidence documents given to the State by Elnora Whetsell and testimony relating to those documents on the ground that the documents were obtained by the State through an unconstitutional search and seizure. Since we have already held that the documents taken by Mrs. Whetsell were not seized

by the State in violation of defendant's constitutional rights, these assignments of error are without merit and are overruled.

Defendant also assigns as error the trial judge's actions of signing and entering the judgments against him, disbarring him and ordering him to surrender his law license. These assignments of error are purely formal and are without merit.

Defendant received a fair trial free of prejudicial error.

No error.

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

MARGARET M. WEST, CLIFFORD SCOTT, CALEB POYNER, ELWYN WALKER, JAMES O. DUNTON, DONALD ADAMS, SAMUEL H. LAMB, SAMUEL H. LAMB, II, PAMELA V. WEILAND v. EARL F. SLICK AND WIFE, JANE P. SLICK, PINE ISLAND DEVELOPMENT VENTURE, RDC, INC.

No. 111PA83

(Filed 27 February 1985)

1. **Easements § 6.1; Highways and Cartways § 11.2— neighborhood public roads —easements by prescription—evidence of routes of use sufficient**

In an action to restrain the blocking of public access and to create an easement or public roadway over unpaved and unimproved roads that cross respondents' Outer Banks property, the Court of Appeals erred by holding that the evidence failed as a matter of law to identify specific and definite routes of use where the testimony was to the effect that since the early 1900's the Inside Road has been a recognized road with a definite and specific course and variation only in the route taken by some travelers, not in the road itself, and that deviation in the Pole Line Road was not substantial. G.S. 136-67, G.S. 1A-1, Rule 50.

2. **Easements § 6.1; Highways and Cartways § 11.2— neighborhood public roads —necessary means of ingress and egress—evidence insufficient**

Where petitioners contended that two roads across respondents' Outer Banks property were "neighborhood public roads" under G.S. 136-67, but the State Board of Transportation adopted a resolution providing for the acquisition of a right of way in a third road in the area, the two roads in question were no longer the "necessary" means of ingress and egress from petitioners' dwelling houses.

3. **Easements § 6.1; Highways and Cartways § 11.2— neighborhood public roads —outside city limits, public use—evidence sufficient**

In an action to create a public roadway over unpaved and unimproved roads across respondents' Outer Banks property, the evidence was sufficient to take the case to the jury upon the theory of neighborhood public roads under the third part of G.S. 136-67 where the evidence of the location, nature and use of the roads in question was adequate to permit a jury to find that either one or both of the roads were located outside the boundaries of any incorporated city or town, that they served a public use and that they served as a means of ingress and egress for one or more of petitioners' families.

4. **Easements § 6.1; Highways and Cartways § 11.2— public roads—easement by prescription—evidence sufficient**

In an action in which petitioners contended that two unpaved roads across respondents' Outer Banks property had become public roads through prescription based on continuous and open public use for over twenty years, there was abundant evidence that the public had used the two roadways openly, notoriously and continuously for decades, that no permission was obtained or sought, and that these roads were the primary means of access by land to Corolla and the Currituck Banks. Assuming *arguendo* that a requirement of public maintenance is applicable, there was sufficient evidence of public maintenance to take the case to the jury.

5. **State § 2.1; Waters and Watercourses § 7— use of foreshore by public to be unobstructed**

Where the testimony in an action to establish public roadways through respondents' Outer Banks property showed that members of the public regularly used the foreshore area but did not show whether respondents were denying access across their land to the foreshore, the rule that passage by the public by foot, vehicle and boat must be free and substantially unobstructed over the entire width of the foreshore was affirmed.

6. **Appeal and Error § 26— failure to make assignments of error or to group exceptions—appeal itself is exception to judgment**

Where petitioners excepted in apt time to the granting of a directed verdict, the appeal itself was an exception to the judgment, and the Court of Appeals correctly ruled that the petitioners satisfied the requirements of Rule 10 of the Rules of Appellate Procedure even though petitioners failed to make assignments of error or to group exceptions.

Justices MITCHELL and VAUGHN did not participate in the consideration or decision of this case.

ON discretionary review of a decision of the Court of Appeals, reported at 60 N.C. App. 345, 299 S.E. 2d 657 (1983), which affirmed the judgment of *Ervin, J.*, entered 30 September 1976 in Superior Court, PASQUOTANK County, allowing respondents' motion for directed verdict at the close of petitioners' evidence and

dismissing the action. The Court of Appeals denied petitioners' Motion to Rehear by Order dated 17 February 1983. This Court allowed petitioners' Petition for Discretionary Review on 9 September 1983.

This case arose in September 1975 with the filing by petitioners of a special proceeding before the Clerk of Superior Court, Currituck County, in which petitioners sought to restrain respondents from blocking public access by vehicle to Corolla from the south across respondents' land and to establish two specific and definite "roads" across such land as neighborhood public roads pursuant to N.C.G.S. § 136-67 and as public roads by prescription or by dedication. The case was transferred from Currituck County to Pasquotank County and subsequently came on for hearing before Judge Sam J. Ervin III and a jury duly empaneled at the 27 September 1976 regular Civil Session of Superior Court, Pasquotank County. At the conclusion of the petitioners' evidence, Judge Ervin allowed respondents' motion for a directed verdict made pusuant to Rule 50 of the North Carolina Rules of Civil Procedure and dismissed the action. The judgment also continued in effect, pending final determination of the appeal in this case, permission theretofore granted by respondents to petitioners with respect to the use of a new, paved road through respondents' property known as the Coastland Road and unrelated to either of the two roads which are the subject of this action.

Petitioners appealed and after the case was briefed in the Court of Appeals (Formerly No. 771SC147), the parties moved that the action be stayed pending proceedings before the North Carolina Department of Transportation concerning overall public access on the entire Currituck County section of the Outer Banks. Despite the passage of approximately five years during which there were lengthy proceedings before the Department of Transportation, the matters relating to public vehicular access between the Dare-Currituck County line and Corolla were not resolved. The parties ultimately requested that the Court of Appeals hear the appeal in the fall of 1982. The appeal was heard on 6 December 1982 and the Court of Appeals affirmed the trial court's grant of a directed verdict for the respondents.

We allowed discretionary review on the grounds that the subject matter of this case is of significant public interest because

it involves the question of whether the public has access by unpaved road to the Village of Corolla and that it involves legal principles of major significance to the jurisprudence of this State, to wit: the standard of proof required to prove the existence of a public road in the shifting sands of the Outer Banks by "specific and definite lines or routes of use."

Sanford, Adams, McCullough & Beard, by J. Allen Adams, Charles C. Meeker and Steven J. Levitas, for petitioner appellants.

Womble, Carlyle, Sandridge & Rice, by W. F. Womble, Allan R. Gitter and William McBlief; Leroy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells, for defendant appellees.

MEYER, Justice.

The primary issue presented on this appeal is whether the petitioners' evidence was sufficient to take the case to the jury. We find that it was and for the reasons stated herein we reverse the decision of the Court of Appeals and remand the case to the trial division for trial on the merits.

The area of North Carolina known and usually referred to as "the Outer Banks" consists of narrow windswept islands and spits of land guarding our coastal sounds and waters and is characterized by its remoteness, its sparsity of population, its frequent battering by high winds and high seas and the accompanying shifting sands, erosion and accretion. The area offers over three hundred miles of ocean beaches stretching from Corolla near the Virginia border to Sunset Beach on the South Carolina border. Scattered on these barrier islands are villages and communities of unique qualities with picturesque names such as Duck, Kitty Hawk, Kill Devil Hills, Nags Head, Whalebone, Waves, Salvo, Salter Path, Indian Beach, Topsail, and Sunset. This unique area is not only home to a hardy people, it beckons to the vacationer, the naturalist, the sightseer, the sailor, the fisherman and the hunter alike. These lands are, at the same time, sturdy guardians of our mainland against fierce winds and seas and fragile coastal ecosystems.

Respondents are individuals and joint ventures owning a tract of land known as the "Pine Island property" approximately four miles long and from three hundred yards to three-quarters of

a mile wide running between the Atlantic Ocean on the east and Currituck Sound on the west and lying between Corolla to the north and the Currituck-Dare County line to the south.[1] The northern property line of the tract is approximately seven miles south of Corolla while the southern property line is located near the Currituck-Dare County line. The tract actually extends into Dare County a short distance but the allegations in the pleadings refer only to the tract bounded on the south by the Currituck-Dare County line.

Petitioners are nine individuals, some of whom are owners of real property on the Outer Banks of Currituck County. Some of the petitioners are residents of Corolla, some of Knotts Island, and some are residents of other areas of Currituck County north of respondents' property. Yet others are nonresidents of North Carolina.

The property in question consists of sand beach, dunes and marsh, and comprises about four of the eleven miles of the Outer Banks between the Currituck-Dare County line and the Village of Corolla. The property has always been and largely still is wild, open land.

Pursuant to a private easement respondents permit certain individuals to cross their property on a new paved road. Respond-

1. During the times pertinent to this case the Pine Island property was owned by:

Earl F. Slick by deed dated 29 November 1972, Book 116, page 220 and Pine Island Development Venture, deed dated November 29, 1973, Book 124, page 216, are present owners. Pine Island, Inc. from January 15, 1958 to January 11, 1972. Austin O. Barney and wife from January 21, 1936 to January 15, 1958.

(Since 1936 the property in question has been a single tract; prior to 1936 the property in question was in two separate tracts—the Northern Tract and the Southern Tract:)

Northern Tract: Preston Clark and Arthur Milliken, Trustees of Pine Island Trust, from April 14, 1911 to January 21, 1936. Julian Baum et al. from May 28, 1910 to April 14, 1911. Prior to 1910 by Dr. Josephus Baum, his brother Jacob, and their father and other members of the Baum family.

Southern Tract: Preston Clark and Arthur Millikin, Trustees, from June 3, 1919 to January 21, 1936. William P. Clyde from May 18, 1914 to June 3, 1919; Clarence Gallop and his father from the latter part of the nineteenth century to 1914.

ents however have, by the use of chain link gates, a guardhouse and conspicuous signs, prohibited vehicular traffic by the general public, including petitioners, from crossing the Pine Island property. Because vehicular access to Corolla from the north is blocked by the Back Bay National Wildlife Refuge and from the east and west by the Atlantic Ocean and Currituck Sound respectively, respondents in effect are denying the petitioners and the public the only available vehicular access to and from Corolla and the northern reaches of the Currituck outer banks. The respondents have denied access contending that the ways and easements across their property are private.

N.C.G.S. § 136-67 provides, in pertinent part, as follows:

> Neighborhood public roads.—All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Human Resources, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads and they shall be subject to all of the provisions of G.S. 136-68, 136-69 and 136-70 with respect to the alteration, extension, or discontinuance thereof, ... Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the Department of Transportation and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby specifically excluded from the definition of neighborhood public roads, and the owner of the

land, burdened with such portions and segments of such old roads, is hereby invested with the easement or right-of-way for such old roads heretofore existing. Upon request of the board of county commissioners of any county, the Department of Transportation is permitted, but is not required, to place such neighborhood public roads as above defined in a passable condition without incorporating the same into the State or county system, and without becoming obligated in any manner for the permanent maintenance thereof.

This statute declares three distinct types of roads to be neighborhood public roads. The first part of the statute concerns only those roads which were once a part of the "public road system." The second part of the statute declares to be neighborhood public roads all those roads that had been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare. The third part of the statute declares to be neighborhood public roads all those roads outside the boundaries of municipal corporations which served a public use and as a means of ingress and egress for one or more families. *See Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56, *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972).

By this proceeding the petitioners sought to establish the existence of two roads for use by the public across respondents' lands by one or more of the following theories: (1) a "neighborhood public road" under the first part of N.C.G.S. § 136-67 relating to roads which were once a part of the public road system, (2) a "neighborhood public road" under the third part of N.C.G.S. § 136-67 concerning roads located outside city limits which serve a public use, (3) a "*public* road" (as opposed to a "*neighborhood public* road") through prescription based upon continuous and open public use for over twenty years, and (4) a "public road" by implicit or explicit dedication.

The Court of Appeals did not reach the question of whether petitioners' evidence concerning any one or more of the four theories was sufficient for submission to the jury. That court held that as a preliminary matter, petitioners' evidence failed to establish the *identity or situs* of either roadway claimed—that is, the evidence failed, as a matter of law "to disclose that travel was confined to a definite and specific line," *citing Speight v. Ander-*

son, 226 N.C. 492, 39 S.E. 2d 371 (1946) and *Cahoon v. Roughton*, 215 N.C. 116, 1 S.E. 2d 362 (1939).

Upon review, this Court must determine: (I) whether the Court of Appeals erred in its holding that the evidence failed as a matter of law to identify specific and definite routes of use, and (II) if the Court of Appeals erred in that regard, whether there was sufficient evidence to take the case to the jury on one or more of the theories propounded by the petitioners and brought forward on appeal.

I.

At the close of the petitioners' evidence the respondents made a motion for a directed verdict and the trial judge allowed the motion and entered judgment dismissing the action. We conclude that, upon the evidence presented by the petitioners, the trial court erred in so directing the verdict and dismissing the action.

In a jury trial, the motion for a directed verdict is the only procedure by which a party may test the sufficiency of his adversary's evidence to go to the jury. *Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 183 S.E. 2d 115 (1971), *cert. denied*, 405 U.S. 977, 31 L.Ed. 2d 252 (1972).

Upon a motion for a directed verdict pursuant to N.C.G.S. 1A-1, Rule 50, the court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. *Norman v. Banasik*, 304 N.C. 341, 283 S.E. 2d 489 (1981); *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). It is only where the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor that the motion for directed verdict should be granted. *Snow v. Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979).

A directed verdict is proper only if it appears that the nonmovant failed to show a right to recover upon *any* view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678. Or, as otherwise expressed—" 'On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may

grant the motion for a directed verdict only if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff.' 5 Moore's Federal Practice, § 41.13(4) at 1155 (2d ed. 1969)." *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971).

[1] As the Court of Appeals correctly noted, it is well-settled that in order to create an easement or public roadway, the evidence must disclose that travel was confined to a definite and specific line. *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371; *Cahoon v. Roughton*, 215 N.C. 116, 1 S.E. 2d 362. Furthermore, although there may be slight deviations in the line of travel, there must be substantial identity of the easement claimed. *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371; *Taylor v. Brigman*, 52 N.C. App. 536, 279 S.E. 2d 82 (1981). While the evidence submitted by the petitioners might have been conflicting in certain respects, upon motion for directed verdict, the trial judge, and indeed the appellate courts on review, must view the evidence in the light most favorable to the petitioners and give them the benefit of every inference that could reasonably be drawn. We now proceed to review the petitioners' evidence in that light to determine whether it sufficiently established the threshold fact that travel was confined to a definite and specific line to take the case to the jury as to either or both roads.

Two unpaved and unimproved roads cross respondents' Pine Island property. One is known as the "Inside Road" or as the "Soundside Road" and the other as the "Pole Line Road." The two names for the first mentioned road, "Inside Road" and "Soundside Road" are used interchangeably and the road is so named because it lies along the sound side or inside (western side) of the Currituck Outer Banks. This road was well known to and used by the many witnesses who testified, most of whom were local residents of Currituck and Dare Counties. This road was used since the early 1900's as the main route from Kitty Hawk, through Duck to Caffey's Inlet and then through what is now the respondents' property to Poyner's Hill and on along the inside of the banks to the Village of Corolla.

The testimony of the witnesses reveals that the Inside Road was used by them from as early as 1912 through 1974, and there was substantial evidence that for much of this century the Inside Road has been in good, passable condition. There was also evi-

dence that, in addition to this principal route, travelers going north above Poyner's Hill (which is approximately one-half mile south of respondents' northern property line), if the tide was out and the sea calm, also frequently drove along the surf to Corolla. Some of those who used the surf route would cut over from the Inside Road at Poyner's Hill while others would veer over to the Pole Line Road to reach Poyner's Hill and then cut over to the beach. Weather permitting, vehicles have been and are able to negotiate the beach relatively easily from Poyner's Hill to Corolla. However, apparently because of its pebbles and soft sand, the beach through the entire length of the Pine Island property and north to Poyner's Hill is virtually impassable by vehicle and has never been regularly used. While there was evidence that the routes of the travelers varied, no witness indicated any uncertainty about the course of the Inside Road and there was no testimony that the course of the Inside Road ever shifted, deviated or was ever obscured. On petitioners' Exhibit No. 10, a 1970 aerial photo, this road clearly appears, particularly as it crosses respondents' Pine Island property.

A few examples of the nature of the testimony regarding the variation of the course of the *Inside Road* are instructive:

Mrs. Margaret Dowdy, a long-time resident of the general area, testified that she had traveled the Inside Road and the Pole Line Road since 1912. In describing the Inside Road, she said, "You did not go in one track as opposed to another track. There was one deep track, and if you met anybody it was just too bad. There was no brush that had grown up in the track . . . anybody that lives on the beach knows the sand moves when it blows. I would say there was not much variation when sand blew in any of the tracks."

Mr. Leslie James Henley, who was 72 years old and lived in Corolla, testified that he had driven the Inside Road "many a time" and that he had driven on the Inside Road past Dr. Baum's club a "million times in cars." He testified on cross-examination that the "old road that we used to drive (the Inside Road) did not change depending upon the conditions of the winds and rain and the tides."

Mr. Caleb Poyner, a lifelong resident of Currituck County and one of the petitioners, testified that the Inside Road and the

Pole Line Road "were definite routes." With specific reference to the Inside Road he said, "Referring to Exhibit No. 10 (the strip aerial photograph), there is a main track for the Inside Road which over the years has been consistently followed."

Mr. David H. Lawrence, a resident of Currituck and Dare Counties for nearly 50 years, testified that he traveled both the Inside and Pole Line Roads as early as 1927. Referring specifically to the Inside Road he testified, "That road was there in 1927 when I made my trip. I would say that the road as shown on this 1970 map varies almost negligible [sic] with the same road that was there in 1927."

In sum, the testimony of the witnesses was to the effect that since the early 1900's the Inside Road has been a recognized road with a definite and specific course. The only evidence of variation relevant to the Inside Road was not in the road itself but in the route taken by some of the travelers northward from Dr. Baum's club, which did vary depending on the weather, the seas and the tides. The fact that the travelers often took the Inside Road all the way to Corolla but at other times went by a different route, does not mean that the Inside Road was less than a definite and specific line.

The second road, known as the "Pole Line Road" because of its location along established telephone line poles, is located behind the sand dune line. In former days, a telephone line ran from Oregon Inlet to Virginia Beach and Coast Guard Stations located at intervals of approximately six miles were connected by this line. The Pole Line Road through respondents' property was apparently the maintenance road located on the west side of the line of telephone poles. The evidence seems to indicate that electric lines were also located on these poles and the road is sometimes referred to by the witnesses as the Power Line Road. Like the Inside Road, the Pole Line Road can be easily discerned on the aerial photograph which is petitioners' Exhibit No. 10, particularly as it traverses respondents' Pine Island property. The Pole Line Road is a sand road or trail and there was evidence that its course *has* deviated slightly through the years. Numerous witnesses testified as to the existence, location and course of the Pole Line Road. Notably, witnesses Caleb Poyner and David Law-

rence identified the road on the strip aerial photo admitted into evidence as petitioners' Exhibit No. 10.

As to the deviation in the course of the *Pole Line Road*, the evidence taken in the light most favorable to the petitioners indicates that the deviation was slight.

Mr. Blanton Saunders, a long-time resident of the area who at one time worked for about six years for one of respondents' predecessors in title, testified that he had traveled the Pole Line Road many years since 1926. While there was evidence to the contrary from another witness, Mr. Blanton Saunders described the Pole Line Road as being on the west side of the telephone line poles at all times. Saunders testified that though there were deviations when cars had to pass each other, the main tracks were always on the west side of the poles and the line of poles was as "straight as a compass would put it." He described the road as being 18 to 20 feet along the line of poles. Although the blowing sand sometimes filled the tracks, the roadway was always discernible.

Mr. Elwyn Walker, another of the petitioners and a resident of the Currituck area, began traveling the area in the late 1960's and testified: "During the time I was traveling the Pole Line Road, there was more or less one main track. There were places along that you would have to get away from the main road, but it wasn't too far either way. The deviations from the track were probably just bad places where you would go around, or where somebody had passed somebody and got out of the tracks. Most of the time, when I would go back, the main track would be back there and you would follow it and not the deviation."

Mr. James Dunton, a petitioner who is a resident of Coinjock but owns property north of Corolla, testified in part that he first traveled the area about 1950 and that when he was "picking my way" along the Pole Line Road past the Pine Island "Club," "I would stray out of the normal regular tracks maybe to let a car by, or where one had passed before. I never had a problem where [sic] the road got bad because [of] wind or rain."

As we have with regard to the Inside Road, we find that petitioners' evidence with regard to the Pole Line Road meets the test of substantial identity. Although there was evidence of some

slight deviation, at least so far as the Pole Line Road is concerned, that deviation was not substantial. Thus, we conclude that although there was substantial evidence that travelers passing through respondents' property varied their chosen routes, there was also sufficient evidence of the substantial identity of the easements claimed for both the Inside Road and the Pole Line Road to take the case to the jury as to both roads. Accordingly, we hold that the Court of Appeals erred in holding that the petitioners' evidence "failed as a matter of law to identify specific and definite lines or routes of use."

II.

Having determined that the Court of Appeals erred in holding that the evidence failed to disclose that travel was confined to a definite and specific line, we now move to the question of whether the evidence was otherwise sufficient to take the issues to the jury on the theories advanced by the petitioners. As petitioners have not brought forward for review any assignment of error or issue with regard to their theory number (4) (a public road by virtue of an implicit or explicit dedication), we will address only their theories numbers (1) and (2)—establishment of the roads in question as "neighborhood public roads" under the first and third parts of N.C.G.S. § 136-67 and (3)—their establishment by prescription. We do not discuss the so-called "public trust" theory as it was not pled and not addressed by the trial court nor was it briefed or argued on appeal.

[2] Petitioners' first theory is that the two roads in question are "neighborhood public roads" under the first part of N.C.G.S. § 136-67 relating to roads which were once a part of the public road system. However, events transpiring subsequent to filing of the record and briefs and the oral arguments on this appeal make it unnecessary for us to address this theory in any significant detail.

We take judicial notice of the fact that, at its regular meeting on 12 October 1984, the State Board of Transportation adopted a resolution which provided *inter alia* as follows:

> WHEREAS, the General Assembly by Resolution 42 ratified on July 7, 1983, urged the Department of Transporta-

tion to provide public access to the community of Corolla on the Outer Banks in Currituck County; and

WHEREAS, the Currituck County Board of Commissioners by resolution adopted August 6, 1984, requested the Department of Transportation to provide a public road from the Currituck-Dare County line on the Outer Banks to the Village of Corolla; and

WHEREAS, the Department of Transportation and the Board of Transportation recognize the need for the road; and

* * *

WHEREAS, the Board of Transportation finds that such rights of way to be acquired and hereinafter described are for public use and are necessary for the maintenance of the road connecting SR 1200 at the Currituck-Dare County line to existing SR 1185 at the Village of Corolla.

NOW, THEREFORE, IT IS HEREBY ORDAINED that the existing road from SR 1200 near the Currituck-Dare County line to Corolla, which road is more particularly described on Exhibit 1 attached hereto, is hereby added to the State Highway System effective November 1, 1984. Those portions of the road dedicated to the public which have been constructed, are hereby accepted. The Right-of-Way Branch is directed to immediately acquire by deed or right-of-way agreement the rights-of-way for portions of the existing road from SR 1200 to Corolla which are not dedicated to the public. The Attorney General's Office is requested to initiate proceedings to acquire by condemnation the right-of-way for those sections of road not dedicated to the public which the Right-of-Way Department has not acquired prior to November 1, 1984. The right-of-way to be acquired by conveyance or condemnation shall be 60 feet in width; except where the road is located on dedications which are not to the public, and as to such locations, the right-of-way to be so acquired shall be 100 feet in width to coincide with such dedications.

Minutes of the State Board of Transportation, 12 October 1984, Minute Book 16A, pp. 4347-50.

Attached to the resolution as Exhibit 1 is a general centerline description of the proposed right-of-way of the roadway to be acquired from the end of existing SR 1200 near the Currituck-Dare County line to Corolla, added to the State Highway System effective 1 November 1984. The centerline description runs for a distance of 10.87 miles, 3.61 miles of which traverse respondents' property. The description, as it crosses respondents' property, appears to follow the centerline of an existing paved private road. From the foregoing resolution it appears that the width of the right-of-way through respondents' property will be a minimum of sixty feet.

The first part of N.C.G.S. § 136-67 designates as neighborhood public roads: "All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use *as a necessary means of ingress to and egress from the dwelling house of one or more families. . . .*" (Emphasis added.) It is abundantly clear that this first part of the statute relating to roads which were once a part of the public road system applies only to a road or roads which constitute a "necessary" access to a dwelling house.

The Department of Transportation having acquired the foregoing right-of-way for the construction of a public highway, neither of the two roads in question any longer constitutes a "necessary" means of ingress and egress from the dwelling houses of the petitioners across respondents' land—a means having been supplied by the acquisition of said right-of-way. *See Community Club v. Hoppers*, 43 N.C. App. 671, 260 S.E. 2d 94 (1979), *disc. rev. denied*, 299 N.C. 329, 265 S.E. 2d 403 (1980).

[3] Petitioners' second theory concerns the third part of N.C.G.S. § 136-67 relative to roads located outside city limits which serve a public use. That part of the statute provides: "[A]ll other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and *as a means of ingress and egress for one or more families*, regardless of whether the same have ever been a portion of any State or county road system, are

hereby declared to be neighborhood public roads. . . ." (Emphasis added.)

Although the legislature created and defined the first two types of neighborhood public roads in 1933, it was not until 1941 that the statute was rewritten to include this third type. N.C. Public Laws 1941, Chapter 183. *See Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56. It is to be specifically noted that, unlike the first part of the statute, under this third part it is immaterial whether the road has ever been a part of the public road system and this part does not specify that the means of ingress and egress be a "necessary" means. Thus the recent acquisition of the right-of-way for the proposed road does not moot petitioners' theory that the roads are neighborhood public roads under the third part of the statute.

Under this third part of the statute, the elements required to be shown to establish a neighborhood public road are: (1) the road or street or portions thereof are outside the boundaries of any incorporated city or town, (2) serves a public use, and (3) serves as a means of ingress or egress, (4) for one or more families. We have held that this third part refers to traveled ways which were established easements or roads or streets in a legal sense at the time of the 1941 amendment. *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371. "The term 'legal' means that which is according to law. It does not mean permitted by law, but means created by law." *Junior Order American Mechanics v. Tate*, 212 N.C. 305, 309, 193 S.E. 397, 399 (1937). The term "roads" in a legal sense would refer to roads established, *i.e.*, created, by law by such means as dedication, condemnation or prescription. In the case *sub judice*, petitioners may establish the existence of a neighborhood public road in a legal sense by proof of such road or roads by prescription. A subsequent section of this opinion deals with the sufficiency of the evidence to take the case to the jury on the issue of a "public road" by prescription. We deem it unnecessary to duplicate that survey of the evidence at this point in the opinion. Suffice it to say that the same evidence may support both the theory of "public road" by prescription and the theory of "neighborhood public road" established in a legal sense by prescription.

Our review of the testimony indicates that the evidence proffered by the petitioners regarding the location, nature and usage of the roads in question is adequate to permit a jury to find that either one or both of the roads in question are located outside the boundaries of any incorporated city or town, that they serve a public use and that they serve as a means of ingress and egress for one or more of petitioners' families. We thus hold that the evidence was sufficient to take the case to the jury upon the theory of neighborhood public road under the third part of N.C.G.S. § 136-67.

[4] Petitioners' last theory is that the roads in question are "*public* roads" (as opposed to "*neighborhood public* roads") through prescription based upon continuous and open public use for over twenty years.

In *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974), this Court set out the principles of law which are applicable to cases such as this one wherein a claim of an easement by prescription is made:

> 1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.
>
> 2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.
>
> 3. The use must be adverse, hostile, or under a claim of right. . . . "To establish that a use is 'hostile' rather than permissive, 'it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate.' (Citations omitted.) A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right. . . ." There must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent. . . . A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription.

4. The use must be open and notorious. "The term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim; and this may be proven by circumstances as well as by direct evidence."

5. The adverse use must be continuous and uninterrupted for a period of twenty years. . . . "The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement." J. Webster, Real Estate in North Carolina § 288 (1971). An interruption to an easement for a right-of-way "would be any act, done by the owner of the servient tenement, which would prevent the full and free enjoyment of the easement, by the owner of the dominant tenement. . . ."

6. There must be substantial identity of the easement claimed. . . . "To establish a private way by prescription, the user [sic] for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." (Citations omitted.)

284 N.C. at 580-81, 201 S.E. 2d at 900-01. *Accord Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981), in which this Court succinctly enumerated the elements necessary to be proved in order to establish an easement by prescription:

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

301 N.C. at 666, 273 S.E. 2d at 287.

As we have previously addressed the sufficiency of the evidence in regard to the fixed location of both the Inside Road and the Pole Line Road, we deem it unnecessary to repeat that analy-

sis here. Suffice it to say that as to the enumerated elements required to establish an easement by prescription, there was abundant evidence that the public had used the two roadways openly, notoriously and continuously for decades, that no permission was obtained or sought and that these roads were the primary means of access by land to Corolla and the Currituck Banks.

Mr. Blanton Saunders who used the road from 1926 and who worked for the Pine Island Club for six or eight years testified:

> I was never given any instructions to keep the public off any of the roads passing through those properties.
>
> The reputation of the Inside Road in the community was that it was public. All of them went and came that wanted to at that time. There wasn't anybody stopping them or telling them to stop.
>
> The reputation in the community of the Pole Line Road was that it was a public road. The public used it as much as they wanted to. Didn't anybody tell them not to go and come.
>
> * * *
>
> When I went on that land, I didn't ask anybody whether I could be there or not. I didn't see anybody to ask. I never got any permission or even asked any permission because everybody else was going and coming whenever they wanted to.

Mrs. Margaret Dowdy who traveled the Inside or Soundside Road before there were automobiles, testified that the road was never closed to any one and that no one ever stopped her or told her that she could not use the road. She further testified that after 1923 when she traveled the road by automobile, no one ever stopped her or told her that she could not use the road.

Mr. Pennell A. Tillett testified that no one kept people from traveling the Inside Road and that no one ever told him he could not use the road and he thought it was a public road. He stated specifically that between 1917 and 1930 the general reputation in the community was that the Inside Road was a public road.

Mr. Leslie James Henley testified that he knew the general reputation in the community as to whether the Inside Road was known as public or private and that it was a public road.

Mr. Caleb Poyner testified in this regard as follows:

> I never asked permission to use the Inside Road. From my youth until now, I have never seen any occasion to. The general reputation in the community of the Inside Road was that it was a public road. The general reputation in the community of the Pole Road was that it was a public road. I have never been stopped from traveling on the Inside Road until the present guard gate was put on the other road and the gate was closed to Pine Island. At that time, I was stopped. The gate was closed. I insisted that I go to Corolla that I had property there, and that I was going to Corolla. The gate was locked with a latch in it. I shortly thereafter went through the gate. I did not have to break down the gate. The guard opened the gate for me. I was not given permission to go through.

Mr. David H. Lawrence testified that he had done engineering and surveying work in the area of Currituck and Dare Counties since 1950 on various projects. He testified as to the reputation of the two roads as follows:

> During the time I was doing these projects, I had an opportunity to learn the general reputation of the road, the Inside Road as to whether it was public or private. It was a public road. I had an opportunity to learn the reputation in the community of the Pole Line Road. It was a public road. No one ever stopped me from using either one of these roads.

B. Ray White testified in pertinent part as follows:

> It would be fair to say I have been traveling south from Penny's Hill for 42 years. During that whole time no one has ever stopped me and told me I could not go through the Pine Island property. The general reputation in the community of the Pole Line Road from Poyner's Hill to Caffey's Inlet is that it is a public road. The reputation of the Inside Road from Poyner's Hill to Caffey's Inlet in the community is that it is a public road.

The evidence was sufficient to rebut the presumption of permissive use and to allow, although not compel, a jury to conclude that the use was under such circumstances as to give respondents notice that the use was open, notorious, adverse, hostile and

under claim of right with respondents' and their predecessors' full knowledge and acquiescence. Unlike the panel below, we find in the evidence presented substantial identity of the easements claimed.

The respondents argue that petitioners' evidence fails to establish an additional element required for public, as opposed to private, prescription of roads; that is, the element of "public maintenance." It is the respondents' contention that "North Carolina has always required public maintenance" as an element of public prescription of roads, relying upon *Chesson v. Jordan*, 224 N.C. 289, 29 S.E. 2d 906 (1944); *State v. Fisher*, 117 N.C. 733, 23 S.E. 158 (1895); *Stewart v. Frink*, 94 N.C. 487 (1886); *Kennedy v. Williams*, 87 N.C. 6 (1882); *Boyden v. Achenbach*, 79 N.C. 539 (1878); *Tarkington v. McRea*, 47 N.C. 47 (1854) and *Woolard v. McCullough*, 23 N.C. 432 (1841).

In their brief, petitioners take the position that the modern test requiring public maintenance, which they concede currently applies to public prescription of roads, has evolved over time and is substantially more stringent than the test applied to the taking of a road in this State's rural areas in the nineteenth and early twentieth century. The petitioners submit that as of 1931, North Carolina case law established that public maintenance of a road was *not* a prerequisite to public prescription, relying upon *Wright v. Lake Waccamaw*, 200 N.C. 616, 158 S.E. 99 (1931); *Haggard v. Mitchell*, 180 N.C. 255, 104 S.E. 561 (1920); and *Tarkington v. McRea*, 47 N.C. 47. According to the petitioners, these cases indicate that "the length and character of the public's use were the key factors, and this remained the law until 1937." The petitioners argue that this court first *required* proof of public maintenance as an essential element of public prescription in its 1937 decision of *Hemphill v. Board of Aldermen*, 212 N.C. 185, 193 S.E. 153 (1937). Petitioners' argue further that under these standards, the evidence showed public use of the Inside Road for 25 years (*i.e.*, from 1912) prior to the time that a requirement of public maintenance existed for public prescription, and that there was evidence of public maintenance of both the Inside and the Pole Line Roads during 20-year periods of prescription occurring before and after 1937.

Our examination of the applicable precedents indicates that the necessity of demonstrating "public maintenance" as an essential element in establishing the existence of a public road by prescription has not undergone a steady "evolution" as petitioners argue, but has figured prominently in some cases, while either being ignored or expressly disclaimed as an element in others.

The earliest cases on the subject of public prescription of roads fail to make any mention of public maintenance as an element, emphasizing, rather, use by the public for the requisite length of time and reputation of the road as a public way. *See, e.g., Tarkington v. McRea*, 47 N.C. 47 and *Woolard v. McCullough*, 23 N.C. 432. Later cases mention public maintenance as a factual circumstance having strong bearing on the question of adverse use by the public of the roadway claimed. *See, e.g., Boyden v. Achenbach*, 79 N.C. 539; *State v. McDaniel*, 53 N.C. 284 (1860); and *Davis v. Ramsey*, 50 N.C. 236 (1858).

In the year 1882, however, the court made two seemingly conflicting statements with regard to the necessity of demonstrating public maintenance. The first statement appears in a criminal action for obstructing a public road, *State v. Purify*, 86 N.C. 682 (1882). There, the court stated the rule as follows:

> A *public highway* is one established by public authority, and kept in order by the public, under the direction of the law; *or else it is one used generally by the public for twenty years, and over which the public authorities have exercised control, and for the reparation of which they are responsible.* (Emphasis added.)

Later that year, in a civil action to enjoin the obstruction of an alleged public road, the court, *citing, inter alia, State v. Purify* and *Boyden v. Achenbach*, summarized the applicable precedents in the following manner:

> According to the current decisions of this Court, there can be no *public highway*, unless it be one, either established by the public authorities in a proceeding regularly constituted before the proper tribunal; *or one generally used by the public, and over which the proper authorities have exerted control for the period of twenty years*; or one dedicated to

> the public by the owner of the soil with the sanction of the authorities, and for the maintenance and reparation of which they are responsible. (Emphasis added.)

Kennedy v. Williams, 87 N.C. at 8.

Following the *Kennedy* decision, the court again phrased the requirements of public prescription in such a way as to strongly suggest that public maintenance was not an essential element, but rather functioned as proof of the exercise of public authority and control, necessary to show adverse, as opposed to, permissive use by the public. *See, e.g., Stewart v. Frink*, 94 N.C. 487 ("the proper public authorities must have exercised authority and control over it in some way to be seen, as by superintending and keeping it in proper repair, adversely to the owners of the land") and *State v. Fisher*, 117 N.C. 733, 23 S.E. 158 (1895) ("the best evidence of such [adverse] user is the fact that the proper authorities have appointed overseers and designated hands to work, and assumed for the public the responsibility of keeping the way in repair").

However, this view was not consistently followed by the court and a number of later cases once again take the position that public maintenance is an essential element of public prescription. *See, e.g., State v. Lucas*, 124 N.C. 804, 32 S.E. 553 (1899) (it is "still essential" that the road must have been worked and kept in order by public authority). *Accord State v. Haynie*, 169 N.C. 277, 84 S.E. 385 (1915) (obstruction of a road not an indictable offense where public authorities have not assumed the obligation to work the road and keep it in order).

A similar pattern of development is observable in later pronouncements on the subject of public maintenance. *Compare, for example, Hemphill v. Board of Aldermen*, 212 N.C. 185, 193 S.E. 153 (it is "essential" that the road must have been worked and kept in order by public authority) *with Haggard v. Mitchell*, 180 N.C. 255, 104 S.E. 561 (party claiming public road need only prove that the occupation is so general and of such kind as to permit the inference and apprise the owner that the public has assumed control of his property and is exercising it as a matter of right; it is not essential that public maintenance be performed). *See also Chesson v. Jordan*, 224 N.C. 289, 29 S.E. 2d 906 (adverse use by the public must be manifested in some appropriate way by the properly constituted public authorities) and *Wright v. Lake Wac-*

camaw, 200 N.C. 616, 158 S.E. 99 (public use and control exerted by the proper authorities for the period of twenty years). It is evident from the foregoing review of our case law that public maintenance is either to be considered as evidence of adverse use of a road by the public, or as an essential element, the showing of which must be made in order to establish a public road by prescription.

In *Scott v. Shackelford*, 241 N.C. 738, 86 S.E. 2d 453 (1955) Justice Higgins contrasted the maintenance requirement "[i]n early times, when the country was thinly populated, when lands were of relatively little value, when public funds for road and street construction and maintenance were simply not available . . ." with the maintenance requirement "when the State and Towns developed and larger and larger sums of money became available for highways and streets . . ." and roads were "authorized by carefully prepared proceedings." In addressing the testimony of witnesses as to the existence of a street for the period of about 1895 to 1955 Justice Higgins wrote:

> There can be no doubt but that under the old decisions of this Court the evidence of the use of the alley by the public for the time shown by the plaintiff's evidence would be amply sufficient to sustain the findings and judgment in this case. Under the later decisions, we think the facts offered, though somewhat inconclusive as proof of acceptance, constitute *some* evidence and as such will support Judge Grady's findings.
>
> However, as the State and the towns developed, and larger and larger sums of money became available for highways and streets, they were surveyed with mathematical exactness. They were authorized by carefully prepared proceedings. Records of surveys and plans showing the exact location were made and were available at every courthouse and town hall. The authority for the location and construction can be ascertained without difficulty. As a consequence, the recent decisions of this Court are in harmony with and recognize the change in conditions. In an opinion by *Barnhill, J.*, now *C.J.*, in the case of *Chesson v. Jordan*, 224 N.C. 289, 29 S.E. 2d 906 [1944], the Court clearly states the modern view: "According to the current of decisions in this Court, there

> can be in this State no public road or highway unless it be one either established by public authorities in a proper proceeding regularly instituted before the proper tribunal; or generally used by the public and *over which the public authorities have assumed control* for a period of twenty years or more; or dedicated to the public by the owner of the soil with the sanction of the authorities and *for the maintenance and operation of which they are responsible.*" (Emphasis added.)
>
> Long after the time the alley in question here had been in use according to the plaintiff's evidence, maintenance of streets and highways generally consisted of the draining or filling up of mudholes, often by the owner of the adjacent property. Then, the use alone was sufficient to establish the right. Then, no provision or facilities were provided for maintenance. Now, it is not enough for the public to use the streets, highways or alleys for twenty years. The public authorities must assert control over them.

Id. at 743, 86 S.E. 2d at 457. While this statement appears in a case which involved the question of dedication of a street and acceptance thereof by the public, it serves as further illustration that the cases are in conflict as to the necessity (requirement) of showing maintenance by the public either as some evidence of the exercise of public control or as a necessary element of public prescription.

While the question of the *necessity* of proving public maintenance in order to establish a public road in this manner is an interesting one, and one about which much could be written, we find it unnecessary to address the matter in any greater detail for the purposes of this decision. Assuming *arguendo*, that a requirement of public maintenance is applicable, and although the evidence was conflicting on this issue, we find sufficient evidence of public maintenance to take the case to the jury.

While, as previously indicated, evidence as to the public maintenance of the roads in question was in conflict, evidence which would support the petitioners' claim of public maintenance included the following:

Mr. Thomas J. King, 51 years of age, who lived on the Outer Banks of Dare County virtually all of his life testified that his father was a full time State Highway Department employee and that between the years 1946 and 1948 his father worked the Soundside Road with a State Highway truck with a pull drag and also put rushes in the holes on the road. His father's job was to make the roads passable and he worked the Pole Line Road to within 100 yards of Dr. Baum's house and stopped there because the road was hard and it did not need any work.

Mr. Jesse Newman who lived on the Outer Banks since 1937 testified that he worked for the Interior Department, National Parks Service, and was familiar with the Currituck Outer Banks between Caffey's Inlet and Poyner's Hill and Corolla. His group maintained the roads that they used between Duck and Corolla and that this work was performed from 1934 to 1936. He stated that when his trucks went northward out of Duck they would put brush in the bad places to make the road passable—apparently referring to the Pole Line Road.

Mr. Lonnie Bowden testified that he lived at Penny's Hill for 69 years and that in 1937 and 1938 he was employed by the federal Work Progress Administration (WPA) driving a State truck. The truck was used to haul shells and gravel on the road south of Corolla to about halfway to Poyner's Hill.

Mr. Leslie James Henley testified that he had worked for the WPA in the area in the 1930's. He drove a truck for the WPA and hauled gravel off the beach to make a roadbed. In this testimony, Leslie Henley was referring to the Inside or Soundside Road approximately a mile and one-half north of Poyner's Hill.

Mr. Oriental Dell Beasley Henley, who had lived on the Outer Banks all of his life testified that the road was maintained "a lot" by the Coast Guard and that his father went out and worked on the roads in question.

Mr. David H. Lawrence testified that he remembered on at least one occasion riding with his father up to the Outer Banks in Currituck to see what progress was being made on some road work there. He stated that this was a Civil Works Administration (CWA) project and that he observed a road crew working. This was in the general vicinity of Caffey's Inlet and further north

toward Corolla. He specifically testified that he had seen road crews with equipment working on the road within the Pine Island property which was not a part of the CWA project. He further testified that some time in the middle 1930's he observed workmen putting myrtle bushes and limbs in holes and ruts in the Soundside Road and in soft areas along the Pole Line Road.

Mr. Lewis Milford Scarborough, a resident of Duck in the 1940's, testified that he was employed by the North Carolina Highway Commission in 1946. He stated that he knew Mr. Tom King, who was in charge of State work at Duck, and he did some work on the road north of Caffey's Inlet. The road was built with shovels and a road drag and Lewis Scarborough personally dragged the road near the clubhouse at the Pine Island property. He worked on the truck driven by Mr. Tom King. This work was done on the Inside and Soundside Roads to within 200-300 yards of the clubhouse. Scarborough stated that he was paid by the State for this work.

Mr. Griggs O'Neal, whose affidavit was offered into evidence, stated that he had seen State equipment travel on the road within the Pine Island property. He had seen trucks, road graders, and bulldozers passing through the Pine Island property going to the Corolla area. When the State road grader returned south from Corolla and within the Pine Island property it dropped the blade on the Pole Line Road. He drove on this road later after it had been graded and leveled off.

Mr. James Scarborough testified that he was 57 years old and that as a young boy he remembered accompanying his father on what they called "community" or "gentlemen's agreement road work day." This was some time around 1925 when people would meet on a certain day and use shovels and horse and cart to work the road. The ruts were filled in and the branches were trimmed out of the roadway. He stated this work "started at the Guard Camp and went as far as Dr. Baum's property and went a good half or better toward Kitty Hawk, to what they called the Mule Plant."

Upon the foregoing testimony, we find sufficient evidence to take the case to the jury on the issue of public maintenance. It cannot be said that petitioners failed to show a right to recover under *any* view of the facts which the evidence reasonably tends

to establish or that, *as a matter of law*, their evidence was insufficient to justify a verdict in their favor on this issue. Accordingly, we must vacate the trial court's judgment dismissing the action upon the granting of respondents' motion for directed verdict at the close of petitioners' evidence.[2]

[5] We are unable to tell from our review of the record whether respondents are also denying access across their land to the petitioners and the public in general to the area known as the "foreshore." However, much of the testimony indicated that members of the public also regularly used the foreshore area to make their way to and from Corolla.

The longstanding right of the public to pass over and along the strip of land lying between the high-water mark and the low-water mark adjacent to respondents' property is well established beyond need of citation. In North Carolina private property fronting coastal water ends at the high-water mark and the property lying between the high-water mark and the low-water mark known as the "foreshore" is the property of the State.

> Where is the dividing line between the property of the State and that of the littoral private owner? There is a division among the States on that question, and the groups may be conveniently labeled "high-tide" "low-tide" states.
>
> The "strip of land between the high- and low-tide lines" is called the foreshore. . . . The high-tide states hold that private property ends at the high-water mark, and that the foreshore is the property of the state. The low-tide states, on

2. When the respondents in the case moved for a directed verdict at the close of the petitioners' evidence, the trial judge could have reserved his ruling. Even assuming that the respondents had offered evidence and then renewed their motion, he could have continued to reserve his ruling and allowed the case to go to the jury. Where, as here, the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to go to the jury since (1) if the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided; (2) if the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict; and (3) on appeal, if the motion proves to have been improvidently granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial. W. Shuford, North Carolina Civil Practice and Procedure (2d ed.), p. 380 (1981).

the other hand, fix the boundary at the low-water mark, and the foreshore is said to belong to the littoral landowner unless it has been otherwise alienated. . . .

Although the North Carolina position is somewhat obscured by the vagaries of ancient cases, ... North Carolina is a high-tide state. Under the old "entry and grant" statutes (which were replaced in 1959 by the State Land Act, Session Laws, 1959, c. 683, codified as Gen. Stat., c. 146), only land under non-navigable waters could be entered. Ownership which might interfere with navigation was not allowed. Therefore, littoral rights in ocean-front property did not include the title to the foreshore, which remained in the State. . . .

The State Land Act of 1959, *supra*, carries forward the distinction between navigable and non-navigable waters and provides that land under navigable waters cannot be "conveyed in fee," but that easements may be granted. G.S. 146-3. More importantly, the act creates a new subclassification for lands "which lie beneath . . . The Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State," and provides that no such lands can be "conveyed in fee." G.S. 146-3 and 146-64. There is nothing in the new act to change the general rule that ownership of the foreshore remains in the State. On the contrary, it is noteworthy that a special class was created for the protection of the foreshore and the marginal seas. We therefore adhere to our long established rule that littoral rights do not include ownership of the foreshore.

The littoral owner may, however, in exercise of his right of access, construct a pier in order to provide passage from the upland to the sea. " 'But the passage under the pier must be free and substantially unobstructed over the entire width of the foreshore. This means that from low to high water mark it must be at such a height that the public will have no difficulty in walking under it when the tide is low or in going under it in boats when the tide is high'. . . ." This language is consistent with the view we take here that the foreshore is reserved for the use of the public.

> The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water. (Citations omitted.)

Fishing Pier, Inc. v. Town of Carolina Beach, 277 N.C. 297, 301-03, 177 S.E. 2d 513, 516 (1970) and numerous cases cited therein.

Therefore, we once again affirm the rule that passage by the public by foot, vehicle and boat must be free and substantially unobstructed over the entire width of the foreshore adjacent to respondents' property.

We conclude that the petitioners presented sufficient evidence of the situs of the two roads on the ground by sufficiently specific and definite lines or routes of use to permit, but not require, a jury to find that either or both roads constitute neighborhood public roads under the third part of N.C.G.S. § 136-67 and public roads through prescription based upon continuous, adverse and open public use for more than twenty years. The decision of the Court of Appeals is therefore reversed. The trial court's judgment directing a verdict for respondents and dismissing the action is vacated and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Pasquotank County, for further proceedings not inconsistent with this opinion.

In the event the petitioners should eventually prevail in having the court declare either or both of the roads in question as neighborhood public roads or as public roads by prescription, the trial court must describe the roads in the judgment so as to give notice to public authorities, to the titleholder, his successors and to all others concerned. Should the trial court require expert assistance in establishing the description it has ample authority to acquire it.

[6] We have carefully considered respondents' argument to the effect that the Court of Appeals erred in overruling respondents' motion to dismiss petitioners' appeal for failure to make assignments of error and group exceptions. The petitioners' exception to the ruling of the trial court granting the directed verdict was made in apt time. The appeal itself is an exception to the judgment. The Court of Appeals correctly ruled that the petitioners satisfied the requirements of Rule 10 of the Rules of Appellate Procedure.

Reversed and remanded.

Justices MITCHELL and VAUGHN did not participate in the consideration or decision of this case.

GENE EDWARD PLOTT v. SYLVIA FAYE EVANS PLOTT

No. 27PA84

(Filed 27 February 1985)

1. **Divorce and Alimony §§ 24.1, 24.9— child support—determination of reasonable living expenses—findings inadequate**

A child support order was remanded where the evidence before the court tended to show that defendant's monthly living expenses were $847.00 but the court "found" that only $777.00 was reasonable. A finding of fact that defendant's average monthly expenses are a certain amount requires only that the trial judge resolve any conflicts in the evidence and state what he finds to be true; on the other hand, determining how much of defendant's average monthly expenses should be treated as reasonable in arriving at her disposable income requires an exercise of judgment and is therefore not a question of fact but a conclusion of law, which should be supported by findings. G.S. 1A-1, Rule 52(a); G.S. 50-13.4(b); G.S. 50-13.4(c).

2. **Divorce and Alimony §§ 24.1, 24.9— child support—defendant's disposable income—findings inadequate**

A child support order requiring defendant to contribute one-fourth of the amount necessary for her child's support was remanded where defendant's disposable income was one of the factors relied upon by the trial judge in determining defendant's proportionate share of child support and the facts underlying this determination were not stated in appropriate findings.

3. **Divorce and Alimony §§ 24.1, 24.9— child support—use of formula—must be used accurately**

The trial court did not abuse its discretion by applying a formula to determine defendant's share of child support, but the formula used cannot be applied without some degree of mathematical accuracy.

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

ON petition by plaintiff for discretionary review of a unanimous decision of the Court of Appeals, 65 N.C. App. 657, 310 S.E. 2d 51 (1983), vacating the judgment for plaintiff entered on 26 July 1982 in FORSYTH County District Court by *Tash, J.*, and

remanding the case for further proceedings. *See* N.C. Gen. Stat. § 7A-31(c) (1981).

Morrow & Reavis, by John F. Morrow and Clifton R. Long, Jr., for plaintiff-appellant.

David F. Tamer, for defendant-appellee.

FRYE, Justice.

The primary issues involved in this appeal are whether a trial court during a child support hearing must make factual findings to support its conclusion that only a part of the expenses claimed by a party are reasonable, and whether a trial court abuses its discretion by applying a formula to determine the non-custodial parent's proportionate share of child support. We answer the first question yes and the second question, no.

I.

Plaintiff husband and defendant wife were married on 11 January 1964 and divorced almost seventeen years later on 22 September 1980. One child, Timothy, was born of the marriage on 14 September 1969. Timothy has continuously been in the custody of plaintiff since the parties separated on 12 August 1979. On 26 November 1980, a consent order was entered granting custody of the child to plaintiff and granting defendant visitation privileges. On that same day, Judge William H. Freeman entered an order requiring the non-custodial mother, the defendant, to pay $135.00 monthly as child support. The plaintiff was also given possession of the couple's homeplace as part of the child support.

Defendant appealed from Judge Freeman's order and on 3 November 1981 the North Carolina Court of Appeals, in an unpublished opinion, reversed the order for child support and remanded the case for further proceedings. In its decision, the Court of Appeals quoted from and applied G.S. 50-13.4(b) (amended 1981), which made the father primarily responsible for support of his children. The Court of Appeals concluded that the trial court erred in compelling defendant to share in supporting the child because: 1) the findings indicated her net income equaled her expenses; and 2) an inordinate proportion of the total resources, combined earnings, and the residence of the parties was allocated to the plaintiff and child.

At a second hearing on 7 July 1982, before Judge Gary B. Tash, defendant was ordered to pay $150.00 a month child support, commencing 1 October 1982 and retroactive child support from 18 June 1981 totaling $1,687.50.

Judge Tash, after considering all the evidence contained in the parties' financial affidavits and their limited oral testimony, made certain findings of facts and conclusions of law. Contained in Judge Tash's order are the following relevant findings and conclusions:

> (5) The gross income of the plaintiff is $2,916.67 per month; that the plaintiff's net income after taxes is $1,980.65; that the reasonable living expenses of the plaintiff, including payments due on the outstanding loans, are $1,114.25 per month; that the available income of the plaintiff over and above his reasonable expenses is approximately $886.00 per month;
>
> (6) The gross income of the defendant is $1,285.00 per month; that the defendant's net income after taxes if (sic) $957.48 per month; that the reasonable living expenses of the defendant, including payments due on outstanding loans, is $777.00 per month; that the available income of the defendant over and above her reasonable expenses is approximately $180.00 per month;
>
> (7) The reasonable needs of the minor child of the parties for health, education and maintenance is approximately $625.00 per month . . . .
>
> (10) . . . that the plaintiff further provides child care and homemaker contributions in the homeplace of the plaintiff and minor child of a value of approximately $130.00 per month;
>
> (12) The relative ability of the plaintiff to provide support for the minor child of the parties is approximately four times the ability of the defendant to provide said support;
>
> (13) Neither party presented evidence concerning his or her estate, and the Court, therefore, did not take into consideration the estates of the parties in entering its order herein;

(14) The reasonable expenses of the parties and the child referred to above represent expenses that are consistent with the accustomed standard of living of the child and the parties prior to the separation of the parties;

(15) In ordering the defendant to provide financial support for the minor child of the parties, the Court should and has taken into consideration the value of the defendant's interest in the former homeplace of the parties and the household and kitchen furnishings located in said former homeplace, for which the plaintiff is being granted a writ of possession;

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

(1) Taking into consideration the reasonable needs of the minor child for health, education and maintenance and having due regard to the earnings, conditions, accustomed standard of living of the child of (sic) the parties, the child care and homemaker contributions of each party, and other facts of this particular case, including, *inter alia*, the fact that the plaintiff is being awarded a writ of possession of the former homeplace of the parties and the household and kitchen furnishings therein as part of the order of child support herein, the defendant should be ordered to pay child support into the Office of the Clerk of Superior Court of Forsyth County, North Carolina, in the amount of $150.00 per month to the (sic) disbursed to the plaintiff at Post Office Box 276, Clemmons, North Carolina, 27012.

(4) Taking into consideration the reasonable needs of the minor child for health, education and maintenance and having due regard to the earnings, conditions, accustomed standard of living of the child of (sic) the parties, the child care and homemaker contributions of each party, and other facts of this particular case, the defendant should be ordered to pay $135.00 per month retroactive support payments, a total of $1,687.50 for 12½ months, on or before the 17th day of September, 1982;

It was also stipulated between the parties that the plaintiff would be awarded a writ of possession of the former homeplace

and all household and kitchen furnishings located therein and that this property would be considered as part of the child support.

Again, the defendant appealed to the Court of Appeals. For reasons explained hereafter, that court vacated Judge Tash's order and remanded the cause for further proceedings not inconsistent with its opinion. *Plott v. Plott*, 65 N.C. App. 657, 310 S.E. 2d 51 (1983). Additional facts deemed relevant to our resolution of the issues before us will be incorporated in this opinion.

II.

The issues raised by the plaintiff generally relate to the appropriateness of the amount of child support to be paid by the mother, who is the non-custodial parent. Before considering this question, some attention must be devoted to the law that governs actions for support of a minor child. The Court of Appeals correctly concluded that at the time of the second hearing G.S. 50-13.4(b) (Cum. Supp. 1981) imposed primary liability upon both the father and mother to support a minor child.[1] That statute, in pertinent part, states:

> (b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child . . . . Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child.

1. Prior to the statutory amendments to G.S. 50-13.4 in 1981, the father had the primary duty of support, while the mother's duty was only secondary. In cases decided under the prior version of 50-13.4(b), the courts softened the financial burden placed on fathers by reading subsections (b) and (c) to G.S. 50-13.4 together. These companion subsections were interpreted as contemplating 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*, 300 N.C. 708, 711, 268 S.E. 2d 185, 188 (1980). Prior case law interpreted this statute as requiring the trial court to first find that the father alone could *not* make the entire payment before the mother could be required to contribute. *In re Register*, 303 N.C. 149, 277 S.E. 2d 356 (1981). Practically all states have imposed on mothers an equal duty to support. *See*, Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 Harv. Women's L.J. 1 (1983); Comment, *Child Support: His, Her or Their Responsibility?* 25 DePaul L. Rev. 707 (1976).

> The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child as may be appropriate in the particular case . . . .

Today, the equal duty of both parents to support their children is the rule rather than the exception in virtually all states. H. Krause, *Child Support in America: The Legal Perspective* 4-5 (1981). "[T]he parental obligation for child support is not primarily an obligation of the father but is one shared by both parents." *Rand v. Rand*, 280 Md. 508, 516, 374 A. 2d 900, 905 (1977); *see generally* Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 Fam. L. Q. 101 (1977-78) (discussing ramifications of the equal duty of support on the mother). This equal duty to support, however, does not impose upon both parties an equal financial contribution when such an allocation would be unfair or place too great a burden on a party. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). In fact, it has been recognized that the equal duty to support does not necessarily mean the amount of child support is to be automatically divided equally between the parties. "Rather, the amount of each parent's obligation varies in accordance with their respective financial resources." *German v. German*, 37 Md. App. 120, 123, 376 A. 2d 115, 117 (1977).

The amount of each party's contribution to child support is generally determined by the judge on a case-by-case basis. The judge must evaluate the circumstances of each family and also consider certain statutory requirements in fixing the amount of child support. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). G.S. 50-13.4(c) mandates that the trial judge consider the following factors in setting child support amounts:

> (c) 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, the child care and homemaker contributions of each party, and other facts of the particular case.

To comply with G.S. 50-13.4(c), the order for child support must be premised upon the interplay of the trial court's conclusions of law as to the amount of support necessary "to meet the

reasonable needs of the child" and the relative ability of the parties to provide that amount. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980). To support these conclusions of law, the court must also make specific findings of fact so that an appellate court can ascertain whether the judge below gave "due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." G.S. 50-13.4(c); *Coble*, 300 N.C. 708, 268 S.E. 2d 185. Such findings are necessary to an appellate court's determination of whether the judge's order is sufficiently supported by competent evidence. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). If the record discloses sufficient evidence to support the findings, it is not this Court's task to determine *de novo* the weight and credibility to be given the evidence contained in the record on appeal. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968).

The judge's consideration of the above factors contained in G.S. 50-13.4(c) is not guided by any magic formula. Bruch, *Developing Standards for Child Support Payments: A Critique of Current Practice*, 16 U.C.D. L. Rev. 49 (1982); Franks, *How to Calculate Child Support*, 86 Case & Com. 1 (1981). Computing the amount of child support is normally an exercise of sound judicial discretion, requiring the judge to review all of the evidence before him. Absent a clear abuse of discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal. *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). In exercising sound judicial discretion, a trial judge is guided by the following general principles:

> By the exercise of his discretion, a judge ought not to arrogate unto himself arbitrary power to be used in such a manner so as to gratify his personal passions or partialities. (Citation omitted.) . . . A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. (Citation omitted.)

Clark v. Clark, 301 N.C. 123, 128-29, 271 S.E. 2d 58, 63 (1980).

With these general legal principles to guide us, we shall now consider plaintiff's arguments regarding defendant's contribution to child support.

III.

[1] Plaintiff contends that the Court of Appeals was incorrect in its holding that the trial judge erroneously rejected certain listed expenses claimed by the defendant. The Court of Appeals concluded that finding of fact number (6) was not specific enough to indicate why, under the circumstances, certain of defendant's itemized personal expenses were unreasonable and consequently rejected by the judge. The trial court found as a fact the following:

	Plaintiff	Defendant	Child
Gross Income	$2,916.67	$1,285.00	
Net Income (After Taxes)	1,980.65	957.48	
Reasonable Living Expenses (Includes Outstanding Loan Payments)	1,114.25	777.00	
Available Income[2] (After Reasonable Expenses)	886.00	180.00	
Reasonable Needs			625.00

The record does not contain a mathematical worksheet reflecting the amounts that were allowed or disallowed by the judge for reasonable living expenses. The Court of Appeals examined the record and explained how the trial court apparently arrived at its figures:

> A close examination of the record indicates that the trial court arrived at these figures by using the gross income figures supplied by the parties and then adding their indicated deductions for loans, savings, and retirement back into the net income figure supplied by the parties, but later subtracting these items again as part of the parties' reasonable monthly expenses. However, while the trial judge apparently accepted all of plaintiff's listed expenses as reason-

2. We will refer to this amount as "disposable income," although the Court of Appeals labels it "discretionary income." This amount equates to net income after deducting reasonable personal expenses.

able, including his payroll savings deductions of $175.00 per month, only $567.00 of defendant's listed expenses of $747.00 were found to be reasonable. Without a specific finding of fact indicating why, under the circumstances, defendant's itemized personal expenses were not reasonable, this Court cannot adequately make its determination whether the order predicating the amount of liability upon an analysis of the balance sheets of the respective parties is adequately supported by competent evidence.

Plott, 65 N.C. App. at 655, 310 S.E. 2d at 56.

In our quest to accurately determine whether the trial court did arrive at its figures as the Court of Appeals explains and to correctly identify the amount of defendant's personal expenses accepted by the trial judge as reasonable, we have conducted an independent analysis of the parties' income and expense statements. It is certain that the trial court, in arriving at its figures, did base its calculations on the affidavits and brief oral testimony presented by the parties to supplement their affidavits. These affidavits disclose the following pertinent data:

Plaintiff

Gross Wages		$2,916.67
Taxes and Social Security	$936.02	
Loans (Includes Auto)	285.76	
Others (Specify) Bell Systems Savings	175.00	
Net Wages		$1,519.89
Total Expenses	828.76	

Defendant

Gross Wages		$1,285.00
Taxes and Social Security	$327.42	
Retirement	100.00	
Loans	100.00	
Others	10.36	
	1.00	
Net Wages		$ 746.12
Total Expenses	747.00	

Not having the actual mathematical computations used by the judge in determining his factual findings places both this Court and the Court of Appeals at an obvious disadvantage. Without the judge's computations, we can, as did the Court of Appeals, only speculate as to how the trial judge arrived at the final figures contained in the judgment. We have carefully reviewed and analyzed the figures contained in the record. Our computations indicate that the Court of Appeals was inaccurate in its explanation in the following respects:

1. Both parties' net income was found by subtracting taxes and social security from the gross income, not by adding to and subtracting from the gross income certain items listed by the Court of Appeals.

	Plaintiff	Defendant
Gross	$2,916.67	$1,285.00
Taxes & Soc. Sec.	936.02	327.42
Net Income	$1,980.65	$ 957.58*

*The trial court's figure of $957.48 apparently contains a slight mathematical error of 10 cents.

2. The reasonable expenses of plaintiff did not include, as the Court of Appeals states, plaintiff's payroll deductions of $175.00 per month. Instead, plaintiff's reasonable expenses are comprised of his listed expenses and his outstanding loan payment, calculated as follows:

Listed Expenses Accepted as Reasonable	$ 828.76
Loan(s)	285.76
Total Reasonable Living Expenses	$1,114.52*

*The trial court's figure of $1,114.25 apparently contains a transpositional error.

3. The trial court accepted $677.00 of defendant's listed expenses as reasonable, a sum appreciably greater than presumed by the Court of Appeals. This sum together with her outstanding loan payment were thus combined to equal her total reasonable living expenses as follows:

Listed Expenses Accepted as Reasonable	$677.00
Loan(s)	100.00
Total Reasonable Living Expenses	$777.00

Contrary to the Court of Appeals' determination that "only $567.00 of defendant's listed expenses of $747.00 were found to be reasonable," the trial court instead accepted $677.00 of defendant's listed expenses of $747.00 as reasonable. This indicates that the court rejected $70.00 of defendant's listed expenses instead of the $180.00 figure projected by the Court of Appeals.

In *Coble*, this Court wrote:

> 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.

Coble, 300 N.C. at 714, 268 S.E. 2d at 190.

The judge in his orders specifically found that the reasonable living expenses of the defendant, including payments due on outstanding loans, were $777.00 per month. "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 statute(s), . . ." *Coble*, 300 N.C. at 713, 268 S.E. 2d at 189. To support this conclusion of law, there must be factual

findings specifically made by the trial judge. *See* N.C. Gen. Stat. 1A-1, Rule 52(a). Although Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions involved in the action and essential to support the conclusions of law reached. *Quick*, 305 N.C. 446, 290 S.E. 2d 653.

We note that the evidence before the court tended to show that plaintiff's monthly living expenses were $1,114.52, a sum that included $285.76 per month for plaintiff's outstanding loan payment. The trial judge found that plaintiff's reasonable living expenses were $1,114.25 per month, an amount virtually equal to that shown by plaintiff's evidence. If read as a conclusion of law, that all of plaintiff's listed expenses were reasonable, then the failure to make a specific finding of fact as to plaintiff's actual monthly expenses is unobjectionable.

On the other hand, the evidence before the court tended to show that defendant's monthly living expenses were $847.00, a sum that included $100.00 per month for her outstanding loan payment. However, the trial judge's "finding" that only $777.00 of defendant's claimed monthly living expenses are reasonable represents either an implicit finding of fact that defendant had no other expenses, which appears contrary to the evidence presented, or a conclusion of law that the other expenses claimed were not reasonable. It thus becomes important for the trial judge in this case to make explicit findings of fact as to defendant's monthly living expenses as a basis for the conclusion of law that only a part of those expenses are reasonable. The finding of fact that defendant's average monthly expenses are a certain amount requires only that the trial judge resolve any conflicts in the evidence and state what he finds to be true. On the other hand, determining how much of defendant's average monthly expenses should be treated as reasonable in arriving at her disposable income requires an exercise of judgment and is therefore not a question of fact but a conclusion of law. Since this conclusion of law is not supported by any finding of fact, the cause must be remanded for additional factual findings. *Coble*, 300 N.C. 708, 268 S.E. 2d 185.

IV.

[2] Plaintiff next contends that the Court of Appeals was incorrect in finding that the trial court abused its discretion in ordering defendant to contribute to child support when such an award failed to reflect the relative abilities and hardship to each party. Specifically, the Court of Appeals held that the order requiring the defendant to contribute one-fourth of the amount necessary for the child's support constitutes an abuse of discretion because of the striking discrepancy in the parties' respective abilities to provide support under the facts of the case.

The Court of Appeals is correct that equal legal duty to support pursuant to G.S. 50-13.4(b) does not impose an equal financial contribution by both parties. However, we are not prepared to say that the trial court abused its discretion solely because defendant was ordered to pay a proportionate share of the child's needs, based on a comparison of the disposable incomes of the parties. "[T]he ability of the supporting spouse to pay is ordinarily determined by his or her income at the time the award is made." *Quick*, 305 N.C. 446, 453, 290 S.E. 2d 653, 658. Although the relative ability of the parties to contribute should not depend solely and exclusively on the parties' income, we consider the court's use of the parties' disposable income (net income after deducting personal expenses) to fairly reflect the relative abilities of the parties to contribute proportionately to support of the child. Furthermore, we do not agree that the proportionate amount of defendant's disposable income to be contributed to child support places a greater hardship on her simply because the plaintiff's disposable income approximates the defendant's entire net income. Indeed, the trial court's ratio established by the final disposable income figures should reflect the relative abilities of the parties to contribute to child care costs, rather than an amount based on gross income alone.

The Court of Appeals and defendant cite *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963) to support their position that it is an abuse of discretion to require defendant to contribute one-fourth of the $625.00 needed by the child. *Fuchs* does not persuade this Court to adopt this position. The trial court in that case based the amount of child support on the non-custodial parent's net pay after deductions, apparently without allowing any

credit for defendant's living expenses. Additionally, the court did not consider the reasonable needs of the children. The trial court did not base the non-custodial parent's contribution to child support upon his ability to pay or upon the needs of the children. That is not the case here. In the case *sub judice*, the court did take into consideration the non-custodial parent's living expenses and the child's needs prior to determining the proper amount of child support to be contributed by the defendant.

Other cases cited in the Court of Appeals' opinion and the defendant's brief are also not analogous to the case before us. In those cases, as in *Fuchs*, the trial court did not refer to nor consider the non-custodial parent's living expenses before computing that parent's contribution to child support. The trial court in both cases based its child support award on defendant's salary, without deducting *any* of defendant's expenses. *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1963); *Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). In an additional case cited in defendant's brief and throughout the Court of Appeals' opinion, the trial court's finding of fact listed defendant's living expenses as $510.00 per month, an amount in excess of the defendant's listed monthly net income of $483.32 per month, a fact which, on its face, tended to negate the conclusion that the defendant (non-custodial) parent was capable of providing support. *Coble*, 300 N.C. 708, 268 S.E. 2d 185. In the present case, however, "finding of fact" number (6) lists defendant's reasonable expenses as $777.00 per month and income as $957.48 per month, which does not on its face reflect a deficit balance or an incapability of the non-custodial parent to provide any support.

The Court of Appeals viewed plaintiff's possession and use of the homeplace and the personal possessions within the home to be further evidence of the trial court's failure to give "due regard to the earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of this particular case." However, we note that the parties stipulated that the plaintiff should be awarded possession of the homeplace and the household and kitchen furnishings therein. Furthermore, the court in finding of fact number (15) specifically states that due regard was given to the defendant's interest in the homeplace and the personal possessions. Finding of fact number (10) states that the court placed

a value of $130.00 per month on the contributions made by plaintiff in the form of child care and homemaker contributions in the homeplace. G.S. 50-13.4(c) recognizes that a party's contribution to child support may consist of factors other than direct monetary contributions. "All such forms of indirect support must be included in determining the just and proper contribution of a parent toward the support and welfare of the child." *Smith v. Smith*, 290 Or. 675, 678, 626 P. 2d 342, 344 (1981). This fact indicates that the judge could have viewed plaintiff's indirect additional contribution to child support as a factor to justify and offset plaintiff's use and possession of defendant's interest in the homeplace.

As noted earlier in this opinion, the trial court failed to make adequate factual findings to support its conclusion of the reasonableness of defendant's expenses. Since defendant's expenses were deducted from her net income in order to determine her disposable income, it stands to reason that the correctness of the trial judge's "findings" regarding defendant's reasonable expenses will necessarily have an impact upon defendant's amount of disposable income. This disposable income amount was one of the factors relied upon by the trial judge in determining defendant's proportionate share of child support. However, since the facts underlying this determination were not stated in appropriate and adequate findings of fact that enable an appellate court to ascertain that the amount ordered was within the trial court's discretion, *Quick*, 305 N.C. 446, 290 S.E. 2d 653, the case must be remanded in order that such findings can be made.

V.

[3] Finally, plaintiff challenges the Court of Appeals' conclusion that the use of a mathematical formula by the trial court constitutes an abuse of discretion. The trial court determined that plaintiff's disposable income of $886.00 was approximately four times that of defendant's disposable income of $180.00; and therefore, apparently based on this ratio, defendant was responsible for approximately one-fourth of the child's monthly needs of $625.00, or $150.00 a month. The plaintiff's responsibility for support constituted the balance of support for the child's needs. The Court of Appeals stated, "Such a calculation can hardly be considered an exercise of 'discriminating judgment within the bounds of reason.'" *Plott*, 65 N.C. App. 657, 667, 310 S.E. 2d 51, 57.

Commentators generally agree, "[N]o precise formula exists to assist the court in determining a fair support award, and the uniqueness of each divorce renders a precedent almost valueless." Note, *Inflation-Proof Child Support Decrees: Trajectory to a Polestar*, 66 Iowa L.R. 131, 135 (1980); *see generally* Bruch, *supra* (containing a discussion of formulae for allocating support costs when parties are in unequal financial positions to contribute to the child support); Note, *Smith v. Smith: No Magic Formula for Determining Child Support Payments of the Non-Custodial Parent*, 18 Williamette L.R. 353 (1982). Although no precise formula has been hailed as a panacea, some courts have endorsed the use of a formula for determining the amount of child support to be awarded. *Melzer v. Witsberger*, 505 Pa. 462, 480 A. 2d 991 (1984) (plurality opinion) (mandating the trial courts' use of a defined formula); *Smith v. Smith*, 290 Or. 675, 626 P. 2d 342 (1981) (fractional shares based on parents' gross income); *Rand v. Rand*, 280 Md. 508, 374 A. 2d 900 (1977) (fractional shares based on parents' disposable income). Additionally, the use of a formula has been recognized by the courts and commentators as an effective uniform means of allocating the burden of child support proportionately between the parents in accordance with their respective financial resources. *Rand*, 280 Md. 508, 374 A. 2d 900; *Smith*, 290 Or. 675, 626 P. 2d 342; Bruch, *supra*. Interestingly, the Court of Appeals in *Hamilton v. Hamilton*, 57 N.C. App. 182, 290 S.E. 2d 780 (1982) made the following enlightened comments about this same topic:

> We note that plaintiff has set forth in her brief two possible formulas by which the amount of child support could be determined according to objective criteria. These formulas, based on guidelines appearing in professional publications, do not appear in the record and therefore cannot be considered on appeal. Nevertheless, the Court wishes to lend its approval to the employment of such guidelines by many trial courts and to encourage their use by others. A review of case law underscores the total lack of consistency in the amount of child support awarded by courts. Moreover, the route by which the court arrived at a particular award is too often impossible to fathom.
>
> . . . .

> Employment of a standard formula . . . would take into account the needs and resources of the parents, as well as the needs of the children, and would result in fair apportionment of responsibility in the majority of cases.

The employment by the trial judge of a formula based on a ratio established by the parties' disposable income figures seems a fair method to apply so that parents can share equally the responsibility for supporting their children. The judge's use of a ratio seems to be supported by logic and reason, based upon simple mathematics rather than simple guesswork. Therefore, we agree with plaintiff that the trial court did not abuse its discretion in applying a formula for determining defendant's share of child support.

Although the use of such a formula does serve as a convenient guideline in assisting the trial judge in fairly calculating child support awards, the formula used cannot be applied without some degree of mathematical accuracy. The plaintiff's disposable income, whether $886.00 or $866.40,[3] is closer to five times the defendant's disposable income of $180.00 rather than four times, as found by the trial judge. Thus, following the trial judge's reasoning as reflected in the judgment, the relative ability of the plaintiff to pay is closer to five times that of defendant, rather than four times. Since this fact could have a significant impact upon defendant's financial contribution to support of the child, upon remand, the trial judge should include this fact in his consideration.

The Court of Appeals declined to reach the issue concerning the amount of defendant's retroactive child support, since the calculations were to be redetermined anew upon retrial. Although our remand does not necessarily require a new trial, defendant should be afforded an opportunity to be heard on the question of whether the amount of arrearages is affected by this decision.

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3. While performing our calculations, we note that the trial court specifically found that plaintiff's approximate disposable income is $886.00 per month. The amount of disposable income should be the difference between plaintiff's net income after taxes of $1,980.65 and plaintiff's reasonable expenses of $1,114.25, which is $866.40, an amount approximately $20.00 less than the court's figure of $886.00. This may have been a mathematical error on the part of the trial judge.

This cause is remanded to the Court of Appeals for further remand to the District Court, Forsyth County, for additional factual findings to support the trial judge's conclusions regarding the reasonable expenses of the defendant, for a determination as to whether the mathematical miscalculations of the trial judge affected the amount of child support ordered, and for further action not inconsistent with this opinion.

Reversed in part; affirmed in part; modified and remanded.

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

STATE OF NORTH CAROLINA v. MYRON EARL PRIDGEN

No. 226A84

(Filed 27 February 1985)

1. **Criminal Law § 87.1— leading questions**

The trial court did not abuse its discretion in permitting the prosecutor to ask certain leading questions of several witnesses who were inarticulate, reticent, and generally unable to communicate clearly.

2. **Criminal Law § 66.2— identification testimony—effect of equivocation by a witness**

The trial court did not err in allowing photographic identification testimony by a witness who testified that she had identified defendant's photograph as the one most closely resembling a man she saw on the night of the crime but that she couldn't be sure, since a witness's equivocation on the question of identification does not render the testimony incompetent but goes only to its weight.

3. **Criminal Law § 169.3— objection sustained—other evidence of same import—absence of prejudice**

Defendant was not prejudiced when the trial court sustained the prosecutor's objection to an answer given in response to a question which the prosecutor himself asked the witness on redirect examination where the same evidence was repeatedly elicited during cross-examination of the witness.

4. **Homicide § 15— photograph and location of third person's house—relevancy to show motive**

In a prosecution for first-degree murder, a photograph of and evidence as to the location of a third person's house were relevant to establish that the

motive for the murder was to prevent the victim from testifying in a criminal case against defendant and the third person and that the third person was one of two men seen with the victim at the time of his disappearance.

5. **Homicide § 15— location of defendant's house—relevancy to show opportunity**

Testimony concerning the location of defendant's house with respect to the murder scene was relevant to establish that defendant's opportunity to murder the victim was enhanced by the proximity of his house to the crime scene.

6. **Criminal Law § 34.7— pending charges—evidence competent to show motive**

Evidence pertaining to charges pending against defendant for forgery and failure to return a rental tool was admissible in a murder trial to prove that the motive for the murder was to prevent the victim from testifying against defendant.

7. **Criminal Law § 66— identification of defendant—size comparison**

The trial court properly permitted two witnesses to testify that the driver of a car in which a murder victim disappeared was the same size and about the same height and weight as defendant.

8. **Criminal Law § 42.5; Homicide § 20— identification of car—equivocation in testimony**

Testimony by two witnesses identifying a car parked in defendant's yard as the one they had seen on the night of a murder was not rendered inadmissible because the witnesses testified that the car "looked like" or "appeared to be" the same car they had previously seen. Whatever equivocation attended their testimony went to its weight, not its admissibility.

9. **Constitutional Law § 30; Bills of Discovery § 6— discovery of proposed testimony—admissibility of substantially similar testimony**

Where trial testimony is substantially similar to what in substance was provided to defendant during discovery, and variations are attributable to the addition or elaboration of detail or are merely changes in vocabulary or syntax, the testimony is admissible and in full compliance with our discovery rules. Therefore, where defendant was provided well in advance of trial with proposed testimony that defendant told the witness that he was going to "take care of" the victim, the trial court properly ruled that testimony by the witness that defendant stated that "he might get somebody to shoot" the victim was admissible because there had been substantial compliance with G.S. 15A-903(a)(2).

10. **Homicide § 15— route from murder scene—admissibility to show opportunity**

Testimony regarding the route one might take from the street where a murder victim was last seen to the street where the body was found was relevant to establish the opportunity for defendant to commit the crime.

11. **Criminal Law § 53.1; Homicide § 15.4— range of gunshot—testimony by pathologist**

A pathologist was qualified to give his opinion that one gunshot wound was inflicted to the victim's head at close range and that a second wound was inflicted with the barrel of the weapon more than six inches from the skin.

12. Criminal Law § 53.1; Homicide § 15.4— time of death—expert testimony

A doctor who performed an autopsy could give an opinion as to the time of death based on the probable lapse of time between the victim's last ingestion of food and the victim's death.

13. Criminal Law § 50.1; Homicide §§ 15.4, 18.1— murder victim alive when clutched grass—testimony by medical doctor—relevancy

A medical doctor was qualified to state an opinion that a murder victim was alive when he clutched grass which was found in his hand, and such testimony was relevant to establishment both that the victim was shot at the crime scene and that the murder was committed with premeditation and deliberation.

14. Homicide § 15.4— position of body when wound inflicted—testimony by medical doctor

A medical doctor who examined a murder victim's body at the crime scene was properly permitted to state an opinion as to the position of the victim's body when the fatal wound was inflicted.

15. Homicide § 15.4— time of death—testimony by medical doctor

A medical doctor was properly permitted to state an opinion as to the time of death based upon the doctor's at-the-scene examination of the body and other physical evidence available.

16. Homicide § 21.5— premeditation and deliberation—defendant as perpetrator—sufficiency of evidence

There was sufficient evidence of premeditation and deliberation to support a charge against defendant of first-degree murder where the evidence tended to show that defendant had threatened the victim prior to the murder; following the murder defendant exhibited a callous and smug attitude toward the victim's death; the body was concealed at the side of a deserted dirt path; there had been ill will between defendant and the victim over the victim's impending court testimony against defendant in a criminal case; and the victim was shot three times in the head. Furthermore, evidence of the victim's disappearance in a car later identified as belonging to defendant, together with other facts and circumstances tending to prove that defendant drove the car and that the victim was killed a short time later, was sufficient to support a jury finding that defendant was the perpetrator of the crime.

17. Criminal Law § 113.7— charge on aiding and abetting and acting in concert

In a prosecution for first-degree murder in which the evidence would permit the jury to infer that another man was with defendant when the victim was murdered, the trial court properly instructed the jury on aiding and abetting and acting in concert to insure that the jury understood that, irrespective of who actually shot the victim, defendant would be equally guilty under the theories of acting in concert and aiding and abetting.

18. Criminal Law § 131.2— newly discovered evidence—denial of new trial

The trial court did not abuse its discretion in denying defendant's motion for appropriate relief in a first-degree murder case based on newly discovered

evidence consisting of testimony that a blue and white Monte Carlo was seen in the vicinity of the crime scene approximately three hours before the victim's body was discovered where the trial court found that all the medical evidence showed that deceased died around eighteen hours before the body was found, and that there was no valid evidence to suggest any improper purpose on the part of any occupant of the blue and white Monte Carlo.

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

APPEAL by defendant from *Peel, J.*, at the 5 December 1983 Criminal Session of WAYNE County Superior Court pursuant to N.C.G.S. § 7A-27(a).

Defendant was charged in a bill of indictment with the kidnapping of Robert Earl Stephens and with the first-degree murder of Robert Earl Stephens both occurring on or about 13 June 1983. The district attorney dismissed the kidnapping charge during the course of the trial. The jury returned a verdict of guilty of first-degree murder. A sentencing hearing was held and the jury recommended a sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

R. Gene Braswell and S. Reed Warren, for defendant appellant.

BRANCH, Chief Justice.

Defendant brings forward twenty-eight assignments of error. He challenges the sufficiency of the evidence to sustain his conviction, and most of the remaining assignments of error are directed to evidentiary rulings of the trial judge.

The State offered evidence tending to show that on 14 June 1983 at approximately 6:00 p.m. the body of Robert Earl Stephens was discovered concealed beside a dirt path at the end of a residential street in Goldsboro, North Carolina. The victim had been shot three times in the left side of his head. An autopsy disclosed that the victim had been dead for at least twelve hours due to the large number of maggots detected on the face area. An examination of the contents of the victim's stomach indicated that death occurred approximately six to ten hours after the victim had last eaten. There was testimony that prior to his disappearance on 13

June, the victim had eaten chicken at approximately 6:30 p.m., and cornflakes at approximately 8:00 p.m. Hence the time of death was estimated to be between midnight and the early morning hours of 14 June. Scrape wounds on the victim's body and physical evidence along the dirt road were consistent with the victim's having been dragged down the dirt road from where blood was first detected to where the body was located. The victim was clutching dried grass in his hand.

There was testimony that at approximately 11:30 p.m. on 13 June, as the victim left the apartment of a friend where he had been cutting hair, he was beckoned to a car, a brown and beige Camaro, by a man meeting defendant's description—a tall, slim, well-dressed black male. The victim left his hair clippers on his car, walked toward the Camaro, got into the car and was driven away. The Camaro had a dent in the side, chrome wheels, and there was a red and green sticker next to the license plate. In addition to the victim and the tall, slim man, there was a shorter stockier man in the Camaro as it drove away. Prior to leaving with the victim, the tall, slim man approached a nearby car, a Datsun 280-Z, and spoke to the two occupants. He stated that he knew someone who drove a 280 at "O'Berry or Cherry."

There was evidence that the victim was scheduled to appear in court in Kinston on 14 June to testify against defendant on charges of forgery and failure to return rental property. The victim was with defendant on 29 March when defendant rented a motor hoist using the identification of a neighbor, Frank Dawson.

A co-worker testified that while he and defendant were working at the O'Berry Center, defendant discussed the pending forgery and rental property charges, called the victim a "rat," and intimated that he would "take care of" the case by "taking care" of the victim or having someone else do it. Following the murder, defendant smiled and stated "somebody got that boy."

Approximately two weeks after the murder, defendant was seen at a local club. When asked if he knew anything about the murder he replied that he did, but he wouldn't say anything. He pointed his finger to his head and said "Bang, bang, bang." That same evening another witness asked defendant if he had killed Ron Stephens, to which defendant replied "I ain't going to say I did or I didn't because if I do I might get the reward, you know,

the reward money for it."[1] The victim's brother also encountered defendant at a club and heard defendant say "I'm glad the mother f---- is dead. He needed to be killed."

In order to ascertain the identity of the driver of the brown and beige Camaro, law enforcement officers drove around the area with the various witnesses looking for the car. The witnesses identified a Camaro which was parked in the yard of defendant's house as the one in which they saw the victim leave. The Camaro was registered in defendant's name.

A passenger in the Datsun 280-Z was shown a photo array in an effort to identify the man who had spoken to her and her boyfriend on the night of 13 June. She selected defendant's photograph as the one which came "closest" to the man she had seen, noting that it "favored" the well-dressed man. No in-court identification was made. However, the witness's photo identification testimony was allowed with limiting instructions that it not be considered as positive identification.

Finally, the State presented the testimony of an inmate at the Wilson County jail. Defendant had been arrested on 16 June on the forgery and rental property charges and was later released on bond. While in the Wilson County jail, defendant had suggested to the witness that he contact the sheriff's department and disclose the following: that defendant had discussed the murder with him; that the murder was connected to a drug transaction; that defendant was approached on the night of the murder by the victim and a man named Rodriques who offered to sell him cocaine for $2,400; that the victim and Rodriques left arguing; that Rodriques came back alone; and that Rodriques was now "in South Carolina somewhere in a river" because "he did [some white people] wrong so he ended up with all the money that night."

[1] Defendant first contends that the trial judge erred in failing to sustain objections to numerous leading questions propounded by the State in its effort to elicit testimony from various witnesses. Defendant has excepted to forty-four such questions. Of these, we agree that many are leading. Our reading of the tran-

1. The trial judge excluded evidence that a newspaper article appeared that day referring to a reward sponsored by "Crime Stoppers."

script, however, indicates that the prosecutor was handicapped in having to elicit testimony from several witnesses who were inarticulate, reticent, and generally unable to communicate clearly. The trial judge and the prosecutor frequently found it necessary to ask the witnesses to repeat or explain answers. Nevertheless, the trial judge repeatedly cautioned the prosecutor to avoid leading questions and occasionally sustained defense counsel's objection to a leading question.

We have repeatedly held that it is within the sound discretion of the trial judge to allow counsel to use leading questions, and in the absence of an abuse of that discretion, the judge's rulings will not be disturbed on appeal. *State v. Wilson*, 311 N.C. 117, 316 S.E. 2d 46 (1984); *State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983). Many of the objected-to questions in the present case, although technically leading, were designed to direct the witness's attention to the next subject of inquiry and the witness then elaborated on his "yes" or "no" answer with additional testimony. *See State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980). In many instances the subject matter of the leading question was otherwise properly elicited through later testimony by the witness himself or by other witnesses. *Id.* While the prosecutor's questioning of his witnesses was certainly not a model of trial advocacy, given the nature and circumstances of the questioning, we hold that the trial judge did not abuse his discretion in overruling defense counsel's objections. This assignment of error is rejected.

[2] Defendant contends that the trial court erred in allowing the identification testimony of Margaret Keech. Miss Keech was the passenger in the Datsun 280-Z. She testified that she had identified defendant's photograph as the one most closely resembling the man she saw on 13 June, but that she couldn't be sure. The trial judge, although not required to do so, gave a limiting instruction that the testimony was not to be considered as positive identification. We have held that a witness's equivocation on the question of identity does not render the testimony incompetent, but goes only to its weight. *State v. Church*, 231 N.C. 39, 55 S.E. 2d 792 (1949). *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981); *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978). We find these cases dispositive of the issue.

[3] Defendant also contends that the trial judge erred in sustaining the prosecutor's objection to an answer given in response to a question which the prosecutor himself asked Miss Keech on redirect examination. Defendant argues that by sustaining the objection, the trial judge essentially permitted the prosecutor to impeach his own witness. The prosecutor's question and the objected-to answer were as follows:

> Q. You said that you told your boyfriend about the picture after you picked it out?
>
> A. Yes, sir.
>
> Q. What did you tell him?
>
> A. I told him that the picture we looked at that that was the best one that looked like him of all of the other pictures but I couldn't be sure.

Without speculating as to why the trial judge sustained the prosecutor's objection to this answer, we simply note that this same evidence was repeatedly elicited during cross examination of the witness, thus the defendant has failed to demonstrate how he was prejudiced by the trial judge's ruling. *See State v. Walden*, 311 N.C. 667, 319 S.E. 2d 577 (1984); *State v. Wood*, 310 N.C. 460, 312 S.E. 2d 467 (1984). This assignment of error is rejected.

[4] Defendant next contends that the trial court erred in failing to sustain his objection to testimony concerning Frank Dawson. The State was permitted to introduce a photograph of Dawson's house and to establish the location of the house with respect to the murder scene. Defendant argues that the testimony was irrelevant and highly prejudicial. The State claims that the evidence tended to establish facts in issue, to wit: defendant and Dawson were involved in a scheme to unlawfully procure a rental tool; that the motive for the murder was to prevent the victim from testifying against them; and that Dawson was one of the two men in the Camaro with the victim when he disappeared. Our long-standing law on the issue of relevancy[2] supports the State's

2. This case was tried before the effective date of the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, Rule 401, however, would permit a similar result.

position: " 'In criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible,' and 'Testimony is relevant if it reasonably tends to establish the probability or improbability of a fact in issue.' " 1 Brandis on North Carolina Evidence, § 78 (1982) and cases cited thereunder. Furthermore, we recently reiterated that

> [I]t is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

State v. Stanley, 310 N.C. 353, 365, 312 S.E. 2d 482, 490 (1984). We do not agree that the probative value of this evidence (a photograph and location of Dawson's house) was outweighed by whatever prejudicial effect it might have had. This assignment of error is rejected.

[5] Likewise we reject defendant's contention that testimony concerning the location of his house with respect to the murder scene was irrelevant. This evidence was relevant and properly admitted to establish that defendant's opportunity to murder the victim was enhanced by the proximity of his house to the scene of the crime. *Id.*

[6] Defendant contends that the trial judge erred in failing to grant his motion in limine to exclude evidence pertaining to charges pending against him for forgery and failure to return a rental tool and to allow testimony concerning those charges at trial. The evidence was clearly admissible to prove motive. *See State v. Adcox*, 303 N.C. 133, 277 S.E. 2d 398 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, *reh. denied*, 448 U.S. 918 (1980); *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957).

[7] Defendant next contends that the trial judge erred in allowing a witness who was present when the victim disappeared in the Camaro to compare the driver of the Camaro with defendant.

In addition to Miss Keech, there were two other witnesses, Hinnant and Stephens, who were present when the victim was beckoned by a man driving a Camaro and ultimately driven away.

Both witnesses, although unable to make a positive identification, described the man as tall, slim and black. Without objection, Hinnant testified that the man he saw was the same size as defendant. Prior to Hinnant's testimony, defendant had objected when the prosecutor asked Stephens to compare the size of the man he saw with the size of defendant. Stephens replied "It's about the same height, about the same weight." We agree with the State that the testimony was relevant and admissible. As noted earlier, positive identification is not required in order for identification testimony to be admissible. *State v. Church*, 231 N.C. 39, 55 S.E. 2d 792 (1949). Furthermore, the same evidence was admitted, without objection, during the State's direct examination of Hinnant. Defendant has therefore waived his objection. *State v. Walden*, 311 N.C. 667, 319 S.E. 2d 577 (1984); *State v. Wood*, 310 N.C. 460, 312 S.E. 2d 467 (1984). The assignment of error is rejected.

[8] Defendant's next argument concerns the admissibility of testimony relating to the identification of the Camaro. Witnesses Hinnant and Stephens described the car in which the victim was seen leaving on the night of 13 June. Later the witnesses were taken by law enforcement officers to look for the car. Both identified a car parked in defendant's yard as the one they had seen on 13 June. Stephens recognized the car by the make (a Camaro), by the color (beige and brown), and by the chrome wheels. Hinnant recognized the car by its make, color, and by two other identifying features—a dent in the side of the door and a red and green sticker next to the license plate. Both witnesses testified that the car they saw in defendant's yard "looked like" or "appeared to be" the same car they saw on 13 June. Defendant contends that as neither witness positively identified the car in defendant's yard as the one he had seen earlier, the testimony was speculative and highly prejudicial. We disagree. Both witnesses had sufficient opportunity to observe the Camaro on the night of the murder and were able to identify it at a later time. Whatever equivocation attended their testimony went to its weight, not its admissibility. *See State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). This assignment of error is rejected.

[9] Defendant next contends that his constitutional right to due process was violated when the trial judge failed to exclude certain testimony of witness Geddie on the grounds that the exact

testimony of the witness was not disclosed to defendant until just prior to the witness's taking the stand. Mr. Geddie worked with defendant at the O'Berry Center. Defendant was informed well in advance of trial that the State intended to call Geddie as a witness and was provided with a summary version of the witness's proposed testimony.[3] It was defendant's impression that Geddie would testify concerning a conversation he had had with defendant relating to the charges pending against defendant involving forgery and failure to return a rental tool. In the course of the conversation, defendant told Geddie that he was going to "take care of" the victim. During interviews with the witnesses a week before trial, the prosecutor learned that Geddie would testify that defendant stated that "he might get somebody to shoot [the victim]." This information was disclosed to defendant on the Friday before the Tuesday when the witness was scheduled to testify. The trial judge conducted a voir dire hearing on the admissibility of Geddie's proposed testimony. The judge concluded that the statement was admissible and that there had been substantial compliance with the discovery rules, N.C.G.S. § 15A-903. Defense counsel was provided with a copy of the statement and the trial judge ordered that defense counsel could defer cross examination of Geddie to any reasonable time during the case. We hold that the trial judge's rulings on this matter were entirely proper.

N.C.G.S. § 15A-903(a)(2), effective 14 July 1983, provides in pertinent part that upon motion of a defendant, the court must order the prosecutor:

> (2) To divulge, in written or recorded form, the substance of any oral statement relevant to the subject matter of the case made by the defendant, regardless of to whom the statement was made, within the possession, custody or control of the State, the existence of which is known to the prosecutor or becomes known to him prior to or during the course of trial; . . . If the statement was made to a person other than a law-enforcement officer and if the statement is then known to the State, the State must divulge the substance of the state-

3. The district attorney's office for the eighth judicial district has an "open file" system making all statements by a defendant available to defense counsel upon request.

ment no later than 12 o'clock noon, on Wednesday prior to the beginning of the week during which the case is calendared for trial. . . .

Defendant made no request for voluntary discovery nor a motion to compel discovery, more than likely relying on the district attorney's "open file policy." We believe that the more prudent course and one which would insure statutory protections, would be to rely on statutory discovery procedures despite an "open file policy." Nevertheless, we agree with the trial judge that the prosecutor substantially complied with N.C.G.S. § 15A-903(a)(2) in that the *substance* of Geddie's statement was disclosed well in advance of trial. We believe that it would be unreasonable, if not impossible, for a prosecutor to anticipate the exact testimony of a witness. Additional details omitted under the stress or other circumstances of an initial interview may be recalled when the witness is later interviewed in preparation for trial. Moreover no witness can be expected to repeat verbatim on the stand what he or she has previously stated during interviews. Where, as in the present case, trial testimony is *substantially similar* to what in substance was provided during discovery, and variations are attributable to the addition or elaboration of detail or merely changes in vocabulary or syntax, the testimony is admissible, and in full compliance with our discovery rules. The assignment of error is overruled.

[10] Defendant argues that the trial court erred in failing to sustain counsel's objections to a question propounded to witness Stephens regarding the route one might take from Maple Street, where the victim was last seen, to Forsyth Street, where the body was found. The purpose of the testimony was to establish the opportunity for defendant to commit the crime inasmuch as 1) the defendant's Camaro proceeded in the direction of Forsyth Street as it left Maple Street on the night of the murder, and 2) Eastern Wayne High School, the vicinity in which Stephens and Hinnant later saw the Camaro, is on this route. The testimony was relevant as tending to establish defendant's opportunity and was therefore admissible. 1 Brandis on North Carolina Evidence, § 78 and cases cited thereunder.

[11] Dr. Wolf, an expert in forensic pathology, conducted an autopsy on the victim. During the course of his testimony, he was

permitted to give his opinion that a gunshot wound inflicted to the victim's head was a "close range gunshot wound;" that with respect to a second wound, the barrel of the weapon "was greater than six inches from the skin;" and that a bullet found under the victim's head "looked like about a .22 caliber." Defendant contends that his objections to this testimony should have been sustained. He argues that the witness was not a ballistics expert and that "[t]he purpose of all these questions was to emphasize that a gun was used at relatively close range, and irrelevant to determining the identity of the individual that shot Robert Earl Stephens."

An expert certified in pathology is qualified to give an opinion regarding the range from which a gun might have been fired when that opinion is incident to his examination. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972). The testimony was not offered to establish the identity of defendant as the perpetrator of the crime. The testimony tended to indicate that the victim was shot at the scene as he lay on the roadside and the perpetrator stood over him. We find no error.

[12] Dr. Wolf was also permitted to offer an opinion as to time of death. Defendant contends this was error. The opinion was based upon the doctor's examination of the body which included an examination of the victim's gastro-intestinal tract. A doctor who performs an autopsy may give an opinion as to time of death based on the probable lapse of time between the victim's last ingestion of food and the victim's death. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973). The jury was informed of the possible variances in rates of digestion and that death determinations from gastro-intestinal tract studies are subject to six to ten hour variances. This assignment of error is without merit.

[13] Defendant assigns error to testimony, elicited over objection, that the victim was alive when he clutched the grass that was found in his hand. The witness, Dr. Drummond, examined the body at the scene. It was his opinion that "you couldn't reach out and grab a handful of grass the way it was clutched in his hand if you were dead." Defendant argues that the testimony was incompetent because "[t]here is no way in the world, medical doctor or not, that anyone could determine whether Robert Earl Steph-

ens was dead at the time that he had grass in his hand. It does not take medical expertise to know that someone can continue to have muscle spasms and movement after brain death." He contends that "[t]his sequence of testimony was extremely damaging to the defendant from the standpoint of the emotional attitude of the jury."

The testimony was relevant to establish both that the victim was shot at the crime scene, and that the murder was committed with premeditation and deliberation. We hold that Dr. Drummond, based on his experience and expertise in the field of medicine, was qualified to offer his opinion on this question. *See State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979) (holding that implicit in allowing an expert to testify is a finding that the witness was an expert with respect to the subject matter of his testimony).

[14] Dr. Drummond was also permitted to testify that the victim was "lying on the ground with a gun over him pointing down at him" when a graze wound to the victim's head was inflicted. Defendant objected to this testimony and assigns as error the trial judge's failure to sustain the objection. We find no error. Dr. Drummond was properly permitted to offer an opinion as to the position of the victim's body when the wound was inflicted. *State v. Simpson*, 297 N.C. 399, 255 S.E. 2d 147 (1979); *State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1979).

[15] Defendant also contends that the trial judge erred in allowing Dr. Drummond to testify as to the time of death. The opinion was based upon the doctor's at-the-scene examination of the body and other physical evidence available. The testimony was admissible. *Id. See State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

[16] Defendant contends that there was insufficient evidence of premeditation and deliberation to support a charge of first-degree murder. Defendant also argues that the evidence was insufficient to submit the case to the jury on defendant's guilt of any crime. We disagree.

The State's case was built on circumstantial evidence. Premeditation and deliberation may be and is most often proved by circumstantial evidence. *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981); *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978).

Circumstances giving rise to an inference of premeditation and deliberation include the conduct of defendant before and after the murder, attempts to conceal the body, ill-will between the parties, and whether the killing was done in a brutal and vicious manner. *Id.*

In the present case, defendant was heard to threaten the victim prior to the murder. Following the murder defendant exhibited a callous and smug attitude toward the victim's death. The body was concealed at the side of a deserted dirt path. There had been ill-will between defendant and the victim over the victim's impending court testimony. The victim was shot three times in the head. We find the evidence sufficient to establish the elements of premeditation and deliberation.

We also agree with the State that the evidence supports the submission of and the jury's verdict on the charge of first-degree murder. The standard against which the sufficiency of circumstantial evidence is measured was enunciated in *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). In *Jones*, we noted that the following rule was, in substance, similar to that announced in *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560 (1979): "[I]n order to survive a motion for nonsuit there must be substantial evidence of all material elements of the offense." *Id.* at 505, 279 S.E. 2d at 838.

> The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both: the evidence is sufficient to withstand a motion to dismiss and to take the case to the jury if there is "evidence [which tends] to prove the fact [or facts] in issue or which reasonably conduces to its conclusion as a fairly logical and legitimate deduction, and not merely such as raises a suspicion or conjecture." *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930). If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

Id. at 504, 279 S.E. 2d at 838.

What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a ques-

tion of fact for the jury. A jury can convict only upon proof of guilt beyond a reasonable doubt. *Id.* Thus, before the court can submit a charge of first-degree murder to the jury, there must be substantial evidence of every essential element of the offense charged and that the defendant was the perpetrator of the crime. *State v. Judge*, 308 N.C. 658, 303 S.E. 2d 817 (1983). Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *Id.* As discussed above, we find substantial evidence that the death of Robert Stephens was the result of a premeditated killing. As our recitation of the evidence discloses, we find substantial evidence that defendant was the perpetrator of the crime. Defendant had both motive and opportunity. The victim's disappearance in a car, later identified as belonging to defendant, together with other facts and circumstances tending to prove that defendant drove the car, and the victim's death a short time later, all point to defendant as Robert Stephens' murderer. This assignment of error is overruled.

[17] Defendant assigns as error the trial court's instructing the jury on aiding and abetting and acting in concert. We disagree. The evidence tended to show that defendant was involved with Frank Dawson in a case involving forgery and failure to return a rental tool, and that on the night of the victim's disappearance and murder, defendant was accompanied by another man. From this evidence the jury could infer that Dawson was with defendant when the victim was murdered. To insure that the jury would understand that irrespective of who actually shot the victim, defendant would be equally guilty under the theories of acting in concert and aiding and abetting, the trial judge properly instructed the jury on these theories. We find no error.

[18] Finally, defendant contends that the trial court abused its discretion in denying his motion for appropriate relief based on newly discovered evidence. This assignment of error is without merit.

The "newly discovered evidence" consisted of testimony that a blue and white Monte Carlo was seen in the vicinity of the crime scene approximately three hours before the body was discovered at 6:00 p.m. on 14 June. Following a hearing, the trial court made extensive findings of fact which included, *inter alia*:

(1) That Johnny Washington Best testified that he went to the scene of the—scene where the body was found with Gary Jackson on June 14, 1983 and that he thereafter talked with Officer—with Deputy Sheriff Pearce and he told Deputy Sheriff Pearce at approximately—that at approximately 3:30 p.m. he had seen a blue and white Monte Carlo automobile parked up a path close to where he later saw the body and shortly heard the car come by with a loud muffler type sound, and that he saw in the automobile two black people but could not tell if they were men or women.

(2) That he testified—that Mr. Best testified that he told the defendant's attorney this on Sunday morning after the jury had reached a verdict of guilty of first-degree murder on the preceding Friday, because he felt his evidence was relevant enough to be brought out in court. That the officer, and that the officer did not go back to talk to him.

(3) That Annie Best says that she saw a blue and white car at the end of the path at approximately 3:25 p.m. and her concern was why was more not said about this?

(4) That neither Mr. or Mrs. Best heard any gunshots or saw anything out of the ordinary, I mean unusual.

(5) That Mrs. Best saw whatever she saw while at her drive which is a substantial distance from the path in question and from an angle and at a distance where it would be difficult to see clearly anything in the path.

(6) That Mr. Best testified that he told the officers that all he saw and what he saw and that he, and that the officers took notes. That now Mr. Best says that the two occupants . . . looked to be black, he was unable to tell their sex.

(10) That Deputy Sheriff Pearce then asked Johnny Best if he recalled anyone or any vehicle around that area on Forsyth Street, and the Court finds Johnny Best told Deputy Sheriff Pearce that the only vehicle he recalls was a blue and white Monte Carlo, '73 to '74 model vehicle, which came by the house while he was working and he noticed this because of the loud sound. The Court finds that the witness, Johnny Best, did not mention to Deputy Sheriff Pearce seeing the vehicle in the path as he drove by, but the Court finds that

he first noticed—finds as a fact he first noticed the vehicle as he was working in his yard.

(13) That the officers tried to locate this blue and white Monte Carlo automobile together with a couple of pickup trucks apparently that had been in the area in the last couple of days. That Deputy Sheriff Pearce found no evidence to indicate anyone had been up the path or in the vicinity of the path between midnight of June 13th and 6:00 p.m. on June 14th.

(16) Deputy Sheriff Pearce and the officers, despite their vigorous efforts, find nothing of relevance in any of the rather far-fetched vehicle reports, and under the circumstances their failure to note these fruitless leads was understandable and certainly does not constitute improper conduct of any sort on their behalf.

(23) That all the medical evidence shows that the deceased died around midnight or early in the morning of June 14th. That the Court finds this to be the facts.

(25) That even if the blue and white Monte Carlo was up this path around, at approximately 3:30 p.m. on June 14th, it is only speculative as to what it might have been doing there. There is no valid evidence to suggest any improper purpose on the part of any occupant of the said vehicle.

The trial court concluded that the new evidence was not "material, competent and relevant;" that the officers conducting the investigation did not act improperly in failing to apprise the defendant of the evidence; and that the evidence was not of such a nature that a different result would probably be reached at a new trial. We note further that defense counsel was aware that Best had been interviewed and was present at the scene of the crime. The trial court's findings are supported by the evidence and in turn support the trial court's conclusions. We find no abuse of discretion. *See State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982); *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976).

No error.

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

MICHAEL M. NORMILE AND WAWIE KURNIAWAN v. HAZEL ELIZABETH MILLER

LAWRENCE J. SEGAL v. HAZEL ELIZABETH MILLER

No. 487PA83

(Filed 27 February 1985)

1. **Contracts § 2.2; Vendor and Purchaser § 2— offer to purchase—time limit not part of counteroffer**

A time limit for acceptance of an offer contained in a prospective purchaser's written offer to purchase real property did not become a term of the seller's subsequent counteroffer signed under seal so as to transform the counteroffer into an option contract or irrevocable offer for the time stated in the original offer to purchase. Therefore, even if the seal imported the necessary consideration, the counteroffer did not constitute an option where it contained no promise or agreement by the seller that the counteroffer would remain open for a specified period of time.

2. **Contracts § 2.2; Vendor and Purchaser § 2— notice of revocation of counteroffer—no authority thereafter to accept**

If a seller rejects a prospective purchaser's offer to purchase but makes a counteroffer that is not accepted by the prospective purchaser, the prospective purchaser does not have the power to accept after he receives notice that the counteroffer has been revoked.

3. **Contracts § 2.2; Vendor and Purchaser § 2— revocation of counteroffer for sale of property—notice to prospective purchaser—attempted acceptance ineffective**

Where a seller made a counteroffer to plaintiff prospective purchasers, plaintiffs neither accepted nor rejected the counteroffer under the mistaken impression that they had an option to purchase and that the property was off the market, the seller manifested her intention to revoke the counteroffer by entering into a contract to sell the property to a third party, and notice of this revocation was communicated to plaintiffs by a real estate agent who told them the property had been sold, plaintiffs' attempt thereafter to accept the counteroffer was ineffective.

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

ON petition by Plaintiffs Normile and Kurniawan for discretionary review of a unanimous decision of the Court of Appeals, 63 N.C. App. 689, 306 S.E. 2d 147 (1983), affirming an Order granting plaintiff Segal's motion for summary judgment, entered by *Sitton, J.*, at the 17 May 1982 Civil Session of Superior Court, MECKLENBURG County. *See* N.C. Gen. Stat. § 7A-31(c) (1981).

Parker Whedon, for plaintiff-appellants.

Levine & Levine, by Miles S. Levine, for plaintiff-appellee.

FRYE, Justice.

Defendant Hazel Miller owned real estate located in Charlotte, North Carolina. On 4 August 1980, the property was listed for sale with a local realtor, Gladys Hawkins. On that same day, Richard Byer, a real estate broker with the realty firm Gallery of Homes, showed the property to the prospective purchasers, Plaintiffs Normile and Kurniawan. Afterwards, Byer helped plaintiffs prepare a written offer to purchase the property. A Gallery of Homes form, entitled "DEPOSIT RECEIPT AND CONTRACT FOR PURCHASE AND SALE OF REAL ESTATE," containing blanks for the insertion of terms pertinent to the purchasers' offer, was completed in quadruplicate and signed by Normile and Kurniawan. One specific standard provision in Paragraph 9 included a blank that was filled in with the time and date to read as follows: "OFFER & CLOSING DATE: Time is of the essence, therefore this offer must be accepted on or before 5:00 p.m. Aug. 5th 1980. A signed copy shall be promptly returned to the purchaser."

Byer took the offer to purchase form to Gladys Hawkins, who presented it to defendant. Later that evening, Gladys Hawkins returned the executed form to Byer. It had been signed under seal by defendant, with several changes in the terms having been made thereon and initialed by defendant. The primary changes made by defendant were an increase in the earnest money deposit ($100 to $500); an increase in the down payment due at closing ($875 to $1,000); a decrease in the unpaid principal of the existing mortgage amount ($18,525 to $18,000); a decrease in the term of the loan from seller (25 years to 20 years); and a purchaser qualification contingency added in the outer margin of the form.

That same evening, Byer presented defendant's counteroffer to Plaintiff Normile. Byer testified in his deposition that Normile did not have $500 for the earnest money deposit, one of the requirements of defendant's counteroffer. Also, Byer stated that Normile did not "want to go 25 [sic] years because he wanted lower payments." Byer was under the impression at this point

that Normile thought he had first option on the property and that "nobody else could put an offer in on it and buy it while he had this counteroffer, so he was going to wait awhile before he decided what to do with it." Normile, however, neither accepted nor rejected the counteroffer at this point, according to Byer. When this meeting closed, Byer left the pink copy of the offer to purchase form containing defendant's counteroffer with Normile. Byer stated that he thought that Normile had rejected the counteroffer at this point.

At approximately 12:30 a.m. on 5 August, Byer went to the home of Plaintiff Segal, who signed an offer to purchase with terms very similar to those contained in defendant's counteroffer to Plaintiffs Normile and Kurniawan. This offer was accepted, without change, by defendant. Later that same day, at approximately 2:00 p.m., Byer informed Plaintiff Normile that defendant had revoked her counteroffer by commenting to Normile, "[Y]ou snooze, you lose; the property has been sold." Prior to 5:00 p.m. on that same day, Normile and Kurniawan initialed the offer to purchase form containing defendant's counteroffer and delivered the form to the Gallery of Homes' office, along with the earnest money deposit of $500.

Separate actions were filed by plaintiff-appellants and -appellee seeking specific performance. Plaintiff Segal's motion for consolidation of the trials was granted. Defendant, in her answer, recognized the validity of the contract between her and Plaintiff Segal. However, because of the action for specific performance commenced by Plaintiffs Normile and Kurniawan, defendant contended that she was unable to legally convey title to Plaintiff Segal. Both plaintiffs filed a motion for summary judgment. Plaintiff Segal's motion for summary judgment was granted by the trial court, and defendant was ordered to specifically perform the contract to convey the property to Segal. Plaintiffs Normile and Kurniawan appealed to the Court of Appeals from the trial court's denial of their motion for summary judgment. That court unanimously affirmed the trial court's actions. Discretionary review was allowed by this Court on petition of Plaintiffs Normile and Kurniawan.

I.

[1] The first issue on this appeal is whether a time limit within which an offer must be accepted that is contained in a prospective purchaser's written offer to purchase real property becomes a term of the seller's subsequent counteroffer, transforming the counteroffer into an option contract or irrevocable offer for the time stated if signed under seal. We conclude that it does not.

Plaintiff-appellants argue that the counteroffer made by Defendant Miller to plaintiff-appellants became a binding and irrevocable option to purchase within the time for acceptance contained in their original offer to purchase. Essentially, plaintiff-appellants argue that the Court of Appeals was incorrect in holding that defendant's counteroffer was not an irrevocable option because the "promise to hold the offer open until 5:00 p.m., 5 August 1980, was not supported by consideration, . . ." *Normile*, 63 N.C. App. at 694, 306 S.E. 2d at 150.

As a preliminary matter, it is obvious that the thrust of both the Court of Appeals' and plaintiff-appellants' arguments center around their analysis of whether or not the counteroffer from Defendant Miller to plaintiff-appellants constituted a binding and enforceable option contract for the period of time for acceptance stated and contained in plaintiff-appellants' original offer to purchase form. This basic proposition seems to be premised upon the inaccurate notion that Defendant Miller's "counteroffer provided that the offer would remain open until 5:00 p.m. on 5 August 1980 . . . ." *Normile*, 63 N.C. App. at 693, 306 S.E. 2d at 149. This same misconception is reflected in plaintiff-appellants' brief where they state, without citing any legal authority:

> It is basic that when one party makes another a written offer which the offeree changes in some respects, signs and returns, the offer becomes a counteroffer by the original offeree to the original offeror, which consists of the altered provisions and all of the unaltered provisions of the original offer. *Thus, since the time limitation for acceptance was not altered, one of the provisions of the counteroffer was that the time for its acceptance would terminate at 5:00 p.m. August 5, 1980.*
>
> The counteroffer, being under seal, constituted a binding option to sell, irrevocable during the stated time limitation

for its acceptance, and enforceable by specific performance upon its acceptance. (Emphasis added.)

We do not agree that defendant's counteroffer to plaintiff-appellants subsumed all the provisions of the original offer from the prospective purchasers. To effectively explain this conclusion, we begin with a brief description of how a typical sale of real estate is consummated. The broker, whose primary duty is to secure a ready, willing, and able buyer for the seller's property, generally initiates a potential sale by procuring the prospective purchaser's signature on an offer to purchase instrument. J. Webster, *North Carolina Real Estate for Brokers and Salesmen*, § 8.03 (1974). "An 'offer to purchase' is simply an offer by a purchaser to buy property, . . ." J. Webster, *supra*, § 8.03. This instrument contains the prospective purchaser's "offer" of the terms he wishes to propose to the seller. *Id.*

Usually, this offer to purchase is a printed form with blanks that are filled in and completed by the broker. Among the various clauses contained in such an instrument, it is not uncommon for the form to contain "a clause stipulating that the seller must accept the offer and approve the sale within a certain specified period of time, . . . The inclusion of a date within which the seller must accept simply indicates that the offer will automatically expire at the termination of the named period if the seller does not accept before then." *Id.* § 8.10. Such a clause is contained in Paragraph 9 of the offer to purchase form in the case *sub judice*.

In the instant case, the offerors, plaintiff-appellants, submitted their offer to purchase defendant's property. This offer contained a Paragraph 9, requiring that "this offer must be accepted on or before 5:00 p.m. Aug. 5th 1980." Thus the offeree's, defendant-seller's, power of acceptance was controlled by the duration of time for acceptance of the offer. Restatement (Second) of Contracts § 35 (1981). "The offeror is the creator of the power, and before it leaves his hands, he may fashion it to his will . . . if he names a specific period for its existence, the offeree can accept only during this period." Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 Yale L. J. 169, at 183 (1917); *see* Restatement, *supra*, § 41; S. Williston, *A Treatise on the Law of Contracts* § 53 (1957).

This offer to purchase remains only an offer until the seller accepts it on the terms contained in the original offer by the prospective purchaser. J. Webster, *supra*, § 8.10. If the seller does accept the terms in the purchaser's offer, he denotes this by signing the offer to purchase at the bottom, thus forming a valid, binding, and irrevocable purchase contract between the seller and purchaser. However, if the seller purports to accept but changes or modifies the terms of the offer, he makes what is generally referred to as a qualified or conditional acceptance. *Richardson v. Greensboro Warehouse & Storage Co.*, 223 N.C. 344, 26 S.E. 2d 897 (1943); *Wilson v. W. M. Storey Lumber Co.*, 180 N.C. 271, 104 S.E. 531 (1920); 17 Am. Jur. 2d Contracts § 62 (1964). "The effect of such an acceptance so conditioned is to make a new counterproposal upon which the parties have not yet agreed, but which is open for acceptance or rejection." (Citations omitted.) *Richardson*, 223 N.C. at 347, 26 S.E. 2d at 899. Such a reply from the seller is actually a counteroffer and a rejection of the buyer's offer. J. Webster, *supra*, § 8.10.

These basic principles of contract law are recognized not only in real estate transactions but in bargaining situations generally. It is axiomatic that a valid contract between two parties can only exist when the parties "assent to the same thing in the same sense, and their minds meet as to all terms." *Goeckel v. Stokely*, 236 N.C. 604, 607, 73 S.E. 2d 618, 620 (1952). This assent, or meeting of the minds, requires an offer and acceptance in the exact terms and that the acceptance must be communicated to the offeror. *Dodds v. St. Louis Union Trust Co.*, 205 N.C. 153, 170 S.E. 652 (1933). *Goeckel*, 236 N.C. 604, 73 S.E. 2d 618. "If the terms of the offer are changed or any new ones added by the acceptance, there is no meeting of the minds and, consequently, no contract." G. Thompson, *supra*, § 4452. This counteroffer amounts to a rejection of the original offer. S. Williston, *supra*, § 51. "The reason is that the counteroffer is interpreted as being in effect the statement by the offeree not only that he will enter into the transaction on the terms stated in his counteroffer, but also by implication that he will not assent to the terms of the original offer." *Id.* § 36.

The question then becomes, did defendant-seller accept plaintiff-appellants' offer prior to the expiration of the time limit contained within the offer? We conclude that she did not. The of-

feree, defendant-seller, changed the original offer in several material respects, most notably in the terms regarding payment of the purchase price. S. Williston, *supra*, § 77 (any alteration in the method of payment creates a conditional acceptance). This qualified acceptance was in reality a rejection of the plaintiff-appellants original offer because it was coupled with certain modifications or changes that were not contained in the original offer. G. Thompson, *supra*, § 4452. Additionally, defendant-seller's conditional acceptance amounted to a counteroffer to plaintiff-appellants. "A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer." Restatement, *supra*, § 39. Between plaintiff-appellants and defendant-seller there was no meeting of the minds, since the parties failed to assent to the same thing in the same sense.

In substance, defendant's conditional acceptance modifying the original offer did not manifest any intent to accept the terms of the original offer, including the time-for-acceptance provision, unless and until the original offeror accepted the terms included in defendant's counteroffer. The offeree, by failing to unconditionally assent to the terms of the original offer and instead qualifying his acceptance with terms of his own, in effect says to the original offeror, "I will accept your offer; provided you [agree to my proposed terms]." *Rucker v. Sanders*, 182 N.C. 607, 609, 109 S.E. 857, 858 (1921). Thus, the time-for-acceptance provision contained in plaintiff-appellants' original offer did not become part of the terms of the counteroffer. And, of course, if they had accepted the counteroffer from defendant, a binding purchase contract, which would have included the terms of the original offer and counteroffer, would have resulted. J. Webster, *supra*, § 8.03.

Plaintiff-appellants further argue that the Court of Appeals should not have looked behind the seal to determine that there was no actual consideration given by plaintiff-appellants, thus rendering the offer revocable prior to 5:00 p.m., August 5. Having previously determined that the terms of defendant's counteroffer did not include the time-for-acceptance provision contained in the original offer, it is unnecessary to address plaintiff-appellants' primary argument that defendant's signature under seal is sufficient consideration to support an option contract and render it ir-

revocable for the stated period of time. Without addressing this precise issue, we do wish to make certain observations collateral to this argument about the nature of an option contract to further demonstrate why defendant's counteroffer was not an irrevocable option.

It is generally recognized that "[a]n 'option' is a contract by which the owner agrees to give another the exclusive right to buy property at a fixed price within a specified time." 8A G. Thompson, *Commentaries on the Modern Law of Real Property*, § 4443 (1963); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E. 2d 806 (1954). In effect, an owner of property agrees to hold his offer open for a specified period of time. G. Thompson, *supra*, § 4443. This option contract must also be supported by valuable consideration. *Id.* Disregarding the issue of consideration, it is more significant that defendant's counteroffer did not contain any promise or agreement that her counteroffer would remain open for a specified period of time.

Several of the cases cited by plaintiff-appellants are useful in illustrating how a seller expressly agrees to hold his offer open. For instance, in *Ward v. Albertson*, 165 N.C. 218, 81 S.E. 168 (1914), this Court stated, "An option, in the proper sense, is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a certain time." *Id.* at 222-23, 81 S.E. at 169. In that case, defendant-seller had agreed in writing as follows: ". . . I agree that if [prospective purchaser] pays me nine hundred and ninety-five dollars prior to January 1, 1913, to convey to him all the timber and trees . . . ." *Id.* at 219, 81 S.E. at 168. Similarly, in *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654 (1918), defendant-seller agreed in writing: ". . . we, J. C. and W. M. Bescher, do hereby contract and agree with said [prospective purchaser] to sell and convey . . . all that certain tract . . . at his or their request on or before the 18th day of August, 1917 . . ." *Id.* at 624, 97 S.E. at 654. And finally, in *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976), defendant-sellers agreed in writing: ". . . we C. F. Early and Bessie D. Early, hereby irrevocably agree to convey to [prospective purchasers] upon demand by him within 30 days from the date hereof, . . . a certain tract or parcel of land . . . ." *Id.* at 346, 222 S.E. 2d at 396.

In each of these three cases, this Court recognized that the sellers had given the prospective purchasers a contractual option to purchase the seller's property. In the present case we find no comparable language within defendant-seller's counteroffer manifesting any similar agreement. There is no language indicating that defendant-seller in any way agreed to sell or convey her real property to plaintiff-appellants at their request within a specified period of time. There is, however, language contained within the prospective purchasers' offer to purchase that does state, "DESCRIPTION: I/we Michael M. Normile and Wawie Kurniawan hereby *agree to purchase* from the sellers, . . ." and "*this* offer must be accepted on or before 5:00 p.m. Aug. 5th 1980." (Emphasis added.) Nowhere is there companion language to the effect that Defendant Miller "hereby agrees to sell or convey to the purchasers" if they accept by a certain date.

Therefore, regardless of whether or not the seal imported the necessary consideration, we conclude that defendant-seller made no promise or agreement to hold her offer open. Thus, a necessary ingredient to the creation of an option contract, *i.e.*, a promise to hold an offer open for a specified time, is not present. Accordingly, we hold that defendant's counteroffer was not transformed into an irrevocable offer for the time limit contained in the original offer because the defendant's conditional acceptance did not include the time-for-acceptance provision as part of its terms and because defendant did not make any promise to hold her counteroffer open for any stated time.

II.

[2] The foregoing preliminary analysis of both the Court of Appeals' opinion and plaintiff-appellants' argument in their brief prefaces what we consider to be decisive of the ultimate issue to be resolved. Basic contract principles effectively and logically answer the primary issue in this appeal. That is, if a seller rejects a prospective purchaser's offer to purchase but makes a counteroffer that is not accepted by the prospective purchaser, does the prospective purchaser have the power to accept after he receives notice that the counteroffer had been revoked? The answer is no. The net effect of defendant-seller's counteroffer and rejection is twofold. First, plaintiff-appellants' original offer was rejected and ceased to exist. S. Williston, *supra*, § 51. Secondly, the counterof-

fer by the offeree requires the original offeror, plaintiff-appellants, to either accept or reject. *Benya v. Stevens & Thompson Paper Co., Inc.*, 143 Vt. 521, 468 A. 2d 929 (1983).

Accordingly, the next question is did plaintiff-appellants, the original offerors, accept or reject defendant-seller's counteroffer? Plaintiff-appellants in their brief seem to answer this question when they state, "At the time Byer presented the counteroffer to Normile, Normile neither accepted nor rejected it . . . ." Therefore, plaintiff-appellants did not manifest any intent to agree to or accept the terms contained in defendant's counteroffer. Normile instead advised Byer that he, though mistakenly, had an option on the property and that it was off the market for the duration of the time limitation contained in his original offer. As was stated by Justice Bobbitt in *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144 (1962): " 'The question whether a contract has been made must be determined from a consideration of the expressed intention of the parties—that is from a consideration of their words and acts.' " *Id.* at 153, 128 S.E. 2d at 146. Although Normile's mistaken belief that he had an option is unfortunate, he still failed to express to Byer his agreement to or rejection of the counteroffer made by defendant-seller.

A recent decision by the Supreme Court of Vermont based on similar facts is instructive to this Court in reaching its decision in the present case. In *Benya v. Stevens & Thompson Paper Co., Inc.*, 143 Vt. 521, 468 A. 2d 929 (1983), a real estate broker, at plaintiff-buyer's request, prepared an offer to purchase property of defendant-seller. Defendant, when presented with plaintiff's offer, made several modifications, which included changes in the terms regarding the deposit, cash at closing, interest rate, and payment terms. These changes were initialed by defendant, and the offer to purchase was mailed back for plaintiff's consideration. Plaintiff did not agree with some of the modifications and advised his attorney to execute a new offer to purchase, a third proposal. Defendant did not execute or respond to the terms contained in the second offer from plaintiff, since he had sold the property to a second purchaser in the interim. The trial court concluded that the first offer to purchase, having been signed by both the parties, constituted a valid contract. However, the Vermont Supreme Court disagreed.

The court, after citing the law relevant to offer and acceptance, determined that defendant's alteration of the terms contained in plaintiff's original offer to purchase did not constitute an acceptance but a counteroffer. After concluding that the counteroffer required that the original offeror either accept or reject it, the court stated, "The offeror's acceptance of the offeree's counteroffer may be accomplished either expressly or by conduct." (Citations omitted.) *Id.* at 523, 468 A. 2d at 931. After examining the record, the court concluded "that plaintiff never accepted, either expressly or otherwise, defendant's counteroffer." *Id.* The court was of the opinion that plaintiff's decision to draft a third proposal after receiving defendant's counteroffer was not evidence of plaintiff's acceptance of such counteroffer. Furthermore, defendant did not express his assent to this third proposal. Therefore, there was no contract based upon that document either.

[3] Plaintiff-appellants in the instant case, as plaintiff in *Benya*, did not accept, either expressly or by conduct, defendant's counteroffer. In addition to disagreeing with the change in payment terms, Normile stated to Byer that "he was going to wait awhile before he decided what to do with [the counteroffer]." Neither did plaintiffs explicitly reject defendant's counteroffer. Instead, plaintiff-appellants in this case chose to operate under the impression, though mistaken, that they had an option to purchase and that the property was "off the market." Absent either an acceptance or rejection, there was no meeting of the minds or mutual assent between the parties, a *fortiori*, there was no contract. *Horton v. Humble Oil & Refining Co.*, 255 N.C. 675, 122 S.E. 2d 716 (1961); *Goeckel*, 236 N.C. 604, 73 S.E. 2d 618 (1952).

It is evident from the record that after plaintiff-appellants failed to accept defendant's counteroffer, there was a second purchaser, Plaintiff-appellee Segal, who submitted an offer to defendant that was accepted. This offer and acceptance between the latter parties, together with consideration in the form of an earnest money deposit from plaintiff-appellee, ripened into a valid and binding purchase contract.

By entering into the contract with Plaintiff-appellee Segal, defendant manifested her intention to revoke her previous counteroffer to plaintiff-appellants. "It is a fundamental tenet of the

common law that an offer is generally freely revocable and can be countermanded by the offeror at any time before it has been accepted by the offeree." E. Farnsworth, *Contracts*, § 3.17 (1982); Restatement, *supra*, § 42. The revocation of an offer terminates it, and the offeree has no power to revive the offer by any subsequent attempts to accept. G. Thompson, *supra*, § 4452.

Generally, notice of the offeror's revocation must be communicated to the offeree to effectively terminate the offeree's power to accept the offer. It is enough that the offeree receives reliable information, even indirectly, "that the offeror had taken definite action inconsistent with an intention to make the contract." E. Farnsworth, *supra*, § 3.17 (the author cites *Dickinson v. Dodds*, 2 Ch. Div. 463 (1876), a notorious English case, to support this proposition); Restatement, *supra*, § 43.

In this case, plaintiff-appellants received notice of the offeror's revocation of the counteroffer in the afternoon of August 5, when Byer saw Normile and told him, "[Y]ou snooze, you lose; the property has been sold." Later that afternoon, plaintiff-appellants initialed the counteroffer and delivered it to the Gallery of Homes, along with their earnest money deposit of $500. These subsequent attempts by plaintiff-appellants to accept defendant's revoked counteroffer were fruitless, however, since their power of acceptance had been effectively terminated by the offeror's revocation. Restatement, *supra*, § 36. Since defendant's counteroffer could not be revived, the practical effect of plaintiff-appellants' initialing defendant's counteroffer and leaving it at the broker's office before 5:00 p.m. on August 5 was to resubmit a new offer. This offer was not accepted by defendant since she had already contracted to sell her property by entering into a valid, binding, and irrevocable purchase contract with Plaintiff-appellee Segal.

For the reasons stated herein, the decision of the Court of Appeals is

Modified and affirmed.

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

STATE OF NORTH CAROLINA v. RICKY CLYDE TODD

No. 523A83

(Filed 27 February 1985)

1. **Criminal Law § 86.10— accomplice's testimony—corroboration present—not required**

In a prosecution for felonious breaking and entering, larceny, and being an habitual offender, there was no error in admitting an accomplice's testimony which implicated defendant. The testimony was supported by evidence that defendant on the day after the theft had been within six feet of the briar patch where the stolen items were hidden and by scratches on defendant's arms; moreover, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies a jury beyond a reasonable doubt.

2. **Criminal Law § 75.9— defendant's voluntary statement to officer—no Miranda warning—no error**

There was no error in the admission of statements made to an officer without Miranda warnings where defendant called to the officer from his cell while the officer was putting gas in his patrol car. Both the circumstances surrounding the statement and the substance of the statement are clear indications that it was volunteered and a product of defendant's effort to enlist the assistance of the officer in a plea bargain.

3. **Burglary and Unlawful Breakings § 5.8— breaking, entering, and larceny—evidence sufficient**

There was no error in denying defendant's motion to dismiss breaking and entering and larceny charges and no abuse of discretion in denying defendant's motion to set aside the verdict and for a new trial where there was plenary evidence to support defendant's convictions.

4. **Criminal Law § 141; Constitutional Law § 78— habitual offender statute constitutional—type of review—life sentence upheld**

The North Carolina legislature acted within constitutional bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment. Under the Fair Sentencing Act, the proper review is not Eighth Amendment proportionality, but whether there has been "a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play." A life sentence given an habitual offender upon convictions of felonious breaking or entering and felonious larceny was upheld under facts showing defendant's propensity to steal and unlawfully possess firearms, his threat against law enforcement officers, and his attempted escape during trial. G.S. 14-1.1(a)(3), G.S. 14-7.1 *et seq.*, G.S. 15A-1340.1 *et seq.*

5. **Criminal Law § 141— habitual offender—separate indictment proper—not necessary to re-empanel jury**

An habitual felon may be indicted as such in a separate bill, and the underlying indictment does not need to refer to his alleged status. Further-

more, when the same jury considers both the principal felony and the question of defendant's recidivism, it is not necessary to re-empanel a jury once that jury has been properly empaneled pursuant to G.S. 15A-1216. G.S. 14-7.3, G.S. 15A-2000.

6. **Criminal Law §§ 138, 141 — habitual felony — aggravating factor — sociopathic personality**

The trial court did not err by failing to grant defendant's motion to dismiss an habitual felon prosecution and by failing to grant his motions to set aside the verdict and for a new trial where the evidence clearly established that since 6 July 1967 defendant had been convicted or had pled guilty to three felony offenses, none of which were committed prior to defendant's eighteenth birthday. Furthermore, the additional finding in aggravation that defendant has an antisocial personality disorder was proper where the trial judge clearly enunciated the basis upon which this finding was made. Although a mental or emotional disorder may not be considered an aggravating factor, a finding that defendant is "a menace to other human beings and their possessions" is entirely proper where manifestations of that disorder involve little hope of rehabilitation coupled with serious antisocial and criminal behavior. G.S. 14-7.1.

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

DEFENDANT was tried before *Brannon, J.*, at the 18 July 1983 Session of Superior Court, BLADEN County, on charges of felonious breaking or entering and larceny, and being an habitual offender. After the jury returned verdicts of guilty on the charges of breaking or entering and larceny, the question of whether defendant was an habitual felon was submitted to the jury and answered in the affirmative. Pursuant to N.C.G.S. § 14-7.6 defendant was sentenced as a Class C felon and received a life sentence. From verdicts of guilty and a life sentence imposed thereon, defendant appeals as a matter of right.

Before this Court the defendant raises two evidentiary issues; challenges the sufficiency of the evidence; and contends that his conviction as an habitual offender violated his constitutional rights and was unsupported by the evidence. We find no error.

Rufus L. Edmisten, Attorney General, by H. A. Cole, Special Deputy Attorney General, for the State.

Thomas M. Johnson, Attorney for defendant-appellant.

MEYER, Justice.

At trial the State's evidence tended to show that on 12 February 1983, at approximately 7:00 p.m., Tom Rising returned to his Bladenboro home to discover that it had been broken into. A television set, a 12 gauge shotgun and a .22 Remington rifle were missing. The next day, Mr. Rising recovered the missing items which were concealed in briars in a wooded area approximately forty feet from his house.

Jerome Alton Stevens, the State's chief witness, testified that he, Gary Wilson, and William Wilson spent the afternoon of 12 February with the defendant. Stevens had agreed to drive the defendant from Whiteville to Bladenboro. Stevens testified that late in the afternoon, after visiting a friend of Gary Wilson's, the defendant directed Stevens to an area located beyond the intersection of Highway 211. Defendant instructed Stevens to stop the car. Defendant and Gary Wilson then left and went into the woods. After four or five minutes, Stevens heard gunshots. When the defendant returned to the car, he stated that he had broken into a house, and had taken some guns and a TV set which he had left in the woods and for which he would return later. Mr. Rising's house was approximately one hundred and thirty yards from where Stevens had stopped his car. Stevens, the defendant and Gary Wilson then went to a poolroom after which they picked up William Wilson from a friend's trailer and returned to Whiteville.

Tim Rising testified that on 13 February, shortly after he had discovered his property in the woods behind his house, he saw a car stopped on the road approximately fifteen to twenty feet from where the TV and guns had been left. He watched the defendant leave the car and walk to within six feet of the items. Rising confronted the defendant and his brother, who was ostensibly checking the oil in the car. Rising told the pair that his house had been broken into and asked them to await the arrival of the sheriff. Defendant stated he would not get involved, threatened to beat Rising, and the two left immediately.

Defendant offered the testimony of his brother who stated that although he had no trouble starting his car or leaving the area after their encounter with Rising, he was in fact repairing a broken carburetor or alternator at the time they were confronted

by Rising. Randy Todd also testified that the defendant never left the car. Defendant's mother testified that defendant arrived at her home in Bladenboro at approximately 5:00 p.m. on 12 February and remained there until after dark.

Defendant testified that he had gone to Bladenboro with Jerome Stevens on 12 February and they had shot pool until close to 5:00 p.m. when Stevens had taken the defendant to his mother's house. Defendant denied knowing William Wilson and knew Gary Wilson "from him being in the jailhouse." He testified that neither Gary nor William Wilson were with him and Stevens on 12 February.

When asked by his attorney whether he had been cutting wood sometime prior to 12 February, defendant responded that he had a few scratches on his hand. From this it could be inferred that the scratch marks on defendant's hands and arms which were observed by a sheriff's deputy on 13 February, were wounds incurred from cutting wood rather than from attempting to hide a TV set and guns in the briars behind Tim Rising's house. Defendant denied any involvement in the breaking or entering or larceny. Defendant had been out of prison less than a month when these crimes occurred.

With respect to the State's case against the defendant as an habitual felon, the evidence disclosed the following: On 8 June 1977 defendant was convicted in Superior Court, Columbus County, of the felony offense of larceny of a firearm. On 14 May 1979 defendant was convicted in Superior Court, Caldwell County, of the felony offense of larceny of more than $200.00. On 21 November 1980 defendant was convicted in Superior Court, Scotland County, for the felony possession of a controlled substance. In addition, for sentencing purposes, there was evidence that defendant had been convicted of possession of a firearm by a felon; possession with intent to sell or deliver a controlled substance; simple possession of marijuana; carrying a concealed weapon; possession of diazepam; and damage to real property.

During the sentencing hearing, held pursuant to N.C.G.S. § 15A-1340.1 *et seq.*, the State introduced the testimony of Russell Brown to the effect that defendant suffers from an antisocial personality disorder described as sociopathic. Crime is

usually a predominant characteristic of the disorder. Other characteristics are the tendency to focus on one's own needs and to disregard the needs of others; manipulative behavior; and an absence of significant relationships. Treatment of sociopathic personality disorders has not been successful.

The State also introduced the testimony of a Bladen County deputy sheriff who advised the Court that defendant, after the guilty verdict had been returned, stated that although he might be forty years old, when he got out of prison he was going to kill every law enforcement officer that he saw. The record discloses that the defendant, over his attorney's protestations, then interrupted the proceedings by stating "I called him a ----headed son-of-a bitch." The record also discloses the following entry made by the Court during the sentencing proceedings:

> Let the record show that these proceedings were interrupted by what the Court observed to be and was most obviously an attempt to escape by the defendant from the courtroom. The defendant was arrested and taken into custody before he could get out of the building, but he did get out of the courtroom. The Court took a recess at the point in time, in order to calm the situation down and give counsel for the defendant a chance to converse with any and all that he desired to converse to [sic], about that or anything else.

Defendant's evidence at the sentencing hearing consisted of the testimony of his mother and father both of whom were of the opinion that long-term incarceration would be detrimental to the defendant. Following defendant's attempted escape, the defense was permitted to reopen the evidence to present testimony of defendant's parents concerning defendant's good character and reputation in the community.

[1] Defendant first contends that the trial court erred in admitting into evidence Jerome Stevens' testimony concerning defendant's statement that he had just broken into a house and taken a TV set and two guns. It is defendant's position, with no citation of authority, that because Stevens had pled guilty to the same charges for which defendant was being tried, and he was awaiting sentencing, his testimony, "unsupported by other evidence," was inadmissible.

The record belies the defendant's contention that Stevens' testimony was unsupported by other evidence. Certainly defendant's presence within six feet of the stolen items the day after the theft, and the scratches on his arms support Stevens' version of the events. Furthermore, in *State v. Tilley*, 239 N.C. 245, 249, 79 S.E. 2d 473, 476 (1954) we stated that:

> It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused.

Accord State v. Martin, 309 N.C. 465, 308 S.E. 2d 277 (1983); *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975); *State v. Carey*, 285 N.C. 497, 206 S.E. 2d 213 (1974); *State v. McNair*, 272 N.C. 130, 157 S.E. 2d 660 (1967). This assignment of error is without merit.

[2] Defendant next contends that under the authority of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966), his constitutional rights were violated by the admission of testimony concerning statements he made to a law enforcement officer. The officer testified that the day before he had been putting gas in his patrol car when the defendant had yelled down to him from his jail cell and indicated that he wanted to talk to the officer. The officer testified that after he had taken care of his car, he went into the jail to see the defendant. Prior to allowing the officer to testify further, the court conducted the following exchange with defense counsel in response to counsel's objection:

> MR. JOHNSON: Judge, I'm afraid we are getting into hearing evidence of the defendant—
>
> COURT: Pardon?
>
> MR. JOHNSON: —evidence about the defendant that has not been sworn. There is no testimony as to any giving of any constitutional rights in the statements that may be made on behalf of conversation with the defendant that may be damaging without the proper introduction of any Miranda warnings.
>
> COURT: Counsellor, you are not getting ready to tell me that when somebody is standing up in the jail cell yelling out the

window that the folks on the sidewalk have to look up and pull out their Miranda card and start going through that four—or five part written area?

MR. JOHNSON: No, sir. Your Honor, I would like for you to believe that though.

COURT: No . . . .

MR. JOHNSON: Yes, sir.

COURT: I take it though that is the basis of your objection, that as the officer sat there putting gas in his car, he didn't pull out his Miranda card and go through the litany with your client sitting up in the jail, right?

MR. JOHNSON: Thank you, your Honor.

COURT: . . . . On the basis given, the OBJECTION is OVERRULED. Let the jury come on back. There being no interrogation. Miranda requires not only custody, but interrogation, too, or its functional equivalent, neither of which are apparent.

The officer then testified as follows:

> He wanted to know if I would see the D.A. about taking a plea on his case. That he had talked to his lawyer and told him to see the D.A., but the D.A. wouldn't talk to him about it. I told him, I said, "Well, Ricky, it's out of my hands. If your lawyer can't talk to the D.A., there is nothing I can say or do. You are just going to have to go on to court." And I left.

While all parties concede that defendant's statement to the officer was made while defendant was in custody, we agree with the State and the trial judge that the statement was not made as a result of interrogation. Both the circumstances surrounding the statement and the substance of the statement are clear indications that it was volunteered and a product of defendant's effort to enlist the assistance of the officer. This assignment of error is overruled.

[3] Defendant contends that the trial court erred in denying his motion to dismiss the breaking or entering and larceny charges. We disagree. There is plenary evidence to support defendant's

convictions on these charges. *See State v. Green*, 310 N.C. 466, 313 S.E. 2d 434 (1984). Likewise, we find nothing of record to support defendant's contention that the trial judge abused his discretion in denying defendant's motion to set aside the verdict and for a new trial. *See State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). The assignment of error is overruled.

[4] Defendant next contends that North Carolina's habitual offender statute is unconstitutional. Defendant argues that prosecution under this statute denies him due process and equal protection of the law inasmuch as "it punishes him twice for acts for which he has already been punished." Defendant also contends that punishment as an habitual offender violates his eighth amendment right against cruel and unusual punishment.

Inasmuch as we have not specifically ruled on the constitutionality of our habitual felon statute, N.C.G.S. § 14-7.1 *et seq.*, we will first address defendant's due process and equal protection challenges. We begin by rejecting outright the suggestion that our legislature is constitutionally prohibited from enhancing punishment for habitual offenders as violations of constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. These challenges have been addressed and rejected by the United States Supreme Court. *See Rummell v. Estelle*, 445 U.S. 263, 63 L.Ed. 2d 382 (1980); *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed. 2d 606 (1967). Furthermore, in *State v. Allen*, 292 N.C. 431, 435, 233 S.E. 2d 585, 588 (1977), we noted that the procedures adopted by our legislature to deal with the problem of the multiple or habitual offender, "seems to be the fairest and least susceptible to constitutional attack:"

> "[T]he defendant has notice that he is to be charged as a recidivist before pleading to the present offense, eliminating the possibility that he will enter a guilty plea on the expectation that the maximum punishment he could receive would be that provided for in the statute defining the present crime. Moreover, while notice is given before pleading, only the allegation of the present crime is read and proved to the jury at the first trial, preventing any prejudice due to the introduction of evidence of prior convictions before the trier of guilt for the present offense." 40 N.Y.U. L. Rev. at 348.

We now hold that our legislature has acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment as provided. The procedures set forth in N.C.G.S. § 14-7.1 to -7.6 likewise comport with the defendant's federal and state constitutional guarantees.

Relying on *Solem v. Helm*, --- U.S. ---, 77 L.Ed. 2d 637 (1983), defendant argues that the sentence he received violates his eighth amendment guarantee against cruel and unusual punishment. Defendant's reliance is misplaced. In *Solem*, a sharply divided Court held that defendant's life sentence with no opportunity for parole upon his conviction of a seventh nonviolent felony (uttering a "no account" check for $100.00), was disproportionate to the crime and therefore prohibited by the eighth amendment. The case was decided on its particular facts—facts which are clearly distinguishable from those in the present case.

N.C.G.S. § 14-7.6 provides that:

> *Sentencing of habitual felons.* When an habitual felon as defined in this Article shall commit any felony under the laws of the State of North Carolina, he must, upon conviction or plea of guilty under indictment as herein provided (except where the death penalty or a sentence of life imprisonment is imposed) be sentenced as a Class C felon. Notwithstanding any other provision of law, a person sentenced under this Article shall serve a term of not less than seven years in prison, excluding gain time granted under G.S. 148-13. A person sentenced under this Article shall receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

N.C.G.S. § 14-1.1(a)(3) provides that a "Class C felony shall be punishable by imprisonment up to 50 years, or by life imprisonment, or a fine, or both imprisonment and fine." N.C.G.S. § 15A-1340.1 *et seq.*, our Fair Sentencing Act, applies to the sentencing

of persons convicted of Class C felonies. Under that Act, the presumptive term for a Class C felony is 15 years.

As noted earlier, legislation which is designed to identify habitual criminals and which authorizes enhanced punishment has withstood eighth amendment challenges. *See generally Rummell v. Estelle*, 445 U.S. 263, 63 L.Ed. 2d 382; *Spencer v. Texas*, 385 U.S. 554, 17 L.Ed. 2d 606. Furthermore, defendant appears to be seeking a proportionality review of his sentence under the Fair Sentencing Act and such a review is not available under that statute. While we are cognizant of eighth amendment limitations, we have said that "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E. 2d 436, --- (1983). Defendant here has failed to present any facts which would provide the necessary basis for concluding that his sentence is "so grossly disproportionate" as to violate the eighth amendment.

Thus, although defendant's challenge to the severity of his sentence is couched in terms of an eighth amendment proportionality analysis, we believe that the proper review involves a determination, under the Fair Sentencing Act, of whether there has been "a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness or injustice, or conduct which offends the public sense of fair play." *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 697 (1983). Indeed, we are confident that such a review provides fully adequate protections against alleged "disproportionate" punishments and necessarily involves focus on the considerations enunciated in *Solem v. Helms*.

Under the facts of this case, which necessarily include defendant's status as an habitual offender—a Class C felon—we uphold the life sentence imposed upon his convictions of felonious breaking or entering and felonious larceny. These facts include defendant's propensity to steal and unlawfully possess firearms, his threat against law enforcement officers, and his attempted escape during his trial. Our holding, of course, assumes that the evidence supports the trial judge's findings in aggravation and mitigation and that these findings are statutorily permissible. In

this regard, as noted below, our review discloses a technical error in one aggravating factor which we consider to be nonprejudicial.

[5] In addition to the above constitutional challenges, defendant contends that the habitual felon indictment does not comply with N.C.G.S. § 14-7.3 in that the indictment for breaking or entering and larceny fails to refer to his alleged status as an habitual offender at the time of the commission of the crime. This issue has been resolved against the defendant in *State v. Allen*, 292 N.C. at 433-34, 233 S.E. 2d at 587 wherein we stated:

> Properly construed this act clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted *in a separate bill* as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. (Emphasis added.)

See State v. Keyes, 56 N.C. App. 75, 286 S.E. 2d 861 (1982); N.C. G.S. § 14-7.3.

Defendant also argues that the jury should have been re-empaneled prior to hearing the habitual felon case. The Court of Appeals addressed this issue in *State v. Keyes* and held that failure to re-empanel the jury, if error, was technical error and therefore not prejudicial. We hold that when, as contemplated by N.C.G.S. § 14-7.5, the same jury considers both the principal felony and the question of defendant's recidivism, it is not necessary to re-empanel a jury once that jury has been properly empaneled pursuant to N.C.G.S. § 15A-1216.

In *State v. Allen*, 292 N.C. at 435, 233 S.E. 2d at 588, we stated that "[b]eing an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." We therefore view a defendant's "trial" on the issue of whether defendant should be sentenced as an habitual offender analogous to the separate sentencing hearing conducted under N.C.G.S. § 15A-2000 to determine punishment for first-degree murder. That statute does not require a jury to be re-empaneled prior to hearing evidence in the sentence determination phase of the trial.

[6] Finally, defendant contends that the trial court erred in failing to grant his motion to dismiss the habitual felon prosecution and in failing to grant his motions to set aside the verdict and for a new trial. This assignment of error is without merit. The evidence clearly established that since 6 July 1967 defendant had been convicted of or pled guilty to three felony offenses, none of which were committed prior to defendant's eighteenth birthday. N.C.G.S. § 14-7.1.

In reviewing the record in this case, we note that the trial judge found as an additional aggravating factor the following:

> 16. Additional written findings of factors in aggravation.
>
> The Court finds from the expert testimony of Dr. Russell Brown, Staff Forensic Psychiatrist, Dorothea Dix Hospital, that the defendant has what is referred to in the medical literature [as] anti-social personality disorder, also known as a sociopathic personality; and the Court incorporates by reference not only the doctor's testimony on the witness stand, all of which the Court finds to be true by at aleast [sic] a proponderence [sic] of the evidence, but also Section 301.70 as it appears in the standard handbook for psychiatric usage, a copy of which is in the court file as well as furnished to counsel for each side. From this the Court finds from the evidence in this case, taking it in its entirety, that the defendant is a menace to other human beings and their possessions as a direct result of his various social- [sic] and emotional problems as referred to above, and that his prognosis for change from the sociopathic personality is not good. That as a sociopath he will continue to commit crimes whenever the opportunity to do so presents itself. (For a similar result on a different set of facts/legal approach see *U.S. v. Berrigan*, 437 F 2d 750 (4th Cir. 1971).)
>
> A. M. Brannon /s

That the first sentence above is a factor in aggravation that the Defendant, Ricky Clyde Todd, is a sociopathic personality.

That the rest of the above paragraph is an explanation of the finding of a sociopathic personality and does not constitute an additional finding of aggravating [sic].

Although not raised as an issue, pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure, we address the propriety of the finding in aggravation that defendant has an antisocial personality disorder referred to as a sociopathic personality, and hold that such a finding, standing alone, is improper. However, as the trial judge clearly enunciated the basis upon which this finding was made and we find that basis to be fully in accord with our holdings in previous cases, the error was in terminology rather than in reasoning.

A mental or emotional disorder, including a sociopathic personality, may not be considered as an aggravating factor. Where manifestations of that disorder involve, as the trial judge here observed, little hope of rehabilitation coupled with serious antisocial and criminal behavior, a finding that defendant is "a menace to other human beings and their possessions" is entirely proper. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689; *see also State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437 (1984); *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983).

No error.

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

STATE OF NORTH CAROLINA v. RAYMOND CHARLES CREASON

No. 386PA84

(Filed 27 February 1985)

1. **Constitutional Law § 67; Searches and Seizures § 47 — confidential informant — disclosure of identity not required — no constitutional issue**

Defendant's motion to require the State to disclose the name of a confidential informant was properly denied where defendant did not present or argue the motion to the trial court on constitutional grounds, and defendant was not entitled to disclosure under G.S. 15A-978 because the evidence sought to be suppressed was seized pursuant to a search warrant and because there

was corroboration of the existence of the informant independent of the testimony in question.

2. **Narcotics § 5— guilty of possession of LSD with intent to sell or deliver—disjunctive phrasing not improper**

A verdict of guilty of possession of LSD with intent to sell or deliver did not lack unanimity in that the jury was presented with two alternative acts because the intent of the legislature was to prevent the transfer of controlled substances from one person to another; *intent* is the gravamen of the offense, and "sell" and "deliver" are synonymous. G.S. 90-95(a)(1).

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

ON the State of North Carolina's petition for discretionary review and the defendant's petition for writ of certiorari of the decision of the Court of Appeals reported at 68 N.C. App. 599, 315 S.E. 2d 540 (1984). Judgments entered by *Long, J.*, at the 29 March 1983 session of Superior Court, ROWAN County. Heard in the Supreme Court 11 December 1984.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, for the state.

Adam Stein, Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant.

MARTIN, Justice.

Upon review, in our discretion, of the decision of the Court of Appeals, we affirm in part and reverse in part, for the reasons hereinafter set forth.

The evidence presented by the state on voir dire tended to show the following: On 28 October 1982 John Lollis, a police officer with the city of Lexington, called Detective Mark Shue of the Rowan County Sheriff's Department and told him that he had received information that the defendant, Raymond Charles Creason, had sold LSD and marijuana at Creason's residence within the preceding week. Lollis reported that the informant, who had said that he had bought drugs from defendant during the previous week at defendant's residence, was willing to assist in an investigation. Detective Keith Owen testified that he had used the informant on numerous occasions in the past and that the informant had given information leading to about four arrests and con-

victions. The informant had never provided any information that had given the officers reason to doubt his truthfulness. Detective Shue asked Officer Lollis to bring the informant to meet him.

At the meeting place the informant told Detective Shue how he knew that defendant was selling drugs. Detective Shue asked the informant to make a controlled buy of LSD at the defendant's residence. Before proceeding further the informant and his car were searched by Shue, Lollis, and Owen and no controlled substances were found. Detective Shue instructed the informant about the laws of entrapment, gave him some marked money, and told him to make a drug purchase from Mr. Creason. The informant, followed by the police officers, then drove to the defendant's residence, got out of his car, and went into defendant's house where he stayed for about three or four minutes. The informant then left the house, got back in his automobile, and drove back to the place where he had originally met with the three officers. He and his vehicle were searched and several tablets of LSD were found on his person. The informant told the three officers that he had bought the LSD from Creason. The informant also said that he had seen other drugs in Creason's residence. He said that he had observed LSD purple microdots and several bags of marijuana.

Based on this information, Detective Shue prepared his affidavit and obtained a search warrant for defendant's residence. He then went there to conduct the search. Detective Shue knocked on the door and defendant asked what he wanted. Detective Shue identified himself and said that he had a search warrant. Defendant attempted to slam the door, but Detective Shue proceeded into the house to conduct the search. Detective Shue testified that the first thing he and the four or five officers accompanying him did after entering the residence was: "We advised Mr. Creason of his constitutional rights. We handcuffed him; read him a copy of the search warrant and set him in a chair." The officers then proceeded to search the house. In the house at various locations were found three plastic bags containing green vegetable matter, later identified to be marijuana, a plastic vial containing forty-four purple pills, two purple half pills, and one red pill, all of which were later identified as LSD; a set of scales; and a note pad on which were written names, telephone numbers, references to bags and half bags, and computations. Shue testified

that during the search, after two bags of marijuana were found, the defendant said, "that's all the drugs." A ten dollar bill and a five dollar bill which had the same serial numbers as the bills given to the informant were found in defendant's wallet. Later at the sheriff's department defendant said that he did not know the name of the person who had set him up, but he knew who the person was. Except for the reference to the money, substantially the same evidence was introduced before the jury.

Defendant's sole witness, who testified only during the voir dire, said that he and defendant were at a package store in Midland between 6:00 and 9:20 or 9:25 p.m. on October 28.

Two questions are presented for our review. We affirm the Court of Appeals on one and reverse on the other.

I.

[1] Defendant argues that his constitutional and statutory rights were violated by the denial of his motion to require the state to disclose the name of the confidential informant.

We take note that defendant did not present this motion to the trial court on constitutional grounds, the motion was not argued on constitutional grounds, and the trial court did not determine it on constitutional grounds. A careful reading of the record and transcript leads us to this conclusion.

The written motion states:

> Pursuant to N.C.G.S. 15A-978, defendant challenges the validity of the search warrant for his house and person issued on or about October 28, 1982, and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause of its issuance. Defendant, moreover, challenges the existence of the alleged confidential informant and requests the Court to issue an order compelling the district attorney to reveal the identity of said informant.
>
> The grounds for this motion are that defendant was not present at the house on Highway 29 at the time when the alleged confidential informant supposedly met with defendant. The information that the alleged confidential informant purportedly gave the Rowan County Sheriff's Department

deputies, moreover, is not consistent with what the deputies allegedly found at defendant's residence and is incredible.

Supporting affidavits are attached hereto and incorporated herein.

This the 7th day of February, 1983.

SHERRILL & SHERRILL
By: s/ Susan R. Sherrill
Attorney for Defendant

It is clear that the motion does not allege the violation of constitutional rights, but expressly relies upon N.C.G.S. 15A-978.

In the oral presentation of the motion to the trial judge, defendant did not argue or even mention fourth amendment rights or the constitution. He did state that the case of *Franks v. Delaware*, 438 U.S. 154, 57 L.Ed. 2d 667 (1978), entitled him to an evidentiary hearing on the motion. He received a full plenary hearing on the motion. Defendant's argument in making the motion was that the informant, if he existed at all, was more than a tipster and was a material witness in the case as a participant in the alleged crimes. For this reason, defendant says he is entitled to disclosure of the identity of the informant.

Some forty pages of the transcript recite the evidence offered in support of defendant's motion for disclosure of the informant's identity. Thereafter appears the argument of counsel on the motion. Defendant does not make an argument based on constitutional grounds and, more particularly, on fourth amendment principles. Likewise, the state did not make an argument based upon constitutional principles.

In denying the motion, the trial court stated:

THE COURT: After full evidentiary hearing, the Court hereby denies the Defendant's motion to suppress and amended motion to suppress the evidence obtained by the search warrant. The Court likewise denies the motion of the Defendant challenging the truthfulness of the affidavit alleging—showing probable cause for issuance of the search warrant. In doing so, the Court holds the affidavit provided reasonable cause to believe the proposed search for evidence would reveal the presence of the described objects upon the

> described premises and would aid in the apprehension or conviction of the Defendant. The Court further finds that the information provided in the affidavit for the search warrant was truthful and was furnished in good faith by the affiant. Motion is denied.

From the foregoing it is clear that no constitutional issues were presented, argued, or decided in the trial court. The Court of Appeals properly resolved the issue on statutory grounds. This Court is not required to pass upon a constitutional issue unless it affirmatively appears that the issue was raised and determined in the trial court. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); *City of Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955); *Management, Inc. v. Development Co.*, 46 N.C. App. 707, 266 S.E. 2d 368, *disc. rev. denied and appeal dismissed*, 301 N.C. 93 (1980). This is in accord with decisions of the United States Supreme Court. *E.g., Irvine v. California*, 347 U.S. 128, 98 L.Ed. 561 (1954); *Edelman v. California*, 344 U.S. 357, 97 L.Ed. 387 (1953). Defendant raises this issue for the first time on appeal. Because he failed to ask the trial court to pass upon the constitutional issue, we decline to do so now. *Stone v. Lynch*, 312 N.C. 739, 325 S.E. 2d 230 (1985); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574.

Further, there are statutory grounds upon which to determine the question of disclosure. *Cf.* Annot., 24 A.L.R. 4th 1266, § 8 (1983). Constitutional questions will not be passed upon if other grounds for determination exist. *State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129. Here defendant also relies upon N.C.G.S. 15A-978 to support his motion for disclosure. The pertinent parts of the statute are:

> (b) In any proceeding on a motion to suppress evidence pursuant to this section in which the truthfulness of the testimony presented to establish probable cause is contested and the testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the defendant is entitled to be informed of the informant's identity unless:

(1) The evidence sought to be suppressed was seized by authority of a search warrant or incident to an arrest with warrant; or

(2) There is corroboration of the informant's existence independent of the testimony in question.

The provisions of subdivisions (b)(1) and (b)(2) do not apply to situations in which disclosure of an informant's identity is required by controlling constitutional decisions.

N.C. Gen. Stat. § 15A-978(b) (1983).

Although subdivisions (b)(1) and (2) do not apply where disclosure is required by "controlling constitutional decisions," as we have previously noted, no constitutional issues are properly before this Court. By the express terms of the statute, defendant is not entitled to disclosure of the identity of the informant. The evidence was seized pursuant to a search warrant; therefore defendant is not entitled to this disclosure. N.C. Gen. Stat. § 15A-978(b)(1). Additionally, there was corroboration of the existence of the informant independent of the testimony in question. N.C. Gen. Stat. § 15A-978(b)(2).

The Court of Appeals correctly affirmed the denial of defendant's motion for disclosure.

II.

[2] We turn now to the state's argument that the Court of Appeals erred by vacating defendant's conviction of possession of LSD with intent to sell or deliver. We find merit in the argument by the state and, therefore, reverse the decision of the Court of Appeals on this issue.[1]

Defendant was charged and convicted of possession "with intent to sell or deliver a controlled substance, to wit" LSD. The

1. This issue may affect a host of our criminal statutes. The proposed revision of chapter 14 of the General Statutes of North Carolina could resolve many of these questions. A few of the statutes using the conjunction "or" are: N.C.G.S. 14-8 (rebellion against the state), -9 (conspiracy to rebel), -10 (secret organization), -27.2 (rape), -27.4 (first-degree sexual offense), -28 (malicious castration), -30.1 (malicious throwing of acid), -34 (assault by pointing gun), -39 (kidnapping), -45 (miscarriage), -49 (use of explosives), -54 (breaking or entering), -67 (attempting to burn buildings), -120 (forgery), -195 (profanity on passenger train), -190.9 (indecent exposure), -283 (exploding bombs).

charge was based upon N.C.G.S. 90-95(a)(1), which provides that it is unlawful "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance."

The Court of Appeals held that "two distinct crimes in the alternative were charged—possessing LSD with intent to sell it, or possessing LSD with intent to deliver it . . . ." 68 N.C. App. at 603, 315 S.E. 2d at 544. In so doing, the Court of Appeals failed to recognize the intent of the legislature in adopting the statute. The intent of the legislature was twofold: (1) to prevent the manufacture of controlled substances, and (2) to prevent the transfer of controlled substances from one person to another. While the *sale* of narcotics and the *delivery* of narcotics are separate offenses, *State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976), the possession of narcotics with the intent to "sell or deliver" is one offense. On this charge the state is required to prove two elements: (1) defendant's possession of the drug, and (2) defendant's intention to "sell or deliver" the drug.

The evil sought to be prevented by the legislature is the possession of drugs with the intent to place them into commerce by transferring them from one to another by either the sale or delivery of the drug. A sale is a *transfer* of property for a specified price payable in money. *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381 (1953). In the context of controlled substance statutes, "deliver" means the actual, constructive, or attempted *transfer* from one person to another of a controlled substance. N.C. Gen. Stat. § 90-87(7) (1981); *State v. Medina*, 87 N.M. 394, 395, 534 P. 2d 486, 487 (1975). It is the *intent* of the defendant that is the gravamen of the offense. The intent of the legislature was that possession of narcotics with the intent to transfer them to another person is a more serious offense than possession for one's own use. Whether the transfer was to be by sale or delivery, or both, is immaterial. As long as the jury finds that the possession was with the intent to "sell or deliver," the crime is proved.

This conclusion is also supported by the grammatical construction of the statute. It is to be noted that the words "sell" and "deliver" are not separated by a comma but are coupled together by the conjunction "or." By omitting the comma, the legislature manifested its intent that "sell or deliver" is a phrase

modifying the required intent. *See* M. Freeman, *The Grammatical Lawyer* 91 (1979); *see also* Webster's Third New International Dictionary 1585 (1971). It is thus apparent that the legislature intended the crime to be complete if one possesses the narcotic with intent to transfer it, whether by sale or delivery.

Our analysis is buttressed by *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129. In *Jones* defendant challenged an indictment as being duplicitous which alleged that he did "unlawfully and wilfully build or install a septic tank" without first obtaining a permit. The Court held that the terms "build" and "install" were synonymous and that the gist of the offense was not in the manner in which the tank was completed but in defendant's failure to obtain the permit. Likewise, here the only difference between "sell" and "deliver" is that money changes hands in a sale. Within the intent of the legislature, the terms are synonymous, the gist of the offense being possession with the intent to *transfer* the contraband.

> [I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. *See State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943). Thus, G.S. 15-153 provides that an indictment shall not be quashed "by reason of any informality or refinement" if it accurately expresses the criminal charge in "plain, intelligible, and explicit" language sufficient to permit the court to render judgment upon conviction.

State v. Sturdivant, 304 N.C. 293, 311, 283 S.E. 2d 719, 731 (1981).

Defendant relies upon *State v. Albarty*, 238 N.C. 130, 76 S.E. 2d 381, which we do not find to be persuasive. The Court held that Albarty was charged with selling lottery tickets or bartering lottery tickets and that this was a fatal defect. Albarty was not charged with possession of lottery tickets with the *intent* to sell or barter. The Court held that sale and barter were not synonymous for the purpose of the two substantive offenses: sale of lottery tickets and barter of lottery tickets. Here defendant is faced with only *one* offense: possession of LSD with intent to sell or

deliver. The indictment gave defendant proper notice of the crime charged.

Defendant's argument, that the use of the disjunctive verdict form resulted in a lack of unanimity in the jury verdict, was reconciled against defendant in *Jones v. All American Life Insurance Company*, 312 N.C. 725, 325 S.E. 2d 237 (1985). *Jones* involved the application of the common law "slayer" doctrine as a defense to an action on a life insurance policy. The evidence indicated the plaintiff "killed or procured the killing" of the insured. There plaintiff argued that the submission of the disjunctive issue left open the possibility that less than all the jurors could agree on whether plaintiff herself killed the insured or had him killed by another person. We held that plaintiff's participation in the death of the insured by either of the two alternatives bars her from recovering the proceeds of the policy. It is only necessary that the jury unanimously agree that she participated in causing his death. "[S]o long as all twelve jurors find that she participated in one way or the other the requirement of unanimity is met although six may have found that plaintiff 'killed' Hilliard and six may have found that she 'procured the killing.' " *Id.* at 738, 325 S.E. 2d at 244.

So, here, as long as all twelve jurors found that defendant possessed the LSD with intent to transfer it to another, the requirement of unanimity is met, although six jurors may have found that defendant intended to "sell" the LSD and six jurors may have found that defendant intended to "deliver" the LSD. To hold that defendant did not violate the statute because six jurors could have found that he intended to sell the LSD and the other six jurors could have found that he intended to deliver it would be most bizarre. Justice would not be favored by such results.

Defendant's argument that the state must prove the specific act committed by the defendant is not applicable vis-a-vis "sell or deliver." The specific act that the state must prove is the intent to transfer the LSD to another by either sale or delivery. The form of the verdict did not afford the jury with two alternative illegal acts, only one, namely, possession of LSD with the requisite intent.

Neither the form of the indictment nor the verdict was erroneous. We accordingly reverse the Court of Appeals on this issue.

Affirmed in part; reversed in part.

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

STATE OF NORTH CAROLINA v. ALICE A. GALLAGHER

No. 496A84

(Filed 27 February 1985)

1. **Constitutional Law § 51— pre-indictment delay—no denial of speedy trial or due process**

Defendant's Sixth Amendment right to a speedy trial was not violated by a five-year delay between a killing and her indictment for murder since the Sixth Amendment speedy trial provision has no application until the defendant in some way becomes an "accused," and the period of delay complained of by defendant was prior to her having been "accused" by arrest or formal charges. Further, defendant's right to due process was not violated by the delay where defendant made no showing that the delay actually prejudiced the conduct of her defense or that it was engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over her.

2. **Criminal Law § 15.1— pretrial publicity—denial of change of venue**

The trial court properly denied defendant's motion for a change of venue of her trial for murder and conspiracy to murder based on pretrial publicity where newspaper articles offered in support of the motion were factual and non-inflammatory.

3. **Criminal Law §§ 80.1, 89.2— telephone bills—admission for corroboration—authentication not necessary**

Copies of telephone bills were admissible for the purpose of corroborating a witness's testimony that he made telephone calls from his father's number to other numbers at particular times without testimony concerning the accuracy of the copies of the bills by the owner of the residence to which the original bills were sent.

4. **Homicide § 18.1— ill will between defendant and victim—competency to show premeditation, deliberation and intent**

In a prosecution of defendant for the murder of her husband, testimony by a witness that defendant made statements a few months before her husband's death that she hated her husband and wished he was dead was competent to show premeditation, deliberation, motive and intent.

5. Criminal Law § 65; Homicide § 15— defendant's failure to grieve at husband's funeral—admissibility of opinion

In a prosecution of defendant for murder of her husband and conspiracy to murder her husband, a witness was properly permitted to state his opinion that defendant did not appear to be grieving at the funeral of her husband.

6. Criminal Law § 89.9— prior statement witness believed to be untrue—admissibility for impeachment

Testimony by defendant that she had made a prior statement under oath in an affidavit which she believed to be untrue was admissible to impeach her and cast doubt upon her credibility even if the prior statement under oath was in fact correct.

7. Criminal Law § 89.2— cross-examination of defendant—use of insurance proceeds—competency for corroboration

Cross-examination of defendant about her use of life insurance proceeds from her husband's death to purchase a home was competent to corroborate the testimony of a State's witness that he and defendant planned to murder defendant's husband in part from a desire to obtain insurance proceeds to purchase a house in which the two of them would live.

8. Criminal Law § 86.5— acts of misconduct—admission not prejudicial error

Even if cross-examination of defendant about men she had lived with but not been married to after her husband was killed was improper for impeachment purposes, such error was not prejudicial to defendant where there was no reasonable possibility that the jury's verdict was influenced thereby.

9. Homicide § 2— indictment for murder—conviction of accessory before the fact

Defendant could be convicted as an accessory before the fact to murder on an indictment charging murder where the offense occurred on 1 October 1978, since under G.S. 14-5.2 defendant's case was controlled by the laws in effect at the time the offense was committed, former G.S. 14-5.1 did not apply because it had been repealed prior to defendant's indictment, and prior to 1 October 1979 the law of this state was that defendant could be tried as an accessory before the fact on an indictment charging the principal felony.

10. Conspiracy § 3; Criminal Law § 10— conviction for conspiracy and accessory before the fact

Defendant could properly be convicted and sentenced for both conspiracy to commit murder and accessory before the fact to murder since each offense contains an essential element not a part of the other.

11. Conspiracy § 6; Criminal Law § 10.2— conspiracy to murder—accessory before the fact—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of conspiracy to murder her husband and accessory before the fact to the murder of her husband.

Justice VAUGHN took no part in the consideration or decision of this case.

State v. Gallagher

APPEAL by the defendant from judgments entered by *Judge Charles B. Winberry* at the March 27, 1984 Session of Superior Court, CRAVEN County.

The defendant was charged in separate bills of indictment with murder and conspiracy to commit murder. She entered a plea of not guilty to each charge. The jury found her guilty as an accessory before the fact to murder and of conspiracy to commit murder. By judgments entered March 30, 1984, the defendant was sentenced to life imprisonment for her conviction as an accessory before the fact to murder and to a ten year term of imprisonment for her conviction for conspiracy to commit murder.

The defendant appealed her conviction as an accessory before the fact to murder and the resulting life sentence to the Supreme Court as a matter of right. Her motion to bypass the Court of Appeals on her appeal from her conviction and ten year prison sentence for conspiracy to commit murder was allowed on August 31, 1984. Heard in the Supreme Court on December 13, 1984.

Rufus L. Edmisten, Attorney General, by William N. Farrell, Jr., Assistant Attorney General, for the State.

John E. Nobles, Jr. for the defendant appellant.

MITCHELL, Justice.

The defendant has brought forward numerous assignments of error on appeal. She contends that the trial court admitted certain evidence improperly. She also contends that she was denied the constitutional right to a speedy trial, and that the trial court's denial of her motion for a change of venue due to adverse pretrial publicity denied her a fair trial. She further contends that the trial court erred by permitting the jury to render a verdict finding her guilty as an accessory before the fact to murder based upon the indictment for murder and by entering judgments against her for both conspiracy and being an accessory before the fact. An extensive review of the evidence at trial is unnecessary in resolving these issues.

The evidence for the State tended to show among other things that the defendant, Alice A. Gallagher, married Thomas S. Gallagher in 1973. During the marriage both parties began having extramarital activities with various other people on a regular

basis. The defendant met Samuel Lancaster in 1977. During the times when Thomas Gallagher, a member of the United States Marine Corps, was on assignment overseas, Lancaster lived with the defendant. Sometime in 1978, the defendant began to make statements to Lancaster that she wished her husband was dead. She asked if Lancaster knew a "hit man." In the months that followed, she talked more and more about her desire for her husband to have an "accident" and not return from overseas. The defendant ultimately told Lancaster of her plan as to how they would kill her husband. She proposed that they hit Thomas Gallagher in the head and place him in a bathtub to drown. Her plan was to make it appear that he had accidentally slipped, knocked himself unconscious and drowned.

Approximately six months prior to Thomas Gallagher's death on October 1, 1978, an additional $100,000 of life insurance was placed on his life with the defendant as beneficiary. The defendant told Lancaster in detail of her plans for using the insurance proceeds after they killed her husband. On one occasion, Lancaster went with her to look at a home she wished to purchase with the insurance proceeds, and she stated to him that they would have to go ahead and kill her husband. The defendant and Lancaster discussed in detail the alibis they would establish for the time of the murder.

Shortly before the actual killing of Thomas Gallagher on October 1, 1978, Lancaster decided that it would be better if the defendant and her two children were not present when the killing occurred. Lancaster was alone with Thomas Gallagher when he struck Gallagher on the head with a frying pan. The frying pan shattered over Thomas Gallagher's head but did not render him unconscious when Lancaster struck him. The two men struggled, and Lancaster pulled a pistol from his belt and shot Gallagher causing his death.

The defendant offered evidence at trial. Her testimony was in the nature of alibi evidence.

Other evidence at trial is discussed hereinafter where necessary to a discussion of the assignments of error.

[1] The defendant first assigns as error the trial court's denial of her motion to dismiss on the ground that she had been denied the

right to a speedy trial guaranteed her by the Sixth Amendment to the Constitution of the United States. She contends that the delay of five years between the killing on October 1, 1978 and her indictment on October 17, 1983 deprived her of this constitutional right. We do not agree.

The speedy trial provision of the Sixth Amendment "is activated only when a criminal prosecution has begun and extends only to those persons who have been 'accused' in the course of that prosecution." *United States v. Marion*, 404 U.S. 307, 313 (1971). "[T]he Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an 'accused' . . . ." *Id.* As the period of delay complained of by the defendant was prior to her having been "accused" by arrest or formal charges, the delay could not have violated the speedy trial guarantee of the Sixth Amendment. *Id.*

Further, although the defendant has not raised the issue, we perceive no denial of due process by the delay between the killing of the victim and the indictment of the defendant. *See generally United States v. Lovasco*, 431 U.S. 783, *reh. denied*, 434 U.S. 881 (1977); *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). The defendant made no showing that the delay actually prejudiced the conduct of her defense or that it was engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over her. *See State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). To the contrary, the record indicates that Samuel Lancaster, the primary witness against the defendant and the person who actually killed the deceased, made no statement to the police until October 1983. His statement provided evidence required for the indictments against him and the defendant, and she was indicted less than a month after it was received. Therefore, the defendant would have been entitled to no relief on due process grounds under this assignment of error, even had she sought such relief.

[2] The defendant next contends that the trial court erred by denying her pretrial motion for change of venue. She argues that adverse pretrial publicity prevented her receiving a fair trial in Craven County. The defendant attached several newspaper accounts of the killing and the investigation to her pretrial motion. These articles were made a part of the record on appeal. No other evidence was offered in support of the motion.

A motion for change of venue is addressed to the sound discretion of the trial court and its ruling will not be overturned on appeal absent an abuse of discretion. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). Our review of the articles in question indicates that, as in *Oliver*, the articles were factual and non-inflammatory. Accordingly, they do not provide a basis for holding that the trial court abused its discretion in denying the defendant's pretrial motion for change of venue. *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983).

The defendant next assigns as error the trial court's admission into evidence of copies of two telephone bills sent to the residence of the father of the witness Samuel Lancaster. She argues that the copies were not verified by the father and that the father was deceased. The defendant argues that, as a result, a proper foundation had not been established for the admission into evidence of the copies.

[3] Samuel Lancaster testified without objection that he made certain telephone calls from his father's residence to certain other telephone numbers. The State specifically tendered the copies of the telephone bills only for the limited purpose of corroborating this testimony by Lancaster. We perceive no error in the trial court's action in permitting the copies of the telephone bills to be introduced for the purpose of corroborating Lancaster's testimony that he made the telephone calls from his father's number to certain other numbers at particular times. The absence of testimony concerning the accuracy of the copies of the bills by the owner of the residence to which the original bills were sent, would, if anything, tend to go to the weight and credibility to be given the copies and not to their admissibility for purposes of corroborating the independent recollection of the witness. This assignment is overruled.

[4] The defendant next assigns as error the action of the trial court in admitting certain testimony of Patricia Bass. Bass testified in pertinent part that she had conversations with the defendant during the spring of 1978 during which the defendant made statements to the effect that: "She did not like her husband, she hated her husband, she said she wished he was dead." These statements by the defendant a few months before her husband's death were evidence of ill will between the defendant and the vic-

tim, and "this Court has long allowed evidence of ill will between the defendant and the victim as tending to show premeditation and deliberation, motive and intent." *State v. Alston*, 307 N.C. 321, 328, 298 S.E. 2d 631, 637 (1983). The trial court did not err in admitting this testimony by the witness Bass.

[5] The defendant also contends that the trial court erred in admitting certain testimony of the defendant's witness Charles Willis during cross examination by the prosecutor. The questions and answers leading to the testimony complained of were as follows:

Q. Did you have an occasion to see Alice Gallagher at that funeral?

A. Yes, I did.

Q. Did you make any observations or notice anything about her appearance or the way she acted?

A. David, in fairness, my observations at this stage of the game might be biased and I wouldn't want to pass that, if you don't mind.

Q. Would it be safe to say that in your opinion Alice Gallagher did not act like the grieving widow?

MR. NOBLES: Objection, Your Honor.

THE COURT: Overruled.

Q. (Mr. McFadyen) I realize, sir, that you'd rather not say, but of course this is very important, that the jury understand all of the facts surrounding this case.

A. Looking at as I would have felt, I must admit that I was—just didn't seem like that everything was there, but there again, this is my personal opinion.

Assuming *arguendo* that this convoluted answer by the witness was comprehended by the jury as meaning that the defendant did not appear to be grieving at the funeral of her husband, we perceive no error in its admission into evidence. "The emotion displayed by a person on a given occasion is a proper subject for opinion testimony by a non-expert witness." *State v. Looney*, 294 N.C. 1, 14, 240 S.E. 2d 612, 619 (1978). *See generally State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970).

[6] The defendant also assigns as error the action of the trial court in permitting the prosecutor to question her about a prior sworn affidavit she had given to an insurance company stating that her marriage to the deceased had been "without interruption." The defendant argues that she was never divorced from her husband and that the statement in the affidavit was, therefore, true. She argues that it was error for the trial court to allow the prosecutor to imply by his questioning that the statement in the affidavit was untrue.

During the cross examination of the defendant by the prosecutor, the facts surrounding the signing of the affidavit and the full facts of the status of the defendant's marriage to the deceased were explored in detail. The defendant was given the opportunity to explain and did explain the status of her marriage at all pertinent times and the fact that she had never been divorced from the deceased. Therefore, the jury could not have been misled by this line of cross examination. More importantly, however, the defendant stated during cross examination that she had sworn to the affidavit but that portions of the affidavit stating that the marriage had been "without interruptions" and that she and the deceased had "continued to live as husband and wife until his death" were untrue. The testimony of the defendant that she had made a prior statement under oath which she believed to be untrue was admissible to impeach her and cast doubt upon her credibility, even if the prior statement under oath was in fact correct. *See generally* 1 Brandis on North Carolina Evidence, §§ 35, 46 (2d rev. ed. 1982).

[7] The defendant also assigns as error the action of the trial court in allowing the prosecutor to question her about her use of the life insurance proceeds she received as a result of the death of her husband. The defendant's answers indicated that she had used a part of the life insurance proceeds to purchase a home. This tended to corroborate the testimony of Samuel Lancaster to the effect that he and the defendant planned to murder the deceased in part from a desire to obtain the insurance proceeds to purchase a house in which the two of them would live. This assignment of error is without merit and is overruled.

[8] The defendant also contends that the trial court erred in allowing the prosecutor to cross examine her concerning men she

had lived with but not been married to after her husband was killed. As a general rule, a defendant who takes the stand and testifies may be cross examined for purposes of impeachment concerning any acts of misconduct so long as the questions by the prosecutor are asked in good faith. *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). The scope of cross examination of a defendant in a criminal action is largely within the discretion of the trial court. *State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979). The trial court's decision as to whether cross examination "transcends propriety" will not be disturbed absent a showing of abuse of discretion, *Id.*, or a showing that the jury verdict was improperly influenced thereby. *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970). Even if it is assumed *arguendo* that admitting the defendant's answers to these questions on cross examination was error, we perceive neither an abuse of discretion nor a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. 15A-1443(a). The defendant's contentions in this regard are without merit.

[9] The defendant next assigns as error the action of the trial court in permitting the jury to return a verdict of guilty of accessory before the fact to murder. She contends that the indictment for murder will not support a verdict for accessory before the fact to murder. In the context of this case, the assignment is without merit.

Prior to October 1, 1979, the clear law of this State was that a defendant could be tried and convicted as an accessory before the fact on an indictment charging the principal felony. *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978). Effective October 1, 1979, the General Assembly enacted N.C.G.S. 14-5.1 which provided that one indicted for a principal felony could not be convicted on that indictment as an accessory before the fact. 1979 N.C. Sess. Laws ch. 811; *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). The General Assembly later repealed N.C.G.S. 14-5.1 and enacted in its place N.C.G.S. 14-5.2 providing that: "All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony." 1981 N.C. Sess. Laws ch. 686; *State v. Woods*, 307 N.C. 213, 297 S.E. 2d

574 (1982). Although the elements of the crime of accessory before the fact remained separate and distinct from those of the principal felony, the legislature "abolished the difference in guilt and sentencing treatment" between a principal to the felony and an accessory before the fact to the same felony. *State v. Woods*, 307 N.C. at 218, 297 S.E. 2d at 577. *See State v. Cabey*, 307 N.C. 496, 299 S.E. 2d 194 (1983). In cases controlled by N.C.G.S. 14-5.2, an indictment charging the principal felony will support trial and conviction as an accessory before the fact.

The defendant contends nevertheless that she should have the advantage of the terms of former N.C.G.S. 14-5.1 which, if applied to her case, would render invalid her conviction as an accessory before the fact on an indictment charging her with murder. We do not agree. The statute the defendant seeks to rely upon has been repealed. In enacting N.C.G.S. 14-5.2 and repealing former N.C.G.S. 14-5.1, the General Assembly specifically provided that: "[N.C.G.S. 14-5.2] does not apply to any offense *committed before* [its effective date], and any such offense is punishable under the laws *in effect at the time* such offense was *committed.*" 1981 N.C. Sess. Laws ch. 686 (emphasis added). The effective date specified in the Act was July 1, 1981. *Id.* The offense in the present case was clearly "committed before the effective date of [N.C.G.S. 14-5.2]" and is not controlled by N.C.G.S. 14-5.1 which was repealed prior to the indictment of the defendant on the present charges. Instead, the defendant's case is controlled by "the laws in effect at the time [her] offense was committed." 1981 N.C. Sess. Laws ch. 686. As previously indicated, at the time the defendant's offenses were committed on and before October 1, 1978 she could be tried as an accessory before the fact on an indictment charging the principal felony of murder. *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978). Therefore, her conviction as an accessory before the fact to murder on an indictment charging murder in the present case was appropriate. This assignment is without merit.

[10] The defendant next contends the trial court erred by permitting the jury to return guilty verdicts for both conspiracy to commit murder and accessory before the fact to murder and by entering judgments on both verdicts. Although it is not entirely clear, it appears that the defendant argues that one of the offenses is a lesser included offense of the other and that a convic-

tion of both is improper for this reason. It is sufficient to note that each of these offenses contains an essential element not a part of the other. *See State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978); *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907 (1977). The defendant was properly convicted and sentenced for both offenses. *Id.*

[11] By her final assignment of error, the defendant contends that the trial court erred in failing to direct a verdict of not guilty on the charges against her and by failing to enter a verdict of not guilty without regard to the verdict returned by the jury. A motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. The test of the sufficiency of the evidence is whether substantial evidence has been introduced of each essential element of the offense charged and that the defendant committed the offense. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Upon a motion to dismiss for insufficiency of the evidence, the evidence must be considered in the light most favorable to the State with the State entitled to every reasonable inference to be drawn therefrom. When viewed in such light, the evidence in the present case was more than sufficient to warrant submitting the case to the jury for its consideration as to the defendant's guilt of the offenses charged. This assignment is without merit.

The defendant received a fair trial free from prejudical error.

No error.

Justice VAUGHN took no part in the consideration or decision of this case.

CENTURY COMMUNICATIONS, INC. v. THE HOUSING AUTHORITY OF THE CITY OF WILSON AND SITE, INC.

No. 368PA84

(Filed 27 February 1985)

Easements § 4.3; Eminent Domain § 2— easement for underground radio wires— sufficiency of lease provision—interference with easement—summary judgment improperly entered

A lease provision in which the lessors agreed not to interfere, by cultivation or otherwise, with wires of a radio ground system of plaintiff lessee's radio station radiating approximately 250 feet from the center of two radio towers on the leased property was so ambiguous that it could not be held as a matter of law that it did or did not create an easement in adjoining land owned by the lessors into which the radio wires extended. Furthermore, assuming that the lease provision did create an easement, material questions remained as to whether defendant Housing Authority's construction of buildings over portions of the radio wires extending into land defendant purchased from the lessors amounted to an interference with the wires within the meaning of the lease and, if so, whether this injured plaintiff. Therefore, the trial court erred in entering summary judgment in favor of plaintiff lessee on the issue of liability in an inverse condemnation action against defendant Housing Authority.

Justices MEYER and VAUGHN did not participate in the consideration or decision of this case.

ON appeal of the decision of the Court of Appeals filed 5 June 1984, reported per Rule 30(e) of the North Carolina Rules of Appellate Procedure, and the decision filed 1 May 1984, reported at 68 N.C. App. 293, 314 S.E. 2d 749 (1984), affirming order granting partial summary judgment to plaintiff, entered by *Winberry, J.*, on 29 September 1982, in Superior Court, WILSON County. The case was dismissed as to the defendant Site, Inc. on 27 May 1982 and it is no longer a party to this action. Heard in this Court 12 December 1984 pursuant to The Housing Authority of the City of Wilson's petition for discretionary review granted by this Court on 28 August 1984.

Kimzey, Smith, McMillan & Roten, by James M. Kimzey, for plaintiff appellee.

Manning, Fulton & Skinner, by Howard E. Manning, Jr. and Charles E. Nichols, Jr., for defendant appellant.

MARTIN, Justice.

Prior to 1962 D. W. Woodard and his wife, Romaine C. Woodard, owned a tract of land (hereinafter "Woodard tract") located outside the city of Wilson. On 1 October 1962 the Woodards leased a portion of this tract to the Wilson Radio Company, Inc. On 22 December 1971 two new leases were executed between the successors of the Woodards' interest and Wilson Radio Company. These leases pertained to two adjoining parcels of land within the Woodard tract upon which were located two radio towers and buildings containing radio transmission facilities. These leases were assigned to Century Communications, Inc. ("Century"), plaintiff herein, on 1 January 1976. The leases and assignments were duly recorded. Plaintiff uses the facilities located on the land which is the subject of these leases for the purpose of operating two radio stations.

In April 1980 defendant, The Housing Authority of the City of Wilson ("Housing Authority"), purchased from the Woodards' successors in interest that part of the Woodard tract not leased to Century. The Housing Authority then proceeded to build a housing project on the land it thus acquired.

The dispute in the instant case centers upon underground wires emanating from the two radio transmission towers which are located on that part of the Woodard tract leased to plaintiff. Some of these wires extend beyond the boundaries of the land leased by Century into the land purchased in 1980 by the Housing Authority. By virtue of the following paragraph in one of the aforementioned 1971 leases, plaintiff claims that by constructing buildings over the wires, defendant inversely condemned a property interest plaintiff held therein:

> 6. The Lessors agree not to interfere with,—either by cultivation or otherwise—, wires of the present Radio ground system of Station WVOT, radiating approximately 250 feet from the center of the two Radio Towers.

Plaintiff sued defendant for inverse condemnation of private property, and summary judgment "as to the issue of liability" was entered for plaintiff upon the trial court's finding that "there is no genuine issue to [sic] any material fact relating to the liability of the Housing Authority of the City of Wilson for the taking of

private property for public use without just compensation." Defendant appealed this order to the Court of Appeals, which ruled that the physical presence of buildings over the wires is per se a taking because plaintiff cannot now reach the wires under the buildings. Upon rehearing the Court of Appeals amended its initial opinion by adding that "the plaintiff should be allowed to prove any damage it may properly show which was caused by the placing of buildings over the wires. We affirm our previous opinion in all other respects."

The issue before this Court is whether partial summary judgment was properly entered for plaintiff. Summary judgment is appropriate only if the pleadings and other materials before the trial judge show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law. *E.g., Connor Co. v. Spanish Inns*, 294 N.C. 661, 242 S.E. 2d 785 (1978); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). We have determined that it was error for the trial court to have entered summary judgment, and we therefore reverse the decision of the Court of Appeals.

Plaintiff claims that paragraph six of the lease created an easement appurtenant for the benefit of Wilson Radio Company. The lessors also owned land adjoining the leased premises, and it is into this adjoining land that the radio wires extend. Defendant purchased this adjoining land in 1980. Plaintiff argues that the purported easement granted by the 1971 lease runs with the land, so that defendant, who purchased that part of the Woodard tract adjacent to the land leased by the radio station, is bound thereby. *See, e.g., Waldrop v. Brevard*, 233 N.C. 26, 62 S.E. 2d 512 (1950). When defendant constructed buildings over the radio wires, plaintiff argues, defendant in effect inversely condemned property rights plaintiff held by virtue of the grant of the easement.

In its answer defendant denies that paragraph six of the lease creates an easement. Upon examining this paragraph we find it so ambiguous that we are unable to hold as a matter of law that it does or does not create an easement. Generally, whether language in a written instrument creates an easement is to be determined by ascertaining the intention of the parties as gathered from the language of the instrument. *See Borders v. Yarbrough*, 237 N.C. 540, 75 S.E. 2d 541 (1953). However, if the

language is uncertain or ambiguous, the court may consider all the surrounding circumstances, including those existing when the document was drawn, those existing during the term of the instrument (if, as in the present lease, the instrument is limited in time), and the construction which the parties have placed on the language, so that the intention of the parties may be ascertained and given effect. *See Builders Supplies Co. v. Gainey*, 282 N.C. 261, 267, 192 S.E. 2d 449, 453 (1972) (intent of parties as disclosed by the conveyance, when read in the light of surrounding circumstances known to the parties, determines whether the conveyance is an easement or a profit a prendre); *Sergi v. Carew*, 18 N.J. Super. 307, 87 A. 2d 56 (1952) (factual surroundings as well as language of instrument taken into account in determining whether language created easement or estate in fee simple); *Dee v. King*, 77 Vt. 230, 238, 59 A. 839, 841-42 (1905) (language in deed which could have created either a personal covenant or an easement appurtenant "cannot be said to be unequivocal. We therefore look at the surrounding circumstances existing when the deed containing it was made, the situation of the parties, and the subject-matter of the instrument, and in the light thereof the clause should be construed according to the intent of the parties."); *Callan v. Hause*, 91 Minn. 270, 272, 97 N.W. 973, 974 (1904) ("The meaning of a reservation in a contract, when the language is indefinite, must be determined in every case by the particular facts—such as the character of the conveyance, the nature and situation of the property conveyed and of the property excepted, and the purpose of the exception."). *See generally* 25 Am. Jur. 2d *Easements* § 23 (1966 & Supp. 1984). As the Supreme Court of California stated:

> Although extrinsic evidence is not permitted in order to add to, detract from, or vary the terms of an integrated written agreement, extrinsic evidence is admissible in order to explain what those terms are. (*Masterson v. Sine* (1968) 68 A.C. 223, 226-227, 65 Cal. Rptr. 545, 436 P. 2d 561; *Nofziger v. Holman* (1964) 61 Cal. 2d 526, 528, 39 Cal. Rptr. 384, 393 P. 2d 696; see *Laux v. Freed, supra*, 53 Cal. 2d 512, 522, 527, 2 Cal. Rptr. 265, 348 P. 2d 873 (Traynor, J., concurring); Code Civ. Proc. §§ 1856, 1860; Civ. Code, § 1647; Rest., Contracts, §§ 230, coms. a, b, 235, cls. (a), (d), coms. a, f, 238, cl. (a), com. a, 242, com. a; 3 Corbin on Contracts (1960) §§ 535, 536, pp. 17-21, 27-30; 9 Wigmore, Evidence (3d ed. 1940) §§ 2461-2463,

2470 et seq.; Witkin, Cal. Evidence (2d ed. 1966) § 730, p. 675; Corbin, The Interpretation of Words and the Parol Evidence Rule (1965) 50 Cornell L.Q. 161, 164, 189-190; Farnsworth, "Meaning" in the Law of Contracts (1967) 76 Yale L.J. 939, 957-965; Holmes, The Theory of Legal Interpretation (1899) 12 Harv. L. Rev. 417.) Therefore, extrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible. (*Parsons v. Bristol Development Co.* (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P. 2d 839; *Nofziger v. Holman, supra; Coast Bank v. Minderhout* (1964) 61 Cal. 2d 311, 315, 38 Cal. Rptr. 505, 392 P. 2d 265; *Imbach v. Schultz* (1962) 58 Cal. 2d 858, 860, 27 Cal. Rptr. 160, 377 P. 2d 272; see Estate of Rule (1944) 25 Cal. 2d 1, 20-22, 152 P. 2d 1003, 155 A.L.R. 1319 (Traynor, J., dissenting).)

Continental Baking Co. v. Katz, 68 Cal. 2d 512, 521-22, 67 Cal. Rptr. 761, 767, 439 P. 2d 889, 895 (1968) (en banc). *Cf. Richard Paul, Inc. v. Union Improvement Co.*, 33 Del. Ch. 113, 91 A. 2d 49 (1952) (court looked to extrinsic evidence to determine scope of easement granted in a lease); *Burroughs v. Milligan*, 199 Md. 78, 85 A. 2d 775 (1952) (extrinsic evidence considered to determine scope of reservation of easement creating right-of-way). It is noteworthy that this Court has expressly approved the use of extrinsic evidence in cases where written instruments creating easements contain latent ambiguities with respect to the physical location of the easements. *E.g., Allen v. Duvall*, 311 N.C. 245, 316 S.E. 2d 267 (1984); *Oliver v. Ernul*, 277 N.C. 591, 178 S.E. 2d 393 (1971).

In the instant case the language of paragraph six is so uncertain and ambiguous that we are unable to say as a matter of law that it does or does not create an easement. Because it is not clear what rights, if any, this paragraph creates, it was error for the trial court to enter summary judgment "on the issue of liability" in favor of plaintiff. Before plaintiff can recover, it must show that the language of paragraph six does create an easement and that such easement is binding upon defendant. These are mixed

questions of fact and law to be determined by the jury from the evidence under appropriate instructions by the court.

Moreover, while it is undisputed that defendant did in fact construct buildings over the wires, and assuming arguendo that paragraph six creates an easement and that it is binding on defendant, we hold that there remain material issues of fact as to whether defendant's acts "interfere with . . . wires of the present Radio ground system of Station WVOT" as provided in paragraph six of the lease. One such issue concerns the scope of the purported easement. For example, while paragraph six states that the lessors will not interfere with the wires, the question arises whether the lessee has any right of access to the wires embedded in the lessors' property for maintenance or otherwise. Another factual question is what "interference" with the wires is precluded by the lease. It is not clear whether paragraph six prohibits defendant from interfering with the *functioning* of the wires in the ground system. The language of the paragraph is so ambiguous that whether the parties who drew up the 1971 leases intended paragraph six to preclude not only physical interference with the wires themselves but also interference with the functioning of the wires is a question of fact which we cannot resolve on the record before us. Assuming arguendo that the parties to the 1971 leases did intend paragraph six to preclude interference with the wires' functioning, the record also reveals a material issue as to whether defendant's buildings in fact have impaired the functioning of the wires.

Generally, the owner of a servient estate can use his land in any way, as long as it does not interfere with an easement (and other lawful restrictions) to which he is bound. *E.g., Waters v. Phosphate Corp.*, 310 N.C. 438, 312 S.E. 2d 428 (1984); *Pasadena v. California-Michigan Etc. Co.*, 17 Cal. 2d 576, 110 P. 2d 983 (1941). Whether a particular use of the land by the servient owner interferes with an easement is a question of fact for the jury. *Pasadena v. California-Michigan Etc. Co.*, 17 Cal. 2d 576, 110 P. 2d 983. The mere invasion of an easement, without damage thereto, does not give rise to an action quare clausum fregit. *State ex rel. Green v. Gibson Circuit Court*, 246 Ind. 446, 206 N.E. 2d 135 (1965). In other words, once an interference with an easement has been shown, in order to make out a cause of action a plaintiff bears the burden of proving that the interference injured his in-

terests in some way. *See Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982). In the instant case, the Court of Appeals erroneously held that the mere physical presence of the buildings over the wires was sufficient to establish that a taking had occurred. There remain material questions of fact whether defendant's construction of buildings over portions of the radio wires extending into defendant's land amounted to an interference with the wires within the meaning of the lease and, if so, whether this injured plaintiff.[1]

Plaintiff also contends that the defendant interfered with some of plaintiff's property rights because during the construction of the housing project defendant severed some of the underground wires. The record shows that defendant repaired at least some of the severed wires and there is also evidence that the severing of such wires could not have adversely affected the operation of plaintiff's radio station. Thus, there is also a material factual issue here with respect to whether the plaintiff's actions resulted in a taking of defendant's property rights.

If plaintiff is able to prove that an easement binding on defendant was created by paragraph six of the lease and that it was intended to prohibit the owner of the tract adjoining the leased premises from interfering with the wires and their functioning, and that defendant, as the current owner, did in fact interfere with such easement in such a way that a taking occurred, there remains a question of law to determine what property interest defendant acquired by inverse condemnation when it constructed buildings over the wires.[2] Until the foregoing issues of fact are resolved, however, this question is not reached, and we therefore will not address it here.

1. "In order to recover for inverse condemnation, a plaintiff must show an actual interference with or disturbance of property rights resulting in injuries which are not merely consequential or incidental . . . ." *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E. 2d 101, 109 (1982). *Accord Stillings v. Winston-Salem*, 311 N.C. 689, 319 S.E. 2d 233 (1984).

2. Of course then, too, the question would arise as to what damages, if any, plaintiff is entitled because of defendant's inverse condemnation of its property rights. *Cf. Mills, Inc. v. Board of Education*, 27 N.C. App. 524, 219 S.E. 2d 509 (1975) (damages constitute appropriate remedy for taking of negative easements created by language of covenant).

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the Superior Court, Wilson County, for proceedings not inconsistent with this opinion.

Reversed and remanded.

Justices MEYER and VAUGHN did not participate in the consideration or decision of this case.

JAMES A. BROADWAY, ADMINISTRATOR OF THE ESTATE OF PHILLIP THOMPSON v. BLYTHE INDUSTRIES, INC., RELIANCE UNIVERSAL, INC. OF OHIO, D/B/A CAROLINA CONCRETE PIPE COMPANY, THE CITY OF CHARLOTTE, NORTH CAROLINA, AND HOWARD LISK, INC.

No. 577A84

(Filed 27 February 1985)

1. **Negligence §§ 29.3, 51— child crushed by pipes at construction site—attractive nuisance—summary judgment for defendant improper**

In an action for the wrongful death of a child based on the theory of attractive nuisance, summary judgment should not have been entered for defendant Lisk, the common carrier which delivered and unloaded large concrete storm drainage pipe at a construction site, where plaintiff's evidence tended to show that Lisk placed the pipes on an incline within the construction site some five to fifteen feet from the edge of a street on which, on the other side, stands a housing project; that Lisk was warned that there were children nearby and that they would likely play on the pipes; that unsecured pipes of the size and weight left at the site by Lisk involved an unreasonable risk of death or serious bodily harm to children who might play on them; that children would not realize the risk of being hurt by playing on the pipes; that the pipes could easily have been secured from playing children; and that Lisk failed to exercise reasonable care to eliminate the danger or otherwise to protect the children.

2. **Negligence § 36— intervening negligence—issue not fully developed—summary judgment improper**

In an action for the wrongful death of a child crushed by a drainage pipe at a construction site, it could not be held upon the materials before the trial court that the negligence of the general contractor insulated as a matter of law the common carrier which delivered and unloaded the pipe where the common carrier had not filed an answer and the issue of insulating negligence had not been fully developed by the parties.

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

ON appeal by plaintiff from a decision by a divided panel of the Court of Appeals reported at 70 N.C. App. 435, 320 S.E. 2d 295 (1984), affirming summary judgment for defendant Howard Lisk, Inc., entered by *Snepp, J.*, in Superior Court, MECKLENBURG County, on 6 July 1983. Heard in the Supreme Court 6 February 1985.

Ferguson, Watt, Wallas & Adkins, by James E. Ferguson II, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by Frederick C. Meekins and Henry C. Byrum, Jr., and Henry T. Drake for Howard Lisk, Inc., defendant appellee.

MARTIN, Justice.

On or about 10 January 1982, five-year-old Phillip Thompson was crushed to death when a large concrete storm drainage pipe, weighing approximately eighteen hundred pounds and measuring approximately four feet in length, rolled over him as he and other young children played about the pipes. This pipe and others had been delivered on or about 31 December 1981 by Howard Lisk, Inc. ("Lisk"), a common carrier, to the construction site across the street from the public housing project where Phillip lived. Employees of Lisk's unloaded the pipes from their truck by use of a hydraulic lift on the rear of the truck. While they were unloading, Todd Bowman, an employee of Blythe Industries, Inc. ("Blythe"), the general contractors for the construction project, was also present. The pipes were unloaded onto sloping ground. The evidence is conflicting as to whether the pipes were chocked or secured to prevent them from rolling once they were unloaded.

Many children lived across the street from the construction site. Diane Pridgen, a woman living nearby, testified that she observed the people unloading the pipes at the end of December 1981: "I noticed that the men had done nothing to secure the pipes. As they started to leave, I told them there were children here and weren't they going to do anything to secure the pipes. They just looked at me and drove off." Todd Bowman also testified that there were "[k]ids everywhere. . . . They were run off

the pipe when the pipe was unloaded and told not to get back on it." Asked why he ran the children off the pipe, Mr. Bowman answered: "Because it was dangerous to be up on pipe like that." Ms. Pridgen also testified that: "From [the] time [the pipes were delivered] until the time Phillip Thompson was injured by one of those same pipes on Saturday, January 9, 1982, there was nothing placed [around or near the pipes] by anyone to keep them from rolling. After Thompson was injured, the pipes were secured by some wooden stakes."

The sole issue in this negligence case is whether summary judgment was properly entered for defendant Lisk. We have determined that the Court of Appeals erroneously affirmed the summary judgment and, accordingly, reverse.

The law is succinctly stated in *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E. 2d 518, 520 (1981):

> 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, Inc.*, 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 forecast," 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 (2d ed. Supp. 1970). If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 421-22; *Zimmerman v. Hogg & Allen*, 286 N.C. at 29, 209 S.E. 2d at 798. If the moving party fails to meet his burden, summary judgment is improper regardless of whether the opponent responds. 2 McIntosh, *supra*. The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. *Id.* Thus, if there is any question as to the credibility of an affiant 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 Mills, Inc.*, 296 N.C. at 470, 251 S.E. 2d at 422.

The standard for summary judgment is fixed by Rule 56(c) of the North Carolina Rules of Civil Procedure. The judgment sought shall be rendered forthwith if the pleadings and other materials before the trial judge show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). In the present case, the defendant, as the moving party, must prove that an essential element of plaintiff's claim is nonexistent or show that a forecast of plaintiff's evidence indicates an inability to prove facts giving rise at trial to all essential elements of his claim.

[1] Plaintiff's cause of action against Lisk rests on the so-called "attractive nuisance" rule which was explained in *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 411, 62 S.E. 600, 606 (1908):

> It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one's premises is recognized and enforced in cases in which no such liability accrues to adults. This we think sound in principle and humane policy. We have no disposition to deny it or to place unreasonable restrictions upon it. We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury.

Accord Green v. Duke Power Co., 305 N.C. 603, 609, 290 S.E. 2d 593, 597 (1982). *See generally* W. Keeton, *Prosser and Keeton on The Law of Torts* § 59 (1984).

As set forth in Restatement (Second) of Torts § 339 (1965), generally the elements of an action based on a theory of attractive nuisance are as follows:

> § 339. Artificial Conditions Highly Dangerous to Trespassing Children
>
> A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if
>
> (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and
>
> (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and
>
> (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and
>
> (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and
>
> (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

See Green v. Duke Power Co., 305 N.C. 603, 290 S.E. 2d 593. *See also* 9 Strong's N.C. Index 3d *Negligence* § 51 (1977).

Although Lisk was not a possessor of the construction site, it still can be held liable under the attractive nuisance rule. As the Supreme Court of Connecticut explained:

> Section 384 of the Restatement (Second), 2 Torts, states that "[o]ne who on behalf of the possessor of land erects a structure or *creates any other condition on the land* is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condi-

> tion while the work is in his charge." (Emphasis added.) Accord, *Coggins v. Hanchette*, 52 Cal. 2d 67, 74, 338 P. 2d 379; *Dishington v. A. W. Kuettel & Sons, Inc.*, 255 Minn. 325, 329-30, 96 N.W. 2d 684; see *Greene v. DiFazio, supra* [148 Conn. 419, 171 A. 2d 411 (1961)]. This is consistent with our views expressed in *McPheters v. Loomis*, 125 Conn. 526, 533, 7 A. 2d 437, that one upon land under a grant or license from the owner is subject to the same rules of liability which define the duty of the landowner. Under this principle, those, like the defendants, who create a condition on the land on behalf of the possessor generally owe no duty of care to any trespasser to safeguard him from injury due to conditions for which they are responsible. *McPheters v. Loomis, supra*, 531, 7 A. 2d 437; *Wilmot v. McPadden*, 79 Conn. 367, 375, 65 A. 157. On the other hand, once those who create a condition upon the land on behalf of the possessor know or should know that children are likely to trespass upon that part of the land on which they maintain a condition which is likely to be dangerous to them, they may, like the owner, be liable for harm resulting to them therefrom. *McPheters v. Loomis, supra*, 125 Conn. 531-33, 7 A. 2d 437; *Wolfe v. Rehbein*, 123 Conn. 110, 113, 193 A. 608.

Duggan v. Esposito, 178 Conn. 156, 159-60, 422 A. 2d 287, 289 (1979) (subcontractor who left pipes on truck in driveway at construction site liable for injury of child hurt by pipes). *See also Butler v. Porter-Russell Corporation*, 217 So. 2d 298 (Fla. 1968). In the instant case there is no evidence controverting Diane Pridgen's statement in her affidavit that she told the men who delivered the pipes that there were children nearby and that they should therefore secure the pipes. For the purpose of determining whether summary judgment was properly entered for Lisk, we must assume that Lisk knew that children were nearby and that they would likely play on the pipes.

For Lisk to be entitled to summary judgment in the present lawsuit, Lisk must establish either (1) that an essential element of plaintiff's claim is nonexistent, or (2) that plaintiff cannot produce evidence to support an essential element of his claim. *E.g., Brown v. Fulford*, 311 N.C. 205, 316 S.E. 2d 220. The essential elements of a claim for damages for wrongful death based on a theory of attractive nuisance are set forth above. We are satisfied that plain-

tiff has brought forward sufficient evidence to support every essential element of his claim.[1] This evidence tends to show, inter alia, that Lisk placed the pipes on an incline within the construction site some five to fifteen feet from the edge of a street on which, on the other side, stands a housing project; that Lisk was warned that there were children nearby and that they would likely play on the pipes; that unsecured pipes of the size and weight left at the site by Lisk involved an unreasonable risk of death or serious bodily harm to children who might play on them; that children would not realize the risk of becoming hurt by playing on the pipes; that the pipes could easily have been secured from playing children; and that Lisk failed to exercise reasonable care to eliminate the danger or otherwise to protect the children.[2] We hold that this forecast of the evidence discloses genuine issues of material facts which require resolution by a jury. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823. Therefore, for this reason it was error to enter summary judgment in favor of Lisk. *See Butler v. Porter-Russell Corporation*, 217 So. 2d 298 (error to enter summary judgment in favor of builder, trucker who delivered concrete blocks, and materialman who supplied blocks, which blocks fell on trespassing child).

[2] Lisk also argues that plaintiff is prevented from recovering from it because the negligence of defendant Blythe Industries, Inc. in failing to secure the pipes insulated Lisk from liability. In order for the conduct of Blythe to break the sequence of events and stay the operative force of the negligence of Lisk, the intervening conduct must be of such nature and kind that Lisk had no reasonable ground to anticipate it. *Riddle v. Artis*, 243 N.C. 668, 91 S.E. 2d 894 (1956). *Accord McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); *Brown v. R.R. Co. and Phillips v. R.R. Co.*, 276 N.C. 398, 172 S.E. 2d 502 (1970); *Butner v. Spease and Spease v. Butner*, 217 N.C. 82, 6 S.E. 2d 808 (1940). *See also Vaughan v. Silica Corp.*, 140 Ohio St. 17, 42 N.E. 2d 156 (1942) (contractor who left dynamite on premises liable to trespassing child

1. A fortiori Lisk has failed to establish that an essential element of plaintiff's claim is nonexistent.

2. Lisk has produced evidence tending to show that when the pipes were delivered they were chocked to prevent them from rolling. Plaintiff's evidence is to the contrary. This, of course, presents a material question of fact for the jury to resolve.

who discovered and was injured by same eight months later). Generally, whether the negligence of a second actor insulated that of another is a question for the jury. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984); *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 139 S.E. 2d 879 (1965).[3]

Lisk has not filed an answer in this case. Therefore, there are no allegations by Lisk that Blythe was negligent and that such negligence insulated Lisk from liability. Likewise, Blythe has had no opportunity to respond to such allegations, although Blythe denied plaintiff's allegations that it negligently failed to secure the pipes. The issue with respect to insulating negligence has not been fully developed by the parties. Certainly, upon the materials before the trial judge, we cannot hold as a matter of law that negligence by Blythe insulated Lisk from liability for Phillip Thompson's death.

The decision of the Court of Appeals is

Reversed.

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

STATE OF NORTH CAROLINA v. FREDDIE THOMPSON

No. 240A84

(Filed 27 February 1985)

Searches and Seizures § 8; Kidnapping § 1.2— warrantless search—probable cause to arrest present

Defendant's motion to suppress evidence seized as a result of his unlawful arrest was properly denied where the officers who arrested defendant shortly after 10:00 a.m. knew that a nine-year-old female child had been missing since some time prior to 8:00 p.m. the previous evening; knew that she had last been seen heading away from her home with defendant, a man in his mid-twenties; knew that defendant had not been seen since he and the child were seen together on the previous evening; and knew that defendant had a prior history

3. For a thorough review of the law respecting insulating negligence, see *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984).

of assaults on females and of at least one sexual offense involving a child. The information possessed by the officers at the time they arrested defendant was sufficient to cause a reasonable person acting in good faith to believe that defendant was guilty of kidnapping. G.S. 15A-401(b)(2).

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

APPEAL by the defendant from judgments entered by *Judge D. Marsh McLelland* at the December 12, 1983 Criminal Session of Superior Court, ORANGE County.

The defendant was charged in separate bills of indictment with first degree sexual offense, first degree rape and second degree kidnapping. He entered a plea of not guilty to each charge. The jury found the defendant guilty of all of the offenses charged. By judgments entered December 15, 1983, the defendant was sentenced to life imprisonment for his conviction for first degree sexual offense, life imprisonment for his conviction for first degree rape, and nine years' imprisonment for his conviction for second degree kidnapping.

The defendant appealed his convictions for first degree sexual offense and first degree rape, and the resulting life sentences, to the Supreme Court as a matter of right. His motion to bypass the Court of Appeals on his appeal from his conviction and nine year prison sentence for second degree kidnapping was allowed on May 17, 1984. Heard in the Supreme Court December 11, 1984.

Rufus L. Edmisten, Attorney General, by Harry H. Harkins, Jr., Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The controlling question on appeal is whether there was probable cause for the arrest of the defendant without a warrant at the time law enforcement officers took him into custody. We conclude that there was probable cause and that evidence seized as a result of his arrest was properly admitted at trial.

A complete review of the evidence presented at trial is unnecessary in resolving the issue presented on appeal. The evi-

dence at trial tended to show among other things that Linda Gattis left her home at approximately 6:30 p.m. on August 5, 1983 to go to a nearby neighborhood store. She left her nine-year-old daughter Stephanie playing at a neighborhood playground. While at the store, Ms. Gattis saw Wayne Small riding Stephanie's bicycle. When asked he told her that Freddie Thompson, the twenty-seven-year-old defendant in this case, had let him ride the bicycle. The defendant arrived at the store shortly thereafter, and Ms. Gattis told him to take the bicycle back to her house. The defendant indicated that he would do so and left the store.

When Ms. Gattis returned to her home a short while later, Wayne Small told her that Stephanie was with the defendant. Ms. Gattis went immediately to the playground and then to the home of the defendant's sister looking for Stephanie. When she did not find her daughter at either location, she returned to her home and reported the child's absence to the police. The police and Ms. Gattis continued to attempt to locate the child during the night of August 5 and the morning of Saturday, August 6, 1983. A police command post was set up in a parking lot in the neighborhood, and additional officers were called to duty to assist in the search for Stephanie.

On the morning of August 6, Stephanie returned home in the company of a neighbor. She was emotionally distraught and dirty and had blood on her clothing and leaves in her hair.

The child testified at trial that she met the defendant on August 5 as she was returning to her home from the playground. The defendant suggested that they go to his sister's home. Instead of going to the sister's home, they went down a path in the woods. When the defendant told her to undress, she ran but was overtaken by him. After he threatened her, she complied with his demands. He forced her to engage in the sexual acts charged in the bills of indictment against her will.

Medical testimony and physical and scientific evidence were introduced tending to corroborate the child's testimony. This evidence included a pair of jeans removed from the defendant after he was taken into custody which bore bloodstains of the same type as the victim's blood.

The defendant assigns as error the trial court's denial of his motion to suppress evidence seized from him as a result of his ar-

rest. In support of this assignment, he contends that there was no probable cause for arresting him without a warrant, and that any evidence seized as a result of his unlawful arrest could not be admitted against him at trial. We do not agree.

The trial court held a pretrial hearing on several of the defendant's motions including his motion to suppress evidence seized incident to his arrest. The evidence introduced at that hearing tended to show among other things that Chapel Hill Public Safety Officer Mark Porterfield was called at home on August 6, 1983 by Master Public Safety Officer Clark and told to report to a command post which had been set up in the parking lot of Hargraves Recreational Center. He arrived at the command post at about 9:45 a.m. Officer Clark informed Officer Porterfield of the investigation which was being conducted into the disappearance of a nine-year-old black female child. Clark told Porterfield that the child had last been seen on Roberson Street riding a bicycle in a northerly direction with Freddie Thompson. Porterfield was given pictures of the missing child and of Freddie Thompson. Clark told Porterfield that Thompson was a prior sex offender in his mid-twenties and gave Porterfield a detailed physical description of Thompson and of the clothes he had been wearing when last seen with the child. Porterfield then joined other public safety officers in a continuing door-to-door inquiry into the child's whereabouts.

At about 10:10 a.m., Porterfield saw the defendant riding a bicycle. He called out to the defendant and asked him if he was Freddie Thompson. The defendant said, "Yes." Porterfield told the defendant to stop because he needed to talk to him. After the defendant stopped the bicycle, Porterfield again asked if he was Freddie Thompson and received the same answer. Porterfield identified himself as a police officer and told the defendant that Stephanie Gattis was missing and had last been seen with the defendant. He asked the defendant if he knew her. The defendant said that he did not know the child.

Porterfield asked the defendant to accompany him to a nearby house. Porterfield asked a resident there to call the police and tell them that he needed assistance. While Porterfield and the defendant stood on the front porch, the defendant asked "what this was all about." Porterfield showed him a picture of Stephanie Gattis,

and the defendant told Porterfield that he had not seen her. "At this time, he was nervous, he was looking at his feet and shifting and asking again and again what was going on, and what was this all about." Porterfield told him again that the police were looking for Stephanie Gattis, and "he was supposed to have been seen with her the night before." The defendant again stated that he knew nothing.

A minute or two after the call was placed to the police department, Master Public Safety Officer Dave Hill and other officers arrived. Master Officer Hill had been given essentially the same information about the missing child and the defendant Thompson as that given to Porterfield. Additionally, Hill had been personally involved during the preceding four years in investigations into assaults by the defendant and at least one sex offense by him with a child. Hill knew the defendant personally. Hill testified that he felt that the police had probable cause to arrest the defendant for kidnapping at that time. Therefore, he ordered Porterfield "to handcuff him and take him to the Police Station, he was under arrest."

Police have the right, without a search warrant, to search a person for weapons or evidence of a crime if the person has been lawfully arrested. *Chimel v. California*, 395 U.S. 752, *reh. denied*, 396 U.S. 869 (1969); *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). "The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979). Therefore, if the defendant in the present case was lawfully arrested, the items of evidence complained of were properly seized from him and later admitted into evidence at trial. *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971).

We have held that the question of whether an arrest warrant must be obtained in a given case is immaterial "in a constitutional sense" and that "state law alone determines the sanctions to be applied for failure to obtain an arrest warrant where one is required." *State v. Eubanks*, 283 N.C. 556, 560, 196 S.E. 2d 706, 709 (1973). We have also held, however, that an arrest without a warrant is illegal in North Carolina unless authorized by statute. *State v. Harris*, 279 N.C. 307, 182 S.E. 2d 364 (1971). Law enforcement officers are authorized by N.C.G.S. 15A-401(b)(2) to arrest any person when they have probable cause to believe that the

person has committed a felony. *In re Pinyatello*, 36 N.C. App. 542, 245 S.E. 2d 185 (1978). We have previously described "probable cause" in the following terms:

> 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).

State v. Phillips, 300 N.C. 678, 684, 268 S.E. 2d 452, 456 (1980).

At the time the officers arrested the defendant in the present case shortly after 10:00 a.m. on August 6, they knew that a nine-year-old female child had been missing since sometime prior to 8:00 p.m. the previous evening. They also knew that she had last been seen heading away from her home with the defendant, a man in his mid-twenties. They knew that the defendant had not been seen since he and the child were seen together on the previous evening. They were aware that the defendant had a prior history of assaults on females and of at least one sexual offense involving a child. Although it is not clear from the testimony at the *voir dire* hearing whether any of these offenses were the same as those which had led Master Officer Hill to investigate the defendant in prior sexual assault cases, it is clear that the officers knew of them.

The evidence at the *voir dire* hearing revealed that the information possessed by the officers at the time they arrested the defendant was sufficient to cause a reasonable person acting in good faith to believe that the defendant was guilty of kidnapping. Master Officer Hill had formed such a belief and acted upon it when he told Officer Porterfield to put the handcuffs on the defendant because he was under arrest.

We note that Officer Porterfield asked a Major Gold at a later point what the defendant was to be charged with and was told that he should be charged with contributing to the delinquency of a minor, a misdemeanor. We find this in no way determinative, however, as the arrest of the defendant was completed when he was placed in custody by Officer Porterfield on the order of Master Officer Hill. In any event, the record on appeal reflects that the defendant was formally charged by warrant and later by indictment for the felony of kidnapping and not for a misdemeanor.

The totality of the facts and circumstances known to the law enforcement officers at the time they arrested the defendant would have given probable cause for the issuance of an arrest warrant for the felony of kidnapping. It is immaterial that some of the information they possessed at that time might not have been competent in evidence at the defendant's trial. *Brinegar v. United States*, 338 U.S. 160 (1949); *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980).

At the conclusion of the *voir dire* on the defendant's pretrial motion to suppress, the trial court determined that the officers had probable cause to arrest the defendant for kidnapping at the time they took him into custody. As previously indicated, the trial court's determination in this regard was fully supported by the evidence presented during the hearing. Since the defendant had been lawfully arrested at the time he was searched and the evidence complained of was seized, the trial court properly denied his motion to suppress that evidence.

The defendant received a fair trial free of prejudicial error.

No error.

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

STATE OF NORTH CAROLINA v. CURTIS DOWNING

No. 161PA84

(Filed 27 February 1985)

Larceny § 7.3— ownership of stolen property—fatal variance

There was a fatal variance between an indictment charging larceny of property from the owner of a building and evidence that the stolen property belonged to the building owner's daughter who had a business in the building where there was no evidence that the building owner was the owner, possessor or bailee of or had a special property interest in the stolen items relating to the business owned by her daughter.

ON petition for discretionary review from a decision of the Court of Appeals, reported at 66 N.C. App. 686, 311 S.E. 2d 702, finding no error in trial before *Bruce, J.*, at the 18 October 1982 Criminal Session of Superior Court, WASHINGTON County.

Defendant was convicted of felonious breaking or entering, felonious larceny, and obstructing an officer for which he received two consecutive ten year sentences and a two year sentence respectively.[1]

Lacy H. Thornburg, Attorney General, and Jane P. Gray, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

Defendant challenges his conviction of felonious larceny based upon two separate theories: (1) that double jeopardy principles prohibit conviction and sentencing for both felonious break-

1. The Court of Appeals found that the imposition of a two year sentence for obstructing an officer exceeded the statutory maximum and remanded that case for resentencing.

ing or entering and felonious larceny; and (2) that as the result of a fatal variance between the indictment and the evidence as to the ownership of the stolen property, the larceny conviction cannot be sustained. The record supports defendant's position that there is a fatal variance between the indictment and proof as to the ownership of the stolen property and we reverse on this issue. We therefore do not reach the double jeopardy argument.

The State's evidence tends to show that during the early morning hours of 13 August 1982 defendant was observed by two police officers in the vicinity of the East Haven Food Mart in Plymouth, North Carolina. Defendant had been convicted of breaking or entering and larceny on two prior occasions and one of the officers testified that "[w]hen we see [the defendant] out walking, we usually keep an eye on him. I mean we'll patrol in that general area." The officers abandoned their surveillance at approximately 5:00 a.m. when defendant appeared to have gone home. Shortly afterwards one of the officers discovered that the East Haven Food Mart had been broken into.

Mary Ruska testified that her mother, Helen Atamanchuck, owns the East Haven Food Mart store building. Ms. Ruska owns the business. Upon her arrival at the Food Mart on 13 August, Ms. Ruska examined the premises and determined that the following items were missing: two television sets, a radio, about six dollars in change from the cash register and some checks and business papers.

The officers located defendant asleep in the back seat of an abandoned vehicle parked in the backyard of his residence. Inside the vehicle the officers found a tire tool, three cigarette lighters, cigarettes, three bottles of wine, a pack of Dentyne gum and a radio. The officers also found $5.93 in defendant's pocket. Ms. Ruska identified the radio as the one missing from her store. She also identified the Dentyne gum and stated that ordinarily the supplier's identifying tag would have been removed had the gum been sold. Following a search of the area surrounding the store, the television sets, the checks and business papers, and three additional bottles of wine were recovered. There were empty spaces in the dairy case where the wine had been stored.

Defendant testified on his own behalf and denied breaking into the food mart or stealing the property. He stated that after

drinking all evening, he rode home on his bicycle. As he approached the dumpster next to the food mart he fell off his bicycle. There he found a radio and a pack of gum. At the time of his arrest, however, defendant stated that he had bought the radio.

We turn to defendant's contention that there is a fatal variance between the indictment and the evidence as to the ownership of the stolen property. In this regard, Mary Ruska testified that although her mother, Helen Atamanchuck, owned the building, she (Mary Ruska) owned the business known as the East Haven Food Mart. The indictment alleges, inter alia, that defendant "unlawfully and wilfully did feloniously steal, take, and carry away two (2) television sets, one (1) clock radio, $5.93 in coins, one (1) carton of cigarettes, two (2) packages of cigarettes, three (3) bottles of Richard's Wild Irish Rose wine, and one (1) package of Dentine [sic] gum *the personal property of Helen Atamanchuk* [sic]." (Emphasis added.)

In *State v. Eppley*, 282 N.C. 249, 259, 192 S.E. 2d 441, 448 (1972), we stated that "[t]he allegation of ownership of the property described in a bill of indictment for larceny is material. If the proof shows that the article stolen was not the property of the person alleged in the indictment to be the owner of it, the variance is fatal and a motion for judgment of nonsuit should be allowed." We have also held that mere ownership of the premises from which an item of property is stolen does not constitute proof of ownership of the stolen property. *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946). To be sufficient, an indictment for larceny must allege the owner or person in lawful possession of the stolen property. *State v. McKoy*, 265 N.C. 380, 144 S.E. 2d 46 (1965). Should an indictment attribute ownership of the stolen property to the owner of the premises, the evidence at trial must establish that the person named in the indictment is either the owner, the bailee or has an otherwise special interest in the property stolen. *See State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976); *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946).

In *Law* the larceny indictment alleged that a stolen automobile was the property of the City of Winston-Salem. The

evidence at trial disclosed that the automobile had been stolen from a city-owned parking lot after being seized by a police officer. We noted that the officer was in custody of the automobile when it was stolen and that the indictment failed to describe the automobile sufficiently to distinguish it from others on the premises. Thus, the mere fact that this property was stolen from premises owned by the city was insufficient, without more, to establish the city's ownership, possession, or special interest in the automobile.

In *Eppley* the indictment charged the defendant with larceny of two shotguns belonging to James Ernest Carriker. At trial James Carriker identified a shotgun as an article taken from his home, but testified that the gun was the property of his father. We noted an absence of evidence that James Carriker was a bailee of the shotgun or had any other property interest therein and therefore reversed defendant's larceny conviction on this charge.

The State argues that *Law* is not applicable here because the basis of that decision was the insufficiency of the description of the automobile in the bill of indictment. That case, however, does point out the difficulty encountered when an indictment for larceny attributes ownership of the stolen property to the mere ownership of the premises wherein the property is located. In such cases it is incumbent upon the State, following evidence that negates actual ownership or possession to one named in the indictment, to produce evidence of bailment or other special property interest.

Likewise, we reject the State's argument that *Eppley* is distinguishable and therefore not controlling. In fact, it is the distinction between the facts in *Eppley* and those in the present case which further dictates our resolution of this issue in defendant's favor. The State points out that *Eppley* involved a theft from a residential dwelling whereas in this case the property was stolen from a business establishment. The case for bailment or other special property interest is more compelling where property is stolen from a residence. *See State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976); *State v. Smith*, 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977). In contrast, it is less likely, absent proof to the contrary,

that the owner of a building in which another conducts business would have a special property interest in items relating to that business. Here there was no evidence at trial that Helen Atamanchuck, the owner of the business premises and to whom ownership of the stolen property was attributed, was the owner, possessor or bailee of or had a special property interest in the stolen items relating to the business owned by Mary Ruska. The larceny conviction must therefore be reversed.[2] The case is remanded to the Court of Appeals for further remand to Superior Court, Washington County with directions to vacate the judgment in the larceny conviction. Defendant's conviction on the breaking or entering charge is not affected by this ruling.

No. 82CRS1265—Breaking or entering—affirmed.

No. 82CRS1265—Felonious larceny—reversed and remanded.

FORBES HOMES, INC., A NORTH CAROLINA CORPORATION v. JOHN G. TRIMPI AND TRIMPI, THOMPSON & NASH

No. 627A84

(Filed 27 February 1985)

Appeal and Error § 64— Supreme Court justices equally divided—Court of Appeals affirmed without precedential value

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 in the case is affirmed without precedential value.

APPEAL of right by the defendants under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 70 N.C. App. 614, 320 S.E. 2d 328 (1984), reversing the judgment entered by *Judge Grafton G. Beaman* in District Court, PAS-

2. The district attorney, if he so elects, may present another bill of indictment correctly alleging ownership of the property. *State v. Stinson*, 263 N.C. 283, 139 S.E. 2d 558 (1965). *See State v. Simpson*, 302 N.C. 613, 276 S.E. 2d 361 (1981); *State v. Watson*, 272 N.C. 526, 158 S.E. 2d 334 (1968); *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946).

QUOTANK County on August 3, 1983. Heard in the Supreme Court on February 6, 1985.

Frank B. Aycock, Jr., for plaintiff appellee.

Trimpi, Thompson & Nash, by Thomas P. Nash, IV, for defendant appellants.

PER CURIAM.

The trial court entered judgment on August 3, 1983, granting the defendants' motion to dismiss under N.C.G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted. A divided panel of the Court of Appeals reversed, and the defendants appealed to this Court as a matter of right.

Chief Justice Branch took no part in the consideration or decision of this case. The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members to reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

Affirmed.

ANNA B. DOUB v. EUGENE M. DOUB

No. 364PA84

(Filed 27 February 1985)

Divorce and Alimony § 19.5; Husband and Wife § 13— separation agreement consent judgment—enforceability only by contempt

The parties to a separation agreement consent judgment controlled by *Walters v. Walters*, 307 N.C. 381 (1983), do not have an election to enforce such judgment by contempt or to proceed in an independent action in contract.

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

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 68 N.C. App. 718, 315 S.E. 2d 732 (1984), affirming judgment entered by *Alexander, J.*, at the 1 April 1983

session of District Court, FORSYTH County. Heard in the Supreme Court 4 February 1985.

Morrow and Reavis, by John F. Morrow and Clifton R. Long, Jr., for plaintiff appellee.

Bruce C. Fraser for defendant appellant.

PER CURIAM.

Except as modified herein, we affirm the decision of the Court of Appeals. That court correctly held that our decision in *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983), did not apply to the judgment at issue. However, the Court of Appeals fell into error when it stated by way of dicta:

> Even if the *Walters* decision were construed to apply to a 1978 judgment, we believe that it would not control here. In this case, plaintiff has elected to sue defendant for breach of contract instead of invoking the contempt powers of the court to enforce the court ordered separation agreement. We do not read *Walters* as depriving plaintiff of *the option of electing* to sue for breach of contract. While defendant is free to present evidence of his change of circumstances by filing a motion in the cause to modify the alimony provisions of the 1978 court order, this action is based on breach of contract and evidence of changed circumstances is not relevant. The trial judge, therefore, did not err in excluding defendant's evidence of changed circumstances.

Doub v. Doub, 68 N.C. App. 718, 720, 315 S.E. 2d 732, 734 (emphasis added).

We disapprove and disavow this statement by the Court of Appeals.

We reaffirm our holding in *Walters v. Walters*:

> [W]e now establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and en-

forceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

307 N.C. at 386, 298 S.E. 2d at 342.

The parties to a consent judgment controlled by *Walters* do *not* have an election to enforce such judgment by contempt or to proceed in an independent action in contract.

The decision of the Court of Appeals is

Modified and affirmed.

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

GABRIEL WILLIAM ST. CLAIR AND SANDRA PRICE v. MAVIS ST. CLAIR RAKESTRAW AND HUSBAND, OLIN RAKESTRAW

No. 218A84

(Filed 27 February 1985)

APPEAL of right from the decision of a divided panel of the Court of Appeals, 67 N.C. App. 602, 313 S.E. 2d 228 (1984), reversing the judgment entered by *Judge Claude S. Sitton* on 27 April 1982 in Superior Court, MECKLENBURG County. Heard 13 December 1984.

Joseph Warren III and India Early Keith for plaintiff appellants.

Badger, Johnson, Chapman and Michael, P.A., by David R. Badger, for defendant appellee.

PER CURIAM.

The decision of the Court of Appeals is contained in an opinion by Judge Phillips with Judge Eagles concurring in the result and Judge Arnold dissenting. The Court of Appeals held that "As to the defendant appellant's appeal, the judgment is reversed and the cause remanded for a new trial. As to the issues raised by the plaintiff appellees, the trial court's rulings are affirmed."

For the reasons set forth in both the opinion by Judge Phillips and the dissent of Judge Arnold, we affirm that part of the decision of the Court of Appeals which affirmed the trial court's rulings as to the issues the plaintiffs sought to raise on appeal. For the reasons set forth and fully discussed in Judge Arnold's dissent, we reverse that part of the decision of the Court of Appeals which reversed the judgment of the trial court and remanded this case for a new trial. This case is remanded to the Court of Appeals with instructions to reinstate the judgment entered by the trial court on 27 April 1982.

Affirmed in part, reversed in part and remanded.

Justice VAUGHN took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. GEORGE RICO RAY

No. 640A84

(Filed 27 February 1985)

APPEAL as of right pursuant to N.C. Gen. Stat. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 71 N.C. App. 165, 321 S.E. 2d 547 (1984), finding no error in the judgment entered by *Hairston, J.*, on 8 March 1983 in Superior Court, GUILFORD County. Heard in the Supreme Court 5 February 1985.

Rufus L. Edmisten, Attorney General, by Thomas B. Wood, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant appellant.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

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

ARNEY v. ARNEY

No. 671P84.

Case below: 71 N.C. App. 218.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 January 1985.

BUNN v. N. C. STATE UNIVERSITY

No. 704P84.

Case below: 70 N.C. App. 699.

Petition by respondent (ESC) for discretionary review under G.S. 7A-31 denied 30 January 1985.

DENISE v. CORNELL

No. 61P85.

Case below: 72 N.C. App. 358.

Petition by defendants for writ of supersedeas and temporary stay denied 4 February 1985.

ELLER v. COCA-COLA CO.

No. 642P84.

Case below: 70 N.C. App. 787.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 January 1985. Notice of appeal by defendant dismissed 30 January 1985.

HARRIS v. WALDEN

No. 641PA84.

Case below: 70 N.C. App. 616.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 30 January 1985.

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

SMITH v. SMITH

No. 668PA84.

Case below: 71 N.C. App. 242.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 30 January 1985.

STANLEY v. NATIONWIDE MUT. INS. CO.

No. 673P84.

Case below: 71 N.C. App. 266.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 January 1985.

STATE v. ALLEN

No. 599P84.

Case below: 70 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 January 1985. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 30 January 1985.

STATE v. BAIZE

No. 2P85.

Case below: 71 N.C. App. 521.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 January 1985. Petition by defendant for writ of supersedeas and temporary stay denied 30 January 1985.

STATE v. COONEY

No. 84A85.

Case below: 72 N.C. App. 649.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 14 February 1985.

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

STATE v. KORNEGAY

No. 619P84.

Case below: 70 N.C. App. 579.

Petition by defendant for discretionary review under G.S. 7A-31 denied 30 January 1985.

STATE v. LESTER

No. 646A84.

Case below: 70 N.C. App. 757.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 14 February 1985.

STATE v. McRAE

No. 649P84.

Case below: 70 N.C. App. 779.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 30 January 1985.

STATE v. NIXON

No. 688P84.

Case below: 61 N.C. App. 348.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 30 January 1985.

STATE v. RICHARDSON

No. 615A84.

Case below: 70 N.C. App. 509.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 18 February 1985.

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

STATE v. SCOTT

No. 19A85.

Case below: 71 N.C. App. 570.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals as to additional issues denied 30 January 1985.

STATE v. STREATH

No. 89P85.

Case below: 72 N.C. App. 685.

Petitions by defendant for discretionary review under G.S. 7A-31 and for supersedeas and temporary stay of the judgment of the Court of Appeals denied 20 February 1985 without prejudice to defendant to file petitions or motions for such relief as he deems appropriate with the North Carolina Court of Appeals.

WINSLOW v. JOLLIFF

No. 687P84.

Case below: 71 N.C. App. 459.

Petition by defendant (Jolliff) for discretionary review under G.S. 7A-31 denied 30 January 1985.

PETITIONS TO REHEAR

LOWE v. TARBLE

No. 28PA84.

Case below: 312 N.C. 467.

Petition by defendants for rehearing of case reported at 312 N.C. 467 allowed 30 January 1985 for consideration of (1) the substantive due process questions raised and (2) whether, by contract or statute, liability insurance carriers are liable for prejudgment interest allowed in judgments against their insureds.

In re Southern Railway

IN THE MATTER OF: THE APPEALS OF SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN RAILWAY COMPANY FROM THE VALUATION OF THEIR PROPERTY BY THE NORTH CAROLINA PROPERTY TAX COMMISSION FOR 1980

No. 650PA82

(Filed 2 April 1985)

1. **Taxation § 25.10— ad valorem taxation—appraisal of railroad property—rebuttal of presumption of correctness**

The Property Tax Commission erred in ruling that two railroads failed to rebut the presumption of correctness of the appraisals of their system properties by the Department of Revenue where the railroads offered testimony which demonstrated that the appraisal methods used by the Department would not produce true values for the railroads and that the values actually produced by these methods were substantially in excess of true value.

2. **Taxation § 25.10— ad valorem taxation—Property Tax Commission—trial tribunal of original jurisdiction**

Even if the Property Tax Commission properly considered the evidence in an ad valorem tax case as a trial tribunal of original jurisdiction rather than as an appellate tribunal, its decision on the valuation of the property of two railroads was not supported by the evidence before it when the whole record test is applied to that evidence. Therefore, the cause is remanded to the Commission for a proper determination of values on the record before the Commission and the appellate court.

3. **Taxation § 25.6— ad valorem taxation—appraisal of railroad property**

In appraising a railroad for ad valorem tax purposes, the appraisers seek to determine the fair market value of the railroad's system properties, *i.e.*, that amount which a willing and financially able buyer would pay and a willing seller would accept, neither being under any compulsion to buy or to sell.

4. **Taxation § 25.7— ad valorem taxation—appraisal of railroad property—testimony only from seller's standpoint**

The Property Tax Commission erred in adopting the methods of appraisal of the market value of a railroad's property by a witness for the Department of Revenue where his methods were designed to arrive at value only from the standpoint of the seller-owner and not from the standpoint of both a willing seller and a willing and able buyer.

5. **Taxation § 25.7— ad valorem taxation—railroad property—capitalization of income—use of actual interest rates on debt**

In appraising the property of two railroads for ad valorem tax purposes by capitalizing income, the Property Tax Commission erred in using the railroads' historic interest rates applicable to debt, or the "embedded cost of debt," rather than the current cost of borrowed money in figuring the debt component of the capitalization rate.

6. Taxation § 25.7— ad valorem taxation—railroad property—capitalization of income—deduction of deferred income tax expense

The Property Tax Commission erred in refusing to deduct deferred income tax expense from a railroad's net railway operating income in arriving at income to be capitalized under the income approach to valuation of the railroad's property for ad valorem taxation.

7. Taxation § 25.7— ad valorem taxation—railroad property—stock and debt approach to value—deferred income tax expense—undistributed earnings of subsidiaries

The Property Tax Commission erred in adding back deferred income tax expense to total income and in excluding undistributed earnings of non-system subsidiaries from both the non-system and total income in determining the "income influence percentage" under the stock and debt approach to value of a railroad's system property for ad valorem taxation.

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

Justice MITCHELL dissenting.

Justice MEYER joins in this dissenting opinion.

ON Southern and Norfolk Southern Railway Companies' petition for discretionary review of a decision of the Court of Appeals, 59 N.C. App. 119, 296 S.E. 2d 463 (1982), affirming an Order of the North Carolina Property Tax Commission entered 19 May 1981.

Brooks, Pierce, McLendon, Humphrey & Leonard by L. P. McLendon, Jr. and Edward C. Winslow III; William C. Antoine, Southern Railway Company; Laughlin, Halle, Clark, Gibson & McBride by Everett B. Gibson, James W. McBride and Gregory G. Fletcher for Southern Railway Company and Norfolk Southern Railway Company, petitioner appellants.

Rufus L. Edmisten, Attorney General, by George W. Boylan, Assistant Attorney General, for respondent appellee.

Hunton & Williams by R. C. Howison, Jr. and Henry S. Manning, Jr. for Colonial Pipeline Company, amicus curiae.

EXUM, Justice.

This is an ad valorem tax case in which petitioners, Southern Railway Company and Norfolk Southern Railway Company,[1]

1. After these proceedings were begun, Norfolk Southern's name was changed to Carolina and Northwestern Railway Company. To be consistent with the record, we shall refer to this company as Norfolk Southern.

hereinafter "Railroads," challenge the Property Tax Commission's, hereinafter "Commission," appraisal of their companies' market value. The Court of Appeals affirmed the Commission's decision. We conclude the Commission erred in ruling that the Railroads failed to rebut the presumption of correctness accorded the appraisals of the Department of Revenue, hereinafter "Department." We also conclude the Commission erred in adopting certain appraisal methods used by the Department. We, therefore, reverse the decision of the Court of Appeals and remand to that court with instructions to remand the matter to the Commission for a re-determination of the Railroads' market value in a manner consistent with this opinion.

I.

Subchapter II of Chapter 105 of our General Statutes, hereinafter "Machinery Act" or "Act,"[2] provides for the listing, appraisal, and assessment of property for ad valorem tax purposes and for the collection of the tax. Under the Act, § 333(14), the Railroads are "public service companies" subject to ad valorem taxation. Public service companies are appraised initially by the Department, § 335, which also apportions the values subject to North Carolina taxation, § 337, and allocates the values among local taxing units, § 338. Pursuant to § 342 of the Act, the Department duly notified the Railroads of its tentative appraisals of their systems for the 1980 tax year; the Railroads objected to the appraisals and requested a hearing before the Commission.

At this hearing the Railroads supported their challenges to the Department's appraisal methods by the testimony of Dr. Arthur A. Schoenwald, a nationally recognized expert in appraisal of railroads and utilities, and by Dr. Thomas Keller, Dean of the Fuqua Business School at Duke University and R. J. Reynolds Industries Professor of Business Administration. The Department offered the testimony of one of its employees, Mr. William R. Underhill, an experienced appraiser of public service companies. The Department appraised Southern Railway at $1,025,000,000 and Norfolk Southern at $59,500,000. The Railroads' witnesses appraised Southern Railway at $690,166,000. Although the Rail-

2. Since all references to statutes herein are contained in Subchapter II of Chapter 105, we shall refer only to section numbers of the chapter.

roads' witnesses made no formal, independent appraisal of Norfolk Southern, the testimony of Dr. Schoenwald demonstrated that if the methods he advocated had been used by the Department, the Department's own appraisal of Norfolk Southern would have been $46,156,000. As our opinion will show, the Commission on this record should have adopted Dr. Schoenwald's methods.

The Commission issued its final decision on 19 May 1981 in which it adopted the tentative appraisals made by the Department and rejected entirely the appraisal methods urged by the Railroads. The Court of Appeals affirmed. We allowed the Railroads' petition for futher review on 11 January 1983.

II.

Railroads contend that the Commission erroneously concluded that the Railroads failed to rebut the presumption of correctness inasmuch as this conclusion was based only upon a review of the Department's evidence and is unsupported by the evidence of record. Railroads also argue that it is clear from the language used by the Commission in its second conclusion that the Commission "misconstrued its role to be that of an appellate agency." These arguments have merit.

Under § 342(b) of the Act, Department appraisals of public service companies are "deemed tentative" since they are made without notice or opportunity for hearing. The Department is required to give the public service company notice of its tentative appraisal, after which the company may, by timely request, secure a hearing before the Commission. This is the first and only evidentiary hearing to which the public service company is entitled. This hearing presents the first opportunity for a public service company to challenge the Department's appraisal methods. At this hearing the Commission does not sit as an appellate tribunal. Its function under § 342(d) is to hear all the evidence offered by the taxpayer and the Department and from this evidence to make findings of fact, from the findings to make conclusions of law, and from the conclusions to issue its decision. The Commission's function is "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." *In re McElwee*, 304 N.C. 68, 87, 283 S.E. 2d 115, 126-27 (1981).

It is true that the Department's appraisal as it stands before the Commission is presumed to be correct. *In re Appeal of AMP, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). The presumption, however, "is only one of fact and is therefore rebuttable." *Id.* at 563, 215 S.E. 2d at 762. The presumption is rebutted when the taxpayer's evidence before the Commission shows that the Department used either an arbitrary or an illegal method of valuation and that the method used resulted in "a substantially higher valuation than one which would have been reached" under a proper valuation method. *In re McElwee*, 304 N.C. at 86, 283 S.E. 2d at 120; *accord, In re Appeal of AMP, Inc.*, 287 N.C. at 563, 215 S.E. 2d at 762. An illegal appraisal method is one which will not result in "true value" as that term is used in § 283 and, for public services companies, in § 335. *In re Appeal of AMP, Inc.*, 287 N.C. at 563-65, 215 S.E. 2d at 762 (tax assessor's method of using book value of inventory to arrive at "true value" was illegal); *In re McElwee*, 304 N.C. at 88-91, 283 S.E. 2d at 127-29 (where statutory appraisal standard was "present use value" of agricultural land, tax assessor's use of comparable sales held an illegal method when the "comparable" land was not shown to be used for same purpose as land being valued).

Here, Railroads offered testimony which demonstrated that the appraisal methods used by the Department would not result in ascertainment of "true value" of the Railroads. Further, the Railroads' evidence showed that the Department's methods resulted in substantially higher valuations than those which would have been reached had proper methods been followed. The Railroads' evidence showed that the methods were not, in this case, simply matters of appraisal judgment. Rather, it showed that the Department's methods would inevitably and always produce substantially higher valuations than the "true value" of the companies called for in the appraisal statutes.[3]

Despite this evidence and notwithstanding the Commission's duty to consider the case as a trial tribunal of original jurisdic-

3. The Railroads' evidence tended to show, for example, that the Department's appraisal methods challenged on this appeal resulted alone in an income approach to value approximately 27 percent higher in the case of Southern Railway and 29 percent higher in the case of Norfolk Southern than would have been the case if the methods advocated by the Railroads had been used.

tion, the Commission in support of its decision concluded (1) the Railroads did not overcome the presumption of correctness given to the Department's appraisals and (2) the Department's appraisals were "supported by substantial competent evidence of record." The first conclusion is legally erroneous and the second indicates that the Commission's decision may have been based on an erroneous view of the Commission's duty vis-a-vis the evidence.

[1] When the Railroads offered evidence that the appraisal methods used by the Department would not produce true values for the Railroads and that the values actually produced by these methods were substantially in excess of true value, they rebutted the presumption of correctness. The burden of going forward with evidence and of persuasion that its methods would in fact produce true values then rested with the Department. And it became the Commission's duty to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the Department met its burden. *In re McElwee*, 304 N.C. at 86-87, 283 S.E. 2d at 126-27.

The Court of Appeals found no error in the Commission's ruling that the Railroads did not rebut the presumption of correctness of the Department's appraisals. The Commission, as we have shown, did err in this ruling. But the Department argues that, even if error, the ruling did not affect the outcome because the Commission's order, viewed as a whole, demonstrates that the Commission did not rely on the presumption of correctness but carefully weighed the conflicting testimony in reaching its decision.

[2] The Department also argues that notwithstanding the language in the Commission's order, when the order is considered as a whole, it is clear that the Commission did consider both the Railroads' and the Department's evidence and determined in the manner of a trial tribunal of original jurisdiction which evidence it thought more worthy of acceptance. There are aspects of the Commission's order which indicate that it might have done this. In its findings the Commission does refer to the evidence of both the Railroads and the Department. The Commission also gives ex-

planations as to why it adopted the Department's methods rather than those supported by the Railroads' experts. The Court of Appeals concluded that because of these aspects of the order the Commission did consider the evidence as a trial tribunal of original jurisdiction.

It is difficult, if not impossible, for an appellate court to divine the decision making process of an administrative agency unless the agency clearly sets it out in its order. We cannot say on the basis of its order before us that the Commission's decision was not affected by its erroneous conclusion on whether the presumption of correctness was rebutted or the erroneous statement of how it should view the evidence, or both.

We need not, however, dwell further on whether the Commission's decision rested to any degree on these errors. Assuming arguendo that it did not, we find, nevertheless, as we shall now demonstrate, more fundamental errors in the Commission's decision.

We conclude that even if the Commission had considered the evidence as a trial tribunal of original jurisdiction, its decision would not have been supported by the evidence before it when the whole record test is, as it must be, applied to that evidence. There is, therefore, no reason to remand this case for reconsideration by the Commission because of the possibility that it looked at the case as an appellate, rather than a trial, tribunal. Neither should we vacate these entire proceedings and remand the case for an entirely new hearing on new evidence in the hope that the Department could produce evidence which might sustain its position. This disposition of the appeal would be not only novel; it would not be authorized by the statutes governing these appeals. See §§ 345-346. Only § 345.1 expressly authorizes the appellate division to direct the Commission to take new evidence. This section reads, in pertinent part:

> [I]f any party shall satisfy the court that evidence has been discovered since the hearing before the Property Tax Commission that could not have been obtained for use at that hearing by the exercise of reasonable diligence, and will materially affect the merits of the case, the court may, in its discretion, remand the record and proceedings to the Com-

> mission with directions to take such subsequently discovered evidence. . . .

Otherwise the statutes contemplate that decisions of the appellate division will be based on the record as the parties have chosen to make it. There is no suggestion in this case that the Department has evidence which meets the test of § 345.1. This Court in *In re McElwee*, 304 N.C. 68, 283 S.E. 2d 115, determined that the Commission's decision was not supported by the evidence in light of the whole record. We reversed its decision and remanded the matter to the Commission for determination of values consistent with the Court's opinion. We did not vacate the proceedings and order new proceedings in order to give the taxing authorities in *McElwee* a second opportunity to bolster its position with new evidence, although such evidence might have been available. We concluded that the property owners in that case were entitled to a decision on the record before the Commission and before the Court. There is no reason grounded in legal principle not to accord the Railroads here the same treatment we accorded the property owner in *McElwee*.

III.

Before the Commission the Railroads challenged various appraisal methods used by the Department. Three of these challenges have been brought forward to this Court.

[3] The Machinery Act, § 336, requires that public service companies, which include railroads, be appraised by determining the company's "true value . . . as a system." True value means "market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell. . . ." § 283. Thus, in appraising a railroad for ad valorem tax purposes, the appraisers seek to determine the fair market value of the railroad's system properties, *i.e.*, that amount which a willing and financially able buyer would pay and a willing seller would accept, neither being under any compulsion to buy or to sell. The entire operating system, without geographical or functional division, is appraised and a portion of the appraised value is allocated to North Carolina by various statutory formulae. § 337.

Railroads, like other public service companies, are not often sold as going concerns, or operating systems; therefore evidence of comparable sales to prove fair market value is generally not available. For this reason, appraisals of such systems rely on a combination of methods which, in North Carolina, are prescribed in the Act. These are commonly referred to as (1) the "cost approach," (2) the "income approach," and (3) the "stock and debt" approach to value.[4]

The income approach to value is based on the principle that something is worth what it will earn. Fair market value of a railway system, using the income approach, is determined by capitalizing at a specified rate of return the net railway operating income (NROI), that is, the income from system property after depreciation and taxes are deducted but before distribution to the railway's debt and security holders. The rate of return which an investor would demand as an inducement to commit capital to the purchase of the system which generates the NROI determines the rate at which this income is to be capitalized. Because appraisers assume that a purchaser will commit both debt and equity capital to the purchase, the overall capitalization rate is derived by calculating a weighted average of the cost of debt and equity capital (sometimes called the "band of investment"). The capitalized value of a given income stream varies directly with the amount of income and inversely with the capitalization rate. Value equals income divided by rate. Slight variations in the capitalization rate can result in large variations in value.

The stock and debt approach to value is based upon the premise that the aggregate market value of a public service company's outstanding stocks and bonds reflects the market value of the company's assets. Normally companies being appraised consist of system and nonsystem property. Section 335 requires that the "influence" of nonsystem property (which is taxed by other authorities) must be removed from the company's stock and debt. The "income influence method" is an accepted means for elim-

4. Under the "cost approach" the true value of a system is presumed to be equivalent to its original or "book value" cost "less a reasonable allowance for depreciation." *See* § 336(a)(2). In this case the Railroads and the Department, because of the nature of the Railroads' assets, agree that the cost approach should be accorded little or no weight as a method of appraisal.

inating the influence of nonsystem property. Using this method, the appraiser multiplies the total stock and debt value by the "income influence percentage," which is derived by dividing the annual income from nonsystem property by the combined annual income from both system and nonsystem property. The product, representing the value of nonsystem property, is deducted from the total value of the company's stock and debt.

With regard to the income approach to value, Railroads contend the Commission erred in its adoption of the Department's capitalization rate. In determining this rate the Department used the Railroads' historic interest rates applicable to its debt, sometimes referred to as "the embedded cost of debt," in figuring the debt component of the rate rather than the current cost of borrowed money. Railroads urge that current cost of borrowed money must be used in determining the debt component of the capitalization rate.[5] Second, Railroads urge that the Commission erred in adopting the Department's method of adding the five-year average of Southern's deferred income taxes of $15,524,000 to Southern's NROI to arrive at the income to be capitalized. Finally, Railroads urge that the Commission erred in adopting the Department's method of eliminating undistributed earnings of Southern's nonsystem subsidiary companies and in adding back deferred taxes to system income in determining the "income influence percentage" under the stock and debt approach to value.

In determining whether the Commission erroneously adopted the challenged methods of the Department, we do not "substitute our judgment for that of the [Commission] when the evidence is conflicting." *In re McElwee*, 304 N.C. at 87, 283 S.E. 2d at 127. The standard for our review is the "whole record" test. *Id.* "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 evi-

5. The Department used a 15 percent return on common equity and Southern's actual 7.2 percent embedded debt cost for the debt component to arrive at a weighted capitalization rate of 12 percent for Southern. The Railroads' expert used an 18 percent rate for the equity component and a 10.5 percent rate for the debt component (based on current cost of borrowed money) to arrive at a weighted capitalization rate of 15.25 percent for Southern. Railroads are contesting only the Department's use of the 7.2 percent debt component rate based on Southern's actual embedded cost.

dence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979). Under this test the reviewing court is permitted to take into account whatever evidence in the record fairly detracts from the evidence relied on by the Commission. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). "Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [agency's] result, without taking into account the contradictory evidence or evidence from which conflicting inferences could be drawn." *Id.* at 410, 233 S.E. 2d at 541. See *In re McElwee*, 304 N.C. at 87-88, 283 S.E. 2d at 126-27, for an application of the foregoing principles to a decision of the Property Tax Commission.

When the whole record test is applied to the challenged decisions of the Commission, it is clear that these decisions have no rational basis in the evidence and that the Court of Appeals erred in affirming them.

A.

Department's Erroneous Approach to Market Value

[4] As we have shown, the Machinery Act requires that public service companies, including railroads, be appraised at "market value, *i.e.*, the price at which the company "would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell. . . ." § 283. The testimony of the Department's expert, Mr. Underhill, is seriously flawed because of his repeated insistence that he did not attempt to appraise the Railroads from the standpoint of their value to a hypothetical purchaser. His methods were designed to arrive at the value of the Railroads simply from the standpoint of the seller-owner. Mr. Underhill stated:

> In my opinion—even though the laws in the State of North Carolina and most states require the exact willing buyer, willing seller—if I can appraise Southern Railway Company as a value to the present owner . . ., I will determine a value that will not be greater than Southern Railway Company would require as a seller. And in my opinion any time you attack or discuss an appraisal from a purchaser point of view then you are getting the absolute lowest indication of that.

Later, during cross-examination, Mr. Underhill reiterated: "I find the true value of the railroad system property by determining the value to the owner of the property. I explained that *I do not consider value to a willing buyer* because railroad sales are few and those few sales are abnormal and don't represent fair market." (Emphasis added.) Mr. Underhill continued:

> My appraisal of fair market value is determined based on my opinion of the appraisal of the fair market value of the railroad to the present owner and in light of the fact that everyone seems to agree there is no willing buyer or seller, and that satisfies the criteria. I think that if you put it in the perspective of a willing purchaser under a hypothetical restructuring of the capital and everything, also, you come out with a value that is not realistic to market value. So, for that reason I confine my approach to the value of this property to the owner.
>
> Throughout the appraisal there are areas where you say prospective purchaser, or this is what would happen. And any appraiser would do that; but in light of the fact that it's not going to be sold, I think that the value of the present owner represents a reasonable market value.

Mr. Underhill's appraisals of the Railroads from the perspective of the present owner to the exclusion of the willing buyer were in clear violation of the statutory "market value" standard.

Mr. Underhill was the Department's only witness. Arrayed against his testimony was the testimony of the Railroads' experts, Dr. Schoenwald and Dean Keller. Both Railroads' witnesses approached their appraisals from the standpoint of the willing and able buyer and the willing seller as the Act requires. Mr. Underhill's failure to follow the statutory standard by approaching his appraisals solely from the seller-owner's standpoint so detracts from the usefulness of his methods that, on the whole record test, we must conclude it was error for the Commission to adopt them and to fail to adopt the methods urged by the Railroads' experts.

B.

The Commission Erred on this Record in Using Embedded, Historical Cost of Debt Rather than Current Cost in Arriving at the Proper Capitalization Rate

[5] To determine the capitalization rate, the Department calculated a weighted average of the cost of equity and the cost of debt, the "band of investment," as follows: The cost of equity component was based upon current cost of money. However, the Department's figure for the debt component reflected not the current cost of money, but rather the actual historic (and lower) interest rates applicable to the Railroads' existing debt (the "embedded cost of debt"). The Department justified its use of embedded cost of debt in terms of value to the seller. In terms of value to both seller and buyer, the Railroads' expert, Dr. Schoenwald, explained:

> Now, if you use this embedded cost theory, this five percent, the issue rate some years ago is the basis for your capitalization rate, you are saying those railroad assets, the one we are appraising, are still worth one hundred million dollars and investors would pay one hundred million dollars for those assets. I submit that that is not true.
>
> If in today's market given that risk in this company, whatever it is, the appropriate market rate of interest is ten percent, and that reflects everything that's happened in the interim from their issues five years ago to the present. It reflects the tight money policies in existence. That asset can only be worth in today's market fifty million dollars because it can only generate five million dollars annual income. No investor would come in and pay for that asset any more than fifty million dollars, because he can go in the competitive market and buy some equally risky asset for the fifty million and generate his five million a year and obtain the required, current ten percent. As a consequence, the bonds related to that industry could only be worth fifty million dollars. And while it may be in a vault some place and have a price marked on it from some years ago of a hundred million dollars, at today's rates it's only worth fifty million. And the related asset is only worth fifty million.

In approving the embedded cost of debt rate, the Commission's conclusion on this issue reflects the Department's emphasis on value to the owner. The Commission concluded in accord with the Department's evidence that "it is more reasonable to expect a purchaser to assume the debt and pay it off as provided in the actual existing instruments than it would be to expect him to refinance the transaction at current interest rates." In response, the Railroads correctly point out, as their evidence shows, that this rationale, *i.e.*, that an assumable, existing debt at a low interest rate enhances the value of the property, "confuses valuation with methods of financing. Once value has been determined, the means of *payment* are a matter of further negotiation between the parties." An existing debt with a low interest rate simply does not affect the fair market value of the property subject to the debt. *See Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976) (seller receives "fair market value" even when buyer, because of due-on-sale clause in mortgage, cannot assume a mortgage at lower than market rates).

Under the income approach to value, fair market value must be determined by current market conditions, not existing contractual obligations with reference to the asset being valued. This Court has held that valuations of real property for ad valorem tax purposes using the income approach must be based on fair market rents, not actual contract rents. *In re Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E. 2d 855 (1963) (contract rents produced less than market rents); *In re Valuation*, 282 N.C. 71, 191 S.E. 2d 692 (1972) (contract rents produced more than market rents). Just as use of actual, contract rents not reflective of market rents is illegal in making market value appraisals under the income approach, it is likewise illegal to use "actual cost of debt," not reflective of market cost of debt in making such appraisals. Market value appraisals for ad valorem tax purposes must be based on market data.

We further agree with the Railroads that the Commission placed undue significance on the past use of the embedded cost of debt by the ICC and other regulatory bodies in determining an adequate rate of return for *rate-making* purposes. The Railroads properly note that "the purpose of those proceedings was to develop an adequate return to the *current* owners on their *present* investment, and perhaps it is in this sense that the Department

referred to 'the value of the property to the seller.' " Significantly, the ICC has recently determined that even for rate-making purposes, the current cost of debt must be used:

> The minimum rate of return that will allow railroads to obtain investment funds is the cost of capital. *The cost of capital is, by definition, the rate at which the market values investment funds.* As we have said, investments earning less than the cost of capital will, in general, not maintain existing funding nor obtain new funding *because investors will have sufficient opportunities to invest their funds elsewhere at a higher rate of return.* It is extremely important to add, however, that this is true of funds generated internally as well. Railroad management has little incentive to reinvest funds generated by ratepayers in continued rail use if greater returns are available elsewhere. Railroads are private companies whose stockholders would not permit such reinvestment. *Thus, even retained earnings will not be invested in the company if they cannot earn a rate of return equal to the cost of capital.*

Ex parte No. 393, Standards for Railroad Revenue Adequacy, 364 I.C.C. 803, 810 (1981), *affirmed sub nom., Bessemer and Lake Erie Rr. Co. v. Interstate Commerce Comm'n*, 691 F. 2d 1104, 1111 (3rd Cir. 1982) (emphasis added).

The only reported tax case involving this issue holds that current cost rather than embedded cost of debt must be used in valuing railroads for ad valorem tax purposes. *Soo Line R. Co. v. Wis. Dept. of Rev.*, 89 Wis. 2d 331, 278 N.W. 2d 487 (Wis. App. 1979), *aff'd*, 292 N.W. 2d 869 (Wis. 1980); *see also County of Washtenaw v. State Tax Commission*, 126 Mich. App. 535, 337 N.W. 2d 565 (1983) (a real property ad valorem tax case).

In summary, we hold that under our statutory definition of market value, which focuses on both a willing seller and a willing buyer, the value of a railroad's assets to the prospective investor must be measured in terms of current market cost of both equity and debt. It is only by doing so that the prospective prudent investor is able to measure the value of the railroad against the value of other potential investments. The Department's reliance on "value to present owners" not only ignores the statutorily mandated buyer component of the market value definition, but

results in an excessively high value under the income approach which, realistically, would be rejected by any prospective investor seeking a reasonable rate of return under present market conditions.

C.

The Commission Erred on this Record in Refusing to Deduct Deferred Income Tax Expense from Income to be Capitalized

[6] Railroads compute depreciation expenses for book and financial reporting purposes under the straight-line method using asset lives prescribed by the ICC. Under accelerated depreciation provisions of the Internal Revenue Code, the Railroads, for income tax purposes, show depreciation expense greater during the early life of an asset than will be shown during the asset's later life. This means that depreciation expense for income tax purposes will, during the later life of the asset, be less than the expense shown on the books measured by the asset's life. This result is required by the proposition that total depreciation deductions over the life of an asset, even for income tax reporting purposes, cannot exceed the cost of the asset. In the later years of an asset's life the taxpayer will not be able to deduct for income tax purposes the full depreciation shown on the books under the straight-line method. General accounting principles suggest that an expense item, denominated deferred income tax expense, be offset against income during periods when accelerated depreciation is being used so as not to overstate actual after-tax income earned during these years. Even the Department's witness, Mr. Underhill, conceded that this was a generally accepted accounting principle but, in his opinion, the deferred income tax expense should not be deducted from the income stream for purposes of ascertaining value.

The Department initially approached the deferred income tax expense issue two ways. Under one calculation it added back to Southern's NROI the sum of $15,524,000, representing the average deferred expense over the last five years as shown on Southern's books. In the second calculation the Department treated deferred taxes as an expense in determining the income to be capitalized but also treated accumulated deferred taxes on the liability side of the balance sheet as a cost-free source of capital, *i.e.*, an interest-free loan from the government, at a zero percent

interest rate in the band of investment. This latter treatment reduced income to be capitalized, but also decreased the overall capitalization rate. Before the Commission the Department's witness testified:

> In my opinion, deferred income tax is a reality or it is not a reality. It is a legitimate expense or it is not a legitimate expense. If it is or should be considered a legitimate expense on the income statement to reduce income since it is absolutely not paid, it is then a liability. That must be paid in the future, and it constitutes an interest free loan from the federal government. That is the calculation covered in Method B. If we ignore current deferred income tax, since it is not paid, then it would be improper to consider the accumulated deferred as an interest free loan. In other words, ignore it or use it. But do not use it in one place and ignore it in the other.

On cross-examination the Department's witness said that he preferred disallowing the deferred tax expense as an offset to the income stream to be capitalized. He conceded, however:

> I recognized this morning that whatever value deferred taxes have to the railroad, they are not as valuable as a dollar of earnings because they have to be paid back. I said that by using the five-year average of current deferred that you add back to income, you are really kind of discounting them by thirty percent from what this year's deferred tax was. As to whether I feel that's proper because since they will have to be paid back and they are just not as valuable as income itself, well, there is considerable question about being paid back. I think that if they do have to be paid back that they are an interest-free loan.
>
> I do acknowledge that on a single equipment purchase such as a boxcar, the tax is deferred by use of accelerated depreciation and shorter asset lives or, life, in that case. *It will eventually be paid back on that particular boxcar.* [Emphasis added.]

The Commission determined not to treat the deferred tax expense as an interest-free source of capital; instead the Commission simply adopted the Department's alternative treatment and

added back the five-year average for deferred taxes ($15,524,000) to Southern's NROI in arriving at income to be capitalized. Again, applying the whole-record test to this issue, we are satisfied the Commission erred.

The basis for the Commission's determination was that deferred income taxes are not a presently outstanding indebtedness but a mere contingency which may never be paid. The Commission relied on *Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 231 S.E. 2d 656 (1977). In *Coble* this Court held that an installment method taxpayer may not deduct from its franchise tax base deferred federal and state income tax liabilities. The decision in *Coble* was based on the specific language of the franchise tax statute which permitted certain deductions from the franchise tax base only "for definite and accrued legal liabilities" and for "taxes accrued." The Court held that deferred income taxes carried as an expense on the taxpayer's books were not "definite and accrued legal liabilities" or "taxes accrued" within the meaning of the franchise tax statute.

The question before the Commission was whether the deferred income tax expense is properly deductible from the Railroads' NROI in arriving at income to be capitalized under the income approach to value. On this issue the Railroads' evidence, much of which was not challenged by the Department's evidence, is not only clear and cogent, it is overwhelmingly convincing.

This testimony demonstrated, and the Department's witness did not contravene it, that in order for deferred income taxes to be perpetually immune from payment, the Railroads would have to maintain increasingly greater levels of investment necessary to obtain new depreciation in amounts sufficient to offset the reduced depreciation attributable to older assets. Further, the accelerated depreciation provisions of the income tax laws would have to remain in place. Railroads' evidence demonstrated that potential buyers and sellers would not appraise the railroad system on the assumption that these kinds of investments would continue to be made, or that accelerated depreciation provisions would be forever with us. This is true notwithstanding the fact that Southern's capital acquisitions over the last several years

have been so large that it has continued to accumulate deferral tax expenses and, in fact, has paid no income tax.[6]

Normally prospective buyers and sellers evaluate the income of a company by eliminating from it expenses associated with it, even though the expense may not be payable until later. The expense is recognized as a cost of earning the income and should be accounted for accordingly. Dean Keller testified:

> Tax expense is essentially related to the earning of income. So, in any particular period in which income is earned, the tax expense should be recognized as having been incurred in that particular period.
>
> Current deferred taxes are not payable currently; however, in my opinion they should be recognized as a current expense. The tax expense is, as I said, related to the earning of income; so in the period in which the income is earned you would recognize the expense.
>
> . . . .
>
> If I were consulted by a willing seller or a willing buyer to give advice as to the proper income stream to be capitalized in valuing a business, I would not consider it reasonable to add back any portion of the current deferred tax expense of the business to the income stream. None at all.

NROI, the income stream to be capitalized, is, after all, income *after* depreciation and taxes are deducted. To fail to deduct a tax expense which would have to be paid but for accelerated depreciation schedules, from the standpoint of a prospective buyer, over-

6. We acknowledge, too, several scholarly articles cited in the Department's Brief which tend to support the Department's position on this question. *See* Fn. Davidson, "Accelerated Depreciation and the Allocation of Income Taxes," 33 Accounting Rev. 173 (1958); Warren, "Tax Accounting in Regulated Industries, Limitations on Rate Base Exclusions," 31 Rutgers L. Rev. 187 (1979); Davidson, Kirsch and Palast, "Utilities, Accelerated Depreciation and Income Tax Allocation: An Empirical Study," Public Utilities Fortnightly (July 2, 1981); "Is Generally Accepted Accounting for Income Taxes Possibly Misleading Investors," *Price Waterhouse and Co.*, 1967. It suffices to say that when we apply the whole record test, as we are bound to do, to determine whether the Commission erred, we are limited to a consideration of the record as it existed before the Commission. There is no indication in the record or briefs that these articles were made a part of the record below or considered by the Commission in reaching its decision.

states the NROI for the period in which both the income and the taxes attributable to it occur.

Both the Railroads and the Department seem to agree that deferral of federal income taxes is beneficial to the owner-seller largely because it provides cash for asset acquisition which would otherwise be paid to the government. The Railroads' evidence showed, however, that the accumulated deferred tax expense has no value to a prospective buyer. It cannot be transferred from seller to buyer. If deferred taxes can be viewed as value to the buyer, that value is more properly reflected in the value of income generated by assets purchased with funds attributable to the deferral. The Department's expert, Mr. Underhill, admitted that the value of assets purchased with deferred taxes would appear in the capitalization of earnings from those assets. But to include in income to be capitalized both the deferred tax expense and the income earned from the use of that money, in the testimony of Dr. Schoenwald, "double counts the benefit," resulting in an overstatement of value which, rather than attracting a prudent investor, would discourage investment.

Our holding on this issue finds support in the only two reported cases considering the question in a similar context. *See Southern Railway Co. v. State Board of Equalization*, 682 S.W. 2d 196 (Tenn. 1984); *Pac. Power & Light Co. v. Dept. of Revenue*, 596 P. 2d 912 (Or. 1979).

D.

The Commission Erred on this Record in Determining the "Income Influence Percentage" in the Stock and Debt Approach

[7] The Court of Appeals correctly summarized the stock and debt approach to value as follows:

> This appraisal technique operates on the premise that the true property value of a company equals the total market value of all its outstanding debt and equity securities. However, all non-system property must be eliminated to arrive at the true value of the system operation. Under the 'income influence approach,' the appraiser determines the ratio of non-system income to total income before fixed charges (i.e., the income available to both bondholder and stockholder), and then multiplies that ratio by the total value of the

> company's stock and debt. The resulting figure is the 'income influence' of the non-system property. This figure is deducted from the total stock and debt value. The final figure represents the true stock and debt value for the Railroads' system property.

59 N.C. App. at 131, 296 S.E. 2d at 471.

In arriving at the total income upon which the income influence ratio is figured, the Department in one calculation added back the deferred income tax expense. As we have already held, the Commission erred on this record in adopting this method of arriving at income. Further, the Department excluded undistributed earnings ($20,660,000 in Southern's case) of subsidiaries from both the nonsystem and the total income. This resulted in reduced nonsystem income, a smaller "income influence" for the nonsystem assets, and a larger system value. The Railroads argue that undistributed earnings from nonsystem subsidiaries should be included. In support of their position, the Railroads offered the testimony of Dr. Schoenwald who explained:

> If you have more coverage for a debt security or the interest expense on a debt security by virtue of additional income from nonsystem sources, this increases the market value of that security. The greater the coverage, the greater the safety; therefore, the higher the price of that security. In other words, investors would be willing to take a lower interest rate from that type of company than from a company which has marginal coverage and has no nonsystem income to support that coverage.

Earlier, Dr. Schoenwald stated:

> The elimination of those earnings from the nonoperating income reduces the nonoperating income influence percentage; therefore the deduction for nonsystem property under the stock and debt approach is inadequate, and the additional value flows through into the estimate of railroad value made by the Department of Revenue. The market value of Southern Railway stock definitely reflects all of the undistributed earnings of all the companies. You have got to deduct influence of that equity in order to get the proper value of Southern Railway Company.

Mr. Underhill's reason for excluding undistributed earnings of nonsystem subsidiaries was that they offset the exclusion of the long-term debt of the nonsystem subsidiaries in determining the system's stock and debt value. Mr. Underhill conceded that to consider the nonsystem subsidiaries' long-term debt in determining the nonsystem's influence on the system's stock and debt values was a "new concept" in railroad appraising but one which he personally thought ought to be used. Traditionally, only stock and debt values of the *parent company, i.e.*, the system, offset by the influence of nonsystem values, are considered in the stock and debt approach.

In its determination of this issue the Commission merely adopted the Department's figures without reference to the inclusion or exclusion of undistributed earnings. The Court of Appeals affirmed by simply concluding that "[r]etained earnings of a subsidiary have little or no effect on the value of Southern's common stock."

We hold that this record does not support exclusion of nonsystem subsidiaries' undistributed earnings in determining their income influence on the system's stock and debt values. We disagree with the Court of Appeals that the subsidiaries' retained earnings have *little* or *no* effect on the value of the parent Southern's common stock. The only evidence of record supports a contrary conclusion.

IV.

In its appraisal of Norfolk Southern, the Department relied almost entirely on the income approach to value. In determining Norfolk Southern's NROI to be capitalized, it added back the deferred income tax expense. It then capitalized the income at a rate based in part on Norfolk Southern's embedded cost of debt rather than current market cost. It arrived at a value of $59,624,725 with this method. Had the Department not added back the deferred income tax expense to arrive at NROI and had it used current market cost of debt in determining the capitalization rate, it would have arrived at a value under the income approach of $46,156,000.

We have held that the Commission on this record erred in adopting the Department's methods of adding back deferred in-

come tax expense to determine NROI and using embedded rather than market cost of debt. We conclude, therefore, that the Commission erred in adopting the Department's appraisal of Norfolk Southern based in large part on these methods.

V.

We wish to emphasize that this is an ad valorem tax evaluation case. Our resolution of the questions presented would not necessarily be the same were we addressing the proper methods of valuation for rate making purposes.

We reverse the Court of Appeals and remand the case to that court with instructions that it remand to the North Carolina Property Tax Commission to determine the system valuation of Railroads' property in a manner consistent with this opinion.

Reversed and remanded.

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

Justice MITCHELL dissenting.

I share the views expressed in Part II of the opinion of the majority. With regard to that part of the opinion, however, it is clearer to me than to the majority that the Commission erroneously perceived its function in this case as that of an appellate tribunal rather than that of an original trial tribunal. It is apparent to me that this misperception unavoidably caused the Commission to fail to perform the functions of determining the credibility, weight, and sufficiency of the evidence and of finding facts and drawing conclusions of law from those facts. These functions are reserved by law exclusively for the Commission. N.C.G.S. 105-342(d). The opinion of the majority and the result reached therein, however, place this Court in the position of performing the Commission's functions or most of them.

I would hold that the Commission's failure in this case to perform the functions reserved exclusively to it by law requires that its order be vacated and the case remanded to it for a new hearing *ab initio*. I think it neither necessary nor desirable at this

time for the Court to reach or decide any issues other than those addressed in Part II of the opinion of the majority.

Justice MEYER *joins in this dissenting opinion.*

PARKER WHEDON v. JEANNETTE C. WHEDON

No. 354PA84

(Filed 2 April 1985)

1. **Divorce and Alimony § 20.3— dismissal of request for appellate attorney's fees without prejudice**

In a divorce action in which defendant sought to recover attorney's fees for a previous appeal and for her current action to hold plaintiff in contempt, the Court of Appeals erred by assuming that the trial court intended a finding of fact that there was no evidence of defendant's present financial status to provide a basis for an involuntary dismissal without prejudice for insufficient evidence for both the appellate counsel fees and the motion hearing counsel fees. The trial court's only finding of fact relative to the defendant's financial status spoke in terms of her "present" condition and the record contained almost no evidence of her status during the current proceedings, but contained a significant amount of evidence as to her financial status during the initial trial and some evidence of her status during the appeal. Therefore, the trial court intended to rule on the merits only with respect to counsel fees claimed for services rendered in the current action.

2. **Rules of Civil Procedure § 41.2— involuntary dismissal without prejudice—discretion of trial court**

The authority to order an involuntary dismissal without prejudice is exercised in the broad discretion of the trial court. There was no abuse of discretion in dismissing defendant's motion for appellate counsel fees without prejudice where the evidence supported the inference that the trial judge determined that defendant had a meritorious claim but had simply and excusably failed to bring forth the necessary evidence at the motion hearing. G.S. 1A-1, Rule 41(b).

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

ON discretionary review of a decision of the Court of Appeals reported at 68 N.C. App. 191, 314 S.E. 2d 794 (1984), modifying and affirming an order entered 25 January 1983, by *Todd, J.*, dismissing defendant's motions to hold the plaintiff in contempt and for counsel fees, and granting defendant's motion to amend a

prior alimony award. Heard in the Supreme Court 11 December 1984.

This action was instituted on 20 November 1980 by the filing of a complaint for absolute divorce based upon one year's separation between the plaintiff husband and the defendant wife. In his complaint, plaintiff admitted (1) that he had abandoned defendant "within the meaning of that term as set out in N.C.G.S. § 50-16.2 (4) without fault or provocation on her part"; (2) that she was the dependent spouse and he was the supporting spouse "within the meaning of those terms as set out in N.C.G.S. § 50-16.1(3) and (4)"; and (3) that she was entitled to be awarded permanent alimony.

A hearing was held to determine the amount of defendant's alimony award, and a separate hearing was held to determine the amount of defendant's counsel fee award. Following the hearings, Judge Saunders made the appropriate findings of fact, conclusions of law and entered a judgment and supplemental order granting defendant permanent alimony and counsel fees. Upon plaintiff's appeal, the alimony award was vacated in part and remanded for modification; however, the trial court's judgment and order were otherwise affirmed as to the alimony award and the counsel fee award. *Whedon v. Whedon*, 58 N.C. App. 524, 294 S.E. 2d 29, *disc. rev. denied*, 306 N.C. 752, 295 S.E. 2d 764 (1982). (Hereafter "*Whedon I*".)

On 15 October 1982, defendant moved for (1) an order holding plaintiff in willful contempt for failure to pay alimony; (2) an amendment of the previous alimony award in view of the Court of Appeals' opinion in *Whedon I*; (3) for counsel fees to be awarded her counsel during the previous appeal process; and (4) for counsel fees in the preparation, filing and hearing of the motions. A show cause order was entered on 2 November 1982, directing the plaintiff to appear before the judge presiding over the 22 November 1982 Civil Session of District Court, Mecklenburg County.

In her verified motion, defendant alleged that her attorney had spent 115.25 hours in representing her during the appellate process, that the trial court had initially found that she had insufficient funds with which to hire counsel, and that she "clearly has not had the funds to hire counsel during the course of the appellate process." During the hearing on defendant's motion, both the defendant and her attorney testified. At the close of defend-

ant's evidence, the plaintiff moved to dismiss the defendant's motion for contempt and counsel fees pursuant to N.C.G.S. § 1A-1, Rule 41(b), on the grounds that defendant had failed to produce sufficient evidence to entitle her to the relief requested. Judge Todd granted the plaintiff's motion for an involuntary dismissal. The plaintiff presented no evidence.

On 25 January 1983, an order was entered providing that (1) defendant's motion that plaintiff be adjudged in willful contempt be dismissed; (2) defendant's motion for counsel fees for the preparation of the contempt and amendment motion be dismissed; (3) defendant's motion for counsel fees during the appellate process be denied without prejudice; and (4) defendant's motion to amend the previous alimony award be granted.

Plaintiff appealed from the trial court's judgment to the Court of Appeals. In *Whedon v. Whedon*, 68 N.C. App. 191, 314 S.E. 2d 794 (1984) (hereafter "*Whedon II*"), that court held *inter alia* that the trial court erred in dismissing the defendant's request for appellate counsel fees without prejudice. On 30 August 1984, we granted the defendant's petition for discretionary review for the limited purpose of reviewing the question of "whether the trial judge properly dismissed the motion for counsel fees without prejudice."

Cannon & Basinger, P.A., by A. Marshall Basinger, II, for the defendant-appellant.

Kennedy, Covington, Lobdell & Hickman, by Richard D. Stephens for the plaintiff-appellee.

MEYER, Justice.

The question presented for review is whether the Court of Appeals erred in holding that the trial court could not grant an involuntary dismissal without prejudice against the nonmoving party pursuant to N.C.G.S. § 1A-1, Rule 41(b), midway through a hearing to determine an award of counsel fees under N.C.G.S. § 50-16.4. For the reasons set forth below, we hold that (1) the Court of Appeals erred in its determination that the trial court must make a ruling on the merits of a party's request for attorneys' fees when presented with a motion for an involuntary dismissal at mid-trial; (2) the authority to determine whether the

nonmoving party in any action should be permitted to commence a new action has been vested in the trial judge under N.C.G.S. § 1A-1, Rule 41(b); and (3) the exercise of that power lies within the trial court's sound discretion and will not be disturbed on appeal in the absence of a showing of abuse of discretion, which the plaintiff has not demonstrated in this case.

[1] In addressing the plaintiff's contention that the trial court erred by dismissing the defendant's request for appellate attorneys' fees without prejudice, the Court of Appeals stated that although the language of Rule 41(b) would *appear* to permit an involuntary dismissal without prejudice of a motion for counsel fees under N.C.G.S. § 50-16.4, this would not be a proper application of the rule. Rather, the court reasoned, "that it was the trial court's *duty*, when presented with plaintiff's motion for an involuntary dismissal of defendant's requests for attorneys' fees, *to examine the quality of defendant's evidence and make a ruling on the merits.*" *Whedon v. Whedon*, 68 N.C. App. at 195, 314 S.E. 2d at 797.

It is evident from a reading of the opinion in *Whedon II* that the Court of Appeals based its holding upon its assumption that the trial court had *in fact* examined the "quality of defendant's evidence," found it to be insufficient to support her motion for counsel fees, and had made a "ruling on the merits" in the plaintiff's favor such that "the additional language in the order indicating that the motion for appellate attorneys' fees was dismissed without prejudice was without legal effect and must be regarded as mere surplusage." 68 N.C. App. at 195, 314 S.E. 2d at 797.

Our examination of the record fails to support this view of the trial court's actions. More importantly, we find no support for the appellate court's interpretation of the scope of the trial judge's authority under Rule 41(b) in either the language of the rule itself, or in any of the relevant authorities addressing motions for involuntary dismissal made pursuant thereto.

I.

With regard to whether the trial court necessarily determined the facts in the course of ruling on plaintiff's Rule 41(b) motion, we find it significant that the defendant had requested the award of reasonable attorneys' fees for *both* representation during the appellate process in *Whedon I* and for representation during the contempt hearing in *Whedon II*, and that the amount of

evidence presented differed with respect to the two separate claims. With regard to both requests, defendant's verified motion contains the following allegations:

> The defendant alleges that the fair and reasonable value of said [appellate attorney] services is not less than $17,790.00, *which the plaintiff should be ordered to pay inasmuch as the trial court did find as a fact that the defendant had no funds with which to hire counsel during the course of the trial, and she clearly has not had the funds to hire counsel during the course of the appellate process.* The defendant further respectfully submits that the appeal involved several important issues, requiring a great deal of research and preparation in order to achieve the affirmative rulings by the appellate courts.
>
> * * *
>
> The defendant further alleges that *she continues to be without funds with which to pay the expenses incurred as a result of the preparation, filing and hearing of this motion,* and should be awarded additional attorney's fees for her attorney through the course of hearing this Motion. (Emphasis added.)

The "findings" of the trial court to which defendant referred in her verified motion were those findings of fact made by Judge Saunders at the initial alimony trial in February 1981. The relevant findings concerning the parties' finances and the defendant's entitlement to counsel fees are as follows:

> 5. The plaintiff, in his verified complaint, has alleged, and the court does find as a fact, that the plaintiff actually abandoned the defendant on or about August 11, 1978, without any fault or provocation on the defendant's part, within the meaning of that term as set forth in N.C.G.S. § 50-16.2(4).
>
> 6. The plaintiff in his verified complaint, alleges, and the court does find as a fact, that the defendant is the dependent spouse who is actually substantially dependent upon the plaintiff for her maintenance and support, and the plaintiff is the supporting spouse, capable of providing reasonable support for the defendant, within the meaning of those terms as set forth in N.C.G.S. 50-16.1(3) and (4).

7. The court specifically finds that the defendant has not sufficient means whereon to subsist during the defense of this action and to defray the necessary expenses thereof.

8. The plaintiff is 55 years old and in good health, and has been actively engaged in the practice of law in Mecklenburg County for over twenty years. Further, the plaintiff, a sole practitioner, is in good standing in this community and is honestly engaged in his business and is seeking to operate it at a profit.

* * *

17. The defendant is 55 years old, in good health, and is the mother of four children, the youngest of whom is now attending North Carolina State University. The defendant is a graduate of the University of Georgia and the School of Education at the University of North Carolina at Chapel Hill.

18. The defendant has not had a job in the business world in over twenty years and has no readily available job skills. In addition, she would be 58 years of age by the time she could renew her teacher's certificate, assuming the successful completion of the necessary college courses.

19. The defendant has no income from any source whatsoever.

* * *

26. The plaintiff has the present ability to pay attorneys fees to the defendant's attorneys for representing her in this action.

Based upon these findings, Judge Saunders concluded that:

The defendant has not sufficient means whereupon to subsist during the defense of this action, and to defray the necessary expenses thereof, and the Court therefore concludes that the defendant is entitled to an award of attorneys' fees pursuant to N.C.G.S. § 50-16.4.[1]

1. N.C.G.S. § 50-16.4, governing counsel fees in actions for alimony, provides: At any time that a dependent spouse would be entitled to alimony pendente lite, pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony.

The trial court's award of counsel fees to the defendant's attorneys was affirmed by the Court of Appeals in *Whedon I.*

At the November 1982 hearing before Judge Todd, in addition to presenting the record of *Whedon I* and her verified motion, defendant testified that she had to borrow the money she used to defray her counsel fees during the appellate process in *Whedon I* from her mother. Defendant also offered evidence by her attorney as to the time he spent in representing defendant during the appellate process, and her attorney was extensively cross-examined by plaintiff's attorney as to the nature and value of the services rendered.

Since the plaintiff's initial pleadings were filed in 1980, he has filed no additional pleadings in this action, with the exception of his two appeals to the Court of Appeals. During the course of the hearing in question, plaintiff presented no evidence.

At the close of defendant's evidence, the plaintiff moved to dismiss defendant's motion on the ground that defendant's evidence was insufficient to support any of the relief she requested. With regard to counsel fees in particular, plaintiff argued that this was a "new application" for counsel fees, and as such, the burden was on the defendant to show the reasonable value of the services rendered, to show that she presently has insufficient means and ability to defray those expenses and to demonstrate that plaintiff can pay or afford those expenses. Plaintiff made the identical argument regarding both the appellate counsel fees for *Whedon I* and the motion hearing fees for *Whedon II.* After discussion with counsel, the trial court made the following ruling:

> THE COURT: As to the portions of the defendant's motion for attorneys fees on the Appellate level and during this contempt proceeding and all the times we made up and in-

N.C.G.S. § 50-16.3, governing grounds for alimony pendente lite provides: (a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when: (1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and (2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. (b) The determination of the amount and the payment of alimony pendente lite shall be in the same manner as alimony, except that the same shall be limited to the pendency of the suit in which the application is made.

cluding this time today, *it is the judgment of this Court there is insufficient evidence at this time that has been presented to make a ruling on the issue of attorneys fees at both the Appellate level and at this contempt proceeding, and I am therefore dismissing those motions. However, that will be without prejudice to the defendant* and the plaintiff would like to object and except to that ruling. (Emphasis added.)

In the order entered on 25 January 1983, the trial court made a number of findings of fact with regard to the number of hours spent by defendant's attorneys during the appeal in *Whedon I* and in preparation for the hearing in *Whedon II*; the hourly rate defendant's attorney A. Marshall Basinger charged for such appellate work; and the value of the consulting services provided by defendant's attorney William E. Poe throughout the appellate process. No findings of fact were made with respect to the value of the services rendered by these attorneys with regard to the preparations in *Whedon II*.

The trial court made only one finding of fact with regard to the financial status of the defendant.

15. That there was no evidence presented with regard to the *present financial status* of the defendant, particularly with reference to whether the defendant had sufficient means whereon to subsist *during the prosecution or defense of this suit and to defray the necessary expenses thereof.* (Emphasis added.)

Based upon these findings of fact, the court concluded as a matter of law:

2) That the defendant's motion for the award of a reasonable counsel fee for the preparation, filing and hearing of this motion should be denied and dismissed.

3) That defendant's motion for an award of counsel fees to A. Marshall Basinger and William E. Poe for representing the defendant during the appellate process should be denied and dismissed without prejudice.

The Court of Appeals apparently *assumed* that Finding of Fact No. 15 provided the basis for an involuntary dismissal *with prejudice* on the ground of the insufficiency of the evidence as to both the appellate counsel fees request and the motion hearing counsel fees. We do not agree.

An application for counsel fees may be heard orally without a jury by a judge of the District Court at any time upon affidavit, verified pleadings, or other proof. *See* N.C.G.S. § 50-16.8(f) and (g). *See* 2 Lee, North Carolina Family Law § 145, p. 206 (1980). "In order to receive an award of counsel fees in an alimony case, it must be determined that the spouse is entitled to the relief demanded; that the spouse is a dependent spouse; and that the dependent spouse is without sufficient means whereon to subsist during the prosecution of the suit, and defray the necessary expenses thereof." *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E. 2d 58, 67 (1980). "[A]n award of attorney's fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such award are duly met, especially where the appeal is taken by the supporting spouse." *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E. 2d 787, 790 (1981). *See also* 24 Am. Jur. 2d, Divorce and Separation § 600 (1983). In making its determination of the proper amount of counsel fees which are to be awarded a dependent spouse as litigant or appellant the trial court is under an obligation to conduct a broad inquiry considering as relevant factors the nature and worth of the services rendered, the magnitude of the task imposed upon counsel, and reasonable consideration for the parties' respective conditions and financial circumstances. *See Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58; *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975).

With regard to appellate attorneys' fees, the record in this case consisted of the verified pleadings by the plaintiff and the defendant, extensive findings of fact and conclusions of law by the trial judge who presided over the initial alimony trial and the evidence presented by defendant at the motion hearing, which established the number of hours spent and rate charged by her appellate counsel and the fact that defendant had to borrow money from her mother to defray the expenses of that appeal. In contrast, the record is nearly devoid of evidence regarding the defendant's then present financial condition during the pendency of *Whedon II*.

Given the fact that the trial court's only finding of fact relative to the defendant's financial status spoke in terms of her "present" financial condition and the fact that the record contained almost no evidence of that status during the proceedings in

Whedon II, but did contain a significant amount of evidence as to her financial status during the initial trial, together with some evidence of her financial status during the pendency of the appeal in *Whedon I*, we may infer that Finding of Fact No. 15 did not relate to defendant's ability or inability to produce evidence to support her request for appellate counsel fees in *Whedon I*.

Moreover, given the disparities of proof in the record regarding the two requests for counsel fees and the disparate treatment afforded the requests in the trial court's order of dismissal, we conclude that the court intended to rule "on the merits" only with respect to counsel fees claimed for services rendered in *Whedon II*. Therefore, we disagree with the Court of Appeals' determination that the dismissal of the appellate counsel fees motion with respect to *Whedon I* was *necessarily* "on the merits" despite the trial court's express ruling that the dismissal was "without prejudice."

II.

[2] The question which remains, however, is whether the trial court may grant the plaintiff's motion for an involuntary dismissal at the close of defendant's evidence on the ground that upon the facts and the law the nonmoving party has shown no right to relief and specify that the dismissal is without prejudice. The question thus presented is one of first impression under Rule 41(b), and the rule's language itself offers no definitive answer. N.C.G.S. § 1A-1, Rule 41(b) states:

> (b) *Involuntary dismissal; effect thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. *After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make findings as provided in*

Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, *operates as an adjudication upon the merits.* If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal. (Emphasis added.)

Ordinarily, an involuntary dismissal under Rule 41(b) operates as an adjudication upon the merits and ends the lawsuit. *Barnes v. McGee*, 21 N.C. App. 287, 204 S.E. 2d 203 (1974). The rule itself sets forth specific exceptions to this proposition, none of which are relevant to the case *sub judice*, and as to these grounds, an order of involuntary dismissal is not rendered on the merits and may not constitute a dismissal with prejudice. *Carding Developments v. Gunter & Cooke*, 12 N.C. App. 448, 183 S.E. 2d 834 (1971). *See generally*, W. Shuford, N.C. Civil Practice and Procedure (2nd Ed.), § 41-8. However, the major exception to the general proposition that an involuntary dismissal operates as a final adjudication is found in the power lodged by Rule 41(b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits. *Id.* at 329.

Here, in response to the plaintiff's motion, the trial court, in the words of Rule 41(b), "otherwise specified" that the dismissal was not to operate "as an adjudication upon the merits" by stating that the dismissal was "without prejudice." The Court of Appeals, citing no supporting authority, held that this was in error because it is the trial court's "duty" to determine the facts and render a judgment on the merits whenever presented with a motion for involuntary dismissal challenging the sufficiency of the nonmoving party's evidence at the close of that party's presentation. Plaintiff maintains that this is so because any dismissal for failure to present evidence on the ground that upon the facts and the law the nonmoving party has shown no right to relief *automatically* operates as an adjudication on the merits and is therefore not a dismissal which Rule 41(b) authorizes the trial

court to grant without prejudice. Plaintiff argues that this aspect of common law practice was not altered by the enactment of the Rules of Civil Procedure. We disagree.

First, with regard to the trial court's "duty" upon motion for involuntary dismissal at mid-trial, we find no clear indication in the language of the Rule itself that the court *must* then determine the facts and render a judgment against the nonmoving party *if* the court decides to grant the motion without waiting for the moving party to present his evidence. To the contrary, the express language of the Rule in this regard is permissive, rather than mandatory, providing that upon such motion, the trial court "as trier of facts *may* then determine them and render judgment against the plaintiff." Although the Rule does not expressly provide the option for the court to examine the quality of the nonmoving party's evidence and then decline to make a ruling on the merits although granting the motion for involuntary dismissal, we find this authority to be encompassed within the Rule's otherwise unqualified grant of authority to the trial court to dismiss an action on terms by specifying that its order of dismissal is "without prejudice."

In pertinent part, the Official Comment to Rule 41(b) as originally enacted and as to the 1969 amendment states:

> In an action tried by the court without a jury, the rule provides for a motion similar to the familiar motion for compulsory nonsuit under former § 1-183. It is contemplated that where there is a jury trial, Rule 50 will come into play with its motion for a directed verdict. . . . *The practice under section (b) will be much like that under former § 1-183. but there are some changes. The court is empowered to determine that its adjudication shall be on the merits and to find the facts in appropriate cases at the close of the plaintiff's evidence.*
>
> * * *
>
> Section 41(b) has been rewritten, in conformity with the present federal rule, . . .
>
> *A second objective in the rewriting of section 41(b) was to make clear that the court's power to dismiss on terms, that is, to condition the dismissal* ("Unless the court in its

order for dismissal otherwise specifies, . . .") *extends to all dismissals other than voluntary dismissals under section 41(a).* Thus, if there were a motion to dismiss under Rule 37(b)(2)(iii) for failure to comply with a discovery order, the court, under the amended version of Rule 41(b), could in granting the motion specify that the dismissal was without prejudice. (Emphasis added.)

The primary change in practice engendered by Rule 41(b) has been described as follows:

> One of the more far-reaching changes in North Carolina civil trial practice effected by the rules is found in the method for testing the sufficiency of evidence. Rule 41(b) deals with an involuntary dismissal in an action tried by the court without a jury, while Rule 50 covers the motion for a directed verdict in a jury trial. *Perhaps the most significant change lies in the fact that a dismissal for insufficiency operates as an adjudication on the merits unless the court specifies otherwise. Under previous law, a compulsory nonsuit allowed the plaintiff to have an automatic second chance on his claim.* Too often this right resulted in the unnecessary crowding of court dockets and harassing of defendants with claims that did not deserve a second chance. *Rule 41(b) allows the court to dispose of such a claim in final fashion, while at the same time protecting those parties who can demonstrate that they should be afforded another opportunity to produce sufficient evidence.*

W. Shuford, N.C. Civil Practice and Procedure, § 41.3.

The same writer offers these further observations on the effect of an involuntary dismissal under Rule 41(b):

> The major exception to the general proposition that an involuntary dismissal operates as a final adjudication is found in the power lodged by Rule 41(b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits. Unless the order dismissing the action states specifically to the contrary, the dismissal under Rule 41(b) does constitute an adjudication on the merits. It is, therefore, the burden of the party whose claim is being dismissed to convince the court that he de-

> serves a second chance, and he should formally move the court that the dismissal be without prejudice. . . .

Id. at § 41-8. *See also* Phillips, 1970 Supplement to 1 McIntosh, North Carolina Practice and Procedure, § 1375 (the trial judge is empowered to dismiss without prejudice and on any conditions required to protect both parties where, for example, the plaintiff's proof may be insufficient for excusable reasons which might be removed on a re-trial).

The authority to determine in which cases it is appropriate to allow the nonmovant to commence a new action has been vested by N.C.G.S. § 1A-1, Rule 41(b) in the trial judge and is no longer strictly controlled by statute as it was under former rules of practice. *Gower v. Aetna Insurance Company*, 13 N.C. App. 368, 185 S.E. 2d 722, *aff'd*, 281 N.C. 577, 189 S.E. 2d 165 (1972).

This Court, in interpreting the portion of Rule 41 governing voluntary dismissals by order of the trial judge, upheld the trial judge's discretionary authority in dismissing a Rule 41(a)(2) motion without prejudice in *King v. Lee*, 279 N.C. 100, 181 S.E. 2d 400 (1971). There we stated: "The obvious purpose of Rule 41(a)(2) is to permit a Superior Court judge in the exercise of his discretion to dismiss an action without prejudice if in his opinion an adverse judgment with prejudice would defeat justice." *Id.* at 107, 181 S.E. 2d at 404. We find the same discretionary authority to be contained in subsection (b) of Rule 41. The trial court's authority to order an involuntary dismissal without prejudice is therefore exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. *Lewis v. Pigott*, 16 N.C. App. 395, 192 S.E. 2d 128 (1972). *See also Safeway Stores v. Fannan*, 308 F. 2d 94 (9th Cir. 1962). *See generally*, W. Shuford, *supra* at § 41-8; 5 J. Moore, Moore's Federal Practice, § 41.14 (1984). Accordingly, the only remaining issue raised by the plaintiff's assignment of error in this case was whether or not the trial court abused its discretion in dismissing the defendant's motion for counsel fees without prejudice.

III.

We find no abuse of discretion on the part of the trial judge in dismissing the defendant's motion for appellate counsel fees

without prejudice to her right to commence a new action under N.C.G.S. § 50-16.4. The record before Judge Todd when faced with plaintiff's Rule 41(b) motion consisted not only of the evidence presented during the hearing in *Whedon II*, but also consisted of the order entered by Judge Saunders which awarded counsel fees to the defendant's attorneys for their work at the trial proceedings in *Whedon I*. This initial order, upheld during the appeal of *Whedon I*, contained extensive findings of fact detailing the defendant's dependent financial condition, her inability to defray the expenses of the trial proceedings and indicating the unlikelihood of a significant change in her earning capacity in the future, given her age and educational background. The evidentiary predicate of this order, together with the testimony of the defendant during the December 1982 hearing, supports the inference that Judge Todd determined that the defendant indeed had a meritorious claim for appellate counsel fees under N.C.G.S. § 50-16.4, but had simply and excusably failed to bring forth the necessary evidence at the motion hearing, rather than upon the determination that defendant's request was substantively and incurably defective. This is precisely the situation that Rule 41(b) was intended to cover.

In construing the operative effect of the federal equivalent of N.C.G.S. § 1A-1, Rule 41(b), Moore's Federal Practice states:

> The general structure of the provision of Rule 41(b) governing the operative effect of an order for dismissal gives the district court, which is familiar with the case, needed discretion in framing its order of dismissal, while avoiding, in most, although not all, cases, any need for speculation as to the intent of the court and the effect of its dismissal order, where the order fails to indicate whether or not it is with prejudice.
>
> *This discretion in framing the dismissal order is needed, subject to direct appellate review for abuse, where the dismissal is without consideration of the merits.*
>
> *Discretion is also needed in cases where there is a consideration of the merits, but the plaintiff fails to prove his claim. The court can dismiss without prejudice when it believes that the plaintiff has a meritorious claim, but his proof varies from his pleadings to such an extent that the defend-*

ant would be actually prejudiced by an amendment and a continuance of the case, or plaintiff's proof is lacking in some detail, and the court is unwilling to grant a continuance but does feel that he should have an opportunity of commencing another action. Since a dismissal with prejudice is a harsh sanction, such a dismissal is warranted only in extreme circumstances, and only after the trial court has considered a wide range of lesser sanctions. (Emphasis added.)

5 Moore, Moore's Federal Practice, § 41.14.

In summary, we hold that the trial court's dismissal without prejudice of the defendant's appellate counsel fees motion was not an adjudication upon the merits of that claim and that the trial court acted within its discretion under Rule 41(b) in deciding that the defendant should have the opportunity to file another motion for counsel fees under N.C.G.S. § 50-16.4. Accordingly, the decision of the Court of Appeals is reversed insofar as it modified the judgment of the trial court as to the appellate counsel fees.

Reversed.

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

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND NORTH CAROLINA NATURAL GAS CORPORATION v. NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC. AND THE CITIES OF WILSON, ROCKY MOUNT, MONROE AND GREENVILLE, NORTH CAROLINA

No. 269A84

(Filed 2 April 1985)

1. Gas § 1— natural gas ratemaking—elimination of Curtailment Tracking Rate—findings and conclusions inadequate

The Utilities Commission's findings and conclusions were inadequate as a matter of law to support its conclusion that a rate increase of $1,117,531 was just and reasonable where the Commission allowed an increase of $1,117,531 plus the elimination of the Curtailment Tracking Rate, which would result in another increase of approximately $3,300,000 for a total increase of $4,417,531. The Curtailment Tracking Rate was established as part of the basic rate struc-

ture, and the reasonableness of the increase in consumer cost due to the elimination of the CTR is a material issue of fact that must be dealt with by the Commission in its findings and conclusions. G.S. 62-79(a) (1982).

2. **Gas § 1.1— natural gas ratemaking—discrimination between classes of customers—not addressed—error**

In a natural gas ratemaking case, the Utilities Commission erred by not addressing the question of unreasonable discrimination among and within the classes of service where the evidence before the Commission made it clear that there was substantial discrimination between the various classes of customers. G.S. 62-94(b); G.S. 62-140(a).

3. **Gas § 1— natural gas ratemaking—wholesale service—subsidized rates—no evidence to support findings**

In a natural gas ratemaking case where the cities to whom wholesale service was provided proposed a plan whereby residential, small industrial, and some commercial customers would share the benefit of subsidized rates with wholesale customers, the Commission erred by finding that the plan was administratively unfeasible. No evidence that the plan would be difficult to administer was put before the Commission. G.S. 62-94(b) (1982).

4. **Gas § 1— natural gas ratemaking—Transportation Rate**

In a natural gas ratemaking case, the Transportation Rate was to be included on remand in the determination of whether presently charged rates were discriminatory; however, the appellant did not indicate that it argued before the Commission that the Transportation Rate is unjust as a matter of law or that the Commission failed to make adequate findings on this question and the Commission need not consider it on remand.

5. **Utilities Commission § 3— challenges to rates—anti-trust not available**

Challenges to rates are limited by the legal theories provided by the Public Utilities Act; the rates of public utilities under the jurisdiction of the Utilities Commission are not subject to attack on the basis that they violate the anti-trust laws.

6. **Gas § 1— natural gas regulation—Industrial Sales Tracker—new customers excluded—error**

The Utilities Commission erred by excluding new customers from the calculation of the Industrial Sales Tracker, which enables the North Carolina Natural Gas Corporation to negotiate lower prices when necessary for those customers capable of switching to fuel oil while recovering lost profit margins through surcharges to other customers, with any surplus at year end to be refunded. The Commission did not adequately summarize the arguments; moreover, excluding new industrial and large commercial customers from the operation of the IST is unjust and unreasonably discriminatory as a matter of law because the North Carolina Natural Gas Corporation has the chance to earn large profits from new customers while protecting itself from losses at the expense of a select portion of its ratepayers. G.S. 62-140(a).

7. Utilities Commission § 32— natural gas pipeline used for storage—used and useful

The Utilities Commission's inclusion in the rate base of a natural gas pipeline that had been built to serve a large industrial customer that had ceased operations was supported by evidence that the line was used and useful by virtue of its use as a storage facility.

APPEAL by the Cities of Wilson, Rocky Mount, Monroe and Greenville, North Carolina and the North Carolina Textile Manufacturers Association, Inc. pursuant to N.C.G.S. § 7A-29(b) from the final order of the North Carolina Utilities Commission entered 6 January 1984 in Docket Nos. G-21, Sub 235 and Sub 237. Heard in the Supreme Court 4 February 1985.

On 27 April 1983 North Carolina Natural Gas Corporation (NCNG) filed an application with the North Carolina Utilities Commission (Commission) pursuant to N.C.G.S. § 62-133 for authority to adjust its rates and charges for natural gas. Except for small amounts of gas received from an exploration and development subsidiary, NCNG's natural gas distribution system receives all of its gas requirements from Transcontinental Gas Pipeline Corporation (Transco). NCNG is engaged in furnishing retail natural gas service in eastern North Carolina to residential, commercial and industrial customers. The company also provides wholesale service to the Cities of Wilson, Rocky Mount and Monroe, North Carolina and the Greenville Utilities Commission of Greenville, North Carolina (Cities). The Cities are authorized under N.C.G.S. §§ 160A-311(4) and 160A-312 to own and operate their own natural gas distribution systems. Rates set by the Cities for retail customers are not subject to regulation by the Commission.

NCNG uses a number of rate schedules in its business. Those pertinent to this case are: Rate Schedule No. 1—Residential; Rate Schedule No. 2—Commercial and Small Industrial; Rate Schedule No. 3A—Industrial Process Uses; Rate Schedule No. 3B—Industrial Process Uses; Rate Schedule No. 4—Other Commercial and Industrial; Rate Schedule No. 5—Boiler Fuel; Rate Schedule No. 6—Large Boiler Fuel; Rate Schedule No. T-1—Transportation; the RE-1 Rate Schedule for service to municipal wholesale gas customers; and Rate Schedule No. S-1 for industrial and wholesale customers capable of switching from gas to oil.

In the proceedings below, NCNG requested the Commission to increase its rates by $8,577,027. This increase was to apply to Rate Schedule Nos. 1 and 2 and to some Industrial Process Users. At the same time NCNG sought to eliminate from its rate schedules the formula rate known as the Curtailment Tracking Rate (CTR). This formula operated to adjust NCNG's rates depending on the sales volume of gas available to the company. When sales declined due to a curtailment of supplies, the CTR caused rates to rise so that the company could earn the revenues necessary to meet its anticipated level of fixed cost and profit margin. If sales exceeded the volume expected when the base rates were set, the CTR would reduce the rates to reflect the higher level of fixed cost recovery. In the past the CTR had sometimes operated to raise rates and at other times had caused them to decline. At the time NCNG filed its request for increased rates, operation of the CTR had resulted in a price reduction of .01049 per therm (100,000 BTU's) for all rate schedules. As a result of the elimination of the CTR, NCNG's customers will have to pay an approximately $3,300,000 more for gas per year. This figure would vary upward or downward each year depending on NCNG's sales volume.

In its final order the Commission approved a rate increase of $1,117,531. It also implemented an Industrial Sales Tracker provision (IST) similar to that proposed by NCNG. Because of fluctuations in the price of oil, some of NCNG's customers in Rate Schedule Nos. 4, 5, 6 and RE-1, who are capable of doing so, switch to oil when its price drops below the rate set for a comparable amount of natural gas. As a result, the Commission has allowed NCNG to negotiate lower rates with those customers in order to retain their business. The IST enables NCNG to recover from its other customers, through surcharges, the profit margin lost on negotiated sales of gas. A "true-up" will be conducted at the end of each year. If the IST results in charges in excess of what NCNG needs to maintain its margin, the surplus will be refunded. If the company receives insufficient revenues to meet its allowed profit margin, it will recover the deficit through a uniform charge per therm to the customers in Rate Schedule Nos. 1, 2, 3 and the customers in Rate Schedule No. RE-1 who cannot switch to alternate fuels. Any profit earned by NCNG from new customers added after 30 June 1983 will not be considered in

determining whether NCNG has received sufficient revenue to meet its allowed profit margin.

NCNG maintains a gas service pipeline that was built to service a large industrial customer that has ceased operations. The pipeline is largely idle now and is used to store gas. NCNG's investment in the line has not yet been fully recovered. In its final order, the Commission included a portion of NCNG's remaining investment in the line in the investment base used to determine NCNG's rates.

Intervenors appealed from the Commission's order.

McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy and Alfred E. Cleveland for applicant-appellee North Carolina Natural Gas Corporation.

Jerry B. Fruitt for intervenor-appellant North Carolina Textile Manufacturers Association, Inc.

Spiegel & McDiarmid, by David R. Straus and Gary J. Newell and Spruill Lane Carlton McCotter & Jolly, by J. Phil Carlton and Ernie K. Murray for intervenor-appellants Cities of Wilson, Rocky Mount, Monroe and Greenville, North Carolina.

BRANCH, Chief Justice.

Intervenors in the case at bar have excepted to a number of the findings and conclusions of the Commission. Insofar as their assignments of error are inconsistent, they will be treated separately.

I.

[1] North Carolina Textile Manufacturers Association, Inc. (TMA) argues that the Commission's findings of fact that NCNG had requested an increase in revenues of $8,577,027 and that the company should be allowed an increase of $1,117,531 are inadequate as a matter of law because they are not supported by competent and material evidence. We agree.

> All final orders and decisions of the Commission shall be sufficient in detail to enable the court on appeal to determine the controverted questions presented in the proceedings and shall include:

> (1) Findings and conclusions and the reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record, and
>
> (2) The appropriate rule, order, sanction, relief or statement of denial thereof.

N.C. Gen. Stat. § 62-79(a) (1982). Findings of the Commission that are based on competent, material and substantial evidence are conclusive on appeal. *State ex rel. Utilities Comm. v. Conservation Council*, 312 N.C. 59, 64, 320 S.E. 2d 679, 683 (1984). On appeal, the scope of review is limited by N.C.G.S. § 62-94. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 207, 306 S.E. 2d 435, 442 (1983). In pertinent part the statute provides that the reviewing court may remand, reverse, or modify the decision of the Commission

> if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> . . .
>
> (4) Affected by . . . errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted. . . .

N.C. Gen. Stat. § 62-94(b) (1982).

The uncontradicted evidence before the Commission was that elimination of the CTR would result in an increase of approximately $3,300,000 per year in the bills paid by consumers. This is in addition to the $8,577,027 requested by NCNG. In its Finding of Fact No. 15 the Commission concluded that it was just and reasonable to allow NCNG an annual revenue increase of $1,117,531. In Finding of Fact No. 17 the Commission concluded that the CTR was outmoded and should be terminated. This finding of fact is supported by competent and material evidence and is binding on appeal. However, the effect of Finding of Fact No. 15 and Finding of Fact No. 17 was an annual revenue increase, at least for the year of 1983, of approximately $4,417,531. That being the case, the Commission was clearly acting under a misapprehension of the facts when it found an annual revenue increase of $1,117,531 to be just and reasonable.

NCNG attempts to meet this objection to the Commission's findings in two ways.

First, NCNG argues that this Court has previously determined that the CTR is not a general fixed rate or an adjustment to a general fixed rate. *Utilities Comm. v. Industries, Inc.*, 299 N.C. 504, 507-09, 263 S.E. 2d 559, 562-63 (1980). The implication being that since the CTR is not a general fixed rate any increase in consumer cost due to its elimination is not a rate increase. While this reasoning is attractive, it ignores the fact that the CTR was established as part of NCNG's basic rate structure. *Utilities Comm. v. Industries, Inc.*, 299 N.C. at 508, 263 S.E. 2d at 562. The reasonableness of the increase in consumer costs due to elimination of the CTR is a material issue of fact that must be dealt with by the Commission in its findings and conclusions. N.C. Gen. Stat. § 62-79(a) (1982). The Commission must find such increases to be necessary pursuant to N.C.G.S. § 62-133 before it may find NCNG's rates to be just and reasonable. *See Utilities Comm. v. Morgan*, 277 N.C. 255, 266, 177 S.E. 2d 405, 412 (1970).

NCNG next argues that the Commission was aware that elimination of the CTR would increase the company's revenues and impliedly found the increase to be just and reasonable. In its application for a rate increase, NCNG proposed the elimination of the CTR as well as requesting increased revenues. Public Staff witness Garrison and NCNG witnesses Teele and Wells all indicated in their testimony that elimination of the CTR would increase NCNG's revenues. In its evidence and conclusions for Finding of Fact No. 17, the Commission stated that since 1979, application of the CTR had resulted in NCNG making substantial refunds to its customers. NCNG also produced evidence of severe declines in earnings in recent years.

While this evidence makes it clear that the Commission was aware that eliminating the CTR would increase costs to consumers, there is no evidence that the Commission found the approximately $3,300,000 increase in costs to NCNG's customers to be just and reasonable. For that reason, the Commission's findings and conclusions are inadequate as a matter of law to support its conclusion that a rate increase of $1,117,531 is just and reasonable. On remand the Commission will make findings on

whether the increased rates brought about by the termination of the CTR are just and reasonable.

II.

[2] Both TMA and Cities contend that the rates and rate levels approved by the Commission are unjust and unreasonably discriminatory. They contend that the Commission's decision is erroneous as a matter of law and is not supported by the evidence. Cities also argue that the rates set by the Commission are anti-competitive.

"No public utility shall establish or maintain any *unreasonable* difference as to rates or services either as between localities or as between classes of service." N.C. Gen. Stat. § 62-140 (1982) (emphasis added). A substantial difference in service or conditions must exist to justify a difference in rates. *Utilities Comm. v. Edmisten*, 291 N.C. 424, 428, 230 S.E. 2d 647, 650 (1976). "There must be no *unreasonable* discrimination between those receiving the same kind and degree of service." *Utilities Comm. v. Mead Corp.*, 238 N.C. 451, 462, 78 S.E. 2d 290, 298 (1953) (emphasis added). While decisions of the Commission involving the exercise of its discretion in fixing rates are accorded great deference, *see Utilities Comm. v. Edmisten*, 291 N.C. at 428, 230 S.E. 2d at 650; *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 54, 132 S.E. 2d 249, 254 (1963), the Commission has no power to authorize rates that result in unreasonable and unjust discrimination. *Utilities Comm. v. Edmisten*, 291 N.C. at 428, 230 S.E. 2d at 650; *Salisbury and Spencer Ry. v. Southern Power Co.*, 180 N.C. 422, 425, 105 S.E. 28, 29-30 (1920). In determining whether rate differences constitute unreasonable discrimination, a number of factors should be considered: "(1) quantity of use, (2) time of use, (3) manner of service, and (4) costs of rendering the two services." *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 23, 273 S.E. 2d 232, 238 (1980). Other factors to be considered include "competitive conditions, consumption characteristics of the several classes and the value of service to each class, which is indicated to some extent by the cost of alternate fuels available." *Utilities Comm. v. City of Durham*, 282 N.C. 308, 314-15, 193 S.E. 2d 95, 100 (1972).

The evidence before the Commission makes it clear that there is substantial discrimination between the various classes of

customers. Residential customers in Rate Schedule No. 1 and commercial and small industrial customers in Rate Schedule No. 2 pay rates which yield a return considerably below the costs incurred by NCNG in serving them. The customers in the remaining rate schedules pay rates which yield returns in excess of their cost of service. The customers in Rate Schedule Nos. 3B, 4, 5 and 6 in particular pay rates which are far in excess of NCNG's cost of serving them. The effect of this rate structure is that the rates of residential, certain commercial and small industrial customers are subsidized by the remaining industrial, wholesale and commercial customers.

Cities and TMA both assign as error the Commission's failure to address their argument that the rates set by the Commission discriminate unreasonably between classes of customers in violation of N.C.G.S. § 62-140(a). Cities take this argument further and contend that end users of natural gas served by NCNG's wholesale customers are in the same class as end users served directly by NCNG and are being forced to pay unjust and discriminatory rates. Since the same standard of reasonableness is used to judge the validity of discrimination within and between classes of service, both arguments will be dealt with in the same way.

In light of the substantial difference between cost of service and rate of return for the various classes of customers, the question of unreasonable discrimination among and within the classes of service is a material issue of fact and of law. The Commission's failure to address this issue in its findings of fact is error prejudicing the substantial rights of defendants. Therefore, the case must be remanded to the Commission so that it may consider this issue and make appropriate findings. N.C. Gen. Stat. §§ 62-79(a) and 62-94(b); *Utilities Commission v. Public Staff*, 309 N.C. at 207-08, 306 S.E. 2d at 442.

[3] In lieu of rates based primarily on the cost of service to each class of customers, Cities proposed a plan whereby residential, small industrial and some commercial customers (Rate Schedule Nos. 1 and 2) would share the benefit of subsidized rates with the wholesale customers (Cities, Rate Schedule RE-1). Under this plan, the wholesale rate charged to Cities would be adjusted to reflect the cross-subsidization that exists among NCNG's retail customers. The rate charged to Cities would be based on the end

use made of the gas by the various classes of Cities' customers, just as the rates NCNG charges its retail customers are based on the use those customers make of the gas.

In rejecting this proposal the Commission concluded that while the plan had some merit it must be rejected because of the administrative difficulties it might create. At the hearing before the Commission no party argued that the plan proposed by Cities would be difficult to administer, and no evidence to this effect was put before the Commission. The Commission's belief that there would be serious problems for NCNG and Cities with respect to billings and revenues is not supported by evidence in the record. Under Cities' proposal the data showing the sales volume to Cities' various classes of customers during the test period would be used to determine the proper amount of cross-subsidization to be incorporated into the RE-1 Rate. Such data was produced at the hearing. Contrary to the Commission's fears, rates would be based not on varying monthly reports of end use sales volumes but on the test period data. Since Cities presently supply NCNG with monthly reports of sales volumes by customer class, there is sufficient evidence from which NCNG could establish rates in accordance with Cities' proposal. There is no evidence that the data furnished by Cities is unreliable, and NCNG uses it in reporting total sales by customer classes.

The Commission's finding that Cities' proposal is administratively unfeasible is not supported by competent and material evidence and is erroneous. N.C. Gen. Stat. § 62-94(b) (1982). On remand the Commission will decide whether the present rates result in unjust and unreasonable discrimination among ratepayers. If the Commission finds such discrimination to exist, it will examine the remedies proposed by TMA and Cities and decide if one of those or some other remedy is appropriate.

[4] In a related matter TMA argues that the Transportation Rate (T-1) approved by the Commission is unjust and unreasonable. This is the rate NCNG charges customers to transport gas that they have bought from other suppliers. As approved by the Commission, the T-1 rate allows the company to earn the same profit margin on customer-owned gas transported by NCNG that the company would earn had it provided the complete service to the customer. TMA argues that this takes away customers' incen-

tive to buy directly from the producers. Public Staff witness Garrison stated that to the extent the returns are excessive in Rate Schedule Nos. 4, 5 and 6, they are also excessive in the T-1 rate.

Since we have already ordered the Commission to decide whether the rates presently charged are discriminatory, it is proper that the T-1 rate be included in that determination.

We do not hold that it is unjust and unreasonable as a matter of law for a utility to earn the same profit margin on transported gas that it earns on its own retail sales of gas. TMA has not indicated that it argued this issue before the Commission or that the Commission failed to make adequate findings of this question. For that reason the Commission need not consider it on remand.

Cities urge that this Court find as a matter of law that: (1) end users of gas served by NCNG's wholesale customers are in the same classes as end users served directly by NCNG; (2) that the disparity in rates charged to end users who buy directly from NCNG and those who buy from NCNG's wholesale customers constitutes unreasonable and unjust discrimination; and (3) that on remand the Commission be ordered to adopt rates for NCNG's wholesale customers that reflect the cross-subsidies among groups of end users served by wholesale customers. We do not think it proper at this stage of the case that we rule on these matters.

All of these questions contain issues of fact as well as issues of law. Until the Commission has considered these questions and made findings of fact which we can review, it is inappropriate for us to make a final ruling.

[5] We note that Cities contend that they and NCNG are competitors in the retail sale of natural gas. Cities then argue that NCNG's rate structure is anticompetitive because wholesale customers like Cities cannot buy gas from NCNG at the price set in Rate Schedule RE-1 and sell gas to their own customers at prices competitive with NCNG's retail rates. We wish to make it clear that the rates of public utilities under the jurisdiction of the Utilities Commission are not subject to attack on the basis that they violate the antitrust laws. *See Parker v. Brown*, 317 U.S. 341, 351-52 (1943); *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F. 2d 248, 251-52 (4th Cir. 1971). Challenges to

rates are limited by the legal theories provided by the Public Utilities Act.

III.

[6] Cities and TMA assign as error the adoption by the Commission of the IST on the basis that it results in unjust and unreasonable discrimination among the customers served by NCNG in violation of N.C.G.S. § 62-140(a). After a careful review of the record, we hold that the Commission erred in implementing the IST in its present form.

For a proper understanding of these issues a brief explanation of how the IST operates is in order. The IST applies to customers presently being served under Rate Schedule Nos. 4, 5, 6 and RE-1 that are capable of using heavy fuel oil as an alternate fuel. The Commission estimated the level of fixed cost recovery NCNG would obtain from these customers by subtracting projected variable costs from the revenues NCNG could expect to receive from IST customers. This calculation was based on anticipated sales and oil prices. The resulting figure is NCNG's allowed profit margin. If oil prices drop so that heavy fuel oil becomes cheaper to use than natural gas forcing NCNG to negotiate lower rates with its IST customers, the IST allows NCNG to add a surcharge to the rates of customers not covered by the IST to maintain its profit margin. If oil prices should increase allowing NCNG to make profits in excess of its allowed profit margin, the excess is passed on to the non-IST customers by a credit. At the end of each year there is a "true-up."

The features of the IST that are objectionable to Cities and TMA are as follows. Cities object to the fact that profits from sales to *new* industrial and large commercial customers not covered by the IST will not be included in the computations used to determine whether NCNG is recovering its allowed profit margin. As a compromise measure, Cities are willing to accept the IST if half of any profits above the allowed margin earned by NCNG on sales to industrial and large commercial customers added after 30 June 1983 are shared with NCNG's customers by adding them into the IST computations. TMA shares the view that profits earned from new industrial and large commercial customers should be included in the computations and contends that profits from (1) increased sales to present industrial

customers not covered by the IST; and (2) increased sales to residential and commercial customers should be included in the computations. TMA points out that the IST causes discrimination within classes of customers because customers included in the IST are not subject to surcharges and receive no refunds. TMA objects to the idea of treating customers differently on the basis of their ability to switch from gas to fuel oil and argues that the IST concept results in rates that are impermissibly discriminatory.

Both Cities and TMA contend that under the present version of the IST it will be possible for NCNG to show a decrease in profits from its IST customers entitling it to a surcharge at the same time that it is earning large profits in other markets that, if included in the computations, would obviate the need for any surcharge.

In its Finding of Fact No. 18 the Commission stated that "[n]ew customers added after June 30, 1983, are specifically excluded from the IST." In the Evidence and Conclusions for Finding of Fact No. 19 the Commission noted that both the Public Staff and NCNG proposed the exclusion of customers added after 30 June 1983 in order to give NCNG incentive to expand its sales base by adding new industrial customers. The purpose is to allow NCNG to earn some return on the new plant investments it will need to make to attach new customers to its system. The Commission noted that Cities had proposed that the IST include new customers added after 30 June 1983 but concluded that it was fair and reasonable to exclude those new customers from the IST. This appears to be the Commission's sole answer to the objections raised by Cities and TMA. As such it is clearly inadequate.

At a minimum the Commission must summarize the arguments made by parties to the case so that a reviewing court will be able to "ascertain the controverted questions presented in the proceedings." *Utilities Commission v. Conservation Council*, 312 N.C. at 62, 320 S.E. 2d at 682. Here, the Commission completely ignored the discrimination arguments put forward by TMA. This along with the Commission's mere passing reference to Cities' objections to excluding new customers from the IST is sufficient to justify the Court in remanding this issue for additional findings. Further, we hold that excluding new industrial and large commer-

cial customers from the operation of the IST is unjust and unreasonable as a matter of law.

Apparently, the Commission's only reason for excluding these new customers from the IST and allowing NCNG to keep all the profits generated by them is that this will encourage NCNG to seek new customers by holding out the prospect of increased profits to help defray the costs of bringing the new customers into the system. While this is a legitimate concern, it does not justify the disparate treatment accorded to NCNG's customers by the IST as it is presently formulated. *See generally Utilities Comm. v. Edmisten*, 291 N.C. at 428, 230 S.E. 2d at 650; *Utilities Comm. v. Oil Co.*, 302 N.C. at 23, 273 S.E. 2d at 238; *Utilities Comm. v. City of Durham*, 282 N.C. at 314-15, 193 S.E. 2d at 100; N.C. Gen. Stat. § 62-140(a) (1982).

Under the rate structure approved by the Commission, most business risks associated with the sale of gas to large industrial and commercial customers are shifted to NCNG's ratepayers while NCNG retains significant benefits for itself. If falling oil prices force NCNG to negotiate lower rates with its IST customers which cut into its allowed profit margin, it may recover that loss through a surcharge to its other customers. At the same time NCNG will retain any profits it makes from new customers as "incentive." Should falling oil prices or some other contingency prevent NCNG from recovering its fixed costs and allowed profit margin associated with its new customers, it would be free to file for a rate increase to recover those costs. The fact that ratepayers will receive the benefit from sales to these new customers the next time NCNG files for a change in its base rates is irrelevant since NCNG will have little incentive to file for an increase if it makes large profits from these customers. Under this system, NCNG has the chance to earn large profits from new customers while protecting itself from losses at the expense of a select portion of its ratepayers. Such discrimination is unreasonable.

Since the loss of C. F. Industries (CFI) as a customer, NCNG has been under pressure to find new customers to use the gas allotted to CFI. NCNG wants the allotment to meet peak demand requirements of its high priority customers and needs new industrial or commercial customers so that the company may continue to purchase the gas pursuant to its contract with Transco

and avoid penalty payments.[1] This in itself is a strong incentive for NCNG to find new industrial and large commercial customers.

NCNG is allowed to request contributions from prospective customers to aid in construction of new facilities to serve those customers and often does so. The company may file for a rate increase if it feels that such investments must be included in the rate base in order for it to obtain adequate earnings. Further, some of NCNG's new customers would receive their gas from the lateral transmission line built to serve CFI. This line is included in the company's rate base, yet the IST would deny the ratepayers any benefit from the profits earned on this line. Because NCNG has open to it two methods of recovering the exact costs it expends on connecting new customers to its system, it is improper to allow it such an imprecise method as retaining all profits from new customers.

On remand, any form of the IST considered will include new customers added to NCNG's system after 30 June 1983. The Commission will then consider TMA's contention that the IST is unreasonably discriminatory and make appropriate findings of fact.

IV.

[7] Lastly, Cities assign as error the Commission's failure to exclude from NCNG's rate base the pipeline built to serve CFI. Cities' argument is based on the fact that the line is presently idle except for use as storage, and any new customers using the line would not be included in the IST. Cities contend that the Commission was required to address the issue of whether the CFI line should have been included in the rate base if new customers using the line are to be excluded from the IST. Since we have held that new customers added after 30 June 1983 may not be excluded from the IST, Cities' objections to inclusion of the CFI line have been satisfied.

The test for whether the cost of facilities of a public utility may be included in the rate base is whether such facilities are

1. It is difficult to determine the extent to which NCNG actually needs the gas formerly going to CFI in order to meet its peak day demands. The company has arrangements to buy supplemental gas from Piedmont Natural Gas Company through the winter of 1984-85. NCNG also intends to construct a gas storage facility to assist in meeting peak day demands.

used and useful. *Utilities Comm. v. Power Co.*, 285 N.C. 377, 387, 206 S.E. 2d 269, 276 (1974). Any costs recovered as construction work in progress pursuant to N.C.G.S. § 62-133 are, of course, excluded from this computation. "[T]he fact that a transmission line . . . is not presently used to its full capacity does not necessarily justify the exclusion of any portion of it from the rate base on the theory that such portion is not presently 'used and useful' in rendering service." *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 353, 189 S.E. 2d 705, 728 (1972). Whether specific facilities are used and useful is a question of fact to be determined by the Commission. *Utilities Comm. v. Telephone Co.*, 281 N.C. at 354, 189 S.E. 2d at 728. The CFI line was used and useful by virtue of its use as a storage facility, and the Commission's finding that it should be included in the rate base is supported by competent and material evidence and so is binding on appeal. *Utilities Commission v. Conservation Council*, 312 N.C. at 64, 320 S.E. 2d at 683.

For the reasons stated, we reverse in part and affirm in part the Final Order of the Utilities Commission and remand this case for proceedings consistent with this opinion.

Reversed in part; affirmed in part.

THE TRUSTEES OF ROWAN TECHNICAL COLLEGE v. J. HYATT HAMMOND ASSOCIATES, INC., WAGONER CONSTRUCTION CO., INC., WILFORD A. HAMMOND AND J. HYATT HAMMOND

No. 376PA84

(Filed 2 April 1985)

1. Architects § 3; Limitation of Actions § 4.2; Professions and Occupations § 1— action against architects and engineers—applicable statute of repose

Plaintiff's claim against defendant architects and engineers arising out of their design and supervision of improvements to realty was governed by the six-year statute of repose set forth in the 1963 version of G.S. 1-50(5), a statute dealing with claims against persons, among others, who design and supervise construction of buildings, rather than by the four-year statute of repose contained in the statute dealing with professional malpractice claims, G.S. 1-15(c). In enacting G.S. 1-15(c), the Legislature intended the statute to apply to malpractice claims against all professionals who are not dealt with more

specifically by some other statute, and the 1963 version of G.S. 1-50(5) is a statute specifically applicable to architects and builders and deals more particularly with the precise situation presented by plaintiff's claim.

2. Architects § 3; Professions and Occupations § 1— faulty design or supervision by architects—applicability of statute of repose

G.S. 1-50(5) was intended to apply to all actions against architects, and others therein described, where plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect. *Obiter dictum* in *Ports Authority v. Roofing Co.*, 294 N.C. 73 (1978), that the statute applies only when plaintiff alleges not merely the defective condition itself but also some injuries subsequent to and caused by the defective condition is disapproved.

Justice MITCHELL took no part in the consideration or decision of this case.

ON discretionary review of an unpublished decision of the Court of Appeals, affirming in part and reversing in part orders entered by *Judge Wood* at the 7 September 1982 Civil Session of ROWAN County Superior Court.

Williams, Boger, Grady, Davis & Tuttle, P.A., by Samuel F. Davis, Jr. for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by William C. Raper and Michael E. Ray for defendant appellees J. Hyatt Hammond Associates, Inc., Wilford A. Hammond and J. Hyatt Hammond.

EXUM, Justice.

[1] The sole question presented by this appeal is whether the four-year statute of repose contained in N.C.G.S. § 1-15(c), a statute dealing with professional malpractice claims, operates to bar plaintiff's claim for damages against defendant architects and engineers. We conclude that it does not because N.C.G.S. § 1-50 (5), a statute dealing with claims against persons, among others, who design and supervise construction of buildings with a six-year statute of repose, governs this claim.[1] We, therefore, reverse the Court of Appeals which decided to the contrary.

Rowan Technical College is a community college located in Salisbury. Defendant J. Hyatt Hammond Associates, Inc. (Ham-

1. All statutes of limitation or repose referred to in this opinion appear in Chapter 1 of the North Carolina General Statutes. All references to these statutes, therefore, will hereafter be simply by section number.

mond) is an architectural and engineering firm. Defendant Wilford A. Hammond, a licensed architect, and defendant J. Hyatt Hammond, a licensed engineer, are both officers, stockholders and employees of the firm. Defendant Wagoner Construction Company, Inc. (Wagoner) is a general contracting firm.

According to the complaint filed 26 April 1982, plaintiff on 6 December 1973 contracted in writing with Hammond for Hammond to provide architectural and engineering services in connection with the construction of three buildings and a teaching auditorium on plaintiff's campus. Hammond agreed under section 1-13(f) of the contract to "provide general administration of the performance of construction contracts," including continuous inspection of all work "by qualified and mutually agreed upon representatives of the designer's firm not less than once per week . . . and as often as necessary to insure compliance with plans and specifications." The parties entered a supplemental agreement in which, for further consideration paid by plaintiff, Hammond agreed "to provide daily and continuous supervision and inspection of the work." Following this agreement, plaintiff on 2 October 1974 contracted in writing with defendant Wagoner for the actual construction of the buildings. On 1 October 1976, Hammond certified to plaintiff that Wagoner had completed its construction contract. Plaintiff made final payment to Wagoner on 11 October 1976 based upon this certification, followed by final payment to Hammond on 27 April 1977.

The complaint further alleges: On or about 15 January 1982, plaintiff noticed a horizontal fracture and displacement between the first and second courses of concrete block in one of the buildings, creating an offset in the masonry joint and an outward bowing of the wall. Upon further inspection, plaintiff discovered similar fractures and displacements on exterior walls of each of the buildings designed by Hammond and constructed by Wagoner. These defects were not reasonably discoverable before 15 January 1982. Plaintiff suffered extensive and ongoing damage, requiring extensive repairs and replacement, proximately caused by breach of contract, breach of express and implied warranties and negligence by Hammond and Wagoner in failing to properly design and construct the buildings.

Hammond responded with a motion to dismiss under N.C.G.S. 1A-1, Rule 12(b)(6) alleging *inter alia* that plaintiff's claim was filed more than four years after it accrued and was therefore time barred by § 15(c) and § 52(1). Wagoner raised the same defense in an amended answer filed 20 September 1982.

The trial court granted Hammond's motion to dismiss on 17 September 1982 and Wagoner's on 7 October 1982.

On plaintiff's appeal the Court of Appeals reversed the dismissal as to Wagoner. The Court of Appeals held that plaintiff's claim against Wagoner was governed by § 52(16), which provides for a three-year period of limitation from the time "damage to property becomes apparent or ought reasonably to have become apparent, whichever first occurs." Since plaintiff discovered its damage on 15 January 1982 and brought its action within three years, plaintiff was not time barred.

The Court of Appeals affirmed the dismissal of plaintiff's claims against Hammond. It held this action was governed by § 15(c) with its "outside limit of four years [from defendant's last act] for an action for malpractice arising out of the performance or failure to perform professional services." Since plaintiff's claim was not filed until 26 April 1982, more than four years from Hammond's certification of the project, plaintiff's suit against Hammond was time barred.

We allowed plaintiff's petition for discretionary review "with review limited solely to the question of which statute . . . applies to . . . plaintiff's claim against . . . defendant architects and engineers."

I.

At the outset we note that the present version of § 50(5), as amended effective 1 October 1981 (1981 Sess. Laws, c. 644), does not apply to this claim. Both parties concede that had plaintiff's claim accrued after the effective date of the 1981 amendments to § 50(5), it would be governed by the six-year statute of repose contained therein.[2] Plaintiff's claim accrued, however, before the

2. This statute, as amended, expressly applies to "actions to recover damages for breach of a contract to construct or repair an improvement to real property," § 50(5)(b)(1), "actions to recover damages for the negligent construction or repair

effective date of this statute. If plaintiff's claim was already barred when amended § 50(5) became effective, it could not be revived by the amendments. *Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976).

The question, then, is whether plaintiff's claim was barred before the amendments to § 50(5) became effective. The answer depends upon whether plaintiff's claim is governed by § 15(c) as Hammond contends, or the 1963 version of § 50(5) as plaintiff contends.[3] If the former governs, plaintiff's claim would be barred because that statute contains a four-year statute of repose running from Hammond's last act giving rise to the claim. The parties apparently agree that Hammond's last act giving rise to the claim occurred no later than 1 October 1976, the date Hammond certified that the general contractor had completed construction. If § 50(5) applies, plaintiff's claim would not be barred since this statute contains a six-year statute of repose running from "performance or furnishing of . . . services and construction." If Hammond completed its architectural and engineering services no earlier than 1 October 1976, the date of its certification, plaintiff's claim was filed within the time period prescribed by this statute.[4]

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of an improvement to real property," § 50(5)(b)(2), and "actions against any person furnishing materials, or . . . who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property," § 50(5)(b)(9), to the express exclusion of § 15(c). § 50(5)(g).

3. Both the four-year limitation period in § 15(c) and the six-year limitation period in § 50(5) constitute statutes of repose, rather than statutes of limitation. In *Lamb v. Wedgewood*, 308 N.C. 419, 302 S.E. 2d 868 (1983), this Court explained the distinction. Statutes of limitation are generally seen as running from the time of injury, or discovery of the injury in cases where that is difficult to detect. They serve to limit the time within which an action may be commenced after the cause of action has accrued. Statutes of repose, on the other hand, create time limitations which are not measured from the date of injury. These time limitations often run from defendant's last act giving rise to the claim or from substantial completion of some service rendered by defendant. The four- and six-year time limitations of § 15(c) and § 50(5) run not from date of injury or accrual, but from the last act of defendant in the case of § 15(c) and from completion of some service or construction in the case of § 50(5).

4. It is unclear from the record and the parties' briefs when they contend defendant's last act giving rise to the claim occurred, for purposes of § 15(c), or when defendant last furnished or performed services, for purposes of § 50(5). Some suggestion is made by plaintiff that construction was completed on 11 October 1976 and that this date is the critical one for both statutes. However, as we understand

The Court of Appeals erroneously concluded plaintiff's claim was governed by § 15(c).

That section provides:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .[5]

This section was enacted on 12 May 1976. (1975 N.C. Sess. Laws, c. 977.) It was designed to change "the time of accrual" of professional malpractice actions "from the date of discovery of injury to the date of defendant's last act" giving rise to the claim. *Flippin v. Jarrell*, 301 N.C. 108, 112, 270 S.E. 2d 482, 485 (1980). "Also, for latent claims discovered two or more years after the defendant's last negligent act, except those involving a non-therapeutic and non-diagnostic 'foreign object' left in the body,

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the briefs, both parties apparently concede that on 1 October 1976, defendant certified to plaintiff that Wagoner Construction Company had completed construction and that this is the critical date for purposes of § 50(5). This fact appears in plaintiff's statement of facts and is not disputed by defendant's brief.

5. Neither party apparently disputes that the damage to plaintiff's building was a "defect in or damage to property which originate[d] under circumstances making the . . . defect not readily apparent to the claimant." Thus, there is no contention that a limitation period shorter than the four-year period of this statute applies to plaintiff's claim.

the statute established a four-year period of limitation" measured from defendant's last act. *Id.*

A review of this statute's legislative history reveals that it was enacted specifically in response to a so-called *medical malpractice* "crisis" experienced by North Carolina and many of her sister states. The Court of Appeals in *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. 533, 540-41, 289 S.E. 2d 875, 879-80 (1982), provided the following analysis of the factors prompting the enactment of § 15(c):

> It is generally agreed that in the early 1970's what has been termed a medical malpractice insurance crisis existed in most jurisdictions in this country. The crisis resulted from the increasing reluctance of insurance companies to write medical malpractice insurance policies and the dramatic rise in premiums demanded by those companies which continued to issue policies. The difficulty in obtaining insurance at reasonable rates forced many health-care providers to curtail or cease to render their services. The legislative response to this crisis sought to reduce the cost of medical malpractice insurance and to insure its continued availability to the providers of health care. By October 1975, 39 states had commissioned studies of the medical malpractice problem and 22 states had revised civil practice laws and rules in an attempt to remedy the problem. Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications, 55 Tex. L. Rev. 759, 761 n. 14 (1977); see generally, American Bar Association, Report of the Commission on Medical Professional Liability (1977).
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> In North Carolina, the Report of the North Carolina Professional Liability Insurance Study Commission (1976), analyzed the malpractice crisis in this state. The commission found that nationwide the number of malpractice suits increased by 70% from 1973 to 1974 and that this malpractice dilemma began to surface in North Carolina in 1974. The St. Paul Fire and Marine Insurance Company, which at that time insured over 90% of the physicians and surgeons practicing in this state as well as 75 hospitals, requested an 82.03% increase in its malpractice rates and threatened to withdraw from the state if the increase was not granted. Shortly

thereafter, St. Paul requested another premium rate increase and a change in policy form from 'occurrence' to 'claims made' and in September 1975 decided to cease offering coverage in North Carolina. After much negotiation a compromise was reached between the Commissioner of Insurance and St. Paul, so they again began offering coverage in North Carolina. *Id.* at 4-16. The bulk of the rate increases by St. Paul was for reserves for claims that were 'incurred but not reported.' *Id.* at 7. Reports of curtailments in health care services by some doctors and a few hospitals in the state were received by the Study Commission as it began to explore ways to increase the availability of insurance. *Id.* at 12. The Study Commission recommended lowering the outside time limit to four years for actions based on professional malpractice, including the foreign object cases. During the four year period, it advised allowing only one year from the date of discovery in which to bring an action. *Id.* at 28. The legislature responded by enacting N.C. Gen. Stat. § 1-15(c).

The legislative purpose to be served by this statute as it relates to these defendants is clear. This statute was passed by the General Assembly in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims.[6]

Defendant Hammond concedes that this statute, originally proposed by the North Carolina Professional Liability Study Commission (Study Commission), was enacted primarily to deal with malpractice problems in the health care field. However, Hammond also argues that the Study Commission's original draft of § 15(c) referred expressly to "health care providers." When some members of the Study Commission objected that this designation was too narrow, the Study Commission changed it to read "professional malpractice."[7] The statute as enacted does not provide a defini-

6. The Court of Appeals noted that many other states in response to this crisis enacted statutes similar to § 15(c). For cases upholding such statutes, see *Roberts v. Durham County Hospital Corp.*, 56 N.C. App. at 541.

7. See Report of the North Carolina Professional Liability Insurance Study Commission, dated 12 March 1976, and the minutes of that Commission, dated 6 November 1975 and 23 January 1971.

tion of "professional." Hammond argues nonetheless that both the Study Commission and the legislature intended for claims against all "professionals" based on negligence to fall within § 15(c).

Section 15(c) is broad enough to encompass professionals other than those in health care. We do not, however, read the statute to mean that all persons who arguably may be labeled "professionals" necessarily fall within its ambit. All we gather from the actions of the Study Commission is that it wanted the statute to include some, but not necessarily all, professionals other than "health care providers." The legislature, we believe, intended the statute to apply to malpractice claims against all professionals who are not dealt with more specifically by some other statute.

Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability. *National Food Stores v. North Carolina Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966); *State ex rel. Utilities Comm. v. Union Electric Membership Corp.*, 3 N.C. App. 309, 164 S.E. 2d 889 (1968). "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Seders v. Powell*, 298 N.C. 453, 459, 259 S.E. 2d 544, 549 (1979); *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 251 S.E. 2d 457 (1979).

II.

Plaintiff contends, and we agree, that the 1963 version of § 50(5) is a statute specifically applicable to architects and others who plan, design or supervise construction, or who construct improvements to real property; therefore it and not § 15(c) should govern this claim.

The 1963 version of § 50(5) provides in pertinent part:

> No action to recover damages for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any

action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property, more than six (6) years after the performance or furnishing of such services and construction.

Hammond argues that as between § 15(c) and § 50(5) the former is the more specific statute because it deals with "malpractice," which can only be alleged against a "professional," while § 50(5) may be applied generally to anyone making improvements to real property, not just to professionals performing a specialized service.

We disagree. Section 15(c) speaks generally of a "cause of action for malpractice arising out of the performance or failure to perform professional services." This statute defines the time of accrual and sets outer time limits for bringing malpractice claims in general. Section 50(5), by contrast, speaks specifically of "actions . . . for injury to property . . . arising out of the defective and unsafe condition of an improvement to real property brought against any person performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property." Because it deals expressly with claims arising out of defects in improvement to realty caused by the performance of specialized services of designers and builders, § 50(5) is, in essence, an architect's and builder's malpractice statute. In this sense it is a statute "special and particular," *Seders v. Powell*, 298 N.C. 453, 259 S.E. 2d 544, rather than a general malpractice statute like §15(c). Because this statute deals more particularly with the precise situation presented by plaintiff's claim, we hold that it, and not § 15(c), governs the claim.

Our analysis is bolstered by the present version of § 50(5). That section deals with actions for damages for breach of contract, negligence, and recovery of economic or monetary loss in general arising from faulty repair or improvement to real property against, among others, persons who furnish the design for or supervise the construction of such repair or improvement; and it does so to the express exclusion of § 15(c). While this version of § 50(5) does not apply to plaintiff's claim, we find it instructive in ascertaining the legislative intent embodied in the 1963 version.

When the legislature amends a statute, a presumption arises that its intent was either to (1) change the substance of the original act or (2) clarify the meaning of it. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). Where the legislature amends an ambiguous statute, no presumption arises that its intent was to change the substance of the original act. *Id.* Rather, the purpose of the amendment may be merely to "improve the diction, or to clarify that which was previously doubtful." *Id.* at 260, 162 S.E. 2d at 484.

We believe the 1981 amendments to § 50(5) were intended to clarify "that which was previously doubtful." The present case stands as an example of the ambiguity present in the 1963 version of § 50(5). The 1981 amendment made clear that § 50(5), and not § 15(c), is designed to govern malpractice claims against architects and builders. We believe the legislature intended this amendment to clarify the proposition that §15(c) was never intended to govern malpractice claims against architects arising out of their design and supervision of improvements to realty.

Our decision is further bolstered by the fact that § 50(5) was enacted, like many similar statutes across the country, at the urging of architects and builders in order to protect them against claims arising long after their work had been accomplished. A full discussion of this point with supporting authorities appears in *Lamb v. Wedgewood South Corp.*, 308 N.C. at 426-28, 302 S.E. 2d at 873. It would be anomalous, indeed, to permit defendant architects to avoid the very statute which their profession sought for its own protection when in a particular case the statute permits a claim to proceed because it was filed within the statute's time limitation.

Finally, we note that the 1963 version of § 50(5) was applied by this Court to a claim against architects in *Lamb v. Wedgewood*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Hammond contends that *Lamb* does not stand as precedent for doing the same here because § 15(c) was not in effect when *Lamb* was decided. Thus, the *Lamb* Court was not confronted with a choice between it and § 50(5). We believe *Lamb* does represent valid authority for applying the six-year limitation period of § 50(5) to malpractice claims against architects. We are persuaded that the historical backdrop against which both § 15(c) and § 50(5) were

enacted would have led this Court to hold the latter applicable to plaintiff's claim in *Lamb* even if § 15(c) had then been in effect.

III.

[2] Finally, Hammond contends that even if the 1963 version of § 50(5) ordinarily applies to malpractice claims against architects and engineers, it is not applicable to this case because of the nature of the defects complained of. Hammond relies on *North Carolina State Ports Authority v. Frye Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978), for this contention. There, plaintiff sued a general contractor for breach of its contract to construct a warehouse and a transit shed. Plaintiff alleged that the roof of both buildings leaked following completion of the construction. Defendant admitted the roofs were built under its supervision and control but contended that the action was barred by the three-year statute of limitations in § 52. The trial court granted defendant's motion to dismiss upon this ground. The Court of Appeals, applying § 15(b) to the claim, reversed, but rejected plaintiff's contention that the six-year time limitation in § 50(5) applied.

On appeal, this Court affirmed. It held that

> . . . the six-year statute . . . contained in G.S. 1-50(5) has no application to this section. That statute applies to an action 'to recover damages for any injury to property, real or personal . . . arising out of the defective and unsafe condition of an improvement to real property.' The complaint does not allege, and nothing in the record before us indicates, any injury to property arising out of 'defective and unsafe conditions' of the roofs in question. It does not apply to an action, such as this, for a simple breach, by defective performance, of a contract to construct an improvement on real property.

Id. at 87, 240 S.E. 2d at 353. Hammond contends that under this language, § 50(5) applies only when plaintiff alleges not merely the defective condition itself but also some injury "subsequent to and caused by" the defective condition. Hammond argues that in alleging faulty design services resulting in fractures, masonry displacement and bowed walls, plaintiff has merely alleged the defective condition and not any injury "subsequent to and caused by it."

Hammond points to *Lamb v. Wedgewood*, 308 N.C. 419, 302 S.E. 2d 868 (1983), as an example of the type of case to which § 50(5) would apply. There, plaintiff, a guest at the Greensboro Hilton Inn, fell through an allegedly defective glass window near the sixth floor elevator and was killed. Hammond here contends that only this sort of injury "subsequent to and caused by" the defective improvement, rather than a claim for damages to repair the defect, falls within the ambit of § 50(5).

We disagree with this contention. Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby. *Muncie v. Travelers Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960); *Washburn v. Washburn*, 234 N.C. 370, 67 S.E. 2d 264 (1951); *State ex rel. Utilities Comm. v. Central Telephone Co.*, 60 N.C. App. 393, 299 S.E. 2d 264 (1983). The Court's discussion of § 50(5) in *Ports Authority* was not central to its decision. There defendant contractor finished the building in the summer of 1968, and plaintiff filed suit on 7 August 1973. Plaintiff's breach of contract claim would have been barred by the three-year statute of limitations in § 52(1) if the claim accrued when the work was completed. The Court concluded, however, that plaintiff's action was not necessarily barred, relying not on § 50(5) as plaintiff urged, but on § 15(b) which changed the time of accrual of a cause of action in latent "injury, defect, or damage" cases from defendant's last act to the time the "injury" was or reasonably should have been discovered. The Court held that plaintiff was entitled to show that its claim was based on a latent defect as defined by § 15(b), discovered within three years of filing claim, and affirmed the Court of Appeals' reversal of summary judgment for defendant. Since the Court was able to afford plaintiff the relief it sought by applying §15(b), and did so, its discussion of § 50(5) was unnecessary to the decision and is *obiter dictum.*

We also believe that for the purpose of applying statutes of limitations and repose, the distinction made in the *Ports Authority* dictum between damages for repairs or for diminution in value caused by a defective or unsafe condition in real property improvements, and damages "subsequent to and caused by" such defects, is not well founded. We here reject it. We hold § 50(5) was intended to apply to all actions against architects, and others therein described, where plaintiff seeks damages resulting from

the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect.

The decision of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion.

Reversed and remanded.

Justice MITCHELL took no part in the consideration or decision of this case.

SAM GAITO AND WIFE, ELEANOR H. GAITO v. HOWARD FRANK AUMAN, JR. v. ALVIN LEGRAND, INDIVIDUALLY AND D/B/A ALVIN LEGRAND PLUMBING AND HEATING

No. 529A84

(Filed 2 April 1985)

1. **Sales § 6.4; Vendor and Purchaser § 6.1 — implied warranty of habitability — latent defects**

An implied warranty of habitability of a recently completed dwelling is limited to latent defects — those not visible or apparent to a reasonable person upon inspection of a dwelling.

2. **Sales § 6.4; Vendor and Purchaser § 6.1 — implied warranty of habitability — recently completed dwelling — standard of reasonableness**

The standard of reasonableness is the appropriate standard for determining whether a dwelling has been recently completed for purposes of the implied warranty of habitability. Among the factors which may be considered in determining this question are the age of the building, the use to which it has been put, its maintenance, the nature of the defects and the expectations of the parties.

3. **Sales § 6.4; Vendor and Purchaser § 6.1 — implied warranty of habitability — whether dwelling recently completed — jury question**

Whether a dwelling completed four and one-half years before plaintiffs received a deed or took possession was "recently completed" for purposes of the implied warranty of habitability was a question of fact for the jury.

4. **Sales § 6.4; Vendor and Purchaser § 6.1 — implied warranty of habitability — effect of prior occupation by tenants**

The effect of occupation by tenants prior to the passage of the deed to the initial vendee is but one of the factors which a factfinder should consider in

determining whether defendant is liable for breach of an implied warranty of habitability.

5. **Sales § 6.4; Vendor and Purchaser § 6.1— implied warranty of habitability—fixtures—test of breach**

The test of a breach of an implied warranty of habitability is not whether a fixture is an "absolute essential utility to a dwelling house" but is whether there is a failure to meet the prevailing standard of workmanlike quality. Under the facts of this case, a jury could properly find that a defective air conditioning system in a recently completed dwelling was a major structural defect as between an initial vendee and a builder-vendor so as to constitute a breach of the implied warranty of habitability.

6. **Sales § 6.4; Vendor and Purchaser § 6.1— breach of implied warranty of habitability—measure of damages**

The measure of damages for breach of the implied warranty of habitability because of a defective air conditioning unit was the cost of replacing the unit where the evidence showed that the defect could be remedied without destroying a substantial part of the dwelling.

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

APPEAL from a decision of the Court of Appeals, 70 N.C. App. 21, 318 S.E. 2d 555 (1984), affirming the judgment of *Burris, J.*, at the 1 November 1982 Civil Session of District Court, MOORE County.

Plaintiffs Sam and Eleanor Gaito brought this action against defendant Howard Frank Auman, Jr. on 19 May 1981, alleging in their complaint that in April 1978 they purchased a home from Auman, its builder, and moved into the home in June 1978. The Gaitos alleged that the purchase price of the home included central air conditioning, but that the air conditioning system in the house never worked properly despite repeated efforts to correct the cooling problems. The plaintiffs alleged that they were damaged in the amount of $3,500 as a result of a breach of warranty on the part of the defendant Auman.

In his answer and amended answer defendant Auman denied liability under a theory of implied warranty of habitability of a recently completed dwelling on grounds that the house was not new at the time plaintiffs purchased it and on grounds that plaintiffs were aware that the house was not new. Defendant Auman also filed a third party complaint against Alvin LeGrand, who Auman alleged supplied and installed the air conditioner in the home. On 30 April 1982 defendant filed a motion for summary judgment which the trial court denied.

The evidence at trial tended to show that the house in dispute was completed by defendant in November 1973 as a speculation house. Defendant was in the business of building houses. The house sat vacant one and one-half years before defendant Auman contracted to sell it to a man named Lee Cole. Although no deed was passed conveying title to him, Cole lived in the house for two months. While living there, Cole bulldozed the area around the house to make a pasture for horses. Cole left the house after he became unable to make a payment and forfeited his down payment.

The house was next rented to a realtor, Jack Vernon, for a period of six months. In 1976 Raymond and Catherine Ashley rented and lived in the house for fifteen months. During the time the Ashleys lived in the house, the air conditioning system did not cool the house properly. During three weeks of 95 degree weather, the Ashleys were unable to get the temperature of the house below 85 degrees. The Ashleys contacted defendant Auman about the problem and defendant LeGrand went to the house to attempt repairs. LeGrand replaced compressors and Freon and did electrical work. Another air conditioning repairman, Metrah Spencer, subsequently replaced the compressor, opened up and rearranged the duct work. He did not change the capacity of the air conditioning unit.

In early 1978 defendant Auman listed the house for sale with a local real estate company, and Thomas Caulk, one of the firm's realtors, showed the house to the Gaitos. Caulk told the Gaitos that the house was four years old and that it had been occupied for two short periods of time. The Gaitos decided to purchase the house and had Caulk inspect it before the closing. The closing on the house was in April 1978 and plaintiffs moved in in June. Plaintiffs first turned on the air conditioning at the end of June 1978 when the temperature outside was in the eighties. Although plaintiffs let the system run two days and nights, the system created only a ten degree difference between outside and inside temperatures. The Gaitos contacted Auman several times during the summer of 1978 and had repairs done. The repairs included the installation of power vents, an exhaust fan, and insulation for the duct work, the changing of filters, and the addition of Freon. The ducting system was reworked, and the compressor was replaced two times. In 1979 the Gaitos converted their garage into an

apartment. They had duct work added and attached the apartment to the air conditioning system for the house.

Rod Tripp, who was qualified as an expert in the field of heating and air conditioning, testified for the plaintiffs that in 1973 the accepted standard in the air conditioning industry for the differential between outside and inside temperatures was 20 degrees when the outside temperature was 95 degrees. In 1978 the accepted differential was 15 degrees. Tripp stated that in his opinion a four ton air conditioning system rather than the three and one-half ton system originally installed was the proper size for the Gaitos' house. Tripp testified that the cost of installing a four ton system in a house in 1980 would have been approximately $3,655. At the time of trial the cost would have been $3,955.

At the close of the evidence, Judge Burris granted defendant Alvin LeGrand's motion to dismiss the case against him based on the statute of limitations. Defendant Auman's attorney made a motion to dismiss the case on grounds that the implied warranty of habitability theory was inapplicable. The trial court denied his motion and allowed the jury to deliberate on the question of defendant's liability.

The jury returned with a verdict in favor of the plaintiffs in the amount of $3,655. Defendant appealed to the Court of Appeals, which affirmed the trial court. Judge Hedrick dissented.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for plaintiff appellees.

Brown, Holshouser, Pate and Burke, by G. Les Burke, for defendant appellant.

BRANCH, Chief Justice.

The question posed by this appeal is whether the Court of Appeals erred in affirming the judgment in favor of the plaintiffs on a theory of implied warranty of habitability. The majority concluded that a residential structure could be considered new for purposes of the implied warranty within the maximum applicable statute of limitations period. We reject this reasoning.

Although the majority opinion did not address the procedural posture of the questions before it, we note that the defendant

builder's claim is that the trial court erred in denying his motions for summary judgment, directed verdict and judgment notwithstanding the verdict. Upon a motion for summary judgment the burden is on the moving party to establish that there is no triable issue of fact and that he is entitled to judgment as a matter of law. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). The test is whether the moving party presents materials that would require a directed verdict in his favor if offered at trial. *Coakley v. Ford Motor Co.*, 11 N.C. App. 636, 182 S.E. 2d 260, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 244 (1971).

Where a motion for directed verdict is made at the conclusion of the plaintiff's evidence, the trial court must determine whether the evidence, taken in the light most favorable to the plaintiff, was sufficient to submit the case to the jury. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). Like the motion for directed verdict, the motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence to take the case to the jury and support the verdict for the plaintiff. *See Snider v. Dickens*, 293 N.C. 356, 237 S.E. 2d 832 (1977).

The essence of defendant's arguments, however, is that plaintiffs' claim was not cognizable under an implied warranty theory because of the age of the house and its occupation by tenants prior to its purchase by the plaintiffs. Although we held in *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976), that the implied warranty of habitability arises by operation of law, we hold that the applicability of the warranty is to be determined on a case by case basis and that under these facts, plaintiffs presented a legally cognizable claim under a theory of implied warranty of habitability.

The trend of recent judicial decisions has been to invoke the doctrine of implied warranty of habitability or fitness in cases involving the sale of a new house by the builder. *See Humber v. Morton*, 426 S.W. 2d 554 (Tex. 1968); *Annot.*, 25 A.L.R. 3d 372 (1969). The rigid common law rule of *caveat emptor* in the sale of recently completed dwellings was relaxed in this state by this Court's opinion in *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974). In *Hartley* the plaintiffs purchased a "recently" constructed house from defendants. Although they inspected the

house prior to moving in, plaintiffs observed nothing amiss. Shortly after moving in the house showed signs of substantial water leakage and insufficient waterproofing in the basement. This Court, in an opinion authored by Chief Justice Bobbitt, concluded that the defendant builder-vendor had an obligation to perform work in a proper, workmanlike and ordinarily skillful manner. Chief Justice Bobbitt then stated the rule as follows:

> [I]n every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

Id. at 62, 209 S.E. 2d at 783.

[1] The doctrine recited in *Hartley* is known as an implied warranty of habitability and represents a growing trend in the jurisprudence of our states. An implied warranty of habitability is limited to latent defects—those not visible or apparent to a reasonable person upon inspection of a dwelling. *Griffin v. Wheeler-Leonard and Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976) (defect was poor waterproofing which caused standing water in crawl space).

The relaxing of the rigid rule of *caveat emptor* in *Hartley* is based on a policy which holds builder-vendors accountable beyond the passage of title or the taking of possession by the initial vendee for defects which are not apparent to the purchaser at that time. This policy is justified because the innocent purchaser is often making one of the largest investments of a lifetime from one whose experience and expertise places him in a dominating position in that sale. *See Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P. 2d 698 (1966); 25 A.L.R. at 391.

Defendant appellant argues that the facts of this case are legally insufficient to support a verdict for the plaintiff because the

facts do not fall within the exception to the rule of *caveat emptor* established by *Hartley*. Defendant contends that an implied warranty of habitability is inapplicable because both the pretrial pleadings and evidence at trial show that the house was not "recently completed" or under construction at the time of the passing of the deed; the plaintiff claims and the evidence shows instead that the house was built four and one-half years earlier. Defendant also argues that the previous occupancy by tenants invalidated any implied warranty which may have arisen.

We first consider defendant's argument that he must prevail because the house was built four and one-half years before the plaintiffs received a deed or took possession. Our cases do not address the precise limits of our requirement in *Hartley* that a house be "recently completed." We therefore turn to other jurisdictions for instruction on this question.

A number of courts have established a standard of reasonableness in determining how the age of a house affects the application of the warranty. *See Sims v. Lewis*, 374 So. 2d 298 (Ala. 1979); *Barnes v. Mac Brown and Co.*, 264 Ind. 227, 342 N.E. 2d 619 (1976); *Smith v. Old Warson Development Co.*, 479 S.W. 2d 795 (Mo. 1972); *Padula v. J. J. Deb-Cin Homes, Inc.*, 111 R.I. 29, 298 A. 2d 529 (1973); *Waggoner v. Midwestern Development, Inc.*, 83 S.D. 57, 154 N.W. 2d 803 (1967).

In *Barnes* the plaintiffs in 1971 purchased a home which had been completed in 1967 and had been sold to an intermediate purchaser. After plaintiffs moved in, a large crack appeared in a wall, and the plaintiffs discovered that the basement leaked. In considering the question of the applicability of an implied warranty of habitability, the Indiana Supreme Court applied a reasonableness standard:

> This extension of liability is limited to latent defects not discoverable by a subsequent purchaser's reasonable inspection, manifesting themselves after the purchase. The standard to be applied in determining whether or not there has been a breach of warranty is one of reasonableness in light of the surrounding circumstances. The age of the home, its maintenance, the use to which it has been put are but a few factors entering into this factual determination at trial.

342 N.E. 2d at 621.

In a subsequent case, the Indiana Court of Appeals considered whether the warranty extended to a defective septic tank in which the defect appeared five years after the completion of the dwelling. Relying on *Barnes* and the reasonableness standard, the court stated that where a defective septic tank was involved "we cannot say, as a matter of law, that five years is too long a period of time to extend the implied warranty of fitness." *Wagner Construction Co. v. Noonan*, 403 N.E. 2d 1144 (Ind. App. 1980).

In a case decided by the Washington Supreme Court, *Klos v. Gockel*, 87 Wash. 2d 567, 554 P. 2d 1349 (1976), plaintiffs purchased a home in 1973 which had been completed in July 1972. The builder-vendor had lived in the house approximately one year before plaintiffs purchased it. After plaintiffs moved in, a portion of the slope below the rear wall of the house slid, causing the patio to crack and patio slabs to upend. Although the Court in *Klos* rejected the applicability of the warranty on other grounds, it reasoned that the passage of a year would not necessarily invalidate a warranty of habitability.

> It is true that for purposes of warranty liability, the house purchased must be a "new house," but this is a question of fact. The passage of time can always operate to cancel liability but just how much time need pass varies with each case.

87 Wash. 2d at 571, 554 P. 2d at 1352. *See also Tavares v. Horstman*, 542 P. 2d 1275 (Wyo. 1975) (warranty applied where septic tank failed after five years because "we appreciate that different parts of construction may have different expected life").

[2, 3] We are persuaded that the reasoning of these courts is sound and that the standard of reasonableness is the appropriate standard for determining whether a dwelling has been recently completed. Thus, under the facts of this case, it was a question of fact for the fact finder to determine whether the house was "recently completed." Among some of the factors which may be considered in determining this question are the age of the building, the use to which it has been put, its maintenance, the nature of the defects and the expectations of the parties. This standard allows extension of the warranty to vary in lengths of time, depending on the nature of the defect and whether the warranty should reasonably be expected to apply. *See Sims v. Lewis*, 374 So. 2d 298 (Ala. 1979).

[4] Even so, defendant argues that the tenancies which intervened between construction and purchase by plaintiffs rendered the warranty inapplicable. We disagree. We note that the purpose of the warranty is to protect homeowners from defects which can only be within the knowledge of vendors. There are many kinds of major structural defects upon which the presence of tenants can have little or no effect. In other cases intervening tenants may contribute to or directly cause major defects in a dwelling's structure. We hold that the effect of occupation by tenants prior to the passage of the deed to the initial vendee is but one of the factors which a fact finder should consider in determining whether defendant is liable for breach of an implied warranty of habitability. *See Casavant v. Campopiano*, 114 R.I. 24, 327 A. 2d 831 (1974) (warranty affected by tenants only if tenants causally connected with defects).

At this point we note that *Hartley* limits the implied warranty of habitability to *initial vendees* at the time of the taking of possession or the passing of the deed. Here plaintiff was an initial vendee and therefore it is unnecessary for us to discuss the applicability of the implied warranty to subsequent purchasers. For the same reason, we disavow any inferences that may arise from the footnote from the decision of the Court of Appeals relating to this question.

Defendant contends that to extend an implied warranty to this factual situation will be disastrous to home builders who would "for all intents and purposes be prevented from renting homes they were unable to sell" for fear that the builders would be liable for damage to the home caused by the tenants.

However, builders are still accorded substantial protection by the requirement that the defect in a dwelling or its fixtures be latent or not reasonably discoverable at the time of sale or possession. Claimants must also show that structural defects had their origin in the builder-seller and in construction which does not meet the standard of workmanlike quality then prevailing at the time and place of construction. *Hartley*, 286 N.C. 51, 209 S.E. 2d 776. We have also made it clear that the implied warranty falls short of "an absolute guarantee." *Id.* at 61, 209 S.E. 2d at 782. In regard to this argument we wish to make it clear that the test of reasonableness to determine whether a dwelling is "recently com-

pleted" does not affect the relevant statutes of limitation and repose.

[5] Although defendant did not raise the argument at the Court of Appeals level, he now argues that an implied warranty is inapplicable to an air conditioning unit because it is not "an absolute essential utility to a dwelling house." In *Hartley* we held that the builder of a recently completed dwelling impliedly warrants that "the dwelling, *together with all its fixtures*, is sufficiently free from major structural defects and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction." 286 N.C. at 62, 209 S.E. 2d at 783. (Emphasis added.)

Courts have found a breach of implied warranty for defects arising in many different areas of construction. *See, e.g., Sims v. Lewis*, 347 So. 2d 298 (Ala. 1979) (defective septic tank); *Carpenter v. Donohue*, 154 Colo. 78, 388 P. 2d 399 (1964) (cracks in basement wall); *Weeks v. Slavick Builders, Inc.*, 24 Mich. App. 621, 180 N.W. 2d 503, *affirmed*, 384 Mich. 257, 181 N.W. 2d 271 (1970) (leaky roof); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A. 2d 314 (1965) (failure to install boiler valve which regulated temperature for water used for domestic purposes); *Waggoner v. Midwestern Development, Inc.*, 83 S.D. 57, 154 N.W. 2d 803 (1967) (water seepage in basement); *Humber v. Morton*, 426 S.W. 2d 554 (Tex. 1968) (fireplace and chimney defective).

The test of a breach of an implied warranty of habitability in North Carolina is not whether a fixture is an "absolute essential utility to a dwelling house." The test is whether there is a failure to meet the prevailing standard of workmanlike quality. *See Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976) (breach of standard of workmanlike quality not "liveability" is test of breach of warranty). We hold that under the facts of this case, a jury may properly find a defective air conditioning system in a "recently completed dwelling" to be a major structural defect as between an initial vendee and a builder-vendor.

After a review of the evidence we hold that under a theory of implied warranty of habitability, the plaintiff raised questions of fact and a legally cognizable cause of action sufficient to survive defendant's motions for summary judgment, directed verdict and judgment notwithstanding the verdict.

[6] Since Judge Hedrick in his dissent took exception to the Court of Appeals majority's affirmance of the trial court on the issue of damages, we consider the relevant rules of damages. The rule as stated in *Hartley* is that a vendee can maintain an action against a builder-vender for damages for the breach of implied warranty of habitability "either (1) for the difference between the reasonable market value of the subject property as impliedly warranted and its reasonable market value in its actual condition, or (2) for the amount required to bring the subject property into compliance with the implied warranty." *Hartley v. Ballou*, 286 N.C. at 63, 209 S.E. 2d at 783. The Court in *Hartley* cited *Robbins v. C. W. Trading Post, Inc.*, 251 N.C. 633, 111 S.E. 2d 884 (1960) in which Justice Moore explained the principles behind the two measures of damages in the context of a breach of a construction contract:

> "The fundamental principle which underlies the decisions regarding the measure of damages for defect or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. *In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract.* But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value." 9 Am. Jur., Building and Construction Contracts, sec. 152, p. 89; *Twitty v. McGuire*, 7 N.C. 501, 504. The difference referred to is the difference between the value of the house contracted for and the value of the house built—the values to be determined as of the date of tender or delivery of possession to the owner.

Id. at 666, 111 S.E. 2d at 887. (Emphasis added.)

The evidence in this case shows that the defect complained of may be remedied without destroying a substantial part of the dwelling. Since the appellant did not bring forward the trial court's instructions, we must assume they were correctly given. *See Mann v. Virginia Dare Transportation Co.*, 283 N.C. 734, 198 S.E. 2d 558 (1973). It appears that the jury's verdict correctly represented the cost of making the builder-vendor's work conform to the implied warranty of habitability—in this case the cost of replacing the original air conditioner. Since plaintiffs do not contest defendant's assertion that he is entitled to receive the original three and one-half ton unit if a four ton unit is installed, we do not consider defendant's argument in this regard. We therefore do not disturb the jury's award of damages.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

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

STATE OF NORTH CAROLINA v. ALTON EARL WARREN

No. 191A84

(Filed 2 April 1985)

1. **Criminal Law §§ 26.5, 92.3— failure to join related offenses—availability of dismissal**

A defendant is entitled to a dismissal under G.S. 15A-926(c)(2) if the defendant can show that the prosecution withheld indictment on additional charges solely in order to circumvent statutory joinder requirements.

2. **Criminal Law §§ 26.5, 92.3— failure to join related offenses—evidence not available at first trial**

The trial court did not err in denying defendant's motion to dismiss burglary and larceny charges for failure to join where defendant's previous indictment for murder and conviction of voluntary manslaughter arose from the same incident. The evidence at the hearing on the motion to dismiss tended to show that at the time of the murder trial no witness was available to the State who could testify that anything was missing from within the victim's home; that the victim's purse, found close to the home of defendant's mother, was not

found until after the murder trial; that a detective's testimony that he had overheard defendant say prior to the murder trial that he took the purse would not have created a case so strong as to compel the State to proceed with the larceny charge; and, while there was evidence of a forced entry, there was no evidence that the breaking and entering was accompanied by the intent to commit a felony before the purse was found because defendant had been found guilty only of voluntary manslaughter.

3. **Criminal Law §§ 26.5, 92.3— failure to join related offenses—collateral estoppel not applicable**

There was no error in the denial of defendant's motion to dismiss for double jeopardy burglary and larceny charges which were brought after he was tried for murder and convicted of voluntary manslaughter. Defendant did not provide a transcript of the murder trial to the court in support of his motion to dismiss; moreover, collateral estoppel did not apply because the only ultimate issue of fact determined by the court's dismissal of the first-degree murder charge was that defendant did not kill the deceased with premeditation and deliberation.

4. **Burglary and Unlawful Breakings § 8— burglary sentence consecutive with prior manslaughter sentence—no error**

The trial court correctly ordered defendant's burglary sentence to run consecutively with a prior manslaughter sentence; the plain meaning of G.S. 14-52 is that a term imposed for burglary is to run consecutively with *any other sentence* being served by defendant.

Justice VAUGHN took no part in the consideration or decision of this case.

APPEAL of right under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 67 N.C. App. 337, 313 S.E. 2d 181 (1984), finding no error in the judgments or sentences for first degree burglary and felonious larceny entered against the defendant by *Judge Bradford Tillery* on March 30, 1983 in Superior Court, DUPLIN County. The defendant's petition for discretionary review of additional issues was allowed on July 27, 1984. Heard in the Supreme Court November 14, 1984.

Rufus L. Edmisten, Attorney General, by Marilyn R. Rich, Assistant Attorney General, for the State.

Edward G. Bailey and Glenn O'Keith Fisher for the defendant appellant.

MITCHELL, Justice.

The defendant appeals from judgments and sentences of imprisonment entered against him after verdicts of guilty were returned by the jury on charges of first degree burglary and felonious larceny. On appeal he contends that the trial court erred

in denying his motion to dismiss the charges because of the State's failure to join them for trial with a related murder charge and for a violation of the prohibition against double jeopardy. The defendant also contends the trial court erred by ordering that the imprisonment for the burglary conviction be consecutive to the sentence he was already serving. Having reviewed the assignments of error and contentions of the defendant, we affirm the holding of the Court of Appeals finding no error.

The first degree burglary and felonious larceny charges for which the defendant was convicted arose out of events occurring at the mobile home of Dorothy Kilpatrick Petersen on the evening of January 28, 1982. The defendant was indicted on March 1, 1982 for the first degree murder of Petersen and was tried at the July 12, 1982 Criminal Session of Superior Court, Duplin County. The defendant's motion to dismiss was allowed as to the charge of first degree murder and the case was submitted to the jury on second degree murder and lesser included offenses. The defendant was found guilty of voluntary manslaughter and was sentenced to the presumptive term of six years.

On January 17, 1983, the defendant was indicted for the first degree burglary of the mobile home and the larceny of Petersen's pocketbook and automobile. The defendant moved to dismiss the charges for failure to join offenses in violation of N.C.G.S. 15A-926(c)(2) and for a violation of the prohibition against double jeopardy.

Following a pretrial hearing in the present case, the trial court dismissed the charge of larceny of the automobile. No issue is before us concerning that charge. The trial court, however, found that at the time of the murder trial the prosecutor did not possess sufficient evidence to warrant trying the defendant for burglary or for larceny of the purse and denied the motion to dismiss as to those charges.

The evidence at trial in the present case tended to show that the defendant and Petersen had been dating for approximately two years. The defendant left his mother's home at approximately 7:00 p.m. on January 28, 1982 to purchase some cigarettes. He returned sometime after midnight. His stepfather testified that the defendant was intoxicated when he returned. As a result of a conversation with the defendant, the stepfather checked his bed-

room closet and discovered that his .357 caliber pistol was missing. He then went outside and looked in a Ford Pinto parked in the driveway which he recognized as belonging to Petersen. He found the pistol lying on the floor of the car. The stepfather then notified the police.

At approximately 1:00 a.m. January 29, Lieutenant Melvin Vernon of the Topsail Beach Police Department arrived at the home of the defendant's mother. At that time the stepfather turned the gun over to him. The defendant was very emotional and seemed to be intoxicated. Vernon contacted the Duplin County Sheriff's Department, and Jimmy Smith, a deputy with the Duplin County Sheriff's Department, was dispatched to Petersen's home. He observed a Buick automobile stuck in a ditch across the road from the mobile home. The car was later identified as belonging to the defendant. Smith looked through a window of the mobile home and saw a body covered with a blanket lying on the living room floor. He entered through the unlocked front door and examined the body which was later identified as that of Dorothy Kilpatrick Petersen. She had been killed by a gunshot wound to the head. The rear door was standing open approximately one foot, and the screen had a hole in it near the handle. A glass slat was missing from the rear door.

Later that morning other law enforcement officers discovered the glass slat which was missing from the rear door about eight feet from the mobile home. They also found a bullet lodged in a curtain over the couch in the living room. Expert testimony indicated that the bullet was fired from the .357 pistol which had been turned over to the authorities by the defendant's stepfather.

Thomas Rackley, a neighbor of the deceased, testified that between 7:00 p.m. and 8:00 p.m. on January 28, the defendant came to his house, knocked on the door and called out his name. Rackley did not answer the door but later looked out a window and saw the defendant in Petersen's mobile home. Subsequently, he heard the sound of tires spinning. He went to investigate and discovered the defendant's car in a ditch.

Robert Sipper discovered a purse on July 27, 1982 three and a half blocks from the home of the defendant's mother. Petersen's name was on identification cards found in the purse. Chief Detective Alfred Basden of the Duplin County Sheriff's Department

testified that prior to the murder trial he overheard the defendant tell members of his family that he had taken the purse and disposed of it somewhere near his mother's house.

The defendant testified that he had met Petersen in July 1980 and that they began to date. He had been drinking on the night of January 28, 1982 and for several days prior to that date. He took his stepfather's pistol to protect himself on a trip that he was preparing to take. On the evening of January 28 he decided to visit Dorothy Petersen. When he entered the Petersen home, she noticed the gun in his coat. She told him to put it away, and he placed it on a table. After visiting with Petersen he picked up the gun and prepared to leave. As he was placing the gun in his coat, it discharged hitting Petersen. He ran to a neighbor's house to get help but was unable to find anyone. When he tried to drive his car for help, it became stuck in the ditch. He tried to reenter the mobile home but found the front door locked. He then removed a glass panel from the back door and went inside.

The next thing the defendant remembered was driving Petersen's car. He drove around contemplating suicide before returning to Topsail Beach. He then realized that he had taken Petersen's purse. He placed the purse on the shoulder of the road a few blocks from his mother's house. He then drove to his mother's and told his stepfather that there had been an accident and Petersen was dead.

Ralph Freeman, an investigator with the law firm which represented the defendant on the murder charge, testified that the defendant had told him that he had placed the purse in a vacant lot near his mother's house. Freeman unsuccessfully attempted to locate the purse.

At the close of all of the evidence, the defendant made a motion as for nonsuit which was denied. The jury returned a verdict of guilty of first degree burglary and felonious larceny. He was sentenced to a prison term of fourteen years for the burglary conviction which was to be consecutive to the six year sentence imposed for the manslaughter conviction in the previous trial. He was sentenced to three years for the felonious larceny, which was to run concurrently with the term imposed for the burglary conviction.

[1] The defendant first contends that the trial court erred by failing to dismiss the first degree burglary and felonious larceny charges due to the State's failure to join them for trial with the prior murder charge. N.C.G.S. 15A-926(c)(2) provides:

> A defendant who has been tried for one offense may thereafter move to dismiss a charge of a joinable offense. The motion to dismiss must be made prior to the second trial, and must be granted unless
>
> a. A motion for joinder of these offenses was previously denied, or
>
> b. The court finds that the right of joinder has been waived, or
>
> c. The court finds that because the prosecutor did not have sufficient evidence to warrant trying this offense at the time of the first trial, or because of some other reason, the ends of justice would be defeated if the motion were granted.

Joinable offenses are those which arise out of the same act or transaction or out of a series of acts or transactions connected together or constituting parts of a single scheme or plan. N.C.G.S. 15A-926(a). Clearly, the burglary and larceny charges could have been joined for trial with the murder charge if they had been pending at the time of that trial. The evidence at the pretrial hearing concerning the State's failure to do so, however, did not require that the trial court dismiss these charges.

Our analysis of the defendant's argument is guided by a review of *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924 (1977). In that case the defendant was indicted and tried for first degree murder. The trial ended in a mistrial. Indictments were subsequently returned charging the defendant with twelve counts of solicitation to commit the same murder. The solicitation charges were joined with the murder charge on retrial, and the defendant was convicted on all counts. The defendant claimed that the trial court erred in failing to dismiss the solicitation charges because they were not joined with the murder prosecution at the first trial.

We held in *Furr* that N.C.G.S. 15A-926 did not apply because the defendant had not been indicted for the solicitation charges at the time of the first trial and they could not have been joined with the murder charge at that time. We also noted that there was no evidence to indicate that the prosecution had held the solicitation charges in reserve pending the outcome of the murder trial. The defendant in the case *sub judice* asserts that we should explicitly recognize this statement as a qualification to the holding in *Furr*. We agree.

If a defendant shows that the prosecution withheld indictment on additional charges solely in order to circumvent the statutory joinder requirements, the defendant is entitled under N.C.G.S. 15A-926(c)(2) to a dismissal of the additional charges. The defendant must bear the burden of persuasion in such cases. This interpretation of the statute is given some support by the fact that the Supreme Court of the United States has intimated that due process would require the dismissal of an indictment "if it were shown at trial that the pre-indictment delay . . . caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *U.S. v. Marion*, 404 U.S. 307, 324 (1971).

If a defendant can show, for example, that during the first trial the *prosecutor* was aware of substantial evidence that the defendant had committed the crimes for which he was later indicted, this would be some evidence that the delay in bringing the later indictment was for the purpose of circumventing the statute. A showing that the State's evidence at the second trial would be the same as the evidence presented at the first would also tend to show that the prosecutor delayed indictment on the additional crimes for such purpose. A finding of either or both circumstances would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute.

[2] When reviewing the trial court's denial of the defendant's motion to dismiss in this case, we may only consider the evidence before the trial court when it made its ruling at the conclusion of the pretrial hearing. When the case at hand is reviewed in such light, we are unable to say that the trial court erred in denying the defendant's motion to dismiss the additional charges.

At the pretrial hearing on the defendant's motion, Chief Detective Basden testified that although he heard the defendant tell relatives prior to the murder trial that he had taken the purse and disposed of it near his mother's house, the purse had not been recovered at the time of the first trial. Basden's testimony was ambiguous as to when he informed the prosecutor that he had overheard the defendant's conversation concerning the purse.

Assistant District Attorney Hudson also testified at the pretrial hearing. He stated that at the time of the first trial he possessed evidence tending to show that there had been a breaking into the mobile home. He also acknowledged that he had received information from the defendant's lawyer that a purse belonging to Petersen was missing. He indicated, however, that no witness was available to him who would testify to this fact. He stated that he could not recall whether Basden told him of the conversation he had overheard before, during or after the murder trial. Hudson testified that a search was conducted for the purse prior to the first trial, but that it was not found until two weeks after the trial. He also testified that the State did not elect to proceed on the theory of felony murder at the first trial.

Hudson stated that at the time the defendant was indicted for first degree murder, the State had no intention of bringing these additional charges against him because there was insufficient evidence to prove that the defendant had stolen anything. After the purse was located a decision was made to indict the defendant for the additional crimes of larceny and burglary. Hudson acknowledged that this decision was based in part on the fact that the victim's family was dissatisfied with the verdict in the murder trial.

Therefore, with regard to the larceny charge, the evidence at the hearing on the motion to dismiss tended to show that at the time of the murder trial no witness was available to the State who could testify that anything was missing from within the victim's home. The purse itself was not found until after the completion of the murder trial. Assuming *arguendo* that prior to the murder trial Basden reported to the prosecutor that he had heard the defendant state that he took the purse, such evidence would not have created a case so strong as to compel the State to pro-

ceed with the larceny charge at that time or risk dismissal at some later date. The statutory joinder requirements do not compel a prosecutor to seek an indictment simply because he has enough evidence available to establish probable cause, "a quantum of evidence which may fall short of the amount necessary to support a criminal conviction." *Hoffa v. United States*, 385 U.S. 293, 310 (1966), *reh. denied*, 386 U.S. 940 (1967). Here, the State could have shown little more than probable cause for a larceny charge until the purse was recovered after the murder trial.

With regard to the first degree burglary charge, the testimony during the pretrial hearing on the defendant's motion showed that the State introduced evidence during the murder trial of a forced entry. One of the constituent elements of first degree burglary, however, is that the breaking and entering must have been accompanied by the intent to commit a felony. *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). We have said that intent is a mental attitude which is rarely provable by direct evidence but must ordinarily be shown by circumstances from which it may be inferred. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). The intent which existed at the time of a breaking and entering may be inferred from evidence of what the accused did within the dwelling. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). The fact that a felony was actually committed in the dwelling, however, does not necessarily establish the intent required for the crime of burglary. It is merely evidence from which such an intent at the time of the breaking and entering may be found. *Id.*

At the time of the murder trial, the only evidence of what the defendant did in the mobile home was the fact that Petersen was found there shot to death. The defendant strenuously argues that the murder could have served as the underlying felony for the first degree burglary charge. The fact that the jury in the murder trial found the defendant guilty only of voluntary manslaughter, however, indicates the lack of evidence available to the State during the first trial to show that the defendant broke into the home with the premeditated and deliberate intent to kill Petersen. It was not until Petersen's purse was found that the State had clear evidence of a specific intent to support a charge of first degree burglary.

We also find it significant that during the murder trial the State did not proceed under the felony murder theory. If the prosecutor had possessed evidence of burglary or any other felony, it would seem that he would have presented it and relied upon the felony murder theory in the hope of increasing the possibility of a first degree murder conviction.

The record before us does not show that a transcript of the murder trial was introduced or made available to the trial court during the pretrial hearing in this case for a comparison of the evidence presented during the murder trial with the State's forecast of evidence on the larceny and burglary charges. The Assistant District Attorney testified, however, that the only additional evidence he had was the purse and its contents. Assuming *arguendo* that evidence at the hearing provided an adequate basis for the trial court to compare the evidence presented during the murder trial with the State's forecast of evidence in the burglary and larceny trial, it is clear that the purse provided the State with much stronger evidence of first degree burglary than was available at the time of the defendant's trial for murder.

The evidence before the trial court during the pretrial hearing on the defendant's motion to dismiss tended to show valid reasons for the State's failure to seek the indictment charging larceny and burglary before the defendant was tried on the murder charge. This evidence would support a determination that the prosecutor did not withhold the additional indictment solely for the purpose of circumventing N.C.G.S. 15A-926. It certainly did not compel a determination that the prosecutor withheld the indictment solely for such purpose. Therefore, the trial court did not err in denying the motion to dismiss the burglary and larceny charges.

[3] The defendant next contends that the denial of his motion to dismiss the burglary and larceny charges violated the constitutional prohibition against double jeopardy. He argues that the concept of collateral estoppel barred the State from bringing these charges because the issues of ultimate fact as to them were determined at the first trial. Specifically, he argues that the dismissal of the first degree murder charge at the close of the State's evidence at the first trial necessarily included a deter-

mination that there was no underlying felony such as burglary or larceny. We disagree.

The double jeopardy clause of the Fifth Amendment was made applicable to the states in *Benton v. Maryland*, 395 U.S. 784 (1969). Embodied within the prohibition against double jeopardy is the concept of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436 (1970). "Collateral estoppel" means that once an issue of ultimate fact has been determined by a valid and final judgment, that issue may not be relitigated by the same parties in a subsequent action. *Id.* at 443; *State v. Lewis*, 311 N.C. 727, 319 S.E. 2d 145 (1984).

When raising a claim of collateral estoppel, the defendant bears the burden of showing that the issue he seeks to foreclose was *necessarily* resolved in his favor at the prior proceeding. *U.S. v. Hewitt*, 663 F. 2d 1381 (11th Cir. 1981); *U.S. v. Castro*, 629 F. 2d 456 (7th Cir. 1980). There is no indication in the record that a transcript of the murder trial was provided to the trial court in the present case in support of the motion to dismiss. The defendant's failure to provide a transcript of the previous trial provided an adequate basis for the trial court's refusal to hold the State collaterally estopped in the case at hand. *Turley v. Wyrick*, 554 F. 2d 840 (8th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978); *U.S. v. Tierney*, 424 F. 2d 643 (9th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970). It is clear even in the absence of a transcript, however, that collateral estoppel does not apply in the present case.

At the pretrial hearing, the Assistant District Attorney testified that the defendant was tried for murder at the first trial solely on the theory of premeditation and deliberation. He stated that no evidence was introduced on the theory of felony murder, and neither side put forth the felony murder doctrine during arguments on the motion as for nonsuit on the first degree murder charge. This testimony was uncontroverted. Therefore, the only ultimate issue of fact determined by the court's dismissal of the first degree murder charge during the first trial was that the defendant did not kill the deceased with premeditation and deliberation. Since the State did not seek to prosecute on the theory of felony murder at the first trial, the defendant's argument that the court necessarily decided there that an underlying felony did not exist is meritless.

[4] The defendant's final contention relates to the sentence imposed by the trial court for the burglary conviction. N.C.G.S. 14-52 sets out the punishment for first and second degree burglary. The final sentence of the provision states: "Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." The trial court sentenced the defendant to a fourteen-year term of imprisonment for the burglary to run consecutively with the six-year term imposed for the manslaughter conviction at the first trial. The presiding judge stated, however, that he ordered the burglary sentence to run consecutively with the sentence for manslaughter only because he felt such a result was mandated by N.C.G.S. 14-52. Otherwise, he would have ordered that the burglary sentence be served concurrently with the previous sentence.

The defendant contends that the trial court's construction of N.C.G.S. 14-52 was erroneous. He argues that under the statute the only time a trial court is required to enter a burglary sentence consecutive to another sentence is when that other sentence was also imposed for burglary. We disagree.

The last sentence of N.C.G.S. 14-52 is clear and unambiguous. In such cases judicial construction is not permitted and the courts must give the statute its plain and definite meaning. *State v. Koberlein*, 309 N.C. 601, 308 S.E. 2d 442 (1983); *State v. Wall*, 304 N.C. 609, 286 S.E. 2d 68 (1982). The plain meaning of N.C.G.S. 14-52 is that a term imposed for burglary under the statute is to run consecutively with *any other sentence* being served by the defendant. The trial court was, therefore, correct in interpreting N.C.G.S. 14-52 as requiring that the burglary sentence be made consecutive to the sentence for the prior manslaughter conviction.

For the foregoing reasons, the decision of the Court of Appeals finding no error in the defendant's trial and sentences is

Affirmed.

Justice VAUGHN took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES WALTER PEEK

No. 117A84

(Filed 2 April 1985)

1. **Criminal Law § 122.2— additional instructions on failure to reach verdict—no error**

The trial judge did not err in his instructions to the jury when the foreman told him the jury was having trouble reaching a verdict where the jury had been deliberating less than two hours when it reentered the courtroom; the jury foreman and other members of the panel appeared to believe that the jury was not hopelessly deadlocked; and the instructions, although not following precisely the guidelines set forth in G.S. 15A-1235, in essence merely asked the jury to continue to deliberate and in no way contained any element of coercion that would warrant a new trial.

2. **Criminal Law § 117— character evidence incompetent—no error in instructions**

The trial court did not err in its instructions on character evidence where the testimony given by defendant's witnesses was not competent character evidence because it was given in the form of personal opinion. Moreover, defendant did not request an instruction on character evidence and did not object to the instruction given despite invitations by the trial judge for corrections or additions to his instructions.

3. **Rape and Allied Offenses § 7; Constitutional Law § 80— first-degree rape—mandatory life sentence—not cruel and unusual punishment**

A mandatory life sentence for first-degree rape did not constitute cruel and unusual punishment under the U.S. or North Carolina Constitutions in view of the seriousness of the crime and the substantial deference granted to the broad authority that legislators necessarily possess in determining the types and limits of punishments for crimes. G.S. 14-1.1(a)(2); G.S. 14-27.2; Eighth Amendment to the Constitution of the United States; Art. I, § 27 of the North Carolina Constitution.

APPEAL by defendant from *Downs, J.*, at the 16 January 1984 Criminal Session of Superior Court, MECKLENBURG County. Defendant was convicted of first-degree rape and sentenced to life imprisonment. He appeals as a matter of right pursuant to N.C. G.S. § 7A-27(a) (1981).

The State's evidence at trial tended to show that the prosecuting witness, Mary Black, spent the evening of 23 April 1983 with her boyfriend in her apartment. She had sexual intercourse with her boyfriend in the apartment prior to 10:00 p.m. when he left for work. As a result of taking pain medication, Ms. Black fell asleep on a sofa in her apartment soon after her boyfriend left.

She was awakened by a knock on her front door. She went to answer the door and recognized defendant James Walter Peek standing outside. Ms. Black had known defendant since 1981 when he worked on an interior construction project in the office where she was employed. She and defendant had gone to lunch together a number of times and defendant had visited Ms. Black in her apartment on several occasions. On one such occasion defendant had made sexual advances toward her. Ms. Black testified that she protested and struggled with him, but that she finally submitted, and had sexual intercourse with him.

On the night of 23 April 1983 after Ms. Black admitted defendant to her apartment, he returned to his car to turn off the car's motor and to retrieve his gun, telling Ms. Black he did not want his gun to be stolen. Defendant reentered the apartment, closed and locked Ms. Black's front door and sat down with her on the sofa. Defendant's gun was in his pocket at that time, but Ms. Black testified that she was not initially frightened by it. Defendant began making sexual advances toward Ms. Black, and she asked him to leave. Assuring her that he would not hurt her, defendant removed a bullet from his gun and gave it to her. Ms. Black and defendant began to struggle on the sofa, and she scratched defendant. When defendant looked in a mirror above the sofa to see the scratch, he told Ms. Black the scratch burned and that he was going to hurt her. At that time defendant had the gun in his hand, and Ms. Black testified that she was afraid of it. Ms. Black threatened to call the police, but defendant told her he would have done what he wanted to do by the time the police arrived. After another struggle Ms. Black submitted against her will to vaginal intercourse with defendant. Defendant also attempted to have anal intercourse with her. Ms. Black testified that during the sexual acts, she thought the gun was on the sofa beside her head.

Ms. Black called the police after defendant left her apartment. She was taken to a hospital where a rape kit was prepared. The results of the rape kit revealed that semen was present in both vaginal and rectal smears taken from Ms. Black. Both Ms. Black and her boyfriend denied having engaged in anal intercourse on the evening of 23 April.

Defendant's evidence tended to show that he and Ms. Black engaged in consensual sexual intercourse on the night in question.

Defendant testified that Ms. Black neither scratched him nor threatened to call the police. He stated that although he had a gun on his person when he first went to Ms. Black's door, he returned the gun to his car when he turned off the car's motor. Defendant also testified that he and Ms. Black had been lovers for a time and that he had proposed to marry her. He testified that while he worked in the building where Ms. Black was employed, they had lunch together nearly every day and that he had introduced her to his co-workers as his "lady."

One of defendant's former co-workers testified that he had frequently seen defendant and Ms. Black go to lunch together and that he had observed them holding hands. Another co-worker testified that Ms. Black and defendant appeared to be "going with each other," and that defendant had mentioned spending the night with Ms. Black. Several witnesses stated their opinions about defendant's character.

The jury found defendant guilty of first-degree rape. Although the trial judge eventually sentenced defendant to the mandatory sentence of life imprisonment, he postponed sentencing defendant for one month to investigate alternatives to sentencing. He also conducted a sentencing hearing during which he found five factors in mitigation and none in aggravation cognizable under the Fair Sentencing Act. N.C. Gen. Stat. § 15A-1340.1-1340.7 (1983).

Lacy H. Thornburg, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender and Louis D. Bilionis, Special Assistant to the Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends the trial judge prejudicially erred in his instructions to the jury when the jury foreman told him the jury was having trouble reaching a unanimous verdict. We do not agree.

The jury began its deliberations at 11:55 a.m. and continued until 12:35 p.m. when the court recessed for lunch. After having

resumed deliberations at 2:00 p.m., the jury returned to the courtroom at 3:13 p.m. at which time the following transpired:

THE COURT: Ms. Morton, you're carrying the verdict sheet, I take it from that you're the foreperson.

MS. MORTON: Right.

THE COURT: Does the jury want to make some inquiry of the Court?

MS. MORTON: Well, we just feel like now we can not make a unanimous decision.

THE COURT: Are you saying you're deadlocked?

MS. MORTON: I don't think so. Do ya'll?

JURORS: No; we're not.

MS. MORTON: No; we're not.

THE COURT: Well then, if you're not hopelessly deadlocked—

MS. MORTON: Some feel like we might be.

THE COURT: I want you then, of course—the Court is going to let you continue deliberating. You've heard all the evidence that's going to be presented in this case. And, I want you to try to resolve it, if you can. And, I'm going to let you stay around for a while. I may make some inquiry of you further on. You won't need to announce it; we'll make some inquiry.

If you feel like you're deadlocked, that's not—that's not something that's the end of the world if you're not hopelessly deadlocked; that's the key.

So, if you would, go back and continue your deliberations. We'll make inquiry of you unless we've heard from you. All right.

EXCEPTION NO. 6

MS. MORTON: Thank you.

Defendant contends that the trial court erred in failing to instruct the jury in accordance with N.C.G.S. § 15A-1235, which provides in pertinent part:

> § 15A-1235. 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.*

N.C. Gen. Stat. § 15A-1235 (1983). (Emphasis added.)

It is defendant's contention that the trial judge's failure to instruct the jury in accordance with N.C.G.S. § 15A-1235 entitles him to a new trial because the instruction the trial judge gave had the effect of forcing the jury to reach a verdict. Citing *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980), defendant

would have us adopt a rule requiring verbatim instructions from the statute in every instance of potential jury deadlock.

In *Easterling*, we interpreted N.C.G.S. § 15A-1235 as "the proper reference for standards applicable to charges which may be given a jury that is apparently unable to reach a verdict." *Id.* at 608, 268 S.E. 2d at 809. In that case we held that in view of the legislative intent in establishing the guidelines in N.C.G.S. § 15A-1235, it was error for a trial court in its jury instructions to mention the time and expense required to retry a case after a jury deadlock. We recognized, however, that every variance from the procedures set forth in the statute does not require the granting of a new trial. We held that the erroneous instruction in *Easterling* was not prejudicial since the jury did not appear to be deadlocked and the charge was not unduly coercive. *Id.*

Nonetheless, this Court issued the following warning to the trial bench:

> 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 the statute will require a finding on appeal of prejudicial error.

Id. at 609, 268 S.E. 2d at 809-10.

We find no such clear violation of the procedural safeguards of N.C.G.S. § 15A-1235 in this case. We note that the language of the statute is permissive rather than mandatory—a judge "may" give or repeat the instructions in N.C.G.S. § 15A-1235(a) and (b) if it appears to the judge that a jury is unable to agree. N.C. Gen. Stat. § 15A-1235(c) (1983). *See Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938) (the word "may" will ordinarily be construed as permissive and not mandatory). Furthermore, it has long been the rule in this State that in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978).

In the case before us the jury had been deliberating less than two hours when it reentered the courtroom. The jury foreman

and other members of the panel appeared to believe that the jury was not hopelessly deadlocked. *See Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980) (no prejudicial error where jury not deadlocked). Furthermore, although the instructions do not precisely follow the guidelines set forth in N.C.G.S. § 15A-1235, the essence of the instructions was merely to ask the jury to continue to deliberate. The instructions in no way contained any element of coercion that would warrant a new trial in this matter. Indeed we note that the effect of the instructions was not so coercive as to impel defendant's trial counsel to object to the instructions. We hold that the trial judge did not prejudicially err in his instructions, and this assignment of error is overruled.

[2] Defendant next assigns as error the trial court's instruction to the jury relating to his character. He contends that the trial judge's instruction was erroneous because it did not inform the jury that the character evidence could be considered both as substantive evidence and as evidence relating to defendant's credibility. Although defendant requested no instruction on the character evidence, the trial judge instructed as follows:

> Evidence in this case was received in regard to the defendant's reputation and character that is. [sic] That he served honorably in the United States Marine Corps; that he fought for his country; that he is employed; in the area that he works and lives, that he has a good reputation.
>
> Although good character and good reputation is not an excuse for a crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character.
>
> Therefore, if you believe from the evidence that the defendant has a good character, you may consider this fact in your determination of his guilt or his innocence. Give it such weight as he [sic] decide it should receive in connection with all other evidence.
>
> EXCEPTION NO. 5

Defendant argues that the prosecuting witness's credibility as compared with defendant's was the crucial issue in the case, and the judge's failure to inform the jury that it could consider

defendant's evidence of good character for purposes of determining credibility entitled defendant to a new trial. We disagree.

It is true that when a defendant offers evidence of his good character and testifies in his own behalf, he is entitled to have the jury consider it as bearing on his credibility as a witness and as substantive evidence bearing directly on the issue of his guilt or innocence. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954). When a defendant who has testified in his own behalf offers evidence as to his good general reputation, and the court undertakes to instruct the jury as to the legal significance of such character evidence and how it should be considered by the jury, incomplete instructions have been found to be sufficient grounds for a new trial. *State v. Burell*, 252 N.C. 115, 113 S.E. 2d 16 (1960).

In this case, however, evidence pertaining to defendant's character did not rise to the level of competent character evidence. At the time of this trial, the rule in North Carolina was that a defendant's character could be proved by testimony concerning "his *general* reputation, held by an appreciable group of people who have had adequate basis upon which to form their opinion."[1] *State v. McEachern*, 283 N.C. 57, 67, 194 S.E. 2d 787, 793-94 (1973).

It was well settled that such character evidence could not be a witness's personal opinion. *State v. Williams*, 299 N.C. 652, 263 S.E. 2d 774 (1980); *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978). In *Williams* the witness stated that he "had not never seen anything that would indicate but what [the defendant] is a pretty good fellow." *Williams*, at 661, 263 S.E. 2d at 780. This Court held that the testimony was not competent character evidence because it did not contemplate the defendant's *general* reputation among a

1. Effective 1 July 1984, Rule 405 of the North Carolina Evidence Code provides:

(a) Reputation or opinion.—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct. Expert testimony on character is not admissible as circumstantial evidence of behavior.

(b) Specific instances of conduct.—In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

group of people, but gave only the witness's personal opinion of character. *Id.*

We find the same lack of competent character evidence in the case at hand. Three of defendant's witnesses testified about his character. Andrell Watts said that he was familiar with defendant's reputation at work, but his testimony as to defendant's general character consisted of the following statement: "At work he's a very happy person. He never seems to get in arguments or anything else, settles it without getting in a big dispute about it; easy going type person."

Roosevelt Mayers testified that he was familiar with defendant's reputation in the community, but like Mr. Watts, Mr. Mayers never stated what that reputation was. Instead he said that defendant was "cool and really calm and got a mild manner about him. And, I've never known him to be in any trouble since I've been knowing him."

The Reverend Clinton Luster testified as follows:

Q. You're familiar with his character and reputation?

THE COURT: You need to give a specific answer to that.

A. Yes.

Q. What is his character and reputation in the community?

A. I would say he's an outstanding person in the community.

Q. What is his character and reputation for telling the truth, sir?

A. As long as I've known him, I've never known him to lie to me about anything.

MR. JAMES: OBJECTION, Your Honor. That's not reputation, that's opinion.

THE COURT: OVERRULED.

We find that the testimony given by defendant's witnesses is not competent character evidence because it was given in the form of personal opinion. The Reverend Luster's testimony comes

closest to being reputation evidence, but it is clear that his impression of defendant as an outstanding person in the community and as a person who does not lie is based on Luster's personal opinion, rather than defendant's *general* reputation in the community.

We note that absent a request, a trial court is not required to instruct upon character evidence even where such evidence is competent because character evidence is a subordinate feature of a case. *State v. Burell*, 252 N.C. 115, 113 S.E. 2d 16 (1960). Here, defendant made no such request and presented no competent character evidence. Therefore, had the trial court erred in its instruction, the error was in defendant's favor. We note further that defendant's attorney failed to object to the instruction despite invitations by the trial judge for any corrections or additions to his instructions. This assignment of error is overruled.

[3] Defendant next contends that the imposition of a mandatory life sentence for first-degree rape is constitutionally disproportionate and is cruel and unusual punishment as prohibited by the eighth amendment to the Constitution of the United States and Article 1, Section 27 of the North Carolina Constitution. First-degree rape is a Class B felony punishable by a mandatory sentence of life imprisonment. *See* N.C. Gen. Stat. §§ 14-27.2 and 14-1.1(a)(2). Defendant contends that the mandatory sentence imposed upon him is disproportionate when measured against sentences imposed for the same crime in other jurisdictions, against sentences imposed for other crimes in this jurisdiction, and against the gravity of the offense in this case.

In *State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983), the defendant similarly requested a proportionality analysis of consecutive life sentences. In *Ysaguire* we acknowledged that under the eighth amendment, "a criminal sentence must be proportionate to the crime for which defendant has been convicted." *Id.* at 786, 309 S.E. 2d at 440 (quoting *Solem v. Helm*, 463 U.S. 277, ---, 103 S.Ct. 3001, 3009 (1983)). We nonetheless upheld the constitutionality of the imposition of consecutive life sentences in *Ysaguire* and recognized that in view of the substantial deference accorded legislatures and sentencing courts, a reviewing court "rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate."

Solem v. Helm, 463 U.S. at ---, 103 S.Ct. at 3009 n. 16; *State v. Ysaguire*, 309 N.C. at 786, 309 S.E. 2d at 441. Indeed, "[o]nly in exceedingly unusual non-capital cases will the sentences imposed be so grossly disproportionate as to violate the Eighth Amendment's proscription of cruel and unusual punishment." *Ysaguire*, at 786, 309 S.E. 2d at 441.

We do not find the mandatory life sentence prescribed for defendant's conviction of first-degree rape to be unconstitutionally excessive. Defendant relies in large part on *Helm* in which the United States Supreme Court overturned as excessive a sentence imposed upon a defendant under South Dakota's recidivist statute. As contrasted with this case, the defendant in *Helm* received a sentence of life imprisonment without parole after pleading guilty to uttering a "no account" check for $100, for which the maximum punishment was ordinarily five years imprisonment. The Supreme Court, in overturning Helm's sentence, noted that that defendant's crime had been referred to as "one of the most passive felonies a person could commit." *Solem v. Helm*, 463 U.S. at 653, 103 S.Ct. at 3012.

On the other hand, we are mindful that the crime of rape of which defendant was convicted has been described as the "ultimate violation of self" short of homicide. *Coker v. Georgia*, 433 U.S. 584, 597 (1977). Our legislature has seen fit to classify this serious crime into two degrees, establishing as a possible element of the first-degree offense the employment or display of a deadly weapon. Defendant in this case was convicted of rape accompanied with the display of a deadly weapon. While other jurisdictions may penalize this crime with a less severe sentence, our General Assembly has chosen to punish this serious, often life-threatening offense as a Class B felony, with a mandatory life sentence. In view of the seriousness of the crime and our obligation to "grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes," we do not find defendant's sentence to be unconstitutionally excessive or so gross and disproportionate as to violate the constitutions of the United States or North Carolina. *Solem v. Helm*, 463 U.S. at 290, 103 S.Ct. at 3009. This assignment of error is overruled.

Defendant received a fair trial free from prejudicial error.

No error.

MAXTON HOUSING AUTHORITY v. ANITA McKOY McLEAN

No. 626A84

(Filed 2 April 1985)

1. **Landlord and Tenant § 13— public housing—eviction of tenant—finding of fault**

In order to evict a tenant occupying public housing for persons with low incomes for failure to pay rent as called for in the lease, there must be a finding of fault on the part of the tenant in failing to make the rental payment. Upon a showing by the housing authority that the rental payment has not been made as required by the lease, it is presumed that the failure to pay the rent is good cause for eviction, and the burden thereupon shifts to the tenant to produce evidence to prove a lack of fault on his part in failing to make the rental payment. G.S. 157-2.

2. **Landlord and Tenant § 13— eviction from public housing—showing of lack of fault by tenant**

A public housing authority was not entitled to evict defendant from a low income public housing project for failure to make rental and water and sewer payments because defendant rebutted the presumption that good cause existed to terminate the lease by showing lack of fault on her part in failing to make such payments where defendant presented evidence that the rent in question was based upon the income of her husband when he moved into the apartment after marrying defendant; defendant's only income before her marriage came from AFDC payments which ended upon her marriage; defendant's husband lost his job and then moved out of the apartment; defendant has received no income from her husband since he moved out; defendant was unable to get an extension of time to pay her water and sewer bill; and defendant had no income with which to make the rental and water and sewer payments until her AFDC payments were reinstated some months after her husband moved out of the apartment.

Justice MEYER dissenting.

Chief Justice BRANCH joins in this dissenting opinion.

ON appeal by defendant from the decision by a divided panel of the Court of Appeals reported at 70 N.C. App. 550, 320 S.E. 2d 322 (1984), affirming judgments signed 20 June 1983 and entered 24 June 1983 by *McLean, J.*, in District Court, ROBESON County. Heard in the Supreme Court 14 March 1985.

Williamson, Dean, Brown & Williamson, by Andrew G. Williamson and Andrew G. Williamson, Jr., for plaintiff appellee.

Lumbee River Legal Services, Inc., by Phillip Wright, for defendant appellant.

MARTIN, Justice.

We find that the Court of Appeals erred in affirming the judgments of the district court and therefore reverse the decision of the Court of Appeals.

I.

The defendant, Anita McKoy McLean, became a tenant of the plaintiff, Maxton Housing Authority (Authority) on 1 July 1980. At that time Mrs. McLean was unmarried and lived in the apartment with her two children. She was not required to pay rent to the Authority and received a check from it in the amount of six dollars per month to apply to her utility bills. On 10 October 1981 she married David McLean, who is the father of her children. The marriage was reported to the Authority, as required, and because of the income of David McLean, the rent on her apartment increased to $171 per month effective 1 December 1981. The rent for December was paid. The January 1982 rent in that amount was not paid to the Authority. Effective 1 February 1982 the rent on defendant's apartment decreased to $73 per month because David McLean had been laid off from his job. However, the rent for February and March was not paid to the Authority.

Because of marital difficulties between the defendant and David McLean, they separated, and he moved out of the apartment on 24 March 1982. Although required by court order to pay $40 per week to the defendant for child support, McLean has never made any such payments. Defendant informed the Authority of this change in her domestic situation. Mrs. McLean, who had received Aid to Families with Dependent Children (AFDC) payments prior to her marriage, reapplied for AFDC benefits on 27 April 1982. She received a check for the May payment on 22 June 1982. She had borrowed some money from her parents to help pay her electric bill. However, she did not pay the water and sewer bill and those services were disconnected for nonpayment on 28 May 1982 and remained so until they were restored on 22 June 1982. This was for an unpaid bill of $14.

On 11 March 1982 the Authority instituted a summary ejectment action against defendant for failing to pay "according to rent policy." After judgment was entered for the plaintiff before a magistrate, the case was appealed to the District Court of Robeson County. Meanwhile, another summary ejectment action was commenced against the defendant on 20 July 1982 based upon nonpayment of utilities which resulted in the water and sewer being disconnected; defendant's inaction in this instance was alleged to be a violation of item 7 of the lease. This case also was appealed to the district court. The cases were consolidated for trial in the district court and were heard by a judge without a jury on 9 June 1983. Judgment was entered for the Authority in both cases, and the defendant appealed to the Court of Appeals on 16 June 1983. By its opinion filed 2 October 1984 the Court of Appeals affirmed the judgments of the district court. Judge Becton dissented.

II.

The defendant argues that summary ejectment should not have been entered against her because under the doctrine of necessaries her husband was responsible for the rental payments. As we base our decision upon another theory of law, we do not find it necessary to discuss the doctrine of necessaries nor to determine if it is applicable to the facts of this case.

We find that the public policy of the state and federal governments with respect to public housing for the poor is dispositive of this appeal. In regard to the problem of public housing for the poor, our legislature has declared:

> It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor condition of the buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations . . . many persons of low income are forced to occupy overcrowded and

> congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the State . . . these conditions cannot be remedied by the ordinary operation of private enterprise . . . .

N.C. Gen. Stat. § 157-2 (1982). The legislature authorized the creation of housing authorities as a means of protecting low-income citizens from unsafe or unsanitary conditions in urban or rural areas. *Powell v. Housing Authority*, 251 N.C. 812, 112 S.E. 2d 386 (1960).

[1] The purposes of public housing for the poor are implicit in the construction of leases for such housing. We hold that in order to evict a tenant occupying public housing for persons with low incomes for failure to pay rent as called for in the lease, there must be a finding of fault on the part of the tenant in failing to make the rental payment. Upon a showing by the Authority that the rental payment has not been made as required by the lease, it is presumed that the failure to pay the rent is good cause for eviction. The burden thereupon shifts to the tenant to produce evidence to prove a lack of fault on his part in failing to make the rental payment.

We adopt with approval the writing of former Chief Judge Morris for the Court of Appeals:

> It has been recently established that a tenant in a federally subsidized low-income housing project enjoys substantial procedural due process rights under the Fifth and Fourteenth Amendments. . . . Under these decisions, a tenant in a federally subsidized housing project has an "entitlement" to continued occupancy, and to that extent cannot be evicted unless and until certain procedural protections have been afforded him, including notice, confrontation of witnesses, counsel, and a decision by an impartial decision maker based on evidence adduced at a hearing. . . . It has become apparent that by enacting the rules and regulations implementing the National Housing Act, 12 U.S.C. § 1701 *et seq.*, Congress contemplated "more occupancy entitlement than limited leasehold terms" . . . and at least some degree of permanency. . . . Thus, in their attempt to cure the evils

> of discriminatory and arbitrary eviction procedures prevalent in federally-subsidized housing, the courts have established a standard of "good cause" as a condition upon which tenancies in public housing may be terminated.

Apartments, Inc. v. Williams, 43 N.C. App. 648, 650-51, 260 S.E. 2d 146, 148-49 (1979), *disc. rev. denied*, 299 N.C. 328 (1980) (citations omitted).

The standard of "good cause" finds support in the policy of the federal government as expressed in the regulations relating to public housing. In the Code of Federal Regulations we find:

> (b) *Payments due under the lease.* (1) The lease shall state the amount fixed as rent, specifying the utilities and quantities thereof and the services and equipment furnished by the PHA without additional cost.
>
> . . . .
>
> (l) (1) That the PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease such as failure to make payments due under the lease or to fulfill the tenant obligations set forth in § 966.4(f) or for other good cause.

24 C.F.R. § 966.4(b)(1), (l)(1) (1984). The regulations do not provide for forfeiture of rights under the lease upon failure to pay rent or upon other violations of the terms of the lease by the tenant. Automatic termination of the lease upon breach of a condition of the lease by the tenant is not provided for in the regulations. Nor do the regulations provide for the reservation by the Authority of a right of reentry upon breach of a condition of the lease by the tenant. The lease in this case is in accord with the regulations.

Our holding also finds support in *Tyson v. New York City Housing Authority*, 369 F. Supp. 513, 518-19 (S.D.N.Y. 1974):

> Implicit within the concept of due process is that liability may be imposed on an individual only as a result of that person's own acts or omissions . . . .
>
> There must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct.

Carrie Hines v. New York City Housing Authority, 67 A.D. 2d 1000, 413 N.Y.S. 2d 733 (1979), involved the termination of a lease upon a finding of "nondesirability." The New York court held:

> It would be shocking to one's sense of fairness to terminate the tenancy of persons who have not committed nondesirable acts and have not controlled those who have committed such acts (*Baldwin v. New York City Housing Auth.*, 65 A.D. 2d 546 [2d Dept., 1978]).

67 A.D. 2d at 1001, 413 N.Y.S. 2d at 735.

[2] In applying these principles to the present case, we do not find good cause for the termination of the lease. The Authority proved the failure of Mrs. McLean to make the rental payments and the water and sewer payment, thus raising a presumption that good cause existed to terminate the lease. However, Mrs. McLean has by uncontroverted evidence rebutted the presumption by proving the lack of fault on her part in failing to make these payments. Initially, no rent was required of Mrs. McLean and her two children. The rent in question was based upon the income of David McLean when he moved into the apartment after marrying defendant. Mrs. McLean still had no income herself. When her husband refused to pay the rent in January, defendant had no income with which to do so. David McLean then lost his job, causing the rent to be decreased to $73 per month. Then defendant was in the anomalous position of being without income with an additional mouth to feed and having her rent increased from zero to $73 a month, all without any fault on her part.

The trial judge erroneously excluded evidence of the defendant that when she attempted to talk with McLean about their unpaid bills, he assaulted her. Defendant then filed criminal charges against him and secured a judgment requiring McLean to pay to her $40 a week for child support. McLean has failed to make any child support payments. The evidence was relevant to show that defendant received no income from her husband.

David McLean moved out of defendant's apartment on 24 March 1982. Before defendant married David McLean she had received AFDC payments as her only income. These were terminated when she married McLean and were not reinstated until June. After McLean left, defendant borrowed money to pay her

bills as best she could. She tried to get an extension of time for the payment of her water bill by showing to the water department staff a letter from the Department of Social Services about the resumption of her AFDC payments, but was unable to obtain an extension. The water was disconnected because of a $14 delinquency.

By this evidence the defendant has carried her burden to rebut the presumption established by the Authority, and it clearly shows that her failure to pay the rent and water bill was without fault on her part. Mrs. McLean has not committed any wrongful acts that resulted in the rent and water bill being unpaid. There is no causal nexus between the eviction of Mrs. McLean and her own conduct. The fault resulting in the failure to pay the rent and water fee rests upon David McLean, not the defendant. The necessary delay in reinstating the AFDC payments also affected defendant's ability to pay the water bill. To eject Mrs. McLean and her two children from their humble abode upon this evidence would indeed shock one's sense of fairness. Such result would contravene the express public policy of the state. N.C. Gen. Stat. § 157-2 (1982).

As stated in N.C.G.S. 157-2, the objectives sought by public housing authorities cannot be achieved by the ordinary operation of private enterprise. Therefore, it should be noted by the bench and bar that the principles set forth in this opinion apply only to leases between public housing authorities and their tenants.

The decision of the Court of Appeals is

Reversed.

Justice MEYER dissenting.

I must respectfully dissent from the majority opinion.

The two cases against Ms. McLean were consolidated for trial in the district court. In Case No. 82-CvD-632 (nonpayment of rent), judgment was entered in favor of the plaintiff awarding to the plaintiff a money judgment in the amount of $332.00 and ordering that the defendant be removed from the premises and that the plaintiff be put in possession. In Case No. 82-CvD-1482 (nonpayment of utilities), judgment was entered in favor of the

plaintiff ordering that the defendant be removed from the premises and that plaintiff be put in possession. The Court of Appeals affirmed both judgments of the district court.

Before this Court, it is not disputed that the rent due to the plaintiff under the lease was $171.00 per month for the months of December 1981 and January 1982, and the rent due for February 1983 and March 1983 was $73.00 per month. It is not disputed that the rent was not paid for the months of January, February or March 1983, and that the rent remained unpaid at the conclusion of the trial. Paragraph 12.1 of the lease specifically provides that "nonpayment of rent" is a material non-compliance with the lease and is grounds for termination of the lease.

The payment of utilities, like the payment of rent, is a requirement stated in the lease which must be complied with by the tenant if the right of occupancy is to continue. The wisdom of having such a provision as a requirement is clear. A dwelling without utilities such as water, sewer or electricity, certainly creates a situation where "unsafe and unsanitary dwelling accommodations" would exist—the very problems identified and sought to be corrected by the Housing Authority's law in North Carolina. *See* N.C.G.S. § 157-2. It is not disputed that the water and sewer services were cut off for nonpayment for a period from 28 May 1982 until 22 June 1982. There is no argument that the rent and the utilities were not paid. Neither is there an argument that nonpayment of the rent and utilities is not proper grounds for termination of the lease, nor that an action in summary ejectment was not a proper remedy for the plaintiff to pursue. These represent material violations of the lease and clearly they are grounds for termination of the lease and were the bases for these actions in summary ejectment. The only argument is that the defendant tenant should not have been required to pay the rent and utilities in arrears because it was not her *fault* that she could not pay them when due.

I have no difficulty with the "good cause" requirement as a condition upon which tenancies in public housing may be terminated, I simply believe that the record before us reflects good cause for termination. However, even if I felt that the good cause requirement had not been met in this case, I could not support the majority's unnecessary and unwise engrafting upon the "good

cause" principle a requirement that the Housing Authorities of this State must establish "fault" on behalf of the tenant before they can terminate the tenancy.

I believe the majority's holding with regard to a requirement of a showing of "fault" has resulted from its mistaken interpretation that the "good cause" requirement somehow incorporates the concept of "fault." Good cause to terminate and fault on behalf of the tenant are not synonymous and need not coexist. It is not difficult to envision the occurrence of situations in which a showing of fault should not be a prerequisite for ejectment. For example, the continued use of the leased premises in which the water and sewer utilities have been cut off for nonpayment may be expected to cause such unsanitary conditions so as to endanger the other tenants and thus furnish good cause for eviction, even though the tenant's failure to pay is not a result of "fault." Fortunately, here, the tenant had somewhere else to live temporarily and voluntarily vacated the premises during the period in which the utilities were discontinued. That of course will not always, nor even in the majority of these situations, be the case.

I am certain that the majority would be quick to respond that this is not at all what is intended by the holding in this case. Noting that the majority has made the same holding with regard to the failure of this tenant to pay her water and sewer utilities as it has to her failure to pay rent, I would simply point to the broad language of the majority's holding: "We hold that in order to evict a tenant occupying public housing for persons of low income for failure to pay *rent* (water and sewer utilities) as called for in the lease, there must be a finding of fault on the part of the tenant in failing to make the *rental* (utilities) payment." (Emphasis and matter within parentheses added.) The majority has made this same holding with regard to the failure of this tenant to pay her water and sewer utilities.

The majority, after reciting evidence tending to show that it was through no fault of Ms. McLean that she had no money to pay the utilities, has held that "Ms. McLean has not committed any wrongful acts" that resulted in nonpayment of the water and sewer bills and therefore there is "no causal nexus between the eviction of Ms. McLean and her own conduct." The prospect of the application of this reasoning to other factual situations is dis-

quieting. Would this same reasoning prevent a Housing Authority from evicting a tenant who may innocently be totally unable to control conduct of her family members which is totally unreasonable and results in continuing danger or annoyance to the other tenants? I am convinced that it is unwise to establish a requirement of a showing of fault on the part of a public housing tenant as a prerequisite to termination of a lease.

Again, even if I agreed with the result reached by the majority, I believe this case could have, and should have, been decided on the basis of the existing "good cause" principle rather than by establishing a new "fault" principle. I also find it curious that the majority has found it necessary to establish fault on the part of the absentee husband who was not a party to the lease.

In summary, I would point out that if inability to oust tenants for nonpayment of rent or utilities or for other reasons because fault cannot be shown becomes a chronic problem in public housing it will create hardship for the Housing Authorities which may not receive adequate funds in a timely manner to retire the debt issued to construct the housing units. It will likewise create hardship for those prospective tenants on the waiting lists for public housing who can and will comply with the terms of the standard Housing Authority lease. Housing which prospective tenants might receive will be tied up by tenants who do not comply with conditions of the lease through no fault of their own.

For all of the foregoing reasons I would vote to affirm the decision of the Court of Appeals.

Chief Justice BRANCH joins in this dissenting opinion.

Pollock v. Reeves Bros., Inc.

WARREN N. POLLOCK, EMPLOYEE, AND BARBARA S. BECKWITH, WIDOW, BARBARA S. BECKWITH, GUARDIAN AD LITEM FOR MARNIE BECKWITH AND KATIE BECKWITH, MINOR CHILDREN OF PETER O. BECKWITH, DECEASED, EMPLOYEE, PLAINTIFFS v. REEVES BROTHERS, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 534A84

(Filed 2 April 1985)

1. **Master and Servant § 55.4— workers' compensation—crash of airplane owned by superior—injuries arising out of and in course of employment**

A conclusion by the Industrial Commission that an employee suffered injuries by accident arising out of and in the course of his employment when he was killed in an airplane crash while returning from Georgia after having flown a Cessna there to pick up his superior who had flown a Piper Aztec there to have new FAA numbers painted on it was supported by evidence and findings to the effect that the superior owned the two airplanes and used them primarily in the course of the employer's business; the employer paid the superior $2,500 annually for the use of the Cessna and paid for all gasoline the plane used during business trips; the employer paid for the fuel used in the two planes on the day of the crash; the superior acquired the twin-engine Aztec plane so that he could more safely travel the long distances among several of the employer's operating facilities; the numbers to be painted on the Aztec had been assigned to the plane by the FAA and were required by law to be displayed on the aircraft soon after assignment; the superior directed the employee to make the trip with him; the trip was scheduled and made during regular office hours; and the employer paid the employee's salary in full for the day of the trip.

2. **Master and Servant §§ 56, 60— workers' compensation—performing duty at direction of superior—special errand rule**

Where the evidence showed that an employee's superior directed the employee to fly an airplane to Georgia to pick up the superior who flew a second airplane there to have FAA numbers painted on it, the employee was entitled to recover workers' compensation for injuries suffered in a plane crash during the return trip under the principle that when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable. The employee's acquiescence in his superior's directive to fly with him to Georgia also falls under the "special errand" rule which entitles an employee to compensation if he is injured while engaged in a special duty or errand for his employer.

3. **Master and Servant § 60.1— workers' compensation—dual purpose rule**

Assuming that an employee had personal business to conduct in Georgia when he flew an airplane to Georgia to pick up a superior who had flown a second airplane there to have FAA numbers painted on it, an award of workers' compensation benefits for injuries suffered by the employee in a plane crash on the return trip would be justified under the dual purpose rule.

4. Master and Servant §§ 49.1, 61— workers' compensation—services for independent contractor—acting at direction of superior

An executive of defendant employer who owned two airplanes involved in a trip to Georgia to have FAA numbers painted on one of the planes was acting as an employee and not an independent contractor during the trip where the numbers were to be painted on a plane used primarily for business purposes; the trip was scheduled and made during regular office hours; the employer paid for the fuel used on the trip; and the employer paid the executive's salary in full for the day of the trip. Even if the executive was an independent contractor during the trip, an employee who flew one of the planes to Georgia to pick up the executive was entitled to recover workers' compensation for injuries suffered in a plane crash on the return trip where the evidence established that the employee agreed to accompany the executive because of the executive's apparent authority to direct the employee to accompany him on a trip relating to flight readiness of a plane which the employee assumed would be used for the employer's purposes.

APPEAL of right from the decision of a divided panel of the Court of Appeals, reported at 70 N.C. App. 199, 319 S.E. 2d 286 (1984), reversing the opinion and award of the Industrial Commission filed 13 April 1983. Heard in the Supreme Court 4 February 1985.

Caudle & Spears, by Lloyd C. Caudle and Richard S. Guy, for plaintiff appellant Barbara S. Beckwith.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick and Martha W. Surles, for defendant appellees.

MARTIN, Justice.

The issue dispositive of this action for workers' compensation benefits is whether Peter O. Beckwith (Beckwith) suffered injuries by accident arising out of and in the course of his employment with defendant Reeves Brothers, Inc. (Reeves). We find that the accident did arise out of and in the course of Beckwith's employment, and therefore we reverse the decision of the Court of Appeals.

Warren N. Pollock (Pollock) was injured and Peter O. Beckwith was killed when a plane owned and piloted by Pollock crashed en route from Commerce, Georgia to Charlotte, North Carolina. The two men had flown to Commerce in separate private airplanes so that they could return to North Carolina in one plane while Federal Aviation Administration (FAA) registration numbers were painted on the other plane.

A deputy commissioner of the Industrial Commission made the following findings of fact which were subsequently adopted by the full Commission:

1. Warren N. Pollock (Pollock) was on 9 March 1982 and is still first vice president of defendant employer and president of defendant employer's Curon Division which is the North Carolina Division of the company. The deceased employee, Peter O. Beckwith (Beckwith), was manager of defendant employer's foam operation and vice president of the company. He worked directly under Pollock. Defendant employer manufactured various items including polyurethane foam. Defendant employer's North Carolina operations were located in Cornelius and the company had operations in various parts of the United States and in Canada.

2. Pollock owned and had owned since 1978 a Cessna 210 which was a single-engine aircraft. Pollock was a pilot and would pilot the plane for pleasure and for business purposes when necessary. Defendant employer paid Pollock $2,500.00 per year plus all gasoline for the use of the 210. Pollock maintained and hangared such aircraft at his own expense.

3. Sometime prior to March 1982 Pollock purchased a Piper Aztec which is a twin-engine aircraft. Pollock put the aircraft in the name of a partnership consisting of he and his wife. Pollock intended to sell his 210 aircraft and use the Aztec for company business purposes as well as for pleasure. The Aztec had a greater flight range and could be used for flights to Canada and other more distant places. The Aztec was maintained and hangared at Pollock's expense or at the expense of the partnership consisting of he and his wife.

4. Approximately two weeks prior to 9 March 1982 the Federal Aviation Authority assigned new numbers to Pollock's Aztec. Pollock desired to have the new numbers painted on the aircraft and decided to fly it to Commerce, Georgia, to have the work done on the plane.

5. Beckwith was also an airplane pilot and his pilot's lessons had been paid for by defendant employer when Beckwith was working for such defendant in Canada prior to 1981. Beckwith would from time to time make business associated

flights in Pollock's aircraft and on occasions he would accompany Pollock on business trips by airplane. Beckwith on occasions also leased an aircraft for pleasure trips.

6. Pollock and Beckwith had a busy business schedule during the week of 9 March 1982. However, Pollock decided to work in between his business schedule a trip to get the numbers painted on his Aztec in Commerce, Georgia, or to at least leave the plane in Commerce to have the painting done. He decided to work in a trip to carry the Aztec to Commerce around his company work schedule on the morning of 9 March 1982. Being aware that Beckwith was a pilot, Pollock asked Beckwith to fly the 210 aircraft to Commerce while Pollock piloted the Aztec to Commerce. After arriving at such destination Pollock would leave the Aztec and return with Beckwith in the 210 to North Carolina where they would be able to continue with their business during the day and the ensuing week. Therefore on 8 March 1982 Pollock asked Beckwith to accompany him on such trip to Commerce, Georgia, on the morning of 9 March 1982. Beckwith stated that he preferred to take a practice flight in the 210 on 8 March 1982 before undertaking the flight to Georgia on the next day. Therefore, on the afternoon of 8 March 1982 Beckwith and Pollock did take a practice flight in the 210.

7. On the morning of 9 March 1982 Beckwith and Pollock left North Carolina and flew to Commerce, Georgia, with Pollock flying his Aztec and Beckwith flying the 210. After arriving at Commerce they left the Aztec to have the new letters painted on such plane. They then checked the 210 and left for the return flight to North Carolina. Upon obtaining an altitude of approximately 2,500 feet the engine quit. Pollock attempted to turn the plane around and go back to Commerce but was unable to do so. He then attempted to make an emergency landing in a field but hit trees going into the field and the plane crashed. Pollock and Beckwith had left North Carolina at approximately 8:00 a.m. and the return flight commenced at approximately 10:00 a.m. with the expectation of being back in their office between 11:00 a.m. and 12:00 noon.

After the full Commission reviewed the deputy commissioner's order, it made the following additional findings of fact:

8. The gasoline for the flight from North Carolina to Georgia was purchased by Pollock by use of the employer's credit card. Such flight was for the purpose of taking Pollock's Aztec to Georgia in order to have the new numbers painted on the plane. Neither Pollock nor Beckwith had any personal business to transact in Georgia, and the sole purpose of the trip was a maintenance tank [task] connected with operation of the Aztec. Pollock paid for the maintenance of both aircraft from his own funds, including the funds received from the employer for use of his planes as set out in Finding of Fact 2.

9. At the time complained of, Pollock and Beckwith were engaged in the discharge of a function which was calculated [to] further indirectly the employer's business. The accidents sustained by them arose out of and in the course of their employment.

10. Barbara S. Beckwith married Peter O. Beckwith on August 5, 1961 and, at the time complained of, was living with and dependent upon him for support. The two minors named in the caption were minor children of the deceased on the date of his death and the widow and said minors are entitled to all benefits due by reason of his death.

Based upon the foregoing findings the full Commission concluded as a matter of law that:

1. On the occasion complained of, the employees sustained an injury by accident arising out of and in the course of their employment. G.S. 97-2(6); *Clark v. Burton Lines*, 272 N.C. 433; see also *Marks' Dependents v. Gray*, 167 N.E. 181.

2. Barbara S. Beckwith and her two minor children were the sole whole dependents of Beckwith and are entitled to all compensation due by reason of his death. G.S. 97-38.

The Commission thereupon awarded workers' compensation benefits to both plaintiffs. Defendants appealed to the Court of Appeals where a divided panel reversed the full Commission's opinion and award. Plaintiff Beckwith appeals the decision of the Court of Appeals pursuant to N.C.G.S. 7A-30(2).[1]

1. Pollock has voluntarily dismissed his appeal to this Court.

As this Court stated in *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E. 2d 807, 809-10 (1982), it is a well settled rule that

> "[w]hether 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." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). An appellate court is, therefore, justified in upholding a compensation award if the accident is "fairly traceable to the employment as a contributing cause" or if "any reasonable relationship to employment exists." *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E. 2d 702, 704 (1963). In other words, compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer "to any appreciable extent" when the accident occurred. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955). Such a determination depends largely upon the unique facts of each particular case, and, in close cases, the benefit of the doubt concerning this issue should be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act. *See Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930). With these principles in mind, we proceed to examine the individual merits of the case presently before us.

[1] Defendants except only to finding of fact 9, a portion of finding of fact 8, and conclusion of law 1. Therefore we are bound by all other findings of fact and need determine only if those findings to which exception was taken are supported by competent evidence of record and, if so, whether the Commission's findings of fact support its conclusions of law. Based on our review of the record and the able arguments of counsel, we have concluded that the findings of fact made by the Industrial Commission to which defendants except are supported by competent evidence and that its conclusions of law are supported by its findings of fact. We therefore reverse the Court of Appeals and remand the case to that court for further remand to the Industrial Commission for reinstatement of the opinion and award of the full Commission.

Evidence supporting the Commission's finding of fact 9 that "[a]t the time [of the crash] Pollock and Beckwith were engaged in the discharge of a function which was calculated [to] further indirectly the employer's business [and therefore] [t]he accidents sustained by them arose out of and in the course of their employment" includes the following: Pollock testified that although he owned the planes that he and Beckwith flew on the day of the accident, they were used primarily by Pollock and other Reeves employees in the course of business for Reeves. Reeves paid Pollock $2,500 annually for the use of the Cessna and also paid for all gasoline the plane used during business trips. Reeves paid for the fuel used in the two planes on the day of the crash. Pollock acquired the twin-engine Aztec plane on 3 November 1981 so that he could more safely travel the long distances among several of Reeves' operating facilities. The numbers that Pollock had painted on the Aztec had been assigned to the plane by the FAA approximately two weeks before the crash and were required by law to be displayed on the aircraft soon after assignment. Pollock wanted to have these numbers painted on the plane as soon as possible so that the plane would be fully available to Reeves for business trips. Pollock scheduled the flights to Georgia during the morning of Tuesday, 9 March 1982, at about 8:00 a.m., the usual hour for the beginning of his and Beckwith's workday for Reeves. The trip was intended to be a short one so that both men would be able to return to the Reeves operations in North Carolina later that morning to prepare for a business meeting. There is no evidence that Pollock or Beckwith carried out any business in Commerce aside from arranging for the numbers to be painted on the plane.[2] Both men were paid by Reeves for a full day's work for the day of the plane crash.

Finding of fact 6 reads in part: "After arriving at such destination Pollock would leave the Aztec and return with Beckwith in the 210 to North Carolina where they would be able to continue with their business during the day and the ensuing

2. Defendants except to only that part of finding of fact 8 which states: "[n]either Pollock nor Beckwith had any personal business to transact in Georgia." Because we have determined that there is competent evidence supporting the Commission's finding of fact 9 and there is no evidence that the two men conducted any personal business in Commerce, we have determined that finding of fact 8 is also supported by the record.

week." Defendants did not except to this finding of fact, therefore it is deemed to be supported by competent evidence and it is binding upon appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962). This finding of fact is sufficient to support the conclusion that the purpose of the trip was related to the business of Reeves and that Pollock and Beckwith were acting in the course of their employment at the time of the accident. The accident was "fairly traceable to the employment as a contributing cause" and the trip had some reasonable relationship to Beckwith's employment with Reeves; thus Beckwith was acting for the benefit of Reeves to an appreciable extent. *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E. 2d 807, 810. We hold that the Commission's findings of fact support its conclusion of law that "[o]n the occasion complained of, [Beckwith] suffered an injury by accident arising out of and in the course of his employment."

[2] We further note that Pollock testified that he directed Beckwith to make the trip with him. Pollock was Beckwith's immediate superior at Reeves, and there is no evidence that Beckwith agreed to make the trip as a personal favor rather than as part of his duties as an employee of Reeves. When asked why Mr. Beckwith was going with him to Commerce, Pollock replied, "Well first Mr. Beckwith was a pilot and he could fly the 210. He was the only one really qualified in the 210 in the Reeves operation." Pollock also testified that the purpose in having Beckwith fly the Cessna to Georgia was "[s]o that I could have a way to get back from Commerce, Georgia." Beckwith is thus entitled to recover under the workers' compensation principle that when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable. 1A A. Larson, *The Law of Workmen's Compensation* § 27.40 (1982); *Stewart v. Dept. of Corrections*, 29 N.C. App. 735, 225 S.E. 2d 336 (1976). *See also Biggs v. United States Fire Insurance Company*, 611 S.W. 2d 624 (Tex. 1981). Beckwith's acquiescence to Pollock's directive to fly with him to Georgia also falls under the "special errand" rule, which provides that an employee is entitled to benefits if he is injured while engaged in a special duty or errand for his employer. *See Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 30-32, 290 S.E. 2d 720, 723-25 (Martin, J., dissenting), *rev'd*, 306 N.C. 728, 295 S.E. 2d 473 (1982); *Felton v. Hospital Guild*, 57 N.C. App. 33, 291

S.E. 2d 158, *aff'd*, 307 N.C. 121, 296 S.E. 2d 297 (1982); *Stover v. Midwest Tank*, 87 Mich. App. 452, 275 N.W. 2d 15 (1978).

[3] The facts at bar also allow Beckwith to recover under the so-called dual purpose rule. In *Humphrey v. Laundry*, 251 N.C. 47, 51, 110 S.E. 2d 467, 470 (1959), this Court quoted Chief Justice Cardozo's statement of the rule as enunciated in *Matter of Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929):

> "The test in brief is this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk."

In the present case the nature of Pollock's position with Reeves required that current FAA numbers be displayed on the planes he used for business travel on behalf of Reeves; thus his "work . . . create[d] the necessity for travel [to Georgia]" and was therefore "in the course of his employment." The nature of Beckwith's position, as subordinate to Pollock, made him agree to accompany Pollock on this business trip. There is no evidence that Beckwith had any personal business to conduct in Commerce, but even assuming arguendo that he did, his award of workers' compensation benefits would also be justified under the dual purpose rule. *Felton v. Hospital Guild*, 57 N.C. App. 33, 291 S.E. 2d 158, *aff'd*, 307 N.C. 121, 296 S.E. 2d 297.

[4] We do not agree with defendants' argument that because Pollock owned the airplanes involved here he was an independent contractor whose trip to have numbers painted on the plane was merely one of his personal responsibilities as owner of the plane. *See Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807; *Church v. G.G. Parsons Trucking Co.*, 62 N.C. App. 121, 302 S.E. 2d 295, *disc. rev. denied*, 309 N.C. 191 (1983); *Thompson v. Transport Co.*, 32 N.C. App. 693, 236 S.E. 2d 312 (1977); *Duetsch v. E.L. Murphy Trucking Co.*, 307 Minn. 271, 239 N.W. 2d 462 (1976); *Texas General Indemnity Company v. Bottom*, 365 S.W. 2d 350 (Tex. 1963). In *Hoffman v. Truck Lines*, we remarked that one

who owns a vehicle leased to his employer is an independent contractor as owner-lessor, but when operating the vehicle in service of his employer, he is an employee. "[The] actual circumstances surrounding the task undertaken by plaintiff determined whether he was working for himself or the [employer] at any given time and thus whether he was, in fact, covered under the [Workers' Compensation] Act." 306 N.C. at 506-07, 293 S.E. 2d at 810. In the present case, given that the trip was scheduled and made during regular office hours, that Reeves paid for the fuel used on the trip, that Reeves paid Pollock's salary in full for the day of the trip, that as an executive Pollock's use of his time as an employee of Reeves was discretionary, and that the trip was for the limited and unusual task of having new numbers painted on a plane used primarily for business purposes, we hold that Pollock was acting as an employee of Reeves during the trip in which the crash occurred.

Even if we were to assume that Pollock was wearing his independent contractor hat during the trip, this would not disqualify Beckwith's widow and children from entitlement to workers' compensation benefits. As stated above, there is no evidence supporting a contention that Beckwith accompanied Pollock in any capacity other than as a subordinate employee acquiescing in a directive of his superior. Pollock chose Beckwith to accompany him because Beckwith was the only Reeves employee who could pilot the Cessna. Reeves paid both Pollock's and Beckwith's salaries for the day of the accident. Mrs. Beckwith testified that the evening before the trip to Georgia Mr. Beckwith told her "that he was going on a business trip with Mr. Pollock" the next morning. Mr. Pollock testified that the trip from Georgia to North Carolina was made so that he could return to the Reeves plant to prepare for a business meeting. Mr. Beckwith never piloted the Cessna 210 for pleasure trips. There is certainly competent evidence to establish that Mr. Beckwith agreed to accompany Pollock because of Pollock's apparent authority to direct Beckwith to accompany him on a trip relating to the flight readiness of a plane which Beckwith assumed would be used for corporate purposes. We agree with the Court of Appeals dissent that "[i]n these circumstances Beckwith should not be compelled to determine, at his peril, whether the requested activity would place him beyond the ambit of the Workers' Compensation Act."

Compare Burnett v. Paint Co., 216 N.C. 204, 4 S.E. 2d 507 (1939) (no evidence that employee's mowing of lawn at supervisor's private residence was for benefit of employer company); *Hales v. Construction Co.*, 5 N.C. App. 564, 169 S.E. 2d 24 (1969) (supervisor had no apparent authority to order employee to go work on supervisor's private dwelling).

The Court of Appeals erred in reversing and remanding the opinion and award of the Industrial Commission. The decision of the Court of Appeals is reversed and this case is remanded to the Court of Appeals for further remand to the Industrial Commission for reinstatement of the award of workers' compensation benefits to Barbara S. Beckwith as widow of Peter O. Beckwith and as guardian ad litem of Peter Beckwith's two children.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES ELLIOTT PRICE

No. 174A84

(Filed 2 April 1985)

1. Witnesses § 1.2— ten-year-old rape victim—competent to testify

The trial court did not abuse its discretion by permitting a ten-year-old kidnapping and rape victim to testify where the court conducted a *voir dire* during which the witness was thoroughly questioned by both the prosecutor and the defense attorney and after which the court found that the court had observed the demeanor of the witness, that the witness attended religious services on a regular basis and believed that it would be a sin if she did not tell the truth, knew the difference between truth and falsehood, intended to tell the truth, and understood her oath.

2. Rape and Allied Offenses § 10— testimony not linked to issues in case—properly excluded

In a prosecution for the kidnapping and rape of a ten-year-old third grader in which defendant claimed that the victim could give detailed descriptions of his house and car only because she was coached by her mother and great-aunt, the trial court properly excluded testimony that two women had been seen sitting in a car outside defendant's house, walking around the side of defendant's house, looking through a bedroom window, and asking, "Is this where Tootie Price lives?" Defendant did not establish when the women were sitting in the car, there was no evidence of either woman's identity, and no evidence in the record that the victim was coached; the testimony had no logical tendency to prove any fact in issue.

3. Criminal Law § 102.6— prosecutor's argument on role of judge, prosecutor, and defense attorney—no error

The trial court did not err by overruling defendant's objection to the portion of the prosecutor's argument in which he explained the role of the judge, prosecutor, and defense attorney. The prosecutor's remarks did not amount to the expression of a personal opinion as to the veracity of defendant or his witnesses, of defendant's guilt, or of anything else that could be remotely prejudicial to defendant.

4. Constitutional Law § 34— first-degree kidnapping and rape—no double jeopardy

Where defendant was indicted for first-degree kidnapping and first-degree rape, he was not put in jeopardy twice for the same offense where there was testimony of a sexual assault in addition to the rape. G.S. 14-39.

APPEAL by defendant from judgments entered by *Watts, J.*, at the 9 January 1984 session of Superior Court, PASQUOTANK County. Defendant was convicted of rape in the first degree and kidnapping in the first degree. He appeals his conviction and sentence for rape pursuant to N.C.G.S. 7A-27(a). Defendant's motion to bypass the Court of Appeals with respect to his appeal of the conviction and sentence for kidnapping was allowed on 16 August 1984. Heard in the Supreme Court 4 February 1985.

Evidence for the state tended to show that on Thursday, 25 August 1983, defendant abducted the victim,[1] a ten-year-old third-grader, as she crossed a ball field in Elizabeth City. Defendant put her into a car, drove her to a house, took her inside, and raped her. Defendant then performed cunnilingus on the victim, allowed her to go to the bathroom, and then raped her again. He permitted the victim to put her clothes on and then drove her back to the ball field where she was released.

Defendant did not testify but presented witnesses who testified as to alibi.

Lacy H. Thornburg, Attorney General, by George W. Lennon, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Malcolm R. Hunter, Jr., First Assistant Appellate Defender, for defendant.

1. We see no need to expose the victim to further embarrassment and pain by revealing her name here.

MARTIN, Justice.

[1] Defendant's first assignment of error is that the trial court erroneously ruled that the victim was competent to testify. There is no fixed age limit below which a witness is incompetent to testify; rather, the question in each case is whether the witness understands the obligations of the oath and has the capacity to understand and relate facts which will assist the jury in reaching its decision. *E.g., State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). The determination of the competency of a child to testify is a matter resting within the sound discretion of the trial court and its decision is not reversible except for clear abuse of discretion. *Id.*; *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972).

In the present case the trial court conducted a voir dire of the victim during which she was thoroughly questioned by both the prosecutor and defense attorney. At the close of the voir dire the court entered the following order:

> This matter came on before the undersigned Judge Presiding over this session of Pasquotank County Superior Court upon the oral motion made by defendant's counsel requesting the Court to conduct a Voir Dire Hearing in the absence of the jury for the purpose of determining the competency of prosecuting witness . . . , and the Court, having conducted such inquiry, makes the following findings of fact:
>
> (1) That the defendant was present and represented by counsel at the time of Voir Dire Hearing in the absence of the trial jury; that the Court had opportunity to see and observe the witness . . . as she testified, and the Court had further opportunity to observe her demeanor upon the witness stand and in the courtroom.
>
> (2) That [the victim] is age ten and is in the third grade in school; that she attends religious services on a regular basis at Saint James Church and sings in the church choir; that she believes in God and believes that God would be mad and it would be a sin against God if she did not tell the truth; that she believes that a failure to tell the truth is a lie and that is bad and that it is wrong to tell a lie; that the witness believes that to tell the truth

means to tell what really happened; that the witness knows the difference between "make-believe" and the truth and knows that "make-believe" is a lie.

(3) That this witness knows the difference between truth and falsehood and intends to tell the truth insofar as she is able in the course of her testimony in this trial, and that she understands the obligation of her oath before God sworn to upon the Bible in the courtroom; that the witness has sufficient intelligence to give evidence which may be of some assistance to the jury in reaching a verdict in this cause.

From the foregoing findings of fact, the Court, in its discretion, determines that this witness is competent to testify in this cause upon the present Pre-Trial Voir Dire Proceeding and also upon the trial of this cause before the jury.

Upon review of the transcript of the voir dire hearing, we hold that the trial court did not abuse its discretion in ruling the witness competent to testify. Defendant's assignment of error is without merit.

[2] Defendant next assigns as error the trial court's exclusion of certain testimony of one of defendant's witnesses. Several of defendant's witnesses presented evidence that defendant was at home with his child and with one Nellie White and her children at the time the offenses occurred. According to defendant, the victim in this case had never been in his house or automobile. Defendant contended that the reason the victim was able to give such detailed and accurate descriptions of the interiors of his automobile and house was because the victim's mother and great-aunt had observed defendant's vehicle and house and thereafter coached the victim as to the description of each. In support of this theory defendant sought to establish at trial that the victim's mother and great-aunt had been near defendant's house on the day of the crimes. Defendant's witness Nellie White testified that sometime during the afternoon of 25 August 1983 she saw a woman sitting in a car in front of defendant's house. During the same afternoon, Ms. White testified, she also saw another woman whom she did not know walk around to the side of defendant's house and apparently look through a bedroom window. Crystal

Moore, a neighbor of defendant's, also testified that at some point during the day of 25 August 1983 she observed a "black lady parked in front . . . of the duplex apartment there where [defendant's] house is—parked in front and sitting there in the car." Defense counsel then asked Ms. Moore:

> Q. And what, if anything, did this person do?
>
> A. She called me over to her and she said "Is this where Tootie Price lives?"

The state thereupon objected and the trial court sustained the objection and motion to strike. Defendant now argues that the trial court erroneously excluded this testimony on grounds that it was hearsay. Defendant contends that the testimony was not hearsay as it was offered only to prove that the woman in the car had made a statement to the witness. *See State v. Craven*, 312 N.C. 580, 324 S.E. 2d 599 (1985) (hearsay). Therefore, the testimony should have been permitted.

When a general, as opposed to specific, objection is sustained, no error is committed if any purpose exists for which the evidence would be inadmissible. *See Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951). In the instant case, regardless of whether the judge excluded the proffered testimony on hearsay grounds, we hold that his rulings were not erroneous, as the testimony had no logical tendency to prove any fact in issue. *See* 1 Brandis on North Carolina Evidence § 77 (1982). Defendant established only that Ms. Moore saw a woman in an automobile at some unspecified time during the day of the crimes. The record is silent as to whether this was before or after the crimes were committed. Further, defendant failed to produce any evidence of the woman's identity. For all the trial court knew, this woman may have been an out-of-town relative coming to visit "Tootie Price." Moreover, there is no evidence in the record that the woman or anyone else coached the prosecuting witness with respect to descriptions of defendant's automobile and dwelling. There is simply nothing linking the woman's presence in front of the defendant's house to the issues involved in defendant's trial, and the trial court properly sustained the state's objection because the testimony was not relevant. *Cf.* N.C. Gen. Stat. § 8C-1, Rule 402 (Supp. 1983); *State v. Adkins*, 304 N.C. 582, 284 S.E. 2d 296 (1981).

[3] Defendant's third assignment of error is that the prosecutor's closing arguments exceeded the bounds of propriety. Generally, a prosecutor is prohibited from expressing a personal opinion as to the veracity of a witness. *E.g., State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967). During closing argument the state explained to the jury the role of the judge, prosecutor, and defense attorney:

> Now, as I said earlier, Judge Watts will tell you about the law. That's his job. He's kind of like a referee and when he tells you what the law is of this case, that is the law, and what he says is the law of this case. He'll also summarize the facts. He'll tell you to remember the evidence as you recall it, but he'll summarize just so much as to help him make you understand and explain what the law is. As I said, the State's duty—the Prosecutor's job is to prove the case by the available evidence that we have—the available and competent and admissible evidence that we have. It's our responsibility to give—bring it into court and present it to you and prove that the guilty people are guilty. That's our job. The defense attorney has the responsibility of defending his client. It's his solemn duty to defend this man whether he's guilty or not, and his responsibility—

At this point defendant interposed an objection which was overruled by the trial court. Defendant now argues that the prosecutor's statements amounted to an expression of his opinion that the state charges only guilty people with crimes and that the jury should affirm the prosecutor's predetermination of the defendant's guilt by finding that "the guilty people are guilty." *See generally* Annot., 88 A.L.R. 3d 449 (1978). We disagree. The prosecutor's remarks do not amount to the expression of a personal opinion as to the veracity of defendant or his witnesses, of defendant's guilt, or of anything else that could be remotely prejudicial to defendant. Nor did they undermine the fundamental fairness of the trial and constitute a miscarriage of justice. *Compare United States v. Young*, 53 U.S.L.W. 4159 (U.S. Feb. 20, 1985). The trial court properly overruled defendant's objection.

[4] Finally, defendant argues that the principles of double jeopardy preclude his conviction of both rape in the first degree and kidnapping in the first degree because proof of the rape was

an essential element of proof of the kidnapping. As the United States Supreme Court stated recently: "[U]nder *In re Nielsen*, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889), a person who has been convicted of a crime having several elements included in it may not subsequently be tried for a lesser-included offense—an offense consisting solely of one or more of the elements of the crime for which he has already been convicted." *Illinois v. Vitale*, 447 U.S. 410, 421, 65 L.Ed. 2d 228, 238 (1980). *Cf., e.g., State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977) (merger under felony-murder rule). N.C.G.S. 14-39 provides in relevant part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restraining or removed or any other person.
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

In *State v. Jerrett* we held that "the language of G.S. 14-39(b) states essential elements of the offense of first-degree kidnap-

ping." 309 N.C. 239, 261, 307 S.E. 2d 339, 351 (1983). The kidnapping indictment in the present case sufficiently alleges that defendant committed kidnapping in the first degree. In relevant part it states:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did confine, restrain, and remove from one place to another [the victim], a person under the age of 16 years, without the consent of her parent and legal guardian, for the purpose of facilitating the commission of a felony, the crime of rape, and for the purpose of doing serious bodily harm to [the victim], and to terrorize [the victim], and [the victim] was seriously injured and sexually assaulted by the defendant during the course of the kidnapping, against the form of the statute in such case made and provided and against the peace and dignity of the State.

At the close of all of the evidence the trial court instructed the jury as follows with respect to kidnapping:

> I charge that for you to find James Elliott Price guilty of first degree kidnapping, the State of North Carolina must prove five things to you beyond a reasonable doubt, as I have defined that term to you. First, the State must prove that the defendant unlawfully either confined [the victim]—that is, imprisoned [the victim] at any given area such as the house at 204 Pritchard Street here in Elizabeth City or that the defendant unlawfully restrained [the victim]. That is, restricted her freedom of movement by force, or that the defendant unlawfully removed [the victim] from one place to another. Secondly, that [the victim] had not reached her 16th birthday and that her mother did not consent to this confinement or restraint or removal. Thirdly, that the defendant confined or restrained or removed [the victim] for the purpose of facilitating his commission of the felony of rape. Fourthly, that this confinement or restraint or removal was a separate complete act independent of and apart from any rape subsequently or any rape which might have occurred subsequently. And, fifthly, that [the victim] has been sexually assaulted.

Defendant argues that his conviction of rape necessarily constituted the proof of the fifth element: that defendant sexually assaulted the victim. Therefore, because he was convicted of rape, he is being twice put in jeopardy for the same offense by virtue of his conviction of kidnapping in the first degree.

We disagree with defendant. As we stated in *State v. Williams*, 295 N.C. 655, 661, 249 S.E. 2d 709, 714 (1978), a case decided under the predecessor statute to the current N.C.G.S. 14-39, "a 'sexual assault' need not necessarily be a rape." Such is the case here. After testifying, in effect, that the defendant raped her, the victim was then asked:

> Q. What did you do then? What happened?
>
> A. I started crying, and then he took his mouth and used it.
>
> THE COURT: I'm sorry. I couldn't hear you . . .
>
> A. He used his mouth.
>
> THE COURT: All right. Go ahead, Mr. Johnson.
>
> Q. And what did he do when he used his mouth? Can you tell us about that?
>
> A. Yes. He put his mouth on my vagina.

Testimony of this sexual assault was sufficient evidence of the fifth element of kidnapping in the first degree, as charged, to take the kidnapping case to the jury. Proof of the rape was not required to satisfy this element of the crime.[2] Therefore, no principle of double jeopardy was violated by the entry of judgments that defendant committed both rape in the first degree and kidnapping in the first degree.

Because of the foregoing analysis disposing of the appeal, we do not find it necessary to further address the double jeopardy issue urged by the defendant.

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2. Defendant does not contend that a double jeopardy problem arises because of the third element, namely, "that the defendant confined or restrained or removed [the victim] for the purpose of facilitating the commission of the felony of rape." In order for this element to have been established it was necessary only to prove a *purpose* of rape, not the commission of rape itself. *State v. Williams*, 295 N.C. 655, 660, 249 S.E. 2d 709, 714 (1978).

Defendant received a fair trial, free of prejudicial error.

No error.

WHITE OAK PROPERTIES, INC., A NORTH CAROLINA CORPORATION v. TOWN OF CARRBORO, A MUNICIPAL CORPORATION, ROBERT W. DRAKEFORD, MAYOR, STEVE ROSE, AN ALDERMAN, JIM WHITE, AN ALDERMAN, JOHN BOONE, AN ALDERMAN, HILLIARD CALDWELL, AN ALDERMAN, ERNIE PATTERSON, AN ALDERMAN, AND JOYCE GARRETT, AN ALDERMAN

No. 692A84

(Filed 2 April 1985)

1. **Municipal Corporations § 31— denial of conditional use permit—board of aldermen—review by certiorari—reasonable time for petition**

G.S. 160A-381, not G.S. 160A-388(e), grants applicants for a conditional use permit the right to petition the superior court for a writ of certiorari to review an adverse decision of a board of aldermen. Since the statute sets forth no time limitation for filing such a petition, the superior court must determine, in its discretion, whether a petition has been filed within a reasonable time of the decision of the board of aldermen, and the Court of Appeals erred in concluding as a matter of law that the superior court was without jurisdiction to review the decision of a board of aldermen by petition filed more than thirty days from notice of the board's decision.

2. **Municipal Corporations § 31— board of aldermen—review of denial of conditional use permit—reasonable time for petition**

The superior court did not err in concluding that, under the circumstances of this case, a petition for certiorari to review a board of aldermen's denial of a conditional use permit filed forty-seven days after the board mailed notice of denial was filed within a reasonable time.

ON appeal from the decision by a divided panel of the Court of Appeals reported at 71 N.C. App. 360, 322 S.E. 2d 400 (1984), vacating judgment signed by *McLelland, J.*, 20 January 1984 in Superior Court, ORANGE County, and remanding the cause with instructions to enter judgment dismissing petitioner's appeal. Heard in the Supreme Court 11 March 1985.

Jordan, Brown, Price & Wall, by Charles Gordon Brown and M. LeAnn Nease, for petitioner appellant.

Michael B. Brough for respondent appellees.

MARTIN, Justice.

The sole issue before us is whether the Court of Appeals erred by holding as a matter of law that White Oak Properties, Inc. ("White Oak") had only thirty days within which to file its petition for certiorari. We hold that the Court of Appeals did so err, and reverse.

White Oak applied to the Carrboro Board of Aldermen ("Board") for a conditional use permit to build nineteen townhouse units on a 3.31 acre tract of land. After a series of public hearings the Board denied the application and mailed notice of the denial to White Oak on 25 August 1983. The record is silent as to when this notice was received. On 13 September 1983, however, White Oak consulted an attorney, Charles Gordon Brown, regarding the filing of a petition for certiorari in superior court to review the Board's decision. Brown prepared such a petition, as well as other documents, and scheduled a meeting with the attorney for the Board for 19 September 1983. The attorneys for both parties met on 19 September 1983, reviewed the petition, and agreed on major portions of the proposed record for review and on a proposed briefing schedule. Mr. Brown left a copy of the petition for certiorari with the attorney for the Board.

Apparently the attorneys for both parties anticipated that the cause would be heard during the 24 October 1983 session of Superior Court, Orange County. However, on 20 September 1983, Brown learned that the motion docket for that session was closed and he postponed filing the petition until 11 October 1983. This was forty-seven days after the Board mailed notice of the denial of the permit to White Oak.

The Board moved to dismiss White Oak's petition for certiorari on grounds that because under N.C.G.S. 160A-388(e) White Oak had only thirty days from notice of denial of the permit within which to petition for certiorari, the petition had been filed too late. In opposition to this motion Brown filed an affidavit on behalf of White Oak setting forth substantially the facts just stated and claiming that none of the Board's legal or equitable rights were prejudiced by the forty-seven day time span. Upon hearing the Board's motion to dismiss White Oak's petition, the superior court entered an order, the relevant parts of which are as follows:

IT APPEARING THAT:

1. Respondents denied petitioner's application for a conditional use permit and mailed petitioner notice of that fact on August 25, 1983.

2. Petitioner filed a "Petition for Writs of Certiorari, Mandamus and a Decree of Mandatory Injunction to the Town of Carrboro and its Board of Aldermen" on October 11, 1983, 47 days after the notice of denial was mailed.

3. The statements appearing in the Affidavit of Charles Gordon Brown are true and are incorporated herein.

4. The passage of 47 days did not legally or practically prejudice respondents in the defense of their decision to deny petitioner's application for a special use permit.[1]

AND IT APPEARING FURTHER that upon the law:

1. N.C.G.S. Sec. 160A-381 provides, in pertinent part, that an adverse decision of a city council "shall be subject to review by the superior court by proceedings in the nature of certiorari," and N.C.G.S. Sec. 160A-1(2) and (3) define "city" as including "town" and "council" as including "board of aldermen."

2. Because the decision which petitioner seeks to have reviewed was that of a board of aldermen rather than a board of adjustment, Sec. 160A-381 and not Sec. 160A-388(e) applies.

3. There is no statutory restriction imposed upon judicial review by way of writs of certiorari to boards of aldermen. The common law power of the Superior Court to grant writs of certiorari in such cases as the one *sub judice* still obtains.

4. To the extent Section 15-116 of the Carrboro Land Use Ordinance attempts to restrict the common law jurisdiction of this Court by mandating that petitions for certiorari be filed within 30 days of notification of denial, such attempt is beyond the authority of the Town of Carrboro.

1. We note that the Board did not except to this finding of fact.

5. Judged by common law criteria, the petition for certiorari was timely filed, no legal or practical prejudice will befall respondents as the result of a lapse of 47 days, there are no facts which would support the bar of laches, and the petition raises serious and substantial questions for review.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that respondents' motion to dismiss should be and hereby is DENIED.

Subsequently, a full hearing was held in superior court on the merits of the issues raised in White Oak's petition. The superior court reversed the Board's decision and remanded the cause, directing the Board to issue a conditional use permit to White Oak. The Board appealed this order and judgment to the Court of Appeals which vacated the judgment and remanded the case to Superior Court, Orange County, "with instructions for entry of judgment dismissing [White Oak's] appeal." The basis for this result was that White Oak's petition for certiorari had been filed more than thirty days from the time the Board mailed its notice of denial and therefore the superior court was without jurisdiction to hear White Oak's review. Because of this holding the Court of Appeals did not reach the issue of whether the superior court erred by reversing the decision of the Board. Judge Webb dissented from the majority opinion on grounds that the petition for certiorari was properly allowed by the superior court as it was filed within a reasonable time from the Board's decision. He was also of the opinion that the Court of Appeals should have decided the substantive issue brought forward on appeal. White Oak appealed the decision of the Court of Appeals to this Court pursuant to N.C.G.S. 7A-30(2).

[1] The Court of Appeals reasoned correctly that N.C.G.S. 160A-381, not N.C.G.S. 160A-388, applies to the case at bar. In relevant part 160A-381 provides: "When issuing or denying . . . conditional use permits, the city council shall follow the procedures for boards of adjustment . . . and every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. 160A-1(3) states in pertinent part that:

[The term] "[c]ouncil" is interchangeable with the terms "board of aldermen" and "board of commissioners," is used

> throughout this Chapter in preference to those terms, and shall mean any city council as defined in this subdivision without regard to the terminology employed in charters, local acts, other portions of the General Statutes, or local customary usage.

Therefore, when issuing or denying conditional use permits, the Carrboro Board of Aldermen was bound to follow the procedures established for boards of adjustment. Such procedures are generally set forth in N.C.G.S. 160A-388.

As with N.C.G.S. 160A-381, 160A-388(e) provides that "[e]very decision of the board [of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari." Unlike 160A-381, however, 160A-388(e) adds that "[a]ny petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board [of adjustment] is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party . . . whichever is later." N.C.G.S. 160A-381 specifies that boards of aldermen must follow procedures set forth for boards of adjustment "when *issuing* or *denying* . . . conditional use permits"; however, a party seeking *review* of a decision by a board of aldermen must return to 160A-381 to learn what procedure governs the review of such a decision. (Emphasis ours.) Because 160A-381 does not contain a thirty-day limit for the filing of a petition for certiorari, White Oak was not statutorily barred from seeking review of the Board's decision by filing its petition more than thirty days after the decision was reached.

We disagree with the opinion of the Court of Appeals that the structure of North Carolina zoning law and administrative law requires that a thirty-day limit be judicially engrafted onto N.C.G.S. 160A-381. The Court of Appeals reasoned that because a thirty-day rule is provided in the Administrative Procedures Act[2]

2. We note that the Court of Appeals incorrectly stated that "[t]he time for filing a petition for writ of certiorari under the APA [Administrative Procedures Act] is thirty days after notice of final decision is received; see G.S. 150A-45. . . ." N.C.G.S. 150A-45 concerns the procedures for obtaining judicial review of certain administrative decisions, which review is granted as a matter of right by N.C.G.S. 150A-43. Such review is thus in the nature of an *appeal*, as contrasted with a petition for certiorari provided for in N.C.G.S. 160A-381. *Cf. Pierce v. King County*, 62 Wash. 2d 324, 382 P. 2d 628 (1963) (general rule that certiorari is to be sought

and in a Carrboro city ordinance pertinent to review of decisions of boards of aldermen, thirty days should also mark the outer boundary for the filing of petitions for certiorari under N.C.G.S. 160A-381. While this reasoning may provide a good argument for legislative amendment of 160A-381, it was improperly applied in the interpretation of the statute. There being no time limitation in the statute, it was improper for the Court of Appeals to conclude as a matter of law that the superior court was without jurisdiction to review the decision of the Board by petition filed more than thirty days from notice of the Board's decision. Authority to establish rules governing the procedure and practice in superior courts is vested in the General Assembly unless such authority is delegated to the Supreme Court. N.C. Const. art. IV, § 13(2). The Court of Appeals has no authority to establish such rules. Had the legislature intended N.C.G.S. 160A-381 to contain a thirty-day limit, it would have included one in the statute. As such a limit is not present in 160A-381, we must assume the legislature intended to leave determination of the timeliness of a petition for certiorari to the superior court in which the petition is filed.

[2] In the absence of a designated time period within which to seek review of a decision by a board of aldermen, the superior court must determine, in its discretion, whether a petition for writ of certiorari has been filed within a reasonable time of the decision of the board of aldermen. As this Court stated in *Mizell v. Burnett*, 49 N.C. 249, 255 (1857): "What is a reasonable time must, in all cases, depend upon the circumstances." *Accord Claus v. Lee*, 140 N.C. 552, 53 S.E. 433 (1906). Generally, whether a petition for certiorari has been timely filed can be decided by deter-

within time within which appeal could have been taken does not apply to review of zoning cases reviewed by certiorari). The Court of Appeals' casual conflation of a petition for certiorari and an appeal is further revealed by the following language from its opinion: "[W]e hold the superior court did not have jurisdiction to review the decision of the board and petitioner waived his [sic] right of appeal. For this reason the petitioner's appeal should have been dismissed." Petitioner (White Oak) did not have a right of *appeal*; it sought review by petition seeking a writ of certiorari. The distinction is important because the superior court is required statutorily to hear certain appeals, whereas it is within the superior court's discretion to allow or deny a petition for certiorari. In exercising its discretion, in the absence of a statutory time limit it is proper, as here, for the court to consider whether the lapse of time between the decision sought to be reviewed and the filing of the petition for certiorari worked to the detriment of the respondents.

mining whether the petitioner's delay bars him under the equitable doctrine of laches from being afforded review. *See Redevelopment Commission v. Capehart*, 268 N.C. 114, 150 S.E. 2d 62 (1966) (to be entitled to recordari, petitioner must show he is not guilty of laches); *Todd v. Mackie*, 160 N.C. 352, 76 S.E. 245 (1912) (writ of recordari or of certiorari, as a substitute for appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the parties' power to make application, must be satisfactorily accounted for); *Bowman v. Foster*, 33 N.C. 47 (1850) (delay in making inquiry until two and one-half years after judgment constitutes laches). As stated in *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 271, 192 S.E. 2d 449, 456 (1972):

> ". . . where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case." *Teachey v. Gurley*, 214 N.C. 288, [294], 199 S.E. 83, [88] [1938].

Upon the record before us, we hold that the superior court did not err in concluding as a matter of law that "the petition for certiorari was timely filed, no legal or practical prejudice will befall respondents as the result of a lapse of 47 days, [and] there are no facts which would support the bar of laches. . . ." We hold, therefore, that the superior court properly had jurisdiction to hear the substantive issue brought forward by White Oak, namely, whether the Board erred in denying White Oak a conditional use permit.

The decision of the Court of Appeals is reversed. The Court of Appeals did not decide the substantive issue of whether the superior court erred by reversing the Board's denial of White Oak's application for a conditional use permit. *See Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 265 S.E. 2d 379, *reh'g denied*, 300 N.C. 562 (1980). Therefore, the case is remanded to the Court of Appeals for determination of that issue.

Reversed and remanded.

CAROL M. THOMPSON v. DONALD O. THOMPSON, L & O, INC., A CORPORATION; AND ROBERT B. PRYOR, TRUSTEE, AND STEPP, GROCE, PINALES & COSGROVE, A PARTNERSHIP v. CAROL M. THOMPSON

No. 554A84

(Filed 2 April 1985)

Attorneys at Law § 7.1; Quasi Contracts and Restitution § 1.2— domestic relations —contingent fee contract—void as against public policy—no grounds for intervention

In an action in which the former attorneys of the plaintiff in a domestic action were allowed to intervene to enforce a contingent fee contract, the Court of Appeals should not have upheld intervention by the attorneys for recovery in quantum meruit after holding that the contingent fee contract was void as against public policy. The contract being void, intervenors had no interest in the property or the transaction that was the subject of the suit and there was no basis for intervention.

APPEAL by plaintiff, pursuant to G.S. 7A-30(2) of a decision of the Court of Appeals (*Johnson, J.*, with *Hill, J.*, concurring and *Hedrick, J.* [now C.J.], dissenting), reversing and remanding a judgment by *Gash, J.*, entered 4 January 1983 in District Court, HENDERSON County. The opinion is reported at 70 N.C. App. 147, 319 S.E. 2d 315 (1984). Heard in the Supreme Court 4 February 1985.

The appeal is from an order allowing the former attorneys of the original plaintiff (Ms. Thompson) to intervene in her action against the original defendant, her husband.

The suit between Ms. Thompson and her husband sought to resolve property and other rights arising out of the marriage of the parties.

Stepp, Groce, Pinales & Cosgrove, a partnership made up of attorneys, was, over the objection of Ms. Thompson, allowed to intervene in her suit against her husband under Rule 24 of the Rules of Civil Procedure. G.S. 1A-1, Rule 24. The attorneys then filed a complaint against her seeking to recover on a contingent fee contract they had entered into with her on 27 January 1981. They were discharged by Ms. Thompson on 16 February 1981.

Under the terms of that contract the attorneys were to receive from Ms. Thompson one-fourth of any amount recovered for her arising out of the "domestic difficulties existing between she

and her husband." The trial court allowed a recovery but deducted the amount Ms. Thompson had paid her new attorney to bring and settle her action against her husband.

The Court of Appeals held that the contingent fee contract entered into between Ms. Thompson and her attorney was void as against public policy. The Court then held that the attorneys were entitled to recover in *quantum meruit* and remanded the case for determination of the reasonable value of the services rendered prior to 16 February, the day they were discharged.

Judge Hedrick (now Chief Judge) agreed that the contingent fee agreement was void but dissented on the grounds that it was error to allow the attorneys to intervene in Ms. Thompson's lawsuit.

Lentz, Ball & Kelley, P.A., by Ervin L. Ball, Jr., for defendant appellant.

Stepp, Groce & Cosgrove, by W. Harley Stepp, Jr. and Edwin R. Groce, for plaintiff appellee.

VAUGHN, Justice.

The Court of Appeals held that the contingent fee contract for legal services to be rendered in connection with matters arising out of the domestic difficulties between Ms. Thompson and her husband was void and unenforceable exclusively by virtue of the fact that it violated the public policy of this State. Review of that decision has not been sought and therefore the validity of that decision is not before us.

The opinion of the Court of Appeals on that point is the law of this case as it now stands before us. The contract being void, intervenors had no interest in the property or the transaction that was the subject of Ms. Thompson's suit. There was, therefore, no basis for the order allowing intervention. The Court of Appeals should have, therefore, vacated the order allowing intervention and dismissed the intervenors from that suit. It erred in not doing so.

Although in view of our disposition of the case a decision on the point is not necessary, we note that it is generally held that if there can be no recovery on an express contract because of its

repugnance to public policy, there can be no recovery on *quantum meruit*. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968) (unlicensed contractor). *Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E. 2d 496 (1955) (county commissioner contracting for repair work for county).

The opinion of the Court of Appeals remanding the case for determination of the reasonable value of the services rendered prior to 16 February 1981, the date the attorneys were discharged, is reversed. The case is remanded to the Court of Appeals for remand to the District Court of Henderson County for an order vacating the order allowing intervention and for the entry of an order dismissing the action filed by the intervenors against Ms. Thompson.

Reversed and remanded.

IN THE MATTER OF: BRENT MELTON McCARROLL, APPLICANT TO THE FEBRUARY 1984 NORTH CAROLINA BAR EXAMINATION

No. 664A84

(Filed 2 April 1985)

1. **Appeal and Error §§ 6.4, 6.9— right of appeal—motions to produce documents, for free transcript, to sue as pauper, and for jury trial**

The denial of a bar applicant's motion for the production of documents and his motion for a free transcript of the hearing before the Board of Law Examiners did not affect substantial rights and was not immediately appealable. However, the trial court's denial of the applicant's motion to sue as a pauper and his motion for a jury trial did affect substantial rights and could be immediately appealed.

2. **Attorneys at Law § 2— denial of motion to sue as pauper**

No abuse of discretion was shown in the trial court's order denying a bar applicant's motion to sue as a pauper where the court made detailed findings of fact to support its order, and it is presumed that the evidence is sufficient to support the findings since the evidence is not included in the record on appeal. G.S. 1-110.

3. **Attorneys at Law § 2; Constitutional Law § 24.9— bar admission case—no right to jury trial**

A bar applicant had no right to a jury trial in his appeal to the superior court from an order of the Board of Law Examiners denying his application to take the N.C. Bar Examination.

APPLICANT-appellant's application to take the February 1984 North Carolina Bar Examination was denied by the North Carolina Board of Law Examiners (Board) on 10 May 1984. From the Board's order, applicant appealed to the WAKE County Superior Court pursuant to Rule .1404 of the Rules Governing Admission to the Practice of Law.

Before the matter was heard on its merits, applicant filed motions for a jury trial, for production of certain documents, for a free transcript of the Board's hearing, and to appeal as a pauper. All four motions were heard and denied by Barnette, J., on 6 July 1984. From the trial court's denial of his motions, applicant appeals directly to this Court pursuant to Rule .1405 of the Rules Governing Admission to the Practice of Law.

Brent Melton McCarroll, pro se.

Erdman, Boggs & Harkins, by Harry H. Harkins, Jr., for appellee.

PER CURIAM.

[1] No final judgment has been entered by the trial court with regard to the applicant's appeal of the Board's order denying his bar application. "As a general rule, interlocutory decrees are immediately appealable only when they affect a substantial right of the appellant and will work an injury to him if not corrected before an appeal from a final judgment." *Love v. Moore*, 305 N.C. 575, 578, 291 S.E. 2d 141, 144 (1982); *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980). Denial of applicant's motion for production of documents affects no substantial right and is not appealable. *Lundy Packing Co. v. Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO*, 31 N.C. App. 595, 230 S.E. 2d 181 (1976). Nor is his motion for a free transcript appealable. However, the trial court's denial of applicant's motion to sue as a pauper affects a substantial right and is appealable. Similarly, the order denying his motion for a jury trial is appealable. *Matter of Ferguson*, 50 N.C. App. 681, 274 S.E. 2d 879 (1981).

[2] Upon filing his notice of appeal with the Wake County Superior Court, applicant filed an application to sue as a pauper under G.S. 1-110. The Clerk of Superior Court granted him an *ex*

parte order allowing him to pursue this action as a pauper. The Board of Law Examiners appealed the clerk's ruling to the Superior Court. Applicant subsequently filed a written motion that he be declared a pauper. The Board's appeal and applicant's motion were heard by Judge Barnette, who denied the motion to sue as a pauper.

Board Rule .1403 requires that the record on appeal be prepared and filed "at the expense of the appellant." The chief expense is the cost of the transcript of the Board's hearing, required by Rule .1403(2). The Clerk of Court also requires the usual fee for filing civil actions. The Rules contain no provision for waiver of these charges. G.S. 1-110 states that a judge or clerk "*may* authorize a person to sue as a pauper in their respective courts . . . ." "The right to sue as a pauper is a favor granted by the court and remains throughout the trial in the power and discretion of the court." *Whedbee v. Ruffin*, 191 N.C. 257, 259, 131 S.E. 653, 655 (1926); *Alston v. Holt*, 172 N.C. 417, 90 S.E. 434 (1916).

The trial judge made detailed findings of fact to support its order. Although applicant excepted to most of these findings of fact, he has offered no argument in his brief that any are unsupported by the evidence. Indeed, he did not include any of the testimony taken by the court in the record on appeal. The findings are therefore conclusive on appeal. "It is well settled that when the evidence is not included in the record, it will be presumed that the evidence was sufficient to support the findings of fact." *Southern Bell Tel. & Tel. Co. v. Petty Communications, Inc.*, 27 N.C. App. 673, 674, 219 S.E. 2d 800, 801 (1975). *See In re Housing Authority*, 233 N.C. 649, 65 S.E. 2d 761 (1951); *Bethea v. Bethea*, 43 N.C. App. 372, 258 S.E. 2d 796 (1979), *cert. denied*, 299 N.C. 119, 261 S.E. 2d 922 (1980). Clearly, no abuse of discretion has been shown here.

[3] The trial court denied the applicant's motion that his appeal from the Board's order be heard by a jury and that Board Rule .1404 be declared unconstitutional. This rule requires the judge to hear bar application appeals without a jury. G.S. 150A-50, the Administrative Procedure Act, contains a similar provision. Applicant contends that Article I, § 25 of the North Carolina Constitution mandates that he be allowed a jury trial.

In *North Carolina State Bar v. Dumont*, 304 N.C. 627, 286 S.E. 2d 89 (1982), this Court rejected the contention of an attorney that he had a constitutional right to a trial by jury in a disciplinary proceeding. At one time, trial by jury did exist in attorney disciplinary proceedings. There has never been a right to trial by jury in bar admission cases, either for the original application or on appeal. The argument is wholly without merit and is rejected.

For the foregoing reasons, the orders denying applicant's motions for a jury trial and to sue in forma pauperis are affirmed and the case is remanded to the Superior Court of Wake County for further proceedings not inconsistent with this opinion.

No error.

STATE OF NORTH CAROLINA v. WALTER SHELTON GOODSON

No. 303A84

(Filed 2 April 1985)

1. **Rape and Allied Offenses § 1— evidence of sexual act unambiguous—sufficient**

The State's evidence was sufficient to describe a sexual offense and to take the case to the jury where defendant forcibly and with the threatened use of a knife made his victim disrobe and perform oral sex on him. G.S. 14-27.4(a)(2); G.S. 14-21.1(4).

2. **Rape and Allied Offenses § 4— identification card with false name—relevant**

Evidence that defendant was seen tearing and throwing into a trash basket identification cards bearing the name "David" was relevant since defendant had used that name when he approached his victim.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Griffin, J.*, at the 9 January 1984 Criminal Session of LINCOLN County Superior Court.

Defendant was indicted and tried on charges of first degree rape and first degree sexual offense. He was convicted of first degree sexual offense and judgment was entered imposing the appropriate prison sentence.

Attorney General Thornburg, by David E. Broome, Jr., Assistant Attorney General, for the State.

Calvin B. Hamrick, for defendant appellant.

VAUGHN, Justice.

[1] Defendant's first assignment of error attacks the sufficiency of the evidence. He does not argue that he did not do precisely what the State's witness testified he did. He argues instead that the testimony does not describe a sexual offense. In particular, he appears to argue that the evidence relied on to show that a sexual act took place was ambiguous and insufficient to take the case to the jury. The argument is without merit.

Among other ways, a person is guilty of a first degree sexual offense when he (1) engages in a sexual act with another by force and against the will of that person and (2) employs or displays a dangerous weapon in the process. G.S. 14-27.4(a)(2).

The evidence tends to show that defendant forcibly and with the threatened use of a knife made his victim disrobe and, in her words, perform "oral sex on him" against her will. This testimony alone was sufficient to take the case to the jury. The term "sexual act" as defined in G.S. 14-27.1(4) includes fellatio. The term "oral sex" is recognized as describing a sexual act involving "contact between the mouth of one party and the sex organs of another." *People v. Dimitris*, 115 Mich. App. 228, 234, 320 N.W. 2d 226, 228 (1981) (per curiam). When a female is said to perform oral sex on a male the term is reasonably taken to mean fellatio. *See, e.g., Johnson v. State*, 272 Ind. 547, 400 N.E. 2d 132 (1980).

Quite aside from the reasonable meaning of the term, the sexual act described by the witness in this case is perfectly clear. The evidence shows that defendant and his victim were in the front seat of a car. Defendant put his hand around the back of her head and pulled her over to him where he forced her to perform oral sex on him. He subsequently ejaculated in her mouth.

[2] In his other assignment of error defendant challenges, on relevancy grounds only, the admission of identification cards which were found in defendant's possession. All but one of the cards bore a name other than defendant's correct name. He was seen tearing all the cards (except the one that bore his real name)

and throwing them in a trash basket at the police station. Several of the cards bore the first name "David," the name defendant had used when he approached his victim. Evidence is relevant if it has any logical tendency to prove a fact in issue. 1 Brandis on North Carolina Evidence § 77 (2d rev. ed. 1982). The evidence was relevant because, among other things, it tended to show that although defendant's name is Walter Shelton Goodson, he possessed identification showing him to be someone named "David," the same name used by the perpetrator of the crime.

Neither of the arguments disclose prejudicial error.

No error.

BELLMONT MURPHREY v. HENRY WINSLOW AND JAMES H. WINSLOW

No. 533A84

(Filed 2 April 1985)

ON appeal by plaintiff from the decision by a divided panel of the Court of Appeals reported at 70 N.C. App. 10, 318 S.E. 2d 849 (1984), affirming summary judgment for defendants entered by *Ezzell, J.*, at the 10 January 1983 session of District Court, EDGECOMBE County. Heard in the Supreme Court 14 March 1985.

Bridgers, Horton & Simmons, by Edward B. Simmons, for plaintiff appellant.

LeRoy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr., for defendant appellees.

PER CURIAM.

In granting summary judgment for defendants, the trial court dismissed plaintiff's complaint for a declaratory judgment and entered judgment for defendants on their counterclaim. The sole issue before this Court is the correctness of the Court of Appeals' decision affirming the judgment on the counterclaim. For the reasons stated by Judge Webb in his dissent, the decision of the Court of Appeals as to this issue is reversed and this case is

remanded to that court for remand to the District Court of Edgecombe County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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

WENDY EVE WILLIAMS v. BOYLAN-PEARCE, INC.

No. 458A84

(Filed 2 April 1985)

APPEAL of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 69 N.C. App. 315, 317 S.E. 2d 17 (1984), affirming in part the judgment in favor of plaintiff on the issue of compensatory damages for malicious prosecution and reversing in part the judgment in favor of defendant on the issue of punitive damages entered 18 March 1983 by *Judge Wiley F. Bowen* in Superior Court, WAKE County. Heard in the Supreme Court 11 March 1985.

Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander and James A. Roberts III, Attorneys for defendant-appellant.

Brenton D. Adams, Attorney for plaintiff-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

Justice MITCHELL took no part in the consideration or decision of this case.

IN RE: RONNIE ODOM WEBB, III

No. 579A84

(Filed 2 April 1985)

APPEAL under N.C.G.S. § 7A-30(2) by respondent appellant parents from the decision of the Court of Appeals, 70 N.C. App. 345, 320 S.E. 2d 306 (1984), affirming an order terminating their parental rights entered on 31 January 1983 by *Judge William H. Bennett, Jr.*, in District Court, MECKLENBURG County. Heard in the Supreme Court 12 March 1985.

Ruff, Bond, Cobb, Wade & McNair, by Robert S. Adden, Jr., and William H. McNair, with Guardian ad Litem Ellis M. Bragg joining on the brief; for petitioner appellee Mecklenburg County Department of Social Services.

Gillespie & Lesesne, by Donald S. Gillespie, Jr., for respondent appellant Ronnie Odom Webb, Jr.

Edward G. Connett, for respondent appellant Mona F. Webb.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

State v. Hudson

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MARJORIE HUDSON	)	

No. 686P84

(Filed 27 February 1985)

THE petition for discretionary review is allowed for the following purpose.

The order of the Court of Appeals remanding cases No. 82CRS7579 and No. 82CRS7400 is reversed. The cases are remanded to the Court of Appeals for entry of an order affirming the judgments of the Superior Court of BEAUFORT County.

This the 27th day of February, 1985.

VAUGHN, J.
For the Court

Cannon v. Miller

HAYWOOD A. CANNON	)	
	)	
v.	)	ORDER
	)	
JEFFREY L. MILLER	)	

No. 21P85

(Filed 27 February 1985)

IT appearing that the panel of Judges of the Court of Appeals to which this case was assigned has acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.

It is therefore ordered that the petition for discretionary review is allowed for the sole purpose of vacating the decision of the Court of Appeals purporting to abolish the causes of action for Alienation of Affections and Criminal Conversation.

The decision of the Court of Appeals is vacated. The case is remanded to the Court of Appeals for entry of an order reversing the order of the trial court granting summary judgment in favor of defendant and remanding the case to the Superior Court of PITT County for trial.

This the 27th day of February, 1985.

VAUGHN, J.
For the Court

State v. Peed

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LEWELLYN PEED	)	

No. 72P85

(Filed 20 March 1985)

DEFENDANT, an indigent, has lost his right to appeal because of the failure of his court appointed counsel to prepare and serve the proposed record on appeal within the time allowed by the North Carolina Rules of Appellate Procedure and within the time allowed by two consecutive thirty day extensions of time granted by the North Carolina Court of Appeals.

In order, however, to avoid the necessity of a new trial or release of defendant because of alleged ineffective assistance of appellate counsel, the Court orders as follows:

The petition for certiorari filed in this Court on 1 February 1985 is allowed as follows:

The case is remanded to the Court of Appeals for entry of an order allowing the petition of certiorari filed in that Court on 11 January 1985 and for such other orders as it may deem necessary and appropriate.

This 20th day of March 1985.

VAUGHN, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
MICHAEL STREATH	)	

No. 89P85

(Filed 25 February 1985)

THE defendant's second Petition for Discretionary Review is ALLOWED for the sole purpose of entering this Order. We treat the documents filed by the defendant with this Court as a Motion to Amend the record on appeal. The Motion to Amend the record on appeal to include the judgments of the District Court, CRAVEN County, entered against defendant herein is ALLOWED. The judgment of the Court of Appeals dismissing defendant's appeal and its Order of 22 February 1985 treating petitioner's Motion to Amend and Petition for Writ of Supersedeas and Temporary Stay, filed with that court on 21 February 1985, as a Petition to Rehear and denying the same are hereby vacated. The case is remanded to the Court of Appeals for consideration of defendant's appeal on the merits. Execution of the judgments of the Superior Court, CRAVEN County dated 14 November 1983 are temporarily stayed pending the issuance of the mandate of the Court of Appeals following that court's consideration of the merits of defendant's appeal.

This the 25th day of February 1985.

VAUGHN, J.
For the Court

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

ALLEN v. STANDARD MINERAL CO.

No. 5P85.

Case below: 71 N.C. App. 597.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 February 1985.

ANDERSON v. CENTURY DATA SYSTEMS

No. 17P85.

Case below: 71 N.C. App. 540.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985.

AZZOLINO v. DINGFELDER

No. 718PA84.

Case below: 71 N.C. App. 289.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 27 February 1985. Cross petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 27 February 1985.

BIGGERS v. EVANGELIST

No. 720P84.

Case below: 71 N.C. App. 35.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 27 February 1985.

BROOKS, COMR. OF LABOR v. BUTLER

No. 651P84.

Case below: 70 N.C. App. 681.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 27 February 1985.

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

CITY OF WINSTON-SALEM v. COOPER

No. 34PA85.

Case below: 72 N.C. App. 173.

Petition by defendants (Norman L. Cooper and wife, Ruth S. Cooper) for discretionary review under G.S. 7A-31 allowed 27 February 1985.

DAVIS v. MOBILIFT EQUIPMENT CO.

No. 616P84.

Case below: 70 N.C. App. 621.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985. Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 27 February 1985.

E. F. HUTTON & CO. v. SEXTON

No. 538P84.

Case below: 70 N.C. App. 146.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

FERREE v. FERREE

No. 30P85.

Case below: 71 N.C. App. 737.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

FOOD TOWN STORES v. CITY OF SALISBURY

No. 751P84.

Case below: 71 N.C. App. 457.

Petitions by plaintiffs for discretionary review denied 27 February 1985. Motion by City of Salisbury to dismiss plaintiffs' appeals allowed 27 February 1985.

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

FRANCE v. WINN-DIXIE SUPERMARKET

No. 583P84.

Case below: 70 N.C. App. 492.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985.

HANEY v. ALEXANDER

No. 51P85.

Case below: 71 N.C. App. 731.

Petition by defendant (Hospital) for writ of certiorari to the North Carolina Court of Appeals denied 27 February 1985.

HEATHERLY v. MONTGOMERY COMPONENTS, INC.

No. 697P84.

Case below: 71 N.C. App. 377.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 February 1985.

HEISER v. HEISER

No. 714P84.

Case below: 71 N.C. App. 223.

Notice of Appeal by plaintiff under G.S. 7A-30 dismissed 27 February 1985. Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985.

HOBSON CONSTRUCTION CO. v. GREAT AMERICAN INS. CO.

No. 22P85.

Case below: 71 N.C. App. 586.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 27 February 1985.

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

IN RE WATSON

No. 539P84.

Case below: 70 N.C. App. 120.

Petition by Bledsoe Watson for discretionary review under G.S. 7A-31 denied 27 February 1985.

INTERNATIONAL MINERALS v. MATTHEWS

No. 683P84.

Case below: 71 N.C. App. 209.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

IRELAND v. IRELAND

No. 555P84.

Case below: 70 N.C. App. 344.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

JOYNER v. J. P. STEVENS AND CO.

No. 28P85.

Case below: 71 N.C. App. 625.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985.

LAMBE-YOUNG, INC. v. COOK

No. 617P84.

Case below: 70 N.C. App. 588.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

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

MILLER v. DAVIS

No. 676P84.

Case below: 71 N.C. App. 200.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. BATES

No. 621PA84.

Case below: 70 N.C. App. 787.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 27 February 1985.

STATE v. BATES

No. 631PA84.

Case below: 70 N.C. App. 477.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 27 February 1985.

STATE v. BROOKS

No. 90P85.

Case below: 72 N.C. App. 254.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 March 1985.

STATE v. BROWN

No. 4P85.

Case below: 71 N.C. App. 458.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 27 February 1985.

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

STATE v. CROMARTIE

No. 46P85.

Case below: 66 N.C. App. 554.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 27 February 1985.

STATE v. DAVIS

No. 613P84.

Case below: 70 N.C. App. 788.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. DEANS

No. 678P84.

Case below: 71 N.C. App. 227.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. FINGER

No. 94P85.

Case below: 72 N.C. App. 569.

Petition by defendant for writ of supersedeas and temporary stay denied 25 February 1985.

STATE v. GILCHRIST

No. 680P84.

Case below: 71 N.C. App. 180.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

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

STATE v. GOODMAN

No. 717P84.

Case below: 71 N.C. App. 343.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. HAWKINS

No. 13P85.

Case below: 71 N.C. App. 809.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. HOLBROOK

No. 602P84.

Case below: 70 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. HUGGINS

No. 681P84.

Case below: 71 N.C. App. 63.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. JONES

No. 677P84.

Case below: 71 N.C. App. 226.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

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

STATE v. LEVERETT

No. 137P85.

Case below: 73 N.C. App. 180.

Petition by defendant for writ of supersedeas and temporary stay allowed 11 March 1985.

STATE v. McCORD & CAMPBELL

No. 77P85.

Case below: 72 N.C. App. 223.

Petition by defendant (Campbell) for writ of certiorari to the North Carolina Court of Appeals denied 27 February 1985.

STATE v. McLAMB

No. 660PA84.

Case below: 71 N.C. App. 220.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 27 February 1985.

STATE v. MAJORS

No. 126A85.

Case below: 73 N.C. App. 26.

Petition by Attorney General for writ of supersedeas and temporary stay allowed 15 March 1985.

STATE v. NEWKIRK

No. 119P85.

Case below: 73 N.C. App. 83.

Petition by defendant for writ of supersedeas and temporary stay allowed 8 March 1985.

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

STATE v. REBER

No. 679P84.

Case below: 71 N.C. App. 256.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. ROBERTS

No. 701P84.

Case below: 70 N.C. App. 789.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 27 February 1985.

STATE v. RUTHERFORD

No. 639P84.

Case below: 70 N.C. App. 674.

Petition by defendants Rutherford and Faust for discretionary review under G.S. 7A-31 denied 27 February 1985.

STATE v. SOUTHERN

No. 24PA85.

Case below: 71 N.C. App. 563.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 27 February 1985.

STATE v. WALTER

No. 675P84.

Case below: 71 N.C. App. 226.

Petition by defendant for discretionary review under G.S. 7A-31 denied 27 February 1985.

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

STATE v. WILLIAMS

No. 151P85.

Case below: 73 N.C. App. 282.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 20 March 1985. Petition by Attorney General for writ of supersedeas and temporary stay denied 20 March 1985.

STATE ex rel. EDMISTEN v. CHALLENGE, INC.

No. 26P85.

Case below: 71 N.C. App. 575.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 February 1985.

STRICKLAND v. A & C MOBILE HOMES

No. 682P84.

Case below: 70 N.C. App. 768.

Petition by defendants for discretionary review under G.S. 7A-31 denied 27 February 1985.

SUPERIOR TILE v. RICKEY OFFICE EQUIPMENT

No. 563P84.

Case below: 70 N.C. App. 258.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985.

WALLACE v. WALLACE

No. 647P84.

Case below: 70 N.C. App. 458.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 8 March 1985.

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

WILSON v. TRAYNHAM

No. 594P84.

Case below: 70 N.C. App. 497.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 February 1985.

MARY CAROL RORRER v. ARTHUR O. COOKE

No. 468PA84

(Filed 7 May 1985)

1. **Rules of Civil Procedure § 56.2— motion for summary judgment—burden of proof**

On his motion for summary judgment, defendant had the initial burden of showing that an essential element of plaintiff's case did not exist as a matter of law or showing through discovery that plaintiff had not produced evidence to support an essential element of her claim. Plaintiff was then required to come forward with a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant.

2. **Attorneys at Law § 5.1— attorney malpractice—proof required**

In a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth in *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954), and that this negligence (2) proximately caused (3) damage to the plaintiff.

3. **Attorneys at Law § 5.2— legal malpractice in medical malpractice case—affidavit by attorney—insufficiency to show negligence by defendant**

In a legal malpractice action arising from defendant attorney's representation of plaintiff in a medical malpractice case, an attorney's affidavit was insufficient to forecast proof that defendant's preparation for and conduct of the medical malpractice trial was such that defendant breached his duty of reasonable care and diligence to plaintiff because it failed to state what the standard of care to which defendant was subject required him to do. The mere fact that one attorney testifies that he would have acted contrarily or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant's negligence.

4. **Attorneys at Law § 5.2— legal malpractice—failure to exercise best judgment—insufficient forecast of evidence**

In a legal malpractice action arising from defendant attorney's representation of plaintiff in a medical malpractice case, plaintiff's affidavits failed to establish material issues of fact as to whether defendant was negligent in failing to exercise his best judgment in good faith at every decision point arising in preparation for and trial of plaintiff's medical malpractice case.

5. **Attorneys at Law § 5.2; Rules of Civil Procedure § 56.4— proximate cause—issue raised in affidavits supporting summary judgment motion—necessity for opposing materials**

In a legal malpractice action arising from defendant attorney's representation of plaintiff in a medical malpractice case, defendant placed the issue of causation squarely before the court when he submitted affidavits in support of his summary judgment motion which specifically addressed the issue of

whether defendant's alleged negligence was a proximate cause of plaintiff's failure to obtain a favorable jury verdict in her medical malpractice suit, and it became incumbent upon plaintiff to submit affidavits in opposition to this and other issues so presented.

6. **Attorneys at Law § 5.2— attorney malpractice—proximate cause**

To establish in an attorney malpractice case that negligence is a proximate cause of the loss suffered, plaintiff must establish that the loss would not have occurred but for the attorney's conduct.

7. **Attorneys at Law § 5.2— attorney malpractice—proximate cause**

Where the plaintiff bringing a suit for legal malpractice has lost another suit allegedly due to his attorney's negligence, to prove that but for the attorney's negligence, plaintiff would not have suffered the loss, plaintiff must prove that: (1) the original claim was valid; (2) it would have resulted in a judgment in plaintiff's failure; and (3) the judgment would have been collectible.

8. **Attorneys at Law § 5.2— attorney negligence—failure to show proximate cause of loss**

In a legal malpractice action arising from defendant attorney's representation of plaintiff in a medical malpractice suit, affidavits presented by plaintiff in response to defendant's motion for summary judgment failed to forecast evidence that would show that defendant's alleged negligence was a proximate cause of the loss of her medical malpractice suit in that they failed to show that there was any other or better theory or any additional admissible evidence other than what defendant attorney considered and used and that plaintiff's suit would have been successful had defendant done anything differently.

ON defendant's petition for discretionary review of a decision of the Court of Appeals, 69 N.C. App. 305, 317 S.E. 2d 34 (1984), reversing judgment entered by *DeRamus, J.*, on 28 March 1983 in Superior Court, ROCKINGHAM County. Heard in the Supreme Court 13 March 1985.

This legal malpractice action arises upon attorney Arthur O. Cooke's representation of plaintiff in a suit for damages based upon the alleged medical malpractice of Dr. Carl A. Sardi. During the instant suit Arthur O. Cooke died and the executrix of his estate was substituted as a party defendant by order of the Court of Appeals dated 21 November 1983.

On or about 25 October 1971 Dr. Sardi, a Greensboro otolaryngologist, performed an adenoidectomy-tonsillectomy upon plaintiff at Moses H. Cone Memorial Hospital in Greensboro. Upon regaining consciousness following the operation, plaintiff discovered she could not manipulate her tongue. She thereafter

experienced great difficulty in eating and talking. Eventually she was examined by a neurologist and by several otolaryngologists at Duke University Medical Center. In March 1972 plaintiff met with Cooke to discuss bringing an action against Dr. Sardi for injuries caused by his alleged negligence.

On behalf of plaintiff, Cooke filed a complaint against Dr. Sardi on 7 June 1974 alleging that he failed to exercise due care in performing the adenoidectomy-tonsillectomy; that as a result of this failure damage was inflicted upon that portion of plaintiff's nervous system which controls her tongue; and that Dr. Sardi's negligent use of a tongue clamp was a proximate cause of plaintiff's injury and damage. The case came on for trial during the 29 May 1978 session of Superior Court, Guilford County, and the jury found for Dr. Sardi. Plaintiff did not appeal.

On 26 August 1982 Mrs. Rorrer filed this action against Cooke alleging that he negligently represented her in the suit against Sardi and, as a proximate result, the medical malpractice case was lost. Cooke moved for summary judgment, which was granted 28 March 1983. Plaintiff appealed to the Court of Appeals, which reversed, holding that because plaintiff's forecast of evidence created material issues of fact, summary judgment was improper. The Supreme Court granted defendant's petition for discretionary review on 8 November 1984.

McCain & Essen, by Grover C. McCain, Jr. and Jeff Erick Essen, for plaintiff appellee.

Smith Moore Smith Schell & Hunter, by Stephen P. Millikin, Alan W. Duncan, and Douglas W. Ey, Jr., for defendant appellant.

MARTIN, Justice.

The sole issue before this Court is whether the Court of Appeals erred in holding summary judgment for defendant to be improper. For the reasons set forth below we conclude that it did and therefore reverse the decision of the Court of Appeals. The rules governing summary judgment motions are now familiar and need not be repeated here. *See Broadway v. Blythe Industries, Inc.*, 313 N.C. 150, 326 S.E. 2d 266 (1985); *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E. 2d 518, 520 (1981).

Plaintiff's suit is predicated upon the theory that Cooke negligently represented her during prosecution of her suit against Dr. Sardi. This Court's most thorough discussion of an attorney's legal obligation to his client is set forth in *Hodges v. Carter*, 239 N.C. 517, 519-20, 80 S.E. 2d 144, 145-46 (1954):

> Ordinarily when an attorney engages in the practice of the law and contracts to prosecute an action in behalf of his client, he impliedly represents that (1) he possesses the requisite degree of learning, skill, and ability necessary to the practice of his profession and which others similarly situated ordinarily possess; (2) he will exert his best judgment in the prosecution of the litigation entrusted to him; and (3) he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge to his client's cause. *McCullough v. Sullivan*, 132 A. 102, 43 A.L.R. 928; *Re Woods*, 13 S.W. 2d 800, 62 A.L.R. 904; *Indemnity Co. v. Dabney*, 128 S.W. 2d 496; *Davis v. Indemnity Corp.*, 56 F. Supp. 541; *Gimbel v. Waldman*, 84 N.Y.S. 2d 888; Anno. 52 L.R.A. 883; 5 A.J. 287, 47; Prosser Torts, p. 236, sec. 36; Shearman & Redfield Negligence, sec. 569.
>
> An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his State and on which reasonable doubt may be entertained by well-informed lawyers. 5 A.J. 335, sec. 126; 7 C.J.S. 979, sec. 142; *McCullough v. Sullivan, supra; Hill v. Mynatt*, 59 S.W. 163, 52 L.R.A. 883.
>
> Conversely, he is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care. 5 A.J. 333, sec. 124; *Re Woods, supra; McCullough v. Sullivan, supra;* Anno. 52 L.R.A. 883.

See generally Annot., 45 A.L.R. 2d 5 (1956).[1]

Plaintiff does not contend that Cooke did not possess the requisite degree of learning, skill, and ability necessary to the practice of law and which others similarly situated ordinarily possess. Nor would the record support such finding. It is uncontested that Cooke was duly licensed to practice law in North Carolina and engaged in such practice from that time until his death during the pendency of the present litigation. Plaintiff made no challenge to the statements of several of defendant's affiants that Cooke's reputation in Greensboro for the application of his legal skills was excellent. Therefore, the first criterion established by *Hodges* is not at issue.

Plaintiff does claim, however, that the affidavits she submitted in opposition to defendant's motion for summary judgment establish that there is a material question of fact as to whether Cooke's conduct of the litigation of her suit was in accord with the other two criteria set forth in *Hodges*. To place these affidavits in context we first review the undisputed facts as to the course of events culminating in the jury verdict in favor of Dr. Sardi.

Plaintiff first met with Cooke regarding suit against Dr. Sardi on 22 March 1972. At this conference both plaintiff and her husband stated emphatically that Dr. Sardi had told them that the cause of Mrs. Rorrer's tongue paralysis was probably too much pressure exerted by the clamp used during the course of the operation. The Rorrers also told Cooke that plaintiff had been seen and examined by Dr. T. Boyce Cole at the Duke University Medical Center. Mr. Rorrer also stated that Dr. Cole told him that although he had never seen or heard of a paralysis resulting from a tonsillectomy, he felt that something had occurred in the course of the operation to cause the paralysis and that pressure on the tongue was a possible explanation. After the Rorrers left, Mr. Cooke conducted extensive research in various medical treatises

1. We note the fundamental differences between care of a patient by the medical profession and the representation by a lawyer of a client during litigation. Doctors are joined together in seeking a single result, while lawyers involved in litigation are acting antagonistically and adversely toward each other and seeking diverse results.

and other written materials in order to understand the medical aspects of Mrs. Rorrer's injury.

Mr. Cooke then obtained a copy of a written report prepared on 6 December 1971 by Dr. Joseph W. Stiefel, a neurologist to whom plaintiff had been sent by Dr. Sardi. This report stated in part:

> I would certainly agree she has a bilateral palsy of the tongue, presumably from the involvement of the 12th nerves bilaterally. I am still inclined to think it will improve as I don't believe it is as atrophic as it should be six weeks after complete interruption of the 12th nerves. I would do nothing at the present except to let a little time go by.

In an affidavit filed with his motion for summary judgment Cooke stated that he

> construed the words "complete interruption" used by Dr. Stiefel as tending to support the fact that Dr. Sardi had discussed an interruption of the 12th nerve with Dr. Stiefel and this further tended to support the supposition that the blood supply to the hypoglossal nerve had been "interrupted", and that this "interruption" had been caused by too much pressure being exerted on Mrs. Rorrer's tongue by the clamp used by Dr. Sardi during the operation, and as not suggesting any other cause. I construed this report of Dr. Stiefel as being entirely consistent with what Mr. and Mrs. Rorrer said had been stated to them by Dr. Sardi and as ruling out any psychosomatic problem as a cause for the tongue paralysis.

Cooke then contacted Dr. Gray Hunter, a Greensboro surgeon, and asked him whether or not it would be possible for the hypoglossal nerve to be severed or cut during the course of a tonsillectomy. Dr. Hunter said that in his opinion it would be virtually impossible for this to occur. As Cooke stated in the aforementioned affidavit, Dr. Hunter's

> opinion strengthened my view that the cause of the paralysis of Mrs. Rorrer's tongue was the pressure exerted on her tongue by the clamp used by Dr. Sardi, which pressure had impaired the flow of blood to the hypoglossal nerve. Dr.

> Hunter had no other explanation. This same view was later expressed to me by Dr. Cole.

Mr. Cooke then proceeded to obtain and study all medical records relating to Mrs. Rorrer from (1) the Moses H. Cone Memorial Hospital, (2) Dr. Sardi, (3) Dr. Stiefel, as well as copies of the reports of Dr. Cole and Drs. Joseph C. Farmer and Ng Khye Weng, doctors who practice at the Duke University Medical Center. In one report Dr. Farmer stated: "It is possible that she (Mrs. Rorrer) could have a tongue muscle injury secondary to the retraction of the tongue at the tonsillectomy, however, this is most unusual." By his affidavit Cooke states that he

> construed this statement by Dr. Farmer as further supporting the supposition that the paralysis of the tongue was an injury secondary to the retraction of the tongue during the tonsillectomy, and that this was caused by pressure exerted on the tongue by the clamp in such a manner as to damage the hypoglossal nerve.

In a report dated 2 February 1972 obtained by Cooke, Dr. Cole stated:

> No explanation has been found to date for the difficulty and Dr. Weng referred her to obtain a tongue biopsy. . . . Certainly the time element as far as a tonsillectomy is concerned would point to an injury at the time, however, it is impossible for me to see how a direct injury could have caused this and while doing a tonsillectomy. I have never seen or heard of a similar incidence.

In a report dated 20 March 1973, Cole further remarked: "According to Dr. Weng, there is no evidence of any other neurological disease and I told her (Mrs. Rorrer) to let me see her again in about six months for a follow-up examination." In the affidavit, discussing these reports of Cole, Cooke states:

> I construed this information from Dr. Cole as ruling out any cause for paralysis of the tongue other than something that occurred during the tonsillectomy by Dr. Sardi. I was satisfied from the information from Dr. Cole, Dr. Weng, and Dr. Stiefel, that Mrs. Rorrer's condition was not psychosomatic. Based upon the information furnished to me by Mr.

> and Mrs. Rorrer, by the several doctors and by all medical records, I was of the opinion that the best theory and only theory of injury to the tongue was the placing of too much pressure on the tongue by the clamp by Dr. Sardi. I was of the opinion that I needed to determine whether evidence of too much pressure on the tongue which could result in a paralysis would be in accordance with the accepted standards of practice in performing a tonsillectomy. I decided that Dr. Cole, Mrs. Rorrer's own doctor, who had first hand personal knowledge of her condition, and the resources at the Duke Medical Center at his disposal was the best source of information on this.

After waiting for some time to elapse (in hopes that plaintiff's condition would improve) Cooke met personally with Dr. Cole in 1973. Cooke's affidavit states that he

> discussed with Dr. Cole the theory which was suggested by what Dr. Sardi had stated to Mr. and Mrs. Rorrer, that is, that too much pressure from the clamp used by Dr. Sardi during the operation had impaired the flow of blood to the hypoglossal nerve and had caused a paralysis thereof. Dr. Cole told me that he had never heard of a similar result following a tonsillectomy, but that there seemed to be no other explanation for Mrs. Rorrer's condition. Dr. Cole did not suggest any other possibility. This discussion with Dr. Cole caused me to believe that Dr. Cole would respond to appropriate hypothetical questions in such manner as to provide adequate and sufficient expert testimony for taking a case against Dr. Sardi to the jury. I therefore concluded that a suit on behalf of Mrs. Rorrer against Dr. Sardi should be undertaken.

Cooke filed suit against Dr. Sardi on 7 June 1974 and later took depositions of Dr. Sardi and Dr. Cole. With respect to a conference Cooke had with Dr. Cole several weeks before Cole was deposed, Cooke's affidavit remarks:

> It was Dr. Cole's opinion at that time that there did not appear to be any explanation for the paralysis of Mrs. Rorrer's tongue other than the supposition of too much pressure being exerted by the clamp during the tonsillectomy. Dr. Cole did not suggest any other explanation or possibility. In response

to the hypothetical questions, Dr. Cole stated that he did have an opinion, and that it was his opinion that it would not be in accordance with the accepted standards of medical practice in the performance of a tonsillectomy for sufficient pressure to be exerted on the tongue during a tonsillectomy to cause an impairment of blood supply and damage to the hypoglossal nerve. It was my opinion and judgment as a result of this second conference with Dr. Cole that Dr. Cole was a qualified otolaryngologist and that he was prepared to testify in such way and manner as to take the negligence issue to the jury against Dr. Sardi based upon what Mr. and Mrs. Rorrer said that Dr. Sardi had stated to them. It was my best judgment that I did not need to consult with or seek to obtain the testimony of any other otolaryngologists.

Cooke took Cole's deposition on 28 August 1975. Cooke's affidavit explains that:

14. In view of the statements of Dr. Cole that he had never seen or heard of this result following a tonsillectomy, and that he could give no other possible reason for this result, it was my opinion and best judgment that the approach that I was taking in the handling of Mrs. Rorrer's claim, predicated upon what Mr. and Mrs. Rorrer said that Dr. Sardi had stated to them, was logical and sound, both from a medical and a legal standpoint.

15. Mr. and Mrs. Rorrer had gone to Dr. Cole and to the other doctors at the Duke University Medical Center for medical assistance prior to their having contacted me to represent them in a claim against Dr. Sardi. One of the reasons for Mrs. Rorrer going to Duke was to attempt to ascertain the cause of her condition. Dr. Cole was Mrs. Rorrer's treating physician, and he had not been consulted as a "paid expert" merely for the purpose of trying to make out a case against Dr. Sardi. It was my best judgment that it would be much better to use Dr. Cole as a witness than it would be to try to seek out a paid expert from some other state or some other doctor who was not personally acquainted with and who had not treated Mrs. Rorrer, and that Dr. Cole would make a stronger and more convincing witness than would some doctor called in merely to testify even if

> some unknown doctor could be located who would give testimony adverse to Dr. Sardi.

Cooke explains that Cole's deposition, which was received into evidence at trial,

> goes to show that he was fully qualified and experienced as an expert otolaryngologist; was an associate teaching professor at Duke Medical Center; was a practicing surgeon at Duke Hospital; was experienced in performing tonsillectomies, adenoidectomies, laryngectomies, statadectomies, and other operations; was usually in the operating room every day and performed three to five operations per day. At the time of his deposition he had been at the Duke Medical Center for six years, seeing patients from a wide area. As both a practicing and teaching otolaryngologist, and as one of Mrs. Rorrer's treating physicians, it was my judgment that Dr. Cole provided an adequate source of information, and that I did not need to seek consultations with other otolaryngologists. The testimony of Dr. Cole identified Dr. Weng as an expert neurologist and Dr. Farmer as an expert otolaryngologist and associate professor, both at Duke Medical Center. Both saw Mrs. Rorrer. Information from them is in the trial record in the form of their reports and through the testimony of Dr. Cole. Thereby I had the benefit of information from two otolaryngologists from Duke and two neurologists in the persons of Dr. Weng and Dr. Stiefel. None of these four doctors gave to me any indication of any cause of Mrs. Rorrer's problem other than the possible pressure from the clamp used by Dr. Sardi. Dr. Sardi did not come up with any other explanation, and Dr. Sardi was the third otolaryngologist involved with the case. A careful study of the medical records of all of these doctors, and the testimony of Dr. Cole, as well as what Dr. Cole stated to me off the record, caused me to be of the opinion in my best judgment that there was no explanation for the trouble that Mrs. Rorrer had with her tongue other than damage to the hypoglossal nerve from pressure exerted by the clamp used by Dr. Sardi, and further, that the best interest of Mrs. Rorrer in my prosecution of her case against Dr. Sardi would not be served by my seeking consultations with other otolaryngologists. It was my best judgment that Mrs. Rorrer's interest was best served by

my proceeding with her case as I did through the use of Dr. Cole as the plaintiff's expert witness, and when I learned Dr. Cole would not be available for the trial I felt that it was best to introduce his testimony through his deposition rather than again delaying the trial in order to have him testify in person. In my judgment there was no need to seek out other otolaryngologists for consultation or as witnesses, based upon all the information that was available to me.

At the medical malpractice trial the Rorrers both testified that Dr. Sardi admitted to them that pressure from a tongue clamp used during surgery caused the injury to plaintiff's tongue. Sardi denied the admission. Plaintiff also presented testimony of Dr. Stiefel and the deposition of Dr. Cole. Dr. Stiefel testified that upon initially examining plaintiff he believed her paralysis was caused by some injury or involvement to the hypoglossal nerve, the nerve which controls the tongue's movement. On cross-examination, however, Dr. Stiefel stated that after examining a subsequent pathology report on a biopsy of plaintiff's tongue, he found this report to be inconsistent with injury to the nerve. Dr. Sardi's evidence included his own testimony, as well as that of Dr. William M. Satterwhite, Jr., a Winston-Salem otolaryngologist. Dr. Satterwhite was of the opinion that there was nothing Dr. Sardi did or did not do during the surgery which could have damaged plaintiff's tongue.

The jury returned a verdict for Dr. Sardi after deliberating for twenty minutes. On behalf of Mrs. Rorrer, Mr. Cooke moved that the verdict be set aside as being against the greater weight of the evidence, and the trial judge responded that he would like to postpone ruling on the motion because he was "a little surprised in the verdict." Ultimately the motion was denied. Although Cooke filed notice of appeal on behalf of Mrs. Rorrer, appeal was never perfected.

Mrs. Rorrer filed a complaint against Cooke on 26 August 1982 alleging:

8. Defendant was negligent in his representation of Mary Carol Rorrer and failed to apply the high degree of attention and care which he had agreed to in the prosecution of Mary Carol Rorrer's claim in the following respects:

a. he failed to obtain adequate expert consultations from physicians qualified to evaluate plaintiff's claim;

b. he failed to properly investigate, assemble and present relevant evidence at the trial;

c. he failed to properly cross-examine Dr. Sardi concerning his treatment and evaluation of his patient;

d. he failed to present the existing neurological evidence concerning plaintiff's tongue paralysis;

e. he failed to properly cross-examine Dr. Satterwhyte [sic], a defense witness;

f. he failed to properly cross-examine Dr. Steifel [sic];

g. he failed to locate, subpoena and present the testimony of Carol Taylor, another patient of Dr. Sardi's who experienced the same type of tongue paralysis following the same type of tonsillectomy procedure;

h. he failed to properly cross-examine Dr. Sardi concerning statements made by him to plaintiffs [sic] herein;

i. he failed to offer into evidence conversations and office records of Dr. Rosen and failed to subpoena Dr. Rosen or any of his office records;

j. he failed to perfect an appeal from the judgment entered on the verdict even though notice of appeal was given and there was no conversation held between plaintiff and defendant concerning an abandonment of any appeal.

10. As a direct and proximate result of the negligence of defendant, plaintiff Mary Carol Rorrer has been caused to lose her claim and case against Dr. Carl A. Sardi and all compensation and damages that would have been awarded to her by a jury had her claim and case been properly and adequately investigated, assembled and presented at a trial. Such damages would have included adequate and reasonable compensation for plaintiff Mary Carol Rorrer's permanent tongue paralysis and inability to speak, loss of earnings and incomes, medical and nursing expenses, pain and mental anguish for the condition which she will permanently suffer with.

[1] On 1 October 1982 defendant moved for summary judgment and in support thereof filed eleven affidavits of Arthur O. Cooke, exhibits to these affidavits, including medical records and the full transcript of the trial of the case of *Rorrer v. Sardi*, the deposition testimony of Arthur O. Cooke, and the affidavits of W. Owen Cooke, Wayland Cooke, Judge Walter E. Crissman, and attorneys William D. Caffrey, G. Marlin Evans, Perry C. Henson, and Norman B. Smith. On his motion for summary judgment defendant had the initial burden of showing that an essential element of plaintiff's case did not exist as a matter of law or showing through discovery that plaintiff had not produced evidence to support an essential element of her claim. *E.g., Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd*, 297 N.C. 696, 256 S.E. 2d 688 (1979). Plaintiff was then required to come forward with a forecast of evidence showing the existence of a genuine issue of material fact with respect to the issues raised by the movant. *See, e.g., Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). In support of his motion, Mr. Cooke placed into evidence facts showing that there was no actionable negligence with respect to any of the contentions in plaintiff's complaint, that each contested action on his part constituted the good faith exercise of attorney judgment, and that the essential aspect of proximate cause was absent. Mr. Cooke also placed into evidence the testimony of Dr. Cole that there was "no other explanation" for plaintiff's condition than the theory of causation which was presented to the jury.

To shift the burden under the "but for" test of causation, defendant averred that there was no evidence or witness available to or known by Cooke that could have brought about a different result in the underlying action. By discussing thoroughly the actions Cooke took and decisions made during the investigation and trial of plaintiff's case against Dr. Sardi (in the form of sixteen affidavits, Mr. Cooke's deposition, and the trial record and exhibits), we hold that defendant shifted the burden to plaintiff to show something Cooke failed to do that would have changed the result.

Plaintiff submitted the affidavits of Dr. T. Boyce Cole and attorney Tim L. Harris in opposition to Mr. Cooke's motion for summary judgment. Plaintiff contends that her two affidavits raise

genuine issues of material fact with respect to whether Cooke breached the criteria enunciated in *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144, and that therefore the Court of Appeals properly reversed the trial court's entry of summary judgment in favor of defendant. Defendant argues, of course, that summary judgment was properly entered in Cooke's favor because no such issues are raised by plaintiff's affidavits. Dr. Cole's affidavit begins by reciting his involvement with the medical examination and diagnosis of Mary Rorrer's paralysis. It states that before his deposition was taken by Cooke, he and Cooke

> discussed Mr. Cooke's theory of whether the tongue retractor used during the tonsillectomy could have placed sufficient pressure on the tongue to impair blood flow and cause ischemic damage to the tongue. At that time, I told Mr. Cooke that I did not know what caused Mrs. Rorrer's tongue damage without knowing the details of the tonsillectomy procedure and I further told him that I thought it unlikely that a tongue retractor could exert enough pressure to produce this result. Mr. Cooke explained the purpose of a hypothetical question to me and asked me to assume as a hypothetical fact, that sufficient pressure was, in fact, exerted to the tongue by the tongue retractor to impair blood flow. I explained to Mr. Cooke that, assuming an impaired blood flow from whatever cause, it could have produced the tongue damage. However, I reiterated to Mr. Cooke more than once that it was my opinion that a tongue retractor could not place sufficient pressure on the tongue to caused [sic] ischemic damage. This explains my deposition testimony as to why I thought the tongue retractor theory to be an unlikely candidate for the tongue paralysis. I attempted to explain to Mr. Cooke that I could not support such a medical theory when he visited my office before taking my deposition.

The second affidavit plaintiff submitted states the following:

> My name is Tim L. Harris and I am an attorney licensed to practice law in the State of North Carolina. Part of my practice involves the specialty of preparing and trying medical malpractice cases and I have, in fact, tried these types of cases. In reading Mr. Cooke's deposition, I have become familiar with his background, training and experience with

regard to medical malpractice cases and I am further familiar with the standards of practice with attorneys with similar background and experience in communities similar to Greensboro, North Carolina, in the trial of these types of cases in May, 1978. It is my opinion that the standards of practice for attorneys who handle medical malpractice cases in communities similar to Greensboro, North Carolina, are high since preparation and trial of these actions is difficult and requires a thoroughly competent and skilled legal practitioner.

Counsel for Mrs. Mary Carol Rorrer has asked me to review certain records in this action and render my opinion as to whether or not Mr. Arthur O. Cooke complied with the standards of practice for the handling of medical malpractice cases in May, 1978, in communities similar to Greensboro, North Carolina. In preparation for the giving of my opinion, I have reviewed the following matter:

1. A copy of the transcript of the trial before Judge Crissman at the May 29, 1978, session in Guilford County, 74CVS10329;

2. The medical chart containing the notes of Dr. Sardi, the 1971 Moses Cone admission, the notes of Dr. Stiefel and the Duke Hospital records;

3. The affidavit of T. Boyce Cole;

4. The deposition of Mr. Arthur O. Cooke;

5. A statement of Robert Rorrer;

6. The nine affidavits of Mr. Cooke, together with attachments, the affidavit of Mr. Evans, the affidavit of Mr. Caffrey, the affidavit of Judge Crissman, the affidavit of Mr. Hinson [sic], the affidavit of Mr. Norman B. Smith and the affidavit of Wayland Cooke.

7. A copy of the complaint and answer.

Based upon the above information, I conclude that Mr. Cooke sought and received two medical consultations concerning the cause of the tongue paralysis of Mrs. Rorrer and whether or not Dr. Sardi's care and treatment of her met medical standards of care. He first sought the opinion of Dr.

Gray Hunter, a general surgeon in Greensboro who informed him that he had not ever heard of this result following a tonsillectomy before. As Mr. Cooke testified on page 19 of his deposition, he stated that Dr. Hunter told him that he could virtually rule out the possibility of severing or damaging the hypoglossal nerve with an instrument during the surgery. I note on page 20 of his deposition that he did not ask Dr. Hunter to consider the possibility of injuring the tongue with a tongue retractor during this surgery. I note on page 21 of Mr. Cooke's deposition that he testifies that he did not ask Dr. Hunter what could have caused the paralysis to Mrs. Rorrer's tongue. Specifically, and most importantly, I note that Dr. Hunter is a general surgeon, not an otolaryngologist, and that Mr. Cooke testifies on page 22 of his depositions that, "actually I didn't finally come to rest as the theory on which I proceeded in this case until after I had talked to Dr. Cole at Duke." In other words, Mr. Cooke relies greatly on the fact that Dr. Cole lent support to the tongue retractor theory as having caused the tongue damage. However, from a reading of Dr. Cole's medical records, and from his affidavit, it appears clear that Dr. Cole denies having lent any support to a theory that would place any blame on the tongue retractor during this surgery. Apparently, in my opinion, Mr. Cooke tried to convince Dr. Cole that sufficient pressure was placed by the tongue retractor to cause the damage and, apparently from the affidavit of Dr. Cole, Dr. Cole tried to explain to Mr. Cooke that he could not place the blame on the tongue retractor. Even if Mr. Cooke was surprised by the testimony of Dr. Cole during his deposition on August 28, 1975, there was a period of almost two and one-half years after the deposition testimony of Dr. Cole for Mr. Cooke to further investigate the cause and nature of Mrs. Rorrer's problem and to obtain further consultation as whether or not the care given by Dr. Sardi complied with accepted medical standards or not. I also note that, despite Mr. Cooke's knowledge as to the weak nature of the testimony of Dr. Cole contained in his deposition, Mr. Cooke failed to subpoena or secure the testimony of the other attending physicians which she had at Duke Hospital, including neurologists who ran electromyographic studies on her tongue which is an objective basis of proving nerve damage in the tongue and other medical witnesses. Also, I note

that Mr. Cooke failed to read or exhibit to the jurors any of the exhibits which were identified and attached to the deposition of Dr. Cole and it is also clear that some of the more favorable notes of Dr. Cole that would support the claim of Mrs. Rorrer were not identified or introduced into evidence.

On balance, and after having carefully considered the matter and the time of the trial, it is my opinion that the failure of this case was due to the fact that no medical witness supported, in any convincing manner, the medical theory which Mr. Cooke advanced at the trial. This medical theory also hampered Mr. Cooke in the cross-examination of the defendants expert witnesses. Being tied to a medical theory which was not accepted by any medical witness who gave testimony in the case was an overwhelming reason why the jury was not convinced of the merits of Mrs. Rorrer's claim. In my opinion, it is very important in the preparation and trial of a medical malpractice case to have at least one medical witness who enthusiastically and convincingly will support the plaintiff's attorney's medical theory of negligence. In this regard, Mr. Cooke failed to obtain the consultation advice of an otolaryngologist disassociated with Mrs. Rorrer's care for the purpose of thoroughly reviewing her case for the purpose of arriving at a medical theory of negligence. In 1978, there were available medical consulting agencies who could have reviewed Mrs. Rorrer's claim objectively and, if meritorious, supported her with testimony in court. Also, Dr. Cole and the other physicians at Duke may well have been more inclined to support an alternative medical theory rather than the one advanced by Mr. Cooke. Thus, it is my opinion that the representation given by Mr. Arthur O. Cooke to Mrs. Mary Carol Rorrer to and through her trial did not comply with the existing standard for the handling of medical malpractice claims in May of 1978 and communities similar to Greensboro, North Carolina. It is further my opinion that the departures from these standards of care contributed greatly to the loss of Mrs. Rorrer's claim when it was tried.

[2] We hold that the Court of Appeals erred in reversing the trial judge's entry of summary judgment in favor of defendant. Summary judgment is appropriately entered if the movant estab-

lishes that an essential part or element of the opposing party's claim is nonexistent. In a professional malpractice case predicated upon a theory of an attorney's negligence, the plaintiff has the burden of proving by the greater weight of the evidence: (1) that the attorney breached the duties owed to his client, as set forth by *Hodges*, 239 N.C. 517, 80 S.E. 2d 144, and that this negligence (2) proximately caused (3) damage to the plaintiff. As stated in *Williams v. Power & Light Co.*:

> In a negligence action, summary judgment for defendant is proper where the evidence fails to establish negligence on the part of defendant, establishes contributory negligence on the part of plaintiff, or establishes that the alleged negligent conduct was not the proximate cause of the injury. *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976).

36 N.C. App. 146, 147, 243 S.E. 2d 143, 144, *rev'd on factual grounds*, 296 N.C. 400, 250 S.E. 2d 255 (1978). *See* Comment, *Summary Judgment: A Comparison of Its Application by North Carolina and Federal Courts in Negligence Actions*, 9 Wake Forest L. Rev. 523 (1973). In the instant case, as we explain below, plaintiff's affidavits do not sufficiently forecast evidence that would prove that in his representation of plaintiff Cooke failed to conform to the criteria enunciated in *Hodges*. Further, plaintiff's affidavits fail to show that any such alleged negligence proximately caused her any damage.

I. Negligence Aspect

The materials submitted by plaintiff do not raise any material issue of fact with respect to whether Mr. Cooke breached the general duties of care set forth in *Hodges*. In item eight of her complaint against Cooke, plaintiff lists ten acts which Cooke allegedly did not perform in the course of his representation of her. Three of these concern largely pretrial investigation; the remainder allege certain inactions after trial commenced. Neither these allegations nor the affidavits submitted in opposition to defendant's motion for summary judgment establish the existence of a factual question of whether Mr. Cooke negligently misrepresented Mrs. Rorrer in her suit against Dr. Sardi.

[3] The third prong of *Hodges* requires an attorney to represent his client with such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. The standard is that of members of the profession in the same or similar locality under similar circumstances. *See Wright v. Williams*, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975). Expert testimony is helpful to establish what the standard of care as applied in the investigation and preparation of medical malpractice lawsuits requires and to establish whether the defendant-attorney's performance lived up to such a standard. *E.g., Kirsch v. Duryea*, 21 Cal. 3d 303, 146 Cal. Rptr. 218, 578 P. 2d 935 (1978); *Wilkinson v. Rives*, 116 Cal. App. 3d 641, 172 Cal. Rptr. 254 (1981). *See generally* Annot., 14 A.L.R. 4th 170 (1982); Annot., 17 A.L.R. 3d 1442 (1968 & Supp. 1984); McIntosh and King, *Legal Malpractice—Inadequate Case Investigation*, 16 Am. Jur. Proof of Facts 2d 549, 567 (1978); Breslin and McMonigle, *The Use of Expert Testimony in Actions Against Attorneys*, 47 Ins. Couns. J. 119 (1980); Hutcheson and Monroe, *Actions Against Attorneys for Professional Negligence*, 14 Am. Jur. Trials 265, 289-91 (1968); McCain, *The Malpractice Trial—Causation, Liability and Damages*, in *North Carolina Professional Malpractice* 340, 343 (Wake Forest L. School 1983). *Cf., e.g., Stevenson v. Nauton*, 71 Ill. App. 3d 831, 390 N.E. 2d 53 (1979); *Dorf v. Relles*, 355 F. 2d 488 (7th Cir. 1966). In opposition to defendant's motion for summary judgment, plaintiff submitted her complaint, the affidavit of Dr. Cole, and the affidavit of one attorney, Tim Harris, who testified as an expert with respect to Cooke's preparation and trial of Mrs. Rorrer's claim. Because it fails to state what the standard of care to which Cooke was subject required him to do, we hold that the affidavit of Harris is insufficient to forecast proof that Mr. Cooke's preparation for and conduct of trial was such that Cooke breached his duty of due care and diligence to Mrs. Rorrer. The closest the Harris affidavit comes to setting forth a standard of care for the handling of a medical malpractice case is the statement that "the standards of practice . . . are high." Although the Harris affidavit does outline several things that Cooke did not do and that presumably Harris would have done had he tried Mrs. Rorrer's case against Dr. Sardi (and tried it with the benefit of hindsight gained by the instant suit), the affidavit nowhere states that Cooke's inaction violated a standard of care required of similarly

situated attorneys. Harris's statement that "[i]n my opinion, it is very important in the preparation and trial of a medical malpractice case to have at least one medical witness who enthusiastically and convincingly will support the plaintiff's attorney's medical theory of negligence"[2] is merely an opinion. The affidavit does not state that the standard of care in such cases required Cooke to obtain such a witness. The mere fact that one attorney-witness testifies that he would have acted contrarily to or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant's negligence. The law is not an exact science but is, rather, a profession which involves the exercise of individual judgment. Differences in opinion are consistent with the exercise of due care. Similarly, Harris's allegations that "[i]n 1978 there were available medical consulting agencies who could have reviewed Mrs. Rorrer's claim objectively and, if meritorious, supported her with testimony in court . . . [and] the . . . physicians at Duke may well have been more inclined to support an alternative medical theory rather than the one advanced by Mr. Cooke" do not aver that the standard of care by which Cooke's conduct is to be measured required him to pursue this line of investigation. All we are left with is a conclusory statement that "it is my opinion that the representation given by Mr. Arthur O. Cooke to Mrs. Mary Carol Rorrer to and through her trial did not comply with the existing standard for the handling of medical malpractice claims in May of 1978 and communities similar to Greensboro, North Carolina." Given that the Harris affidavit was the only item[3] presented to the trial judge on behalf of plaintiff's contention that Cooke breached his duty of care to Mrs. Rorrer in (1) investigating her claim before trial and (2) conducting the trial itself, we hold that plaintiff failed to forecast any evidence that Mr. Cooke in fact breached his duty of reasonable care and diligence in the prosecution of Mrs. Rorrer's suit against Dr. Sardi.

2. We note that such may also be the case in an action based on legal malpractice predicated upon a theory of negligence.

3. The affidavit of Dr. Cole does not support plaintiff's contention that Cooke breached a duty to obtain additional expert testimony. Plaintiff did not establish that Cooke had any such duty, and the statements in Cole's affidavit are consistent with those he made to Cooke as the case against Sardi was being prepared.

[4] We further hold that plaintiff's affidavits fail to establish material issues of fact with respect to the second prong of the *Hodges* test.

> Every counsel in practice knows that daily he is faced with the question whether in his client's interest he should raise a new issue, put another witness in the box, or ask further questions of the witness whom he is examining or cross-examining. That is seldom an easy question but I think that most experienced counsel would agree that the golden rule is —when in doubt stop. Far more cases have been lost by going on too long than by stopping too soon. But the client does not know that. To him brevity may indicate incompetence or negligence and sometimes stopping too soon is an error of judgment. So I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity, which would not only be harmful to the client but against the public interest in prolonging trials. Many experienced lawyers already think that the lengthening of trials is not leading to any closer approximation to ideal justice.

Rondel v. Worsley, 3 All E.R. 993, 999 (H.L. 1967). There is no evidence of record that Mr. Cooke failed to exercise his best judgment in good faith at every decision point arising in the preparation for and trial of Mrs. Rorrer's suit against Dr. Sardi. Good faith is an objective, not subjective, standard. Defendant's affidavits establish that before making each decision involved in the suit—such as whether to consult additional witnesses or to pursue further cross-examination of a given witness—Cooke was informed of the pertinent legal issues and strategies and made decisions based only on the welfare of his client and her suit. Absent any evidence of a standard of care with which Cooke failed to comply and absent a showing that Cooke failed to exercise his best, informed judgment, he is immune from any allegedly erroneous judgmental decisions made during the preparation and trial of Mrs. Rorrer's lawsuit against Dr. Sardi. *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144. *See Rondel v. Worsley*, 1 All E.R. 467 (Q.B. 1966), 3 All E.R. 657 (C.A. 1966), 3 All E.R. 993 (H.L. 1967); *Stricklan v. Koella*, 546 S.W. 2d 810 (Tenn. Ct. App. 1976), *cert. denied*, 546 S.W. 2d 810 (1977); Haskell, *The Trial Lawyer's Immunity from Liability for Errors of Judgment*, 1979 The Trial

Lawyer's Guide 87. *Cf. In re Watts and Sachs*, 190 U.S. 1, 47 L.Ed. 933 (1903); *Quality Inns v. Booth, Fish, Simpson, Harrison and Hall*, 58 N.C. App. 1, 292 S.E. 2d 755 (1982). *See generally* Beck, *Legal Malpractice: Trial Lawyers and the Error-In-Judgment Rule*, 52 Ins. Couns. J. 50 (January 1985). As plaintiff has not come forward with any evidence that would support her claim that Cooke's representation of her was negligent, summary judgment was properly entered against her.

Even assuming arguendo that she had set forth materials showing the existence of issues of fact with respect to Cooke's alleged negligence, we hold that Mrs. Rorrer's affidavits do not forecast evidence that would show that Cooke's alleged negligence was a proximate cause of the loss of her suit against Sardi.

II. PROXIMATE CAUSATION

[5] Preliminarily, however, we must address plaintiff's contention that the issue of the proximate causation of Mrs. Rorrer's alleged damages by virtue of the loss of the medical malpractice suit is not before this Court. Plaintiff contends that because defendant's motion for summary judgment did not raise causation as an issue, plaintiff, as the responding party, was not required to bring forward affidavits or other materials addressing this issue. Defendant's motion is set forth as follows:

> The defendant, through counsel, hereby renews his motion, as set forth in his first further defense in his answer filed herein, for dismissal of this action, with prejudice, for failure to state a claim upon which relief may be granted, under Rule 12(b)(6) of the Rules of Civil Procedure.
>
> In the alternative, the defendant, through counsel, respectfully moves for summary judgment, in his favor, pursuant to the provisions of Rule 56 of the Rules of Civil Procedure, and as grounds therefor shows unto the court that there is no genuine issue as to any material fact as to there being no negligence on the part of the defendant in relation to the preparation and prosecution of the claim of Mary Carol Rorrer against Dr. Carl Sardi. Affidavits and the full record of the trial referred to in the plaintiff's complaint were filed in an earlier action involving the same plaintiff and this same

> defendant and the same subject matter, this being 81CVS198, in which the plaintiff took a voluntary dismissal on August 31, 1981. The defendant request[s] that these affidavits and the full record of the trial of the case against Dr. Sardi be considered by the court in support of this motion, along with any additional affidavits or other materials that may be filed herein.

In support of the motion defendant submitted many affidavits, a number of which specifically address the issue of whether the alleged negligence of Cooke was a proximate cause of Mrs. Rorrer not obtaining a jury verdict against Dr. Sardi. Defendant thus placed the issue of causation squarely before the trial court, and it became incumbent upon plaintiff to submit affidavits in opposition to this and other issues so presented. If plaintiff was unprepared to introduce affidavits with respect to causation by the time of the hearing on defendant's motion for summary judgment, she should have moved for a continuance under Rule 56(f) of the North Carolina Rules of Civil Procedure:

> (f) *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As she did not do so, it is deemed that plaintiff was satisfied with the strength of her opposition to defendant's motion.[4] As proximate cause was an issue before the trial court, it is also now properly before this Court.

[6, 7] Generally, the principles and proof of causation in a legal malpractice action do not differ from an ordinary negligence case.

4. We note that plaintiff originally filed this action against Arthur O. Cooke, W. Owen Cooke, and A. Wayland Cooke on 23 February 1981. When defendants' motion for summary judgment came on for hearing on 31 August 1981, plaintiff took a voluntary dismissal of that action without prejudice. The instant case was refiled against Arthur O. Cooke on 26 August 1982, and hearing on defendant's motion for summary judgment was held during the 10 January 1983 session of superior court. It would thus appear that plaintiff had sufficient opportunity to prepare whatever materials she wished to submit in opposition to defendant's motion.

See Murphy v. Edwards and Warren, 36 N.C. App. 653, 245 S.E. 2d 212 (Mitchell, J.), *disc. rev. denied*, 295 N.C. 551 (1978); Annot., 45 A.L.R. 2d 5 (1956). To establish that negligence is a proximate cause of the loss suffered, the plaintiff must establish that the loss would not have occurred but for the attorney's conduct. *Maryland Casualty Co. v. Price, Smith, Spilman & Clay*, 224 F. 271 (S.D. W. Va. 1915), *aff'd*, 231 F. 397 (4th Cir. 1916). *See generally* R. Mallen and V. Levitt, *Legal Malpractice* § 102 (2d ed. 1981); D. Meiselman, *Attorney Malpractice: Law and Procedure* § 3.3 (1980 & Supp. 1984); Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. Va. L. Rev. 225 (1958). Where the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to his attorney's negligence, to prove that but for the attorney's negligence plaintiff would not have suffered the loss, plaintiff must prove that:

(1) The original claim was valid;

(2) It would have resulted in a judgment in his favor; and

(3) The judgment would have been collectible.

McIntosh and King, *supra*, 16 Am. Jur. Proof of Facts 2d 549, 571; D. Meiselman, *supra*, §§ 3.4, .5; Annot., 45 A.L.R. 2d 5, § 7 (1956). *See Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962); *Blue Ridge Sportcycle Co. v. Schroader*, 60 N.C. App. 578, 299 S.E. 2d 303 (1983).

[8] We agree with defendant that plaintiff's contention that Mr. Cooke should have done something more than he did in preparation for trial is without meaning or significance absent the establishing of (1) specific evidence that Cooke could have gathered and, under the prevailing standard, should have gathered and presented at trial, and (2) its impact on the outcome of the trial against Dr. Sardi. The materials produced by plaintiff in response to defendant's motion for summary judgment have failed to forecast any evidence showing that had Mr. Cooke done anything differently plaintiff would have been successful in her litigation against Dr. Sardi.

Plaintiff has failed to show: who should or could have been consulted; what any person consulted would have said; whether any person consulted would have supported the pressure theory; whether any other theory or explanation for plaintiff's injury has

ever existed; whether any person consulted would have supported any other theory; or whether any person consulted would have been available to testify. We note that Dr. Cole's affidavit filed in opposition to defendant's motion for summary judgment fails to offer any alternative explanation for Mrs. Rorrer's injury. The Harris affidavit is insufficient in the same respect. Plaintiff has failed to show that there was any other or better theory or any additional admissible evidence other than what Mr. Cooke considered and used.

We further note that Harris's conclusory statement that the (alleged) departure from standards of care "contributed greatly to the loss of Mrs. Rorrer's claim when it was tried" is deficient in several respects. Not only is it not based upon specific facts, see *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982), it does not aver that but for Cooke's negligence Mrs. Rorrer would have prevailed in her suit against Dr. Sardi. The affidavit offers no specific facts suggesting how Cooke's alleged departure from the (again unenunciated) standard of care in prosecuting medical malpractice suits could or might have caused a jury to decide against Mrs. Rorrer, or how further preparation and investigation by Cooke would have produced a different result. Therefore, no genuine issue of material fact existed with respect to the issue of whether the loss of Mrs. Rorrer's suit against Dr. Sardi was proximately caused by defendant's negligence.

Summary judgment was properly entered for defendant. The decision of the Court of Appeals is

Reversed.

TEDDY RAY BRYANT AND OMA P. BRYANT v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 274PA84

(Filed 7 May 1985)

1. **Insurance § 136— fire insurance—instructions on affirmative defense of misrepresentation**

The trial court correctly charged the jury on an insurance company's affirmative defense of misrepresentation.

2. Insurance § 136— fire insurance—affirmative defense of misrepresentation—judgment n.o.v. improper

The trial court erred by granting defendant insurance company's motion for judgment n.o.v. on the issue of misrepresentation during the investigation of plaintiffs' claim where the evidence was sufficient to support a jury finding that plaintiffs did not swear falsely or willfully make material misrepresentations of their marital status and financial condition during the investigation of their claim. The male plaintiff's original misstatement concerning his marital status was corrected in a later sworn statement, and there was a question of whether his marital status was material. The male plaintiff's limited education, the extensive questioning, and his difficulty in understanding questions presented a question for the jury as to whether he had related his financial circumstances to the best of his ability, considering the average person's ability to remember figures and amounts with precision. G.S. 58-176(c).

3. Rules of Civil Procedure § 59— new trial—Rule 59(a)(7) and (8) distinguished—no abuse of discretion

In an action to collect under a fire insurance policy, the Court of Appeals erred by reversing the trial judge's grant of a new trial. Defendant's motion was made pursuant to G.S. 1A-1, Rule 59(a)(7), rather than Rule 59(a)(8), because defendant did not object to or specify any error of law, the trial judge in his order made no intimation that he was granting a new trial for an error in law, and there was no specific error identified in the record or in the judge's order. Appellate review under Rule 59(a)(7), allowing new trials for insufficiency of evidence to justify the verdict, is limited to whether the trial judge abused his discretion; a review of the record in this case indicates no manifest abuse of discretion. G.S. 58-176(c).

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

ON discretionary review pursuant to G.S. 7A-31 of a unanimous decision of the Court of Appeals, 67 N.C. App. 616, 313 S.E. 2d 803 (1984), reversing an order by *Hairston, J.*, entered at the 13 September 1982 civil session of SURRY County Superior Court, granting defendant's motions for judgment notwithstanding the verdict and to set aside the jury verdict and award a new trial.

Gardner, Gardner, Johnson and Donnelly, by Gus L. Donnelly for plaintiff-appellee.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by W. Thompson Comerford, Jr., and G. Gray Wilson for defendant-appellant.

FRYE, Justice.

This appeal presents two separate and distinct issues that are procedural in nature. The first issue is whether the Court of Appeals erred in reversing the trial court's entry of judgment notwithstanding the verdict in favor of defendant on two of the issues submitted to the jury. The answer is no. The second issue is whether the Court of Appeals erred in reversing the trial court's alternative grant of a new trial for defendant. The answer is yes.

FACTS

On 20 September 1980, defendant, Nationwide Mutual Fire Insurance Company, issued a fire insurance policy insuring the dwelling and contents owned by plaintiffs, Teddy Ray and Oma P. Bryant. The insured property was located near Pinnacle, within Stokes County. At approximately 4:30 a.m. on 14 April 1981, while plaintiffs' policy was in full force and effect, plaintiffs' insured dwelling and contents were totally destroyed by fire. The evidence at trial tended to show that Mr. Bryant had taken his family to his brother-in-law's house in Mt. Airy, approximately twelve miles from Pinnacle, the evening before. One of the reasons, according to Mr. Bryant, for going to Mt. Airy was to work on a painting job for a Mrs. Grover Hyatt; however, Mrs. Hyatt testified and denied ever hiring or even knowing Mr. Bryant. Plaintiffs were notified of the fire at approximately 6:30 a.m. the morning of 14 April 1981. At approximately 10:00 a.m. that same morning, a detective and arson expert with the State Bureau of Investigation arrived at the scene of the fire to investigate its origin and cause. It was the opinion of the SBI detective that the fire was incendiary in nature, *i.e.*, a fire nonaccidental in nature and that is intentionally caused.

Roger Cranford, a large loss adjuster for Nationwide, testified that he was contacted the following morning about the fire and that the fire was being investigated by the local authorities. After receiving a company report, Mr. Cranford contacted Mr. Bryant and conducted a recorded telephone interview on 16 April 1981. Mr. Bryant expressly consented to the interview being recorded. According to Mr. Cranford, the purpose of this interview was "to try and determine where the insured was, possibly how the fire happened, and financial conditions of the insured."

During this telephone interview, Mr. Bryant was asked general questions regarding his personal background and family, the approximate value of his home and its contents, circumstances surrounding the fire and its possible cause, and the value of his assets. Although he was not specifically asked to enumerate any debts, he was asked whether his mortgage was current and if he owed "anybody any money that they've come and asked you for . . . ." Additionally, Mr. Bryant stated that he was married to Oma P. Bryant, when, in fact, he was still legally married to his first wife, Eunice. Teddy and Oma Bryant had lived together for fifteen years and were the parents of three children. In May 1982, approximately one year later, they did become legally married.

On or about 3 June 1981, plaintiffs prepared and submitted a proof of loss form to Nationwide. On the proof of loss form plaintiffs listed three mortgages, Bank of Pilot Mountain, J. R. Jessup, and Ronnie Bennett, as encumbrances on the insured property. No other portion of this form required that the insured list additional outstanding debts. Afterwards, on 1 July 1981, a sworn statement was obtained by Nationwide's attorney from both plaintiffs. During this question-and-answer period, plaintiffs estimated their debts to be approximately $22,293. This sum included the three mortgages that had previously been listed on plaintiffs' proof of loss form dated 3 June 1981, plus five outstanding judgments. Mr. Bryant also stated that he and Oma had never been legally married.

On 14 August 1981, plaintiffs instituted an action against Nationwide, claiming that defendant "has failed and refused to pay to the plaintiffs the amounts due to them under its policy of insurance . . . ." Nationwide denied coverage in its answer and alleged *inter alia* that plaintiffs deliberately set the fire and made repeated material misrepresentations to defendant during investigation of the fire. Nationwide based its defense of misrepresentation on the answers given by plaintiffs during the foregoing interview sessions and the results of their independent investigations of the claim.

During May 1982, after this action was commenced and approximately five months prior to trial, Nationwide took the deposition of Mr. and Mrs. Bryant. These depositions were not introduced into evidence at trial but were referred to during cross-

examination of plaintiffs. In this pre-trial deposition, Mr. Bryant revealed for the first time the existence of a disputed debt in the amount of $5,000 or $6,000 that he owed to a Mrs. Effie Stanley. At trial Mr. Bryant testified that the amount he owed to Mrs. Stanley should actually be reduced by $3,000 and offered the following explanation:

> Mrs. Stanley wanted her son—none of her kids lived in the country near her, they all live in other states. She wanted to buy my house for her son. She paid me three thousand dollars to hold the house for her for a period of, I don't know, I think maybe sixty days. She gave me the three thousand dollars. Her son couldn't come up with the money to buy the house with, which I was not obligated to give her the three thousand back, but I decided it would be wrong for me to keep it. So I just considered myself owing her that three thousand back . . . .

The evidence at trial further tended to show that prior to the fire Mr. Bryant actually owed an undisputed amount of approximately $27,000,[1] comprised primarily of debts in excess of $25,000 previously revealed by plaintiffs during pre-trial interviews. Additional debts totalling approximately $1,300, which had not been referred to by plaintiff in earlier interviews, were disclosed at trial. At the close of plaintiffs' evidence, defendant moved for a directed verdict, which was denied by the trial judge. At the close of all the evidence, both parties' motions for directed ver-

1. The amount owed ranged from this undisputed low to a high of approximately $50,000, a figure that included certain amounts allegedly owed by Mr. Bryant but subject to dispute and uncertainty. The largest amount in dispute, approximately $19,500, was the subject of a pending breach of contract action against Mr. Bryant. There was testimony tending to show that Mr. Bryant had leased a car wash from the J. A. Eads Company on 10 October 1980, and thereafter defaulted by failing to pay the monthly rent. Defendant stipulated that at the time of the fire he owed $1,660 to the company for past rental payments. Defendant argues that the remaining rental payments due under the lease constituted a "possible total liability" owed by defendant of over $19,000. However, plaintiff denied liability for future rental payments, contending that the J. A. Eads Co. had "misled me on the car wash completely," thus breaching the provisions of the lease. The total amount due under this lease is speculative in nature and has not been reduced to judgment. Therefore, such sum should not be considered a current debt owed by Mr. Bryant at the time of the fire, since Mr. Bryant's liability, if any, for this sum had not been legally determined.

dicts were denied. The trial judge submitted three issues to the jury, which were answered as follows:

1. Did the plaintiffs Teddy Ray Bryant and Oma P. Bryant burn or procure the burning of their dwelling?

ANSWER: NO

2. Did the plaintiffs Teddy Ray Bryant and Oma P. Bryant swear falsely or make material misrepresentations in connection with any matter pertinent to their claim for insurance proceeds?

ANSWER: NO

3. What amount of damages, if any, are the plaintiffs entitled to recover of the defendant?

(a) For real property $34,750

(b) For personal property $12,500

(c) For additional living expenses $0

After return of the jury verdict for plaintiffs, plaintiffs moved for judgment notwithstanding the verdict on issue 3(a), or in the alternative, for a new trial on that same issue. This motion was denied by the trial judge. Defendant's motions for judgment notwithstanding the verdict and a conditional new trial were allowed "as to the second and third issues on the ground that the verdict is contrary to the greater weight of the evidence and that defendant is entitled to judgment as a matter of law." Furthermore, the court ordered a new trial as to those two issues in the event that judgment notwithstanding the verdict in defendant's favor was subsequently vacated or reversed. Plaintiffs appealed to the Court of Appeals. That court reversed the judgment of the trial court and remanded the case with instructions that judgment for the plaintiffs be entered on the jury's verdict. Defendant filed a petition for rehearing with the Court of Appeals, which was denied. This Court subsequently granted defendant's petition for discretionary review pursuant to G.S. 7A-31.

I.

RULE 50: JUDGMENT NOTWITHSTANDING THE VERDICT

Rule 50 of the North Carolina Rules of Civil Procedure is entitled: *Motion for a directed verdict and for judgment notwithstanding the verdict.* It provides in pertinent part as follows:

> (b) *Motion for Judgment Notwithstanding the Verdict.*—
>
> (1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case, the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. . . .

Defendant argues that the Court of Appeals should not have reversed the trial judge's entry of judgment notwithstanding the verdict on the second and third issues pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure. The Court of Appeals did not directly address nor advance its reasoning for reversing the trial court's entry of judgment notwithstanding the verdict in favor of defendant. Although the Rule 59 motion in the alternative to set aside the verdict and for a new trial was dealt with in that court's opinion, the only apparent justification for reversing the Rule 50(b) motion seems to be because "[i]t is clear that there was sufficient evidence to support the jury's verdict . . . ." *Bryant v. Nationwide Mutual Fire Insurance Co.*, 67 N.C. App. 616, 622, 313 S.E. 2d 803, 808 (1984). It thus becomes the duty of this Court to review the applicable law and determine whether the trial judge erred in granting defendant's motion pursuant to Rule 50(b).

Our analysis begins with a review of certain basic principles applicable to a Rule 50(b) motion. First, such a motion is essential-

ly a renewal of an earlier motion for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Accordingly, if the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977) (cited in 90 A.L.R. 3d 525). In considering any motion for directed verdict, the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977). This Court has also held that a motion for judgment notwithstanding the verdict is cautiously and sparingly granted. *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *rev'd on other grounds*, 283 N.C. 277, 196 S.E. 2d 262 (1973). It is also elementary that the movant for a Rule 50(b) motion must make a motion for directed verdict at the close of all the evidence. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). And finally where, as in the case *sub judice*, defendant has the burden of proof on its affirmative defense of misrepresentation, the granting of a directed verdict or judgment notwithstanding the verdict will be more closely scrutinized. *North Carolina National Bank v. Burnette*, 38 N.C. App. 120, 247 S.E. 2d 648 (1978), *rev'd on other grounds*, 297 N.C. 524, 256 S.E. 2d 388 (1979).

In the present case, the statutory provision of G.S. 58-176(c) was controlling on Issue 2, that is, whether plaintiffs had made material misrepresentations that would void the policy. That statute provides:

> This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or in the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

[1] Generally, this is referred to as a fraud and false swearing provision. *See* R. Keeton, *Basic Text on Insurance Law* § 7.2(b)

(1971). As is true in the present case, many insurers raise misrepresentation as a basis for an affirmative defense and seek to void the policy on that ground. R. Keeton, *supra.* To prevail in its defense, the insurance company must prove the insured made statements that were: 1) false, 2) material, and 3) knowingly and willfully made. *Watkins v. Continential Insurance Companies*, 690 F. 2d 449, 451 (5th Cir. 1982). Relative to these elements, the trial judge charged the jury as follows:

> Now, ladies and gentlemen of the jury, the second issue reads, did the plaintiffs, Teddy Ray Bryant and Oma P. Bryant swear falsely or make material misrepresentations in connection with any matter pertinent to their claim for insurance proceeds? On this issue, likewise, the burden of proof lies on the defendant. And likewise you will answer this issue either yes or no.
>
> . . . .
>
> Now, the defendant, Nationwide Mutual Fire Insurance Company, contends that the plaintiffs made material representations with regard to the insured premises, and that [sic] their interest therein, as well as the value of the premises. The defendant therefore contends that these material representations void the policy and alleviate Nationwide from any liability. Conversely, of course, the plaintiffs contend that they did no such thing and that if they made any misrepresentations they were simply innocent mistakes and that they were not intentional and that they were not material.
>
> . . . .
>
> Under the law a willful and intentional misrepresentation of the extent of the fire loss, or a willful and intentional misrepresentation as to the interest of the insured in the premises, or the value thereof, with the intention of deceiving the insurer, will preclude any recovery on the policy. I instruct you, members of the jury, that a mere overstatement of value of the goods or premises lost in a fire, or an error in judgment with respect to their value, is not sufficient to prove an intentional misrepresentation. On the other hand, if the insureds knowingly made false statements to Nationwide with regard to a material matter, the law infers or presumes that the insured intended to deceive the insurer, Nationwide.

Further, I instruct you that it is not necessary for the insurer, Nationwide, to be actually deceived, prejudiced, or injured by the false or fraudulent statements made by the insured in order to void the policy of insurance. Therefore, you need not be persuaded that Nationwide relied or acted upon the statements of the insured to its detriment, it being sufficient to void the policy that the plaintiffs made material representations knowing them to be false. Further, if the plaintiffs failed to disclose an encumbrance or lien existing on the policy or misled the defendant with regard to its existence, then the policy of insurance is void and the plaintiffs are not entitled to recover from the defendant.

Now, members of the jury, a misrepresentation is material if the facts misrepresented would reasonably be expected to influence the decision of the defendant insurance company in investigating, adjusting or paying the claim of the plaintiffs.

. . . .

Finally with respect to the second issue, I instruct you that if you are persuaded by the greater weight of the evidence that the plaintiffs made material misrepresentations to Nationwide, the defendant, with the intent to deceive the defendant, Nationwide, or swore falsely in connection with the policy or the house or the claim, then you should answer the second issue yes in favor of the defendant. However, if you are not so persuaded by the greater weight of the evidence or you are unable to tell where the truth lies, then you should answer the second issue no in favor of the plaintiffs.

We consider the substance of these instructions, read in context with the remaining charges to the jury, to accurately explain the applicable law for consideration by the jury. Furthermore, we note that neither party contends that any of the trial court's instructions were erroneous. Hence, the pivotal question to be resolved is simply whether the evidence was of such a character that reasonable men could form divergent opinions of its import, thereby justifying submission of the issues to the jury. *Brewer v. Majors*, 48 N.C. App. 202, 268 S.E. 2d 229, *disc. review denied*, 301 N.C. 400, 273 S.E. 2d 445 (1980).

[2] A review of the evidence relative to the issue of fraud and false swearing convinces this Court that such evidence, when viewed in a light more favorable to the plaintiffs, the nonmovants, was sufficient to support a jury finding that plaintiffs did not swear falsely or willfully make material misrepresentations during the investigation of their claim by defendant. There was clearly conflicting evidence as to whether plaintiffs knowingly and willfully made material misrepresentations of fact, all essential elements to prove fraud and false swearing.

Defendant argues that plaintiffs' misrepresentation of their marital status and financial condition at the time of the fire should void coverage pursuant to G.S. 58-176(c). The evidence established that Mr. Bryant did misrepresent his marital status when he first spoke with defendant's adjuster during the initial telephone interview. However, this was corrected in Mr. Bryant's subsequent sworn statement of 1 July 1981. Defendant contends that such a misrepresentation was material because it led defendant to assume that the risk insured was entireties property rather than property held as tenants in common. It is true that the deed to plaintiffs' dwelling was in the names of both Mr. and Mrs. Bryant as tenants in common. As tenants in common, it is clear that both would have an insurable interest in the property.

First, since Mr. Bryant corrected his original misstatement in his later sworn statement taken by defendant on 1 July 1981, the jury could reasonably question whether the prior statement constituted any misrepresentation whatsoever. Secondly, if the jury did consider the statement a misrepresentation, there is a question of whether it was material in nature. Certainly the jury could have reasonably concluded that the question of marriage or nonmarriage could not have reasonably influenced defendant's decisions in investigating, adjusting, or paying the claim.

Further evidence established that the Bryants fully informed defendant of the existence of $22,293 in debts and obligations existing prior to the time of the fire. During the 16 April 1981 telephone interview, defendant's first contact with the insured, Mr. Bryant was not asked to estimate or enumerate any of his debts. Despite defendant's failure to specifically ask about debts, defendant contends that the initial telephone interview revealed material misrepresentations on the part of Mr. Bryant when he was asked the following:

Q. Okay, are you current with your mortgage?

A. I guess, well, I've got one payment behind.

Q. How about the rest of your financial status, sir? In other words, do you owe anybody any money that they've come and asked you for or anything of that nature?

A. No sir.

Q. Okay, do you have any other bills?

A. No, other than just normal bills.

During trial, Mr. Bryant, when confronted on cross-examination with the above statements given during the telephone interview with Mr. Cranford, stated and explained as follows:

Q. And you remember talking to Mr. Roger Cranford and giving him a recorded statement on April 16, 1981?

A. Yes, sir. Yes, sir.

. . . .

Q. Do you recall being asked by him, this question, "Okay, do you have any other bills?" Do you remember that question?

. . . .

Q. The question, "Okay, do you have any other bills?" And your answer, "No, other than just normal bills."

A. That was the embarrassing question that Mr. Cranford asked me.

Q. That was an embarrassing question?

A. Yes. And I was thinking Mr. Cranford meant light bills, water bills.

Q. Well, he had already asked you about your light bills earlier, hadn't he?

A. That's what I thought he was still getting at.

. . . .

A. Well, it was in still the frame of my mind that he was asking about the bills that I received every month.

. . . .

Q. Now, you had some other debts also, didn't you, sir, at the time this fire occurred?

A. What kind of debts you talking about?

Q. Well, debts you didn't mention to Mr. Cranford when he asked you about other bills you had outstanding. About Boles Hardware Company, Yadkin Well Company, Dixie Concrete Company. Do you recall those?

A. He didn't ask me about them.

Q. About outstanding bills you had?

A. He may have said something about outstanding bills, but it certainly wasn't in my mind that he was wanting me to tell him who I owed. I mean like Dixie Concrete. That wasn't the picture I was getting on what he was asking me.

. . . .

Q. And you never told Mr. Cranford or Mr. Comerford one word at any time about J. A. Eades Company, did you? Not on the recorded statement, not on the sworn statement, and not when he took your deposition just this summer. You didn't even mention it then, did you?

A. Well, I wasn't trying to hide it.

Q. Well, when they asked you about debts you had outstanding, you didn't tell them about it, did you?

A. Well, I didn't think about it.

A jury could infer from the foregoing testimony that Mr. Bryant's statements were not willful or knowing. "To 'willfully misrepresent' is to make a statement deliberately and intentionally knowing it to be false." 12A Appleman, *Insurance Law and Practice* § 7300 at 404 (1981). The trial judge's instructions to the jury on the element of willfulness was essentially in conformance with the foregoing definition. Such an inference by the jury could very well be attributable also to the limited education of Mr. Bryant. Mr. Bryant in fact testified on cross-examination that he had completed formal schooling only through the fifth grade. Thus, the jury was entitled to consider what role, if any, Mr. Bry-

ant's limited education might have played in his understanding of defendant's question during the course of the investigation. His difficulty in understanding the questions propounded to him by defendant's attorneys is apparent in other areas of his testimony.

Q. Have you got any debts outstanding right now?

A. Now?

Q. Other than those two?

A. Not outstanding, no.

Q. Okay. You don't owe anybody any money?

A. Oh, yes. I owe some people; sure.

Q. Okay. Could you tell me who these people are?

A. Well, I owe the Yadkin Well Company, and I owe Dixie's Concrete Company, and I owe Harold Boles.

Mr. Bryant next correctly indicated the amounts owed to these three creditors.

Bearing on the element of willfulness, the jury may have inferred from the foregoing testimony that Mr. Bryant did not even understand the use of the word "outstanding" in relation to debts. During trial, Mr. Bryant further testified as follows:

Q. Do you recall being asked in your sworn statement here, now this is the one Mr. Comerford took in July, the first day of July, right after your fire. Question, "Okay, have you ever been involved in any lawsuits?" Answer, "No, sir."

A. That's right. I answered that, I hadn't been involved in any lawsuits.

Q. As a matter of fact, seven lawsuits had been filed against you, six of which had been reduced to judgment, at the time this fire occurred, isn't that right?

A. They were filed against me, but what I was thinking Mr. Comerford meant had I ever appeared in court.

. . . .

Q. But that's not what he asked you, is it, sir? He asked you if you had ever been involved in any lawsuits, and you said no.

A. I might have, but to the best of my knowledge I had not been involved in no lawsuit.

. . . .

And during further testimony:

A. Let's go back up here and let me explain this thing.

Q. All right, you go ahead and explain.

A. All right, sir. "Okay, have you ever been involved in any lawsuit?" I said, "No, sir." Which in my way of thinking he meant had I been into court into a lawsuit. I can't, I've got a fifth grade education. I can't compete with you lawyers.

. . . .

Q. The next question, "All right, sir, but you have never had a civil action brought against you to recover any money?" And your answer, "No," is that right?

A. To the best of my knowledge it wasn't. That was a true answer.

. . . .

Q. You had seven of them against you at the time, didn't you?

A. I had never been to court, is what I was thinking you was meaning when I said, "No, sir," to the lawsuit.

Q. But you had seven of them pending against you at the time, didn't you?

A. Well, the lawyers' terms they are lawsuits, that's the opinion—

From this testimony, a jury could have concluded that Mr. Bryant did not understand or have any concept of what a civil action or lawsuit meant when these questions were asked of him. Thus, the jury may have reasonably inferred that Mr. Bryant did not willfully and knowingly misrepresent any facts, even if they were material. The jury was certainly at liberty to reject defendant's contention that Mr. Bryant willfully concealed or misrepresented facts regarding lawsuits and his finances.

During the telephone interview, sworn statement, pretrial deposition, and trial, Mr. Bryant was asked repeatedly by defense counsel whether his creditors were "pressing" him for payment. Mr. Bryant's response to intensive questioning regarding his denial of being pressured by his creditors and his interpretation of the meaning of such questions are illustrated by the following testimony:

> Q. Sir, do you recall being asked this question on your deposition, "Well, you were receiving quite a bit of pressure from your creditors along around April of 1981, were you not, sir?" And your answer, "No, sir, I—none unusual. Nobody was trying to foreclose or anything like that."
>
> A. That's exactly right.
>
> Q. Next question, "You would say that there was nothing unusual about your financial situation as of April, 1981?" And your answer, "I'd say, well, I would say I owed people but they wasn't pressuring me to, you know, very much about it."
>
> A. Uh, huh. That's—I've stated it true.

Following this same theme of questioning, Mr. Bryant was specifically asked about judgments:

> Q. Dixie Concrete Company also had a claim against you and reduced it to judgment for fourteen hundred eighty-eight dollars and fifty-three cents, isn't that right?
>
> A. Yes, sir.
>
> Q. They did that before this fire occurred, didn't they?
>
> A. I suppose so.
>
> . . . .
>
> Q. And you got pressured from Dixie Concrete to pay that bill, didn't you?
>
> A. No more pressure than just what he had filed suit. That's all. He didn't call me or come to my house or anything like that.
>
> Q. Well, you got a letter saying if you don't pay it you are going to be sued? Don't you recall that?

A. I probably did.

Q. And you don't consider that being pressured to pay it?

A. No, I don't. No.

The foregoing questions concerning Mr. Bryant's idea of "pressure" from creditors seem to call for a response in the form of an opinion rather than a fact. Whether or not Mr. Bryant's opinion was an honest one was a matter for the jury to consider. Additionally, Mr. Bryant's testimony during the trial spans nearly two hundred pages in the transcript, and his sworn statement taken prior to trial consisted of seventy pages of continuous questions and answers. Within the sworn statement alone, Mr. Bryant revealed to Nationwide during their initial investigation a substantial majority of his actual total outstanding debts and obligations. Considering the extensive questioning, reasonable men could also certainly form differing opinions about whether Mr. Bryant related his financial circumstances to the best of his ability, considering the average person's capacity to remember figures and amounts with precision.

When plaintiffs have made out a case sufficient to go to the jury, as did plaintiffs in the present case, it is error for the trial court to enter judgment for the defendant notwithstanding the verdict. *Horton v. Iowa Mutual Insurance Company*, 9 N.C. App. 140, 75 S.E. 2d 725 (1970). Since plaintiffs' evidence was sufficient to withstand defendant's earlier motion for a directed verdict, the trial court's entry of judgment notwithstanding the verdict was improper on the question of misrepresentation. *Norwood v. Sherwin Williams Company*, 303 N.C. 462, 279 S.E. 2d 559 (1981). Thus, the Court of Appeals did not err in reversing the trial court's entry of judgment notwithstanding the verdict on the second issue. Although the trial judge also granted defendant's Rule 50 motion for judgment notwithstanding the verdict as to the third issue, damages, defendant did not argue this issue in its brief. Pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure, this question is deemed abandoned.

RULE 59: MOTION FOR NEW TRIAL

[3] In the case *sub judice*, defendant prayed for a new trial in the alternative pursuant to Rules 50 and 59. Rule 50 provides in relevant part as follows:

(b) *Motion for judgment notwithstanding the verdict.—*

A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative . . . .

Rule 50 further provides:

(c) *Motion for judgment notwithstanding the verdict—Conditional rulings on grant of motion.—*

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial had been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered.

Rule 59 lists the grounds available for a new trial. Defendant premised its motion on Rule 59(a)(7), "insufficiency of the evidence to justify the verdict . . . ." Also, the trial judge premised his decision to grant defendant's motion for a new trial on this ground as stated in his order:

3. In the event that this judgment in defendant's favor is hereafter vacated or reversed, it is hereby ordered, pursuant to Rule 50(c) . . . that defendant be granted a new trial . . . because the verdict in this case was contrary to the greater weight of the evidence and the evidence was insufficient to justify the verdict.

When a motion for judgment notwithstanding the verdict is joined with a motion for a new trial, it is the duty of the trial court to rule on both. *Graves v. Walston*, 302 N.C. 332, 275 S.E. 2d 485 (1981). It is evident that the trial judge did just that in this case.

The trial judge indicated that he was granting the motion in his discretion when he responded to defense counsel's questions while ruling on the parties' motions:

> MR. COMERFORD: All right, as to the first issue, we would first ask the Court to enter a judgment for the defendant pursuant to Rule 50.
>
> COURT: Surely.
>
> MR. COMERFORD: And in the alternative to set aside the verdict pursuant to Rule 59.
>
> COURT: Well, I'm going to grant the motion for verdict notwith—for judgment notwithstanding the verdict, as to the second issue . . . . Now, then—as being against the greater weight of the evidence and in my discretion I'm going to set the second issue aside, it being in my discretion, and therefore the third issue in its entirety because I think that that was tied up with that. I just can't help but come to the conclusion that there was just too much evidence that there were misrepresentations.

Therefore, this Court's scope of review is limited to determining whether the trial judge abused his discretion in ordering a new trial because of insufficient evidence. The law is summarized as follows:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967); *see e.g. Bryant v. Russell*, 266 N.C. 629, 146 S.E. 2d 813 (1966); *Robinson v. Taylor*, 257 N.C. 668, 127 S.E. 2d 243 (1962); *Dixon v. Young*, 255 N.C. 578, 122 S.E. 2d 202 (1961); *Caulder v. Gresham*, 224 N.C. 402, 30 S.E. 2d 312 (1944). The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of our state to set aside the verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those Rules did not enlarge the scope of appellate review

> of a trial judge's exercise of that power. *Britt v. Allen*, 291 N.C. 630, 634-35, 231 S.E. 2d 607, 611-12 (1977), *see also Insurance Co. v. Chantos*, 298 N.C. 246, 253, 258 S.E. 2d 334, 338-39 (1979) (Huskins, J., dissenting). The principle that appellate review is restricted in these circumstances is so well established that it should not require elaboration or explanation here. . . .

Worthington v. Bynum, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982).

A ruling in the discretion of the trial judge raises no question of law. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977). A review of the record in the present case demonstrates no manifest abuse of discretion by the trial judge. Therefore, the ruling of the trial judge will not be disturbed on this appeal. *See, e.g., Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982) (this case contains a thorough discussion of the trial judge's discretionary power pursuant to Rule 59 and thoroughly covers the ramifications of that rule).

We disagree with the Court of Appeals' interpretation of the trial judge's ruling on this motion. The Court of Appeals, in its opinion, stated that "where the trial court grants the Rule 59 motion based on an issue of law, its decision may be fully reviewed on appeal." *Bryant*, 67 N.C. App. at 620, 313 S.E. 2d at 807. The following language, taken from the trial judge's dialogue with the attorneys while ruling on the post-trial motions, was then quoted by the Court of Appeals: " '[t]here were too many misrepresentations, and there's no question that they were material . . . .' " *Id.* This phrase influenced the Court of Appeals and seemed to convince that court that the court's ruling below involved an issue of law, which was fully reviewable on appeal.

The Court of Appeals seems to be laboring under the misapprehension that defendant's motion was pursuant to Rule 59(a)(8), an additional ground for granting a new trial for an "[e]rror in law occurring at the trial and objected to by the party making the motion . . . ." The Court of Appeals cited *In re Will of Herring*, 19 N.C. App. 357, 198 S.E. 2d 737 (1973) to support its conclusion and holding that the Rule 59 motion is fully reviewable, because it was "based on an issue of law. . . ." *Bryant*, 67 N.C. App. at 620, 313 S.E. 2d at 807. The court below seems to equate an "issue of

law" to an "error in law." For purposes of a Rule 50(a)(8) motion, the two phrases are not interchangeable. Clearly, defendant's motion and the trial judge's order were not premised upon Rule 59(a)(8).

The order in *In re Will of Herring* is illustrative of how a Rule 50(a)(8) motion differs significantly from a Rule 50(a)(7) motion. The trial judge in that case granted the Rule 50(a)(8) motion and stated explicitly in his order "that errors of law were committed by the Court during the trial which were materially prejudicial to the caveators." *Id.* at 359, 198 S.E. 2d at 739. In that case the Court of Appeals, after noting that the motion was made pursuant to Rule 59(a)(8), stated that such order was defective because it failed to "specif[y] the errors of law committed during the trial which were prejudicial to the caveators." *Id.* at 360, 198 S.E. 2d at 740.

Specificity in the trial judge's order pursuant to Rule 50(a)(8) is mandatory if the trial judge's decision is to be completely reviewable. W. Shuford, *North Carolina Civil Practice and Procedure* § 59.12 (1981). Without the trial judge making precise reference to the errors of law committed during the trial *and* objected to by the party making the motion, an appellate court "would be forced to embark on a voyage of discovery through an unchartered record to find the errors of law referred to in the order." (Citations omitted.) *In re Herring*, 19 N.C. App. at 360, 198 S.E. 2d at 740.

In the case *sub judice*, the trial judge in his order made no intimation that he was granting a new trial for an error of law. Furthermore, there was no specific error identified in the record or in the judge's order. Neither did the defendant, the party making the motion for a new trial, object to or specify any error of law that was made, as required by Rule 59(a)(8). Absent a valid motion pursuant to Rule 59(a)(8) and an order granting such motion for errors of law specifically identified, the Court of Appeals erred in reversing the trial judge's conditional grant of a new trial absent a manifest abuse of discretion. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington*, 305 N.C. at 487, 290 S.E. 2d at ---. In the present case the trial judge did not abuse his discretion.

The Court of Appeals, after finding the trial judge's ruling fully reviewable because it "involved an issue of law," proceeded to formulate a legal definition of the term "material" as used in G.S. 58-176(c). Because the judge's order in the trial court was not premised upon an error of law, it was unnecessary for the Court of Appeals to define such term and consider the question of whether plaintiffs' misrepresentations were "material." The Court of Appeals failed to examine the trial judge's definition of materiality contained in his instructions to the jury and decide if such an instruction was erroneous in the first instance. It is evident from the transcript that both parties agreed to the following definition:

> Now, members of the jury, a misrepresentation is material if the facts misrepresented would reasonably be expected to influence the decision of the defendant insurance company in investigating, adjusting or paying the claim of the plaintiffs.

Furthermore, this definition seems to be a correct statement of the law and compatible with definitions developed by other jurisdictions when materiality and false swearing is an issue. *See, Long v. Insurance Company of North America*, 670 F. 2d 930 (10th Cir. 1982); *accord Fine v. Bellefonte Underwriters Insurance Company*, 725 F. 2d 179 (2d Cir. 1984); *Claflin v. Commonwealth Insurance Company*, 110 U.S. 81 (1984); *but cf.*, A. Windt, *Insurance Claims and Disputes* § 306 (1982) (the author observes that there is "no rule of thumb" for determining whether a fact concealed or misrepresented is material); *Watkins v. Continential Insurance Companies*, 690 F. 2d 449 (5th Cir. 1982) (in the context of false swearing statutes, this court admitted that "an explicit and workable definition of 'materiality' useful in the present case . . . has not emerged from the Mississippi courts," despite a wealth of case law addressing this issue. *Id.* at 452).

Accordingly, the portion of the Court of Appeals' opinion reversing the trial court's ruling in favor of defendant on the Rule 50 motion is affirmed because there was sufficient evidence to go to the jury on the second issue of whether plaintiffs' statements were material and willful misrepresentations of fact. However, since the Court of Appeals erroneously reversed the trial court's discretionary ruling in favor of defendant pursuant to

Rule 59(7), that portion of the Court of Appeals' decision is reversed and the case is remanded to the Court of Appeals for further remand to the trial court for a new trial on the second and third issues.

Affirmed in part; reversed in part and remanded.

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

LARRY DELCONTE v. STATE OF NORTH CAROLINA

No. 9PA84

(Filed 7 May 1985)

1. **Schools § 14— compliance with school attendance statutes**

There are four ways by which school-aged children in this state may comply with school attendance statutes: (1) under G.S. 115C-378 a child may attend public school; (2) under this same section, a child may attend an "approved," "nonpublic school" which maintains the required records and conducts its curriculum concurrently with the local public school; (3) a child may attend a "private church or school of religious charter" which meets the requirements of Part 1, Art. 39, Chapter 115C; (4) a child may attend a "nonpublic school" which "qualifies" by meeting the requirements of Part 2, Art. 39, Chapter 115C.

2. **Schools § 14— compulsory school attendance—home instruction—qualification as nonpublic school**

Plaintiff's home instruction of his children meets the standards for qualification as a nonpublic school under Part 2, Art. 39, Chapter 115C where plaintiff maintains annual attendance and disease immunization records, operates on a regular schedule, is subject to health and safety inspections, administers certain standardized tests and maintains records of the test results, and provides information concerning operation of his home instruction program to appropriate state officials, and where plaintiff's home instruction meets one of the characteristics set out in G.S. 115C-555 in that it receives no state funding. G.S. 115C-555(4); G.S. 115C-556, 557, 558, and 560.

3. **Schools § 14— qualification as nonpublic school—receipt of no state funding—not applicable only to established educational institutions**

The Court of Appeals erred in holding that the qualification for a nonpublic school set forth in G.S. 115C-555(4) that it receive no state funding refers only to established educational institutions.

4. Schools § 14— compulsory school attendance—home instruction not precluded

The legislature did not intend statutes relating to compulsory school attendance to preclude home instruction simply because of some intrinsic meaning attached to the word "school."

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

ON defendant's petition for discretionary review of a decision by the Court of Appeals, 65 N.C. App. 262, 308 S.E. 2d 898 (1983), reversing a declaratory judgment for plaintiff entered by *Judge F. Gordon Battle* in the HARNETT County Superior Court.

Thomas E. Strickland for plaintiff appellant.

Rufus L. Edmisten, Attorney General, by Andrew A. Vanore, Jr., Senior Deputy Attorney General, and Edwin M. Speas, Jr., Special Deputy Attorney General, for the state appellee.

John W. Whitehead; Holleman & Stam by Paul B. Stam, Jr. for The Rutherford Institute; Ware, Parker, Johnson, Cooke and Dunlevie by Wendell R. Bird; Richard W. Summers for the Rutherford Institute of Georgia Legal Defense Foundation, amici curiae.

Frank J. Sizemore, III and Richard B. Harper for The Christian Legal Society, amicus curiae.

Tharrington, Smith & Hargrove by George T. Rogister, Jr. and Ann L. Majestic for The North Carolina School Boards Association, amicus curiae.

EXUM, Justice.

Plaintiff educates his children at home. The dispositive question for decision is whether plaintiff's home instruction is prohibited by our compulsory school attendance statutes.[1] We conclude that it is not. We do not, therefore, reach the question whether these statutes would violate plaintiff's constitutional freedoms if they prohibited him from so educating his children.

1. N.C.G.S. § 115C-378; Parts 1 and 2, art. 39, ch. 115C.

I.

Delconte instituted this action seeking a declaratory judgment that his home instruction was not prohibited by our statutes on school attendance and, if it was, then these statutes contravened certain freedoms guaranteed to him by the state and federal constitutions.

Evidence at trial tended to show the following:

In March 1981 plaintiff, Larry Delconte, moved from New York to Harnett County, North Carolina with his wife, Michelle. They have four children, two of whom, Seth James and Mia Faith, are school age. Delconte graduated from the United States Merchant Marine Academy with a degree in Maritime Science. He did substitute teaching in New York and is currently employed in North Carolina as a machinist. His wife, who finished high school and attended college for one year, is not employed.

The Delcontes are deeply religious, fundamentalist Christians and hold religious services in their home on a regular basis. They believe the Bible is authoritative and obliges them to teach their children at home.

They began educating their two oldest children, Seth and Mia, in their home while they lived in New York after being granted permission to do so from the local board of education. Delconte and his wife shared the teaching responsibilities at that time, working closely with the local school principal in obtaining materials and having Seth and Mia regularly tested.

After the Delcontes moved to North Carolina, the principal of the local public elementary school visited them to discuss the status of Seth and Mia. Subsequently, Delconte advised the Harnett County School Superintendent that he wished to continue educating his children at home. On 1 September 1981 Delconte wrote to Calvin R. Criner, State Coordinator of the Office of Nonpublic Education, requesting approval of his home as a school for the education of his children, naming his school the "Hallelujah School," and enclosing all information required by one seeking to operate a nonpublic school.[2]

2. See N.C.G.S. § 115C-560.

Criner, relying entirely upon an opinion of the Attorney General that home instruction did not fulfill the requirements of an approved nonpublic school,[3] responded on 4 September 1981 that the Hallelujah School could not be acknowledged as a nonpublic school "within the meaning of the law." Criner testified that he had approved a nonpublic school with as few as three students, but none with as few as two.

Delconte continued the practice he had begun in New York. He was subsequently prosecuted for violating our compulsory school attendance laws, but the state voluntarily dismissed these criminal charges.

The Delcontes still educate their children at home. They use books and materials obtained from sources in New York and the Wake Christian Academy. The instruction covers skills in basic reading, writing, and mathematics. The Delcontes have set aside a room in their home, equipped with a blackboard and desk, as a classroom. In addition to formal academic instruction, Seth and Mia's daily routine includes chores, playtime, and Bible study. The Delcontes' instruction for their children continues during most of the year. No other children are included.

Standardized test scores and school work show that both Seth and Mia are achieving at average or better than average rates academically and "getting at least a good, average education, or better." They scored in most areas in the "upper quartile"[4] for their age and grade levels and are "well-behaved . . . quite normal little children."

Delconte testified that his objections to public schools were both religious and "sociopsychological." He expressed a deep religious conviction that children should be taught at home. The Delcontes disagree with some teachings in public school. They do not believe, for example, in evolution and feel children should not be exposed to it, since for them it is contrary to the Bible.

3. The Attorney General has issued two such opinions. 40 Op. Att'y Gen. 211 (1969); 49 Op. Att'y Gen. 8 (1979). These opinions should be accorded some weight on the question presented, but they are not binding on this Court.

4. Mia's scores were at the "99th percentile in reading, 34th in math, 84th in language and 84th in basic." Seth, tested in grade 2, measured "at grade 4 in reading. His overall average was in the upper quartile."

Delconte explained his sociopsychological basis for home instruction in several ways: Sending children from the home at an early age signifies to them rejection by their parents. Young children are too susceptible to undesirable influences of both teachers and other students. Children should not be exposed to the community at large, either in or out of school, until they can have more of an effect on their environment than their environment can have on them.

Delconte testified:

> It is accurate that my decision to teach my children in my home was a twofold decision; that there were two reasons underlying that decision. One reason I would describe as sociopsychological, common sense reasons. The other reason is religious in nature. It is a tough question for me to answer as to which of these reasons is more important. Of course, I put Jesus Christ above anything. However, either reason alone would be enough for me to want to teach my kids in the home. I can't answer the question of whether I would send my children to public or private schools if my sociopsychological objections to schooling outside the home changed. I have never had to consider that question. It is a decision that would take a lot of deep thought. It would take an exceptional child of 12 years old, I think, to be able to stand in the Christian principles that Christ has dictated to us with all these adult figures around him that are giving him a different view. I think it would be better for my children to stay home, but if and when my children are to the point that they can be more of an effect on their environment than their environment on them, I would not want them to go, but if they wanted to go and they wanted to use it as a field of witness for Christ, praise the Lord, let them go.

The trial court concluded: (1) Delconte's Hallelujah School was entitled to recognition as a qualified nonpublic school under Part 2, Article 39 of Chapter 115C. (2) If it were not so recognized, our compulsory school attendance laws would violate Delconte's religious freedoms as guaranteed by the First Amendment of the United States Constitution and Article I, section 13 of the North Carolina Constitution.

The Court of Appeals reversed. It concluded: (1) Delconte's home instruction does not constitute a qualified nonpublic school. (2) The compulsory school attendance statutes prohibit home instruction. (3) This prohibition does not violate Delconte's constitutionally protected freedoms.

We allowed Delconte's petition for discretionary review on 6 March 1984. Believing that Delconte's home instruction does qualify as a nonpublic school and is not otherwise prohibited by our school attendance statutes, we reverse the Court of Appeals.

II.

Our basic compulsory school attendance law, N.C.G.S. § 115C-378, a section of Article 29 of Chapter 115C, provides, in pertinent part:

> Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and 16 years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned shall be in session.
>
> . . . .
>
> The term 'school' as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education.
>
> All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

Notwithstanding this statute, the General Assembly has chosen to provide that attendance at any "private church school or school of religious charter" which meets the requirements of Part 1, Article 39, Chapter 115C, or at any "qualified nonpublic school" which meets the requirements of Part 2, Article 39, Chapter 115C, "shall satisfy the requirements of compulsory school attendance." N.C.G.S. § 115C-548 and § 115C-556.

[1] Reading these statutes together so as to give effect to them all, we conclude that there are four ways by which school-aged children in this state may comply with our school attendance statutes. First, under N.C.G.S. § 115C-378 a child may attend public school. Second, under this same section, a child may attend an "approved," "nonpublic school" which maintains the required records and conducts its curriculum concurrently with the local public school. Third, a child may attend a "private church school or school of religious charter" which meets the requirements of Part 1, Article 39, Chapter 115C. Fourth, a child may attend a "nonpublic school" which "qualifies" by meeting the requirements of Part 2, Article 39, Chapter 115C.

III.

[2] Delconte's home instruction meets all the express standards for "qualification" as a nonpublic school under Part 2, Article 39, Chapter 115C. Sections 556-558, and 560 of Part 2 require qualified nonpublic schools to maintain certain annual attendance and disease immunization records, to operate on a certain regular schedule, to be subject to certain health and safety inspections, to administer certain standardized tests and to maintain records of the test results, and to provide information concerning its operation to appropriate state officials. The trial court found, on supporting evidence, that Delconte's home instruction met all of these requirements. Neither party to the appeal disputes these findings and our review of the record suggests no error in them.

In addition, section 115C-555 requires that a qualified nonpublic school have "one or more of the following characteristics":

(1) It is accredited by the State Board of Education.

(2) It is accredited by the Southern Association of Colleges and Schools.

(3) It is an active member of the North Carolina Association of Independent Schools.

(4) It receives no funding from the State of North Carolina.

All parties agree that Delconte's home instruction receives no state funds. This is all that is required to comply with section 115C-555.

[3] The Court of Appeals construed section 115C-555 as follows:

> All schools described by subsections (1), (2), and (3) would be established educational institutions. Subsection (4) is a general term following a list of specific terms. The rule of *ejusdem generis* dictates that 'where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.' *State v. Fenner*, 263 N.C. 694, 697, 140 S.E. 2d 349, 352 (1965). Therefore, we hold that G.S. 115C-555(4) refers only to established educational institutions. We reject plaintiff's contention that his home school is a qualified nonpublic school merely because it receives no state funds.

65 N.C. App. at 266-67, 308 S.E. 2d at 902-3.

We think the Court of Appeals misapplied the *ejusdem generis* canon of statutory construction. Subsection (4) of the statute does not contain "general words" following "a designation of particular subjects or things." Subsection (4) is as specific a requirement as those contained in subsections (1), (2), and (3). Each of the subsections is equally specific, discrete, and stands on its own footing. The statute clearly requires that only one of the "characteristics" be present. Delconte's home instruction meets the characteristic set out in subsection (4), *i.e.*, it receives no state funding.

We think the Court of Appeals' reading of the statute was really intended to convey its conclusion that there is something intrinsic in the meaning of the word "school" which precludes home instruction from coming within its ambit. The Court of Ap-

peals' analysis of the statute was immediately preceded by this statement:

> There is no North Carolina case interpreting the term 'school' in this statute, but the majority of other jurisdictions hold that home instruction cannot reasonably be considered a school. See, *State v. Riddle*, 285 S.E. 2d 359 (W.Va. 1981); *City of Akron v. Lane*, 65 Ohio App. 2d 90, 416 N.E. 2d 642 (1979); *F. & F. v. Duvall County*, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); *State v. Garber*, 197 Kan. 567, 419 P. 2d 896 (1966), *cert. denied*, 389 U.S. 51, 88 S.Ct. 236, 19 L.Ed. 2d 50 (1967); *State v. Lowry*, 191 Kan. 701, 383 P. 2d 962 (1963); *In Re Shinn*, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961).

65 N.C. App. at 266, 308 S.E. 2d at 902. The Court of Appeals concluded its analysis of the statute by saying, "We hold that 'school' means an educational institution and does not include home instruction." *Id.* at 267, 308 S.E. 2d at 903.

IV.

[4] We do not agree that the legislature intended simply by use of the word "school," because of some intrinsic meaning invariably attached to the word, to preclude home instruction.

A.

Most of the authorities relied on by the state and the Court of Appeals do not support this proposition.

The state strenuously argues, as the Court of Appeals thought, that a majority of jurisdictions hold that home instruction cannot be a "private school" under compulsory school attendance laws because of what the word "school" intrinsically means. Our analysis of the cases on the question convinces us that a majority of jurisdictions have not so held. Most of the cases relied on by the state and the Court of Appeals which hold that home instruction is not a "private school" within the meaning of compulsory school attendance statutes do so for other reasons.

California, Florida, Oregon and Virginia have, or have had, statutes which exempt school-aged children from attending public schools if they attend either private schools which meet statutory requirements or are taught in the home provided the home instruction likewise meets certain requirements. Construing these

statutes, courts in each state have concluded that "home instruction" could not qualify under the "private school" statutory standards because, in the words of the California court, "the legislature intended to distinguish between private schools, upon the one hand, and home instruction by a private tutor or other person, on the other." *People v. Turner*, 121 Cal. App. 2d 861, 263 P. 2d 685, 688 (1953); *accord, State v. M.M.*, 407 So. 2d 987 (Fla. App. 1981); *F & F v. Duvall County*, 273 So. 2d 15, 65 A.L.R. 3d 1217 (Fla. App. 1973), *cert. denied*, 283 So. 2d 564 (Fla. 1973); *Grigg v. Commonwealth*, 224 Va. 356, 297 S.E. 2d 799 (1982); *State v. Bowman*, 60 Ore. App. 184, 653 P. 2d 254 (1982). In each of these cases the court held the home instruction under consideration did not qualify for exemption because it did not meet statutory requirements for home instruction.

In California, Massachusetts, New Hampshire, Ohio and West Virginia, courts have held that home instruction did not qualify for exemption because, again, the instruction did not meet specific statutory requirements. *In re Shinn*, 195 Cal. App. 2d 683, 693-94, 16 Cal. Rptr. 165, 173 (1961) (parents did not hold proper "credentials" for a private tutor; "home instruction, regardless of its worth, is not the legal equivalent of attendance in school *in the absence of instruction by qualified private tutors*" (emphasis supplied)); *Commonwealth v. Renfrew*, 332 Mass. 492, 126 N.E. 2d 109 (Mass. 1955) (home instruction had not received prior approval of school officials under statute which permitted exemption if a child "is being otherwise instructed in a manner approved in advance by the superintendent or the school committee"); *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (N.H. 1929) (home instruction did not qualify for exemption under statute requiring "private schools" to be "approved" because the particular home instruction in question had not "been approved as required by the statute"); *City of Akron v. Lane*, 65 Ohio App. 2d 90, 19 Ohio Op. 3d 356, 416 N.E. 2d 642 (1979) (home instruction did not qualify for exemption because it was neither a "school chartered by the state" nor " 'special education program' operated pursuant to state board of education standards and authorization"); *State v. Riddle*, 285 S.E. 2d 359 (W.Va. 1981) (home instruction did not comply with statute requiring that such instruction be "approved by the county board of education" and taught by persons "qualified to give instruc-

tion" in the judgment of the county superintendent and county board).

Two jurisdictions, Washington and Kansas, have held that home instruction does not qualify for exemption from school attendance laws because it cannot be a "school" within what the court determined to be the intrinsic meaning of the word. The leading Washington case is *State v. Counort*, 69 Wash. 361, 124 P. 910 (1912). *Counort* held that home instruction was not attendance at a "private school" within the meaning of the attendance statute because the words "private school" as used in the statute "mean more than home instruction. It means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children of school age in the required studies and for the full time required by the laws of this state." 69 Wash. at 363-64, 124 P. at 911-12.

The continuing validity of *Counort*, however, is suspect in light of a later Washington case, *State v. Superior Court*, 55 Wash. 2d 177, 346 P. 2d 999 (1959), *cert. denied, Wold v. Shoreline School District*, 363 U.S. 814 (1960). Although the later case quoted *Counort* seemingly with approval, it offered a definition of "school" which is at odds with the *Counort* definition. The later Washington case said:

> A school is an institution consisting of a teacher and pupils, irrespective of age, gathered together for instruction in any branch of learning. *Weisse v. Board of Education of City of New York*, 1941, 178 Misc. 118, 32 N.Y.S. 2d 258; *Board of Education of City School District of City of Cleveland v. Ferguson*, 1941, 68 Ohio App. 514, 39 N.E. 2d 196. The three essential elements of a school are (1) the teacher, (2) the pupil or pupils, and (3) the place or institution. If the alleged school has no teacher, then it does not qualify as a school. There is one standard which the legislature made applicable to all schools, both public and private, and that standard is that the teacher must be qualified to teach and hold a teaching certificate.

55 Wash. 2d at 182, 346 P. 2d at 1002. Relying on a Washington statute that all teachers must be state certified, the later Washington case concluded that parental home instruction did not

qualify for exemption from the state's attendance law because the parents had no teaching certificate. The court said:

> The Wolds had the place [their home] and the pupil, but not a teacher qualified to teach in the state of Washington. Their alleged private school did not legally qualify as such.

Id.

In Kansas, the legislature before 1903 expressly provided for home instruction as a substitute for attending public or private school. In 1909 the legislature amended the school attendance law so as to omit any reference to home instruction but to provide instead that all school-aged children should attend "a public school, or a private, denominational or parochial school taught by a competent instructor . . . ." *State v. Will*, 99 Kan. 167, 160 P. 1025 (1916). In 1919 the Kansas legislature established certain "minimum course requirements for all schools, whether public, private, denominational or parochial." *In Interest of Sawyer*, 234 Kan. 436, 672 P. 2d 1093, 1097 (1983). Thereafter, in concluding that home instruction did not qualify for compliance with school attendance laws, the Kansas court relied not only on the express elimination of home instruction by its legislature but also on the failure of home instruction to meet the statutory requirements for "private, denominational or parochial" schools. *In Interest of Sawyer, supra; State v. Garber*, 197 Kan. 567, 419 P. 2d 896 (1966), *cert. denied and appeal dismissed*, 389 U.S. 51 (1967); *State v. Lowry*, 191 Kan. 701, 383 P. 2d 962 (1963).

On the other hand, Illinois and Indiana, have held that home instruction constitutes a "private school" as that term is used in school attendance laws.

In *People v. Levisen*, 404 Ill. 574, 90 N.E. 2d 213, 14 A.L.R. 2d 1364 (1950), the Illinois Supreme Court considered the question on facts similar to those before us. In that case the parents, both Seventh Day Adventists, taught their daughter at home. The mother, who had attended college for two years and had some training in pedagogy, taught her daughter third grade subjects at home using standard textbooks and keeping a regular schedule. The child showed proficiency comparable with average third grade students. *Id.* at 575-76, 90 N.E. 2d at 214. In reversing the parents' conviction for violating the state compulsory attendance

law, the Court concluded that this method of instruction constituted a "private school" as that term was used in the compulsory attendance statutes. The Court said:

> Appellants contend the State has failed to prove the child was not attending a 'private school' within the intention of the legislature. They argue that a school, in the ordinary meaning of the word, is a place where instruction is imparted to the young, that a number of persons being taught does not determine whether the place is a school, and that by receiving instruction in her home in the manner shown by the evidence the child was attending a private school. We agree with this construction of the statute. Compulsory education laws are enacted to enforce the natural obligation of parents to provide an education for their young, an obligation which corresponds to the parents' right of control over the child. *Meyer v. Nebraska*, 262 U.S. 390, 400, 43 S.Ct. 625, 67 L.Ed. 1042. The object is that all children shall be educated, not that they shall be educated in any particular manner or place. See *Commonwealth v. Roberts*, 159 Mass. 372, 34 N.E. 402. Here, the child is being taught third-grade subjects, has regular hours for study and recitation, and shows a proficiency comparable with average third-grade students. There is nothing in the record to indicate her education is in any way being neglected. We think the term 'private school,' when read in the light of the manifest object to be attained, includes the place and nature of the instruction given to this child. The law is not made to punish those who provide their children with instruction equal or superior to that obtainable in the public schools. It is made for the parent who fails or refuses to properly educate his child.

Id. at 577, 90 N.E. 2d at 215.

A similar result was reached under a similar rationale in *State v. Peterman*, 32 Ind. App. 665, 70 N.E. 550 (1904). There, the parents employed a tutor to teach their child in the tutor's home. The Indiana Appellate Court concluded that this kind of instruction was a "private school" within the meaning of the state's compulsory attendance law. The court said:

> A school, in the ordinary acceptation of its meaning, is a place where instruction is imparted to the young. If a parent

> employs and brings into his residence a teacher for the purpose of instructing his child or children, and such instruction is given as the law contemplates, the meaning and spirit of the law have been fully complied with. This would be the school of the child or children so educated, and would be as much a private school as if advertised and conducted as such. We do not think that the number of persons, whether one or many, make a place where instruction is imparted any less or more a school. Under a law very similar to ours, the Supreme Court of Massachusetts has held that the object and purpose of a compulsory educational law is that all the children shall be educated, not that they shall be educated in any particular way. *Commonwealth v. Roberts*, 159 Mass. 372, 34 N.E. 402.

32 Ind. App. at 669-70, 70 N.E. at 551.

In summary, our sister jurisdictions, when faced with the question of whether home instruction is prohibited by school attendance statutes which specify various standards for nonpublic schools, have almost always analyzed the question not in terms of any meaning intrinsic to the word "school" but rather in terms of whether the particular home instruction in question met the statutory standards. In the absence of a clear legislative prohibition of home instruction, we think this is the better approach to the problem.

B.

To require that schools, whatever their form or setting, meet certain objective statutory standards is the approach which our legislature has historically followed. It has never sought, and does not now seek, to define what is, or is not, a "school." Rather, it has historically enacted and continues to enact various objective statutory criteria, or standards, which various kinds of schools must meet in order for students attending them to comport with the school attendance statutes.

The General Assembly first enacted a compulsory school attendance law applicable to all school-aged children in 1923. The law required school-aged children "to attend school continuously for a period equal to the time which the public school in the district in which the child resides shall be in session." Public

Laws 1923, ch. 136, § 347. In 1925 the General Assembly amended the law to add the following language:

> The term 'school' as used in this section is defined to embrace all public schools and such private schools as have tutors or teachers and curricula that are approved by the county superintendent of public instruction or the State Board of Education.
>
> All private schools receiving and instructing children of compulsory school age shall be required to keep such records of attendance and render such reports of the attendance of such children as are required of public schools; and attendance upon such schools, if the school or tutor refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district, town or city which the child shall be entitled to attend: *Provided*, instruction in a private school or by private tutor shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long a term.

Public Laws 1925, ch. 226; N.C. Cum. Statutes and Notes to Consolidated Statutes, p. 556 (1924-25). The 1925 amendment to the compulsory school attendance law remained unchanged until 1949 when the words "and maintain such minimum curriculum standards" were inserted in the second paragraph immediately before the words "as are required of public schools; . . . ." 1949 Sess. Laws, ch. 1033; N.C.G.S. § 115-302 (1952). These provisions of the compulsory school attendance law were rewritten in 1963, 1963 Sess. Laws, ch. 1223, § 6, and appear codified as N.C.G.S. § 115-166 (1966) as follows:

> The principal, superintendent, or teacher who is in charge of such school shall have the right to excuse a child temporarily from attendance on account of sickness or other unavoidable cause which does not constitute unlawful absence as defined by the State Board of Education. The term 'school' as used herein is defined to embrace all public schools and such nonpublic schools as have teachers and curricula that are approved by the county or city superintendent of schools or the State Board of Education.

> All nonpublic schools receiving and instructing children of a compulsory school age shall be required to keep records of attendance and render such reports of the attendance of such children and maintain such minimum curriculum standards as are required of public schools; and attendance upon such schools, if the school refuses or neglects to keep such records or to render such reports, shall not be accepted in lieu of attendance upon the public school of the district to which the child shall be assigned: Provided, that instruction in a nonpublic school shall not be regarded as meeting the requirements of the law unless the courses of instruction run concurrently with the term of the public school in the district and extend for at least as long as a term.

The 1963 rewrite omitted any reference to tutors but continued to require "nonpublic schools" to have "approved" teachers and curricula, to maintain certain records and curriculum standards, to make certain reports, and to operate on a certain schedule. The standards in the public school attendance law were again amended in 1975 so as to delete the words "by the county or city superintendent of schools or" following the words "are approved by." 1975 Sess. Laws, ch. 731, § 3; N.C.G.S. § 115-166 (1978). Except for being recodified as section 115C-378 in 1981, the standards have remained as they were since the 1975 amendment.

Finally, in 1979 the General Assembly passed "An Act . . . To Deal Specifically With Private Church Schools and Schools of Religious Charter" and "An Act . . . To Deal With Certain Qualified Nonpublic Schools." 1979 Sess. Laws, chs. 505 and 506. These laws were recodified, substantially unchanged, in 1981, 1982 Sess. Laws, ch. 423, § 1, and now appear in the General Statutes as Parts 1 and 2 of Article 39 of Chapter 115C. These laws provide that attendance at a "private church school or school of religious charter" or at a "qualified nonpublic school" satisfies the requirements of compulsory school attendance. These laws eliminate the requirement that teachers or curricula at these schools be approved by any state or county official; but they require these schools to comply with certain attendance, health and safety standards, to administer certain tests, and to provide certain information to an authorized state representative. Nowhere in these recent statutes is the word "school" defined.

The upshot of this historical review is that we find nothing in the evolution of our compulsory school attendance laws to support a conclusion that the word "school," when used by the legislature in statutes bearing on compulsory attendance, evidences a legislative purpose to refer to a particular kind of instructional setting. The legislature has historically insisted only that the instructional setting, whatever it may be, meet certain standards which can be objectively determined and which require no subjective or philosophical analysis of what is or is not a "school."

We find nothing in the recent statutes now under consideration, Parts 1 and 2, art. 39, ch. 115C, which indicate a legislative intent to depart from this historical approach in deciding what kind of schooling meets the requirements of the compulsory school attendance law. Indeed, the evident purpose of these recent statutes is to loosen, rather than tighten, the standards for nonpublic education in North Carolina. It would be anomalous to hold that these recent statutes were designed to prohibit home instruction when the legislature obviously intended them to make it easier, not harder, for children to be educated in nonpublic school settings.

C.

Finally, it is clear that if we interpreted our present school attendance statutes to preclude home instruction, serious constitutional questions would arise.

The North Carolina Constitution requires the General Assembly to permit children of this state to be "educated by other means" than in the public schools.[5] Whether these "other means" would include home instruction is a serious question which we need not, because of our resolution of the case, now address. It is clear that the North Carolina Constitution empowers the General

5. Article IX, section 11 of the Constitution of 1868 provided: "The General Assembly is hereby empowered to enact that every child, of sufficient mental and physical ability, shall attend the public schools during the period between the ages of six and eighteen years, for a term of not less than sixteen months, unless educated by other means."

The 1971 amendments to the Constitution recodified the foregoing section as Article IX, section 3. This section now provides: "The General Assembly shall provide that every child of appropriate age and of sufficient mental and physical ability shall attend the public schools, unless educated by other means."

Assembly to require that our children *be educated.* Whether the constitution permits the General Assembly to prohibit their education at home is not so clear.

With regard to the federal constitution, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), considered whether Wisconsin's compulsory school attendance law could be constitutionally applied so as to require Amish parents to enroll their children in public or private schools or some other educational program authorized by the statutes after the children completed the eighth grade when such enrollment would violate Amish religious tenets.[6] The Supreme Court held that to so apply the Wisconsin compulsory attendance law violated the religious freedoms guaranteed to the Amish by the First Amendment. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court held that Oregon's compulsory school attendance statute could not constitutionally be applied so as to preclude parents from sending their children to private, rather than public schools. The Court said the Oregon law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. The United States Supreme Court seems to consider the right of parents to guide both the religious future and the education generally of their children to be fundamental so as not to be interfered with in the absence of a compelling state interest. *Wisconsin v. Yoder*, 406 U.S. 205; *see also, Roe v. Wade*, 410 U.S. 113 (1973). But it is not clear whether the Court would consider the right to engage in home instruction to be fundamental. *See Board of Education v. Allen*, 392 U.S. 236, 245-46 (1968).

We recognize that both *Yoder* and *Pierce* are easily distinguishable on their facts from the instant case and may not control the question of whether home instruction can be constitutionally prohibited. *See Duro v. District Attorney*, 712 F. 2d 96 (4th Cir. 1983), *cert. denied*, --- U.S. ---, 104 S.Ct. 998 (1984). We also recognize that the state has a compelling interest in seeing that

6. As we understand the facts in *Yoder*, the Amish practice was not to provide any formal education beyond the eighth grade for their children. This practice was based on their long held religious beliefs about the lack of value of formal education at the high school level and beyond. The Amish believed that it was better to learn-by-doing after a child completed the eighth grade and that this kind of learning better prepared their children for the life they were expected to lead in the Amish community.

children are educated and may, constitutionally, establish minimum educational requirements and standards for this education. *Wisconsin v. Yoder*, 406 U.S. 205, 239 (Mr. Justice White, Mr. Justice Brennan, and Mr. Justice Stewart concurring); *see also Pierce v. Society of Sisters*, 268 U.S. 510. Nevertheless, the principles enunciated in *Yoder* and *Pierce* raise serious questions as to the constitutionality of statutes which prohibit altogether home instruction as a means of education especially, as here, when the instruction otherwise complies with express minimum standards laid down by the legislature.

We do not, of course, purport to decide this constitutional issue. We rely, instead, on the familiar canon of statutory construction that "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E. 2d 614, 616 (1977); *accord Nova University v. Board of Governors*, 305 N.C. 156, 287 S.E. 2d 872 (1982).

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*

In re Dairy Farms, 289 N.C. 456, 465-66, 223 S.E. 2d 323, 328-29 (1976), quoting *NLRB v. Jones and Loughlin Steel Corp.*, 301 U.S. 1, 30 (1936). *Accord United States v. Clark*, 445 U.S. 23 (1980); *Blasecki v. City of Durham*, 456 F. 2d 87 (4th Cir.), *cert. denied*, 409 U.S. 912 (1972).

We acknowledge that "[w]e are not at liberty to give a statute a construction at variance with [the legislature's] intent, even though such construction appears to us to make the statute more desirable and free it from constitutional difficulties." *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E. 2d 338, 350 (1978). Here, though, it is not at all clear that the legislature intended the statutes relating to school attendance to preclude home instruction. Indeed, in light of the legislature's historical approach to this question, as we have pointed out above, it is probable that the legislature did not. Without a clearer expression of legislative intent on this issue we are not prepared to hold that the statutes

now under consideration prohibit home instruction as a means of complying with the compulsory school attendance law.

Whether home instruction ought to be permitted, and if so, the extent to which it should be regulated, are questions of public policy which are reasonably debatable.[7] Our legislature may want to consider them and speak plainly about them. It may determine to continue to permit home instruction relatively unregulated or to prohibit home instruction altogether. On the other hand, the legislature may determine to permit home instruction provided it meets certain minimum, objectively determinable standards relating to curricula, teacher qualifications, testing, scheduling, etc., in addition to those already provided. Whatever the legislature ultimately decides to do, we are satisfied that it would not be appropriate for us to determine whether home instruction may be constitutionally prohibited, or the extent to which it may be constitutionally regulated until the legislature has determined as a matter of public policy to prohibit it or to regulate it more closely than it now does.

For the foregoing reasons the decision of the Court of Appeals is

Reversed.

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

7. There is, for example, much testimony and documentary evidence in this record, largely unchallenged by the state, that home instruction at least in a child's earlier "school-age" years is actually preferable to more formal settings. According to this evidence and our own research cited earlier in this opinion, a number of states permit it. We express no opinion on whether it would be good public policy for North Carolina. That determination must be made by the legislature.

STATE OF NORTH CAROLINA v. LEON NELSON BURGIN

No. 75A84

(Filed 7 May 1985)

1. **Criminal Law § 85.3— cross-examination—evidence of bad character—not improper**

In a prosecution for first-degree sexual offense with a seven-year-old child, the court did not permit an improper cross-examination of defendant and his witnesses where defendant did not object to some of the questions, defendant categorically denied taking any girls to a motel for illegal purposes or that he had done anything wrong with a particular girl, the State accepted defendant's denial of any wrongdoing at a restaurant he had formerly owned, defendant had opened the door for testimony about a prior marijuana conviction and his relationship with his own children during direct examination, and questions asked character witnesses were proper to test the witnesses' knowledge and acquaintance with defendant.

2. **Criminal Law § 101.4— jury's request to rehear evidence—no error in instruction denying**

In a prosecution for first-degree sexual offense with a seven-year-old child, the trial judge did not abuse his discretion when he denied the jury's request that the court read back to them some of the testimony and instructed the jury that all twelve jurors should use their own memory. G.S. 15A-1233.

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

Justice MARTIN concurring.

Justice EXUM dissenting.

DEFENDANT appeals as a matter of right pursuant to G.S. 7A-27(a) from judgment entered by *Howell, J.*, at the 5 December 1983 session of Superior Court, BUNCOMBE County, sentencing him to the mandatory term of life imprisonment upon a jury verdict of guilty of a first-degree sexual offense in violation of G.S. 14-27.4.

Rufus L. Edmisten, Attorney General, by Thomas H. Davis, Jr., Assistant Attorney General, for the State-appellee.

Adam B. Stein, Appellate Defender, by Ann B. Petersen, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

Defendant raises two issues on this appeal. He first argues that the trial court erred in allowing the State to ask certain

questions during cross-examination of defendant and certain of defendant's witnesses. Secondly, defendant contends that the trial court erroneously instructed the jury when the trial court denied the jury's request to have certain testimony read to it after beginning deliberations. After reviewing the record, the parties' briefs and arguments, and the relevant law, we find that the actions complained of by defendant do not constitute error on the part of the trial court.

FACTS

Evidence for the State tended to show that on Monday, 31 January 1983, the victim was approximately seven years ten months old and lived in a small town in North Carolina with her mother, her stepfather and two younger sisters. On that date, the victim and a younger sister were taken to the home of defendant and his wife while the victim's mother went to the hospital to give birth to a child. On the afternoon of 1 February 1983, while defendant's wife was at work, defendant allegedly put his hand in the victim's pants and rubbed her genitalia. On 2 February 1983, defendant allegedly put some vaseline on one of his fingers and inserted it into the victim's vagina. He told the victim not to tell anyone that he had done this. Defendant also asked the victim to rub him between his legs but she refused.

The victim and her younger sister were taken home the following day when their mother returned from the hospital. Defendant and his wife had supper with the victim's family and then, as they were about to leave, the victim's mother asked the victim to go kiss them "bye." The victim kissed defendant's wife and then went into her bedroom. When the victim's mother went in to ask her why she had not kissed defendant "bye," the victim started crying. When her mother asked her what was wrong, she told her that Leon, the defendant, had rubbed her between her legs and that he had put vaseline on one of his fingers and put it "up into" her.

The victim's mother immediately called the sheriff's department and then took the victim to the hospital. At the hospital, the victim told the examining physician and nurse what defendant had done to her. The physician discovered a small tear in the victim's hymen.

Defendant presented witnesses and testified on his own behalf. His evidence tends to show that he did take care of the victim and her younger sister on the dates in question, although he denies having had any sexual relations with the victim.

I.

[1] Defendant first argues that the trial court erred in permitting the State to ask certain questions of defendant and his witnesses during cross-examination. More specifically, defendant contends that the State "improperly chartered a course of proving that the defendant committed the offense in this case by proving with improper inference and innuendo, prior alleged 'bad acts' of the defendant." Thus, as defendant further argues, this improper cross-examination of the defendant and his witnesses deprived him of a fair trial and due process of law. We disagree.

Certain legal principles assist us in determining whether the cross-examination in this case was improper. Generally, when a witness, including a defendant in a criminal case, takes the stand and testifies in his own behalf, the opposing party has an absolute right to cross-examine the witness. *State v. Davis*, 291 N.C. 1, 229 S.E. 2d 285 (1976); *see, e.g.*, 1 Brandis § 35 (2d rev. ed. 1982); McCormick on Evidence § 19 (1984). If the witness during direct examination raises specific issues, he "opens the door" to an inquiry into these subject areas during cross-examination. *State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981); *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980). Furthermore, our courts have traditionally been liberal in allowing extensive questioning during cross-examination of witnesses. *State v. Huskins*, 209 N.C. 727, 184 S.E. 2d 480 (1936); McCormick on Evidence, *supra*, § 21 (this practice is referred to by legal scholars and commentators as the wide-open cross-examination or the English Rule); 1 Brandis, *supra*, § 35.

"On cross-examination much latitude is given counsel in testing for consistency and probability matters related by a witness on direct examination." *Maddox v. Brown*, 233 N.C. 519, 524, 64 S.E. 2d 864, 867 (1951). One of the primary purposes of allowing cross-examination in this manner is "to elicit further details of the story related on direct, in the hope of presenting a complete picture less unfavorable to the cross-examiner's case; . . ." 1 Brandis, *supra*, § 35 at 145. Evidence thus becomes ad-

missible to explain or rebut other evidence put in by the defendant himself. *State v. Small*, 301 N.C. 436, 272 S.E. 2d 128; *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949). Finally, the legitimate bounds of cross-examination are largely within the discretion of the trial judge. *State v. Cox*, 296 N.C. 388, 250 S.E. 2d 259 (1979).

Our review of the trial judge's rulings on the objections to questions asked during cross-examination is guided by the following considerations:

> The prosecuting officer has the right, and it is his duty, to cross examine a defendant who testifies in his own defense. A well-directed cross examination may disclose fallacies, if any, in the defendant's testimony and thus aid the jury in its search for the truth. A cross examination, especially where there are no eyewitnesses, should be searching, but at all times it should be fair. The trial judge hears all witnesses and observes their demeanor as they testify. He knows the background of the case and is thus in a favorable position to control the scope of the cross examination. The appellate court reviews a cold record. For this reason, the trial court, because of its favored position, should have wide discretion in the control of the trial. Its rulings should not be disturbed except when prejudicial error is disclosed. (Citations omitted.)

State v. Ross, 275 N.C. 550, 553, 169 S.E. 2d 875, 878 (1969), *cert. denied*, 397 U.S. 1050 (1970).

It should be noted at the outset that not all of the allegedly improper questions asked by the State were objected to by defendant's trial counsel. Generally, failure to object at trial to a question waives such objection. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). However, when the improper questioning is so prejudicial or so grave that it results in plain error, a new trial will be granted notwithstanding the absence of an objection. *Id.*

In the case before us, defendant testified on direct as follows:

> Q. Now, Mr. Burgin, have you ever had any problems with young children or any kind of sexual problems?
>
> A. No, sir.

Q. I believe that sometime, ten or some odd years ago while you were operating a restaurant, you had a marijuana charge against you.

A. Yes, sir.

Q. I believe you had a traffic charge here four or five years ago.

A. Yes, sir.

Q. Have you had anything else? Violations of the law?

A. No, sir. And, by the way, the marijuana charge was possession in my place of establishment.

Defendant also testified on direct that he had retired from full time employment approximately five years earlier because of a disability and further explained the nature of his disability. Thereafter, on cross-examination defendant was asked the following:

Q. So, basically, you haven't had a full-time job since 1975?

A. No, ma'am.

Q. As part of your treatment, sir, did you go out to Thoms Rehabilitation Center, sir?

A. Yes, ma'am.

Q. And would that have been in 1975?

A. Yes, ma'am.

Q. And—

A. No, ma'am, not in 1975.

Q. When would that have been, sir?

A. It was 1977, I believe.

Q. And were you there more than once; or were you there just once, sir?

A. Just once.

Q. How old were you in 1977? EXCEPTION NO. 8

A. Forty-two, I guess.

Q. Did you meet a girl named Lisa at Thoms Rehabilitation Center? EXCEPTION NO. 9

A. Yes, ma'am.

Q. I believe Lisa was about sixteen at the time? EXCEPTION NO. 10

A. No, she was older than that.

Q. How old? EXCEPTION NO. 11

A. At least she told me she was eighteen years old. She had graduated from high school or was graduating that year.

Q. She was also a patient there, wasn't she, sir?

A. Yes, ma'am.

Q. During that stay, isn't it a fact that you left with Lisa? You left Thoms Rehabilitation Center and took her to the Evergreen Motel, sir?

A. No, ma'am, that is not a fact.

Q. Lisa was in a wheelchair, wasn't she? EXCEPTION NO. 14

A. Yes, ma'am.

Q. She was paralyzed from the waist down, I believe. Is that correct? EXCEPTION NO. 15

A. Yes, ma'am.

Q. Where do you say you and Lisa went, sir? EXCEPTION NO. 16

A. I did not.

MR. SWAIN: Objection.

COURT: Sustained.

Defendant failed to object to most of these questions. The one objection made was lodged after the witness responded to the question. Defendant made no motion to strike the answer, and therefore waived the objection. *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 834 (1977); *State v. Battle*, 267 N.C. 513, 148 S.E. 2d 599 (1966). We note that defendant categorically denied that he had

taken Lisa to a motel. Thereafter, on redirect defendant testified that he had never been charged with taking any girls to a motel for illegal purposes and he had never done anything improper with Lisa. Under the circumstances, we do not view this line of questioning to be plain error. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804.

During further cross-examination, defendant was asked whether the restaurant he owned in 1974 was a "hangout for teenagers" and whether his main clientele was young people. Defendant had referred to his restaurant during direct examination and opened the door to further questions designed to explain his testimony given during direct. The State accepted defendant's denial of any wrongdoing and did not persist in asking the same questions repeatedly. Therefore, the judge did not abuse his discretion in allowing this testimony.

Defendant objected to the following line of questioning during cross-examination:

Q. Do you recall, Mr. Burgin, when the officers came to your place of business?

A. Yes, ma'am.

MR. SWAIN: Objection.

COURT: Sustained.

Q. Mr. Burgin, the day before the officers came, do you remember Rebecca Smith coming into your place of business?

MR. SWAIN: Object.

COURT: Overruled. EXCEPTION NO. 3

Q. Isn't it a fact, Mr. Burgin, that the day before the officers came, you gave Rebecca Smith a quantity of marijuana, sir?

MR. SWAIN: Well, I object to this.

COURT: Overruled. EXCEPTION NO. 4

Q. Isn't that a fact, sir?

A. I honestly don't remember. I did not give her—She bought—she purchased—I don't remember giving her any quantities of marijuana.

Q. You sold it to her then, sir?

A. No, ma'am, I did not sell it to her. No, ma'am.

Q. Who do you say sold it to her, sir?

A. I don't know who sold it to her.

Q. Isn't it a fact that while you were running Leon's you were giving it away for sexual favors to the young girls that were coming to Leon's, sir?

A. Absolutely not.

MR. SWAIN: Objection.

COURT: Overruled.

On redirect, defendant testified that the marijuana he pled guilty to possessing was a bag of stems and seeds found in his briefcase. Other drugs, he stated, were found on the floor of the bathroom in his restaurant and on the floor in the front of the bar. Defendant on direct had testified that he was charged with marijuana possession while operating the restaurant and offered favorable testimony tending to infer that customers had left some of the marijuana found by the officers. Therefore, it was proper for the State to inquire into these matters during cross-examination. Therefore, the judge did not abuse his discretion by allowing this line of questioning.

Defendant next argues that several additional questions asked of him about his restaurant and drug activity during recross-examination by the State were improper. Defendant did not object to any of this questioning. We find no plain error. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804.

Defendant further assigns as error the admission of certain testimony regarding his relationship with his grown children from his first marriage and their failure to appear in court for their father's, the defendant's, trial. Mrs. Burgin, defendant's present wife, was called as a witness for defendant and testified as follows on direct:

Q. All right, Mrs. Burgin, will you relate to the jury what occurred from the time that you met Mrs. Hughes?

A. Leon and Mr. Hughes stayed in the control room, and she and I went into his office with the children because they made too much noise and it went across the air and he wouldn't let them be in there.

We sat in there and talked from about, well, I would say 15 until 9:00 until Leon and I were ready to come home, and it was around, I would say, 12:00 o'clock. We talked about the fact she and I are almost the same age. She had children, and I do not. She had stepchildren and I had stepchildren. Her stepson, David, I think his name is, was the same age as my stepson, Ronnie. And then she, you know—we were discussing how sometimes his family did not accept her, and I, you know, kind of felt like mine didn't at first but after Leon and I had been married for a while that they did.

I never had any problems with Ronnie or the other two girls, but she had had some problems with her stepson because he had stayed with them for a while, and she told me he had cable television and he watched pornographic movies in the house. And she had asked Sid to do something about it and he never would, so she took it upon herself to pull the cable from the wall so he wouldn't watch the movies anymore.

As part of the State's cross-examination of Mrs. Burgin, the following questions were asked:

Q. And you said you talked with Mrs. Hughes about you [sic] having stepchildren; and you basically talked about general things, is that correct?

A. Yes, it is.

Q. Isn't it a fact that just a few weeks before this incident happened, Mrs. Burgin, that the teenage daughter belonging to your husband showed up on your doorstep and you didn't even know anything about it?

MR. SWAIN: Objection.

COURT: Overruled. EXCEPTION NO. 34

Q. Isn't that a fact?

A. No, it's not.

Q. Didn't you tell Delores down in the Sheriff's Department, that you didn't know how much more you could stand because one day, a few weeks before this happened, a daughter showed up that belonged to Mr. Burgin and you didn't know anything about her. Didn't you tell her that?

MR. SWAIN: Objection.

COURT: Overruled. EXCEPTION NO. 35

A. No, ma'am, I did not.

Q. How many children does your husband have?

A. Three. EXCEPTION NO. 36

Q. What are their names?

A. Ronnie, Shera, and Teresa. EXCEPTION NO. 37

Q. How old are they?

MR. SWAIN: Objection.

COURT: Overruled. EXCEPTION NO. 38

A. Ronnis [sic] is 24. Shera is 19. Teresa is 18.

Q. And they live here in Asheville. Is that correct?

A. Yes, ma'am.

Q. Truth of the matter is, they do not come about their father, do they?

MR. SWAIN: Objection.

COURT: Overruled. EXCEPTION NO. 39

The State's questioning was again designed to delve into subjects presented and raised by the witness during direct examination. As with the foregoing arguments raised by defendant, we do not consider this line of questioning improper. Nor do we view the trial judge as having abused his discretion in allowing the State to present a clear and complete picture of matters alluded to on direct.

The next argument raised by defendant pertains to certain questions asked during cross-examination of one of defendant's

character witnesses. Defendant contends that the questions asked were improper because they were prejudicial and irrelevant. The questions asked by the State were as follows:

> Q. And you lived right next door to him. Is that correct?
>
> A. Yes.
>
> Q. Did you ever meet his kids? EXCEPTION NO. 49
>
> A. Yes.
>
> Q. Are they in the courtroom today? EXCEPTION NO. 50
>
> A. Ronnie's not. Okay, the—Shera, I only met her once. And I don't really remember. And the other one, I never met. But I saw a picture of her. He showed me a picture.

This same character witness stated earlier on direct that she had lived next door to defendant and had visited with him "all the time. . . ." "It has been generally held that a character witness may be cross-examined with respect to the extent of his knowledge and acquaintance with the person in whose behalf he testifies or with regard to the sources of information upon which he bases his estimate of character." *State v. Nelson*, 200 N.C. 69, 72, 156 S.E. 154, 156 (1930). This line of questioning during cross-examination was not objected to by defendant. However, such questions were proper to test the extent of the character witness' knowledge and acquaintance with defendant, the person whose character she was supposed to be familiar with. Therefore, this line of questioning was not prejudicial nor improper.

II.

[2] The second issue raised by defendant relates to the instruction given by the trial court after the jury had begun deliberations. After the jury began deliberating to determine defendant's guilt or innocence, the jury returned to the courtroom with a request that the court read back to them the testimony of some of the witnesses. In response to this request, the court stated in part:

> All right, ladies and gentlemen, I have received a request that you have submitted. Let me advise you that the Court Reporter has taken down through the stenotype machine the testimony of all the witnesses, and I have the dis-

cretion to order her to type it up and present it. I also have the discretion not to. And in this particular situation, after considering all the factors and the fact that there are twelve of you over there and that you have collective memories, I'm going to exercise my discretion and deny the request that the testimony of the witnesses be read back or provided. EXCEPTION NO. 63.

By the time I did this your memories might lapse or some other reason might occur that would make that impractical, so I'm going to let you resume your deliberations and ask you to use your collective memories, and that means all 12 of you, to recall all the evidence in this case. EXCEPTION NO. 64.

And again, I emphasize that I could do this if I wanted to, but in this particular case I'm not, in my own discretion. You may now retire.

Defendant contends that these instructions were coercive to the jury because they "could have been interpreted by the jury as a direction to the non-agreeing jurors to compromise their individual recollections of the facts and either surrender their convictions or judgment to the views of the majority or reach agreement by 'collective' or majority vote on the facts in dispute, rather than by unanimous vote." Thus, defendant maintains that the instructions were improper, coercive, and denied defendant his right to due process of law under the federal and state constitutions. Defendant's argument is rejected.

As defendant concedes, there are no cases from this Court directly addressing the propriety of an instruction similar to the one set forth above. Instead, defendant relies on and cites a number of cases involving additional instructions given by a judge to a deadlocked jury. *See, e.g., State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). We do not consider such cases to be dispositive of the issue before us. Instead, we rely upon G.S. 15A-1233(a), which deals directly with the issue of when a jury's request for a restatement of the evidence can be granted or denied by a trial judge. That statute states in relevant part:

§ *15A-1233. Review of testimony; use of evidence by the jury.*

(a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

Thus, the trial judge has sole discretion to decide this matter. *State v. Dover*, 308 N.C. 372, 302 S.E. 2d 232 (1983). The judge states explicitly in his instruction that his denial of the request was within his discretion. The judge had previously stated to the jury that "it is your duty to recall all of the evidence, whether or not mentioned by me, and to use your own recollection of the evidence. . . ." When the instructions are read in their entirety, it seems clear that the judge was instructing the jury, all twelve members, to use their own memories. We do not consider such an instruction an abuse of the trial judge's discretion. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). Thus, this instruction was not improper nor prejudicial to defendant.

No error.

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

Justice MARTIN concurring.

Believing as I do that the "plain error" doctrine has no proper place in the law of evidence, I concur in the result reached in part I of the majority opinion. *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983) (Martin, J., concurring). In this regard, it is notable that the Evidence Code, N.C.G.S. 8C, became effective 1 July 1984. It does not contain a reference to the "plain error" doctrine created by the federal courts and adopted by a majority of this Court in *Black*, but, rather, provides that "an appellate court may review errors affecting substantial rights if it determines, in the interest of justice, it is appropriate to do so." N.C. Gen. Stat. § 8C-1, Rule 103(d) (Cum. Supp. 1983). This is no more than what

this Court has always done, and will continue to do, to prevent manifest miscarriage of justice. *Ange v. Ange*, 235 N.C. 506, 71 S.E. 2d 19 (1952); *State v. Cochran*, 230 N.C. 523, 53 S.E. 2d 663 (1949); *Mining Co. v. Mills Co.*, 181 N.C. 361, 107 S.E. 216 (1921).

I concur in the remainder of the opinion.

Justice EXUM dissenting.

Cases like this involving alleged sexual assaults against young children tear at the hearts of us all. Emotions tend to run high and our natural inclination is to want to favor and protect the child. In these cases especially it is important that the courts permit the state to put on all the legitimate evidence it has to prove its case. It is equally important that courts be assiduous to keep out evidence which is both irrelevant to defendant's guilt or innocence or to any other question in the case but which may incline the jury to want to convict defendant for reasons other than evidence of his guilt of the crime for which he is being tried. In the trial of this case so much of this kind of evidence came in that I think there is a possibility a different result would have been reached by the jury had it been kept out. N.C.G.S. § 15A-1443, which requires that a new trial be granted if the error in question results in such a possibility, compels me to vote for a new trial.

The state's evidence consisted primarily of the testimony of the young victim, corroborated by the testimony of several adults that the victim had made statements to them consistent with her trial testimony. There was, however, no testimony by the examining physician concerning a tear in the victim's hymen. Although the physician was subpoenaed by the state, he was never called to testify. Instead, a nurse who assisted the physician testified that she observed a tear in the victim's hymen during the physician's examination of the victim's external genitalia.

Defendant testified in his own behalf and denied his guilt. According to his testimony, he had been previously married and divorced, had three adult children by his former wife and had recently been married about a year to his second wife. He had been minister of music and youth director at several churches in Buncombe County and had gotten to know the victim's parents through his work with a local radio station where the victim's

father was employed as program director and which station broadcast defendant's gospel music.

Defendant's wife volunteered to help the victim's parents, who were new to the community, when they needed babysitting services. Defendant and his wife provided these babysitting services while the victim's mother was giving birth to another child. The victim and her sister stayed with defendant and his wife from Monday, 31 January 1983, until Friday, 4 February 1983. Defendant and his witnesses testified in great detail as to the care defendant, defendant's wife, and others, including defendant's wife's parents who were licensed foster care parents, provided the victim and her sister during this week. Without detailing all of this evidence, I think it fair to say that it does tend to support defendant's innocence of the crime charged.

In addition to this factual evidence, defendant offered several character witnesses who were well acquainted with defendant and who testified that he had a good reputation in the community. Finally, defendant called as a witness a ten-year-old boy who visited defendant's home while the victim was there. The boy testified that while he and the victim were alone in defendant's living room on Monday, 31 January, the victim tried to pull his pants down.

I mention this evidence for the defendant to demonstrate that this was a close, hard-fought case on the issue of guilt.

Much of the offending evidence came in during what I consider to be improper cross-examination of the defendant. In addition to the cross-examination detailed in the majority opinion concerning defendant's activities at Thoms Rehabilitation Center and the incident involving marijuana, defendant was cross-examined about a restaurant he owned in 1974 called "Leon's." The following colloquy occurred:

Q. And basically it was a hangout for teenagers, is that correct?

A. No, ma'am, not basically. It was basically a restaurant.

Q. What did you serve in the restaurant?

A. I served—When I started out there, I served three meals a day. And then I changed when I started selling beer. That's when I started to getting the young folks in there.

Q. Well, after a while, didn't it become sort of like what you call a teenage hangout in the evening, sir?

A. No, ma'am. I never—I never discontinued to serve food as long as I was there.

Q. Well, in the evening hours during the time that you were running 'Leon's'—

MR. SWAIN: Objection, Your Honor.

Q. (Ms. Carlisle continues)—Mr. Burgin, would you say in the evening hours your main clientele were young people?

A. Yes, ma'am.

MR. SWAIN: Object.

COURT: Overruled.

EXCEPTION NO. 2

Under the rules of evidence prevailing when this case was tried, a defendant who testified could be cross-examined for purposes of impeachment about specific acts of misconduct; but general inquiries concerning broad ranges of activity which may or may not be misconduct were not permitted. *State v. Shane*, 304 N.C. 643, 651-52, 285 S.E. 2d 813, 819 (1982) (error to ask on cross-examination whether defendant "resigned from the intelligence unit because of sexual improprieties . . ." because the question was not designed to elicit an affirmance or denial "of 'some identifiable specific act' by means of a detailed reference to 'the time or the place or the victim or any of the circumstances of defendant's alleged prior misconduct' "); *accord, State v. Purcell*, 296 N.C. 728, 732-33, 252 S.E. 2d 772, 775 (1979). *See also, State v. Mason*, 295 N.C. 584, 592-93, 248 S.E. 2d 241, 247 (1978), where this Court held the question, "Were you involved in what you call street gang operations in New York?" inappropriate cross-examination for impeachment purposes.

Except for the question about whether defendant had sold marijuana to Rebecca Smith, none of the complained of cross-

examination referred to alleged specific acts of misconduct. Yet the examination solely by innuendo and suggestion tended to portray defendant in a bad light before the jury and could have inclined the jury to want to convict him because of these innuendoes rather than the evidence relevant to the issue of his guilt.

Finally, the cross-examination of defendant's wife attempted to convey to the jury, again through innuendo and suggestion, that defendant did not have a good relationship with his children. This cross-examination was improper for impeachment purposes and had no relevancy to any issue being tried. Its only purpose, again, was to belittle the defendant in the eyes of the jury and incline the jury to want to convict him for reasons other than evidence of his guilt.

I do not think these instances of improper cross-examination can be sustained on the theory that somehow the defendant "opened the door" to these lines of inquiry by stating on direct examination that he had never "had any problems with young children or any kind of sexual problems" or that he had been convicted of possessing marijuana while "operating a restaurant" some years before. The cross-examination, except by innuendo and suggestion, does not tend to refute these assertions. Further, it is improper "to go into the details of the crime by which the witness is being impeached. Such details usually distract the jury from the issues properly before it, harm the witness and inject confusion into the trial of the case. . . . [T]he time and place of the conviction and the punishment imposed may be inquired into upon cross-examination." *State v. Finch*, 293 N.C. 132, 141, 235 S.E. 2d 819, 825 (1977).

Whether by the "plain error" doctrine or, as the concurring opinion suggests, in "the interest of justice," I believe the extensive cross-examination of defendant and defendant's wife about matters irrelevant to the question of guilt or the witness's credibility yet which solely by innuendo and suggestion paints defendant as a "bad man" before the jury warrants a new trial.

IN THE MATTER OF SOPHIA RENEE TRUESDELL

No. 429PA83

(Filed 7 May 1985)

1. **Insane Persons § 12— sterilization of mentally retarded person—necessity for likelihood of sexual activity**

Before an order authorizing the compulsory sterilization of a mentally retarded person can be entered pursuant to G.S. 35-43 on the ground that, because of a mental deficiency not likely to improve, respondent would be unable to care for a child, petitioner must prove by clear, strong and convincing evidence that there is a substantial likelihood that respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation.

2. **Insane Persons § 12— compulsory sterilization—best interests standards**

A petitioner who seeks an order of compulsory sterilization pursuant to G.S. 35-43 must satisfy certain "best interests" standards listed by the Court of Appeals in *In re Truesdell*, 63 N.C. App. 258, 279-80, 304 S.E. 2d 793, 806. Moreover, the trial judge in his discretion may consider certain other factors he considers to be reflective of the best interests of the respondent in any particular circumstance.

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

APPEAL by petitioner, Mecklenburg County Department of Social Services, pursuant to G.S. 7A-30(1) from a unanimous decision of the Court of Appeals, 63 N.C. App. 258, 304 S.E. 2d 793 (1983), affirming in part and reversing in part the judgment entered by *Griffin, J.*, during the 30 November 1981 Civil Session of the MECKLENBURG County Superior Court, and further remanding the case to the trial court.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski, for petitioner-appellant.

Haywood, Carson & Merryman, by Eben T. Rawls, for respondent-appellee.

Moore, Van Allen and Allen, by C. Steven Mason, for Amicus Curiae, Mrs. Carole Seate.

Karen Sindelar and R. Bradley Miller, for Amicus Curiae, Governor's Advocacy Council for Persons with Disabilities.

Deborah Greenblatt, for Amicus Curiae, Carolina Legal Assistance, Inc.

Blanchard, Tucker, Twiggs, Earls and Abrams, by Irvin B. Tucker, for Amicus Curiae, North Carolina Association for Retarded Citizens.

Shelley T. Eason and Eric R. Spence, for Amicus Curiae, North Carolina Association for County Directors of Social Services, Inc.

FRYE, Justice.

FACTS

Petitioner, Mecklenburg County Department of Social Services (hereinafter DSS), filed a petition on 30 March 1977, amended on 18 June 1980, pursuant to G.S. 35-36, *et seq.*, requesting the sterilization of respondent, Sophia Renee Truesdell. DSS, in its original and amended complaint, sought the sterilization on the ground that "because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the respondent would probably be unable to care for a child or children." Additionally, petitioner alleged in its petition "that the respondent is a mentally retarded person and sterilization would be in the public good and in the best interest of the mental, moral, and physical improvement of the respondent . . . ."

A guardian ad litem was appointed for respondent on 30 May 1980 by District Court Judge William A. Jones. On 27 June 1980, the guardian ad litem filed an objection to the petition for sterilization. Following a hearing on the matter, Judge Jones denied the petition, after construing the statute and concluding as a matter of law "that before an order of sterilization can be entered there must be a finding, *inter alia*, by clear, strong, and convincing evidence, that the respondent is likely to engage in sexual activity," citing and relying upon *North Carolina Association for Retarded Children v. State of North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976). Also, the court specifically found that there was no evidence that respondent was likely to engage in any sexual activity with any male and made further findings which indicated the lack of a substantial risk of exposure to sexual activity. DSS, pursuant to G.S. 35-44, duly gave notice of appeal, and a trial *de novo* was held in Superior Court on 30 November 1981 before Judge Kenneth A. Griffin.

During this *de novo* hearing in Superior Court, Edward C. Holscher, M.D., qualified as an expert in psychiatry and child psychiatry and Charles E. Warner, M.D., qualified as an expert in the field of medicine with an emphasis in pediatrics. The testimony given by these experts was directed to the question of whether respondent's condition met the statutory elements required by G.S. 35-43, and both felt that sterilization by hysterectomy was in the best interest of Sophia. Daisy Vance, Sophia's caretaker, and other staff members and personnel from Sophia's school for the mentally handicapped also testified. The following facts are undisputed: Sophia, who is profoundly retarded, was 18 years of age as of 6 June 1981, with a mental age of three to five years and an I.Q. of 30. Her level of intellectual functioning will not materially improve over time. Sophia is unable to exist without significant assistance from others. Her well being and comfort will always depend upon the willingness of others to protect her and tend to her basic needs. There is no indication that Sophia is infertile. Her regular monthly menstruation makes it reasonable to assume that she ovulates and is fertile. Sophia's mental retardation renders her unable to care for the needs of a child or children.

The evidence in the record also tended to show that Sophia rides the bus to and from the Metro school for the mentally retarded. The bus picks her up and returns her to her doorstep. She never leaves home or school except in the company of school authorities, her foster mother, or an adult approved by her foster mother. She never runs away from home. She is extremely retiring, shy, and quiet. She does not talk to strangers and does not have friends or social contacts. Her teacher testified that Sophia stays to herself and only moves when asked to. Sophia has not been observed removing her clothes inappropriately during school or engaging in any sexual activity with any other class members at the school.

There was no evidence of Sophia having been sexually active or sexually exploited at school. Daisy Vance did testify that she had observed Sophia rubbing her genital area several years ago and that she had prevented Sophia from continuing such sexual activity since that time. There was testimony that one young man had viewed Sophia as his "girlfriend" and would sometimes hug

her. But there were no other reports from school personnel that Sophia masturbated or rubbed her genitals while at school.

Testimony indicated that Sophia's menstrual period posed problems for her and her caretaker because Sophia was unable to tell when her menstruation began, and she would pull her pad down and stain her sheets and bed. Testimony was introduced about Sophia's ability to utilize various alternative forms of birth control and also how a hysterectomy would affect her and whether such a surgical procedure was the most desirable method of birth control.

After making thirty-three specific findings of fact relative to the foregoing, Judge Griffin denied the petition, stating in his order:

> BASED UPON THE FOREGOING FINDINGS OF FACT THE COURT CONCLUDES AS A MATTER OF LAW THAT Respondent is subject to NCGS Sec. 35-43; that she suffers from a mental disease or deficiency, not likely to materially improve, which renders her unable to care for a child or children; that sterilization would be in the best interest of Respondent. Notwithstanding these conclusions the Court further concludes that the decision in *N.C. Association for Retarded Children v. State of North Carolina*, 430 [sic] F. Supp. 451 (MDNC 1976) precludes it from granting Petitioner's request for sterilization.
>
> EXCEPTION NO. 1
>
> Said decision indicates that before a sterilization may be granted there must be a showing that Respondent is "likely to engage in sexual activity without using contraceptive devices." In the instant case there is no evidence that Respondent is likely, at present, to engage in sexual activity.

Although the petition was denied and judgment was in favor of respondent, the trial judge requested petitioner's attorney to prepare the order, containing findings of fact and conclusions of law. Respondent promptly filed objections to the findings of fact but did not set forth formal cross assignments of error in the record on appeal. Petitioner gave timely notice of appeal to the Court of Appeals. That court agreed that clear and convincing evidence had been presented that Sophia's condition satisfied the

preliminary requisite elements of G.S. 35-43, *i.e.*, that Sophia Truesdell is a mentally retarded person subject to the sterilization statutes with a physical, mental or nervous disease or deficiency that is not likely to materially improve and would probably be unable to care for a child or children.

However, the Court of Appeals, persuaded by the reasoning of the court's decision in *North Carolina Association for Retarded Children v. State of North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976), held that petitioner failed to prove by clear, strong, and convincing evidence that Sophia was substantially likely to voluntarily or otherwise engage in sexual activity likely to cause impregnation. Furthermore, the court interpreted G.S. 35-43 to include constitutional standards consistent with a strict scrutiny analysis and certain other "constitutional 'best interests' " standards substantially identical to those developed by other jurisdictions. The Court of Appeals held that all these standards must be proved by clear and convincing evidence before a petition for sterilization could be granted. In addition to the sexual activity requirement, three of these requisite standards were not, in the court's opinion, proved by petitioner.

Based on these grounds, the Court of Appeals unanimously affirmed the trial court's denial of the petition for sterilization. In addition, the court reversed in part and remanded the case to the trial court to correct certain findings of facts and conclusions of law not inconsistent with its opinion. From this unanimous decision, petitioner appeals to this Court pursuant to G.S. 7A-30(1).

I.

The primary issue on this appeal is whether the trial court erred in applying the construction of G.S. 35-43 contained within the court's decision in *North Carolina Association for Retarded Children v. State of North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976), that is, before sterilization may be granted under this statute, DSS must show that respondent would be "likely to engage in sexual activity without using contraceptive devices." *Id.* at 456. Also to be resolved is whether the Court of Appeals was incorrect in requiring that certain standards, which include specific sexual activity, must be met by the petitioner before a sterilization petition could be granted. Although we modify in some respects the opinion of the Court of Appeals, we basically

agree with its rationale and holding. Therefore, our answer to the foregoing questions is no.

Article 7 of Chapter 35 of the General Statutes of North Carolina is entitled "Sterilization of Persons Mentally Ill and Mentally Retarded." Section 35-37 of that article states in relevant part:

> The . . . county director of social services . . . is hereby authorized to petition the district court of his county for the sterilization operation of any mentally ill or retarded resident of the county, not a resident or patient of any State institution . . . considered in the best interest of the mental, moral, or physical improvement of such resident, or for the public good, provided that no operation authorized in this section shall be lawful unless and until the provisions of this Article shall first be complied with.

In defining the duty of the petitioner, G.S. 35-39 provides:

> Duty of petitioner.
>
> It shall be the duty of such petitioner promptly to institute proceedings as provided by this Article in any of the following circumstances:
>
> (1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, resident of an institution, or noninstitutional individual, that he or she be sterilized.
>
> (2) When in his opinion it is for the public good that such patient, resident of an institution, or noninstitutional individual be sterilized.
>
> (3) When in his opinion such patient, resident of an institution, or noninstitutional individual would be likely, unless sterilized, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency; or, because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children.

If a hearing is requested and evidence presented, G.S. 35-43 describes what the district judge must find before entering an order for sterilization:

> *Hearing before the judge of district court.*
>
> If the judge of the district court shall find from the evidence that the person alleged to be subject to this section is subject to it and that because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child or children, or because the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies, he shall enter an order and judgment authorizing the physician or surgeon named in the petition to perform the operation.

The guardian ad litem stipulated in this case and the trial judge found as a fact that Sophia suffers from a "mental deficiency not likely to materially improve and because of the deficiency she would be unable to care for a child." Petitioner argues that respondent's condition, established by these facts, satisfied the requisite elements for sterilization included in G.S. 35-43, *i.e.*, "because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the [respondent] would probably be unable to care for a child or children." Consequently, petitioner contends, the judge was required to enter an order for sterilization. Thus, petitioner argues that the petition for sterilization was erroneously denied by the trial court and that the Court of Appeals further erred by engrafting the additional standards to G.S. 35-43.

II.

[1] *North Carolina Association for Retarded Children v. State of North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976) has generated the primary controversy in this appeal. In that case, a three-judge panel upheld the constitutionality of Article 7 but interpreted the clause, ". . . because the person would be likely, unless sterilized, to procreate a child or children . . .," within Section 35-43 to mean "that the subject is likely to engage in sexual activity without utilizing contraceptive devices and is therefore likely to

impregnate or become impregnated." *Id.* at 456. Therefore, the district court viewed sterilization as unnecessary "unless sexual activity and inability or unwillingness to utilize contraception is indicated by the evidence . . . ." *Id.* at 457.

In the present case, the trial court denied DSS's petition for sterilization because "the decision of *N. C. Association for Retarded Children v. State of North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976) precludes it from granting Petitioner's request for sterilization." The Court of Appeals affirmed the trial court's denial of the petition and approved of the Federal court's interpretation of the statute. Petitioner argues that the trial court and Court of Appeals should not have relied upon the Federal decision because that decision is not binding on the courts of this state and because "the manner in which the court construed G.S. 35-43 constitutes an unconstitutional and unprincipled exercise in judicial legislation."

G.S. 35-43 expressly authorizes the judge to enter an order for sterilization based upon either of two grounds. The first ground is if the person would probably be unable to care for a child or children. The second ground is if the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies. These are referred to respectively as the non-eugenic and eugenic grounds. The Federal court interpreted the statute as requiring sexual activity within the second ground for obtaining sterilization, the eugenic ground, and then included that same requirement within the first ground—the person's inability to care for a child or children. The Federal court explained its reasoning:

> Although the phrase is not contained in the prior clause, it must have been the sense of the legislature to require only that which is necessary, and unless sexual activity and inability or unwillingness to utilize contraception is indicated by the evidence, there would be no occasion for resort to sterilization.

Id. at 457.

Defendant argues that "[w]hile a decision of a lower federal court may be persuasive in a state court on a federal matter, it is

nevertheless not binding, since the state court owes obedience to only one federal court, the United States Supreme Court." 1B. Moore Federal Practice § 0.402(1) n. 36 (2d ed. 1983); *see State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971); 20 Am. Jur. 2d § 225 (1965). Although we recognize that this Court is not bound by the decision from the Federal court, we are nevertheless mindful of the legal maxim, *ratio est legis amina*, reason is the soul of the law. Because we are persuaded by the reasoning and logic of the Federal court's decision, this Court agrees with the Court of Appeals that G.S. 35-43 was correctly interpreted by the Federal court. Therefore, the Court of Appeals correctly held that the trial court did not err in applying the construction of G.S. 35-43 found in *North Carolina Association for Retarded Children*. Furthermore, we affirm the Court of Appeals' holding that requires the petitioner to prove by clear, strong, and convincing evidence that there is a substantial likelihood that the respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation before the district court judge may enter an order and judgment authorizing the sterilization procedure.

III.

[2] The Court of Appeals also reviewed certain constitutional "best interests" standards created by courts in other jurisdictions and selected from these cases certain minimum standards that must be met by petitioner before a sterilization could be ordered. We agree with the Court of Appeals that when the state petitions the court for a compulsory sterilization, some minimal "best interests" standards are constitutionally required. The Court of Appeals adopted from other jurisdictions certain of these "best interests" standards. However, we must recognize that the cases relied upon by the Court of Appeals were exclusively from jurisdictions that had no statute authorizing sterilization. Therefore, these courts were not required to judicially interpret a statute, as is this Court. *See, e.g., Matter of A.W.*, 637 P. 2d 366 (Col. 1981); Annot., 74 A.L.R. 3d 1202 (1976) (jurisdiction of courts to permit sterilization of defective persons in absence of specific statutory authority); Comment, *Sterilization Petitions: Developing Judicial Guidelines*, 44 Mont. L.R. 127 (1983). These state courts were primarily considering the question of whether their courts had jurisdiction, in the absence of legislative authorization, to order sterilization of a mentally defective or incompetent person.

A minority of the courts, some pursuant to the common-law doctrine of *parens patriae*, have chosen to judicially sanction such sterilizations. Annot., *supra*. The courts authorizing sterilization judicially have established certain guidelines, despite legislative silence on the subject. To the contrary, our state is among the few that legislatively authorize and sanction non-consensual sterilization.[1] Nevertheless, we, like the Court of Appeals, are persuaded and influenced by the standards promulgated by the states in other jurisdictions in proceedings of this nature. *Ruby v. Massey*, 452 F. Supp. 361 (D. Conn. 1978); *Wyatt v. Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1974) (per curiam); *Matter of C.D.M.*, 627 P. 2d 607 (Alaska 1981); *Matter of A.W.*, 637 P. 2d 366 (Col. 1981); *Matter of Moe*, 385 Mass. 555, 432 N.E. 2d 712 (1982); *Wentzel v. Montgomery General Hosp. Inc.*, 293 Md. 685, 447 A. 2d 1244 (1982), *cert. denied*, 459 U.S. 1147 (1983); *In re Penny N.*, 120 N.H. 269, 414 A. 2d 541 (1980); *In re Grady*, 85 N.J. 235, 426 A. 2d 467 (1981); *Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 307 N.W. 2d 881 (1981); *Matter of Guardianship of Hayes*, 93 Wash. 2d 228, 608 P. 2d 635 (1980); *Cook v. State*, 9 Or. App. 224, 495 P. 2d 768 (1972). Therefore, we hold that the petitioner who seeks sterilization pursuant to G.S. 35-43 must satisfy the standards listed by the Court of Appeals in its opinion.[2] *In re Truesdell*, 63 N.C. App. at 279-80, 304 S.E. 2d at 806.

The standards listed by the Court of Appeals are not meant to serve as an exclusive list. The trial judge, in his discretion, may consider certain other factors that he considers to be reflec-

1. In Comment, *Sterilization Petitions: Developing Judicial Guidelines*, 44 Mont. L.R. 127 (1983) the author lists seven states, in addition to ours, that have enacted such statutes: Arkansas, Delaware, Mississippi, Oklahoma, South Carolina, Utah and West Virginia. "The trend in the last two decades, however, has been either to repeal non-consensual sterilization statutes or to hold them unconstitutional. Ten states repealed their compulsory sterilization statutes in the last decade." *Id.* at 129.

2. G.S. 35-43 provides that a sterilization can be ordered pursuant to a second eugenic ground if "the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous diseases or deficiencies . . . ." The Court of Appeals paraphrases this language within (1)(c) by stating that "the respondent is likely to procreate a genetically defective child . . . ." 63 N.C. App. at 279, 304 S.E. 2d at 806. Although this portion of the statute is not applicable to the instant case, we specifically reject the Court of Appeals' mischaracterization of this provision of the statute.

tive of the best interests of the respondent in any particular circumstance. Examples of these factors are included in the cases cited *supra* from other jurisdictions, which can be relied upon by the trial judge when making specific findings of fact regarding the respondent's best interest.

CONCLUSION

In reviewing the evidence of the trial court to support the findings, we agree with the Court of Appeals that finding of fact number 10 satisfies the requirement that respondent is capable of procreation. There are no findings to support the possibility of trauma. Additionally, there is insufficient evidence to support a finding that respondent is substantially likely to engage in sexual activity likely to cause impregnation. Instead, the facts indicate that the occasions for Sophia's heterosexual contact are severely limited because she is so closely supervised. However, Sophia may be exposed in the future to more social interaction with her peers. If and when she is not as closely supervised and should increased heterosexual social interaction develop, such evidence may be sufficient to sustain a finding that she is substantially likely to engage in sexual activity which is likely to cause impregnation. However, such prediction and speculation are not within the province of this Court.

We are sympathetic to petitioner's argument that an absence of sexual activity should not preclude the court from granting a sterilization petition where careful consideration of all of the facts indicates that such a procedure would be therapeutically and medically beneficial to respondent. Certainly, in life-threatening or emergency situations where sterilization is medically necessary, a petition could be granted absent a showing of the required factors. N.C. Gen. Stat. § 35-49; *see P. S. by Hardin v. W. S.*, --- Ind. ---, 452 N.E. 2d 969 (1983). However, in the case *sub judice* there is insufficient evidence to prove that Sophia is in imminent danger for her life or that her health is severely jeopardized if a hysterectomy is not immediately performed.

Finally, there are inadequate findings regarding the least drastic means to prevent conception, considering the circumstances of this case.

Therefore, the decision of the Court of Appeals is

Modified and affirmed.

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

SHEILA HUFF O'BRIANT v. HUBERT RONNIE O'BRIANT

No. 598A84

(Filed 7 May 1985)

1. Contempt of Court § 1.1— civil and criminal contempt distinguished

Criminal contempt is applied in punishment of an act already accomplished which tends to interfere with the administration of justice; the punishment is to preserve the court's authority and to punish disobedience of its orders. Civil contempt is applied where the proceeding is to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. G.S. 5A-15.

2. Contempt of Court § 5.1— criminal contempt—insufficient notice

Plaintiff's failure to appear as ordered at two child custody hearings constituted criminal contempt, if contempt at all; however, she was not given sufficient notice under G.S. 5A-15 where show cause orders issued on 27 April and 14 May 1982 were not specific about which of plaintiff's acts constituted contempt, the record did not reveal that plaintiff received a copy of any show cause order for the 2 February 1983 hearing at which the final adjudication of contempt was rendered, the 1982 show cause orders did not provide adequate notice of the final adjudication nearly a year later, and the order compelling the parties to attend the 1983 custody trial referred only to all outstanding issues and motions. G.S. 5A-11 through 14.

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

APPEAL by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of the Court of Appeals, 70 N.C. App. 360, 320 S.E. 2d 277 (1984), affirming in part and vacating in part the judgment entered by *LaBarre, J.*, at the 2 February 1983 Civil Session of District Court, Domestic Division, DURHAM County.

This action arose on 31 October 1980 when plaintiff Sheila Huff O'Briant filed a complaint requesting custody and support of a minor child, Ronald Luther O'Briant, born of her marriage to defendant Hubert Ronnie O'Briant. The trial court initially awarded custody to plaintiff and granted visitation rights to

defendant. For more than two years following the award of custody and child support, the parties filed a number of motions with regard to visitation, telephone privileges, custody, and support of the child. After numerous court hearings, most of which are not pertinent to the issue before us, the trial court conducted a full trial on the matter of custody on 24 February 1983 and awarded permanent custody to the defendant father and allowed limited vistation to the plaintiff mother. The trial court in its order additionally found plaintiff in contempt of court as follows:

> 4. The Plaintiff has willfully, wantonly, and without lawful excuse violated the lawful Orders of this Court and is in contempt of Court as follows:
>
> A. The Plaintiff willfully violated this Court's Order of December 22, 1981, regarding visitations to be allowed to the Defendant.
>
> B. The Plaintiff willfully failed to appear as Ordered at the February 25, 1982 hearing.
>
> C. The Plaintiff willfully failed to appear as Ordered at the hearing set for March 12, 1982.
>
> D. The Plaintiff willfully attempted to avoid and ignore and circumvent the lawful Orders of this Court by violating the provisions of Chapter 50 and 50(a) of the Uniformed [sic] Code by filing an action in the State of Virginia.

The trial court sentenced plaintiff to thirty days for each of the four contempt violations but stayed the sentence on condition that plaintiff adhere to the provisions set forth in the court's order.

The plaintiff appealed to the Court of Appeals. The Court of Appeals majority (Judge Hedrick with Chief Judge Vaughn concurring) affirmed in part the judgment of the trial court but vacated a portion of the trial court's order finding plaintiff in contempt for filing an action in Virginia. Judge Wells dissented from that portion of the majority opinion which affirmed adjudications of contempt for plaintiff's failure to appear at court hearings.

The remaining facts relevant to the issue presented by this appeal are included in the body of this opinion. For a more de-

tailed statement of the facts surrounding this case, see the Court of Appeals opinion at 70 N.C. App. 360, 320 S.E. 2d 277 (1984).

Corvette & Hassell, P.A., by Robert A. Hassell, for plaintiff-appellant.

Arthur Vann for defendant-appellee.

BRANCH, Chief Justice.

Plaintiff-appellant contends that the trial court committed error in finding her in contempt for her failure to attend hearings on 25 February 1982 and 12 March 1982 and in sentencing her accordingly. We are persuaded that plaintiff's contentions have merit and hold that proper notice was not given plaintiff as required by Chapter 5A of the General Statutes.

[1] At the outset we note that contempt in this jurisdiction may be of two kinds, civil or criminal, although we have stated that the demarcation between the two may be hazy at best. *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503, 169 S.E. 2d 867 (1969). Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. *Id.; Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966).

A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. at 508-09, 169 S.E. 2d at 869. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. *Id.* The importance in distinguishing between criminal and civil contempt lies in the difference in procedure, punishment, and right of review. *Luther v. Luther*, 234 N.C. 429, 67 S.E. 2d 345 (1951).

[2] Guided by these principles, we conclude that plaintiff's failure to appear at two court hearings, if contempt at all, constituted criminal contempt. It is clear that the purpose of the con-

tempt judgments was to punish plaintiff's disobedience of the court's orders rather than to provide a remedy for defendant. We also find that the contempt power was exercised to punish acts or omissions already accomplished which tended to interfere with the administration of justice: to wit, plaintiff's failure to attend two court hearings as ordered. In accord with our conclusion is N.C.G.S. § 5A-11 which provides that among others, the following is a ground for finding criminal contempt:

> (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

N.C. Gen. Stat. § 5A-11(a)(3) (1981). *Compare* N.C. Gen. Stat. § 5A-21 defining civil contempt as the failure to comply with a court order as long as (1) the order remains in force; (2) the purpose of the order may still be served by compliance with it; and (3) the person to whom the order is directed is able to comply with it.

In determining whether the trial court in the case at hand properly adjudged plaintiff in contempt, we recognize that criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards. *North Carolina v. Carr*, 264 F. Supp. 75 (W.D.N.C.) *appeal dismissed*, 386 F. 2d 129 (4th Cir. 1967). The United States Supreme Court has held that in contempt actions where the defendant is not punished summarily or where the contemptuous act does not occur in the presence of the judge or legislative body, principles of due process require reasonable notice of a charge and opportunity to be heard in defense before punishment is imposed. *See Groppi v. Leslie*, 404 U.S. 496 (1972).

In determining what procedure is appropriate for finding an accused in contempt, our statutes require that a distinction be made between direct and indirect criminal contempt. Criminal contempt is direct when the act:

> (1) Is committed within the sight or hearing of a presiding judicial official; and
>
> (2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court.

N.C. Gen. Stat. § 5A-13 (1981).

Indirect contempt is defined as "[a]ny criminal contempt other than direct criminal contempt." N.C. Gen. Stat. § 5A-13(b).

Summary proceedings are appropriate for punishing direct contempt "when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt." N.C. Gen. Stat. § 5A-14(a). In cases where a court does not act immediately to punish acts constituting direct contempt or where the contempt is indirect, notice and a hearing is required. *See* N.C. Gen. Stat. § 5A-15 and N.C. Gen. Stat. § 5A-13(b).

Since the trial judge in the case at bar did not proceed summarily against plaintiff, we conclude, without deciding whether plaintiff's acts constituted direct or indirect contempt, that the provision requiring a plenary proceeding, N.C.G.S. § 5A-15, is the statute governing the appropriate procedure. That statute also sets forth the notice required in a non-summary contempt proceeding:

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

N.C. Gen. Stat. § 5A-15.

To determine whether plaintiff had proper notice of the contempt proceedings in this case, we must review the facts pertinent to the trial court order of 20 April 1983 which found plaintiff in contempt for her failure to attend the two 1982 court hearings. In contempt proceedings, the trial judge's findings of fact are conclusive on appeal when supported by any competent evidence and

are reviewable only for the purpose of passing on their sufficiency. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978). In reviewing the pertinent facts we rely in part upon the trial judge's findings of fact in his April 1983 order.

On 12 February 1982, after months of dispute with plaintiff over visitation, telephone calls and support, defendant Ronnie O'Briant filed a motion in the cause, seeking custody of the minor child, and requesting that plaintiff be found in contempt for her failure to obey prior court orders which allowed defendant unlimited and unmonitored telephone calls to his son. Defendant also requested that both parties be required to post bond to secure their performance of the court orders. In an order filed 12 February 1982 the court summarized defendant's motion and ordered plaintiff Sheila O'Briant to appear before the court on 25 February 1982 to show cause why custody should not be granted to defendant and why "[p]laintiff should not be held in contempt of the Orders of this Court."

The record includes certification by the sheriff of Tazewell County, Virginia that a copy of the order was personally served upon plaintiff on 17 February 1982.

On 24 February 1982 plaintiff's attorney made a motion to withdraw as her counsel, citing his inability to communicate effectively with her.

The findings of fact included in the trial court's 20 April 1983 judgment state that at the scheduled 25 February 1982 hearing, plaintiff's counsel of record appeared but that plaintiff was absent. Plaintiff's counsel offered "no excuse or justification for the Plaintiff's absence . . . other than that the Plaintiff was not cooperative in dealing with him." In its Finding No. 32 the trial court stated: "[d]ue to the Court's schedule on February 25, 1982, the Court Ordered this matter be continued until Friday, March 12, 1982." The court further directed defendant to prepare an order directing plaintiff to appear.

In an order filed 3 March 1982 the court noted plaintiff's absence from the 25 February hearing and her lack of excuse for her absence. The order continued:

> That the Court, in anticipation of the absent Plaintiff, Sheila Huff O'Briant, being present at a later hearing, con-

tinues this matter until Friday, March 12, 1982 at 9:30 A.M. at which time all matters set forth in the Motion of the Defendant will be heard and disposed of.

IT IS NOW, THEREFORE ORDERED that this matter be and is hereby continued until March 12, 1982 at 9:30 A.M. or as soon thereafter as the matter can be heard and that further the Plaintiff, Sheila Huff O'Briant, is to appear before this Court and show cause, if any there may be, as to why the Defendant, Hubert Ronnie O'Briant, should not have the custody of the minor child and why the Plaintiff should not be held in contempt of the Orders of this Court. . . .

The trial court's Finding No. 34 reveals that on 12 March 1982 plaintiff failed to appear. The finding further stated:

Plaintiff's counsel of record indicated to the Court that he was offered no excuse by the Plaintiff for her failure to appear nor did he offer any excuse to the Court. Due to the Court's caseload in Juvenile Court, the matter was unable to be heard and the Court directed Counsel to agree upon a third Court date for the Plaintiff to be present.

The record reveals that a third court date was set for 3 May 1982 and that an order directing plaintiff to appear on that date was filed 27 April 1982. The order stated that plaintiff had failed to appear on 12 March 1982, failed again to offer an excuse, and "[t]hat the Court believes that the Plaintiff is wilfully refusing to abide by the Orders" of the court. The order directed that plaintiff appear on 3 May 1982 and "show cause . . . as to why the Defendant . . . should not have the custody of the minor child and why the Plaintiff should not be held in contempt of the Orders of this Court. . . ."

The record contains a certificate of service showing service by mail of a copy of the order to plaintiff and her attorney.

In its Finding No. 36 the trial judge found plaintiff was again absent from court on 3 May and ordered that the hearing be continued until 4 May, at which time plaintiff again failed to appear. On 4 May plaintiff's attorney was permitted to withdraw as her counsel.

As a judgment filed 14 May 1982 reveals, the trial court at the 4 May 1982 hearing awarded temporary custody of the

O'Briant child to defendant. The court also found that plaintiff's actions in failing to appear in court were willful refusals to obey court orders. The court stated that there was cause to believe that plaintiff violated orders of the court by refusing to allow defendant phone calls to the child but that a determination whether that action constituted willful and gross contempt would be later determined. The court in its conclusions of law stated that plaintiff was in contempt of orders of the court. The trial court issued no order with regard to the contempt.

The record reveals that numerous motions and affidavits not relevant to the issue before us were filed in the months following the 14 May 1982 judgment. In the early part of 1983[1] the trial court ordered a full custody hearing at the earliest practicable time and stated that "this hearing shall be a trial on the merits upon all outstanding issues, and a hearing shall be held on all outstanding motions pending before this court prior to the actual trial of all issues."

A certificate of service by counsel for defendant appears in the record, certifying that a copy of the order was served on counsel for plaintiff. The custody trial began 2 February 1983 and continued through 15 February 1983.

Defendant-appellee argues that the show cause orders issued by the trial court in the early part of 1982 gave plaintiff adequate notice that she should be prepared to defend herself against charges of contempt as to her failure to attend hearings in February and March of 1982. We disagree.

The United States Supreme Court has recognized that even in instances of direct contempt where the trial court postpones announcing punishment for contemptuous behavior that has occurred in its presence during a trial, the contemnor "should have reasonable notice of the *specific charges* and opportunity to be

1. The date of the order appears in the record as follows: "3. This matter shall be retained for further orders of this Court. This the 25 day of ~~January~~, February, 1983. s/ DAVID Q. LaBARRE, Judge Presiding."

Although the order appears to be dated 25 February 1983 the trial for which the order purported to give notice was completed on 15 February 1983. It is our conclusion that the trial court mistakenly struck the word January instead of February in its order. The parties do not contest that proper notice of the 2 February 1983 hearing was given.

heard in his own behalf." *Taylor v. Hayes*, 418 U.S. 488, 499 (1974) (emphasis added). In *Taylor* the contemnor was an attorney representing a defendant in a criminal trial. The attorney, Taylor, was informed throughout the trial that certain of his actions were contemptuous. The Supreme Court found that although Taylor was aware of the contempt charges throughout the trial, no final adjudication of the contempt occurred until after a verdict was returned, at which time Taylor was sentenced to four and one-half years imprisonment for the contempt. The Supreme Court found that the trial judge erred in failing at the time of the final adjudication to afford the attorney an opportunity to defend his actions.

In the instant case the record is unclear as to whether prior to the 2 February 1983 trial plaintiff was found in contempt for her failure to appear. Since the show cause orders issued to plaintiff in the spring of 1982 and the 14 May 1982 order were not specific about which of plaintiff's acts were deemed contemptuous, it is unclear whether the May 1982 finding of contempt referred only to plaintiff's failure to obey the court's orders regarding visitation and telephone privileges or also to her failure to appear in court. As in *Taylor*, however, it is clear that the final adjudication of contempt against plaintiff was rendered in the trial in February of 1983. For that adjudication, plaintiff was not afforded "reasonable notice of the specific charges" against her with regard to her failure to appear at the 1982 court hearings. *Taylor*, 418 U.S. at 499. In particular, the record does not reveal that plaintiff received a copy of any order directing her to appear at the 2 February 1983 hearing to "show cause why [she] should not be held in contempt of court" for failing to obey court orders directing her to appear at the hearings. N.C. Gen. Stat. § 5A-15.

Assuming, without deciding, that the show cause orders directing plaintiff to appear at the 12 March, 3 May, and 4 May 1982 hearings gave plaintiff notice that she should be prepared to defend herself against the charges of contempt at issue, they do not provide adequate notice of the final adjudication of contempt nearly a full year later.

We also reject appellee's argument that the order compelling the parties to attend the 1983 custody trial supplied adequate notice to plaintiff. That order stated that the hearing would be "a

trial on the merits upon all outstanding issues" and "all outstanding motions pending" before the court. It is not at all clear that plaintiff's alleged contempt was an "outstanding issue" or part of an outstanding motion at the time of the January 1983 order. Even if the matter of contempt was an unresolved issue, we hold that the "notice" provided by the order failed adequately to apprise plaintiff that she should be prepared to defend herself against the charges. We find support for our conclusion from a Court of Appeals case, *In re Board of Commissioners*, 4 N.C. App. 626, 167 S.E. 2d 488 (1969). In that case a superior court judge entered an order on 29 May 1968 directing the Caldwell County Board of Commissioners to provide adequate office space for the clerk of Superior Court. In August 1968 each member of the Board was issued a subpoena commanding him or her to appear and give evidence on behalf of the State. The Board members appeared as ordered. At the conclusion of testimony and arguments, the judge found the Board members in contempt for their failure to obey the 24 May 1969 order. The Court of Appeals found the May order to be vague in its command that the commissioners provide *adequate* office space.

> However, irrespective of the apparent vagueness of what is required by the Order, the subpoenaes in no way advised the commissioners that they were to appear and show cause why they should not be held in contempt for failure to supply *adequate* office space.

4 N.C. App. at 630, 167 S.E. 2d at 491.

In view of the vagueness of the May order and the lack of notice to show cause, the Court of Appeals reversed the contempt adjudications. *See also Ingle v. Ingle*, 18 N.C. App. 455, 197 S.E. 2d 61 (1973) (inadequate notice where contemnor directed to appear "to testify" in District Court).

Similarly, we hold that the notice afforded plaintiff was inadequate to inform her that she should be prepared to defend herself for her failure to attend court hearings on charges of contempt in the February 1983 custody trial. Having found the notice to be inadequate, we find it unnecessary to determine whether there was sufficient evidence to support the contempt adjudications at issue. Therefore the decision of the Court of Appeals is reversed, and this case is remanded to that court with instruc-

tions that it further remand the case to the district court with order that the contempt judgments in question be vacated.

Reversed and remanded.

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

W. J. ADAMS v. ROBERT J. NELSEN AND WIFE, ALICE E. NELSEN

No. 166PA84

(Filed 7 May 1985)

1. **Arbitration and Award § 2; Laborers' and Materialmen's Liens § 1— arbitration agreement—no waiver of right to file lien claim**

A contractual clause providing that the parties shall arbitrate disputes under the contract did not prevent plaintiff from enforcing a claim of lien for architectural services pursuant to G.S. 44A-13.

2. **Arbitration and Award § 2— arbitration agreement—incorporation in complaint—jurisdiction not ousted—motion to dismiss insufficient to compel arbitration**

The trial court was not "ousted" of jurisdiction in an action to recover for architectural services by an arbitration clause incorporated into the complaint by reference where defendants failed to apply to the court for an order to stay litigation and compel arbitration. Defendants' G.S. 1A-1, Rule 12(b)(6) motion to dismiss, which omitted any reference to an arbitration agreement, was insufficient to invoke the arbitration provision pursuant to G.S. 1-567.3.

3. **Arbitration and Award § 2— arbitration demand after statute of limitations has run**

Defendants could not successfully demand arbitration of a contract dispute after the applicable statute of limitations for breach of contract had run. However, defendants' failure to demand arbitration within the applicable statute of limitations did not constitute a "waiver" of such right. G.S. 1-52.

4. **Arbitration and Award § 2— right to arbitration—no waiver by filing complaint**

A party does not impliedly waive his right to arbitration when he pursues an action in court by filing a complaint.

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

ON defendants' petition for discretionary review, pursuant to G.S. 7A-31, of a unanimous decision of the Court of Appeals, 67 N.C. App. 284, 312 S.E. 2d 896 (1984), reversing and remanding the judgment entered by *Rountree, J.*, during the 24 January 1983 civil session of District Court, CARTERET County, granting defendants' motion to dismiss plaintiff's cause of action.

Darden and Pierce, by R. D. Darden, Jr., for plaintiff-appellant.

Bennett, McConkey & Thompson, P.A., by Thomas S. Bennett, for defendant-appellees.

FRYE, Justice.

This dispute presents several issues relative to an arbitration clause contained within a contract. First, we must decide whether a contractual clause which provides that the parties "shall" arbitrate disputes under the contract prevents a party from pursuing a separate legal remedy through court action. Secondly, whether a defendant's 12(b)(6) motion in his answer automatically "ousts" the court of jurisdiction and whether such a motion effectively invokes the arbitration provision. Thirdly, whether defendant may successfully demand arbitration after the applicable statute of limitations has run. Our answer is no to each question.

FACTS

Plaintiff, a registered professional engineer, filed this action on 9 November 1979, alleging that he had entered into a contract with defendants in August 1978 in which plaintiff had agreed to perform professional design services in connection with the construction of a residence to be built for defendants on their property. Plaintiff attached to the complaint a copy of the contract that was allegedly breached by defendants. Plaintiff sought damages in the amount of $2,662 plus interest. Furthermore, plaintiff sought enforcement of a claim of lien filed on 11 September 1979 pursuant to G.S. 44A-14.

Defendants filed their answer on 4 December 1979 and alleged as a first defense that the complaint should be dismissed pursuant to Rule 12(b)(6) because it failed to allege facts upon which relief could be granted. As a second defense, defendants

denied breaching the contract and also alleged as an affirmative defense that "by reason of the plaintiff [sic] procrastinations and delinquencies, the defendants have been caused to suffer" certain losses and hardships.

On 24 January 1983, over three years after defendants filed their answer, Judge Rountree granted defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and also dismissed the notice and claim of lien filed by plaintiff. Plaintiff gave timely notice of appeal, and the Court of Appeals, in a unanimous decision, reversed and remanded the case. Defendants' petition for discretionary review pursuant to G.S. 7A-31 was allowed by this Court.

[1] Defendants raise several questions to be resolved by this Court. First, defendants contend that the Court of Appeals erred in holding that plaintiff's complaint alleges sufficient facts to withstand defendants' motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We disagree with defendants' argument. The Court of Appeals was correct in concluding that plaintiff's complaint was not defective and sufficiently stated a claim for relief. Additionally, plaintiff's claim of lien, included within his complaint and filed pursuant to G.S. 44A-8, constituted a statutory remedy that was not extinguished merely because plaintiff had entered into a contract providing for arbitration. The Court of Appeals correctly held that plaintiff was not foreclosed from pursuing his statutory remedy by agreeing to arbitrate.

[2] Defendants next argue that the Court of Appeals failed to correctly apply the holding in *Sims v. Ritter Construction, Inc.*, 62 N.C. App. 52, 302 S.E. 2d 293 (1983). Basically, defendants contend that the *Sims* case stands for the proposition that the arbitration clause,[1] which was in this case appended to and incorporated by

1. The parties signed an American Institute of Architects form document B151. The arbitration provision included within Article 8 of that contract provides as follows:

All claims, disputes and other matters in question between the parties to this Agreement, arising out of, or relating to this Agreement or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. . . . In no event shall the demand for arbitration

reference into plaintiff's complaint, ousted the court of jurisdiction to litigate the claim and that the trial court was required to grant the Rule 12(b)(6) motion on jurisdictional grounds. Defendants quote the following passage from *Sims* in support of this argument:

> The contract between the parties contained an agreement to submit any controversy to arbitration. This agreement, pursuant to G.S. 1-567.2, is valid, enforceable and irrevocable. Therefore, the Superior Court had no jurisdiction to hear the action arising out of the building contract . . . .

62 N.C. App. at 54, 302 S.E. 2d at 295.

We disagree with defendants' argument. First, the facts in *Sims* are not analogous to those before the Court. In that case, plaintiff filed a complaint to recover damages for breach of a building contract, admitting in the complaint that a valid contract existed. The defendants in their answer made a motion to dismiss the complaint "on the ground that the contract between the parties provided for submission to arbitration of any disagreement arising out of the contract."[2] 62 N.C. App. at 52, 302 S.E. 2d at

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be made after the date when such dispute would be barred by the applicable statute of limitations.

2. N.C. Gen. Stat. § 1-567.3 sets forth the proper procedure for compelling or staying arbitration. That section states:

§ *1-567.3. Proceedings to compel or stay arbitration.*

(a) On application of a party showing an agreement described in G.S. 1-567.2; and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subsection (a) of this section, the application shall be made therein. Otherwise the application may be made in any court of competent jurisdiction.

294. The Court of Appeals in *Sims* upheld the trial judge's order requiring "that all matters in controversy between the parties be submitted to arbitration, . . ." *Id.* at 52, 302 S.E. 2d at 294.

In the present case, defendants' motion to dismiss was not, as in *Sims*, expressly premised upon the existence of the arbitration clause within the contract. In fact, nowhere in defendants' answer is there any explicit reference to an arbitration clause. Therefore, defendants failed to apply to the court for arbitration in order to exercise their contractual remedy to which they were entitled. Consequently, the trial court was not "ousted" of its jurisdiction in this matter, as contended by defendants.[3]

Defendants also contend that by filing their motion to dismiss pursuant to Rule 12(b)(6) they invoked the provisions of Article 8 of the contract as required by G.S. 1-567.3(d). This argument is

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused or a stay of arbitration granted on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown. (1973, c. 676, c. 1.)

3. We note that even if defendants had applied to the court for arbitration pursuant to G.S. 1-567.3, defendants' contention that the trial court would be "ousted" of jurisdiction remains untenable. There is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act. Nothing contained in the language of the Act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. N.C. Gen. Stat. 1-567.17 explicitly states:

§ *1-567.17. Court; jurisdiction.*

The term "court" means any court of competent jurisdiction of this State. The making in this State of an agreement described in G.S. 1-567.12, or any agreement providing for arbitration in this State or under the laws thereof, confers jurisdiction on the court to enforce the agreement under this Article and to enter judgment on an award thereunder. (1927, c. 94, s. 3; 1973, c. 676, s. 1.)

Editor's Note. — It would appear that by the reference in this section to an agreement described in G.S. 1-567.12, an arbitration agreement under § 1-567.2 was intended.

Thus, the court retains jurisdiction to oversee disputes involving arbitration agreements.

also meritless. The Court of Appeals correctly concluded that the proper procedure for staying litigation and compelling arbitration is by a proper motion. *Adams*, 67 N.C. App. at 288, 312 S.E. 2d at 899. G.S. 1-567.3 states that arbitration can be compelled "[o]n application of a party showing an agreement described in G.S. 1-567.2; . . ."[4] An application to the court is defined within G.S. 1-567.16:

> *Applications to court.*
>
> Except as otherwise provided, an application to the court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action. (1927, c. 94, s. 5; 1973, c. 676, s. 1.)

In the case before us, defendants filed an answer that did not include a motion "showing" an agreement to arbitrate. Therefore, defendants' motion to dismiss, which conspicuously omitted any reference to an arbitration agreement, was not the proper method to stay litigation and compel arbitration.

[3] Defendants next attack the Court of Appeals' holding that they "waived their right to arbitration by their conduct in the case which the court says indicated a waiver on their part." Although over three years had elapsed between the filing of the complaint and the ruling on the 12(b)(6) motion, defendants submit that this delay should not be viewed as conduct on their part evidencing an implicit waiver. The Court of Appeals determined that the contract controlled the length of time in which a party could demand arbitration. Indeed, Article 8 of the contract provides that a demand for arbitration cannot be made "after the

4. G.S. 1-567.2 provides:

(a) Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

date when such dispute would be barred by the applicable statute of limitations." By applying G.S. 1-52, the statute of limitations for breach of contract actions, the Court of Appeals correctly decided that defendants' failure to demand arbitration within the three-year period barred them from now asserting their right to arbitrate.

We agree with the Court of Appeals' final resolution of this question. However, in analyzing this question, that court was mistaken in equating defendants' failure to demand arbitration within the time contained in the applicable statute of limitations to a "waiver" of such right. *See, e.g., Cyclone Roofing Company v. LaFave Company*, 312 N.C. 224, 321 S.E. 2d 872 (1984) (for a thorough treatment of whether a party implicitly waives his right to demand arbitration after pleadings have been filed by the parties); *see also*, Annot., 25 A.L.R. 3d 1171 (1969 & Supp. 1984) (this annotation discusses the cases that address the issue of delay in asserting a contractual right to arbitration as precluding enforcement thereof in either the absence or the presence of a specific time limit within the arbitration agreement).

In this case, the contract contained in Article 8 a time limitation within which a party to the contract could make a demand for arbitration.[5] Therefore, the question of whether defendant "impliedly waived" his right to demand arbitration is not an issue in this case. Defendants' contractual right to arbitration was barred by the applicable three-year statute of limitations. *Application of Mark Cross Company*, 15 Misc. 2d 947, 181 N.Y.S. 2d 110 (1958); *see, e.g.*, Annot., 94 A.L.R. 3d 533 (1979 & Supp. 1984) (collected and analyzed within this annotation are cases that have addressed and resolved the issue of whether an agreement to arbitrate is barred by a specific statute of limitations).

[4] Although neither party specifically raises the issue, this Court perceives within the opinion below a misstatement of the law relating to waiver on the part of the plaintiff. The Court of Appeals concluded that plaintiff intended to waive his right to arbitration by pursuing an action in court. *Adams*, 67 N.C. App. at 287, 312 S.E. 2d at 899. The question of whether a party as a mat-

5. The Uniform Arbitration Act does not contain a specific provision containing a time limitation within which a demand for arbitration must be made.

ter of law implicitly waives his right to demand arbitration was recently addressed by this Court in *Cyclone Roofing Company v. LaFave Company*, 312 N.C. 224, 321 S.E. 2d 872 (1984). We held in that case that a party impliedly waives his contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. *Id.* at 229, 321 S.E. 2d at 876. Contrary to the position taken by the Court of Appeals, we recognized that the filing of a complaint or answer does not automatically result in waiver. *Id.* Therefore, we reject that court's conclusion that a party impliedly waives his right to arbitration when he pursues an action in court by filing a complaint.

By way of *dictum*, the Court of Appeals endeavored to assist the trial court by describing four situations in which a defendant may be deemed to have waived a contractual right to arbitration. Whether this Court will be confronted in the future with situations similar to those included within the four categories identified by the Court of Appeals is speculative. Accordingly, we disavow the language contained within the Court of Appeals' opinion that attempts to provide "guidance" to the trial courts on the ground that many of the issues are premature, and we reserve resolution of these questions for future cases in which they are presented.

Accordingly, we modify and affirm the decision of the Court of Appeals.

Modified and affirmed.

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

RICHARD H. GLENN, EARL C. HOOD, HELEN HOOD, CYNTHIA HOOD, TEAKA HOOD, SAMMY HOOD, MARILYN HOOD, ROBERT HOOD, ERICA HOOD, CHAUNCEY HOOD BY HIS G/A/L, AND LEKEITHIA HOOD BY HER G/A/L v. SMILIE WAGNER, D/B/A SALEM MANOR MOTEL, B-BOM, INC., AND D & S ENTERPRISES, INC.

No. 219PA84

(Filed 7 May 1985)

1. **Corporations § 1.1— disregarding corporate entity**

Courts will disregard the corporate form or "pierce the corporate veil" and extend liability for corporate obligations beyond the confines of a corporation's separate entity whenever necessary to prevent fraud or to achieve equity.

2. **Corporations § 1.1— disregarding corporate entity—liability for torts**

A corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded.

3. **Corporations § 1.1— piercing corporate veil—domination not limited to transaction attacked**

Where an affiliated corporation is without a separate and distinct corporate entity and is operated as a mere shell, created to perform a function for an affiliated corporation or its common shareholders, domination sufficient to pierce the corporate veil need not be limited to the particular transaction attacked.

4. **Corporations § 1.1— disregarding corporate entity—erroneous instruction—harmless error**

In an action which related to disregarding the corporate entity of affiliated corporations rather than piercing the veil to reach a sole or dominant shareholder, the trial court's instruction referring to control and domination of business practice by an individual shareholder "as to the transactions in question" was mere surplusage. In any case, the instruction, if error, was harmless since despite it the jury found the evidence of control by defendant corporation over the affiliated corporation sufficient to return a verdict for plaintiffs against defendant corporation.

5. **Corporations § 1.1— disregarding corporate entity—control and domination—instruction on factors to be considered**

In an action relating to disregarding the corporate entity, the Court of Appeals erred in concluding that each of the four factors of inadequate capitalization, non-compliance with corporate formalities, complete domination and control, and excessive fragmentation should be treated as separate legal theories upon which a trial court must instruct where there is evidence of these factors. Rather, these and other factors, including non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the

dominant shareholder, non-functioning of other officers or directors, and absence of corporate records, are merely factors to be considered to determine whether sufficient control and domination is present to satisfy the first prong of the three-pronged rule known as the instrumentality rule.

6. **Corporations § 1.1— disregarding corporate entity—instrumentality rule—affiliated corporations or dominant shareholder**

The rule with regard to piercing the corporate veil encompasses both situations where there is direct stock ownership of a subsidiary corporation by a parent corporation and where stock control is exercised through a mutual shareholder.

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

PLAINTIFFS appeal from the decision of the Court of Appeals, reported at 67 N.C. App. 563, 313 S.E. 2d 832 (1984), granting defendants a new trial. Judgment for plaintiffs was entered by *Tash, J.* at the 24 August 1981 Civil Session of District Court, FORSYTH County. We allowed plaintiffs' petition for discretionary review on 2 October 1984.

Legal Aid Society of Northwest North Carolina, Inc. by Ellen W. Gerber and Gwyneth B. Davis for plaintiff-appellants.

B. Wagner-Sumner for defendant-appellant B-Bom, Inc.

BRANCH, Chief Justice.

The sole issue before us is whether the Court of Appeals erred in holding that the trial judge failed to properly instruct the jury with respect to piercing the corporate veil so as to make defendant B-Bom, Incorporated liable for torts committed by defendant D & S Enterprises. For the reasons set forth we reverse the Court of Appeals.

A full statement of the facts is set forth in the opinion of the Court of Appeals, 67 N.C. App. 563, 313 S.E. 2d 832. For purposes of our decision, the following summary of the facts will suffice. Plaintiffs instituted this action following their alleged wrongful eviction from Salem Manor Motel in Winston-Salem. The evidence at trial tended to show that at the time of their eviction in the fall of 1979, the Salem Manor Motel was owned by B-Bom, Inc. David Wagner and George Hill each own 50 percent of B-Bom's stock, with David Wagner as its president and registered agent.

B-Bom is in the business of acquiring, leasing, and managing property. B-Bom leased the Salem Manor to D & S Enterprises which operated the motel through its agent, defendant Smilie Wagner. David Wagner testified that D & S was "set up mainly to benefit [his cousin] Smilie as well as to help him [Smilie] make some additional funds." the Articles of Incorporation show that David Wagner was the sole subscribing shareholder in D & S. Under the terms of the lease, the bulk of the Salem Manor rents and profits were paid to B-Bom in the form of rental obligations. Smilie Wagner managed the business on a day-to-day basis. According to David Wagner, his own involvement in the business was "more of an advisory nature because that business was operated exclusively by Smilie . . . as a general rule he operated the business pretty much as he saw fit." He stated that he was unaware of the eviction policy which gave rise to this cause of action until he was notified that plaintiffs were evicted.

David Wagner testified that as of 1980, he and Smilie each owned 50 percent of D & S. David Wagner "thought" that he was the president and treasurer of D & S and that Smilie "must be" the vice-president and secretary. He could not recall whether there had been an organizational meeting, when the by-laws were adopted, who was on the initial Board of Directors, or how many board meetings had been held. Although he and Smilie met regularly to deal with business matters, he could not recall having a formal shareholder or annual meeting. The only formal instrument executed on behalf of D & S, which constituted its only business, was the lease agreement with B-Bom giving rise to the operation of the rental business and store at Salem Manor. That lease agreement was executed prior to the incorporation of D & S. B-Bom established the amount of rent to be charged for each of the Salem Manor units. David Wagner's law office served as the corporate office of both B-Bom and D & S.

In July of 1980, Smilie Wagner went into business for himself. B-Bom collected the rent from Salem Manor until October 1980 when an employee of another of David Wagner's corporations, located in the Salem Manor premises, was authorized to collect rent from the tenants. As a corporation, D & S was never formally dissolved. D & S is without assets to satisfy the judgment in this case. It was plaintiffs' theory at trial that Smilie Wagner should be considered the agent of B-Bom because his employer

D & S, was the "alter-ego" of B-Bom through which B-Bom operated the Salem Manor Motel and injured the plaintiffs.[1]

In this regard, the trial judge instructed as follows:

Did B-Bom, Incorporated, so dominate and control D & S Enterprises, Incorporated that the corporate entity should be disregarded? The burden of proof on this issue is on the plaintiffs. This means that they must satisfy you by the greater weight of the evidence that D & S Enterprises had no separate role of its own. Under North Carolina law, a corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances the separate identities of parent and subsidiary or affiliated corporations may be disregarded. The corporate entity also may be disregarded if it is totally dominated by an individual shareholder.

When a corporation is so operated that it is a mere instrumentality or alter ego of the sole or dominant shareholder and a shield for its activities in violation of the declared public policy or statute of the state, the corporate entity will be disregarded and the corporation and the shareholders treated as one and the same person, it being immaterial whether the sole or dominant shareholder is an individual or another corporation. The control must be such complete domination of policy and business practice that as to the transactions in question the subservient corporation had no separate mind, will or existence of its own. Therefore, the plaintiffs must prove by the greater weight of the evidence that B-Bom, Incorporated, through its dominant shareholder, David Wagner, exercised such control over D & S Enterprises, Incorporated that D & S, in effect, had no separate identity, no separate mind or will of its own, but instead there was a complete identity of interest between the two corporations.

1. In their complaint plaintiffs alleged that under the authorization of Smilie Wagner their apartments were padlocked, personal property removed and damaged, and their mail returned to the post office. The jury awarded plaintiff Glenn judgment in the amount of $950 in compensatory and punitive damages and plaintiffs Hood $9,007 in compensatory and punitive damages.

> With regard to this tenth issue—eleventh issue, rather, the plaintiffs allege and have introduced evidence tending to show that D & S Enterprises is the alter ego of B-Bom, Incorporated, and is controlled by B-Bom. On this eleventh issue, the defendants allege and have introduced evidence tending to show that D & S Enterprises and B-Bom, Incorporated, are entirely separate corporations and that no control is exercised by B-Bom over D & S. So I instruct you on this issue that if you find by the greater weight of the evidence that D & S Enterprises was the mere instrumentality or alter ego of B-Bom, Incorporated, with no separate will or mind of its own, it would be your duty to answer this issue "yes" in favor of the plaintiffs. On the other hand, if, considering all of the evidence, the plaintiffs have failed to prove this, it would be your duty to answer this issue "no" in favor of the defendants.

The question is whether the trial judge correctly applied the applicable law to the facts of the case. We answer in the affirmative.

[1, 2] It is well recognized that courts will disregard the corporate form or "pierce the corporate veil," and extend liability for corporate obligations beyond the confines of a corporation's separate entity, whenever necessary to prevent fraud or to achieve equity. 18 Am. Jur. 2d, *Corporations* § 15 (1965). In North Carolina, what has been commonly referred to as the "instrumentality rule," forms the basis for disregarding the corporate entity or "piercing the corporate veil." The decisions of this Court have stated the rule as follows: " '[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded.' " *B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E. 2d 570, 575 (1966). *See Henderson v. Security Mortgage & Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968); *Huski-Bilt, Inc. v. First Citizens Bank & Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967).

This Court has enumerated three elements which support an attack on separate corporate entity under the instrumentality rule:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

B-W Acceptance Corp. v. Spencer, 268 N.C. at 9, 149 S.E. 2d at 576.

Factors which heretofore have been expressly or impliedly considered in piercing the corporate veil include:

1. Inadequate capitalization ("thin incorporation"). *See Commonwealth Mut. Fire Ins. Co. v. Edwards & Broughton*, 124 N.C. 116, 32 S.E. 404 (1899) (recognizing "congenital insolvency" as "intrinsically dangerous").

2. Non-compliance with corporate formalities. *See Hammond v. Williams*, 215 N.C. 657, 3 S.E. 2d 437 (1939); *Henderson v. Security Mortgage & Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968).

3. Complete domination and control of the corporation so that it has no independent identity. *See B-W Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966); *Waff Bros., Inc. v. Bank of North Carolina, N.A.*, 289 N.C. 198, 221 S.E. 2d 273 (1976).

4. Excessive fragmentation of a single enterprise into separate corporations. *See Fountain v. West Lumber Co.*, 161 N.C. 35, 76 S.E. 533 (1912).

See generally Robinson, North Carolina Corporation Law, §§ 2-12, 9-7 to -10 (3d ed. 1983).

The Court of Appeals, in its opinion, correctly recognized that the relationship between B-Bom and D & S was that of affiliated corporations, that is, corporations in which the controlling

interest in both is owned by the same person or persons. In this regard, the facts in the present case differ from those in *Acceptance Corp.*, *Huski-Bilt*, and *Henderson*. In both *Acceptance* and *Huski-Bilt*, the issue before the Court was whether a parent corporation should be held liable on the obligations of its subsidiaries. In *Henderson* the issue was whether the corporate entity should be disregarded and an individual dominant shareholder held liable on the theory that the corporation was the mere instrumentality or alter ego of the sole or dominant shareholder and a shield for his unlawful activities. In these cases the factor of "complete domination and control," gave rise to three elements: (1) stock control and domination of finances, policy and business practice with respect to the transaction attacked; (2) control used by the defendant to commit the wrong; and (3) proximate cause.

[3] The rule of law as formulated in *Acceptance Corp.*, *Huski-Bilt* and *Henderson* was particularly suited to the facts of those cases. We hold in this case, however, that domination sufficient to pierce the corporate veil need not be limited to the particular transaction attacked. In applying this standard it should be remembered that it will be a rare case in which the corporate veil will be pierced when the domination does not extend to the transaction attacked. It is sufficient where, as here, one affiliated corporation is dominated by another to the extent that the dominated corporation has no separate mind, will or *identity* of its own. In this case there was plenary evidence that from its inception D & S had no separate identity and was never anything other than a tool of B-Bom.

In finding the disregard of corporate entity permissible in this case, we note that the evidence showed that the primary function of D & S was to collect rent for B-Bom and that it was the manner in which D & S, through its agent Smilie Wagner, went about that function that gave rise to the wrong alleged. David Wagner, the president and one of two directors for both B-Bom and D & S, frequently discussed business affairs with Smilie. Indeed, his control over D & S, of which he was the sole subscribing shareholder, was sufficient to allow him unilaterally to dissolve the lease agreement between B-Bom and D & S. In David Wagner's words, "that's like me informing me" that the lease, the only significant asset of D & S, was dissolved. D & S

was formed without adherence to corporate formalities, and without adequate capitalization. With respect to plaintiffs, who are involuntary creditors, D & S is insolvent.

Where an affiliated corporation is without a separate and distinct corporate identity and is operated as a mere shell, created to perform a function for an affiliated corporation or its common shareholders, we do not believe an analysis of domination need be narrowly limited to control over the *particular* transaction attacked—here the padlocking of the rooms at Salem Manor Motel. David Wagner exercised such control over the existence and functioning of D & S that if, as he contended, he was not aware of the actual transaction attacked, under the instrumentality rule we hold that he, and through him B-Bom, is deemed to have had notice of the transaction.

[4] The trial court's instructions in the present case restate, in substance, the law respecting the instrumentality rule as enunciated in *Acceptance Corp.*, *Huski-Bilt*, and *Henderson*. We note, however, that the second paragraph of the instruction refers to control and domination of business practice by an individual shareholder "as to the transactions in question." Although the evidence does not support a finding that B-Bom formulated or had actual knowledge of the policy underlying the transaction attacked, it is clear that the second paragraph of the instruction restated in part the law with regard to piercing the corporate veil where a corporation is an alter ego of a sole or dominant shareholder. This instruction was surplusage since this action relates to disregarding the corporate entity of affiliated corporations rather than piercing the veil to reach a sole or dominant shareholder. In any case, the instruction, if error, is harmless error since despite it the jury found the evidence of control by B-Bom sufficient to return a verdict for plaintiffs. Indeed, the evidence here is fully sufficient to support a finding that D & S Enterprises had "no separate role of its own" and that B-Bom, its affiliate, exercised "actual control" over D & S, "operating the latter as a mere instrumentality or tool."

In short, although the instrumentality rule has, until now, been tailored to deal with "domination and control" as evidenced in a parent-subsidiary or sole dominant shareholder situation, the

rule is not limited to factual situations or resulting legal analysis afforded by those cases.

[5] Thus, we expressly reject the Court of Appeals' conclusion that the evidence at trial was insufficient to support an instruction on the instrumentality rule. Nor do we agree with that court's conclusion that each of the four factors enumerated above (inadequate capitalization, non-compliance with corporate formalities, complete domination and control, excessive fragmentation) should be treated as separate legal theories upon which a trial court must instruct where there is evidence of these factors. In fact, in addition to these four factors, which are most commonly encountered when the issue of intercorporate liability is addressed, courts have recognized numerous other factors which may be considered inherent in the instrumentality rule. These include: non-payment of dividends, insolvency of the debtor corporation, siphoning of funds by the dominant shareholder, nonfunctioning of other officers or directors, absence of corporate records. *See DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F. 2d 681 (4th Cir. 1976). We emphasize, these are merely factors to be considered to determine whether sufficient control and domination is present to satisfy the first prong of the three-pronged rule known as the instrumentality rule. *See B-W Acceptance Corp.*, 268 N.C. 1, 149 S.E. 2d 570.

It should be remembered that the theory of liability under the instrumentality rule is an equitable doctrine. Its purpose is to place the burden of the loss upon the party who should be responsible. Focus is upon reality, not form, upon the operation of the corporation, and upon the defendant's relationship to that operation. It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had "no separate mind, will or existence of its own" and was therefore the "mere instrumentality or tool" of the dominant corporation. As stated in *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F. 2d 681, 684 (4th Cir. 1976):

> The circumstances which have been considered significant by the courts in actions to disregard the corporate fiction have been "rarely articulated with any clarity." *Swanson*

v. Levy (9th Cir. 1975), 509 F. 2d 859, 861-2. Perhaps this is true because the circumstances "necessarily vary according to the circumstances of each case," and every case where the issue is raised is to be regarded as "sui generis [to] * * * be decided in accordance with its own underlying facts."

As we have stated herein, the two corporations in this case functioned as a single business enterprise in substance, if not in form. We agree with the Court of Appeals' conclusion that "[u]nder the evidence presented in this case, it would be unconscionable to allow the owner of a valuable apartment/room rental property to escape liability because it turned the property over to an inadequately capitalized operating company 'which is simply itself in another form.' " 67 N.C. App. at 590, 313 S.E. 2d at 849.

[6] Without dwelling at length on the rationale adopted by the Court of Appeals in support of its decision to grant defendants a new trial, we simply note that our rule with regard to piercing the corporate veil is broad enough to encompass both those situations where there is direct stock ownership of a subsidiary corporation by a parent corporation, and stock control as exercised through a mutual shareholder as evidenced in the present case. Thus, when there is evidence of common ownership and actual working control, as in the case of affiliated corporations, taken together with other factors suggesting domination of finances, policy or business practice (including, but not limited to undercapitalization, disregard of corporate formalities, and insolvency) an instruction as provided in the present case is adequate. Each case will be treated as *sui generis* with the burden on the plaintiff to establish the existence of factors that would justify disregarding the corporate entity.

We agree with the suggestion that "courts should abjure 'the mere incantation of the term instrumentality' " in applying the so-called "instrumentality" or "alter ego" doctrine. *DeWitt Truck Brokers*, 540 F. 2d at 685. Since the issue is one of fact, the trial court should take pains to spell out in its instructions the specific factors to be considered in determining whether the corporate entity should be disregarded.

Reversed.

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

BOBBY VESTAL LOWE AND BETTY F. LOWE v. SAMUEL INGHAM TARBLE AND ARA SERVICES, INC.

No. 28PA84

(Filed 7 May 1985)

1. **Constitutional Law § 23.4; Insurance § 110.1— prejudgment interest—due process not violated**

G.S. 24-5 does not violate the due process clause of the U. S. Constitution because the General Assembly had a reasonable basis for enacting the statute, the legislation is not arbitrary, and it is substantially related to legislative goals.

2. **Constitutional Law § 23.4; Insurance § 110.1— prejudgment interest—no violation of law of the land clause**

G.S. 24-5 does not violate Art. I, § 19 of the Constitution of the State of North Carolina because it has a reasonable basis in relation to the public good likely to result from it.

3. **Insurance § 110.1— prejudgment interest—insurer liable**

Prejudgment interest provided for by G.S. 24-5 was a cost within the meaning of the contract which the insurer was obligated to pay. G.S. 24-7.

Justice MEYER dissenting.

Justice MITCHELL joins in the dissenting opinion.

ON rehearing of the decision of this Court reported at 312 N.C. 467, 323 S.E. 2d 19 (1984), affirming judgment entered 20 September 1983 by *Mills, J.*, in Superior Court, RANDOLPH County. By order dated 30 January 1985 this Court allowed defendants' petition for rehearing for the consideration of two issues: (1) whether N.C.G.S. 24-5 violates defendants' rights to substantive due process and (2) whether by contract or statute insurance carriers are liable for prejudgment interest allowed in judgments against their insureds. Heard in the Supreme Court 9 April 1985.

Brackett and Sitton, by William L. Sitton, Jr., for plaintiff appellees.

Henson, Henson & Bayliss, by Perry C. Henson and Paul D. Coates, for defendant appellants.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., for North Carolina Association of Defense Attorneys, amicus curiae.

MARTIN, Justice.

I.

Defendants contend that N.C.G.S. 24-5 violates their substantive due process rights under the fourteenth amendment to the Constitution of the United States and article I, section 19 of the Constitution of North Carolina. Defendants argue that N.C.G.S. 24-5 is not a fundamentally fair statute, that it is unreasonable, and that the statute has no substantial or rational relation to legislative objectives. Substantive due process is a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained. *State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320 (1975).

The Supreme Court of the United States has stated with regard to fourteenth amendment due process:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, 94 U.S. 113, 134 [24 L.Ed. 77, 87], "For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Williamson v. Lee Optical Co., 348 U.S. 483, 488, 99 L.Ed. 563, 572 (1955) (citations omitted).[1] *See also, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124, 57 L.Ed. 2d 91, 99 (1978); *Ferguson v. Skrupa*, 372 U.S. 726, 731, 10 L.Ed. 2d 93, 97-98 (1963). *See Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 93 L.Ed. 212 (1949). *See generally* J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*, 425-51 (2d ed. 1983); L. Tribe, *American Constitutional Law*, 427-55 (1978 & Supp. 1979).

1. In this regard we note that a bill to amend N.C.G.S. 24-5 has been introduced as H.B. 234.

[1] As long as there could be some rational basis for enacting N.C.G.S. 24-5, this Court may not invoke the due process clause of the fourteenth amendment to disturb the statute. Although defendants may have introduced evidence that the statute is irrational, they cannot prevail as long as it is evident from the considerations presented to the legislature that the question is at least debatable. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-63, 66 L.Ed. 2d 659, 667-69 (1981). Here, the question is no longer debatable; it has been resolved against defendants. As discussed in *Powe v. Odell*, 312 N.C. 410, 322 S.E. 2d 762 (1984), we have determined that the General Assembly did have a reasonable basis for enacting N.C.G.S. 24-5.[2] Defendants concede that the governmental objectives of the statute are legitimate and permissible. The legislation is not arbitrary and is substantially related to the legislative goals. Therefore, we hold that N.C.G.S. 24-5 does not violate the due process clause of the fourteenth amendment of the United States Constitution.

[2] While we reserve the right to grant relief against unreasonable and arbitrary state statutes under article I, section 19 of the Constitution of North Carolina in circumstances under which no relief might be granted by the due process clause of the fourteenth amendment, *see In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973), we are satisfied that N.C.G.S. 24-5 does not offend article I, section 19 of our state charter. Whether a state statute violates the law of the land clause "is a question of degree and reasonableness in relation to the public good likely to result from it." 282 N.C. at 550, 193 S.E. 2d at 735. As we have demonstrated in this opinion and in our equal protection analysis in *Powe v. Odell*, this statute has a reasonable basis in relation to the public good likely to result from it. It is not arbitrary and is reasonably related to the legislative objectives. Therefore, it does not contravene our law of the land clause.

II.

[3] Plaintiffs argue that under the contract of insurance issued to defendant ARA Services, Inc. by the National Union Fire In-

2. As the United States Supreme Court stated in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n.12, 66 L.Ed. 2d 659, 673 n.12 (1981): "From our conclusion under equal protection . . . it follows a fortiori that the Act does not violate the Fourteenth Amendment's Due Process Clause."

surance Company (which provided coverage for the judgment rendered in the trial court), the insurer is liable for payment of prejudgment interest.

Relevant parts of the insurer's obligations under the contract include the following:

> AGREEMENT VI. DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS
>
> With respect to such insurance as is afforded by this policy, the company shall:
>
> . . . .
>
> (2) Pay all expenses incurred by the company, *all costs* taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;
>
> . . . .
>
> and the amounts so incurred, except settlements of claims and suits, are payable by the company in addition to the applicable limit of this policy.

(Emphasis added.) Generally, "Costs incident to the action, or costs of the action are 'entirely creatures of legislation and constitute an incident of the judgment' . . . ." *Nichols v. Goldston and Hix v. Goldston*, 231 N.C. 581, 584, 58 S.E. 2d 348, 351 (1950) (quoting *Ritchie v. Ritchie*, 192 N.C. 538, 541, 135 S.E. 458, 459 (1926)).

In determining what are "costs" within the meaning of the contract, we turn to the General Statutes. *See Insurance Co. v. Casualty Co.*, 283 N.C. 87, 91, 194 S.E. 2d 834, 837 (1973) (provisions of a statute applicable to insurance policies are a part of the policy to the same extent as if written therein). *Accord Insurance Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 537 (1977).[3] N.C.G.S. 24-5

3. While it is true that the contract specifically obligates the insurer to pay interest from the date of judgment, any implication arising therefrom that the in-

requires payment of interest to the prevailing party from the date of the filing of the action. Such interest is a cost within the meaning of the contract of insurance. The most pertinent statute provides that:

> Except with respect to compensatory damages in actions other than contract as provided in G.S. 24-5, when the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered shall be computed by the clerk and added to the costs of the party entitled thereto.

N.C. Gen. Stat. § 24-7 (Supp. 1983).[4] *Cf.* N.C. Gen. Stat. § 7A-305(e) (1981). Therefore, we hold that prejudgment interest provided for by N.C.G.S. 24-5 is a cost within the meaning of the contract which, under the contract in the present case, the insurer is obligated to pay.[5]

The previous opinion in this case by this Court remains unchanged.

Affirmed.

Justice MEYER dissenting.

I respectfully dissent from the majority opinion on the basis of my dissent in *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E. 2d 762, 766 (1984), wherein I was joined by Justices Copeland (now retired) and Mitchell in my conclusion that N.C.G.S. § 24-5

surer is not obligated to pay other interest must give way to express statutory provisions such as those contained in N.C.G.S. 24-5. *See Insurance Co. v. Casualty Co.*, 283 N.C. 87, 91, 194 S.E. 2d 834, 837 (1973).

4. It is clear that this statute's reference to N.C.G.S. 24-5 is present because interest provided for in 24-5 begins to accrue at the time the action is *instituted*, whereas in N.C.G.S. 24-7 it begins to accrue at the time the verdict or report is returned. The exception in 24-7 in no way vitiates the obvious point that interest on judgments for the recovery of money is to be included as costs.

5. The issue of whether N.C.G.S. 24-5, which was enacted after the insurance policy was issued, impairs the obligation of the contract in prohibition of article I, section 19 of the Constitution of North Carolina was not raised by any of the parties at trial or in argument before this Court. It is therefore not properly before this Court and we do not pass upon it. *Powe v. Odell*, 312 N.C. 410, 416, 322 S.E. 2d 762, 765 (1984).

violates the Equal Protection Clause of the United States Constitution as well as provisions of the North Carolina Constitution. For the same reasons expressed in my dissent in *Powe*, I conclude that the statute also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the "law of the land" provision (art. I, § 19) of the North Carolina Constitution.

The fundamental principles of "substantive due process" as collected in 16A Am. Jur. 2d *Constitutional Law* § 816 at 978-81 (1979), may be summarized as follows: In substantive law, due process may be characterized as a standard of reasonableness, which is similar to the standard or test of "rational basis" used in determining a claim of unequal protection of the laws. The analysis for substantive due process is not dissimilar from the analysis for equal protection. Substantive due process differs from equal protection in that substantive due process analysis considers the overall fairness of legislation and the relationship between the means used to achieve a legislative goal, and the achievement of that goal. It is not enough that the objective being sought by the legislature has a rational basis, but the manner in which the legislature attempts to achieve that objective must itself have a real and substantial relationship to the objective being sought and not be arbitrary or unreasonable. The due process principle is a limitation upon arbitrary power. While the principle has its origin in England as a protection to citizens from arbitrary action by the Crown, it has been said that in this country the requirement is intended to have a similar effect against legislative power. It is the principle that protects our citizens against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that means selected by the legislature to meet a permissible legislative objective shall have a real and substantial relation to that objective.

The principle of due process is synonymous with the principle of "law of the land" announced in our state constitution.

> [D]ue process of law and the equivalent phrase "law of the land" have frequently been defined to mean a general and public law *operating equally on all persons in like circumstances, and not a partial or private law affecting the rights of a particular individual or class of individuals in a way in*

> *which the same rights of other persons are not affected.* Under this guaranty not only must a statute embrace all persons in like situation, but the classification must be natural and reasonable, not arbitrary and capricious. The guaranty is violated by a statute embodying a classification which is not based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which the classification is imposed. Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraint or burdens not imposed upon, and to be borne by, all of the class or of the community at large, unless the imposition or restraint is based upon existing distinctions that differentiate the particular individuals of the class to be affected from the body of the community. (Emphasis added.)

16A Am. Jur. 2d *Constitutional Law* § 817 at 985-86.

As I indicated in my dissent in *Powe*, I am convinced that assessment of prejudgment interest only on claims covered by insurance is arbitrary, unfair, and unreasonable and has no substantial relation or rational relationship to the legislative goal,[1] and

1. Although the question of impairment of contract was not specifically raised before the trial court or the Court of Appeals, I am of the opinion that it is at least arguable that the "law of the land" provision of our state constitution embodies the concept of impairment of contract set forth specifically in art. I, § 10, cl. 1 of the United States Constitution, which provides in pertinent part: "No state shall . . . pass any . . . law impairing the obligations of contracts. . . ." This clause of the federal constitution imposes limits upon the power of the states to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 57 L.Ed. 2d 727 (1978). The contract at issue in this case was entered into prior to the enactment of N.C.G.S. § 24-5 and it is indeed an ancient and long-standing rule of law that the obligation of a contract within the meaning of the constitutional provisions against impairment depends upon the laws in existence when the contract is made. *See, e.g., Wood v. Lovett*, 313 U.S. 362, 85 L.Ed. 1404 (1941); *McCracken v. Hayward*, 43 U.S. 608, 11 L.Ed. 397 (1844). Moreover, the obligation of contract includes the legal remedies which belong to it at the time and place of its creation; the ideas of validity and remedy are therefore inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 78 L.Ed. 413 (1934). The policy involved in this action contains the provision that the insurer shall be liable for "all interest *accruing after entry of judgment* until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability. . . ." (Emphasis added.) The clear implication of this language is that *pre*judgment in-

indeed fails to meet the very objective intended by the legislature.[2] For these reasons, I conclude that N.C.G.S. § 24-5 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the "law of the land" provision (art. I, § 19) of the North Carolina Constitution.

Justice MITCHELL joins in this dissenting opinion.

EVELYN W. LATTIMORE v. FISHER'S FOOD SHOPPE, INC.

No. 429PA84

(Filed 7 May 1985)

1. **Landlord and Tenant § 13.2— perpetual renewal of lease—words of perpetuity required**

No perpetual lease or right to perpetual renewals may be found to have been created unless the lease agreement contains the terms "forever," "for all time," "in perpetuity" or words *unmistakably* of the same import. The terms "successive" and "for so long as" do not have the same unmistakable import in the context of a lease agreement as do the customary words of perpetuity.

2. **Landlord and Tenant § 13.2— renewal of lease—no ambiguity—no parol evidence**

A lease which did not contain the customary words of perpetuity or words unmistakably of the same import was not ambiguous; therefore, defendant was not entitled to introduce evidence of the conduct of the parties prior to and subsequent to the execution of the lease, and the issue of whether defendant could present evidence of laches, mutual mistake and draftsman's error was not reached.

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

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terest is not to be paid by the company. Thus, the new statute imposes an obligation upon the insurer which is contrary to the provisions of the preexisting contract between the parties, and so substantively and severely impairs the obligations of the parties thereunder.

2. The constitutional shortcomings that I perceive in N.C.G.S. § 24-5 can be easily overcome by appropriate legislation. This could be achieved by allowing no prejudgment interest against any defendant or by allowing prejudgment interest across the board, in all tort cases, against all defendants. As of this writing, the legislature is in session and legislation allowing prejudgment interest across the board in all tort cases has been introduced and is now being debated. Positive action by the legislature is called for.

ON discretionary review of the decision of the Court of Appeals, 69 N.C. App. 227, 316 S.E. 2d 344 (1984), reversing summary judgment entered in favor of the plaintiff by *Judge Coy E. Brewer, Jr.* on July 19, 1982 in Superior Court, WAKE County, and remanding for entry of summary judgment in favor of the defendant. Heard in the Supreme Court February 6, 1985.

Manning, Fulton and Skinner, by Michael T. Medford and Emmett Boney Haywood for the plaintiff appellant.

Boxley, Bolton and Garber, by Ronald H. Garber for the defendant appellee.

MITCHELL, Justice.

The pivotal issue in this case concerns the interpretation to be given to portions of a commercial lease agreement. Specifically the issue before this Court is whether the provisions in question confer upon the defendant-lessee a right to perpetual renewals of the lease. We hold that they do not and accordingly reverse the decision of the Court of Appeals.

The plaintiff, Evelyn Lattimore, owns a store building and service station on Six Forks Road in Wake County. In 1975 the plaintiff entered into negotiations with George Fisher, president of the defendant-corporation, to lease the premises. In March, 1975 the parties executed a lease agreement for all the premises except a center section of the building which the plaintiff retained to operate as a clothing store. The lease included provisions covering matters such as the maintenance of the building, the acquisition of liability and fire insurance, rental payments, and the right of the tenant to make alterations and improvements to the premises. The defendant took possession of the premises and made repairs and improvements to the property including replacement of the shelves in the store, adding more gas pumps and underground storage tanks, and replacement of the building's electrical system.

Approximately three years after the lease was executed a dispute arose between the parties as to the effect of certain language in the lease relating to its renewal. The focus of the dispute was on Paragraph Nine which provides:

> This lease shall be automatically renewed for successive five-year terms, at the increased rentals provided hereinbefore, unless the Tenant gives to Lessor in writing notice on or before ninety (90) days prior to the end of any five-year term; and each renewal shall, except for increased rental, be upon the same terms and conditions of this lease. This lease may be terminated by the Tenant upon the giving of the written 90 days notice to the Lessor, immediately prior to the end of a five-year term.

Also relevant to the disagreement was a portion of the lease regarding rent which stated that the rental payments were to be made:

> At the rate of Eight Hundred ($800.00) Dollars per month, payable on the first day of each and every month, in advance, for and during the first five-year term; and for and during each successive five-year term thereafter an additional sum of One Hundred ($100.00) Dollars per month, in advance and cumulatively, for so long as this lease agreement shall continue . . . .

The defendant contends that this language gave it a perpetual right to renewals for successive five-year terms as long as its obligations under the lease were satisfied. The plaintiff contends that the lease gave the corporation a right to only one renewal and that subsequent renewals must be by mutual consent.

The plaintiff initiated this action seeking a judgment declaring that the lease did not grant the corporation a perpetual lease or, in the alternative, reformation of the lease agreement or a declaration that the lease was null and void. The defendant filed its answer and a counterclaim seeking a judgment declaring that the lease gave it a perpetual right to renewals or, in the alternative, a judgment for $23,405.10 for improvements and repairs made to the property by the corporation.

The trial court, on motion by the defendant, dismissed the plaintiff's claims for reformation of the lease and for a declaration that it was null and void. The trial court denied the defendant's motion to dismiss the plaintiff's action for a declaratory judgment regarding the interpretation to be given the lease.

The parties subsequently filed cross-motions for summary judgment. The trial court granted the plaintiff's motion and entered summary judgment in her favor. The judgment declared that the lease was for a term of five years with the defendant-lessee having an absolute right to only one renewal and with additional renewals to be upon mutual consent. The Court of Appeals reversed, holding that the lease gave the defendant a perpetual right to renewals, and remanded the case for entry of summary judgment for the defendant.

Although the Court of Appeals has previously addressed the issue of the validity of perpetual leases and covenants for perpetual renewals. *E.g., Oglesby v. McCoy,* 41 N.C. App. 735, 255 S.E. 2d 773, *disc. rev. denied,* 298 N.C. 299, 259 S.E. 2d 301 (1979); *Dixon v. Rivers,* 37 N.C. App. 168, 245 S.E. 2d 572, *cert. granted,* 295 N.C. 733, 248 S.E. 2d 867, *motion to dismiss allowed* (1978), this is the first time this Court has done so. The generally accepted view is that a covenant for perpetual renewals is not forbidden by law and will be enforced by the courts. *See, e.g., Williams v. J. M. High Co.,* 200 Ga. 230, 36 S.E. 2d 667 (1946); *Hull v. Quanah Pipeline Corp.,* 574 S.W. 2d 610 (Tex. Civ. App. 1978); R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* § 6.62 (1984). Specifically, a provision granting a right to perpetual renewals is not objectionable on the basis that it constitutes a violation of the rule against perpetuities. *Dixon v. Rivers,* 37 N.C. App. at 171, 245 S.E. 2d at 574; L. Simes, *The Law of Future Interests* § 132 (2nd ed. 1966); J. Gray, *The Rule Against Perpetuities* § 230 (4th ed. 1942). This is so because the covenant to renew is considered part of the lessee's present interest and because there are at all times persons in being who by joining together can convey the fee. *E.g., Lloyd's Estate v. Mullen Tractor & Equipment Co.,* 192 Miss. 62, 4 So. 2d 282 (1941); *Tipton v. North,* 185 Okla. 364, 92 P. 2d 364 (1939).

Although not invalid as a matter of law, perpetual leases and covenants for perpetual renewals are not favored and will not be enforced absent language in the lease agreement which expressly or by clear implication indicates that this was the intent of the parties. 2 M. Friedman, *Friedman on Leases* § 14.1 (2nd ed. 1983); 3 G. Thompson, *Commentaries on the Modern Law of Real Property* § 1088 (1980). *See, e.g., Winslow v. Baltimore & Ohio Railroad Co.,* 188 U.S. 646 (1903); *Waldrop v. Siebert,* 286 Ala. 106,

237 So. 2d 493 (1970); *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952); *Vokins v. McGaughey*, 206 Ky. 42, 266 S.W. 907 (1924); *Brush v. Beecher*, 100 Mich. 597, 68 N.W. 420 (1896); *Burke v. Permian Ford-Lincoln-Mercury*, 95 N.M. 314, 621 P. 2d 1119 (1981); *McCreight v. Girardo*, 205 Or. 233, 287 P. 2d 414 (1955); *Rutland Amusement Co. v. Seward*, 127 Vt. 324, 248 A. 2d 731 (1968); *Pechenik v. Baltimore & Ohio Railroad Co.*, 157 W.Va. 895, 205 S.E. 2d 813 (1974); *McLean v. United States*, 316 F. Supp. 827 (E.D. Va. 1970). A covenant which in general terms provides for a right to renewals will be construed as granting only one renewal. *E.g., Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952); *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E. 2d 905 (1943). *See* R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* § 6.62 (1984).

The foregoing rules reflect the fact that the law is biased against perpetuities. *E.g. Nakdimen v. Atkinson Improvement Co.*, 149 Ark. 448, 233 S.W. 694 (1921); *Hallock v. Kintzler*, 142 Ohio St. 287, 51 N.E. 2d 905 (1943). Furthermore, by requiring that a perpetual lease or a right to perpetual renewals be shown by either express language or clear implication, these rules protect property owners from inadvertently leasing away their property forever. *See Tischner v. Rutledge*, 35 Wash. 285, 77 P. 388 (1904). Believing them to be founded upon sound public policy, we adopt and apply the rules previously stated herein. Perpetual leases and covenants for perpetual renewals are not favored and shall not be enforced unless the intent to create them is shown by clear and unequivocal terms in the lease agreement.

The defendant contends that the language of the lease in question here clearly and unequivocally indicates that the parties intended to establish a right to perpetual renewals. The defendant first points out that Paragraph Nine provides for the automatic renewal of the lease unless the lessee gives written notice that it intends to terminate. It is true that some courts have indicated that a clause authorizing automatic renewals creates a right to perpetual renewals. *See, e.g., In re Mackie's Petition*, 372 Mich. 104, 125 N.W. 2d 482 (1963). Other courts, however, have held to the contrary. *E.g., Rutland Amusement Co. v. Seward*, 127 Vt. 324, 248 A. 2d 731 (1968). We conclude that such clauses providing for automatic renewals do not express the

intent of the parties so clearly and unequivocally as to create a right to perpetual renewals of a lease.

The defendant next points out that Paragraph Nine also provides that "each renewal shall, except for increased rental, be upon the same terms and conditions of this lease." Some courts have said that a provision giving the lessee the right to renew under the same terms and conditions as the original lease creates a right to perpetual renewals. *See, e.g., Seaboard Coast Line Railroad v. Adcock*, 119 Ga. App. 812, 168 S.E. 2d 606 (1969). Other courts, however, have rejected this contention. *E.g., Winslow v. Baltimore & Ohio Railroad*, 188 U.S. 646 (1903); *Diffenderfer v. Board of President*, 120 Mo. 447, 25 S.W. 542 (1894); *Gleason v. Tompkins*, 84 Misc. 2d 174, 375 N.Y.S. 2d 247 (1975). Considering the conflicting results reached by courts in such cases, we conclude that such provisions for renewal upon the same terms and conditions as those of the original lease cannot be said to establish the intent to create a right to perpetual renewals by clear and unequivocal language.

[1] The presence or absence of "customary words of perpetuity" must be accorded great significance in determining whether a perpetual lease or a perpetual right to renewals exists. *E.g., Lonergan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 357 A. 2d 910 (1975); *Rutland Amusement Co. v. Seward*, 127 Vt. 324, 248 A. 2d 731 (1968); *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952). Customary words of perpetuity include the terms "forever", "for all time", and "in perpetuity". *Lonergan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 357 A. 2d 910 (1975); *Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952). Believing that the use of such terms is the only clear and unequivocal way to establish the intent of the parties to create a perpetual lease or a right to perpetual renewals, we adopt and apply a "bright-line" rule requiring that these customary words of perpetuity or terms *unmistakably* of the same import must expressly appear in a lease agreement in order to create any such rights. This rule is the best method of forcing the parties to a lease to specifically consider and directly express their intent. If customary words of perpetuity or terms unmistakably of the same import are included in the lease agreement, a lessor cannot be said to have inadvertently leased away the premises forever. If they are not included in the lease agreement, then this rule will merely reflect

the well established view that perpetuities are not favored by the law.

We recognize the general rule that a contract is to be construed as a whole with each provision considered in the context of the entire contract. *E.g., Dixie Container Corp. v. Dale*, 273 N.C. 624, 160 S.E. 2d 708 (1968). Since the law strongly disfavors perpetuities, however, we have concluded that the special "brightline" rule we adopt and apply here is necessary for construing provisions allegedly granting perpetual leases or rights to perpetual renewals. Unless a lease agreement contains the terms "forever", "for all time", "in perpetuity" or words *unmistakably* of the same import, no perpetual lease or right to perpetual renewals may be found to have been created.

The lease in question does not contain the terms "forever", "for all time", or "in perpetuity". The defendant argues, however, that the word "successive", which is found in Paragraph Nine and in a portion of the lease provision regarding rent, is similar in import to these customary words of perpetuity. Some courts accept the view that the word "successive" implies a perpetuity. *E.g., Pechenik v. Baltimore & Ohio Railroad Co.*, 157 W.Va. 895, 205 S.E. 2d 813 (1974); *Gleason v. Tompkins*, 84 Misc. 2d 174, 375 N.Y.S. 2d 247 (1975); *McLean v. United States*, 316 F. Supp. 827 (E.D. Va. 1970). Others do not. *E.g., Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952); *Burke v. Permian Ford-Lincoln-Mercury*, 95 N.M. 314, 621 P. 2d 1119 (1981). We conclude, however, that the word "successive" does not have the same unmistakable import in the context of a lease agreement as do the customary words of perpetuity previously set out. The word "successive" is defined as: "Following one after another in a line or series." *Black's Law Dictionary* 1600 (rev. 4th ed. 1968). It does not convey the same unmistakable meaning that a lease agreement is of unlimited and unending duration as do the terms "forever", "for all time", and "in perpetuity". *See Geyer v. Lietzan*, 230 Ind. 404, 103 N.E. 2d 199 (1952). The same is true of the term "for so long as" which the defendant also contends is an adequate expression of perpetuity.

Since the lease agreement here does not contain the customary words of perpetuity previously discussed or terms *unmistakably* of the same import, it creates neither a perpetual lease nor a right to perpetual renewals. Therefore, the trial court

properly entered summary judgment for the plaintiff, and the decision of the Court of Appeals must be reversed.

[2] The defendant contends that it is entitled to show the conduct and statements of the parties prior and subsequent to the execution of the lease to aid in construing the provisions relating to renewal. Parol evidence is admissible for such a purpose only if the writing is found to contain an ambiguity. *E.g., Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). Under the rule we adopt and apply, however, there is no ambiguity in the lease agreement. Therefore, we reject this contention.

The defendant also contends that if the lease agreement is ambiguous with respect to the renewal provision, the defendant is entitled to present evidence to show the defenses of laches, mutual mistake of the parties and draftsman's error. Since no such ambiguity exists, we need not address these contentions.

The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals with instructions to reinstate the summary judgment for the plaintiff entered by the trial court.

Reversed and remanded.

Justice VAUGHN took no part in the consideration or decision of this case.

BARBARA (KITE) MILLER v. DENNIS SHERMAN KITE

No. 479PA84

(Filed 7 May 1985)

Constitutional Law § 24.7; Process § 9.1— child in this state—visitation and support payments in this state—insufficient contacts for personal jurisdiction

Defendant did not have the constitutionally required minimum contacts with North Carolina to allow a child support action to be maintained against him in this state where defendant's only contacts with this state were his occasional visits to see his daughter who resided in this state, the fact that he mailed monthly support checks to plaintiff at her North Carolina residence, and the fact that the child has attended North Carolina public schools and otherwise enjoyed the benefits and protections of our laws. The child's presence in North Carolina was solely the result of plaintiff's decision to live

here with the child and did not compel a finding that defendant purposefully availed himself of the benefits and protections of the laws of this state.

Justice VAUGHN took no part in the consideration or decision of this case.

APPEAL pursuant to N.C.G.S. 7A-30(1) from the decision of the Court of Appeals, 69 N.C. App. 679, 318 S.E. 2d 102 (1984), affirming an order entered by *Judge William M. Styles* on February 15, 1983 in District Court, BUNCOMBE County, denying the defendant's motion to set aside a child support order entered against him on July 2, 1982. Heard in the Supreme Court March 14, 1985.

No appearance by plaintiff appellee.

Pitts, Hugenschmidt, Krause & Davis, P.A., by Sara H. Davis, for defendant appellant.

MITCHELL, Justice.

The sole issue before this Court is whether the trial court had *in personam* jurisdiction over the defendant and could lawfully enter a child support order against him. We hold that the trial court did not have *in personam* jurisdiction over the defendant and that the child support order against him must be vacated. Accordingly, we reverse the decision of the Court of Appeals.

The parties to this action were married in Illinois in 1967. A daughter, Debra Hillary Kite, was born in Illinois on July 18, 1968. In 1971 the parties separated and the plaintiff wife took custody of the daughter. They entered into a separation agreement which provided that the defendant father would pay $300.00 per month to the plaintiff for the support of the minor child. The parties were divorced October 2, 1972.

Sometime after the divorce, the plaintiff wife brought the child to North Carolina where they resided until this action was filed. The defendant remained in Illinois until 1977 when he accepted employment with The Bank of America. He has since lived in Texas and California. At the time this action was filed he was domiciled in and a citizen of California but resided in Tokyo, Japan. From January, 1973, until the plaintiff and the child left North Carolina in April, 1982, the defendant mailed monthly child support checks to the plaintiff at her North Carolina residence.

On several occasions between 1973 and 1981 the defendant visited his daughter in North Carolina.

In April, 1982, the plaintiff initiated this action for child support in District Court, Buncombe County. A hearing was subsequently held. The defendant, however, did not appear and was not represented by counsel. The trial court entered an order on July 2, 1982 in which it found that the needs of the child had increased substantially since the separation agreement had been entered. The trial court also found that the defendant's income had increased since the entry of the separation agreement. Based upon these and other findings, the trial court concluded that there had been a substantial and material change of circumstances and ordered the defendant to pay $800.00 per month for the support and maintenance of the child, plus attorney's fees.

After filing a notice of limited appearance, the defendant's attorney made a motion to set aside the July 2 order as void due to the fact that the trial court did not have personal jurisdiction over the defendant. In support of the motion the defendant filed several affidavits which tended to show that he has never lived in North Carolina or purchased any property here, and that his only contacts with this State were his occasional visits to see his daughter and the fact that he mailed the monthly support checks to the plaintiff at her North Carolina residence. The defendant also denied that he had ever been properly served with process. The trial court denied the defendant's motion after determining that he had been properly served with process and that the court had jurisdiction over him. The Court of Appeals affirmed.

We have held that a two-step analysis is to be employed to determine whether a non-resident defendant is subject to the *in personam* jurisdiction of our courts. First, it should be ascertained whether the statutes of this State allow our courts to entertain the action the plaintiff has brought against the defendant. If so, it must be determined whether the exercise of this power by the courts of North Carolina in the case at hand violates due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). On the facts of this case, however, we find it unnecessary to address the first issue. Assuming *arguendo* that our Long-Arm Statute, N.C.G.S. 1-75.4, gives North Carolina courts *in personam* jurisdiction over the defendant, application of

the statute to him in this case would violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The power of a state court to render a valid personal judgment against a non-resident defendant is limited by the due process clause of the Fourteenth Amendment. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Supreme Court has stated that due process requires that the defendant possess sufficient "minimum contacts" with the forum state "that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), *quoting from Milliken v. Meyer*, 311 U.S. 457, 463 (1940). The concept of "minimum contacts" furthers two goals. First, it safeguards the defendant from being required to defend an action in a distant or inconvenient forum. Second, it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

In *Hanson v. Denckla*, 357 U.S. 235 (1958), the Supreme Court held that a state does not acquire personal jurisdiction over the defendant simply by being the "center of gravity" of the controversy or the most convenient location for the trial of the action. The Court also stated:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State . . . . [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id. at 253. The Supreme Court has also indicated that a factor to be considered is whether the defendant had reason to expect that he might be subjected to litigation in the forum state. *See, e.g., Shaffer v. Heitner*, 433 U.S. 186 (1977). The foreseeability that is crucial to due process analysis is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

As noted by the Court of Appeals, the defendant's contacts with North Carolina are that his daughter has lived here for nine years, during which time he has sent child support payments to the plaintiff at her North Carolina residence. The defendant has also come to North Carolina on several occasions to visit his daughter. The Court of Appeals also determined that the defendant has contact with this State due to the fact that the child has attended North Carolina public schools and otherwise enjoyed the benefits and protections of our laws. The Court of Appeals held that these contacts justified the exercise of *in personam* jurisdiction over the defendant by the North Carolina courts. We disagree and hold that the defendant does not have the constitutionally required minimum contacts with North Carolina to allow this action to be maintained against him.

Our conclusion is mandated by *Kulko v. Superior Court of California*, 436 U.S. 84, *reh. denied*, 438 U.S. 908 (1978). In that case the parties were residents of the State of New York. They separated and the mother moved to California. They subsequently entered into a separation agreement which gave the father custody of their two children. The agreement provided that the children were to spend their Christmas, Easter and summer vacations with the mother. The father was to pay $3,000 per year in child support for the period when the children were in her care and custody. Approximately a year after this agreement was entered into, the daughter informed her father that she wished to live with her mother. The father consented and bought an airline ticket to California for her. Thereafter, she lived in California and spent her vacations with her father in New York. Two years later the other child informed the mother that he also wanted to live with her. She sent a plane ticket to him which he used to fly to California.

The mother subsequently brought an action in California against the father seeking custody of the children and increased child support. The father moved to dismiss the claim for increased child support on the ground that the California courts lacked jurisdiction over him. The trial court denied the father's motion. The Supreme Court of California affirmed. *Kulko v. Superior Court of the City and County of San Francisco*, 19 Cal. 3d 514, 564 P. 2d 353, 138 Cal. Rptr. 586 (1977). The California court felt that by sending his daughter to live permanently in

California, the father had purposely availed himself of the protection and benefits of its laws and had caused an effect there which warranted the exercise of *in personam* jurisdiction over him. The Court acknowledged that he had not caused such an effect with respect to his son, but concluded that it would be fair and reasonable for the California courts to exercise *in personam* jurisdiction over him to establish his obligation to support both children. *Id.*

The Supreme Court of the United States reversed holding that the father's acquiescence in the daughter's desire to live with her mother did not establish sufficient minimum contacts to justify the exercise of *in personam* jurisdiction over him by the California courts. The Supreme Court stated:

> A father who agrees, in the interests of family harmony and his children's preferences, to allow them to spend more time in California than was required under a separation agreement can hardly be said to have "purposefully availed himself" of the "benefits and protections" of California's laws.

Kulko v. Superior Court of California, 436 U.S. 84, 94 (1978).

In the instant case the child's presence in North Carolina was not caused by the defendant's acquiescence. Instead, it was solely the result of the plaintiff's decision as the custodial parent to live here with the child. As previously noted, the Supreme Court has expressly stated that unilateral acts by the party claiming a relationship with a non-resident defendant may not, without more, satisfy due process requirements. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). We conclude that *Kulko* compels a finding that this defendant did not purposefully avail himself of the benefits and protections of the laws of this State. A contrary conclusion would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside. *See Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978).

The fact that the defendant in the instant case visited the child in North Carolina approximately six times between 1973 and 1981 is also insufficient to establish *in personam* jurisdiction over him. As stated by the Supreme Court in *Kulko*, "To hold such temporary visits to a State a basis for the assertion of in per-

sonam jurisdiction over unrelated actions arising in the future would make a mockery of the limitations on state jurisdiction imposed by the Fourteenth Amendment." *Kulko v. Superior Court of California*, 436 U.S. 84, 93 (1978). The father's visits to California in *Kulko* were fewer and more distant in time from the litigation than were the visits in this case. The visits by this defendant to North Carolina, however, were no less temporary than those in *Kulko* and were so unrelated to this action that he could not have reasonably anticipated being subjected to suit here.

Our conclusion is also guided by the realization that a contrary result could prevent the exercise of the visitation privileges of non-custodial parents. If the minimum contacts standard were satisfied by visiting the child in the forum state, a parent would be faced with the dilemma of visiting the child and subjecting himself to the jurisdiction of the forum state or refraining from such contacts with the child due to the fear of being forced to litigate there.

We acknowledge that the presence of the child and one parent in North Carolina might make this State the most convenient forum for the action. This fact, however, does not confer personal jurisdiction over a non-resident defendant. *Hanson v. Denckla*, 357 U.S. 235 (1958).

We are also mindful that North Carolina has an important interest in ensuring that non-resident parents fulfill their support obligations to their children living here. Absent the constitutionally required minimum contacts, however, this interest will not suffice to make North Carolina a proper forum in which to require the defendant to defend the action or suffer a default judgment. *See Kulko v. Superior Court of California*, 436 U.S. 84, 100-101 (1978). Furthermore, North Carolina's interest in ensuring the support of minor children residing here is provided for in this case by the fact that North Carolina and California each provide for uniform reciprocal enforcement of child support obligations. N.C.G.S. 52A-1 *et seq.*; Cal. Civ. Proc. Code § 1650 *et seq.* (West 1982 & Supp. 1985). *See* Lee, *N.C. Family Law* § 169 (4th ed. 1980).

In summary, the defendant has engaged in no acts with respect to North Carolina by which he has purposefully availed himself of the benefits, protections and privileges of the laws of

this State. Therefore, we hold that the defendant's contacts with this State were insufficient to justify the imposition of *in personam* jurisdiction over him by the North Carolina courts. This result is consistent with the minimum contacts standard and is mandated by the *Kulko* decision.

The defendant also argues that he was not properly served with process. We do not reach or decide this issue, since we allowed the defendant's appeal under N.C.G.S. 7A-30(1) only for the purpose of resolving the constitutional issue previously discussed herein.

For the foregoing reasons, the decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals for further remand to the District Court, Buncombe County, with instructions to enter an order granting the defendant's motion and vacating the child support order entered against the defendant on July 2, 1982.

Reversed and remanded.

Justice VAUGHN took no part in the consideration or decision of this case.

N.C. DEPARTMENT OF CORRECTION v. JOHN R. HILL

No. 608PA84

(Filed 7 May 1985)

1. Master and Servant § 10; State § 12— State employee—unlawful failure to offer employment—grievance letter

Although plaintiff's letter of formal grievance alleged specifically that he was wrongfully denied an Accountant IV position with the Department of Correction, other more general language in the letter was sufficient to permit plaintiff to raise objections to being denied positions which became available at the Accountant II and Accountant III levels. All that was required was a plain statement of the circumstances allegedly constituting an unlawful failure to offer employment so that respondent could be put upon its defense.

2. Master and Servant § 10; State § 12— State employee—dismissal from exempt position—right to available job in State government

In G.S. 126-5(e), a statute relating to State employees dismissed from an exempt policy-making position, the phrase "such employee shall have priority

to any position that becomes available for which the employee is qualified" means that if the employee is qualified for a job in State government which is available, he must be offered this job before it can be filled by anyone else by promotion or otherwise.

3. Master and Servant § 10; State § 12— State employee—dismissal from exempt position—right to available job in State government

Where plaintiff's employment with the Department of Human Resources as an Accounting Manager I, which had been designated as an exempt policy-making position, was terminated as part of an internal reorganization, the Department of Correction reorganized its accounting section and created two new positions of Accountant II and Accountant III, and plaintiff was qualified to fill at least the Accountant II position, the Department of Correction was required to offer plaintiff this position, and the Department of Correction's internal promotion of an employee to fill this position was a violation of plaintiff's rights under G.S. 126-5(e).

Justice EXUM dissenting.

ON appeal from judgment entered by *Bailey, J.*, on 18 September 1984 in Superior Court, WAKE County, affirming decision and order of the State Personnel Commission. Plaintiff's petition for discretionary review prior to determination by the Court of Appeals was allowed 4 December 1984. Heard in the Supreme Court on 11 April 1985.

Lacy H. Thornburg, Attorney General, by David E. Broome, Jr., Assistant Attorney General, for N.C. Department of Correction, appellant.

Broughton, Wilkins, Webb & Gammon, P.A., by William Woodward Webb, for appellee.

MARTIN, Justice.

The parties to this action have stipulated to the following facts: John R. Hill began working for the State of North Carolina on 6 June 1975. During the summer of 1981 his position as Accounting Manager I, Chief of Budgeting and Accounting, Division of Social Services, North Carolina Department of Human Resources, became designated as "policy-making" and thereby exempt from certain provisions of statutes governing the State Personnel System, N.C.G.S. 126-1 through 126-79. N.C. Gen. Stat. § 126-5(d)(4) (1981). On 19 October 1981 Hill's employment with the Department of Human Resources was terminated effective 2 November 1981 as part of an internal reorganization. Hill

thereupon became eligible for "any position that becomes available for which [he] is qualified," within the meaning of N.C.G.S. 126-5(e):

> (e) If an employee with five or more continuous years of service to the State in a subject position either transfers, on or after January 8, 1977, to a position designated as exempt or who occupied a position that prior to January 8, 1977, was subject to the State Personnel Act and that position is declared exempt on or after January 8, 1977, upon leaving such designated position, for reasons other than just cause, such employee shall have priority to any position that becomes available for which the employee is qualified. No employee shall be placed in an exempt position without prior written notification that such position is so designated.

Through the Office of State Personnel (Office) Hill applied for available accounting positions in a number of state agencies. On 24 September 1982 the Office sent Mr. Hill's application to the Department of Correction (DOC). An Accountant IV position had become vacant at DOC in the summer of 1982 as a result of a retirement. By December 1982 Hill had contacted T. S. Ryon, Jr., Assistant Secretary for Management and Productivity at DOC, regarding his application. Ryon stated at the time that he was in possession of Hill's application and that Hill would be considered for the vacant accounting position. On or about 8 January 1983 Hill received a letter from Ryon, dated 29 December 1982, stating that because of a hiring freeze

> the fiscal section must keep one accountant position vacant for the foreseeable future. In keeping with the current workload and the freeze requirements we have reassigned duties, modified job descriptions and left one Accountant I position vacant to comply with our goals.
>
> If an accountant position becomes vacant and unfrozen we will contact you.

On 10 January 1983 an employee of DOC, Mr. Jerry Hodnett, informed Hill that what had happened was:

> [T]he accountant position had been filled by promoting an Accountant II into the Accountant IV position and by promoting an Accountant I into the vacant Accountant II position. Mr.

Hodnett also remarked that the Accountant IV position was being downgraded to an Accountant III position. This sequence of events, then, left the vacated Accountant I position available for the freeze list.

On 14 January 1983 Hill filed a formal grievance with the State Personnel Commission (Commission) protesting that DOC had not offered him a position. A hearing officer for the Commission adopted the parties' stipulations as part of his findings of fact and concluded that under N.C.G.S. 126-5(e) DOC should have offered Hill the Accountant II position instead of promoting someone internally to the slot. The full Commission affirmed this decision as did the superior court. DOC appeals the decision of the superior court pursuant to N.C.G.S. 7A-31.

[1] DOC raises three issues, the first being the question whether Hill's letter of formal grievance dated 14 January 1983 limits Hill only to an adjudication of the denial of his appointment to the Accountant IV position or, instead, whether the letter was sufficient to permit Hill to raise his objections to being denied the positions which became vacant at the Accountant II and Accountant III levels. It is undisputed that Hill filed his letter of grievance within thirty days of the notice from DOC. N.C. Gen. Stat. § 126-38 (1981). DOC argues, however, that the language of Hill's letter shows conclusively that he was protesting only the failure of his appointment to the Accountant IV position, and therefore he is precluded from appealing the denial of his appointment to the Accountant II and Accountant III positions. We disagree.

Although Hill's letter alleges specifically that he was wrongfully denied the Accountant IV position, other more general language in the letter was sufficient to put DOC on notice of the issues Hill would contest. As one leading scholar of administrative law has said, in the context of administrative procedure "[t]he most important characteristic of pleadings in the administrative process is their unimportance. . . . The fundamental purpose of pleading is to let each party know the other's position so that each can properly prepare." K. Davis, *Administrative Law Text* at 196 (3d ed. 1972). The Administrative Procedure Act does not require the particularity of the pleading of an indictment or a statement of the elements of a cause of action, as required at law or in equity, unless the proceedings are mandatory or penal

in nature.[1] *See Parrish v. Real Estate Licensing Board*, 41 N.C. App. 102, 105, 254 S.E. 2d 268, 270 (1979). All that is required in this proceeding is that there be a plain statement of the circumstances allegedly constituting an unlawful failure to offer employment, so that respondent may be put upon its defense. *See American Newspaper Pub. Ass'n v. National Labor Rel. Bd.*, 193 F. 2d 782, 800 (7th Cir. 1951), *aff'd*, 345 U.S. 100, 97 L.Ed. 852 (1953). *Accord Owens-Corning Fiberglas Corporation v. N.L.R.B.*, 407 F. 2d 1357 (4th Cir. 1969). The extensive stipulations to which Hill and DOC agreed amply show that DOC received adequate notice through prehearing conferences and the discovery process of the fact that Hill was also contesting DOC's refusal to offer him either the Accountant II or the Accountant III position. As DOC had actual notice and an opportunity to defend against these claims, it cannot now challenge Hill's raising of these issues. *Cf.* N.C. Gen. Stat. § 150A-31 (1983) (stipulations in a contested case subject to the Administrative Procedure Act are binding on the parties thereto); C. Koch, 1 *Administrative Law and Practice* § 5.4 (1985).

[2] The second issue in this case concerns the scope of the term "priority" in that part of N.C.G.S. 126-5(e) which reads "such employee shall have priority to any position that becomes available for which the employee is qualified." DOC argues that the term means "first consideration." Under this view an employee such as Hill would be entitled merely to be considered ahead of other applicants for positions available under N.C.G.S. 126-5(e). On the other hand, under Hill's interpretation of the term the statute gives an employee such as him the right to an automatic offer of a position which becomes available. We agree with the latter interpretation for the reasons which follow.

As this Court stated in *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E. 2d 435, 443-44 (1983):

> The cardinal principle of statutory construction is that the intent of the legislature is controlling. *In re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E. 2d 12 (1973). In ascertaining

1. *See* N.C. Gen. Stat. § 126-43 (1981) (the provisions of the Administrative Procedure Act apply to the State Personnel System and hearing and appeal matters before the State Personnel Commission).

> the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972).

While this Court will give due consideration to the Commission's interpretation of the statute, the final interpretation of statutory terms is a judicial function. *In re Community Association*, 300 N.C. 267, 266 S.E. 2d 645 (1980). *See Faizan v. Insurance Co.*, 254 N.C. 47, 118 S.E. 2d 303 (1961). An examination of the legislative history of N.C.G.S. 126-5(d) and (e) leads us to conclude that the Commission's determination that "priority" means the automatic right to appointment is correct.

Before 1975 the State Personnel Act contained no provisions exempting so-called policy-making positions from its coverage. N.C.G.S. 126-5(b) (Int. Supp. 1976) was the first statute to mention policy-making positions and to exempt them from the Act. N.C.G.S. 126-5(c) (Int. Supp. 1976) thereupon provided: "Any career employee who has occupied a position subject to the Personnel Act and who is replaced after the position is exempted . . . shall be provided with all possible assistance in being appropriately relocated in State government." This statute was revised and recodified under N.C.G.S. 126-5(e) in 1977, the effect of which changed the phrase "shall be provided with all possible assistance in being appropriately relocated" to "shall have priority to any position that becomes available." This shift in language clearly evinces an intent to change an employee's rights from mere entitlement to assistance in relocation to the entitlement to an offer of a job for which he is qualified once such an opening becomes available. Had the legislature meant for employees governed by the Act merely to be given first consideration for available positions it would not have changed the language of the statute in the way it did. Therefore, we hold that in N.C.G.S. 126-5(e) (1981) the phrase "such employee shall have priority to any position that becomes available for which the employee is qualified" means that if the employee is qualified for a job in state government which is available, he must be offered this job before it can be filled by anyone else, by promotion or otherwise.

[3] We now turn to the issue of whether DOC denied Mr. Hill an available position. The Commission adopted the deputy hearing

commissioner's conclusion that although the Accountant IV position was never available to Hill under N.C.G.S. 126-5(e), the Accountant II position was available and DOC violated Hill's rights under the statute by failing to offer him that position. We agree with these conclusions. Except for articles 6 and 7 of Chapter 126 of the General Statutes, the Act did not apply to the Accountant IV position because the position was designated as being a policy-making one. N.C. Gen. Stat. § 126-5(d)(4) (1981). Therefore, the position was not "available" to Hill under N.C.G.S. 126-5(e). However, when DOC reorganized its accounting section, it created two new positions, Accountant II and Accountant III, which are subject to the Act. Because Hill was qualified to fill at least the Accountant II position and it was available within the meaning of 126-5(e), DOC was required to offer Hill this position. DOC's internal promotion of an employee to fill this job was a violation of Hill's rights under 126-5(e), for which he was appropriately afforded redress by the Commission.

The judgment of the superior court is

Affirmed.

Justice EXUM dissenting.

With all respect to the majority's visual agility, my eye simply isn't quick enough to spot the vacancy which became available to Hill under N.C.G.S. § 126-5(e). I suppose the majority would concede that had there been no departmental reorganization of the accounting positions, there would have been no available position for defendant Hill to fill. This is so because the hiring freeze prohibited the Department from adding additional employees to positions which became vacant.

I don't see how the reorganization, as the majority asserts, created any additional positions for which new personnel could be hired. The reorganization simply redesignated the positions which certain accounting employees held. All accounting work necessary to be done was being done by the three remaining accountants. There would have been nothing for Hill to do had he been rehired. Even if a vacancy were somehow instantaneously created, because of the freeze the Department could not have offered defendant Hill a position without at least firing one of its

existing accounting employees. Had there been no freeze, Hill would probably have been entitled to the Accountant IV position.

As I read the majority opinion, N.C.G.S. § 126-5 operated to require the Department, in order to meet its obligations to Hill, either (1) to abstain from reorganizing and request that the hiring freeze be lifted or (2) if it did reorganize to get its work done in light of the freeze, to fire one of its existing accounting employees and rehire Hill. I am satisfied the legislature never intended such a result by the passage of this statute.

In order to get around this point, the State Personnel Commission concluded the reorganization was undertaken in part "with the impermissible consideration of allowing [the Department] to avoid its responsibility to" Hill. I find nothing in the record to support this conclusion. Indeed, it was the reorganization itself which the majority of this Court concludes mandated that Hill be hired.

I think the way properly to resolve this case is to hold that because of the hiring freeze and the reorganization necessitated by it no vacancy ever existed which was available to Hill under the statute.

PEMBEE MFG. CORP. v. CAPE FEAR CONSTRUCTION CO., INC., T.R. DRISCOLL SHEET METAL WORKS, INC., AND KOONCE, NOBLE AND ASSOCIATES, INC.

No. 457A84

(Filed 7 May 1985)

Limitation of Actions § 4.3— defective roof—accrual of cause of action

Summary judgment was properly granted for defendants on the basis of the statute of limitations where plaintiff first complained of leaks in its roof within two months after occupying its newly-built facility in 1973, further complaints about leaks in the roof were made over five consecutive months in 1976 and 1977, and plaintiff's complaint was filed in 1981. The fact that experts discovered in 1980 that there was "blistering" throughout the entire roof due to entrapment of moisture in the several layers of roofing material did not create a new cause of action; plaintiff's claim was based on the assertion that its roof was defective, and it clearly knew more than three years prior to bringing suit that it had a defective roof. G.S. 1-52(16), G.S. 1-15(b).

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

PLAINTIFF appeals of right, pursuant to N.C.G.S. § 7A-30(2), from the decision of a divided panel of the Court of Appeals, 69 N.C. App. 505, 317 S.E. 2d 41 (1984), affirming orders of summary judgment in favor of defendants entered by *Britt, J.*, on 22 June 1983 in the Superior Court, ROBESON County. The first order granted summary judgment in favor of defendant Cape Fear Construction Co., Inc. (hereinafter Cape Fear), and the second granted summary judgment in favor of defendants T.R. Driscoll Sheet Metal Works (hereinafter Driscoll) and Koonce, Noble and Associates, Inc. (hereinafter Koonce). Heard in the Supreme Court 13 November 1984.

On 12 July 1972, Pembee Mfg. Corp. (hereinafter Pembee) entered into a contract with Cape Fear and Driscoll under which Cape Fear and Driscoll were to construct for Pembee a 30,000 square foot manufacturing plant in Lumberton, North Carolina at a cost in excess of $205,000. On 1 August 1972, Pembee entered into a contract with Koonce, a professional engineering firm, under which Koonce was to inspect the construction of the plant.

The contract between Pembee and Cape Fear and Driscoll contained specifications for the building to be constructed. These specifications included the following with regard to the roof:

> Roof
>
> Shall be 20 year graveled built up bondable roof similar to Frye GW-X on 1½" Fiberboard insulation. Facia to be .025 Aluminum with scuppers and downspouts.

The construction of the plant was substantially completed during January 1973, and Pembee occupied the building at that time.

In February or March 1973, Davis B. Pillet, president of Pembee, discussed with either T.R. or Stuart Driscoll problems that Pembee was having with roof leaks over the power pipes at the plant. In December 1976, as well as in January, February, March, and April 1977, Mr. Pillet had more discussions with Driscoll concerning roof leaks over the power pipes and at "many spots" throughout the plant. During at least one of these conversations, Driscoll blamed Cape Fear for faulty construction. In

April 1977, Driscoll made some repairs to the roof, for which it charged Pembee $69.15 for 10 pounds of roof cement and labor.

In April 1980, Pembee retained Norman S. Pliner, a registered professional engineer experienced in industrial building design and construction, to inspect the plant's roof. In April, Mr. Pliner, and in May, Mr. Pliner together with Richard T. Baxter, a roofing specialist, examined the roof of the plant. Their inspection revealed evidence of "blistering" throughout the entire roof, which resulted from the entrapment of moisture in the several layers of roofing material.

Pembee filed a complaint against the defendants in Wake County Superior Court on 2 November 1981, alleging breach of contract, negligence, and unjust enrichment. Defendants, in both their answers to the complaint and in their motions for summary judgment, asserted that Pembee's cause of action was barred by the applicable statute of limitations.

Subsequently, Driscoll and Koonce filed a motion for change of venue, and Cape Fear later joined in that motion. On 24 May 1982, the Superior Court of Wake County granted the motion, transferring this action to the Superior Court of Robeson County. Thereafter, in June 1983, the aforementioned orders for summary judgment in favor of all defendants were entered by Judge Britt. The plaintiff appealed and the majority of the panel of the Court of Appeals affirmed the order of Judge Britt.

Hollowell & Silverstein, P.A., by Thaddeus B. Hodgdon, Everett E. Dodd, and Ward, Strickland & Kinlaw, by Earl Strickland, Attorneys for plaintiff-appellant Pembee Manufacturing Corporation.

McLean, Stacy, Henry & McLean, by J. Dickson McLean, Jr., Attorney for defendant-appellee Cape Fear Construction Company, Inc.

Lee & Lee, by David F. Branch, Jr., Attorney for defendant-appellees T.R. Driscoll Sheet Metal Works, Inc. and Noble & Associates, Inc.

MEYER, Justice.

The sole issue on appeal is whether the evidentiary forecast disclosed the existence of a genuine issue of material fact concern-

ing whether the plaintiff knew or should reasonably have known of the defective condition more than three years prior to the filing of this action so as to preclude summary judgment in favor of defendants based on the applicable statute of limitations.[1] We hold that no triable issue of fact was so disclosed, and we affirm the decision of the Court of Appeals.

Upon motion, summary judgment is appropriately entered where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). A fact is material if it constitutes a legal defense, such as the bar of an applicable statute of limitations. *See City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268 S.E. 2d 190 (1980). Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action. *See Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666 (1974). However, the party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact. *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E. 2d 506 (1984). In ruling on the motion, the court is to carefully scrutinize the moving party's papers and is to resolve all inferences against him. *Id.*; *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. *Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978). However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, *Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666 (1974); *Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964), and summary judgment is appropriate. *See Ports Authority v. Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345; *Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666.

1. Plaintiff attempts to present two other questions in this appeal. However, as the dissent in the Court of Appeals dealt only with the foregoing question, the scope of our review is limited to that question alone. N.C.R. App. P. 16(b).

Under the common law, a cause of action accrues at the time the injury occurs, "even in ever so small a degree." *Matthieu v. Gas Co.*, 269 N.C. 212, 215, 152 S.E. 2d 336, 339 (1967). This is true even when the injured party is unaware that the injury exists. *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957). This common law rule is modified by the provisions of N.C.G.S. § 1-52(1), (5), and (16), which provide:

> Within three years an action—
>
> (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).
>
> . . .
>
> (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
>
> . . .
>
> (16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of action referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

Subsection 16, which became effective 1 October 1979, replaced N.C.G.S. § 1-15(b) (Repealed by Session Laws 1979, c. 654, s. 3 effective 1 October 1979), which similarly provided:

> Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, which-

ever event first occurs; provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

Both of these statutes modify the sometimes harsh common law rule by protecting a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury. *Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976). That is the extent to which the common law rule is changed; as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury. *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336.

The plaintiff in this case first complained of leaks in the roof within two months after occupying its newly built facility. The undisputed facts show that further complaints about leaks in many spots in the roof were made over five consecutive months in 1976 and 1977. These complaints clearly show that plaintiff, although perhaps not aware of the extent of damage, knew that its roof was defective at least as early as April 1977. The statute of limitations does not require plaintiff to be a construction expert. *See Earls v. Link, Inc.*, 38 N.C. App. 204, 208, 247 S.E. 2d 617, 619 (1978). However, it does require that plaintiff not sit on its rights. Plaintiff, knowing of the existence of leaks in the roof, was put on inquiry as to the nature and extent of the problem. Plaintiff failed to inform itself of the nature and extent of the roof's defects when leaks were discovered and recurred repeatedly. Viewing the evidence in a light most favorable to plaintiff, there is nothing in the record which would indicate that plaintiff was unaware that its roof was defective until a point in time within three years prior to filing suit.

Plaintiff argues that a distinction should be made between the leaks in the roof and the blistering caused by entrapment of moisture, and that this distinction creates a material issue of fact. We reject this argument. Under N.C.G.S. § 1-52(16), as well as former N.C.G.S. § 1-15(b), as soon as plaintiff's injury became apparent, or ought reasonably to have become apparent, its cause of

action accrued. Plaintiff's claim is based on the assertion that its roof is defective. Plaintiff clearly knew more than three years prior to bringing suit that it had a defective roof, yet took no legal action until the statute of limitations had run. The fact that further damage which plaintiff did not expect was discovered does not bring about a new cause of action, it merely aggravates the original injury. *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336.

In *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 301 S.E. 2d 459, *disc. rev. denied*, 309 N.C. 319, 306 S.E. 2d 791 (1983), the Court of Appeals held that the cause of action was barred by the statute of limitations when the plaintiff knew of defects in its glass curtain wall panels more than three years before instituting suit. The fact that defendants claimed that nothing was wrong with the glass panels did not prevent the statute from running, as the defects were apparent to plaintiff. The same is true here. Plaintiff first complained of problems with the roof eight years before filing suit, and repeatedly complained of many leaks four years before suit was filed. We note again that statutes of limitation "operate inexorably without reference to the merits of a plaintiff's cause of action. . . . The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Shearin v. Lloyd*, 246 N.C. at 370, 371, 98 S.E. 2d at 514.

Here the record discloses that the plaintiff knew that it had a defective roof. Although the plaintiff may not have realized the extent of the defect in the roof, the fact that it was defective was apparent at least by April 1977 and, under N.C.G.S. § 1-52(16) and former N.C.G.S. § 1-15(b), the cause of action was thus barred. Summary judgment, therefore, was properly granted. The decision of the Court of Appeals is

Affirmed.

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

IN RE: INQUIRY CONCERNING, A JUDGE, NO. 84, PAUL M. WRIGHT, RESPONDENT

No. 31A85

(Filed 7 May 1985)

1. **Judges § 7— political campaign committees—not political organization under Canon 7**

A political candidate's campaign committee is not a "political organization" to which a judge or judicial candidate may contribute under Canon 7A.(2) of the North Carolina Code of Judicial Conduct. The Judicial Standards Commission correctly determined that contributions to senate and gubernatorial campaign committees violated Canon 7. G.S. 163-278.7(a).

2. **Judges § 7— contributions to campaign committee—violation of Canon 7**

Contributions to the campaign committees of senatorial and gubernatorial candidates constituted conduct prejudicial to the administration of justice where respondent had been appointed to office by one of the candidates and where both candidates, if elected, would be in a position to appoint or recommend the appointment of judges. Members of the public could easily conclude that the contributions were a reward for a past judicial appointment as well as an expression of hope for a future one. G.S. 7A-376.

PETITION by respondent for hearing on the recommendation filed by the Judicial Standards Commission with the Clerk of the Supreme Court of North Carolina on 15 January 1985. Heard in the Supreme Court 8 April 1985.

In 1983, respondent, then a District Court Judge, contributed $1,250.00 to the United States Senate campaign of former Governor James B. Hunt, Jr. and $1,250.00 to the gubernatorial campaign of former Attorney General Rufus L. Edmisten. These contributions were made by checks payable to the campaign committees of the candidates. Following receipt of a complaint charging respondent with willful misconduct in office, the Judicial Standards Commission (Commission) held a formal hearing and recommended that respondent be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Lacy H. Thornburg, Attorney General, by James J. Coman, Special Deputy Attorney General, and Joan H. Byers, Assistant Attorney General, for the Judicial Standards Commission.

Blanchard, Tucker, Twiggs, Earls & Abrams, P.A., by Howard F. Twiggs and George E. Kelly, III, for the respondent.

BRANCH, Chief Justice.

Canon 7A.(1)(d) of the North Carolina Code of Judicial Conduct provides that a judge or judicial candidate should not make financial contributions to a candidate for political office. However, he may contribute to a political party or organization, Canon 7A.(2), or as between contestants for judicial office, he may contribute to the campaign fund of the candidate he considers best qualified. Canon 7A.(1)(b), Code of Judicial Conduct. He may also contribute to the political campaign of members of his family. Canon 7A.(1)(d), Code of Judicial Conduct.

Respondent attacks the recommendation of the Commission on two grounds: that a contribution to the campaign committee of a candidate for political office is a contribution to a "political organization" allowed by Canon 7A.(2) and that contributions by judges to political campaign committees do not result in prejudice to the administration of justice that brings the judicial office into disrepute.

[1] Respondent has made a number of arguments to support his contention that the campaign committee of a candidate for political office is a "political organization" within the meaning of Canon 7 and is separate and distinct from the candidate himself. Though he has approached the problem from a number of directions, respondent's basic argument is that under Canon 7 a candidate as an individual is separate from his campaign committee which commonly will have more than one person. We cannot agree.

The clear purpose of Canon 7A.(1) is to prevent judges from making contributions to the campaigns of candidates for political office other than judicial candidates or members of a judge's family. To hold that contributions to a candidate's campaign committee are contributions to a "political organization" would frustrate the purpose of the Canon. The political organizations envisioned by Canon 7A.(2) are entities such as the Republican Party, the Wake County Democratic Men's Club, the Democratic Party, the Conservative Party, etc. All candidates for political office in North Carolina must have treasurers, N.C.G.S. § 163-278.7(a), and as a result most candidates establish campaign committees. The fact that a candidate has set up a committee to handle the contributions to his campaign does not insulate him from the con-

tributors. Such a committee is the creature of the candidate who created it and is established for the convenience of the candidate. It is not the "political organization" referred to by Canon 7A.(2) but is, in effect, the alter ego of the candidate.

The North Carolina Code of Judicial Conduct is based on the ABA Code of Judicial Conduct, ABA Code of Professional Responsibility and Code of Judicial Conduct (1977). Other states that have adopted the ABA Canons have concluded that checks made to the campaign committees of candidates for political office are deemed to be contributions to the candidate. *In re Larkin*, 368 Mass. 87, 333 N.E. 2d 199 (1975); *In re Briggs*, 595 S.W. 2d 270 (Mo. 1980). In order for Canon 7A.(1) to have any meaning, checks made to a candidate's campaign committee must be treated as contributions to the candidate. Otherwise, the restrictions imposed by Canon 7 on campaign contributions by judges and judicial candidates are meaningless. The Commission properly concluded that respondent's contributions to the senate campaign committee of former Governor James B. Hunt, Jr. and the gubernatorial campaign committee of former Attorney General Rufus L. Edmisten violated Canon 7 of the North Carolina Code of Judicial Conduct.

[2] Respondent next argues that his contributions did not constitute conduct prejudicial to the administration of justice. We disagree.

Conduct prejudicial to the administration of justice which brings the judicial office into disrepute is willful misconduct in office, *In re Nowell*, 293 N.C. 235, 248, 237 S.E. 2d 246, 255 (1977), or " 'conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office.' " *In re Edens*, 290 N.C. 299, 305, 226 S.E. 2d 5, 9 (1976) (quoting *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 110 Cal. Rptr. 201, 515 P. 2d 1 (1973), *cert. denied*, 417 U.S. 932 (1974)). A significant factor in the determination of whether conduct is prejudicial is "the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office." *In re Martin*, 302 N.C. 299, 316, 275 S.E. 2d 412, 421 (1981).

Respondent contends that public esteem for the judiciary is not lowered when a judge engages in reasonable political conduct. He points to the fact that Canon 7 does not forbid all political activity and that he simply did what any citizen is capable of doing. He also points out that he was not acting in his judicial capacity when he made the contributions and contends that a violation of Canon 7 must stem from conduct while he was acting in such capacity.

After a careful review of the evidence, we conclude that respondent's campaign contributions constitute conduct prejudicial to the administration of justice that brings the judicial office in disrepute.

We cannot accept respondent's assertion that the integrity of his office and of the judiciary has not been affected by his campaign contributions. Any contribution by respondent to these candidates would violate Canon 7, and the amounts of the contributions in question are sufficiently large to constitute more than "normal political activity." Of greater significance is the fact that respondent, who was originally appointed to the District Court bench by Governor James B. Hunt, Jr., made these contributions to the two men in the State who, if elected, would on occasion be in a position to appoint or recommend the appointment of judges. Members of the public could easily conclude that the contributions were a reward for a past judicial appointment as well as an expression of hope for a future one. *See Larkin*, 368 Mass. at 91-92, 333 N.E. 2d at 202. It is clear that respondent's actions tend to undermine public confidence in the judiciary. The fact that respondent was not acting in his judicial capacity is irrelevant because his actions reflect on the integrity of the judicial office. *See Martin*, 302 N.C. at 316, 275 S.E. 2d at 421. Respondent had twice participated in elections for judicial office and should have been familiar with the restrictions imposed on the political activities of judges and judicial candidates by Canon 7.

The Commission's findings are supported by clear and convincing evidence and we adopt them as our own. *In re Kivett*, 309 N.C. 635, 645, 664, 309 S.E. 2d 442, 448, 459 (1983). We also adopt the Commission's conclusion of law that respondent made campaign contributions in violation of Canon 7A.(1)(d) and that these actions of respondent constitute conduct prejudicial to the ad-

ministration of justice that brings the judicial office into disrepute. Therefore, in the exercise of our independent judgment, *see Kivett*, 309 N.C. at 664, 309 S.E. 2d at 459, we hold that respondent should be censured in accordance with the recommendations of the Commission.

A proceeding before the Judicial Standards Commission is neither a civil nor a criminal action. *Nowell*, 293 N.C. at 241, 237 S.E. 2d at 250. Rather, it is "an inquiry into the conduct of one exercising judicial power. . . . Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Id.* The case at bar involves the least infraction of judicial standards meriting the imposition of sanctions that this Court has had to consider. However, censure or removal are the only sanctions authorized by N.C.G.S. § 7A-376.

Therefore, it is Ordered that Judge Paul M. Wright be and he is hereby censured by this Court.

Done by the Court in Conference this 7th day of May, 1985.

STATE OF NORTH CAROLINA v. DAVID MICHAEL REILLY

No. 656A84

(Filed 7 May 1985)

Criminal Law § 146— appeal based on dissent in Court of Appeals—question presented

Where defendant's appeal was grounded solely on a dissent in the Court of Appeals, the dissent disagreed only with the majority's treatment of the second question presented to that court, and defendant did not petition the Supreme Court for discretionary review of the other questions, only the second question was properly before the Supreme Court for review.

APPEAL pursuant to N.C.G.S. § 7A-30(2) by defendant from a decision of the Court of Appeals, one judge dissenting, in which a majority of the panel found no error in defendant's convictions of felonious breaking and felonious larceny at the 15 April 1983 Criminal Session of Superior Court in WATAUGA County, *Judge*

Friday presiding. The Court of Appeals' decision is reported at 71 N.C. App. 1, 321 S.E. 2d 564 (1984).

Lacy H. Thornburg, Attorney General, by Newton G. Pritchett, Jr., Assistant Attorney General, for the state.

Scott E. Jarvis for defendant appellant.

PER CURIAM.

Defendant brought forward three questions to the Court of Appeals: (1) Was the evidence sufficient to be submitted to the jury on the question of defendant's guilt? (2) Did the trial court err in failing to give an instruction on how the jury should consider certain fingerprint evidence? (3) Did the trial court err in permitting certain questions relating to religious affiliation on cross-examination of defendant's alibi witnesses? Defendant attempts to bring forward these same three questions to this Court in his brief filed here.

The dissent in the Court of Appeals disagreed only with the majority's treatment of the second question presented to that court. Defendant did not petition this Court for discretionary review of the other questions. Defendant's appeal is grounded solely on the dissent in the Court of Appeals. Therefore, on this appeal, only the second question is properly before us for review, notwithstanding defendant's attempt to bring forward the first and third questions in his brief to this Court. App. R. 16(b).

Nonetheless, since the first question involves the sufficiency of the evidence on the question of guilt, we have, "to prevent manifest injustice" pursuant to App. R. 2, considered it. We have not considered the third question. The decision of the Court of Appeals on the third question stands unreviewed. On the first and second questions the decision of the Court of Appeals is

Affirmed.

STEVE VERNON TONEY v. CYNTHIA JACKSON TONEY

No. 43A85

(Filed 7 May 1985)

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of the Court of Appeals (*Judge Braswell* with *Chief Judge Vaughn* concurring in part and dissenting in part and *Judge Eagles* concurring in part and dissenting in part) which affirmed the judgment entered by *Gash, J.* at the 23 August 1983 Civil Session of District Court, RUTHERFORD County.

Arledge, Callahan & Franklin, by J. Christopher Callahan for plaintiff-appellee.

W. T. Culpepper, III for defendant-appellant.

PER CURIAM.

The issues raised by defendant on appeal are whether the Court of Appeals erred in affirming the trial court judgment with regard to the custody of a minor child born of the parties' marriage and the plaintiff's obligation of support for another child. We have carefully reviewed the majority opinion, dissents, briefs and records of this case with regard to defendant's contentions. As to the issue of custody, we hold that the reasoning and the legal principles applied by the Court of Appeals majority are correct. We also decline to overrule the Court of Appeals on the issue of support. We note that defendant failed to request child support in her pleadings and that there is no indication in the record that she presented any monetary evidence from which the trial court could make findings relating to support. Defendant cannot now complain of the trial court's allocations of support between the parties. Consequently, the majority opinion of the Court of Appeals is affirmed.

Affirmed.

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

State v. Artis

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROSCOE ARTIS	)	

No. 504A84

(Filed 22 April 1985)

THE motion for appropriate relief filed in this case on 12 April 1985 is decided as follows:

Evidentiary hearing on the motion is set for 10:00 a.m. on 6 May 1985, or as soon thereafter as counsel can be heard, before *Judge Mary McL. Pope* in Superior Court, ROBESON County.

The Court will make findings of fact and conclusions of law on the matters raised in defendant's motion. These findings and conclusions will be certified to this Court without delay.

The Court notes that counsel for the State has joined in this request for an evidentiary hearing.

This 22 day of April 1985.

VAUGHN, J.
For the Court

State v. Britt

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JEROME PARKER BRITT	)	

No. 498A84

(Filed 20 March 1985)

ON 28 February 1985 defendant filed a motion for appropriate relief in this Court.

The motion was accompanied by an affidavit of Joe Lewis Moody dated 3 January 1985 in which the said Joe Lewis Moody says that he gave false testimony when called as a witness to testify in the above case.

The case is remanded to the Superior Court of Northampton County for an evidentiary hearing and findings and conclusions on the matters raised in the motion for appropriate relief. The record so made will be certified to this Court with reasonable dispatch.

This 20th day of March 1985.

VAUGHN, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ELLEHUE JONES	)	

No. 583P83

(Filed 2 April 1985)

IT appears to this Court that *Judge Hal D. Walker* erred in his conclusion that defendant had waived his right to appeal.

Defendant's petition for certiorari is allowed for the following purpose:

The case is remanded to the Court of Appeals for entry of an order allowing defendant's petition for certiorari and establishing an appropriate schedule for preparation and docketing the Record on Appeal and for briefing.

This 2nd day of April 1985.

VAUGHN, J.
For the Court

State v. Richardson

STATE OF NORTH CAROLINA)
)
v.) ORDER
)
FLOYD EDWARD RICHARDSON)

No. 615A84

(Filed 18 April 1985)

THIS case was heard 10 April 1985 in the Supreme Court upon appeal and writ of certiorari to review the decision of a divided panel of the Court of Appeals, 70 N.C. App. 509, 320 S.E. 2d 900 (1984). As the trial court's findings of fact are insufficient to allow proper appellate review of its conclusion that the defendant's alleged confession was voluntary, this case is remanded to the Superior Court, BUNCOMBE County, with instructions to make additional findings of fact addressing the following questions:

(1) What, if anything, did Tennessee authorities promise or offer this defendant?

(2) What threats, if any, did Tennessee authorities make to this defendant?

(3) Did the defendant rely on any such promises or threats, if made, to the extent that they caused his confession to the North Carolina officers to be induced by fear or by hope of reward?

(4) Was the defendant's confession to the North Carolina officers the result of a plea arrangement or plea bargain with Tennessee authorities concerning crimes committed in Tennessee? If so, what were the terms of the plea bargain or plea arrangement, and was it complied with?

The Superior Court, Buncombe County, will certify its findings in this regard to this Court with reasonable dispatch.

This 18th day of April 1985.

MITCHELL, J.
For the Court

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

ABELL v. NASH COUNTY BD. OF EDUCATION

No. 667P84.

Case below: 71 N.C. App. 48.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

BICYCLE TRANSIT AUTHORITY v. BELL

No. 134A85.

Case below: 72 N.C. App. 577.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 22 April 1985.

BLOUNT v. BLOUNT

No. 71P85.

Case below: 72 N.C. App. 193.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985.

BOYCE v. MEADE

No. 64P85.

Case below: 71 N.C. App. 592.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985.

BRYANT v. SAMPSON MEMORIAL HOSP.

No. 75P85.

Case below: 72 N.C. App. 203.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

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

DENISE v. CORNELL

No. 61P85.

Case below: 72 N.C. App. 358.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 April 1985.

FREEMAN v. HUNTER & WALDEN CO.

No. 655P84.

Case below: 70 N.C. App. 787.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

GARRISON v. GARRISON

No. 25P85.

Case below: 71 N.C. App. 618.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985.

HIGDON v. DAVIS

No. 54PA85.

Case below: 71 N.C. App. 640.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 2 April 1985.

IN RE ARBITRATION BETWEEN STATE AND DAVIDSON & JONES

No. 63P85.

Case below: 72 N.C. App. 149.

Petition by Haken/Corley & Associates, Inc. for discretionary review under G.S. 7A-31 denied 2 April 1985.

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

IN RE WILL OF BRINSON

No. 225P85.

Case below: 74 N.C. App. 206.

Petition by propounder for writ of supersedeas and temporary stay denied 2 May 1985.

INGLE v. ALLEN

No. 685P84.

Case below: 71 N.C. App. 20.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985.

JAMES v. CHAMPION INDUSTRIES

No. 42P85.

Case below: 72 N.C. App. 223.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 April 1985.

JOHNSTON v. GASTON COUNTY

No. 45P85.

Case below: 71 N.C. App. 707.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 2 April 1985.

LOEB v. LOEB

No. 107P85.

Case below: 72 N.C. App. 205.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

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

LOWDER v. ALL STAR MILLS

No. 38P85.

Case below: 71 N.C. App. 809.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 2 April 1985.

PITTMAN v. FIRST PROTECTION LIFE INS. CO.

No. 148P85.

Case below: 72 N.C. App. 428.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

SAWYER v. CARTER

No. 705P84.

Case below: 71 N.C. App. 556.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985.

SHELTON v. FAIRLEY

No. 36P85.

Case below: 72 N.C. App. 1.

Petition by defendants for discretionary review under G.S. 7A-31 denied 2 April 1985.

SMITH v. WATSON

No. 40P85.

Case below: 71 N.C. App. 351.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

SOUTHERN UTILITIES, INC. v.
MANDEL MACHINERY CORP.

No. 669P84.

Case below: 71 N.C. App. 188.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985.

SQUIRES TIMBER CO. v. THE INS. CO. OF PENN.

No. 78P85.

Case below: 72 N.C. App. 344.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

STATE v. CAMERON

No. 11A85.

Case below: 71 N.C. App. 776.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

STATE v. CHAVIS

No. 224P85.

Case below: 74 N.C. App. 207.

Petition by defendant for discretionary review under G.S. 7A-31 denied 26 April 1985. Petition by defendant for writ of supersedeas and temporary stay denied 26 April 1985.

STATE v. DAVIS

No. 223P85.

Case below: 74 N.C. App. 208.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 26 April 1985. Petition by Attorney General for writ of supersedeas and temporary stay denied 26 April 1985.

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

STATE v. DAVIS

No. 545P84.

Case below: 70 N.C. App. 495.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 April 1985.

STATE v. EXUM

No. 47P85.

Case below: 68 N.C. App. 357.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

STATE v. FORD

No. 58P85.

Case below: 71 N.C. App. 748.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 2 April 1985.

STATE v. GRAHAM

No. 154P85.

Case below: 73 N.C. App. 179.

Petition by defendant for writ of supersedeas and temporary stay denied 22 March 1985.

STATE v. JOHNSON

No. 33P85.

Case below: 71 N.C. App. 607.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

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

STATE v. JOINES

No. 108P84.

Case below: 70 N.C. App. 146.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

STATE v. LASSITER

No. 722P84.

Case below: 70 N.C. App. 731.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985. Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

STATE v. LEVERETT

No. 137P85.

Case below: 73 N.C. App. 180.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

STATE v. McLEOD

No. 684P84.

Case below: 71 N.C. App. 226.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

STATE v. MOORE

No. 703P84.

Case below: 71 N.C. App. 639.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

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

STATE v. OLIVER

No. 174P85.

Case below: 73 N.C. App. 118.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 April 1985. Petition by defendant for writ of supersedeas and temporary stay denied 3 April 1985.

STATE v. QUINN

No. 56P85.

Case below: 36 N.C. App. 611.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

STATE v. STREATH

No. 89P85.

Case below: 72 N.C. App. 685.

Third petition by defendant for discretionary review under G.S. 7A-31 denied 5 April 1985. Third petition by defendant for writ of supersedeas and temporary stay denied 5 April 1985.

STATE v. THOMPSON

No. 82P85.

Case below: 64 N.C. App. 485.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

STATE v. UPRIGHT

No. 76P85.

Case below: 72 N.C. App. 94.

Petition by defendant (John Henry Russell) for discretionary review under G.S. 7A-31 denied 2 April 1985.

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

STATE v. WALKER

No. 112P85.

Case below: 47 N.C. App. 585.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 2 April 1985.

STATE v. WILSON

No. 158P85.

Case below: 73 N.C. App. 398.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985. Petition by defendant for writ of supersedeas and temporary stay denied 2 April 1985.

STATE ex rel. GRIMSLEY v. WEST LAKE DEV., INC.

No. 39P85.

Case below: 71 N.C. App. 779.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

THE LITTLE RED SCHOOL HOUSE, LTD. v.
CITY OF GREENSBORO

No. 719P84.

Case below: 71 N.C. App. 332.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 2 April 1985. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 2 April 1985.

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

TOWN OF NAGS HEAD v. TILLETT

No. 436PA84.

Case below: 71 N.C. App. 639.

Petition by defendants James T. Ryce and wife, Susan Ryce, for discretionary review under G.S. 7A-31 allowed 3 April 1985 but is limited to the following two questions: (1) the merits of defendants Ryce's cross assignments of error regarding their crossclaim against defendant Loy, and (2) the validity of the Town of Nags Head's denial of the building permit.

WARMACK v. COOKE

No. 18P85.

Case below: 71 N.C. App. 548.

Petition by defendant for discretionary review under G.S. 7A-31 denied 2 April 1985.

PETITION TO REHEAR

MISENHEIMER v. MISENHEIMER

No. 368PA83.

Case below: 312 N.C. 692.

Petition by plaintiffs denied 2 April 1985.

STATE OF NORTH CAROLINA v. HORACE EDWARD WILSON

No. 610A83

(Filed 4 June 1985)

1. **Jury § 6— capital case—denial of sequestration and individual voir dire of jurors**

Defendant's arguments that the collective *voir dire* of prospective jurors in a capital case made the jurors aware of prejudicial matters and inhibited their candor and that it permitted prospective jurors to become educated as to responses which would enable them to be excused from the panel were mere speculation and did not establish that the trial court abused its discretion in denying defendant's motion for sequestration and individual *voir dire*. G.S. 15A-1214(j).

2. **Jury § 2— supplemental jurors summoned by sheriff—failure to exhaust peremptory challenges—absence of prejudice**

Defendant failed to show that he was prejudiced when the trial court ordered the sheriff to randomly recruit jurors during the selection process where the twelfth juror seated was one of the supplemental jurors summoned by the sheriff, and defendant still had one peremptory challenge at the time such juror was accepted but failed to exhaust his peremptory challenges. G.S. 9-11(a).

3. **Jury § 6.4— opposition to death penalty—rehabilitation of challenged jurors—questions concerning duties of citizen as juror**

The trial court did not err in denying defendant the opportunity to "rehabilitate" jurors challenged for cause by the State due to their opposition to the death penalty by asking questions in the nature of comments by defense counsel concerning the obligations and duties of a citizen as a juror.

4. **Jury § 7.12— excusal of jurors for capital punishment beliefs**

Prospective jurors challenged for cause due to their beliefs regarding capital punishment were properly dismissed where the record clearly indicates that all of the prospective jurors excused on this basis stated that they could not or would not vote to return a sentence of death under any circumstances.

5. **Criminal Law § 66.3— impermissibly suggestive identification procedures**

Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification.

6. **Criminal Law § 66.6— irreparable misidentification—factors to be considered**

The factors to be examined to determine the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the individual at the time of the event; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the event and the confrontation. Even in cases where the iden-

tification procedure has been suggestive, the court is to use these factors to determine whether under the "totality of the circumstances" the identification was reliable.

7. Criminal Law §§ 66.6, 66.15— suggestive pretrial identification procedures—no substantial likelihood of misidentification—independent origin of in-court identification

Although pretrial photographic and lineup identification procedures were made suggestive by an officer's comments to the witness that she should point out the individual who was at her motel on the night in question, the evidence supported the trial court's findings and conclusions that the pretrial identification procedures did not create a substantial likelihood of misidentification and were not impermissibly suggestive. The evidence also supported the trial court's ruling that the witness's in-court identification of defendant was admissible as being of independent origin based solely upon the witness's observations of defendant at the scene of the crime.

8. Criminal Law § 50.2— testimony that victim "killed"—no invasion of province of jury

A witness's testimony that he sold decedent a watch a month before he "got killed" did not amount to a prejudicial invasion of the province of the jury in a murder case since there was no suggestion that defendant killed the victim or that the victim died as the result of criminal conduct.

9. Criminal Law § 71— instantaneous conclusion of the mind—admissibility as shorthand statement of fact

A witness's testimony that, after seeing the victim lying in a parking lot covered with blood, she "ran into the room where [the victim] had been stabbed and got a set of keys" was admissible as a shorthand statement of fact based upon an instantaneous conclusion of the mind.

10. Criminal Law § 169.7— evidence admitted without objection—waiver of prior objection to similar evidence

Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence.

11. Criminal Law § 80— title history of automobile—relevancy in murder case—failure to match identification or license tag numbers

A certified copy of the title history of a 1975 Chevrolet Vega showing defendant as the owner of the vehicle at the time of a robbery-murder was relevant in a prosecution for the murder where the State's evidence tended to show that a blue Vega was near the crime scene at about the time the victim was killed and that defendant was seen driving a blue Vega earlier that day. The evidence was not rendered inadmissible by the fact that the witness through whom the title certificate was introduced failed to testify that the vehicle identification or license tag number for the Vega in the certificate of title matched those of the Vega driven by the defendant or the one seen on the day of the crimes.

12. Criminal Law § 80— admission of business records

Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made.

13. Criminal Law § 80.1— authentication of business records

The authenticity of business records may be established by circumstantial evidence, and there is no requirement that the records be authenticated by the person who made them. Furthermore, if the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time.

14. Criminal Law § 80.1— authentication of business records

Although a witness did not explicitly testify that records were made in the normal course of business and at or near the time of the transactions described therein, the witness's testimony when coupled with the records themselves established these facts so that the records were admissible as business records in a robbery-murder case where the witness identified the documents as a motel's daily records which indicated the number of rooms rented and the amount of money received for each room; the witness further testified that the records were in deceased's handwriting; the records showed daily entries for specific dates and were therefore self-authenticating as to the time at which they were made; and the witness owned a motel and was thus familiar with general practices in the motel business regarding the recording of rentals and receipts.

15. Homicide § 21.6— first-degree murder—felony murder rule—sufficiency of evidence

The State's evidence was sufficient to support inferences that the victim was killed during the commission of an armed robbery and that defendant perpetrated or aided in the perpetration of the robbery and killing so as to support defendant's conviction of first-degree murder under the felony murder rule where it tended to show: the victim, a motel manager, was found lying in the motel parking lot covered with blood shortly after 11:00 p.m.; he stated that two or three black men had stabbed and robbed him; the victim's wristwatch and the motel receipts for the previous three days were missing; two black males were seen sitting in a blue Vega near the crime scene at about the time the crimes occurred; defendant was observed driving a blue Vega earlier in the same day; sometime between 11:00 and 11:30 p.m. defendant and another black male inquired about renting a room at another motel which was located only a block from the motel managed by the victim; a vehicle title certificate indicated that defendant owned a 1975 Chevrolet Vega on the date of the crimes; two or three weeks after the crimes were committed, defendant's girl friend was seen in possession of the victim's wristwatch; and approximately a week later defendant sold the watch to an acquaintance.

16. Larceny § 7.4; Robbery § 4.3— possession of recently stolen property—control by defendant—sufficiently recent possession

Evidence tending to show that defendant, his girl friend and their two children checked into a motel on the day a robbery-murder victim's watch disappeared when he was killed by two or three black males and that the watch was seen thereafter only in the hands of the girl friend or the defendant until it was sold by defendant was sufficient to support a finding that the watch was in defendant's custody and control at all pertinent times so as to permit the application of the doctrine of possession of recently stolen goods to link defendant to the crimes. Furthermore, evidence that the girl friend had the watch approximately one to three weeks after the killing and that defendant was seen with it a week later showed sufficiently recent possession of the watch by defendant to support a reasonable inference of defendant's guilt under the doctrine of possession of recently stolen property.

17. Criminal Law § 113.7— charge on acting in concert—sufficient evidence

Evidence tending to show that two or more men robbed and killed the victim and that defendant was one of the perpetrators was sufficient to support an instruction on the concept of acting in concert although there was no direct evidence to show that defendant was present when the crimes were committed.

18. Homicide § 32.1— first-degree murder—instruction on premeditation and deliberation theory—harmless error

The State's evidence was sufficient to justify the submission to the jury of a first-degree murder charge on the theory of premeditation and deliberation. However, assuming that the evidence was insufficient to support such an instruction, defendant was not prejudiced thereby where he was convicted of first-degree murder specifically on the basis of the felony murder rule.

19. Indictment and Warrant § 8.4; Homicide § 12.1— first-degree murder—election of theory not required

Where the State made out a prima facie case on both the theories of felony murder and premeditation and deliberation, the State was not required to elect the theory under which the first-degree murder case would be submitted to the jury.

20. Criminal Law §§ 102, 135.4— first-degree murder—penalty phase—no right to both opening and closing arguments

The trial court did not err in denying defendant's motion to present both the opening and closing arguments at the penalty phase of a first-degree murder trial since G.S. 15A-2000(a)(4) gives a defendant the right to make only the final argument at the penalty phase. Even had this been error, the fact that defendant received a life sentence rather than the death penalty would have made the error harmless.

21. Criminal Law § 132— setting aside verdict as contrary to weight of evidence

The decision whether to grant or deny a motion to set aside the verdict as being against the greater weight of the evidence is vested in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion.

State v. Wilson

APPEAL by the defendant from the judgment of *Judge Claude S. Sitton*, entered August 25, 1983 in Superior Court, GASTON County.

The defendant was charged in bills of indictment, proper in form, with murder and armed robbery. He pleaded not guilty to both charges. A jury found the defendant guilty of armed robbery and first degree murder based on the felony murder rule. Following a sentencing hearing conducted under N.C.G.S. 15A-2000, the jury found one aggravating circumstance, that the defendant had been previously convicted of a felony involving the use of violence to the person. The jury also found five mitigating circumstances. The jury concluded that although the mitigating circumstances were insufficient to outweigh the aggravating circumstance, the aggravating circumstance was not sufficiently substantial to call for the imposition of the death penalty. Based upon the jury's recommendation, the trial court entered judgment sentencing the defendant to life imprisonment. As the armed robbery was the underlying felony upon which the first degree murder conviction was based, the trial court arrested judgment on the armed robbery charge. The defendant appealed to the Supreme Court as a matter of right under N.C.G.S. 7A-27(a). Heard in the Supreme Court March 14, 1985.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General for the State.

Kellum Morris, Assistant Public Defender for Judicial District Twenty-Seven-A, for the defendant appellant.

MITCHELL, Justice.

The defendant brings forward numerous assignments of error in which he contends that certain evidence was improperly admitted, that errors were made concerning the selection of jurors, that the jury was improperly instructed on certain facets of the case and that the evidence presented by the State was insufficient to permit the case against him to be submitted to the jury. We conclude that the defendant received a fair trial free from prejudicial error.

This case arises out of events occurring on the evening of September 16, 1982 at the Bishop Motel located in Belmont, near

Charlotte, North Carolina. The State presented evidence tending to show that at approximately 12:00 noon on September 16, 1982, the defendant checked into the 321 Motel in Charlotte with a woman and two young children. The defendant was driving a blue Chevrolet Vega.

Mrs. Ruparib Jethwa, the victim's aunt, testified that she and her husband operated the Stonewall Motel located in Belmont, North Carolina. The Bishop Motel, which was managed by the victim, Probhatsing Dipubha Jadeja, was located about a block away from the Stonewall Motel. Sometime between 11:00 and 11:30 p.m. on September 16, 1982, the defendant with another black male entered the office of the Stonewall Motel and inquired about renting an apartment. During the ensuing conversation, the witness saw what looked like a knife partially concealed in the defendant's pocket. Upon being informed that an apartment could only be rented in the daytime hours, the defendant stated that they would return in the morning. He and his companion then left.

Ray Collins testified that he owned an automotive parts store located next door to the Bishop Motel. He and an employee, Wanda Miller, stayed late at the store the night of September 16, 1982. Shortly after 11:00 p.m., as they were preparing to close, Collins observed two black males walking toward the Bishop Motel. As Collins and Miller left the store they observed a blue Vega pull up to the corner of the building. A man got out of the car and went to a nearby telephone booth. Collins and Miller got into Collins' car and left. The blue Vega followed them for approximately a block and then turned to go back toward the Bishop Motel.

Ralph Cohn testified that he was living at the Bishop Motel on September 16, 1982 and had been residing there for approximately four months prior to that date. During this period Cohn and the victim Jadeja had become close friends. On the evening of September 16, 1982, Cohn, his girl friend and Jadeja had dinner together. Afterwards Cohn and Jadeja drove to the Stonewall Motel and stopped at a store to buy a pack of cigarettes. They returned to the Bishop Motel around 10:50 p.m. and planned to watch a ballgame together at 11:00 p.m.

Robert Fullerton was also living at the Bishop Motel on September 16, 1982. At approximately 11:00 p.m. he went to his car. In the parking lot he heard someone moving. He discovered Jade-

ja lying in the parking lot covered with blood. Jadeja stated that he had been stabbed and robbed by three black men. Fullerton then ran to a phone booth beside the Bishop Motel to call the police. A black male was in the phone booth, however, and Fullerton ran back to the crowd which had gathered around Jadeja.

In the meantime Ralph Cohn had been informed that Jadeja had been attacked. He knelt beside Jadeja and asked him what happened. Jadeja told Cohn that two black males had stabbed him. At that time the victim was not wearing the wristwatch that he had been wearing when Cohn had last seen him a few minutes earlier. Cohn then ran to the motel office to phone for assistance and discovered that the telephone had been ripped off its hook. There were papers scattered throughout the office and blood was all over the office as well. Cohn then went to a nearby house and called the Belmont Police Department.

Officer Robert Johnston, a member of the Gaston County Police Department assigned to the Identification Section of the department, testified that at approximately 11:25 p.m. on the evening of September 16, 1982, he was instructed to go to the Bishop Motel. He arrived about twenty minutes later and went to the motel office. He found the office disarranged with the telephone, a key, an insurance folder, a small envelope covered with black tape and other items scattered on the floor. He proceeded to photograph the room.

Byron Carpenter, a member of the South Point Lifesaving Crew, testified that he and two other crew members arrived at the Bishop Motel at about 11:20 p.m. They found Jadeja lying in the motel parking lot, his shirt covered with blood. Carpenter cut away the victim's shirt and discovered a stab wound to the upper left quadrant of his chest. The victim was placed in an ambulance which proceeded to Gaston Memorial Hospital. Jadeja went into full cardiac arrest enroute to the hospital and efforts to resuscitate him were unsuccessful.

Dr. Phillip Leone was qualified and accepted by the court as an expert in the field of pathology. He testified that he performed an autopsy on the body of Jadeja which revealed that the victim had sustained a laceration beneath his chin and abrasions over his left eye, over the left hip and to the left temple. He also found a stab wound to the victim's chest a quarter of an inch wide and ap-

proximately three inches deep which penetrated the heart. Dr. Leone stated that in his opinion the chest wound was caused by a knife and that the cause of Jadeja's death was this stab wound.

Bhartsang Jadeja, the victim's brother, testified that the day after the stabbing he went to the Bishop Motel and checked the motel records to ascertain what, if anything, was missing. According to the daily records, $219.40 in receipts had been received since the last deposit of money received for the rental of rooms. Bhartsang Jadeja did not find any money in the motel office. Also, no money was discovered on the body of the victim.

Charles Fernanders, an acquaintance of the defendant, testified that in late September or early October of 1982 he saw Merinda Graham with a wristwatch which was later identified as that of the victim. Other witnesses testified that Graham was the defendant's girl friend. Approximately a week later Fernanders saw the watch in the possession of the defendant. The defendant said that he wanted to pawn the watch. Fernanders rode with the defendant to a pawnshop in Mecklenburg County to attempt to sell the watch. The defendant was driving a blue Vega. The defendant was unsuccessful in selling the watch at the pawnshop. The defendant and Fernanders then drove to see James Ford who operated a garage in Mount Holly. Ford testified that the defendant offered to pawn the watch to him. When Ford replied that he was not interested in such a transaction but would consider buying it outright, the defendant offered to sell it to him. Ford bought the watch from the defendant for $5.00. At that time Ford asked the defendant if the watch was stolen. The defendant replied that the watch was not stolen and was his personal property.

[1] The defendant first contends that the trial court erred in denying his motion for the sequestration and individual *voir dire* of prospective jurors. The defendant argues that the presence of all the prospective jurors during the *voir dire* resulted in their exposure to the beliefs and prejudices of the other prospective jurors and kept them from candidly answering the *voir dire* questioning. He also contends that as a result of the collective *voir dire*, many jurors were able to observe other jurors being excused for cause due to their opposition to the death penalty and

were therefore able to frame their responses so as to achieve disqualification as well.

N.C.G.S. 15A-1214(j) provides: "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." This provision does not grant either party any absolute right. *See State v. Jackson*, 309 N.C. 26, 305 S.E. 2d 703 (1983). The decision whether to grant sequestration and individual *voir dire* of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. *Id.; State v. Johnson*, 298 N.C. 355, 259 S.E. 2d 752 (1979). The defendant's arguments that the collective *voir dire* made the prospective jurors aware of prejudicial matters and inhibited the candor of the jurors are the same arguments rejected as mere speculation in *Johnson*. The argument that a collective *voir dire* permits prospective jurors to become "educated" as to responses which would enable them to be excused from the panel is equally speculative. The defendant offered no proof and failed to show that the trial court's denial of his motion was an abuse of discretion. This assignment of error is overruled.

[2] In his next assignment of error the defendant contends that he was prejudiced when the trial court ordered the Sheriff of Gaston County to randomly recruit jurors in the middle of the jury selection process. N.C.G.S. 9-11(a) provides in pertinent part: "If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire." We have held that N.C.G.S. 9-11(a) clearly authorizes the trial court to order the summoning of supplemental jurors as a means to ensure orderly, uninterrupted and speedy trials. *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972).

The defendant asserts that in this case, however, the trial court acted prematurely since other members of the regular jury pool were or would soon be available. This contention is without merit in light of the fact that the defendant failed to exhaust his peremptory challenges. The record indicates that at the time the trial court ordered the sheriff to summon additional jurors, only one juror remained to be seated and the defendant had two pe-

remptory challenges remaining. The twelfth juror seated was one of the supplemental jurors summoned by the sheriff. At the time he was accepted, however, the defendant still had one peremptory challenge remaining. The defendant has therefore failed to show any possible prejudice and may not now be heard to complain. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Fountain*, 282 N.C. 58, 191 S.E. 2d 674 (1972).

[3] The defendant next contends that the trial court denied him the opportunity to "rehabilitate" jurors who had been challenged for cause by the State due to their opposition to the imposition of the death penalty. Prior to the trial the defendant filed a motion in which he sought to ask a series of specific questions to prospective jurors challenged on this basis. The line of questioning proposed by the defendant was as follows:

> Mr. Juror:
>
> You have been asked questions concerning your view about the death penalty and you have expressed your personal objections to the death penalty which are shared by many others.
>
> I want to ask you some questions about a citizen's duty to serve as a juror. You know, do you not, that jury duty is an obligation and duty of citizenship which we all share?
>
> You know, do you not . . . and I expect the Judge will so instruct the jury . . . that it is a citizen's duty as a juror to put aside what he thinks the law is or what he thinks the law should be and to take the law from the Judge and to render true verdicts according to the evidence?
>
> You know also, do you not, that if the defendant is found guilty of murder in the first degree that the jury must decide what sentence should be imposed, whether the defendant will be sentenced to life imprisonment or to death in the gas chamber?
>
> And you know that the law requires that a member of the jury is required by law to consider whether a penalty of death should be imposed?
>
> And you and other jurors have already placed your hands on the Bible and sworn that you will apply the law.

And would you not try your very best to uphold that oath as a juror and as a citizen if you were called upon to do so?

And, Mr. Juror, if you were seated as a juror in this case, you would do your best to set aside your personal objections to the death penalty and, after hearing the evidence in the case and the instructions of the trial court, to follow your duty as a juror to fairly consider all the penalties which the law has provided?

And you could do that, could you not?

The defendant's motion to pose these questions to prospective jurors challenged for cause due to their opposition to the death penalty was denied. The defendant argues that the denial of the motion constituted prejudicial error in that he was denied access to a jury made up of a cross section of the community. This argument is without merit.

We have acknowledged that both the defendant and the State have the right to question prospective jurors as to their views concerning capital punishment in order to ensure a fair and impartial verdict. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 428 U.S. 903 (1976). The trial court, however, is vested with broad discretion in controlling the extent and manner of such an inquiry and its decision will not be disturbed absent a showing of an abuse of that discretion. *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984). The proposed questions were in the nature of comments by defense counsel concerning the obligations and duties of a citizen as a juror. In light of their content, the trial court did not abuse its discretion by denying the defendant's motion to pose them to prospective jurors challenged for their opposition to the death penalty. In reaching this conclusion we note that the trial court afforded the defendant an opportunity during the jury *voir dire* to question each of these prospective jurors as to whether they could, under any circumstances, vote to impose the death penalty.

[4] The defendant also appears to suggest that one or more of the jurors challenged for cause due to their opposition to capital punishment may have been improperly dismissed in violation of the standard established in *Witherspoon v. Illinois*, 391 U.S. 510

(1968). In the recent case of *Wainwright v. Witt*, --- U.S. ---, 105 S.Ct. 844, 83 L.Ed. 2d 841 (1985), the Supreme Court clarified *Witherspoon* and held that the proper standard for determining whether a prospective juror may be excluded for cause due to views concerning the death penalty "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" --- U.S. at ---, 105 S.Ct. at 852, 83 L.Ed. 2d at 851-52 (1985), *quoting from Adams v. Texas*, 448 U.S. 38, 45 (1980). Under this standard it is clear in the present case that the prospective jurors challenged for cause due to their beliefs regarding capital punishment were properly dismissed. The record clearly indicates that all of the prospective jurors excused on this basis stated that they could not or would not vote to return a sentence of death under any circumstances.

In his next assignment of error the defendant argues that the trial court erred in denying his motion to suppress both the testimony of Mrs. Ruparib Jethwa identifying him at trial as one of the men who entered the Stonewall Motel on the night of the stabbing and evidence of her similar pretrial identification of him. He contends that all such evidence resulted from pretrial identification procedures which were so impermissibly suggestive that they created a substantial likelihood of misidentification. We disagree.

A *voir dire* hearing was held on the defendant's motion to suppress evidence of both types of identification. The trial court's findings based on substantial evidence elicited at the hearing were to the effect that on the night of September 16, 1982, two black males entered the Stonewall Motel and inquired about renting an apartment. Jethwa observed that one of the men was approximately six feet tall and light-complected, while the other was somewhat shorter and darker complected. Both were wearing blue jeans and T-shirts. Jethwa further testified that the lighting was bright inside the office. She stated that the two men were in the office for about two minutes, and during this period she observed a knife partially hidden in the pocket of the lighter complected individual. While she was observing the two men they were on the other side of a twenty-seven inch counter. Later that night she gave a description of these two men to Officer William Jonas who was investigating the stabbing of Probhatsing Jadeja.

Two days later Officer Jonas asked Jethwa to look through four albums of photographs in an attempt to identify the men who had come into the motel on the night of the stabbing. She was unable to identify anyone from the albums.

On January 4, 1983, Jonas had Jethwa look at a photographic line-up containing the photographs of six black males. At the time he showed her the line-up, Jonas instructed her to examine the photographs carefully and "determine whether or not she could identify the man who came into the Stonewall Motel the night that the murder occurred." She told Jonas that one of the photographs resembled the lighter complected individual who had entered the motel on the night in question. The photograph she identified was that of the defendant.

On February 21, 1983, Jethwa viewed a physical line-up consisting of six black males including the defendant. Jonas asked her to pick out the individual who came into the motel on the night in question with a knife. She identified the defendant as being that person. Following the rearrangement of the order of the six subjects, a second line-up was conducted. Jethwa again identified the defendant. Jethwa testified at the *voir dire* hearing that her in-court identification of the defendant at trial as being one of the two men who entered the motel on the evening of September 16, 1982 was based on her observations of him on the night in question.

The trial court concluded that while the pretrial identification procedures were "somewhat" tainted by Officer Jonas's comment that she should pick out the individual who came into the motel that night, the procedures were not so unnecessarily suggestive or conducive to irreparable mistaken identification as to constitute a due process violation. The court further found that Jethwa's in-court identification of the defendant as one of the men she saw at the motel on the evening of September 16, 1982 was based solely on her observations at that time and that it was not tainted by any unnecessarily suggestive pretrial identification procedure. The trial court then allowed evidence of both types of identification of the defendant by the witness Jethwa to be admitted.

[5] Identification evidence must be suppressed on due process grounds where the facts show that the pretrial identification pro-

cedure was so suggestive as to create a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377 (1968); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *State v. White*, 307 N.C. 42, 296 S.E. 2d 267 (1982). The facts and circumstances of each case must be examined to determine whether the pretrial identification procedure was so suggestive as to create a substantial likelihood of misidentification. *Simmons v. United States*, 390 U.S. 377 (1968); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). Furthermore, as stated by the Court in *Harris*, "Even though a pretrial identification procedure may be suggestive, it will be *impermissibly* suggestive only if all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 164, 301 S.E. 2d 91, 95 (1983) (emphasis original).

[6] The factors to be examined to determine the likelihood of irreparable misidentification include: (1) the opportunity of the witness to view the individual at the time of the event; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the event and the confrontation. *Neil v. Biggers*, 409 U.S. 188 (1972); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980). Even in cases where the identification procedure has been suggestive, the court is to use these factors to determine whether under the "totality of the circumstances" the identification was reliable. *Neil v. Biggers*, 409 U.S. 188, 199 (1972); *State v. Brady*, 299 N.C. 547, 556, 264 S.E. 2d 66, 71 (1980).

[7] We agree that the pretrial identification procedures were made suggestive by the officer's comments to Jethwa that she should point out the individual who was at the motel on the night in question, as they tended to convey the impression that he believed that person or his photograph was in each line-up. However, the trial court's findings and conclusions that the pretrial identification procedures did not create a substantial likelihood of misidentification and were not impermissibly suggestive were supported by substantial competent evidence and are binding on this Court. *State v. White*, 311 N.C. 238, 316 S.E. 2d 42 (1984); *State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980).

We also find adequate support for the trial court's ruling that the in-court identification was admissible as being of independent origin based solely upon Jethwa's observations at the scene of the crime. The factors to be considered in determining whether the in-court identification of a defendant is of independent origin are the same as those used to evaluate the likelihood of irreparable misidentification during pretrial identification procedures. *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983); *State v. Thompson*, 303 N.C. 169, 277 S.E. 2d 431 (1981). Applying these factors in light of all of the facts discussed earlier, we find more than adequate evidence in the record to support the trial court's holding that Jethwa's in-court identification was admissible as being of independent origin. This assignment of error is overruled.

The defendant's next assignment of error concerns certain portions of the testimony of prosecution witnesses Michael Campbell and Dawn Fullerton. Campbell testified that he had sold a watch to Probhatsing Jadeja. When asked when this transaction occurred, Campbell replied, "I gave it to him about a month before he got killed, I believe." Fullerton testified that she saw Jadeja lying in the parking lot covered with blood. When asked what she did after seeing him she responded, "I ran into the room where Jay (the victim) had been stabbed and got a set of keys." In both instances the defendant made an objection and moved to strike the testimony. The objections were overruled and the motions to strike denied. The defendant contends that the trial court committed error by allowing the witnesses to testify about their conclusions. Specifically he argues that Campbell's conclusion that Jadeja was "killed" invaded the province of the jury. Also he claims that Fullerton was not qualified to conclude that the acts complained of occurred in the room or that the victim was stabbed. We find these contentions to be meritless.

[8] We reject the assertion that Campbell's use of the word "killed" amounted to a prejudicial invasion of the province of the jury. At no point in Campbell's testimony was there any suggestion that the defendant killed Jadeja. *See State v. Corbett*, 307 N.C. 169, 267 S.E. 2d 553 (1982). The word "killed" did not infer whose actions were criminal or even that the victim died as the result of criminal conduct, and it did not relieve the State of the burden of proving that a crime had been committed and that

the defendant was the perpetrator. *See State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984).

[9] As for Fullerton's testimony:

> This Court has long held that a witness may state the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time." Such statements are usually referred to as shorthand statements of facts.

State v. Spaulding, 288 N.C. 397, 411, 219 S.E. 2d 178, 187 (1975), *death sentence vacated*, 428 U.S. 904 (1976). On the night in question, Fullerton heard someone say that Jadeja had been stabbed. She went outside and saw him lying in the parking lot covered with blood. She apparently overheard Jadeja say that he had been stabbed and robbed by three black males. She then ran to the motel office, which was blood-splattered and in disarray. From these circumstances we believe that the witness understandably arrived at the logical and instantaneous conclusion that Jadeja had been stabbed in the motel office. Her testimony to this effect was therefore admissible as a shorthand statement of fact. *See, e.g., State v. Marlow*, 310 N.C. 507, 313 S.E. 2d 532 (1984); *State v. Stinson*, 297 N.C. 168, 254 S.E. 2d 23 (1979).

The defendant next contends that the trial court erred in admitting over objection testimony from Robert Fullerton and Ralph Cohn that the victim stated that he had been stabbed by some black men. (Fullerton testified that Jadeja said there were three men; Cohn testified that Jadeja said there were two.) The defendant argues that this evidence was inadmissible hearsay. The State contends that under *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874 (1973) and *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983), the testimony was admissible based on a showing that the testimony was necessary and that there was a reasonable probability of truthfulness surrounding the statements.

[10] Even if it is assumed *arguendo* that the statements were not admissible under *Vestal* and *Alston*, this assignment of error is not properly before this Court. On redirect examination Cohn

testified without objection that the victim told him that he was stabbed by two black males. Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence. *State v. Maccia*, 311 N.C. 222, 316 S.E. 2d 241 (1984); *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). We therefore overrule this assignment of error.

[11] The defendant's next contention is that the trial court erred by allowing into evidence a certified copy of the title history of a 1975 Chevrolet Vega showing the defendant as the owner of the vehicle on September 16, 1982. He claims that the State failed to show that this document was relevant to the case and it should have been excluded. We disagree.

Any evidence calculated to throw any light upon the crime charged is admissible. *State v. Hunt*, 297 N.C. 258, 254 S.E. 2d 591 (1979); *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964). The State's evidence tended to show that a blue Vega was observed in the vicinity of the scene of the crime at the Bishop Motel at the approximate time of the stabbing. Earlier that day the defendant was seen driving a light blue Vega when he rented a room at the 321 Motel. Near the time of the stabbing the defendant and a companion inquired about renting a room at a motel located within a block of the Bishop Motel. A blue Vega was near the scene at about the time the victim was killed. Evidence that the defendant owned a Vega automobile was therefore highly relevant to the question of whether the defendant perpetrated the crimes. The evidence was not rendered inadmissible by the fact that the witness through whom the title certificate was introduced failed to testify that the vehicle identification or license tag number for the Vega in the certificate of title matched those of the Vega driven by the defendant or the one seen on the day of the crimes. The absence of such testimony would go to the weight to be given the evidence, not its admissibility. This assignment of error is overruled.

The defendant's next assignment of error concerns the testimony of the victim's brother, Bhartsang Jadeja, about certain records kept at the Bishop Motel. Jadeja testified that according to the motel records, $219.40 had been received since the last

bank deposit of rental receipts. He further testified that no money was discovered in the motel office or on the body of the victim. The defendant argues that the State failed to establish a sufficient foundation as to the authentication of these records to permit admission of Jadeja's testimony concerning them under the business records exception to the hearsay rule. He contends that this error was prejudicial due to the fact that Jadeja's testimony concerning the records created an inference that a robbery had occurred at the Bishop Motel which in turn permitted the court to charge the jury on first degree murder based on the felony-murder rule.

[12, 13] Business records made in the ordinary course of business at or near the time of the transaction involved are admissible as an exception to the hearsay rule if they are authenticated by a witness who is familiar with them and the system under which they are made. *State v. Wood*, 306 N.C. 510, 294 S.E. 2d 310 (1982); *State v. Galloway*, 304 N.C. 485, 284 S.E. 2d 509 (1981). The authenticity of such records may, however, be established by circumstantial evidence. *See State v. Davis*, 203 N.C. 13, 164 S.E. 737, *petition for reconsideration dismissed*, 203 N.C. 35, 164 S.E. 737, *cert. denied*, 287 U.S. 649 (1932). There is no requirement that the records be authenticated by the person who made them. *State v. Carr*, 21 N.C. App. 470, 204 S.E. 2d 892 (1974). *See State v. Franks*, 262 N.C. 94, 136 S.E. 2d 623 (1964). Furthermore, if the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time. *State v. Carr*, 21 N.C. App. 470, 204 S.E. 2d 892 (1974).

[14] Although the witness did not explicitly testify that the records were made in the normal course of business and at or near the time of the transactions described therein, we conclude that Jadeja's testimony when coupled with the records themselves clearly establish these facts. Jadeja identified the documents as being the motel's daily records which indicated the number of rooms which had been rented and the amount of money received for each room. He further testified that these records were in the deceased's handwriting. The records showed daily entries for September 14, 15 and 16, and were therefore self-authenticating as to the time at which they were made. Additionally, we note that the witness testified that he operated his

own motel. This tended to show that the witness was familiar with general practices in the motel business regarding the recording of rentals and receipts received. The State laid an adequate foundation for the admission of both the records and Jadeja's testimony. This assignment of error is overruled.

[15] The defendant next contends that the trial court erred in failing to grant his motions to dismiss the charges against him. He argues that the State's evidence failed to show that the victim was killed during the commission of an armed robbery or that he was the perpetrator of the alleged offense.

Before the issue of a defendant's guilt may be submitted to the jury, the trial court must be satisfied that substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). In considering a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom. *State v. Bright*, 301 N.C. 243, 271 S.E. 2d 368 (1980). Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Hamlet*, 312 N.C. 162, 321 S.E. 2d 837 (1984). The test of whether the evidence is sufficient to withstand a motion to dismiss is whether a reasonable inference of the defendant's guilt may be drawn from the evidence, and the test is the same whether the evidence is circumstantial or direct. *State v. Lowery*, 309 N.C. 763, 309 S.E. 2d 232 (1983).

The evidence tended to show that at approximately noon on September 16, 1982, the defendant and his girl friend checked into a Charlotte motel. At that time he was observed driving a blue Vega. Sometime between 11:00 and 11:30 p.m. the defendant and another black male inquired about renting a room at the Stonewall Motel which was located about a block from the Bishop Motel. Shortly after 11:00 p.m. witnesses saw two black males in the vicinity of the Bishop Motel. One witness testified that she saw the men sitting in a blue Vega. Shortly after 11:00 p.m. the victim was discovered lying in the Bishop Motel parking lot covered with blood. He stated that two (or three) black men had stabbed and robbed him. When seen a few minutes earlier, the

victim was wearing a wristwatch. His watch was missing, however, when he was found lying in the parking lot. The motel office was discovered blood-splattered and in disarray. The receipts for the previous three days were missing. A vehicle title certificate indicated that on September 16, 1982, the defendant owned a 1975 Chevrolet Vega. Finally, in late September or early October 1982, the defendant's girl friend was seen in possession of a wristwatch which was later identified as belonging to the victim. Approximately a week later the defendant sold the watch to an acquaintance. This evidence was sufficient to support a reasonable inference that the victim was killed during the commission of a robbery and that the defendant perpetrated or aided in the perpetration of the robbery and killing.

[16] The defendant, however, strenuously argues that the trial court erred in permitting the prosecution to rely in part on his possession of the watch to link him to the crimes. Under the doctrine of possession of recently stolen goods, the possession of property recently after it is stolen, and under circumstances excluding the intervening agency of others, permits the inference that the possessor is the thief. This inference becomes weaker the more distant in time the possession is from the commission of the offense. *State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984); *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980); *State v. Patterson*, 78 N.C. 470 (1878). In order for the doctrine to be invoked, the State must prove beyond a reasonable doubt that: (1) the property is stolen; (2) it was found in the defendant's custody and subject to his control and disposition to the exclusion of others; and (3) the possession was recently after the unlawful taking. *State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984); *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981).

The State clearly produced sufficient evidence that the watch was stolen from Jadeja. As for the second requirement of custody and control by the defendant, the watch was seen on the person of the defendant's girl friend two or three weeks after the crimes were committed. A week later the watch was seen in the hands of the defendant. The defendant contends that because of the intervening possession of the watch by his girl friend, the jury should not have been instructed on the doctrine of recent possession. We disagree.

It is not always necessary that the stolen property be actually in the hands of the defendant in order to trigger the inference that he is the thief. The doctrine is equally applicable where the stolen property is under the defendant's personal control. *State v. Lewis*, 281 N.C. 564, 189 S.E. 2d 216, *cert. denied*, 409 U.S. 1046 (1972); *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966). *See also State v. Harrington*, 176 N.C. 716, 96 S.E. 892 (1918). "In short, it may be in any place where it is manifest it must have been put by the act of the party or [with] his undoubted concurrence." *State v. Foster*, 268 N.C. at 487, 151 S.E. 2d at 67, *quoting State v. Johnson*, 60 N.C. 235, 237 (1864).

There was evidence in the present case tending to show that the defendant, his girl friend and their two children checked into the 321 Motel in Charlotte on the day the victim's watch disappeared when he was killed by two (or three) *males*. The watch was seen thereafter *only* in the hands of the girl friend or the defendant until it was sold by the defendant. Such evidence was sufficient to support a finding that, although the watch was at one point in the hands of the girl friend, it was in the defendant's custody and control at all pertinent times. *See, e.g., State v. Brown*, 76 N.C. 222 (1877) (doctrine applied in case involving defendant and wife); *State v. Johnson*, 60 N.C. 235 (1864) (same).

As for the final requirement that the possession be recently after the theft, the evidence showed that the girl friend had the watch approximately one to three weeks after the stabbing. The defendant was seen with it about a week later. In some cases we have held that the possession of stolen property more recently after the theft was not sufficiently recent to permit an inference of guilt under the doctrine of recent possession. *E.g., State v. Jones*, 227 N.C. 47, 40 S.E. 2d 458 (1946) (possession of a rooster sixteen to twenty days after alleged theft not sufficiently recent); *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725 (1943) (possession of tires eleven days after alleged theft). There is no specific period, however, beyond which possession can no longer be considered "recent." Rather, the term is a relative one and will depend on the circumstances of each case. *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725 (1943); *State v. Johnson*, 60 N.C. 235 (1864) (six weeks). In light of all of the other circumstances of this case, the possession of the watch by the defendant and his girl friend was sufficiently recent to support a reasonable inference of

the defendant's guilt under the doctrine of recent possession. This assignment of error is overruled.

[17] The defendant next argues that because there was no direct evidence to show he was present when the crimes charged were committed, the trial court erred by instructing the jury on the concept of "acting in concert." The State's evidence, however, clearly tends to show that two or more men robbed and killed the victim. As discussed previously, there was also substantial evidence that the defendant was one of the perpetrators. This evidence was sufficient to support an instruction on the concept of acting in concert. *See State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984). The defendant's argument to the contrary is without merit.

[18] The defendant next contends that the trial court erred in submitting to the jury the charge of first degree murder based upon the theory of premeditation and deliberation. The defendant argues that there was no evidence which would allow the submission of first degree murder under that theory.

The State's evidence was sufficient to justify the submission to the jury of the first degree murder charge on the theory of premeditation and deliberation. However, assuming *arguendo* that the evidence was insufficient to support such an instruction, the defendant has failed to show any resulting prejudice. He was convicted of first degree murder specifically on the basis of the felony murder rule. The jury did not find that he committed the killing with premeditation and deliberation. Further, premeditation and deliberation are not elements of felony murder. *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). Felony murder is murder in the first degree "irrespective of premeditation or deliberation or malice aforethought." *State v. Maynard*, 247 N.C. 462, 467, 101 S.E. 2d 340, 345 (1958). Even assuming the challenged instruction was error, the defendant has failed to show that it affected his first degree murder conviction which was based on the felony murder theory. This contention is without merit.

[19] The defendant also contends that the State was required to elect the theory under which the first degree murder case would be submitted to the jury. We disagree. The State made out a *prima facie* case on both the theories of felony murder and premeditation and deliberation. When this occurs the State is not required to elect the theory under which the first degree murder

case will be submitted. *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). This assignment of error is overruled.

[20] The defendant next contends that the trial court erred in denying his motion to present both the opening and closing arguments at the penalty phase of the trial. This contention is without merit.

N.C.G.S. 15A-2000(a)(4) provides:

> The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

While clearly providing the defendant with the opportunity to make the final argument at the penalty phase of the trial, neither this statutory provision nor any other gives a defendant the right to make both the first and last arguments. Furthermore, even had this been error the fact the defendant received a life sentence rather than the death penalty would have made the error harmless.

[21] The defendant's final argument is that the trial court erred in denying his motion to set aside the verdict as being against the greater weight of the evidence. The decision whether to grant or deny a motion to set aside the verdict is vested in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537, *modified*, 427 U.S. 912 (1976). A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). The evidence was sufficient to support the jury's verdict. We are therefore unable to discern any abuse of discretion by the trial court in denying the motion to set aside the verdict.

The defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. CLIFFORD DEAN FREEMAN

No. 418A84

(Filed 4 June 1985)

1. Constitutional Law § 63; Criminal Law § 135.3— exclusion of jurors opposed to death penalty

North Carolina's jury selection process in first-degree murder cases is constitutional.

2. Criminal Law § 66.14— improper photographic identification—independent identification at trial

In a prosecution for first-degree murder, first-degree burglary, and felonious assault, the court did not err by denying defendant's motion to suppress identification testimony where there was no substantial evidence of impermissibly suggestive State action in the pretrial identification procedure and, although a friend of the victim had acted improperly by showing pictures of defendant to witnesses to boost their recollection of defendant, the witnesses had ample opportunity to observe the defendant in a well-lighted room under circumstances which were conducive to a high degree of attention on their part, furnished an accurate prior description of defendant, and demonstrated a high degree of certainty in the identification procedures which were held a very short time after the commission of the crimes. The trial court properly concluded that the witnesses' in-court identifications of defendant were of independent origin.

3. Criminal Law § 33— evidence found at motorcycle gang clubhouse—admissible

In a prosecution for first-degree murder, first-degree burglary, and felonious assault, the court did not err by admitting into evidence testimony and exhibits relating to defendant's association with the Southern Cross motorcycle club, shell casings found at the club, and testimony concerning the casings. The casings found at the clubhouse had markings similar to those found on the casings recovered from the murder site, defendant frequented the clubhouse, had threatened to kill the victim while at the clubhouse, and was identified as the killer. Testimony concerning defendant's presence at the clubhouse, a photograph of the clubhouse, and a description of defendant as a "sort of biker-looking fellow" were also properly admitted, and there was no prejudicial error in light of the overwhelming evidence against defendant from the admission of evidence of defendant's membership in the Southern Cross or testimony describing it as a motorcycle gang.

4. Burglary and Unlawful Breakings § 5.5— kicking in interior door—evidence of burglary sufficient

The evidence was sufficient to support the submission of burglary to the jury and to support a verdict of guilty where there was plenary evidence that defendant kicked open a bedroom door in the night with the intention to commit the felony of murder. The breaking of and entry through an inner door is sufficient so long as the other elements are present.

5. **Homicide § 30— second-degree murder not submitted to jury—no error**

There was no error in the court's failure to instruct the jury on second-degree murder where the State put on evidence that the night before the murder defendant had said he would kill the victim; that defendant broke into the bedroom of the victim's house the night of the murder, ordered those present into a corner, and announced that this was their "last gig"; and that defendant shot the victim in the head immediately after he identified himself at defendant's order. A rational jury considering this evidence could only conclude that defendant was guilty of first-degree murder or that he was not the killer and was not guilty.

6. **Criminal Law § 138— court's refusal to find mitigating factor—prior contrary jury finding in capital phase—no error**

In a prosecution for first-degree murder, first-degree burglary, and felonious assault, the trial court did not err by failing to find the mitigating factor of good character or good reputation where the jury had found during the sentencing phase of the capital charge that defendant had led a law-abiding life for a substantial period of time before the murder and had a reputation for good character. When a trial judge makes his findings of aggravating and mitigating factors in the sentencing phase of crimes coming within the Fair Sentencing Act, he is not bound by the findings of a jury during the sentencing phase of a capital case that certain mitigating factors exist, especially when the mitigating factors are not supported by uncontradicted evidence. G.S. 15A-1340.4(a)(2)(m).

7. **Criminal Law § 138— one aggravating factor—no mitigating factors—failure of court to weigh—maximum sentence—no error**

The trial court did not abuse its discretion in sentencing defendant to the maximum terms for first-degree burglary and two counts of felonious assault without weighing aggravating and mitigating factors where there was one aggravating factor and no mitigating factors. The command in G.S. 15A-1340.4(b) to weigh the factors presupposes that there are aggravating and mitigating factors; moreover, once the trial judge determines that the aggravating factors outweigh the mitigating factors, the extent by which this sentence exceeds the presumptive sentence is within his discretion.

APPEAL by defendant from the judgment entered by *Ferrell, J.*, at the 6 February 1984 Criminal Session of MECKLENBURG County Superior Court. Heard in the Supreme Court 12 March 1985.

Defendant was convicted of first-degree murder, first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill. Following the sentencing phase of the trial, the jury recommended life imprisonment for the murder conviction. Defendant received two sentences of life imprisonment, one sentence

of twenty years and one sentence of ten years, the sentences to run consecutively.

John Hefferon, Kenn Firman, Dale Alderman and David Alderman were practicing music in a bedroom of John Hefferon's residence on the evening of 21 September 1983. Sometime after 9:00 p.m. defendant kicked open the door of the room. He was holding a pistol with both hands. Defendant stood there for approximately five seconds pointing his pistol at the group. He then said, "This is your last gig" and ordered the band members to get against the wall. At this point defendant asked which one was Johnny Hefferon and Hefferon identified himself. Defendant then shot Hefferon in the head at a range of approximately three feet. Hefferon died as a result of the head wound.

Having shot Hefferon, defendant pointed the pistol at Dale Alderman and attempted to shoot him despite his pleas for mercy. The pistol failed to function and defendant removed the magazine and jammed it back into the gun. He then shot Alderman in the head, seriously wounding him. Defendant next attempted to shoot Kenn Firman, but his pistol again malfunctioned and Firman fled from the house. Defendant followed him, pistol whipped him and shot him in the back. Defendant reentered the house and shouted "who's next" before leaving.

John Hefferon had been dating Joanne Norwood who had previously lived with defendant. On the night before the killing, defendant had told Ms. Norwood that he would kill Hefferon. Two .45 caliber shell casings were found at the murder scene, and twenty-three shell casings of the same caliber were found at the clubhouse of the Southern Cross, a motorcycle club. The State's expert witness Roger Thompson testified that after examining the markings found on the shell casings it was his opinion that all of them had been fired from the same gun. Defendant had been known to frequent the Southern Cross clubhouse.

All of the witnesses present at the murder scene identified defendant as the killer.

Within a few days of the murder, Kenn Firman and David Alderman were shown photographic displays, each of which contained a photograph of defendant. Dale Alderman viewed a similar photographic display on 11 October 1983 after he was released

from the hospital. Each of them identified defendant as the killer without hesitation. Later, all three separately identified defendant from a physical lineup.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Tucker, Hicks, Sentelle, Moon and Hodge, P.A., by David B. Sentelle and James L. Bagwell, for the defendant.

BRANCH, Chief Justice.

[1] Defendant contends that he was tried by a "death-qualified jury" and was thereby deprived of his constitutional rights to a jury drawn from a cross-section of the community, to equal protection of the law and to an impartial trial. We have repeatedly held that North Carolina's jury selection process in first-degree murder cases is constitutional. *State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250 (1985); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 105 S.Ct. 1232 (1985). This contention is without merit.

I.

[2] Defendant assigns as error the trial court's denial of his motion to suppress the identification testimony of witnesses Kenn Firman, David Alderman and Dale Alderman. He argues that the photographic identification procedures were so impermissibly suggestive that the in-court identifications were tainted and therefore inadmissible. Defendant contends that he was heavier than the other persons depicted in the photographic lineup and that the eyewitnesses who identified him had been shown photographs of defendant under uncontrolled circumstances.

Pursuant to defendant's motion to suppress and prior to jury selection, Judge Ferrell conducted a voir dire hearing as to the admissibility of the identification testimony. On voir dire David Alderman testified that the photographic display pictured men who were not as heavy as defendant. However, the witness Dale Alderman testified that he was not sure that this display depicted persons who were a great deal thinner than defendant. Officer VanHoy testified that all the men in the display were of similar build, that he had instructed the witnesses who observed the photographic display to concentrate on facial features and ignore

size, hair, etc. The witness Firman saw ten or more photographs of defendant prior to identifying him in a physical lineup. The photographs were furnished to him by Joanne Norwood for the purpose of making certain that he could identify defendant as the killer. David and Dale Alderman saw some of the photographs after they had identified defendant in photographic displays and in physical lineups and about a week before their in-court identifications were made.

The State offered evidence tending to show that the murder of John Hefferon and the shooting of Dale Alderman occurred in a well-lighted room. The eyewitnesses who testified in court observed defendant when he herded them into a corner and fatally shot Hefferon from a range of about three feet. Both Dale Alderman and Kenn Firman observed defendant as he leveled the pistol at each of them, adjusted the pistol when it malfunctioned and then proceeded with his deadly assault. These witnesses gave police accurate descriptions of their assailant and made very certain identifications in the photographic displays, the lineup and at trial. At trial the witnesses testified that their identifications were based solely on what they saw on the night of 21 September 1983.

At the conclusion of the hearing the trial judge found facts consistent with the above-recited evidence and *inter alia* concluded and ruled:

> 1. There was ample opportunity of the witnesses to observe the defendant on September 21, 1983.
>
> 4. The in-court identification[s] of the defendants [sic] by the witnesses are of independent origin, based solely upon what the witnesses saw at the time of the crimes charged and do not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures suggestive or conducive to mistaken identification. EXCEPTION NO. 28
>
> 5. Any confrontation was not so unnecessarily suggestive or conducive to lead to irreparable mistaken identification to the extent that the defendant would be denied due process of law. EXCEPTION NO. 29
>
> 6. No constitutional right of the defendant was violated. EXCEPTION NO. 30

It is therefore ORDERED that the evidence of the confrontation and subsequent identification of the defendant by the witnesses Kenn Firman, Dale Alderman and David Alderman is competent evidence in the trial of this case.

The Motions to Suppress, and each of them, are DENIED. EXCEPTION NO. 31

When a motion to suppress identification testimony is made, the trial judge must conduct a voir dire hearing and make findings of fact to support his conclusion of law and ruling as to the admissibility of the evidence. When the facts found are supported by competent evidence, they are binding on the appellate courts. *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975).

"Identification procedures which are so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification violate a defendant's right to due process." *State v. Grimes*, 309 N.C. 606, 609, 308 S.E. 2d 293, 294 (1983). The proper test is whether in the totality of the circumstances a procedure is so unnecessarily suggestive and conducive to irreparable misidentification that it offends fundamental standards of decency and justice. *Id.* If an identification procedure is not impermissibly suggestive, the inquiry is ended. *State v. Leggett*, 305 N.C. 213, 220, 287 S.E. 2d 832, 837 (1982). If the procedure is impermissibly suggestive, then it is necessary to determine whether "all the circumstances indicate that the procedure resulted in a very substantial likelihood of irreparable misidentification." *Grimes*, 309 N.C. at 609, 308 S.E. 2d at 294. A determination by the trial judge that the identification testimony was of independent origin must be supported by clear and convincing evidence. *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977). Factors to be considered include:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Grimes, 309 N.C. at 609-10, 308 S.E. 2d at 294-95.

A photographic lineup is not impermissibly suggestive merely because defendant has a distinctive appearance. "All that is required is that the lineup be a fair one and that the officers conducting it do nothing to induce the witness to select one picture rather than another." *Grimes*, 309 N.C. at 610, 308 S.E. 2d at 295. The photographic displays in this case clearly meet this standard.

In instant case we find no substantial evidence of State action in the pretrial identification procedure which was impermissibly suggestive. However, the action of Joanne Norwood in showing pictures of defendant to the witnesses Kenn Firman, David Alderman and Dale Alderman to bolster their recollection of defendant was improper. We note that there is some authority which intimates that impermissibly suggestive pretrial identification procedures not resulting from State action do not taint in-court identification testimony. *United States v. Davis*, 407 F. 2d 846 (1969); *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971). Here, we need not decide whether the improper display of the photographs to the State's witnesses by one other than the State tainted their in-court identifications. This is so because the trial judge concluded that the witnesses' in-court identifications of defendant were of "independent origin, based solely upon what the witnesses saw at the time of the crime." This conclusion was supported by clear and convincing evidence.

The witnesses had ample opportunity to observe the defendant in a well-lighted room under circumstances which certainly were conducive to a high degree of attention on their part. The witnesses furnished an accurate prior description of defendant and demonstrated a high degree of certainty in the identification procedures which procedures were held a very short time after the commission of the crimes.

We hold that the trial court correctly denied defendant's motion to suppress the identification testimony.

II.

[3] Defendant next assigns as error the admission by the trial court into evidence of certain testimony and exhibits relating to defendant's association with the Southern Cross motorcycle club on the basis that this evidence was irrelevant and unfairly prejudicial. Defendant also assigns as error the admission into evidence

of shell casings found at the Southern Cross clubhouse and testimony concerning those shell casings.

We will not consider the rules set forth in Chapter 8C, The North Carolina Evidence Code, since the trial of this case was completed prior to its effective date, 1 July 1984.

Our rule has long been that "evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue." 1 *Brandis on North Carolina Evidence* § 77 (1982). "[I]n a criminal case, every circumstance which is reasonably calculated to throw light upon the alleged crime is admissible." *State v. Price*, 301 N.C. 437, 452, 272 S.E. 2d 103, 113-14 (1980).

Defendant argues that the fact that he had previously visited the clubhouse and that his car was found there is too tenuous to establish a link between him, the shell casings and the crime. Defendant points out that no gun was found at the clubhouse, that three men—not including himself—lived there, that ten or more men were frequent visitors to the clubhouse and that his fingerprints were not found on the shell casings nor on the box in which the casings were found.

Even though the shell casings found at the murder site had markings similar to the markings on the casings found at the clubhouse, defendant argues that this is insufficient to connect the murder weapon with the clubhouse or to show that he used the murder weapon because he visited the clubhouse. Defendant relies on the case of *State v. Needham*, 235 N.C. 555, 71 S.E. 2d 29 (1952) for support. In that case the defendant was convicted of killing another man by burning his house. At trial the State introduced testimony that oil had been found in the well of one of the victim's prior residences and burned chips and paper under the kitchen safe in another residence. There was also evidence that defendant had frequently visited the victim. In reversing the trial court this Court held there was no evidence to connect the defendant to these events and that in the absence of such proof the evidence was inadmissible. *Needham*, 235 N.C. at 567, 71 S.E. 2d at 38. Defendant contends that the evidence in the case at bar is similarly unconnected to him and is inadequate to support anything other than conjecture. We disagree.

Although there are some similarities between *Needham* and this case, the differences make *Needham* clearly distinguishable. The shell casings found at the Southern Cross clubhouse had markings similar to the markings found on the casings recovered from the murder site. This similarity tends to show that the casings came from the same weapon. The fact that defendant frequented the clubhouse, was identified as the killer and had threatened to kill John Hefferon while at the clubhouse is sufficient to link the shell casings found at the clubhouse to defendant and the murder weapon. These facts are to be distinguished from *Needham* in which the burnt chips and oil could not be linked directly to the crime or the accused. Defendant's evidence tending to show that other persons *might* have put the shell casings at the clubhouse merely goes to the weight of the evidence rather than its admissibility.

The shell casings in State's Exhibit No. 25 and the testimony relating to them clearly have a logical tendency to prove a fact in issue and so were properly admitted. *See* 1 *Brandis on North Carolina Evidence* § 77 (1982); *Price*, 301 N.C. at 452, 272 S.E. 2d at 113-14. Therefore, the trial court properly admitted the portion of Joanne Norwood's statement that referred to the clubhouse and defendant's presence there with her on several occasions. For the same reason, admission of the photograph of the clubhouse was not error. While it may not have been particularly useful in linking defendant to the clubhouse, it was not prejudicial. Likewise, we find that Dale Alderman's testimony that defendant was "sort of a biker-looking fellow" was properly admitted. That testimony came in response to a question as to how defendant looked on the night of the murder. All of this evidence was relevant and was properly admitted.

In addition to challenging the relevance of this evidence defendant contends that its probative value is outweighed by unfair prejudice. Defendant rightly points out that the public views organizations like the Southern Cross and "bikers" in general with distaste and fear. However, defendant misconstrues the rule of *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971) (error to admit portion of the defendant's confession referring to his relationship with members of the Black Panthers), when he contends that it requires the exclusion of evidence linking him to the Southern Cross. In *Lynch* there was no link between the Black Panthers

and the arson the defendant was charged with. The Court noted that this evidence was irrelevant to the issue of the defendant's guilt and should have been excluded. *Lynch*, 279 N.C. at 18, 181 S.E. 2d at 572. We have already held that evidence of defendant's membership in the Southern Cross was relevant and now hold that defendant was not unfairly prejudiced by its admission.

The same cannot be said for the testimony elicited from Joanne Norwood that the Southern Cross is a "motorcycle gang." This evidence is irrelevant to the issue of defendant's guilt and its admission was error. We do not consider the State's argument that this evidence was admissible to rebut the testimony of defendant's character witnesses because this testimony came out during the State's case-in-chief before defendant had put his character in issue. *State v. Sanders*, 295 N.C. 361, 373, 245 S.E. 2d 674, 683 (1978).

Although admission of this evidence was error, we hold that this error does not entitle defendant to a new trial. Defendant has the burden not only of showing error but that the error was prejudicial. *State v. Milby*, 302 N.C. 137, 142, 273 S.E. 2d 716, 720 (1981). A defendant must further show that but for the error it is likely that a different result would have been reached. *State v. Loren*, 302 N.C. 607, 613, 276 S.E. 2d 365, 369 (1981). In light of the overwhelming evidence of defendant's guilt we cannot see how admission of this evidence could possibly have influenced the outcome of the trial. This assignment of error is overruled.

III.

[4] We next turn to defendant's argument that the trial court erred in failing to dismiss the charge of first-degree burglary and in failing to set aside the verdict of guilty of first-degree burglary because the evidence was insufficient to support the charge or the verdict. After examining the record we hold that the evidence supported submission of the charge to the jury and the verdict of guilty.

Burglary "consists of the felonious breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein, whether such intent be executed or not." *State v. Beaver*, 291 N.C. 137, 141, 229 S.E. 2d 179, 181 (1976). If a defendant enters through an open

door or window, he is not guilty of burglary. *State v. Boon*, 35 N.C. 244, 246 (1852). A motion to dismiss a charge for insufficiency of the evidence should be denied if there is "substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E. 2d 649, 651-52 (1982).

Defendant's sole challenge to his indictment and conviction of first-degree burglary is his argument that the State failed to produce evidence of a breaking. Defendant relies on the fact that the State did not put on any evidence to show that the doors and windows of the Hefferon residence were closed at the time he entered.

Defendant's argument that no breaking of the outer doors or windows was proven is attractive but ignores the fact that he kicked open the door of the room where John Hefferon, Kenn Firman, Dale Alderman and David Alderman were practicing prior to entering the room and killing Hefferon. In order to establish the breaking and entering element of burglary our law only requires a "breaking, removing or putting aside of something constituting a part of the dwelling house and relied upon as security against intrusion." *Boon*, 35 N.C. at 244. The breaking of and entry through an inner door is sufficient to meet this requirement so long as the other elements of burglary are present. 13 Am. Jur. 2d, *Burglary*, § 21 (1964). There was plenary evidence in this case to support a finding that defendant entered the bedroom of the Hefferon residence by a breaking of the door in the night and with the intention to commit the felony of murder. The trial court properly denied defendant's motion to dismiss.

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the trial court and is not reviewable absent an abuse of discretion. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911 (1980). This assignment of error is merely formal and is overruled.

IV.

[5] Defendant assigns as error the trial court's failure to instruct the jury on second-degree murder. Defendant contends that the

evidence warranted such an instruction. This assignment of error is without merit.

When the State has fully met its burden of proving each and every element of the offense of first-degree murder, the trial judge need not instruct the jury on second-degree murder when: (1) all the evidence put before the jury by the State "belies anything other than a premeditated and deliberate killing," and (2) defendant has put on no evidence to negate premeditation and deliberation other than his denial that he killed the victim. *State v. Strickland*, 307 N.C. 274, 293, 298 S.E. 2d 645, 657-58 (1983). In such a case the only possible verdict is guilty of first-degree murder or not guilty.

In the case at bar the State put on evidence that (1) on the night before the murder defendant said that he would kill John Hefferon; (2) on the night of the murder defendant broke into the bedroom of Hefferon's house, ordered those present into a corner and announced that this was their "last gig"; and (3) when Hefferon identified himself at defendant's order, defendant immediately shot him in the head. Defendant did not dispute these facts other than to deny that he was the killer. A rational jury considering this evidence could only conclude that defendant was guilty of first-degree murder or that he was not the killer and was not guilty. Therefore, under the rule of *Strickland*, the trial judge properly refrained from instructing the jury on the elements of second-degree murder.

Defendant next requests that the Court reconsider *Strickland*. Defendant has cited no new authority or reasoning to support a reconsideration of *Strickland* and we decline to do so.

V.

Defendant's remaining assignments of error concern the sentencing phase of the trial.

[6] First, defendant argues that at the sentencing hearing for the burglary charge and the charges of assault with a deadly weapon with intent to kill the trial court erred in failing to find the mitigating factor set out in N.C.G.S. § 15A-1340.4(a)(2)(m) that defendant is a person of good character or has a good reputation in the community where he lives. In the sentencing phase of the capital charge, the jury found as a mitigating factor that defend-

ant had led a law-abiding life for a substantial period of time before the murder of Mr. Hefferon and had a reputation for good character. Defendant argues that since the jury had already found defendant to have a reputation for good character, it was error for the trial court to fail to find this factor. Defendant also argues that the evidence for this factor is uncontradicted and manifestly credible.

When evidence supporting a mitigating factor is uncontradicted, substantial and manifestly credible, the sentencing judge may not simply ignore it. *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454 (1983). However, it is not error for a sentencing judge to fail to find a mitigating factor if uncontradicted, substantial and manifestly credible evidence is simply not probative of the mitigating factor sought to be established. *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E. 2d 783, 789 (1983).

When a defendant argues that his evidence is sufficient to compel the finding of a mitigating factor, he bears the same burden of persuasion of a party seeking a directed verdict. *Jones*, 309 N.C. at 219, 306 S.E. 2d at 455. He must demonstrate that " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a matter of law.' " *Id.* at 219-20, 306 S.E. 2d at 455 (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979)). Defendant clearly has failed to do that in this case. He had been convicted of trespassing, assault and resisting arrest four years earlier and possession of alcoholic beverages by a minor seven years earlier. While defendant did put on a number of character witnesses who testified that he was not violent, was well liked and did not get into trouble, these witnesses were either relatives, close friends or persons who had little knowledge of defendant's general character and reputation in the community. When defendant's prior convictions are considered, this evidence does not rise to the level of being uncontradicted, substantial and manifestly credible. Good character, as the term is used in the Fair Sentencing Act, means something more than the mere absence of bad character. *State v. Benbow*, 309 N.C. 538, 548, 308 S.E. 2d 647, 653 (1983). To merit the reputation for good character a person must conduct himself as a person of upright character ordinarily would, should or does.

Id. After examining the evidence offered by defendant and the State, we cannot say that the trial judge erred when he concluded that this evidence was insufficient to establish that defendant had a good reputation in the community in which he lives. To the extent that defendant intended that the evidence that he had led a law-abiding life for a considerable period of time prior to his present conviction be considered as a separate non-statutory mitigating factor, we reach the same conclusion. The trial judge justifiably concluded that four years without a conviction does not amount to leading a law-abiding life for a substantial period of time.

Defendant argues that the trial judge was bound by the jury's finding in the sentencing phase of the capital charge that defendant had a reputation for good character in the community in which he lived and had led a law-abiding life for a considerable period of time prior to his present conviction. We hold that when a trial judge makes his findings of aggravating and mitigating factors in the sentencing phase of crimes coming within the Fair Sentencing Act, he is not bound by the findings of a jury during the sentencing phase of a capital case that certain mitigating factors exist. This is especially true when the mitigating factors in question are not supported by uncontradicted evidence.

[7] Lastly, defendant contends that the trial judge abused his discretion by imposing consecutive maximum sentences for the convictions of first-degree burglary, assault with a deadly weapon with intent to kill causing serious injury and assault with a deadly weapon with intent to kill. We disagree.

When imposing a sentence that is greater or lesser than the presumptive term, the trial judge "must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence." N.C. Gen. Stat. § 15A-1340.4(b) (1983). If a prison term in excess of the presumptive is imposed, the trial judge must conclude that the factors in aggravation outweigh the factors in mitigation. *Id.* The weighing of the factors in aggravation and mitigation that have been found is within the sound discretion of the trial judge. *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E. 2d 689, 697 (1983). "The number of factors found is only one consideration in determining which factors outweigh others." *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.

2d 658, 661 (1982), *quoted in Ahearn*, 307 N.C. at 597, 300 S.E. 2d at 697.

Defendant contends that he is entitled to a new sentencing hearing because the trial judge did not make a finding that the aggravating factors outweighed the mitigating factors as required by N.C.G.S. § 15A-1340.4(b). While conceding that no mitigating factors were found, defendant contends that the prohibition in *Ahearn* on using the relative numbers of factors found to determine their weight compels the judge to weigh the factor found and make a finding. Defendant argues that had such a finding been made, the aggravating factor of prior convictions would have been given little weight and so would not have justified the maximum sentences given.

The command in N.C.G.S. § 15A-1340.4(b) to weigh the factors presupposes that there are aggravating and mitigating factors for the trial court to weigh against each other. When only aggravating factors have been found, it would be an exercise in futility to require the trial judge to make a specific finding that those factors outweigh nonexistent mitigating factors. Defendant misconstrues the purpose of the balancing required by N.C.G.S. § 15A-1340.4(b) when he suggests that it could have resulted in a finding that would have compelled a lesser sentence. The only purpose of this balancing is to determine which factors have the greater weight. Since there were no mitigating factors to balance against the aggravating factor found, defendant can only attack his sentences on the basis that the trial judge abused his discretion. We now consider that issue.

Once the trial judge determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sentence is within his discretion so long as it does not exceed the maximum punishment set by the legislature. *Ahearn*, 307 N.C. at 598, 300 S.E. 2d at 698. Likewise, the Fair Sentencing Act has not taken away the trial judge's discretion to impose either consecutive or concurrent sentences. *State v. Ysaguire*, 309 N.C. 780, 785, 309 S.E. 2d 436, 440 (1983). The trial judge properly found a factor in aggravation, and we cannot say that he abused his discretion by giving the defendant the maximum sentence allowed by statute for each offense. Having been convicted of murder and other crimes of violence carried out

in a cruel and pitiless manner, defendant cannot now argue that his sentences are excessive or disproportionate.

Defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. CALVIN EUGENE PEACOCK

No. 307A84

(Filed 4 June 1985)

1. **Burglary and Unlawful Breakings § 7— burglary—ambiguous evidence of intent to commit larceny—instruction on misdemeanor breaking and entering required**

The trial court erred by not instructing the jury on the lesser-included offense of misdemeanor breaking and entering where there was some evidence which may have convinced a rational trier of fact that defendant did not form the requisite intent to commit larceny at the time he broke and entered the deceased's apartment in that his statement to police indicates that he consumed LSD and large quantities of alcohol, was hallucinating in his room just prior to the crime, thought about going down to talk with his landlady about the rent, kicked her door and broke the glass and moldings when she wouldn't answer, reached inside and unlocked the door, went in and stood in the living room thinking about robbing her, saw a vase, picked it up and went to her bedroom, and began to hit her with the vase. The detective who transcribed defendant's statement testified that defendant told him that it was after he was inside that he decided to rob the landlady, there was evidence that defendant owed the landlady four weeks rent, and the evidence discloses that defendant noticed and picked up the vase only after he broke into the apartment. G.S. 15A-1232 (1983), G.S. 14-51.

2. **Robbery § 5.4— robbery with a dangerous weapon—glass vase dangerous weapon as used—no instruction on common law robbery—no error**

The trial court did not err by instructing the jury on robbery with a dangerous weapon but not on the lesser-included offense of common law robbery where defendant admitted that he used a vase to strike the victim's head, the uncontradicted evidence showed that the victim's life was endangered by defendant's use of a glass vase, defendant is a large man and the victim was an elderly female weighing only seventy-three pounds, the physician who performed the autopsy found three lacerations on her head which were created by a blunt force, the wounds were three-fourths of an inch in length and her scalp was torn down to the skull with bleeding over the brain beneath those wounds, the blows the victim suffered were sufficient to have rendered her unconscious, and the police found slivers of white glass on her body and

throughout the room. The only reasonable inference was that the glass vase as used by defendant was a dangerous weapon. G.S. 14-87(a) (1981).

3. Constitutional Law § 63; Criminal Law § 135.3— exclusion of jurors opposed to death penalty—no error

There was no error in "death qualifying" the jury prior to the guilt phase of the trial.

APPEAL by defendant from judgments entered 22 March 1984 by *Cornelius, J.*, at a two-week Criminal Session of Superior Court, GUILFORD County, which began 12 March 1984.

Defendant was charged in indictments, proper in form, with first degree murder, first degree burglary, and robbery with a dangerous weapon.

Evidence for the State tended to show that on the morning of 5 November 1983 Jeffrey Wilson Kelly went to visit a friend at the boarding house operated by the victim, Lizzie Mabel Frye. Upon entering the house he noticed that the door to Mrs. Frye's apartment had been "beat in." He entered the apartment and discovered Mrs. Frye's body on her bed. He called the police. When the police entered Mrs. Frye's bedroom, they noticed slivers of white glass on Mrs. Frye's corpse, her bed, and the bedroom floor. The bedroom was in general disarray, and Mrs. Frye's clothing was torn.

Defendant, a resident of the boarding house, arrived there sometime after the police had begun their investigation of the crime scene. When defendant identified himself as a resident of the house, a police detective requested that he go to the police station to be interviewed concerning Mrs. Frye's death. Defendant agreed and the police drove him to the station in a police car. At the station defendant was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant executed a waiver of his *Miranda* rights and made an exculpatory statement to police.

After defendant gave his statement, the interviewing officer, Detective Edward Lee Hill, noticed two white hairs on defendant's dark sweater. Hill removed the hairs from the sweater, left the interviewing room and gave them to another officer. The detective returned to the room about ten minutes later and said to defendant, "You need to tell me about killing Mrs. Frye. If you

did kill her and if you made a mistake, you need to tell me about it."

Defendant hung his head and said, "If I tell you, will you help me with my drug and alcohol problem?"

Detective Hill then told defendant that he could not help him but that he would advise defendant's attorneys about the problem and that perhaps they would get him help. Defendant then made an inculpatory statement which Detective Hill reduced to writing. Defendant made some minor corrections and signed the written version of his statement. He then gave officers permission to search a motel room he had stayed in the night before and showed them where he had discarded the victim's money pouch.

Detective Hill was permitted to read the written version of defendant's statement to the jury. The statement was, in pertinent part, as follows:

> I went to my room and I started to trip on the acid. I remember laying on my bed for a while. I remember seeing colors and shit like that. I remember thinking about going down and talking to Mrs. Frye about the rent. I then went downstairs and started banging on her door. It was about eleven forty-five p.m. She wouldn't come to the door. I keeped [sic] banging on the door, and then I kicked the door and the glass broke. The moulding around the glass broke and fell off.
>
> I pulled the moulding the rest of the way from around the window, and some glass fell out. I reached in and unlocked the door. I went on in and I was standing there in the living room and I was thinking about robbing Mrs. Frye. I had heard Mrs. Frye say that she got her check the first of the month. I had seen Mrs. Frye with a pouch around her neck on a chain, or sometimes it would be pinned on the inside of her shirt.
>
> When I was standing in the living room, I hadn't seen Mrs. Frye yet. I saw a vase in the living room and I picked it up. I walked to the doorway and stood there thinking about robbing Mrs. Frye. My head started hurting real bad. I then stepped into her bedroom and Mrs. Frye sat up on the side of the bed. I then hit her in the head with the vase.

On cross-examination counsel for defendant asked Detective Hill the following question: "The only statement he [defendant] made is that after he was in there, he decided to rob her; isn't that correct?" Detective Hill answered, "That's the statement he gave me."

A pathologist testified that Mrs. Frye died from multiple injuries, the most serious of which were broken ribs which interfered with her breathing.

Defendant offered no evidence at trial.

Defendant requested instructions on misdemeanor breaking or entering, a lesser included offense of burglary. He also requested an instruction on common law robbery, a lesser included offense of armed robbery. The trial court denied these requests and instructed the jury that it could convict defendant of first degree murder on the basis of premeditation or on the basis of felony murder upon the underlying offense of burglary.

The jury found defendant guilty of burglary, armed robbery and first degree murder on the theory of felony murder, and the trial court merged the murder and first degree burglary convictions. In a separate sentencing hearing, the jury recommended a sentence of life imprisonment for the murder conviction. The trial judge accordingly sentenced the defendant to life imprisonment for the murder and to forty years imprisonment for the armed robbery. We allowed defendant's motion to bypass the Court of Appeals as to the robbery on 7 November 1984.

Lacy H. Thornburg, Attorney General, by Christopher P. Brewer, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Malcolm Ray Hunter, Jr., First Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant assigns as error the trial court's denial of his request for a jury instruction on the crime of misdemeanor breaking or entering, a lesser included offense of first degree burglary. Defendant's indictment for first degree burglary was based on the theory that he broke and entered with an intent to commit larceny within. Despite his request for an instruction on the lesser

offense, the trial judge instructed the jury that it could find the defendant guilty of first degree burglary or not guilty.

The common law offense of burglary is committed when a person breaks or enters into the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein. *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975). A person is guilty of first degree burglary when the crime is committed while any person is in "actual occupation" of the dwelling house or sleeping apartment. N.C. Gen. Stat. § 14-51 (1981). In the instant case, if defendant had committed all of the other elements of first degree burglary but had not intended to commit larceny at the time of the breaking and entering, he would be guilty of misdemeanor breaking or entering. *See State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979).

It is defendant's contention that his statement to police, which the State introduced into evidence, contained some evidence which would support a charge on the lesser offense since portions of the statement tended to negate the element of felonious intent.

It is well established that a judge must declare and explain the law arising upon the evidence. N.C. Gen. Stat. § 15A-1232 (1983). This duty necessarily requires a judge to charge upon a lesser included offense, even absent a special request, where there is evidence to support it. *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *Id.* at 351, 283 S.E. 2d at 503. *See State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense. *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980).

It is clear that when considered in the light most favorable to the State, there was sufficient evidence to submit the greater offense of first degree burglary to the jury. Evidence tending to

show that defendant had the requisite intent was the fact that the defendant was wearing gloves at the time of the robbery, that he knew where the victim kept her money and that she was supposed to have received a check in the mail on the first of the month. Defendant also concedes that there was evidence that he committed larceny once inside the deceased's apartment. We have held that such evidence is some evidence of intent at the time of the break-in, although it is not positive proof. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967). A breaking or entering into a building without the intent to commit a felony "is not converted into burglary by the subsequent commission therein of a felony subsequently conceived." *Id.* at 594, 155 S.E. 2d at 274. The presence of any evidence of guilt in the lesser degree is the determinative factor. *State v. Simpson*, 299 N.C. 377, 261 S.E. 2d 661 (1980); *State v. Griffin*, 280 N.C. 142, 185 S.E. 2d 149 (1971).

We believe there was some evidence in this case which may have convinced a rational trier of fact that defendant did not form the requisite intent to commit larceny at the time he broke and entered the deceased's apartment. His statement to police indicates that after consuming LSD and large quantities of alcohol, he was hallucinating in his room just prior to the crime. At that time he remembered "thinking about going down and talking to Mrs. Frye about the rent. I then went downstairs and started banging on her door." When Mrs. Frye "wouldn't come to the door" defendant kicked the door, breaking the glass and molding on the door and then pulled more molding away from the door. He reached inside at that point and unlocked it. Defendant stated that he "went on in and I was standing there in the living room and I was thinking about robbing Mrs. Frye." At that point defendant saw a vase inside the apartment, picked it up and proceeded to the bedroom where he began to hit Mrs. Frye with the vase.

Defendant's statement that he "was standing there [in the living room] thinking about robbing Mrs. Frye" is at best ambiguous with regard to the question of when he formed an intent to commit larceny. We note, however, that Detective Hill, who transcribed defendant's oral statement, testified on cross-examination that defendant told him that it was *after* he was inside that he decided to rob Mrs. Frye. Detective Hill's interpretation of what defendant said lends credence to defendant's argument that a

juror might also infer that he broke and entered without an intent to commit larceny.

Of more significance is defendant's statement that he went to Mrs. Frye's apartment intending to talk about the rent he owed her. The evidence was that he indeed owed Mrs. Frye four weeks' rent and that she had confronted him earlier in the evening about that back rent. When Mrs. Frye had confronted him, defendant informed her that he would talk to her about the rent later. This evidence lends support to defendant's statement about his purpose in going to his landlady's apartment later that night. Defendant's actions in breaking into the apartment after Mrs. Frye failed to answer the door are concededly not consistent with behavior normally associated with a tenant attempting to resolve an issue of back rent with a landlord. Nonetheless, we believe that a rational trier of fact could find that behavior attributable to drug and alcohol abuse rather than to an intent to commit a felony. This Court has found that evidence of a defendant's drunkenness at the time of a breaking and entering may require an instruction on the lesser included offense of misdemeanor breaking or entering in addition to an instruction on burglary. *State v. Feyd*, 213 N.C. 617, 197 S.E. 171 (1938). Finally, we note that the evidence discloses that it was only after defendant broke into Mrs. Frye's apartment that he noticed and picked up the glass vase he used to strike her. This evidence is further support for defendant's contention that a trier of fact could find that defendant's decision to commit larceny occurred only after he entered Mrs. Frye's apartment.

We find precedent for defendant's argument in *State v. Worthey*, 270 N.C. 444, 154 S.E. 2d 515 (1967). In *Worthey* the defendant was discovered by police inside a building used as a locker room and washroom by employees of Swift & Company. The screen on two windows of the building had been torn away. At trial defendant testified that he had gone inside the building to meet an employee of the company named Robert who was going to give him a ride. The evidence showed that there was no person named Robert employed with the company. In holding that the trial court erred in refusing to instruct on misdemeanor breaking or entering as a lesser included offense of felonious breaking or entering, this Court stated:

> The evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony; the jury might have found defendant guilty of a misdemeanor upon the evidence.
>
> The court's failure to submit for jury consideration and decision whether the defendant was guilty of a misdemeanor was prejudicial error.

Id. at 446, 154 S.E. 2d at 516.

We believe the defendant's evidence in this case is more plausible than that in *Worthey*. Although the evidence in *Worthey* showed that no employee named Robert even existed, defendant in this case indeed had reason to speak with Mrs. Frye about his rent on the evening of her death.

We find support for defendant's position in *State v. Banks*, 295 N.C. 399, 245 S.E. 2d 743 (1978). *Banks* involved the question of the necessity of charging on assault upon a female, a lesser included offense of assault with intent to commit rape. The evidence tended to show that although the defendant in *Banks* rubbed his genitalia against the victim and forced her to perform oral sex, there was no evidence he actually attempted coition. This Court stated:

> The factual element which distinguishes assault with intent to commit rape from assault upon a female is *intent* at the time of the assault, and when evidence of intent to commit rape is overwhelming or uncontradicted, it would not be error to submit only the greater offense. . . . Here, however, the factual issue which separates the greater offense from the lesser, *i.e.*, intent, is not susceptible to clear cut resolution. Under these circumstances, the trial judge should have submitted to the jury the lesser included offense of assault upon a female.

Id. at 416, 245 S.E. 2d at 754 (citations omitted).

As in *Banks*, we do not find the question of intent in this case susceptible to clear cut resolution. Since we conclude that a rational trier of fact could find that the drugged and intoxicated defendant did not form the intent to commit larceny before break-

ing and entering, we hold that the trial court prejudicially erred in failing to instruct on misdemeanor breaking or entering.

For the reasons stated, there must be a new trial on the charge of burglary. Since the burglary was the underlying offense of the first degree murder under the felony murder rule, it follows that there must also be a new trial on the charge of first degree murder.

[2] By his next assignment of error, defendant contends that in instructing the jury on robbery with a dangerous weapon, the trial court erred in denying his request for a jury instruction on the lesser included offense of common law robbery. The trial court instructed the jury that it could convict defendant of armed robbery if it found that the white glass vase found at the murder scene was a deadly weapon. Defendant argues that the description of the vase and the medical evidence adduced at trial were insufficient to support a finding that the vase was a deadly weapon. Defendant contends that since reasonable jurors might disagree as to whether the circumstances supported a finding that the vase was used as a deadly weapon, he was entitled to an instruction on the lesser offense.

We have held that where the uncontradicted evidence is positive and unequivocal as to each and every element of armed robbery, and there is no evidence supporting defendant's guilt of a lesser offense, the trial court does not err in failing to instruct the jury on the lesser included offense of common law robbery. *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

Robbery with a deadly weapon is defined as the unlawful taking or attempted taking of personal property from another by "[a]ny 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." N.C. Gen. Stat. § 14-87(a) (1981).

The critical difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened. *State v. Coats*, 301 N.C. 216, 270 S.E. 2d 422 (1980); *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). The use or threatened use of a dangerous weapon is not an

essential element of common law robbery. *State v. Moore*, 279 N.C. 455, 183 S.E. 2d 546 (1971). In *State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982), we stated:

> In determining whether evidence of the use of a particular instrument constitutes evidence of use of "any firearms or other dangerous weapon, implement or means" within the prohibition of G.S. § 14-87, the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened [by the use of that instrument].

305 N.C. at 650, 290 S.E. 2d at 616.

Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use. *See, e.g., State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979); *State v. Funderburk*, 60 N.C. App. 777, 299 S.E. 2d 822, *disc. review denied*, 307 N.C. 699, 301 S.E. 2d 392 (1983).

Here the uncontradicted evidence shows that Mrs. Frye's life was endangered by defendant's use of the glass vase. Defendant admitted in his statement to police that he used the vase to strike Mrs. Frye's head. The evidence showed that defendant is a large man and that Mrs. Frye, an elderly female, weighed only seventy-three pounds. The physician who performed an autopsy upon Mrs. Frye's body found three lacerations on her head which were created by a blunt force of some kind. The wounds were three-fourths of an inch in length and her scalp was torn down to the skull with bleeding over the brain beneath those wounds. The physician testified that the blows Mrs. Frye suffered were sufficient to have rendered her unconscious. The police found slivers of white glass on Mrs. Frye's body and throughout the room. From the above, we believe that the only reasonable inference was that the glass vase as used by defendant was a dangerous weapon.

We find similarities between this case and *State v. Harmon*, 21 N.C. App. 508, 204 S.E. 2d 883, *cert. denied*, 285 N.C. 593, 205 S.E. 2d 724 (1974). In *Harmon* although no specific evidence was offered about a dangerous weapon, the Court of Appeals held that

the trial court did not err in failing to instruct upon a lesser included offense. There the evidence showed that a victim had been severely cut in the course of a robbery requiring nineteen stitches, and the Court of Appeals concluded that such an injury could not have been inflicted except by use of a deadly weapon. Also in support of our conclusion is *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). In *Rowland* this Court stated that the only reasonable inference was that a dangerous weapon was used where the evidence showed that the victim received a blow to her head rendering her unconscious and opening a wound requiring eight stitches.

Thus, all of the State's uncontradicted evidence, if believed, tends to compel the conclusion that the vase as wielded by defendant, "endangered or threatened" the victim's life. There was no evidence to support an instruction on a lesser included offense, and we therefore find defendant's assignment of error in this regard to be without merit.

[3] By his final assignment of error, defendant contends that the trial judge deprived him of his constitutional rights by "death qualifying" the jury prior to the guilt phase of the trial. Defendant acknowledges that this Court has decided this claim against him on numerous occasions. *See, e.g., State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). Nonetheless, defendant requests that this Court reconsider its holdings in light of *Grigsby v. Mabry*, 758 F. 2d 226 (8th Cir. 1985), and grant him a new trial. We decline to reconsider our prior decisions on this issue.

For the reasons stated, there must be a new trial on the murder and burglary charges in this case. We find no error in the robbery conviction.

No. 83CRS75488—first degree murder—new trial.

No. 83CRS75490—first degree burglary—new trial.

No. 83CRS75489—robbery with a dangerous weapon—no error.

NEIL BARNABY AND MARINA VILLAGE, INC. v. ELBRIDGE H. BOARDMAN AND WIFE, RUTH R. BOARDMAN AND O. L. GRAHAM, TRUSTEE

No. 559PA84

(Filed 4 June 1985)

Mortgages and Deeds of Trust § 32.1— purchase money deed of trust—release of security—action on note not permitted

A holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing such land may not release his security and then sue on the note but must look exclusively to the property conveyed in seeking to recover any balance owed. To allow the holder to release its security and then sue upon the note would, in effect, repeal the anti-deficiency statute, G.S. 45-21.38. The reasoning of *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940), is expressly rejected.

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

Justice MEYER concurring in result.

ON discretionary review of the decision of the Court of Appeals, 70 N.C. App. 299, 318 S.E. 2d 907 (1984), reversing an order dismissing the defendants' counterclaim entered by *Judge William H. Freeman* on May 12, 1983 in Superior Court, CARTERET County. Heard in the Supreme Court March 13, 1985.

Kenneth M. Kirkman, P.A., by John E. Way, Jr., for the plaintiff appellants.

Sumrell, Sugg and Carmichael, by Fred M. Carmichael and Rudolph A. Ashton, III, for the defendant appellees.

MITCHELL, Justice.

This case presents questions concerning the proper interpretation of the anti-deficiency statute, N.C.G.S. 45-21.38.[1] The

1. § 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by

controlling question on appeal is whether the holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing such land may release his security and then sue on the note. We conclude that any such note holder must look exclusively to the property conveyed in seeking to recover any balance owed. He may not sue on the note. Accordingly, we reverse the decision of the Court of Appeals.

At the outset we point out that this case requires appellate review of a dismissal of the defendants' counterclaim by the trial court under N.C.G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Therefore, the material allegations of fact alleged in that counterclaim are taken as admitted. *See Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). As a result, the facts recited in this opinion are either agreed upon by the parties or are allegations drawn from the defendants' counterclaim and taken as true.

On December 28, 1978, the defendants, Elbridge H. Boardman and wife, sold certain land near Cedar Island in Carteret County to the plaintiff, Neil Barnaby. Neil Barnaby executed and delivered to the Boardmans a promissory note for $150,000 for a portion of the purchase price of the land. The promissory note was secured by a purchase money deed of trust embracing the land and signed by Barnaby and his wife. The defendant sellers, Boardman and wife, subsequently executed certain deeds releasing all of the land embraced by the deed of trust. This was done at the request of the plaintiff buyer, Neil Barnaby, and in compliance with a prior agreement which had been incorporated by reference in the purchase money deed of trust. Neil Barnaby and his wife later conveyed the land in its entirety to the plaintiff Marina Village, Inc., subject to the purchase money deed of trust. Thereafter, the defendants, Boardman and wife, directed the trustee, the defendant O. L. Graham, to commence foreclosure proceedings under the purchase money deed of trust executed by

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the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

the plaintiff, Neil Barnaby, and his wife. The trustee complied. As a result of an order by the Clerk of Superior Court dated February 8, 1982, the defendant trustee caused a notice of sale to be filed and advertised indicating that the land in question would be sold on March 8, 1982.

The plaintiffs, Neil Barnaby and Marina Village, Inc., commenced this action by the filing of a complaint on February 17, 1982, seeking among other things to restrain the defendants from exercising or attempting to exercise the power of sale contained in the purchase money deed of trust. The defendants filed an answer and counterclaim and amendments thereto. By these pleadings, the defendants admitted that they had released all of the land embraced by the purchase money deed of trust. By their counterclaim, the defendants sought an *in personam* judgment against the plaintiffs for the balance owed on the note plus costs and attorneys' fees. The plaintiffs moved under Rule 12(b)(6) to dismiss the defendants' counterclaim as amended for failure to state a claim. After a hearing, the trial court entered an order which, among other things, allowed the motion to dismiss the counterclaim as amended. The trial court specifically found that there was no just reason for delay. The defendants appealed to the Court of Appeals which reversed the order of the trial court. On December 4, 1984, we allowed the plaintiffs' petition for discretionary review.

The plaintiffs assign error to the holding of the Court of Appeals reversing the trial court's order dismissing the defendants' counterclaim on the promissory note. The plaintiffs contend that to allow a creditor to release the property embraced by the purchase money deed of trust forming the security for a note and then obtain a personal judgment against the purchaser on the note would have the effect of repealing the anti-deficiency statute. The defendants contend, on the other hand, that their release of their security makes the statute inapplicable, since it applies only to notes secured by purchase money mortgages or deeds of trust. They argue that the statute does not apply, because the note they hold is no longer secured by any such mortgage or deed of trust. The Court of Appeals agreed with the reasoning of the defendants and stated:

> Neither the anti-deficiency statute nor *Realty Co., supra*, purports to determine or restrict the rights of a purchase money mortgagee who, at the time of default, is unsecured because he, the mortgagee, has released his security in accordance with the terms of an agreement contained in the purchase money mortgage or deed of trust.

70 N.C. App. at 302-03, 318 S.E. 2d at 909.

We find the interpretation of the statute advanced by the defendants and accepted by the Court of Appeals too mechanically literal and restrictive. In *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), we pointed out that the intent of the 1933 General Assembly in enacting the statute was "to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees." 296 N.C. at 371, 250 S.E. 2d 274. We went on to say that:

> Having in mind the purpose for which G.S. 45-21.38 was adopted, the perceived problem which the statute seeks to remedy, and the effect which a literal construction of the statute produces, we are compelled to construe the statute more broadly and to conclude that the Legislature intended to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction. This construction of the statute not only prevents its evasion, but also gives effect to the Legislature's intent.

296 N.C. at 373, 250 S.E. 2d at 275.

The defendants here argue, nevertheless, that they no longer have "options" since they have released their security and must recover upon the note if at all. Prior to releasing the security, however, the defendants were secured and could foreclose under the purchase money deed of trust in the event of default on the note. To allow them to release their security and then sue upon the note would give them the "option" forbidden by the statute. Such a result would violate the intent of the General Assembly and, in effect, repeal the statute.

The anti-deficiency statute does not allow the buyer "to deny himself the protection afforded him" by the statute, as this "would be to allow by indirection that which was directly forbidden." *Bank v. Belk*, 41 N.C. App. 356, 367, 255 S.E. 2d 421, 428,

disc. rev. denied, 298 N.C. 293, 259 S.E. 2d 911 (1979). Since the buyer may not deny himself the protection of the statute, the seller certainly may not deny him its protection by the simple expedient of releasing the security and suing upon the note. As we have previously stated:

> [T]he manifest intention of the Legislature was to limit the creditor *to the property conveyed* when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Realty Co. v. Trust Co., 296 N.C. at 370, 250 S.E. 2d at 273 (emphasis added). Such creditors "may not sue upon the note." *Bank v. Belk*, 41 N.C. App. at 363, 255 S.E. 2d at 426. *See Brown v. Jensen*, 41 Cal. 2d 193, 259 P. 2d 425 (1953), *cert. denied*, 347 U.S. 905 (1954).

The defendant sellers in the present case rely upon this Court's decision in *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940) and contend that the holder of a note originally secured by a purchase money deed of trust may bring an *in personam* action under the note in any case in which the note later becomes unsecured. In *Brown* this Court held that the holder of a note secured by a second purchase money deed of trust could bring an *in personam* action upon the note when he was left unpaid and unsecured because the property had been sold under a deed of trust having priority over his. The *Brown* holding was based upon the following reasoning:

> [T]his statute does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. The statute applies only to the holders of notes "secured by such deed of trust," that is the deed of trust under which the security was foreclosed and the land sold. It refers to the "obligation secured by the same." The holder of the note secured by the first deed of trust upon foreclosure, presumably, will receive satisfaction of his note from the sale, or he can protect himself by purchase of the land. But the holder of the note secured by the second deed of trust, who receives nothing, or an insufficient amount, from the sale, finds him-

> self without security. In this situation the Court will not extend by judicial interpretation the provisions of the statute, and deny him the right to judgment for a valid debt.

217 N.C. at 487-88, 8 S.E. 2d at 602.

The reasoning employed in *Brown* is the same as that of the Court of Appeals in the present case and is not in harmony with *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979). It has been said:

> The conflict between *Brown v. Kirkpatrick* and *Ross Realty* is apparent. If the value of the security is less than the outstanding balance on the purchase price, a purchase money mortgagee has no hope of recovering the entire debt after default unless the purchase money mortgage can be subordinated to the rights of a third-party secured creditor who will foreclose and sell the property. Relying on *Brown*, the purchase money creditor, though now unsecured, can assert his rights against the debtor on the note.

Note, 58 N.C. L. Rev. 855, 862-63 (1980). It also is significant that this Court expressly relied in part upon the case of *Page v. Ford*, 65 Or. 450, 131 P. 1013 (1913) for its reasoning and holding in *Brown*. In *Realty Co.*, however, this Court analyzed *Page* in more detail and expressly rejected its reasoning. We conclude that the rationale of *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940) was severely undercut by *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), and we now expressly reject the reasoning of *Brown*.[2]

The defendants contend that the purchase and sale in the present case represented a commercial transaction by "sophisticated business people" and should not be subject to the anti-deficiency statute. Some courts have fashioned special rules or exceptions to their anti-deficiency statutes for particular types of commercial transactions. The Supreme Court of California in *Spangler v. Memel*, 7 Cal. 3d 603, 498 P. 2d 1055, 102 Cal. Rptr. 807 (1972), for example, exempted certain purchase money deeds of trust subordinated to commercial construction loans from the

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2. It can be argued that the result reached in *Brown* was correct because the deed of trust in that case was not a "purchase-money deed of trust under G.S. 45-21.38." *Childers v. Parker's, Inc.*, 275 N.C. 256, 261, 162 S.E. 2d 481, 484 (1968).

rule it had established in *Brown v. Jensen*, 41 Cal. 2d 193, 259 P. 2d 425 (1953), *cert. denied*, 347 U.S. 905 (1954) barring any remedy other than foreclosure. Courts in such cases were, of course, interpreting and applying the particular statutes before them. We find no indication in our statute or elsewhere that the 1933 General Assembly of North Carolina intended any special exclusion of commercial transactions from our anti-deficiency statute. To the contrary, some evidence exists indicating that "sophisticated business people" needed no such special protection even during the Great Depression which led to the adoption of our statute. *See* Brabner-Smith, *Economic Aspects of the Deficiency Judgment*, 20 Va. L. Rev. 719, 723 (1934). We reject this contention by the defendants.

The teaching of *Realty Co. v. Trust Co.* is that our anti-deficiency statute "bars any suit on the note whether before or after foreclosure." Note, 15 Wake Forest L. Rev. 822, 830 (1979). We reiterate here our statement that the creditor is limited "*to the property conveyed* when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price." *Realty Co. v. Trust Co.*, 296 N.C. at 370, 250 S.E. 2d at 273 (emphasis added). In such cases the creditor simply may not sue upon the note.

The decision of the Court of Appeals is reversed. This case is remanded to the Court of Appeals with instructions to reinstate the order of the trial court dismissing the defendants' counterclaim.

Reversed and remanded.

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

Justice MEYER concurring in result.

I concur only in the result reached by the majority. I deem it unnecessary and unwise for the majority simply to reach out and reject the reasoning of (*i.e.*, virtually overrule) *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940), when the issue upon which that case was decided is not even remotely before us

in this case. *Brown* dealt only with a note secured by a second purchase-money deed of trust left unpaid and unsecured because the property had been sold under a first deed of trust having priority. That situation is clearly distinguishable from the factual situation before this Court in this case. The *Brown* issue was not raised by this appeal and thus was neither briefed nor argued by the parties. The majority's boldness in virtually overruling *Brown* in this situation is somewhat surprising since, ordinarily, the bench and bar would consider any comment on the *Brown* issue in this case to be obiter dictum.

It is also appropriate, once again, to point out that the application of the anti-deficiency judgment statute is relatively rare in North Carolina because seller-financing of home purchases is itself relatively rare. Usually sellers need the equity from the sale of their home to acquire a new home for themselves. Most home purchase-money financing is done not by the vendor but by savings and loan institutions, banks, mortgage companies, and insurance companies, to which the anti-deficiency judgment statute does not apply. This being so, the ostensible purpose of the anti-deficiency judgment statute is not really being served. The application of the statute today is not primarily to unwary homeowners, but to sophisticated developers and land speculators who purchase with at least partial owner financing. Perhaps the statute has outlived its usefulness—at least to the extent that it is not applicable to the third-party thrift institutions, mortgage companies, and insurance companies, which provide the great bulk of home financing.

STATE OF NORTH CAROLINA v. ROY McLAMB

No. 660PA84

(Filed 4 June 1985)

1. Jury § 7.14— refusal of peremptory challenge after jury impaneled—no abuse of discretion

The trial court did not abuse its discretion in refusing to permit defendant to exercise his remaining peremptory challenge to excuse a juror after the jury had been impaneled and opening statements had been made when it came to the court's attention that the juror was a receptionist in a dental office at

which the State's chief witness was a patient where the juror described her relationship with the State's witness only as "she has been to our office," and the trial court received assurances that the juror would have no difficulty rendering a fair and impartial verdict despite that relationship.

2. **Narcotics § 5— sale or delivery of cocaine—ambiguous verdict**

A verdict finding that defendant "feloniously did sell or deliver" cocaine was ambiguous and fatally defective since sale and delivery are distinct and separate offenses.

3. **Narcotics § 5— possession of cocaine with intent to sell or deliver—verdict not ambiguous**

A verdict finding defendant guilty of possession of cocaine with intent to "sell or deliver" is not fatally ambiguous because it is in the disjunctive form.

4. **Narcotics §§ 2, 5— conspiracy to sell or deliver cocaine—proper indictment and verdict**

An indictment alleging conspiracy to "sell or deliver" cocaine charges only one offense of conspiring to sell or deliver, *i.e.*, transfer, cocaine, and a verdict of guilty of conspiracy to "sell or deliver" cocaine found defendant guilty only of a single offense and was not fatally defective.

ON discretionary review of a decision of the Court of Appeals, 71 N.C. App. 220, 321 S.E. 2d 465 (1984), granting defendant a new trial. Judgments against defendant were entered by *Brewer, J.*, at the 16 November 1983 Criminal Session of Superior Court, CUMBERLAND County.

The evidence presented at trial tended to show that an undercover police officer, William Simons, approached Mary Sue Hammonds on 27 November 1982 seeking to buy cocaine. After making a telephone call to defendant, Hammonds, along with her boyfriend Ronnie Parsons and Simons, drove in Simons' car to a dirt road which led to defendant's trailer. Simons gave Hammonds money and asked that she obtain an eighth of an ounce of cocaine. Leaving Simons in the car, Hammonds and her boyfriend went inside defendant's trailer, paid defendant $300.00, and received the cocaine. After using a small amount of the cocaine, Hammonds and her boyfriend returned to the car and gave the cocaine to Simons. Two days later Simons arrested Hammonds and Parsons on various counts of dealing in narcotics. A grand jury returned an indictment against defendant on 5 July 1983 charging him with possession with intent to sell or deliver cocaine, felonious sale or delivery of cocaine, and conspiracy to sell or deliver cocaine. He pled not guilty to all counts. Defendant

presented no evidence at trial. The jury found him guilty and he appealed his convictions to the Court of Appeals. The Court of Appeals found error and granted a new trial. We allowed the State's petition for discretionary review on 27 February 1985.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for the defendant-appellee.

BRANCH, Chief Justice.

[1] The State first challenges that portion of the Court of Appeals' decision which found error in the trial court's refusal to permit defendant to exercise a peremptory challenge of a juror. We find merit in this argument.

The record in this case reveals that after the jury was impaneled, the assistant district attorney made his opening statement, and the jury was given preliminary instructions. The trial judge then recessed court until the following morning at which time it came to the judge's attention that one of the seated jurors was a receptionist at a dental office where Mary Sue Hammonds, the State's chief witness, was a patient. The following exchange took place:

> Court: Before we proceed this morning, speaking to juror Number Six, Mrs. Graham, in response to your communication which witness do you know?
>
> #6: Mary Hammond.
>
> Court: What kind of relationship do you have with her, business or social?
>
> #6: Business. She has been to our office.
>
> Court: Is your relationship with her such that you feel it would make it difficult for you to be fair and impartial in this case?
>
> #6: No.
>
> Court: Thank you very much for your candor. Attorneys approach the bench?

Defendant then moved to excuse the juror for cause and alternatively moved to exercise his remaining peremptory challenge. The trial court denied both motions. The Court of Appeals found the trial court's refusal to allow defendant to exercise his peremptory challenge to be reversible error which denied defendant a fair trial.

It is well established that a trial judge has the power to regulate and supervise the selection of a jury so that the defendant and the State have the benefit of trial by an impartial jury. *State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796, *cert. denied*, 414 U.S. 850 (1973). The judge's ruling on such questions is not subject to review on appeal unless accompanied by some imputed error of law. *Id.* We find no such error of law in the instant case.

The General Assembly has provided for situations in which prior to impanelment but after acceptance by a party, the questioning of a juror may be reopened and a juror challenged. *See* N.C. Gen. Stat. § 15A-1214(g) (1983). There is no statutory provision which speaks precisely to the situation in which a party seeks to challenge a juror after impanelment. However, this Court in *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977), considered a similar factual setting. In that case the jury and two alternates had been selected and impaneled when a juror revealed that she worked with the wife of one of the defendants. In response to questions by the court, the juror stated that she would feel no embarrassment in returning a guilty verdict and in continuing to work with the defendant's wife. After further questioning the district attorney requested that the examination of the juror be reopened, which the trial court allowed. The court also allowed the district attorney to exercise a remaining peremptory challenge and seated one of the alternate jurors. The defendant appealed the trial court's ruling, and this Court, in finding no error, stated:

> It is well established that, prior to the impaneling of the jury, it is within the discretion of the trial judge to reopen the examination of a juror, previously passed by both the State and the defendant, and to excuse such juror upon challenge, either peremptory or for cause. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. McKenna*, 289 N.C. 668, 224

S.E. 2d 537, *death sentence vacated*, 429 U.S. 912 (1976); *State v. Harris*, 283 N.C. 46, 194 S.E. 2d 796, *cert. den.*, 414 U.S. 850 (1973).

> . . . In all the foregoing cases, the challenge in question was allowed before the jury was impaneled. We perceive no reason for the termination of this discretion in the trial judge at the impanelment of the jury.

293 N.C. at 453-54, 238 S.E. 2d at 460.

Both the State and defendant concede that after a jury has been impaneled, further challenge of a juror is a matter within the trial judge's discretion. Defendant contends, however, that the role of the peremptory challenge is sufficiently important to the choosing of an impartial jury that it was an abuse of discretion to deny defendant his right to exercise that challenge in this case after he learned of the juror's relationship with the prosecuting witness. We have held in a civil setting that a trial court may be reversed for an abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). A ruling committed to a trial court's discretion is to be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *Id.*

We do not find the judge's denial of defendant's request to exercise his remaining challenge to be an abuse of discretion. Before denying defendant's motion, the court questioned the juror about her relationship with the State's witness. That relationship was described only as "she has been to our office." The judge received assurances that the juror would have no difficulty in rendering a fair and impartial verdict despite that relationship. The trial judge was in a position to see and observe the demeanor of the juror and to hear the questions asked and the answers given. This we cannot do.

In arguing that the judge abused his discretion, defendant stresses the importance of the right to peremptory challenges in guaranteeing a fair and impartial trial. We do not dispute the significant role that the free exercise of peremptory challenges plays in a trial of a criminal case. Nonetheless, it is generally held that reasonable limitations on the procedure may be fixed so long

as the right itself is not taken away. 47 Am. Jur. 2d *Jury* § 251 (1969). Indeed, although the matter is one of discretion in our courts, the general rule is that after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror. *Id.* at § 255. In this case the jury had been impaneled and opening statements had been made. The time was past for the free exercise of defendant's right to challenge a juror peremptorily. We hold that the trial judge in this case was acting well within his discretionary powers when he denied defendant the opportunity to exercise his remaining peremptory challenge at that time. The Court of Appeals is reversed as to this issue.

The State next challenges the ruling of the Court of Appeals as to the sufficiency of the indictment and the verdicts in this case. The Court of Appeals upon its own motion examined the record and concluded that the indictments and verdicts were fatally defective. The indictment and verdicts allege each offense in the disjunctive. Defendant is charged under N.C.G.S. § 90-95 (a)(1) with the sale *or* delivery of cocaine, and the possession of cocaine with intent to "sell or deliver." Defendant is charged under N.C.G.S. § 90-98 with conspiracy to "sell or deliver" a controlled substance. The Court of Appeals determined that defendant waived any defect in the indictment by his failure to move for a dismissal. The court found reversible error in the submission of the verdicts to the jury, however, because the verdicts were in the disjunctive form and "being inherently ambiguous, do not support the judgments." 71 N.C. App. at 222, 321 S.E. 2d at 467. We consider each count in the indictment separately.

[2] We agree with the Court of Appeals that the verdict finding that defendant "feloniously did sell or deliver" cocaine is fatally defective and ambiguous. *See State v. Dietz*, 289 N.C. 488, 223 S.E. 2d 357 (1976) (holding that sale and delivery are distinct and separate offenses). *Accord, State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985). Indeed, the State has conceded this point and has not sought review of this portion of the Court of Appeals' decision.

[3] Defendant, on the other hand, concedes that the portion of the indictment charging him with the crime of possession with intent to "sell or deliver" is not fatally ambiguous under our recently decided *State v. Creason*, 313 N.C. 122, 326 S.E. 2d 24 (1985). In

Creason the defendant's indictment and verdict sheet were styled in the disjunctive, alleging that he possessed LSD with the intent to sell or deliver it. The defendant contended that the indictment and verdict charged two separate crimes: (1) possession with intent to sell; and (2) possession with intent to deliver. This Court rejected the defendant's reasoning and held that the evil sought to be prevented by the legislature in enacting N.C.G.S. § 90-95 (a)(1) was possession of narcotics with the intent to transfer them. We held that the indictment charged only one offense, and that intent was the gravamen of the offense. As to the form of the verdict, the Court held that so long as the jury could find that the possession was with the intent to sell or deliver the LSD, the crime was proved and the requirement of unanimity satisfied. *Creason*, which was decided after the Court of Appeals filed its opinion in this case, clearly controls the situation before us. The verdict form finding defendant guilty of possession with intent to sell or deliver cocaine is not fatally ambiguous under *Creason* and the Court of Appeals is reversed on this point.

[4] We also reverse the Court of Appeals' decision with regard to the alleged ambiguity of the conspiracy verdict. This Court has long held that the charge of conspiracy need not describe the subject crime with legal and technical accuracy, the charge being the crime of *conspiracy* and not the charge of committing the subject crime. *State v. Blanton*, 227 N.C. 517, 42 S.E. 2d 663 (1947). We have also held that a charge of conspiracy to commit any number of crimes charges only one offense. *See State v. Gibson*, 233 N.C. 691, 65 S.E. 2d 508 (1951); *State v. Shipman*, 202 N.C. 518, 163 S.E. 2d 657 (1932). A verdict may be given significance by reference to the indictment. *See State v. Hampton*, 294 N.C. 242, 239 S.E. 2d 835 (1978). Our federal courts have stated the rule with regard to indictments in the following manner:

> An agreement to commit several crimes is but one offense even though one or more means are alleged to have been used to complete the conspiracy. . . . It is well settled that it is permissible to charge a conspiracy to commit several crimes, all in one count of an indictment without it being duplicitous. *Braverman v. United States*, 317 U.S. 49 (1942).

United States v. Kernodle, 367 F. Supp. 844, 851 (M.D.N.C. 1973) (citation omitted).

In *Dowdy v. United States*, 46 F. 2d 417 (4th Cir. 1931), a voluminous conspiracy indictment charged an agreement to violate liquor laws in a number of particulars, including the manufacture, possession, sale, and delivery of liquor. The Circuit Court of Appeals stated:

> The fact that the conspiracy contemplated numerous violations of law as its object does not make it duplicitous. The gist of the offense is the conspiracy, though its object is to commit a number of crimes.

46 F. 2d at 420.

These cases involve indictments which were alleged to be duplicitous, but our Court of Appeals has considered a verdict form styled in the disjunctive similar to that in the case before us. In *State v. Overton*, 60 N.C. App. 1, 298 S.E. 2d 695 (1982), *disc. review denied, appeal dismissed*, 307 N.C. 580, 299 S.E. 2d 652, *disc. review denied, appeal dismissed*, 307 N.C. 581, 299 S.E. 2d 652 (1983), the defendant's verdict sheet charged a conspiracy to "manufacture, possess with intent to sell and deliver, *or* sell and delivery of [sic] heroin." The defendant in that case argued that the verdict was ambiguous and could not stand. The Court of Appeals held that the defendant was clearly found guilty of conspiracy to deal in drugs. "The parameters of the conspiracy could include either a conspiracy to manufacture *or* to possess with intent to sell or deliver *or* to sell or deliver heroin." *Id.* at 34, 298 S.E. 2d at 715. In a similar fashion, we have made it clear in *Creason* that in the crime of possession with intent to sell or deliver, the requisite intent is the intent to "transfer." Although we recognize that the sale and the delivery of controlled substances are separate offenses, we hold that the indictment in this case charges defendant with one offense: conspiring to sell or deliver—*i.e.* transfer—cocaine. It is clear that by its verdict the jury found defendant guilty of the single offense of conspiring to sell or deliver cocaine. Defendant was sentenced accordingly for only one conspiracy offense. The verdict is sufficient to support the judgments, and the Court of Appeals is reversed.

The result is that we reverse the Court of Appeals and remand to that court with instructions that it further remand to the trial court for reinstatement of the judgments against defendant

for possession with intent to sell or deliver cocaine and conspiracy to sell or deliver cocaine.

Reversed and remanded.

STATE OF NORTH CAROLINA v. BOBBY BATES

No. 631PA84

(Filed 4 June 1985)

Robbery § 4.2— common law robbery—evidence sufficient

Defendant's motions to dismiss a charge of common law robbery and to set aside the verdict were properly denied where the evidence at trial tended to show that defendant rang the doorbell of Marty and Ravonda Hedrick at about 7:00 p.m. on 4 March 1983; defendant told Mr. Hedrick that he had something for Mr. Hedrick to see at the back of the house; Mr. Hedrick went through the house to the sun deck at the rear of the house; defendant's father came around the corner of the house and they both began to curse Mr. Hedrick and accuse him of spinning the wheels of his jeep in defendant's father's yard; Mr. Hedrick retreated into his house, pursued by defendant and his father; Mr. Hedrick got his .22-caliber rifle and ordered defendant and his father to leave; defendant knocked the rifle out of Mr. Hedrick's hands; defendant's father picked up the rifle and threatened to kill Mrs. Hedrick if she called the law; defendant grabbed a spindle from a bannister and beat Mr. Hedrick about the head; Mr. Hedrick blacked out, and defendant and his father started to leave; and defendant's father gave defendant the gun as they were leaving and defendant threw it into the back seat of his car, saying "Daddy, he won't shoot us now." G.S. 15A-1414(b)(2) (1983).

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

Justice EXUM dissenting.

ON defendant's petition for discretionary review of the decision of the Court of Appeals reported at 70 N.C. App. 477, 319 S.E. 2d 683 (1984), finding no error in the judgment entered by *Morgan, J.*, at the 11 July 1983 session of Superior Court, DAVIDSON County. Heard in the Supreme Court 14 May 1985.

Lacy H. Thornburg, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

Philip B. Lohr for defendant.

MARTIN, Justice.

The sole issue before this Court is whether the Court of Appeals properly held that the trial court did not err by denying defendant's motions to dismiss the charge against him at the close of the state's evidence and at the close of all the evidence. We hold that the Court of Appeals did not err and that judgment was properly entered against defendant by the trial court.

A defendant's motion for dismissal for insufficiency of the evidence in a criminal case raises the question of whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). In determining this issue the court must consider the evidence in the light most favorable to the state, and the state is entitled to every reasonable inference to be drawn therefrom. *Id.; State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, a case for the jury is made and a motion to dismiss should be denied. *E.g., State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980).

In the present case defendant was charged by an indictment proper in form with common law robbery. As this Court stated in *State v. Black*, 286 N.C. 191, 193, 209 S.E. 2d 458, 460 (1974), "[r]obbery at common law 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 putting him in fear." Defendant contends that because there was insufficient evidence of a felonious taking or a taking with violence, the trial court erroneously denied his motions to dismiss. The felonious taking element of common law robbery requires "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." *State v. Lawrence*, 262 N.C. 162, 168, 136 S.E. 2d 595, 599-600 (1964).

Taken in the light most favorable to the state, the evidence at trial tended to show that on the evening of 4 March 1983 Marty and Ravonda Hedrick and their two children were at home in Davidson County. About 7:00 p.m. defendant, Bobby Bates, rang the doorbell of the Hedrick house, and Mr. Hedrick went to the door. Mr. Hedrick did not recognize the defendant, who asked him to come around to the back of the house because, defendant said, he had something for Mr. Hedrick to see. Mr. Hedrick complied and went through the house to the sun deck on the back of the house. As he did so defendant's father, Howard Bates, came around the corner of the house. Howard and Bobby Bates then began to curse Mr. Hedrick and accused him of spinning the wheels of his jeep in Howard Bates's yard. Mr. Hedrick then told the Bateses he wanted no trouble and began to retreat up the steps into his house, but defendant and his father pursued him into the house. Mr. Hedrick went up the stairs into his bedroom, got his .22-caliber rifle, returned to the kitchen, and ordered defendant and his father to leave. About this time defendant knocked the rifle out of Mr. Hedrick's hands and struck him. The rifle fired, and the bullet went through the kitchen counter top. Howard Bates picked up the rifle and pointed it at Mrs. Hedrick. Mr. Hedrick asked his wife to call "the law," but defendant's father repeatedly threatened to kill her if she did so. From the blow struck by defendant, Mr. Hedrick fell about ten feet down some stairs, against a bannister. Defendant grabbed a spindle from the bannister and beat Mr. Hedrick about the head. Mr. Hedrick blacked out. Defendant then started to leave the house. His father, taking the rifle with him, followed shortly. Defendant's father testified that he gave defendant the gun as they were leaving the house. As defendant and his father got into defendant's car, defendant threw the rifle into the back seat. According to defendant's father, defendant then stated, "Daddy, he won't shoot us now." Defendant and his father then drove away. The rifle was never returned. The sheriff's department was then called, and Mr. Hedrick was taken to the emergency room for treatment.

We hold that the trial court properly denied defendant's motions to dismiss the charge against him. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649. Our holding is also in accord with the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, *reh'g denied*, 444 U.S. 890 (1979) (dismissal allowed only if

no rational trier of fact could have found proof of guilt beyond a reasonable doubt).

Defendant also argues that the trial court erred by denying his motion to set aside the jury verdict as being contrary to the weight of the evidence. N.C. Gen. Stat. § 15A-1414(b)(2) (1983). "Such a motion is addressed to the sound discretion of the trial court and is not reviewable in the absence of manifest abuse of discretion." *State v. Whitley*, 311 N.C. 656, 666, 319 S.E. 2d 584, 591 (1984). *Accord, State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984); *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). Defendant has failed to come forward with any showing that the trial court abused its discretion. Accordingly, this assignment of error is meritless.

The decision of the Court of Appeals is

Affirmed.

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

Justice EXUM dissenting.

Defendant Bobby Bates and his father, Howard Bates, were tried jointly at the 11 July 1983 Session of Davidson County Superior Court. They were convicted of common law robbery and sentenced to terms of imprisonment. On separate appeals to the Court of Appeals, one panel of that court concluded on Howard Bates' appeal that the evidence was insufficient to be submitted to the jury. The opinion in that case is unpublished. See *State v. Howard Bates*, No. 621PA84, filed 4 June 1985, 313 N.C. 591, 330 S.E. 2d 204 (1985). Another panel of the Court of Appeals determined in Bobby Bates' appeal that the evidence was sufficient. *State v. Bobby Bates*, 70 N.C. App. 477, 319 S.E. 2d 683 (1983).

I agree with the panel of the Court of Appeals which determined that the evidence of common law robbery is insufficient to be submitted to the jury.

The evidence against both defendants is succinctly summarized by Judge Whichard, who wrote for the Court of Appeals in Bobby Bates' appeal:

The State's evidence tended to show that defendant and his father, a codefendant, drove to the house of the victim to discuss personal grievances. An argument ensued, and the victim retreated into his house to get a rifle. Defendant and his father followed the victim into the house. Defendant knocked the rifle out of the victim's hands and began beating him around the head with a spindle. Defendant's father then picked up the rifle. Defendant and his father left with the rifle and did not return it.

The evidence is also correctly summarized, in somewhat more detail, by Judge Becton, writing for the Court of Appeals in Howard Bates' appeal:

About 7:00 on 4 March 1983, the defendant, Howard Bates, and his son, Bobby Bates, went to the home of Marty Hedrick in Lexington. Bobby Bates rang the doorbell, and, when Marty Hedrick came out of the house to talk to the Bates, an argument ensued concerning Marty Hedricks' alleged action in spinning tires, causing damage to the Bates' yard. Bobby Bates made threats to Marty Hedrick, and a scuffle ensued. Hedrick ran into his house and got a .22 automatic rifle. When Hedrick came back to the kitchen area, Howard and Bobby Bates were present in the kitchen. When another argument started, Hedrick pointed the gun at Bobby Bates. During the argument, Bobby Bates was able to strike the gun Hedrick was holding, causing it to discharge, and he also was able to strike Hedrick, causing him to fall through a nearby bannister into a lower level of the house. Bobby Bates went down the steps to the place where Hedrick had landed and hit Hedrick several times. Howard Bates, meanwhile, picked up the rifle that was lying on the kitchen floor. When Mrs. Hedrick attempted to telephone for help, Howard Bates threatened her with the rifle. Bobby Bates then came up the steps and went out the back door. He was later followed by Howard Bates, who left carrying the rifle.

During the time the father and son were in the Hedrick home, neither of them mentioned anything about stealing any item, including the rifle. Bobby contended that he hit Hedrick in order to protect himself; Howard contended that he took the rifle when he left the Hedrick home so as to prevent

Hedrick from gaining access to the rifle, and thereby endangering his own life and his son's life.

Specifically on the question of defendants' intent with regard to the rifle, state's witnesses Marty and Revonda Hedrick testified as follows:

MARTY HEDRICK:

Q. Did Bobby Bates say anything about stealing anything from you?

A. That he was going to steal anything from me?

Q. Yes, sir.

A. No.

REVONDA HEDRICK:

Q. Did anybody, either Bobby or Howard, any time say they were coming there to steal anything?

A. No.

Howard Bates testified in his defense as follows:

Q. Why did you take the gun?

A. To keep from getting shot with it; so I could get away from there, he had done fired one shot.

In considering a motion to dismiss for insufficiency of evidence, it is true that the evidence is to be considered in the light most favorable to the state. It is also well established that defendant's evidence, which does not contradict or conflict with the state's evidence and which tends to explain, or even rebut inferences of guilt in, the state's evidence, must be considered:

> We have consistently held that on a motion to dismiss, the court must consider the defendant's evidence which explains or clarifies that offered by the State. *State v. Blizzard*, 280 N.C. 11, 184 S.E. 2d 851 (1971); *State v. Bruton*, 264 N.C. 488, 142 S.E. 2d 169 (1965). The court must also consider the defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *State v. Bruton, supra.*

State v. Bates, 309 N.C. 528, 535, 308 S.E. 2d 258, 262-63 (1983).

Further, "[i]t is well settled law that the defendant must have intended to permanently deprive the owner of his property *at the time the taking occurred* to be guilty of the offense of robbery." *State v. Richardson*, 308 N.C. 470, 474, 302 S.E. 2d 799, 802 (1983). It is not enough to convict of robbery that the felonious intent to steal was formed after defendant obtained possession of the victim's property. *Id.*

When the state's evidence and the defendants' evidence which does not conflict with, and tends to explain and rebut any inference of guilt contained in, the state's evidence is considered together, as it must be, I am satisfied that the evidence is insufficient to show defendants intended to steal the rifle when they took it. All the evidence, both that for the state and defendant, shows only that when Bobby Bates deprived Marty Hedrick of possession of the rifle, he did so not with an intent to steal it, but to defend himself against its use. He simply knocked the rifle out of Hedrick's hand onto the floor. Likewise when Howard Bates picked up the rifle from the floor and took it with him, he did so not for the purpose of stealing it but, as he said, "to keep from getting shot with it . . . ." There is no evidence to the contrary.

Nothing I say here is intended to condone everything the Bates did on this occasion. Indeed, they may be guilty of the crime of trespass or assault with a deadly weapon, or both. I am satisfied, however, that the evidence falls far short of raising a jury question on their guilt of common law robbery.

WILLIAM T. BUIE AND WIFE, MARTHA BUIE; BENNIE ROGERS AND WIFE, JACQUELINE ROGERS; RICHARD L. HALL, JR., AND WIFE, LOIS HALL; C. KENNETH WOOD AND WIFE, SYLVIA M. WOOD; RALPH HULLENDER AND WIFE, GERALDINE HULLENDER; JOE MONTGOMERY AND WIFE, CORNELIA MONTGOMERY; BESS S. WAMPLER; AND MICHAEL H. CORNETTE AND WIFE, LINDA D. CORNETTE v. RICHARD C. JOHNSTON

No. 463PA84

(Filed 4 June 1985)

Rules of Civil Procedure § 60; Deeds § 20.7— restrictive covenant in subdivision— permanent injunction against violation—motion for relief

The Court of Appeals erred by directing the trial judge to enter an order relieving defendant of a final judgment where defendant had begun a second

residence on his property in violation of restrictive covenants, plaintiffs had obtained a permanent injunction against the construction of a second residence, the trial judge had ordered defendant to remove the incomplete structure after the Court of Appeals had reversed his earlier refusal to do so, plaintiffs moved for a show cause order after defendant failed to comply with the removal order, and defendant sought relief from the order under G.S. 1A-1, Rule 60(b)(5) and (6) on the grounds that he planned to convert the existing incomplete structure into a garage, a lawful use under the restrictions. Directing entry of the order erroneously removed all discretion from the trial judge.

ON plaintiffs' petition for discretionary review, allowed 2 October 1984, of a Court of Appeals decision (*Becton, J.*, with *Webb* and *Eagles, JJ.*, concurring) reported in 69 N.C. App. 463, 317 S.E. 2d 91 (1984). The opinion reversed and remanded a judgment of *Washington, J.*, entered 14 January 1983 in Superior Court, GUILFORD County.

The current petition arises out of an order wherein the Court of Appeals reversed Judge Washington's order and directed him to enter an order relieving defendant of a final judgment that had been entered in this case. Defendant had sought relief under G.S. 1A-1, Rule 60(b)(5) and (6). For reasons stated we must reverse the Court of Appeals and remand for proceedings in accordance with this opinion.

Boyan, Nix and Boyan, by Clarence C. Boyan and Robert S. Boyan, for plaintiff-appellants.

Robert R. Schoch, for defendant-appellee.

VAUGHN, Justice.

The questions presented come to us as follows. Defendant's property is subject to restrictive covenants which, among other things, prohibit more than one dwelling. Defendant knowingly began construction of a second dwelling in violation of the covenants. On 17 August 1979 plaintiffs started their action to enjoin that conduct. Defendant, with counsel, stipulated there would be no further construction while the case was pending. Exhibits and affidavits were offered by plaintiffs including pictures showing the foundation and plans for the additional building.

By order entered 25 July 1980, Judge Washington permanently enjoined defendant from constructing the second resi-

dence. The judge, however, specifically declined to grant an order requiring defendant to remove the existing incomplete structure. On appeal by plaintiffs the Court of Appeals agreed with plaintiffs and held that Judge Washington erred when he did not require defendant to remove the new construction. *Buie v. Johnston*, 53 N.C. App. 97, 280 S.E. 2d 1 (1981).

In that case the Court of Appeals said "the defendant acquired his [land] with notice of the restrictive covenants. He was reminded of the particular restriction at issue when he first undertook construction of two residences . . . . [I]t is of no avail to the defendant that construction of the second residence is incomplete. The restrictive covenants are intended to preserve the value and character of the subdivision; and a useless, incomplete residential structure would be at least as detrimental to property values and the character of the neighborhood as a completed one. . . . [T]he trial court erred in denying plaintiffs a mandatory injunction requiring the defendant to remove the existing incomplete construction of the second residence. The cause is remanded for further proceedings in accordance with this opinion." 53 N.C. App. at 100-101, 280 S.E. 2d at 3.

Pursuant to this first opinion of the Court of Appeals, Judge Wood, on 17 November 1981, entered an order directing defendant to remove the incomplete structure no later than 17 December 1981. Defendant failed to do so and upon motion of plaintiffs, a show cause order for contempt was issued on 23 December 1981. Defendant responded to plaintiffs' motion and the order requiring him to show cause by filing a motion in which he contended that he was not in contempt because he had abandoned all plans to build a second residence on the property and, instead, planned to convert the existing new structure into a garage, a lawful use of the property under the restrictions. He contended that if he is required to remove the structure he would lose $8,000 that he had spent on it plus about $3,000 representing the cost of removal. He contended this loss could be avoided by incorporating the existing structure into the new garage. He sought relief from Judge Wood's order under Rule 60 of the Rules of Civil Procedure.

The motions came on for hearing before Judge Washington on 14 January 1983. Plaintiffs were allowed to withdraw their

request that defendant be held in contempt. The judge denied defendant relief under Rule 60(b). On appeal to the Court of Appeals, that decision was reversed and the case was remanded for entry of an order allowing the motion.

We first must note that the Court of Appeals was correct on the first appeal when it directed the entry of an order requiring removal of the incomplete structure. Under the facts then presented it properly relied on *Ingle v. Stubbins*, 240 N.C. 382, 82 S.E. 2d 388 (1954), and ordered the removal of the offensive structure. A mandatory injunction is an appropriate remedy to compel the removal or modification of a building erected in violation of restrictive covenants. Nothing else appearing, a subsequent order punishing defendant for his willful violation of the order would have been appropriate. *City of Brevard v. Ritter*, 285 N.C. 576, 206 S.E. 2d 151 (1974).

The case had taken a different complexion, however, when defendant's motion came on for hearing before Judge Washington on 14 January 1983. Proceedings in contempt were no longer pending. Defendant's contumacious resistance to authority had, on the surface at least, been replaced with supplications to plaintiffs and to the court. Defendant, instead of ignoring the restrictive covenants and the order, sought equitable relief. For the first time he offered evidence calculated to show his intention to comply with the covenants. He offered evidence tending to show that he could incorporate the offensive construction into a structure that would be in compliance with the restrictive covenants. He asked the court to use its equitable powers to modify the decree so as to allow him to use the nonconforming construction instead of removing it as originally ordered.

On motion and upon such terms as are just, a court may relieve a party from a judgment if, among other reasons, it is no longer equitable that the judgment have prospective application. G.S. 1A-1, Rule 60(b)(5). It is fundamental, however, that "[a] motion under Rule 60(b) is addressed to the sound discretion of the trial court and the court's ruling will not be disturbed without a showing that the court abused its discretion." *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E. 2d 369, 372 (1983). It was error, therefore, for the Court of Appeals to direct entry of the order now before us. When it did so it erroneously removed all discretion from the trial judge where it properly lies.

There may be instances, however, where a trial judge may fail to exercise his discretion to grant or withhold relief under a mistaken understanding of a question of law. We believe that is what occurred in the present case. It appears to us that the judge was of the view that the exercise of his discretion was limited by what he saw as requirements imposed by a 1932 decision of the United States Supreme Court. This was an error of law and not an exercise of discretion. The order recites: "The opinion in *U.S. v. Swift and Company* . . . imposes certain *requirements* on this Court before this Court *can* modify, alter or vacate the order of Judge Wood and that the defendant has failed to produce competent evidence that justice *requires* it." *Citing* 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed. 999 (1932) [Emphasis added].

In the first place the decision in *Swift* does not bind state courts and we are not required to either follow it or distinguish it from the case before us. Moreover, because of the important factual differences that prompted the language of the Supreme Court in *Swift*, we doubt that any court, state or federal, would feel constrained to reach the same result in the case before us. In 1920 the federal government started a proceeding under the Sherman Antitrust Act against Swift, Armour and three other leading meat packers to dissolve a monopoly it alleged had succeeded in unlawfully suppressing competition in the purchase of livestock, the sale of dressed meat and the distribution of a large part of the food supply of the nation. A consent decree was entered wherein, among other things, defendants were enjoined from maintaining the monopoly. On review of an order of modification the Supreme Court pointed out that, almost from the day the decree was entered, defendants and their allies had attempted to invalidate the decree and thwart its purposes. The Court further pointed out that defendants were still in a position, even if acting separately, to starve out weaker rivals. "The opportunity will be theirs [if the consent decree is lifted] to renew the war of extermination that they waged in years gone by." *Swift*, 286 U.S. at 118, 52 S.Ct. at 464, 76 L.Ed. at 1007. The Court further cited the difficulty of ferreting out the evils and repressing them when discovered as another reason for leaving the parties where it found them.

No such reasons mandate a similar response in the case before us. It seems to be clear that, if the construction started by

defendant is destroyed, defendant could then build the proposed garage without offending either the restrictive covenants or the decree. The evidence would also seem to permit the Court to find that defendant's original wrong can be corrected without requiring the destruction of the existing construction. The evidence indicates that this construction can be incorporated into the proposed garage.

We are well aware of plaintiffs' concern that, considering defendant's past attitude, his proposal is but a ruse and that, given the very large size and other features of the proposed garage, it can easily be adapted for residential purposes. They have a natural concern that after years of expensive litigation they may, once again, be forced into litigation if they are to protect those rights which have been theirs all along. It suffices to say that the judge may impose or incorporate in the decree any reasonable precautions he deems appropriate. We feel sure that the court, if it grants defendant any relief from the judgment, can fashion an equitable remedy that will protect plaintiffs. That protection must lie at the heart of any relief granted defendant under Rule 60(b) "upon such terms as are just." *Id.*

The opinion of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for remand to the Superior Court of Guilford County for proceedings in accordance with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. HOWARD BATES

No. 621PA84

(Filed 4 June 1985)

Robbery § 4.2— common law robbery—sufficient evidence

The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of common law robbery.

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

Justice EXUM dissenting.

ON discretionary review of a decision of the North Carolina Court of Appeals filed 18 September 1984 and reported pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure. In that decision the Court of Appeals reversed defendant's conviction and judgment entered thereon by *Morgan, J.*, on 14 July 1983 in Superior Court, DAVIDSON County, imposing a three year sentence for common law robbery. This Court allowed the State's petition for discretionary review on 27 February 1985. Heard in the Supreme Court 14 May 1985.

Lacy H. Thornburg, Attorney General, by David S. Crump, Special Deputy Attorney General, for the State.

Randy L. Cranford, Attorney for defendant-appellee.

MEYER, Justice.

Defendant, Howard Bates, and his son Bobby Bates were tried jointly and both were convicted of common law robbery and sentenced to terms of imprisonment. In apt time each defendant appealed separately to the Court of Appeals. In their respective appeals, both defendants raised the question of whether the evidence was sufficient to submit to the jury the question of guilt of the offense of common law robbery. The case of defendant Howard Bates was heard in the Court of Appeals on 29 August 1984 and that panel of the court rendered its decision on 16 October, finding that the evidence was insufficient to submit the charge of common law robbery to the jury. The separate appeal of the son, Bobby Bates, was heard in the Court of Appeals on 23 August 1984 and a different panel of the court rendered its decision on 18 September 1984, holding that the evidence was sufficient to take the case to the jury on common law robbery. *State v. [Bobby] Bates*, 70 N.C. App. 477, 319 S.E. 2d 683 (1984). We allowed discretionary review in the [Bobby] Bates case on 27 February 1985 upon defendant's petition.

In an opinion filed contemporaneously herewith, this Court affirmed the decision of the Court of Appeals holding that there was sufficient evidence to take the case of common law robbery to the jury in *State v. [Bobby] Bates*, 313 N.C. 580, 330 S.E. 2d 200 (1985). For the reasons stated in that opinion, we reverse the Court of Appeals decision finding insufficient evidence to take the case to the jury in the instant case of *State v. Howard Bates*. The

case is remanded to the Court of Appeals for reinstatement of the judgment of the Superior Court finding the defendant Howard Bates guilty of common law robbery and imposing sentence thereon.

Reversed and remanded.

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

Justice EXUM dissenting.

I dissent for the reasons stated in my dissenting opinion in *State v. [Bobby] Bates*, 313 N.C. 580, 330 S.E. 2d 200 (1985).

STATE OF NORTH CAROLINA v. L. J. HUNT

No. 74A85

(Filed 4 June 1985)

Criminal Law § 177— evenly divided Court—judgment 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 and stands without precedential value.

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the North Carolina Court of Appeals, 72 N.C. App. 59, 323 S.E. 2d 490 (1984) (*Chief Judge Vaughn* and *Judge Johnson* concurring; *Judge Whichard* dissenting), finding no error in the trial before *Judge Giles R. Clark* and a jury. *Judge Clark* imposed a sentence of imprisonment of fifteen years upon the jury's verdict of guilty of murder in the second degree.

Lacy H. Thornburg, Attorney General, by T. Byron Smith, Associate Attorney, for the State.

Adam Stein, Appellate Defender, and James R. Glover, for defendant-appellant.

PER CURIAM.

Justice Vaughn took no part in the consideration or decision of this case. The remaining members of this Court were equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974).

Affirmed.

STATE OF NORTH CAROLINA v. JASON LEE COONEY

No. 84A85

(Filed 4 June 1985)

APPEAL by state pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 72 N.C. App. 649, 325 S.E. 2d 15 (1985), reversing defendant's conviction at the 25 January 1984 Session of NEW HANOVER Superior Court, *Judge Llewellyn* presiding.

Lacy H. Thornburg, Attorney General, by Isham B. Hudson, Jr., Special Deputy Attorney General, for the state appellant.

D. Webster Trask for defendant appellee.

PER CURIAM.

Defendant was convicted at trial of driving while his operator's license was revoked on the theory that he operated his vehicle within three days after consuming an alcoholic beverage in violation of an earlier issued restricted driving privilege. *See* N.C.G.S. § 20-179.3(j). A majority of the Court of Appeals, Chief Judge Hedrick and Judge Parker, with Judge Whichard dissenting, concluded the state's evidence was insufficient to be submitted to the jury and the trial court erred in not granting defendant's motion to dismiss. We agree. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. MATTHEW DOUGLAS LESTER

No. 646A84

(Filed 4 June 1985)

APPEAL by the State pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals (*Judges Hedrick* and *Becton* concurring and *Judge Phillips* dissenting) reversing in part and remanding in part judgment before *Collier, Judge*, at the 14 July 1983 Session of Superior Court in SURRY County. The opinion of the Court of Appeals is reported in 70 N.C. App. 757, 321 S.E. 2d 166 (1984).

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellee.

PER CURIAM.

Affirmed.

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

ADAMS v. BROOKS

No. 244P85.

Case below: 73 N.C. App. 624.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 June 1985.

ASHLEY v. CONE MILLS CORP.

No. 146P85.

Case below: 72 N.C. App. 536.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

BANDY v. CITY OF CHARLOTTE

No. 128P85.

Case below: 72 N.C. App. 604.

Petition by defendant (City of Charlotte) for discretionary review under G.S. 7A-31 denied 7 May 1985.

BELASCO v. NATIONWIDE MUTUAL INS. CO.

No. 188P85.

Case below: 73 N.C. App. 413.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985.

BRIDGES v. SHELBY WOMEN'S CLINIC, P.A.

No. 103P85.

Case below: 72 N.C. App. 15.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 May 1985.

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

CAROLINA BUILDERS CORP. v.
HOWARD-VEASEY HOMES, INC.

No. 104P85.

Case below: 72 N.C. App. 224.

Petition by defendants (Dan C. Austin and V. Watson Pugh, d/b/a Tap Company) for discretionary review under G.S. 7A-31 denied 7 May 1985.

CASE v. CASE

No. 164P85.

Case below: 73 N.C. App. 76.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

CHAMPION INT. CORP. v. UNION NAT'L BANK

No. 205P85.

Case below: 73 N.C. App. 147.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985.

CLARK v. ASHEVILLE CONTRACTING CO., INC.

No. 73PA85.

Case below: 72 N.C. App. 143.

Petition by defendant (State of North Carolina Department of Transportation) for discretionary review under G.S. 7A-31 allowed 7 May 1985.

CLEMONS v. WILLIAMS

No. 181P85.

Case below: 71 N.C. App. 457.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1985.

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

COUNTY OF DURHAM v. MADDRY & CO., INC.

No. 135PA85.

Case below: 72 N.C. App. 671.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 May 1985.

DeGREE v. DeGREE

No. 110P85.

Case below: 72 N.C. App. 668.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

DUSENBERRY v. DUSENBERRY

No. 160PA85.

Case below: 73 N.C. App. 177.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 7 May 1985.

E & J INVESTMENTS v. CITY OF FAYETTEVILLE

No. 27P85.

Case below: 71 N.C. App. 638.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

E-B GRAIN CO. v. DENTON

No. 153P85.

Case below: 73 N.C. App. 14.

Petition by defendant (Tobacco Warehouse) for discretionary review under G.S. 7A-31 denied 7 May 1985.

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

EMPLOYMENT SECURITY COMM. v. LACHMAN

No. 44P85.

Case below: 71 N.C. App. 809.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

ERVIN v. SPEECE

No. 52P85.

Case below: 72 N.C. App. 366.

Notice of appeal by defendant under G.S. 7A-30 dismissed 7 May 1985. Petition for discretionary review under G.S. 7A-31 denied 7 May 1985.

FORTSON v. CANNON MILLS

No. 268P85.

Case below: 74 N.C. App. 206.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 June 1985.

FREEMAN v. ST. PAUL INS. CO.

No. 101P85.

Case below: 72 N.C. App. 292.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

FULTON v. VICKERY

No. 192P85.

Case below: 73 N.C. App. 382.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 June 1985.

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

GODFREY v. ZONING BD. OF ADJUSTMENT

No. 182PA85.

Case below: 73 N.C. App. 299.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 4 June 1985.

GOOD v. GOOD

No. 100P85.

Case below: 72 N.C. App. 312.

Petition by defendants for discretionary review under G.S. 7A-31 denied 7 May 1985.

GROGAN v. MILLER BREWING CO.

No. 120P85.

Case below: 72 N.C. App. 620.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

HANNA v. BRADY

No. 233P85.

Case below: 73 N.C. App. 521.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 June 1985.

HARBACH v. LAIN AND KOENIG

No. 204P85.

Case below: 73 N.C. App. 374.

Petition by defendant (Clarence Hemminger) for discretionary review under G.S. 7A-31 denied 4 June 1985.

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

HEAVNER v. HEAVNER

No. 162P85.

Case below: 73 N.C. App. 331.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

HELMS v. GRIFFIN

No. 8P85.

Case below: 71 N.C. App. 638.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

HICKS v. NC DEPT. OF CORRECTIONS

No. 29P85.

Case below: 71 N.C. App. 638.

Petition by plaintiff (Hicks) for discretionary review under G.S. 7A-31 denied 7 May 1985.

INGLE v. ALLEN

No. 200P85.

Case below: 73 N.C. App. 334.

Petition by defendant (Carnell Ingle Allen) for discretionary review under G.S. 7A-31 denied 4 June 1985.

IN RE APPEAL OF GREENSBORO OFFICE PARTNERSHIP

No. 138P85.

Case below: 72 N.C. App. 635.

Petition by taxpayer for discretionary review under G.S. 7A-31 denied 7 May 1985.

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

IN RE ASSESSMENT OF DUNN

No. 189P85.

Case below: 73 N.C. App. 243.

Petition by Bill R. Dunn for discretionary review under G.S. 7A-31 denied 4 June 1985.

IN RE COLONIAL PIPELINE CO.

No. 225PA84.

Case below: 67 N.C. App. 388.

Petition by Pipeline Company for discretionary review under G.S. 7A-31 allowed 7 May 1985.

IN RE EXHUMATION OF DeBRUHL

No. 144P85.

Case below: 72 N.C. App. 536.

Petition by Thurman Ray DeBruhl, Jr., for discretionary review under G.S. 7A-31 denied 7 May 1985.

IN RE HOMESTEAD EXEMPTION OF ROGERS

No. 230P85.

Case below: 74 N.C. App. 206.

Petition by Rogers for discretionary review under G.S. 7A-31 denied 4 June 1985. Notice of appeal by Rogers under G.S. 7A-30 dismissed 4 June 1985.

J. M. THOMPSON CO. v. DORAL MANUFACTURING CO.

No. 129P85.

Case below: 72 N.C. App. 419.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

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

JACKSON v. HOUSING AUTHORITY OF HIGH POINT

No. 201A85.

Case below: 73 N.C. App. 363.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 7 May 1985.

JEFFERSON-PILOT v. WESTBROOK

No. 53P85.

Case below: 72 N.C. App. 371.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 7 May 1985.

L. RICHARDSON MEMORIAL HOSPITAL v. ALLEN AND GUY v. TOWNSEND

No. 122P85.

Case below: 72 N.C. App. 499.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

LEDFORD v. N.C. DEPT. OF TRANSPORTATION

No. 245P85.

Case below: 73 N.C. App. 334.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 4 June 1985.

McLEAN TRUCKING CO. v. OCCIDENTAL CASUALTY CO.

No. 102P85.

Case below: 72 N.C. App. 285.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

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

MARION v. LONG

No. 98P85.

Case below: 72 N.C. App. 585.

Motion by defendants to dismiss plaintiff's appeal for lack of substantial constitutional question allowed 7 May 1985. Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

PEED v. PEED

No. 150P85.

Case below: 72 N.C. App. 549.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1985.

POLLOCK v. REEVES BROS., INC.

No. 534A84.

Case below: 70 N.C. App. 199.

Motion by defendant (Reeves Brothers) to dismiss appeal of Barbara Beckwith, earlier postponed by the Court, is denied 2 April 1985.

SMITH v. NATIONWIDE MUT. INS. CO.

No. 130PA85.

Case below: 72 N.C. App. 400.

Petition by defendant (Nationwide) for discretionary review under G.S. 7A-31 allowed 7 May 1985.

STATE v. AIKEN

No. 229P85.

Case below: 73 N.C. App. 487.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 June 1985.

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

STATE v. ALLEN

No. 238P85.

Case below: 71 N.C. App. 458.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1985.

STATE v. ANGE

No. 288P85.

Case below: 72 N.C. App. 524.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 June 1985.

STATE v. BROWN

No. 149P85.

Case below: 73 N.C. App. 179.

Notice of appeal by defendants filed pursuant to G.S. 7A-30 dismissed 7 May 1985. Petition by defendants for a writ of certiorari to the North Carolina Court of Appeals denied 7 May 1985. Petition by defendants for writ of supersedeas and temporary stay denied 7 May 1985.

STATE v. COX

No. 187P85.

Case below: 73 N.C. App. 432.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. ERWIN

No. 140P85.

Case below: 72 N.C. App. 536.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. ERWIN

No. 141P85.

Case below: 72 N.C. App. 536.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 4 June 1985.

STATE v. EVANS

No. 249A85.

Case below: 74 N.C. App. 31.

Petition by defendant for writ of supersedeas and temporary stay allowed 22 May 1985.

STATE v. FINGER

No. 94P85.

Case below: 72 N.C. App. 569.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. GOODING

No. 171P85.

Case below: 70 N.C. App. 788.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 4 June 1985.

STATE v. HARRIS

No. 177P85.

Case below: 73 N.C. App. 335.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 May 1985.

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

STATE v. HOLMES

No. 169P85.

Case below: 66 N.C. App. 378.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1985.

STATE v. HUNTER

No. 10A85.

Case below: 71 N.C. App. 602.

Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals allowed 7 May 1985.

STATE v. JONES

No. 147P85.

Case below: 72 N.C. App. 610.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. MCLEAN

No. 270A85.

Case below: 74 N.C. App. 224.

Petition by Attorney General for writ of supersedeas allowed 16 May 1985.

STATE v. MERCADO

No. 121PA85.

Case below: 72 N.C. App. 521.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 7 May 1985.

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

STATE v. MILLER

No. 317A85.

Case below: 74 N.C. App. 760.

Petition by Attorney General for writ of supersedeas under Rule 23 allowed 12 June 1985.

STATE v. MONTALBANO

No. 197P85.

Case below: 73 N.C. App. 259.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 June 1985.

STATE v. MOORE

No. 285PA85.

Case below: 74 N.C. App. 464.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 4 June 1985. Petition by Attorney General for writ of supersedeas denied 4 June 1985.

STATE v. NEWELL

No. 133P85.

Case below: 72 N.C. App. 536.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. NEWKIRK

No. 119P85.

Case below: 73 N.C. App. 83.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985. The temporary stay issued on 8 March 1985 is dissolved 7 May 1985.

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

STATE v. ODEN

No. 86P85.

Case below: 72 N.C. App. 360.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. PAYNE

No. 118P85.

Case below: 73 N.C. App. 154.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. PIPPIN

No. 145P85.

Case below: 72 N.C. App. 387.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. RAYE

No. 190P85.

Case below: 73 N.C. App. 273.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985.

STATE v. ROBINSON

No. 202P85.

Case below: 73 N.C. App. 335.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985.

STATE v. SAMPSON

No. 117P85.

Case below: 72 N.C. App. 461.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. SISTARE

No. 139P85.

Case below: 72 N.C. App. 536.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. STONE

No. 258P85.

Case below: 73 N.C. App. 691.

Petition by defendant for discretionary review under G.S. 7A-31 denied 15 May 1985.

STATE v. THOMPSON

No. 152P85.

Case below: 73 N.C. App. 60.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 June 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 June 1985.

STATE v. UPRIGHT

No. 76P85.

Case below: 72 N.C. App. 94.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 7 May 1985.

STATE v. WALLACE

No. 16P85.

Case below: 71 N.C. App. 681.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. WATTS

No. 131P85.

Case below: 72 N.C. App. 661.

Petition by defendant for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE v. WHITE

No. 300P85.

Case below: 74 N.C. App. 504.

Petition by defendant for temporary stay allowed 24 May 1985.

STATE ex rel. BANKING COMM. v.
CITICORP SAVINGS INDUS. BANK

No. 293PA85.

Case below: 74 N.C. App. 474.

Petition by Citicorp for discretionary review under G.S. 7A-31 allowed 4 June 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 4 June 1985.

STEWART v. GRAHAM, COM'R OF AGRICULTURE

No. 143P85.

Case below: 72 N.C. App. 676.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 7 May 1985.

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

STOKES v. WILSON AND REDDING LAW FIRM

No. 108P85.

Case below: 72 N.C. App. 107.

Petition by Alice E. Patterson for discretionary review under G.S. 7A-31 denied 7 May 1985.

TUNNELL v. BERRY

No. 198P85.

Case below: 73 N.C. App. 222.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 June 1985.

WADE v. WADE

No. 116P85.

Case below: 72 N.C. App. 372.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 7 May 1985.

WALLS v. GROHMAN

No. 96PA85.

Case below: 72 N.C. App. 443.

Motion by plaintiffs to dismiss defendants' appeal allowed 7 May 1985. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 May 1985.

WASTE MANAGEMENT OF CAROLINAS, INC. v. PEERLESS INS. CO.

No. 70PA85.

Case below: 72 N.C. App. 80.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 7 May 1985.

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

WINDHAM DIST. CO. INC. v. DAVIS

No. 60P85.

Case below: 72 N.C. App. 179.

Petition by defendant (Steve Davis) for discretionary review under G.S. 7A-31 denied 7 May 1985.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; TOWN OF BRYSON CITY; SWAIN COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE, GRAHAM AND JACKSON COUNTIES, THE TOWNS OF ANDREWS, DILLSBORO, ROBBINSVILLE, AND SYLVA; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; MURIEL MANEY; AND DEROL CRISP v. NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.

No. 227A83

(Filed 3 July 1985)

1. **Electricity § 3; Utilities Commission § 36— electric rates—affiliated utilities—treatment as integrated system—authority of Utilities Commission**

The Utilities Commission has the authority, in the first instance, to determine for itself the relevant criteria to apply to the factual question of whether to treat Nantahala Power Company and Tapoco, Inc. as an integrated system for rate making purposes, and its determination will not be disturbed on appeal where supported by substantial evidence.

2. **Electricity § 3; Utilities Commission § 15— Tapoco as public utility**

The Utilities Commission correctly determined that Tapoco, Inc. is a public utility in North Carolina subject to its regulatory authority and jurisdiction.

3. **Appeal and Error § 2— unanimous decision of Court of Appeals—scope of review**

Pursuant to Rule 16(a) of the Rules of Appellate Procedure, the scope of review in the Supreme Court from an unanimous decision of the Court of Appeals is limited to consideration of the questions properly presented in the new briefs required by Rule 14(d)(1) and 15(g)(2) to be filed in the Supreme Court. Questions properly presented for review in the Court of Appeals but not presented and discussed in the new briefs to the Supreme Court are deemed abandoned under Rule 28(a).

4. **Electricity § 3; Utilities Commission § 36— electric rates—roll-in methodology for Nantahala—no preemption by federal license**

The Utilities Commission's order implementing a roll-in of the properties, revenues and expenses of Tapoco with those of Nantahala for the purpose of setting Nantahala's retail rates in no way contravened the terms and conditions of Tapoco's federal license to operate hydroelectric plants in North Carolina and Tennessee, and the Commission was not, therefore, preempted from implementing the roll-in by virtue of Part I of the Federal Power Act and the Supremacy Clause, Art. VI, cl. 2, of the U.S. Constitution.

5. **Electricity § 3; Utilities Commission § 36— electric rates—affiliated utilities—treatment as integrated system—sufficient evidence**

There was plenary evidence in the record to support a determination by the Utilities Commission that Nantahala and Tapoco constitute a single, in-

tegrated electric system and should be treated as such for the purposes of calculating Nantahala's retail rate base and costs of service.

6. Electricity § 3; Utilities Commission § 15— Alcoa as public utility

The evidence supported a determination by the Utilities Commission that Alcoa, the owner of all of the outstanding stock of Nantahala Power Company, is a North Carolina public utility under G.S. 62-3(23)c by virtue of the effect Alcoa's "affiliation" with Nantahala has had upon Nantahala's rates.

7. Electricity § 3; Utilities Commission § 36— electric rates—roll-in methodology for Nantahala—no preemption by Federal Power Act and Supremacy Clause

The Utilities Commission was not preempted from implementing a roll-in methodology for determining Nantahala's rates by virtue of the Supremacy Clause, Art. VI, cl. 2, of the U.S. Constitution and the Federal Energy Regulatory Commission's exclusive jurisdiction under Part II of the Federal Power Act over certain wholesale power transactions and agreements between and among Nantahala, Tapoco, Alcoa and TVA. The "filed rate" doctrine did not require the Utilities Commission, in determining the proper costs to Nantahala's retail customers for the service provided to them, to use demand and energy factors based upon the proportion of entitlements allocated to Nantahala alone under such agreements. Nor did the Utilities Commission's order conflict with specific FERC actions taken with respect to such agreements.

8. Electricity § 3; Utilities Commission § 21— jurisdiction over intrastate and interstate rates

The Federal Energy Regulatory Commission is prohibited from regulating intrastate retail rates charged to ultimate consumers, and the states are prohibited from regulating interstate wholesale rates charged to local distributing companies.

9. Electricity § 3; Utilities Commission § 21— wholesale interstate electric rates—no authority by Utilities Commission

The N.C. Utilities Commission was preempted from directly or indirectly regulating the wholesale rate structure created by certain interstate power agreements between and among Nantahala, Tapoco, Alcoa and TVA or inquiring into the reasonableness of those FERC-filed wholesale rate schedules when it acted in fixing Nantahala's retail rates.

10. Utilities Commission § 38— electric rates—operating expenses considered

When the provisions of G.S. 62-133(b)(1), (b)(3) and (c) are read *in pari materia*, the only operating expenses which the Utilities Commission may consider in setting intrastate rates for North Carolina public utilities are those incurred in the provision of service to the utility's North Carolina consumers. Accordingly, jurisdiction cost allocation is a necessary step in any general rate case involving a public utility or utility system whose separate companies are operated as a single enterprise serving both jurisdictional (intrastate retail) and non-jurisdictional consumers.

11. Utilities Commission § 24— fixing "reasonable and just" rates—balancing of shareholder and consumer interests

The fixing of "reasonable and just" rates involves a balancing of shareholder and consumer interests. The Utilities Commission must therefore set rates which will protect both the right of the public utility to earn a fair rate of return for its shareholders and ensure its financial integrity while also protecting the right of the utility's intrastate customers to pay a retail rate which reasonably and fairly reflects the cost of service rendered on their behalf.

12. Utilities Commission § 38— operating expenses—questions of fact

The fundamental question as to whether certain expenditures are to be included in the operating expenses a utility is entitled to collect from its customers is one of fact to be ascertained by the regulatory authority.

13. Electricity § 3; Utilities Commission § 36— electric rates—power costs paid to affiliate

Ordinarily, the Utilities Commission may, in a proper case, refuse to allow a utility to include in its reasonable operating expenses the full price it actually paid for power as a result of its contractual power supply arrangements, especially where the operating expense is one incurred through a contract between or including the utility company and its affiliated companies. In such cases, the burden of persuasion on the issue of reasonableness always rests with the utility, and charges arising out of intercompany relationships between affiliated companies should be scrutinized with care and may be properly refused or disallowed in the absence of a showing of their reasonableness.

14. Electricity § 3; Utilities Commission § 36— electric rates—transactions with affiliated companies—filed rate doctrine

The Utilities Commission's otherwise plenary authority to investigate transactions between a public utility and its affiliated companies, and to disallow operating expenses found to be imprudently incurred or allocated under such agreements, is limited by prior federal approval of the rate or price in question under the "filed rate" doctrine. Thus, neither the state public service commission nor the courts can unilaterally establish a different rate for wholesale electric power sold in interstate commerce because they are of the opinion that an FERC-filed or approved rate is unfair or unreasonable.

15. Electricity § 3; Utilities Commission § 36— Nantahala's retail rates—interstate power supply arrangements—benefits to Alcoa—costs to be borne by Alcoa

Insofar as the Utilities Commission determined that Alcoa, as corporate parent and private industrial customer of Nantahala Power Company, had benefited at the expense of Nantahala's public load from interstate corporate and power supply arrangements it imposed upon its subsidiaries, it was within its regulatory authority to decide that the costs associated with those benefits would not be borne by Nantahala's public consumers in the form of higher retail rates but would be borne by Nantahala's customer and sole shareholder, Alcoa.

16. Electricity § 3; Utilities Commission § 36— electric rates—demand and energy factors—failure to use entitlements under interstate agreements—filed rate doctrine

The "filed rate" doctrine did not require the Utilities Commission, in determining the proper costs to Nantahala's retail customers for the service provided to them, to use demand and energy factors based upon the proportion of entitlements allocated to Nantahala alone under certain interstate wholesale power agreements between and among Nantahala, Tapoco, Alcoa and TVA.

17. Electricity § 3; Utilities Commission § 36— Alcoa's dominance of Nantahala—roll-in methodology—effect of FERC actions

The Federal Energy Regulatory Commission's analysis of the corporate structure of Alcoa, Nantahala and Tapoco and various intercorporate power transactions and agreements, and its finding that the evidence before it did not support the conclusion that Alcoa had used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act, did not preempt the N.C. Utilities Commission from determining that the evidence before it supported the conclusion that Alcoa had dominated Nantahala in such a manner as to require relief for Nantahala's retail customers under N.C. law. Nor did the Federal Energy Regulatory Commission's having declined to order a roll-in of Nantahala and Tapoco for rate making purposes preempt the Utilities Commission from implementing such a rate making methodology under its discretionary authority in setting intrastate retail rates.

18. Electricity § 3; Utilities Commission § 36— electric rates—roll-in methodology—no undue burden on interstate commerce

The Utilities Commission's adoption of a roll-in of the properties, revenues and expenses of Tapoco with those of Nantahala for the purpose of setting Nantahala's retail rates did not afford N.C. customers a "first call" on the energy output of the combined system and the economic benefits of Tapoco's lower-cost production so as to place an undue burden on interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, of the U.S. Constitution.

19. Electricity § 3; Utilities Commission § 36— electric rates—roll-in methodology—no confiscation of Nantahala's properties

The Utilities Commission's implementation of a roll-in methodology for setting Nantahala's retail rates, with its resulting reduction in retail rates and refund obligation to Nantahala's retail customers, does not impermissibly impair Nantahala's ability to earn a proper rate of return on its investment and does not amount to a confiscation of its properties in violation of the due process clause of the Fourteenth Amendment to the U.S. Constitution and Art. I, § 19 of the N.C. Constitution.

20. Electricity § 3; Utilities Commission § 36— requiring refund to Nantahala's customers by Alcoa—authority of Utilities Commission

The Utilities Commission acted within its regulatory and rate making authority in imposing the obligation upon Nantahala's parent Alcoa to pay any portion of a refund obligation to Nantahala's retail customers which Nantahala is financially unable to pay. Once the Utilities Commission determined that

Alcoa was a statutory public utility under G.S. 62-3(23)c, it could rely upon the doctrine of "piercing the corporate veil" between Nantahala and its parent, Alcoa, to hold Alcoa financially responsible for Nantahala's refund obligation to the extent its affiliation had adversely affected Nantahala's rates as necessary or incident to the proper discharge of its regulatory duties under G.S. 62-30.

21. Electricity § 3; Utilities Commission § 36— electric rates—piercing the corporate veil—fraud not required

The Utilities Commission was not required to find fraud in order to pierce the corporate veil between Nantahala and its parent, Alcoa.

22. Electricity § 3; Utilities Commission § 36— Nantahala's retail rates—piercing the corporate veil—effect of prior actions by regulatory agencies

Prior investigation and regulation of the activities of Alcoa and Nantahala by state and federal regulatory agencies did not prohibit or preempt the N.C. Utilities Commission from piercing the corporate veil between Alcoa and its wholly-owned subsidiary Nantahala to hold Alcoa financially responsible for Nantahala's refund obligation to its retail customers.

23. Electricity § 3; Utilities Commission § 36— refund to Nantahala's customers—responsibility of Alcoa

There was no merit to Alcoa's contention that it could not be required to pay refunds based upon Nantahala's overcollections prior to 30 October 1980, the date on which the Utilities Commission found Alcoa to be a public utility.

24. Electricity § 3; Utilities Commission § 36— refund to Nantahala's customers—responsibility of Alcoa—no confiscation of Alcoa's property

The Utilities Commission's imposition of an obligation upon Alcoa to pay any portion of a refund obligation to Nantahala's retail customers which Nantahala is financially unable to pay does not amount to a confiscation of Alcoa's property.

25. Electricity § 3; Utilities Commission § 21— period of refund of excessive rates—no retroactive rate making

When, upon appellate review and further action by the Utilities Commission, rates approved for Nantahala by the Utilities Commission in 1977 were determined to be excessive, the Utilities Commission properly ordered Nantahala to refund all excessive rates collected since the 1977 order, not just overcollections which were subject to an undertaking for refund after 6 March 1979 when the Court of Appeals vacated the 1977 order. Furthermore, the Commission's refund order did not amount to retroactive rate making since the rates ultimately fixed and the refund were not collectible for past service but for service in the locked-in docket period.

26. Electricity § 3; Utilities Commission § 21— amount of refund to utility's customers

The Utilities Commission properly ordered Nantahala to refund excess revenue measured by rates determined by a roll-in methodology in this proceeding rather than by what would have been collected under Nantahala's prior rate schedule.

27. Electricity § 3; Utilities Commission § 56— electric rates—order based on independent findings

In this rate case in which the Utilities Commission implemented a roll-in methodology for determining Nantahala's rates and held Nantahala's parent corporation Alcoa financially responsible for refunds to Nantahala's customers, all parties received a full and fair hearing at all stages of the original and remanded proceedings, and the Commission's order was, in all respects, based upon fully independent and well substantiated findings of fact and conclusions of law and not on observations made by the N.C. Supreme Court in remanding the proceeding to the Commission.

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

APPEAL by respondents pursuant to N.C.G.S. § 7A-30(3) from the decision of the Court of Appeals, reported at 65 N.C. App. 198, 309 S.E. 2d 473 (1983), affirming the order of the North Carolina Utilities Commission entered 2 September 1981, Docket No. E-13, Sub 29 (Remanded) reducing retail electric utility rates and requiring a refund by respondents Nantahala Power and Light Company ("Nantahala") and its parent corporation, Aluminum Company of America ("Alcoa") to Nantahala's retail ratepayers for the four-year period of 1977-1981. Heard in the Supreme Court 12 April 1984.

This matter was initiated by Nantahala on 3 November 1976 by the filing of an application with the North Carolina Utilities Commission ("Commission") by Nantahala to establish new rates so as to increase its charges to North Carolina retail customers by $1,830,791. The Commission declared the matter to be a general rate case pursuant to N.C.G.S. § 62-137 and ordered an investigation and hearing. Various parties representing the interests of Nantahala's retail ratepayers intervened and moved that Alcoa and its wholly-owned subsidiary, Tapoco, Inc. ("Tapoco") be joined as parties and that the rate base of Nantahala be computed on a "rolled-in" basis to include the properties, revenues and expenses of Tapoco, as if the two were operating as one utility for the purpose of fixing and establishing a reasonable level of retail rates for Nantahala. These motions were disallowed by the Commission.

On 14 June 1977 the Commission issued an order in Docket No. E-13, Sub 29, permitting Nantahala to put into effect revised rates so as to produce $1,598,918 in additional gross revenues.

The order was not stayed and Nantahala implemented the approved rates at that time. The Court of Appeals reversed, held Tapoco to be a North Carolina public utility, vacated the order authorizing the rate increase and remanded the case to the Commission for the purpose of making Tapoco a party and considering "whether the people of North Carolina would benefit by the use of the roll-in method of rate making involving Nantahala and Tapoco." *Utilities Comm. v. Edmisten, Attorney General*, 40 N.C. App. 109, 120, 252 S.E. 2d 516, 522 (1979).

Nantahala sought and obtained from this Court a stay of the Court of Appeals' decision pending further review. Upon Nantahala's appeal from the Court of Appeals, this Court affirmed in part, reversed in part, and remanded the matter to the Commission for further hearings. *Utilities Comm. v. Edmisten, Attorney General*, 299 N.C. 432, 263 S.E. 2d 583 (1980) ("*Edmisten*").

In *Edmisten* we assumed, without deciding, that Tapoco was a North Carolina public utility subject to the regulatory authority of the Commission, found that there was ample evidence to support a finding that Nantahala and Tapoco operate as a single unified public utility system, held that the Commission erred in giving only minimal consideration to the evidence suggesting the propriety of roll-in, and indicated that the roll-in device or methodology for rate making computation "seems especially appropriate in a case such as this where one physically integrated system, interconnected in such a way that all power available to the system can be used to enhance its overall reliability and supply its requirements as a whole, is presided over by two corporate entities." 299 N.C. at 442, 263 S.E. 2d at 591. In addition, this Court held that Alcoa and Tapoco could be brought in as parties, with a *de novo* right to contest the Commission's jurisdiction; permitted the increased rates to remain in effect, conditioned upon Nantahala's guarantee that it would refund to its customers any excess charges, should the increased rates originally approved by the Commission ultimately be determined to be excessive; and remanded the matter to the Commission with directions to "obtain and consider information and data showing what Nantahala's cost of service to its customers would be if this [roll-in] method of rate making were used and whether Nantahala's customers would benefit thereby." 299 N.C. at 443, 263 S.E. 2d at 591. Thereafter, Nantahala executed an Undertaking to Refund, agreeing to re-

fund any overcollections to its customers should the rates approved by the order of 14 June 1977 be determined excessive.

Upon remand to the Commission and after *de novo* proceedings, Alcoa and Tapoco were held to be North Carolina public utilities and both were made parties respondent to the proceeding. Prior to the remanded rate hearings, the intervenors moved that Alcoa and Tapoco be required to join the execution of Nantahala's undertaking, or, in the alternative, to guarantee Nantahala's ability to make the refund. The Commission deferred its ruling on this motion until a later date.

The case was heard before a panel of the Commission during the months of March, April and May of 1981, and both the intervenors and the respondents presented evidence concerning the propriety of a roll-in, for accounting purposes, of Nantahala's and Tapoco's accounting data in setting Nantahala's retail rates. The panel determined that Nantahala's retail customers would benefit by a roll-in methodology treating Nantahala and Tapoco as a unified system and adopted the roll-in cost allocation formula proposed by the intervenors. On 2 September 1981 the panel ordered a reduction in Nantahala's rates from the level previously approved by the Commission's order of 14 June 1977, in the amount of $2,035,000 annually and, in addition, modified certain purchased power adjustment costs. The panel, consistent with the rate reduction, also ordered Nantahala to refund the excess rates it had been collecting under the 1977 order from its retail customers and directed that Alcoa would be responsible for refunding such portions of the total refund obligation as Nantahala itself is financially unable to refund.

The respondent companies appealed to the Full Commission. After additional hearings, the Commission affirmed and adopted the panel's order in all respects on 28 January 1982. On 16 August 1982, the Commission, after requesting and rejecting several refund plans submitted by Nantahala and Alcoa, ordered the two companies to commence making refunds by monthly installments in October 1982. The Commission left it to the companies to determine the proportion of the refund obligation each would pay, with the provision that any division of financial responsibility not affect Nantahala's ability to continue service to its customers.

The Commission's order was stayed pending appeal to the Court of Appeals. Thereafter, all relevant orders of the Commission were affirmed by the Court of Appeals in *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 65 N.C. App. 198, 309 S.E. 2d 473 (1983). The respondents appeal pursuant to former N.C.G.S. § 7A-30(3), which permitted an appeal of right of any general rate case from the Court of Appeals to this Court in cases decided prior to 1 July 1983. *See* 1983 N.C. Session Laws, Ch. 526, Sec. 10.

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MEYER, Justice.

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III

Conclusion and Holding

This appeal raises substantial questions under the federal constitution and the North Carolina statutory provisions governing intrastate electric power rates charged by a public utility to its retail customers. The most important question presented is whether the North Carolina Utilities Commission is preempted from implementing a roll-in methodology for setting Nantahala's retail rates by virtue of the Supremacy Clause of the United States Constitution, art. VI, cl. 2 and the Federal Energy Regulatory Commission's ("FERC") exclusive jurisdiction over certain interstate wholesale power transactions and agreements[1] between and among, Nantahala, Tapoco, Alcoa and the Tennessee Valley Authority ("TVA"). For the reasons set forth more fully below, we find no statutory or constitutional infirmity in the order of the North Carolina Utilities Commission issued in Docket No. E-13, Sub 29 (Remanded), and therefore affirm the decision of the Court of Appeals upholding the retail rate reduction and refund obligation to Nantahala's public utility customers.

In Part I of this opinion we will undertake to review (a) the procedural history of this case, (b) the historical development of Nantahala and Tapoco as a single, unified hydroelectric generating and distribution system, (c) the factual predicate to the Commission's decision to implement a roll-in rate making method-

1. Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k extends federal regulatory power to the transmission and sale of electric energy at wholesale in interstate commerce, while reserving to the various states the authority to regulate intrastate transmission and sale of electric energy at retail.

ology, and (d) the mechanics of the roll-in in the allocation of costs for the unified system. In the course of this review, we shall address such factual and legal issues raised by the companies as are relevant to the Commission action under discussion. In Part II, we will address the major constitutional and statutory challenges to the Commission's order lodged by the respondent companies. Briefly stated, these challenges concern (a) federal preemption; (b) interference with interstate commerce; (c) the measure, extent and liability for the rate reduction and refund obligation; and (d) the independence of the factual findings of the Commission.

I.

A.

This appeal represents the culmination of a process begun in 1976, with Nantahala's application for permission to increase its retail rates and a revision of its purchased power adjustment clause (PPAC) applicable to those rates. The initial order entered by the Commission on 14 June 1977 in Docket No. E-13, Sub 29, approving certain annual increases in Nantahala's rates and a PPAC adjustment was ultimately reversed on appeal by this Court in *Edmisten*, 299 N.C. 432, 263 S.E. 2d 583. The basis for reversal was the Commission's failure as a matter of law to give more than minimal consideration to material facts of record concerning the propriety of treating Nantahala and its affiliate Tapoco, both wholly owned subsidiaries of Alcoa, as a single unified electric utility and rolling together their properties and costs for purposes of determining just and reasonable retail electric rates for Nantahala's North Carolina customers. 299 N.C. at 437, 263 S.E. 2d at 587-88. The case was remanded with directions to the Commission to obtain and consider information and data showing what Nantahala's cost of service to its customers would be if the roll-in method of rate making were used and whether Nantahala's customers would benefit thereby. *Id.* at 443, 263 S.E. 2d at 591.

Upon remand, the Commission, in preliminary hearing, determined that it had jurisdiction over Nantahala's parent corporation, Alcoa, and its affiliate, Tapoco, and joined them as parties in Docket No. E-13, Sub 29 (Remanded). A panel of the Full Commission then held hearings and received evidence from both the intervening customers of Nantahala and from the respondent com-

panies on the question of roll-in. In addition to the evidence received during Nantahala's initial rate increase hearings in 1977 regarding Nantahala's costs and the relevant test year (1975) data, both parties presented additional testimony and data concerning Nantahala's rolled-in costs of service to its retail customers. The companies presented one allocation methodology for apportioning the combined revenues, expenses and investment of the rolled-in system between the system's North Carolina retail operations and non-jurisdictional Tennessee industrial operations, and the intervenors presented another.

Briefly stated, the basic dispute between the intervenors and the companies as to *which* jurisdictional cost allocation methodology to use involves the question of whether the rolled-in power costs are to be allocated to Nantahala's retail customers on the basis of its actual contribution and use of hydroelectric generation and capacity in the unified system or upon the proportion of return power entitlements it receives under the wholesale agreements between and among the companies themselves and the Tennessee Valley Authority ("TVA"). The intervenors contend that the former allocation formula is just and appropriate for setting Nantahala's retail rates. The companies maintain that the latter is mandated under the federal and state division of, respectively, wholesale and retail rate making authority, because the contracts at issue are federally filed and approved wholesale rates which must be given effect by state public service commissions in setting retail rates.

The wholesale power coordination and exchange agreements primarily at issue are (1) the New Fontana Agreement ("NFA"), a 1962 power exchange agreement among the three companies and TVA, whereby Nantahala and Tapoco subject all of their large plant electrical generation to TVA control and turn over that generation directly to TVA, in exchange for annual return power entitlements for the two subsidiaries to divide between themselves; and (2) the 1971 Nantahala-Tapoco Apportionment Agreement, a contract between the two subsidiaries, whereby the demand and energy return power entitlements received under the NFA are divided between them, with Nantahala receiving no more than a fixed amount of power and energy, and Tapoco receiving the re-

mainder.[2] These, and other contractual arrangements affecting Nantahala's costs of service will be discussed more fully below.

The Commission, in view of the evidence presented by all the parties upon remand, found and concluded that (1) Nantahala and Tapoco are North Carolina public utilities subject to its rate making jurisdiction; (2) Alcoa, by virtue of its parental domination of Nantahala, was itself a statutory North Carolina public utility pursuant to N.C.G.S. § 62-3(23)c; (3) the Nantahala-Tapoco electric generation and distribution system constitutes a single, integrated electric system, operated as such and coordinated with the TVA system; (4) use of an appropriately performed roll-in of Nantahala and Tapoco would be beneficial to Nantahala's customers because its allocated cost of power under the combined system is less than the cost of power for Nantahala as a stand-alone system, such that a roll-in will result in a significant reduction in the cost of providing public utility electric service to the single system's retail customers; (5) significant detriments and inequities to Nantahala arise out of both the NFA and the 1971 Apportionment Agreement, which result in concealed benefits flowing to Alcoa through its subsidiary Tapoco, and render use of the companies' cost allocation formula based on the demand and energy entitlements under those contracts inappropriate for determining the costs fairly attributable to the North Carolina public load in the combined system; (6) the cost allocation methods and procedures proposed by the intervenors, based upon the generational capabilities and needs of Nantahala, are proper for use in the allocation of its demand and energy related costs and should be adopted for use in setting Nantahala's retail rates in the subject proceeding; and (7) Alcoa had so dominated Nantahala in certain contracts and transactions involving Nantahala, Tapoco and others that Nantahala had been left "but an empty shell,

2. In practice, the NFA and its predecessor, the original Fontana Agreement ("OFA"), operated as "sales" to TVA of electric power for resale under Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, by Alcoa's subsidiary-public utilities (Nantahala and Tapoco), with TVA making payments in kind to the Alcoa "system" as a whole. In turn, TVA's "payments" of return power have been divided amongst the system members as they themselves have designated. The various agreements are, accordingly, treated as tariffs or rate schedules by FERC and are subject to regulation under Part II of the Act to assure that the terms and conditions are just and reasonable and not unduly discriminatory, despite the fact that no dollars actually change hands as rate payments.

unable to act in its own self-interest, let alone in the interest of its public utility customers in North Carolina," so as to render Alcoa responsible for such portions of any refund obligation placed upon Nantahala as Nantahala itself is unable to make.

The Commission adopted the intervenors' roll-in methodology, which resulted in lowered rates and required a refund obligation to be placed upon Nantahala and Alcoa. Essentially, the roll-in method adopted treats Nantahala and Tapoco as a single integrated system for accounting purposes. That is, (a) the assets, properties, plants and working capital requirements of the two companies were joined in one unified rate base; (b) the joint revenues and expenses of the single system were totalled; and (c) the combined system was assigned the rate of return previously approved by the Commission for Nantahala alone in the Sub 29 proceeding. From these three elements, the combined system revenue requirement (expenses + rate base × rate of return) was derived.

The combined system cost of service was then allocated between the public load customers in North Carolina and the industrial load customer (Alcoa) in Tennessee, using generally accepted jurisdictional allocation factors commonly employed by the Commission in setting North Carolina retail rates for other companies, such as Duke Power or Carolina Power & Light, which operate in more than one state. Rates for Nantahala's public load customers could be reduced because the cost of service per kwh for the combined Nantahala-Tapoco system is less than for Nantahala treated as a stand-alone electric system.

In its final order entered 28 January 1982, the Commission overruled the exceptions taken by the companies to the panel's order implementing roll-in and made supplementary conclusions of law on certain "federal questions" arising by virtue of the panel's rejection of the companies' proposed jurisdictional cost allocation methodology. The Commission rejected, inter alia, the companies' arguments (1) that the panel's order is precluded by exclusive federal licensing of interstate hydroelectric power facilities under Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823a; (2) that the order intrudes upon the authority vested in FERC by Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, by failing to accept the costs of filed rates under the

NFA and the 1971 Apportionment Agreement; and (3) that the order imposes an impermissible burden on interstate commerce.

The companies, in their individual briefs, challenge the Commission's order on a number of state and federal grounds. Tapoco's sole contention relates to its "involuntary joinder" as a party on the grounds that the Commission is without statutory authority to affect Tapoco's rates and service to its Tennessee customer, Alcoa, and is preempted from doing so by virtue of the fact that Tapoco's four hydroelectric plants are licensed by, and under the exclusive regulatory jurisdiction of, FERC under Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823a. Nantahala's and Alcoa's objections may be broken down into four categories: (1) challenges to the order implementing the roll-in arising under the Supremacy Clause of the United States Constitution, art. VI, cl. 2 and Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k; (2) claims that the order contravenes the Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, by placing an impermissible burden on interstate commerce; (3) challenges to the constitutionality, measure and extent of the rate reduction and refund obligation as well as to the Commission's jurisdiction to hold Alcoa liable for its subsidiary's refund obligation; and (4) challenges to the order issued on remand based upon the alleged failure of the Commission to make independent findings of fact as to the propriety of the roll-in methodology for determining Nantahala's rates and its jurisdiction over Nantahala's parent, Alcoa.

In our earlier decision reversing the Commission's 1977 approval of the rate increase requested by Nantahala in Docket No. E-13, Sub 29, we briefly reviewed the history of the three companies and the basic contracts affecting Nantahala's costs of service. *Edmisten*, 299 N.C. at 434-39, 263 S.E. 2d at 586-89. That review was undertaken with an eye toward (1) elucidating the material facts of record accorded only minimal consideration by the Commission in assessing the factors bearing upon the determination of reasonable retail rates for Nantahala and (2) delineating the legal significance of evidence indicating that Nantahala had structured its economic affairs and physical operations so as to afford an unfair preference to its parent corporation to the detriment of its North Carolina public utility customers. *Id.* The complex factual predicate of the Commission's order implementing roll-in and the rather intricate corporate and contractual rela-

tionships between and among the companies and TVA renders a more extended treatment of the subject necessary in order to place the issues raised by the parties to the present appeal in their proper perspective.[3]

B.

As we noted in *Edmisten*, the factual background of the case is not generally disputed by the parties. In the early part of the century, Alcoa came to the sparsely populated southwestern North Carolina mountains to tap the resources of the mountain streams for low-cost electric power to operate an aluminum reduction plant in neighboring Alcoa, Tennessee. As its source of hydroelectric power, Alcoa acquired the Tallassee Power Company ("Tallassee") (later Carolina Aluminum Company and now Yadkin, Inc.), an electric generating company incorporated in North Carolina and granted the power of eminent domain by legislative act in 1905.[4] Tallassee owned several undeveloped and developed hydroelectric sites along the Little Tennessee River in North Carolina, including two hydroelectric generating facilities at Santeetlah and Cheoah. Tallassee, under the name Carolina Aluminum, was recognized as a North Carolina public utility as early as 1934 in *Manufacturing Co. v. Aluminum Co.*, 207 N.C. 52, 175 S.E. 698 (1934).

By the 1920's, Alcoa, through its subsidiaries, had acquired a substantial number of hydroelectric sites along the Little Tennessee River: Santeetlah, Cheoah, Nantahala, Glenville (now Thorpe), Needmore, Fontana and several smaller sites in North Carolina and Chilhowee and Calderwood in Tennessee. Development of the sites was primarily for the purpose of producing and transmitting electricity to the Alcoa, Tennessee aluminum reduction plant, which requires enormous amounts of low-cost electricity.

3. For the purposes of this historical review, we have relied upon the entire record before the Commission in the Sub 29 (Remanded) proceeding. In addition, in an effort to present a complete picture of the regulatory history of the companies involved, we have, where necessary, taken judicial notice of various prior opinions of this Court, as well as certain prior decisions and orders of the Federal Power Commission and its successor, the Federal Energy Regulatory Commission.

4. *See* Chapter 122 of the private laws enacted by the General Assembly of North Carolina at its regular session in the year 1905.

In 1929 Alcoa created and incorporated Nantahala as another of its wholly owned subsidiaries in North Carolina. Nantahala is a North Carolina public utility with the right of eminent domain, serving a six county franchised territory in the western part of the State. Nantahala's customer mix consists of residential, commercial, industrial and wholesale customers. In time, Tallassee sold its undeveloped North Carolina sites to Nantahala, including the Fontana site later developed by TVA. By 1939, Nantahala owned sites for power development in six western counties of North Carolina.

Between 1929 and 1941, Nantahala undertook token public service through several small, run-of-the-river hydroelectric generating plants acquired from municipalities in its service area and completed acquisition of several sites from Tallassee. In 1941 Nantahala obtained a certificate from the Department of War to develop the large-scale Nantahala and Glenville (now Thorpe) projects on the upper reaches of the Little Tennessee watershed. Nantahala's stated justification for the development of these sizeable projects was the huge electric need of Alcoa's aluminum smelting works in Tennessee, which were then producing aluminum to sell to the federal government for war materials. In its application, Nantahala repeatedly referred to the developments as part of "the Alcoa power system" or "the system."

Prior to 1941, both Nantahala and TVA were interested in developing the massive Fontana site on the Little Tennessee River in North Carolina. Nantahala proposed to construct a large hydroelectric project with storage capacity. The proposed project, known as the Fontana project, was to generate electricity both for aluminum production and for use by the public. Following a determination by FERC's predecessor, the Federal Power Commission ("FPC") that a license was required from that agency under Part I of the Federal Power Act before Nantahala could construct, thereby subjecting the proposed project and Nantahala to a limited-term license under Section 6 of the Act and to the agency's ongoing jurisdiction, Nantahala abandoned its proposal. *See Nantahala Power and Light Co.*, 2 F.P.C. 833 (1940), *petition for discontinuance denied*, 2 F.P.C. 388 (1941).[5] TVA, which had al-

5. Nantahala, upon learning that the project would not be exempt under federal law and that at most, the FPC would grant a 50-year license permitting

ready obtained some acreage in the reservoir site, eventually prevailed upon Alcoa to have the Fontana site transferred to TVA for development. At that time, Alcoa was already purchasing some of the power requirements for its Tennessee aluminum production facilities from TVA. The conveyance was part of the first power coordination and exchange agreement of relevance between Alcoa and TVA, entered into in 1941, which had become known over the years as the Original Fontana Agreement ("OFA").

The 1941 Agreement is a twenty-year (but annually renewable thereafter) contract between Alcoa and TVA, pursuant to which Alcoa agreed to cause Nantahala (not a party to the agree-

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recapture, withdrew its declaration of intention. As to the companies' regard for the public's interests in this project, the Federal Power Commission stated:

"Notwithstanding the public interest, Alcoa, through its subsidiary, in effect demonstrated that in its national defense effort it was unwilling to accept the reasonable limitations on unearned increment in the value of its power project provided by Congress in the Federal Power Act.

"The Fontana situation is not the only instance in which Alcoa and its subsidiaries have shown complete unwillingness to accept provisions of Federal law, regardless of the consequences to the national defense or to the public which they serve. . . .

"Neither the Federal Power Act nor the licenses issued thereunder contain provisions onerous to the operation of a project utilizing the waters of streams subject to Federal control. The provisions of the Act and the license are, in fact, designed wholly to protect the public interest in the use of waters which belong to the Nation. Many other persons and corporations, both public utilities and industrial concerns, have sought and accepted licenses. *The refusal of Alcoa's subsidiary to construct the Fontana project, when required to obtain a license, indicates that not even the urgent demands of national defense can alter its apparent determination never willingly to submit any of its hydro projects to the duly enacted requirements of Federal law. . . .*

"Their attempted withdrawal is inconsistent with their contention regarding their interest in national defense and with their planned 25-year program of construction.

"In our opinion Alcoa and the company have not dealt frankly in this matter, but have in the past undertaken and are now attempting to evade the plain provisions of the law." (Emphasis added.)

Nantahala Power and Light Company, 2 F.P.C. 388, 390-91 (1941). An incidental effect of the subsequent conveyance to TVA of the Fontana site was the removal or elimination of the FPC's licensing authority over the Fontana project. *See* 16 U.S.C. § 831y-1. However, as is evident from the various agreements, the conveyance did not sever Alcoa's link with the project.

ment) to transfer the Fontana Dam site to TVA. The property so transferred was valued at approximately $3.5 million.[6] The transfer was effectuated by Alcoa's repurchase of the Fontana site from Nantahala for $1.9 million, or approximately $128 per acre. Nantahala had purchased the property from Tallassee at a cost of $112 per acre in 1929.

Under the terms of the OFA, the Fontana project, when completed by TVA, was to be operated together with other TVA generating plants owned by Alcoa's subsidiaries. The agreement refers to Alcoa as the "Company," and the "Company's plants" as including Nantahala's generating plants as well as the other plants now owned by Tapoco. The agreement called for the Alcoa system companies to convey the output from their generating plants to TVA in return for power and energy entitlements. The level and amount of power entitlements were dependent upon the level of generation which TVA controlled. In exchange for the companies' relinquishment of their control over stream flow and production from their plants (then operating or under construction) at Santeetlah, Cheoah, Calderwood, Nantahala and Glenville (Thorpe), TVA provided compensation power of 11,000 kw to the Alcoa system. Alcoa purchased Nantahala's portion of this compensation power for an annual payment of $89,200.

Although the OFA did not itself specify how the entitlements returned to the Alcoa system by TVA were to be divided among the system's member companies, the companies apparently would receive back as much or as little capacity and energy as each generated proportionately through its individually owned projects. In October 1954 Nantahala and Alcoa entered into a contract which called for Nantahala, when it had excess power, to make the excess available for Alcoa's use at its Tennessee facilities, and conversely, called for Alcoa to provide the power for Nantahala to meet its public load when Nantahala alone could not meet its public service obligation. *See Tapoco, Inc., Initial Decision*, 30 F.E.R.C. ¶ 63,050, at p. 65,273-74 (1985). Throughout the period of these contracts, Nantahala's capacity and energy production were far in excess of the demands of its then existing public service load. Nantahala's excess entitlements under OFA were then sold to Alcoa at "dump" prices. *See Utilities Commission v. Member-*

6. *Edmisten*, 299 N.C. at 435, 263 S.E. 2d at 586.

ship Corp., 260 N.C. 59, 131 S.E. 2d 865 (1963). There is no indication that the 1954 Alcoa-Nantahala contract was ever filed with the FPC as a tariff or rate schedule under Part II of the Federal Power Act. *See* 30 F.E.R.C. ¶ 63,050 at p. 65,275.

Moreover, when the OFA was signed in 1941, none of the Alcoa system plants subject to it had a license from the FPC under Part I of the Federal Power Act. The agreement itself was never filed with the FPC as a tariff or rate schedule during the twenty years that it remained in effect. As a consequence, the FPC never ruled upon the lawfulness of the agreement as a rate schedule while it was in effect. 30 F.E.R.C. ¶ 63,050 at p. 65,274.

In fact, it would appear from the contemporaneous decisions of the FPC that the federal agency only considered the operative terms of the OFA in an effort to determine whether it had licensing jurisdiction over three of the Alcoa system plants[7] which were subject to it—Calderwood, Santeetlah and Cheoah. At the time of the OFA's execution, Calderwood was owned by Alcoa subsidiary, the Knoxville Power Company (later Tapoco), and Santeetlah and Cheoah were owned by Alcoa subsidiary, the Carolina Aluminum Company. In 1941, the FPC instituted proceedings directing Alcoa and its subsidiaries to show cause why they should not be required to apply for licenses under Part I of the Federal Power Act for the continued operation and maintenance of the three plants. *In re Aluminum Co. of America*, 13 F.P.C. 14 (1954). Ultimate resolution of the matter was delayed by the pressures of the war emergency until March 1954. By that time, the respondent companies argued that the three plants were exempt from FPC jurisdiction because they were operated by TVA under the OFA.

The only actual discussion of the OFA comes in the FPC's discussion and rejection of the companies' arguments *in avoidance* of the agency's jurisdiction.

> *The Projects are Operated by Respondents.*—Under date of August 14, 1941, Alcoa and TVA entered into an agreement

7. All references in the opinion to "the Alcoa system" or the "Alcoa power system" or like phrases, refer exclusively to the subsidiary *operating* utilities which provide or provided the generation and transmission of electricity to their parent company Alcoa.

> (the Fontana Agreement) by the terms of which Alcoa transferred to the United States its interest, and those of its wholly-owned subsidiary, in the lands from the then proposed Fontana project and agreed upon a plan for "the coordinated operation of power facilities" of the Alcoa system and the TVA system. . . .
>
> The Fontana Agreement provides for the coordinated operation of power facilities of the two systems under the direction of TVA. Respondents contend that under this arrangement TVA "operates" the Calderwood, Cheoah, and Santeetlah projects within the meaning of the exemption provision of the last paragraph of Section 26(a) of the TVA Act (16 U.S.C. 831-Y-1). (Footnotes omitted.)

13 FPC at 21. The FPC went on to reject the exemption arguments advanced by Alcoa and its subsidiaries, finding that the Fontana Agreement "does not undertake to place the operation of Respondents' projects in TVA," but merely coordinates such operations as the companies themselves actually perform with the power facilities in the TVA system, "for the mutual benefit of Alcoa and TVA." *Id.* at 22. Consequently, the operating companies were ordered to file license applications under the Federal Power Act for the continued operation and maintenance of the three plants. *Id.* at 32. Thus, the OFA was not presented to the FPC by Alcoa and its subsidiaries for the purpose of affirmative regulation, but as part of an effort to preclude such federal oversight over the system's plants and power transactions.

During the period of the OFA's duration, a number of significant events occurred within the Alcoa system. As we have seen, in March 1954, thirteen years after the signing of the OFA, the FPC rejected the arguments of the Alcoa system and ruled that Cheoah and Santeetlah, among other plants subject to the OFA, required a license under the Federal Power Act. *In re Aluminum Company of America*, 13 F.P.C. 14.[8] In October of that year (1954),

8. Nantahala's hydroelectric generating plants subject to the various Fontana agreements were not required by the FPC to be licensed by that agency until the mid-1960's. *See Nantahala Power and Light Co.*, 36 F.P.C. 119 (1966), *reh'g denied*, 36 F.P.C. 581 (1966), *aff'd on review, Nantahala Power and Light Co. v. FPC*, 384 F. 2d 200 (4th Cir. 1967), *cert. denied*, 390 U.S. 945, 19 L.Ed. 2d 1134 (1968).

the wholly-owned subsidiary of Alcoa which was originally incorporated in Tennessee as the Knoxville Power Company, underwent a change of name to Tapoco, Inc. Within two weeks of its name change, Tapoco was domesticated as a North Carolina corporation.

As of October 1954, Tapoco owned two hydroelectric sites along the Little Tennessee River at Calderwood and Chilhowee in Tennessee. Tapoco, as well as acting as the power supplier to Alcoa's Tennessee aluminum smelting and fabricating facility, had at that time a public service load in Tennessee.

Another noteworthy event of October 1954 was the filing of a joint application by Tapoco and its affiliate, Carolina Aluminum Company, to the FPC for a license to operate the "Tallassee project" along the Little Tennessee River in North Carolina and Tennessee. The project entailed the continued operation of the Cheoah and Santeetlah plants in North Carolina, and another existing plant in Tennessee at Calderwood (also subject to the OFA) and the construction of another hydroelectric generation plant at Chilhowee, Tennessee. The FPC's licensing order of March 1955 indicates that in their joint application, the companies stated that the energy from the Tallassee project "is and will continue to be delivered to the Tennessee Valley Authority, which in turn delivers an equivalent amount of energy to the Aluminum Company of America at Alcoa, Tennessee, pursuant to the provisions of the Fontana agreement and the supplemental agreement thereto, dated August 14, 1941 and October 13, 1954, respectively." *Tapoco, Inc. and Carolina Aluminum Co.*, 14 FPC 610, 612 (1955). The licensing order continued by noting that the joint application states that after the exchange of energy between TVA and the Alcoa system pursuant to the Fontana agreement, "*[a]ll* the energy is used for aluminum production *except for* a small portion used for lighting in operators' villages." *Id.* at 612-13. (Emphasis added.) By June 1955, Tapoco had become the sole licensee of the four plants. *See Carolina Aluminum Co. and Tapoco, Inc.*, 14 F.P.C. 828 (1955); *Carolina Aluminum Co., Tapoco, Inc. & Nantahala Power and Light Co.*, 14 F.P.C. 829 (1955). Thereafter, Carolina Aluminum changed its name to its present name of Yadkin, Inc. The company now operates only the hydro facilities, not at issue here, which serve Alcoa's North Carolina, Badin works.

Conspicuous in its absence from the 1955 licensing order is any reference to the fact that TVA return power entitlements were also used to service Tapoco's public utility load in Tennessee and Nantahala's public utility load which, by the early 1950's, had increased to 10,000 customers, both residential and industrial, in a six-county area in North Carolina. *See Utilities Commission v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953). In addition, the licensing order fails to refer to the FPC's own earlier recognition that under the Fontana exchange and coordination agreements with TVA, Nantahala's larger plants were being operated together with Tapoco's plants as part of what the FPC termed " 'the coordinated operation of power facilities' of the Alcoa system and the TVA system." *In re Aluminum Company of America*, 13 F.P.C. at 21.

At about the same time that the federal license application was under consideration, Tapoco, Carolina Aluminum Company and Nantahala jointly filed for a certificate of public convenience and necessity with the North Carolina Utilities Commission in February 1955, to permit Tapoco to acquire, operate and control certain public utility properties belonging to Nantahala and Carolina Aluminum Company, including the Cheoah and Santeetlah plants and certain transmission lines. In the order granting the certificate, the Commission directed that Tapoco supply to Nantahala the power to satisfy Nantahala's public service load in the two villages of Santeetlah and Tapoco in Graham County. At that time, the two villages had a total population of about 300 people. This certificate is still in effect and Tapoco has never appeared before the Commission to abandon it, or have its terms modified. At the present time, the Village of Tapoco is still in existence and under the terms of the certificate and allocations made pursuant to the Fontana agreements, Tapoco still supplies power to Nantahala, which in turn serves the Village of Tapoco.

In the same month that Tapoco received its certificate of public convenience and necessity from the North Carolina Utilities Commission, it received from the State of Tennessee a certificate of public convenience and necessity to construct and operate the Chilhowee facility. Later in that year (1955), Tapoco contracted to sell its electric distribution system for the City of Alcoa, Tennessee to that municipality. The "City of Alcoa Resolution" which authorized the purchase indicates that the City

planned to look to TVA to supply it with the electric power previously supplied by Tapoco. Thus, Tapoco freed itself of its Tennessee public load and from that point onward, none of the power made available by TVA through the Fontana agreement had to be used to satisfy a Tennessee public load. As a result, Tapoco's share of the TVA return power could be devoted almost exclusively to Alcoa's aluminum production facilities. Notwithstanding the substantial generating capacity of Tapoco's facilities, which is three to four times as great as Nantahala's, Alcoa has historically needed to purchase additional power from TVA to supplement the combined output of its subsidiary power companies. To illustrate, during the test year 1975, Tapoco sold 1,365,499,000 kwh to Alcoa, yet, Alcoa purchased an additional 1,784,833,000 kwh from TVA.

During the period from 1950-1955, Nantahala expanded its facilities to provide additional power to Alcoa to enable it to meet the nation's increased aluminum needs during the Korean War. The major components of Nantahala's East Fork project, the Cedar Cliff, Bear Creek and Tennessee Creek dams and reservoirs were completed between 1952 and 1955. That year, 1955, marked the last year in which Nantahala added hydroelectric generating facilities subject to the coordination and exchange agreement with TVA. No additional generating capacity has been added to the Nantahala system whatsoever since 1957, despite clear indications that Nantahala's public service load was growing.

In this regard, we note that in 1941, Nantahala's public service load was only 25,984,275 kwh. By 1955, this load had increased to 115,735,461 kwh and by 1960, it stood at 172,451,768 kwh. *Utilities Commission v. Membership Corp.*, 260 N.C. 59, 66, 131 S.E. 2d 865, 870. During this same period, from 1941-1960, the relative volume of Nantahala's out-of-state sales to its parent Alcoa consistently outstripped its intrastate public service sales. For example, in 1943, approximately 95 percent of Nantahala's electric generation was sold to Alcoa (320,776,268 kwh), with its public service load receiving the remaining 5 percent (16,493,930 kwh). *Id.*

This imbalance of power consumption between Nantahala's parent and its public load, coupled with Nantahala's assigned role

in "the coordinated operation of power facilities of the Alcoa system and the TVA system,"[9] was observed to adversely affect Nantahala's intrastate rates as early as 1953. In an early Nantahala commercial rate case, *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290, Nantahala had sought to increase its rates to all industrial customers other than Alcoa, thus placing the burden of the increase upon the particular group of customers. The undisputed facts were to the effect that Nantahala had been selling more than 80% of its total generation of electric power to Alcoa at a price which was less than the cost of producing and distributing it. The evidence further showed that Nantahala derived the greater part of its revenue from customers other than Alcoa, who consumed only 18% of its power and who were charged approximately twice as much per kilowatt hour as Alcoa was charged. Additionally, it appeared that Nantahala had been earning a return of approximately 6.5% from the revenue collected from its non-Alcoa customers; whereas inclusion of the service and rate paid by Alcoa showed the company to be operating at a loss.

Nantahala sought to justify the differential in rates charged its parent and its public customers by asserting that the vast portion of its generation sold to Alcoa was "secondary" power, while its other commercial customers were supplied with "primary" or dependable power. The Commission approved the increase, finding no unlawful discrimination in this rate structure. On appeal to the Superior Court, the order of the Commission was reversed. This Court, in affirming the judgment of the Superior Court, stated that Alcoa was not entitled to a return on its investment in Nantahala in the form of a preferential rate to the extent it would work to the disadvantage of its subsidiary's other customers. 238 N.C. at 464, 78 S.E. 2d at 300. After noting that the question of "primary" and "secondary" power "was to a large extent the mere application of different labels to that which is essentially the same," *id.* at 465, 78 S.E. 2d at 300, the Court held that the actual differences in service and expense "were in no way comparable to the difference in rates which was so glaring as to compel the inference that it was unreasonable and therefore unlawful." *Id.*

9. *Cf. In re Aluminum Company of America*, 13 F.P.C. at 21.

Justice Barnhill, in a separate concurrence, commented upon one telling aspect of Nantahala's unique posture as a public utility whose largest customer was its parent-aluminum producer:

> Corporations must operate on a profit motive basis. Not so with petitioner. Financed as it is, it can afford—indeed it proposes—to operate at an apparent loss. By so doing it can evade the payment of its fair portion of State and Federal taxes.

238 N.C. at 467, 78 S.E. 2d at 301 (Barnhill, J., concurring).

Beginning in 1960, Alcoa and TVA began re-negotiation of the operational terms of the Original Fontana Agreement which were due to expire at the end of 1962. At the same time, Nantahala and Duke Power Company ("Duke") were engaged in separate negotiations to sell the assets constituting Nantahala's distribution system to Duke, with Nantahala retaining its major generating facilities and transmission lines. The sale would have enabled Nantahala to abandon its North Carolina public service load and to sell all of its generation (or the entitlements therefrom) to Alcoa, just as Tapoco had done. The 1961 Nantahala-Duke sale proposal received initial approval by both the North Carolina Utilities Commission and the Superior Court prior to the negotiation of the final provisions of the NFA in 1962. *See Utilities Commission v. Membership Corp.*, 260 N.C. 59, 131 S.E. 2d 865.

The New Fontana Agreement ("NFA"), dated 27 December 1962, modified and partially superseded the OFA. In essence, however, the NFA contained the same mechanics of power coordination and exchange as the original Fontana Agreement, except that the amount of power TVA was to make available to the Alcoa system under the NFA was fixed in advance by the agreement without regard to water conditions, rather than being calculated on the basis of amount actually generated by the Alcoa system's plants. As it did under the OFA, Alcoa again warranted that it was backing up or securing the performance of its subsidiaries in carrying out the coordination and exchange agreements with TVA.

In contrast to the OFA, which was negotiated and executed by Alcoa and TVA alone, Nantahala and Tapoco were signatory

parties to the NFA, although Nantahala was not a participant in the negotiations. Nantahala's failure to participate is not surprising in view of the Company's pending attempt to sell its distribution system to Duke, and so divest itself of its North Carolina public load. Later in 1963, this Court reversed the Commission's approval of the sale and ordered the case remanded for further consideration because the Commission had failed to make findings of fact with respect to essential aspects of the case and applied too lenient a standard for approval of abandonment of a public service franchise. *Utilities Commission v. Membership Corp.*, 260 N.C. at 68-69, 131 S.E. 2d at 871-72. The Court's discussion of Nantahala's stated reasons for abandoning its public load indicates the company's awareness that its generating capacity would be insufficient to meet its anticipated future requirements. In the wake of the decision, the attempt to sell Nantahala's distribution system to Duke was abandoned.

Under the NFA (still in effect during the test year 1975), TVA dispatched the operations of Tapoco's four plants and eight of Nantahala's largest plants, and received all of the electrical output of these plants. In return, the NFA provided that Nantahala and Tapoco together would receive an annual average of 218,300 kw, part of which was subject to some curtailment and interruption, to be divided between the companies as they saw fit.

The NFA also provided that it was to remain in effect for twenty years—until the end of December 1982. When the agreement took effect in January 1963 it was not on file with the FPC as a tariff or rate schedule and therefore was not examined at its inception for its lawfulness. *See* 30 F.E.R.C. ¶ 63,050 at p. 65,276. It was not until 1966 that the NFA was filed with the FPC as a tariff or rate schedule under Part II of the Federal Power Act, in response to that agency's request that the companies do so. Both Tapoco and Nantahala (concurring in Tapoco's filing) stated that the filing was "under protest"—that is, undertaken subject to the right to contest the FPC's authority to regulate the operations under the NFA. Moreover, its terms were not formally scrutinized by the federal authorities until after three of Nantahala's wholesale customers filed a complaint raising the matter in 1978. *See Nantahala Power and Light Co. v. FERC*, 727 F. 2d 1342 (4th Cir. 1984).

The NFA, like the OFA, failed to specify how the power made available to the Alcoa system by TVA was to be divided among the members of the system. On the same day that the NFA became effective, 1 January 1963, Alcoa and Nantahala entered into a subordinate allocation agreement establishing Nantahala's share of the return power entitlements.

The 1963 Alcoa-Nantahala Apportionment Agreement provided that Nantahala was to receive, as its share of NFA entitlements each month, a variable of the larger of one-twelfth of its annual primary energy capability of 360 million kwh or its actual generation. A 1960 Ebasco Study, undertaken for Nantahala by independent experts, had established the average annual generation of Nantahala's plants subject to the NFA at 424 million kwh annually. Thus, under the 1963 Agreement, Nantahala was guaranteed its primary generation and was to benefit from additional generation. Moreover, the agreement provided that Alcoa was to pay Nantahala the sum of $89,200 annually as compensation for allowing TVA to operate Nantahala's projects. Significantly, the 1963 Agreement fixed no capacity or demand limitation upon Nantahala's use of the energy returned. However, unlike the 1954 Alcoa-Nantahala contract which was subordinate to the OFA, the 1963 contract did not impose an obligation upon Alcoa to satisfy any deficiency when Nantahala did not have sufficient power to meet its public load. It appears that the 1963 allocation agreement was never filed with the FPC. *See* 30 F.E.R.C. ¶ 63,050 at p. 65,277; *Nantahala Power and Light Co., Initial Decision*, 15 F.E.R.C. ¶ 63,014, at p. 65,035 (1981).

Between 1963 and 1971 the North Carolina public load, although growing, still remained below Nantahala's primary generation and Nantahala did not need all of its entitlements of 360 million kwh; Alcoa utilized the remainder under its separate agreement with Nantahala. However, by 1971, Nantahala's public load had grown to the point where the utility no longer had excess energy under the NFA to sell to its parent Alcoa. Moreover, by 1971, Nantahala recognized the need to obtain a supplemental source of power to meet the anticipated needs of its public service load in North Carolina. TVA, to whom Nantahala was already interconnected, was chosen as the source of this supplemental power; however, TVA required a formal agreement between Nantahala and Tapoco apportioning their NFA entitlements before it

would negotiate a supplemental power contract with Nantahala. Accordingly, in 1971 Alcoa conducted an apportionment study to measure the energy and capacity contributions of Nantahala and Tapoco. Pursuant to the study made by Alcoa's power consultant, George Popovich, Nantahala executed an apportionment agreement with Tapoco and then entered into an additional purchase contract with TVA.

The 1971 Nantahala-Tapoco Apportionment Agreement (the "1971 Apportionment Agreement") called for Nantahala to fix a limitation on its share of energy from TVA at 360 million kwh annually (i.e., only its primary energy capability). Tapoco was to receive the remainder of the power made available by TVA under the NFA. The 1971 Agreement contained no provision for Nantahala to receive the $89,200 previously provided for under the 1963 Alcoa-Nantahala allocation agreement in compensation for Nantahala allowing TVA to control its facilities.

Simultaneously with the execution of this 1971 Apportionment Agreement, Nantahala entered into a contract with TVA to purchase additional power from that agency. By this agreement, in addition to paying TVA's charge for all energy consumed in excess of 360 million kwh per year, Nantahala was required to pay a charge for the demand of its system above 54,300 kw at any instant. This latter figure represents the capacity limitation assigned to Nantahala under the 1971 Apportionment Agreement with Tapoco.

The 1971 Apportionment Agreement was not filed with the FPC as a tariff or rate schedule for almost ten years, until 1980. *See* 30 F.E.R.C. ¶ 65,030 at p. 65,277; 15 F.E.R.C. ¶ 63,014 at p. 65,035. As had been true of the NFA itself, at the time the agreement became operational, and for the bulk of its life, its terms were not scrutinized by the federal authorities for their lawfulness.[10]

10. We find it noteworthy, as did the Administrative Law Judge in the most recent Nantahala case before the F.E.R.C., that 1982 marked the first time in the forty years since the Alcoa-TVA coordination and exchange agreements had begun, that the Alcoa system had given notice to the F.E.R.C. that it was planning to terminate one of these agreements as well as a separate contract between members of the system and seeking approval in advance for the new agreements which were to supersede the expiring contracts. 30 F.E.R.C. ¶ 63,050, at p. 65,280.

Since the inception of the 1971 Apportionment Agreement, Nantahala has not had available to it for sale, through its portion of return power entitlements, enough electricity to meet its North Carolina public service load. During the 1975 test year, Nantahala generated about 560 million kwh. Despite the fact that its public service load was only slightly in excess of 450 million kwh, Nantahala was constrained to purchase an additional 81,265,370 kwh of electricity from TVA at a cost of $1,500,000, due to the allocational limitations of the NFA and 1971 Apportionment Agreement. 1971 also marked the final year in which Alcoa purchased power from Nantahala, looking instead to Tapoco and TVA to fulfill its energy requirements.

The intervenor's evidence shows that subsequent to that time, Nantahala could have used on its system all of the capabilities it contributed to the TVA system under the NFA and failed to receive back in entitlements of comparable worth. The quantity of power Nantahala purchases from TVA is determined by the magnitude of the shortfall resulting when the hour-by-hour load on the Nantahala system exceeds the level of TVA return entitlements set under the NFA and apportioned to Nantahala under the 1971 Apportionment Agreement. Since 1971, when the annual level of Nantahala's load first exceeded its entitlements, the purchased power costs have become a major operating expense for Nantahala.[11] Thus, Nantahala's contractual arrangements with its affiliates and TVA have dramatically influenced Nantahala's costs in providing service to its public load.

C.

There is apparently no dispute between the parties as to the Commission's authority to implement a roll-in of Nantahala's and Tapoco's properties and financial data for rate making purposes without regard to the separate corporate entities of these utilities, once it has properly determined that these corporate affiliates in fact constitute a single, unified "utility enterprise" or system. The propriety of the separation or rolling-in of properties

11. The "fuel" for Nantahala's hydroelectric generating units is water with no fuel cost. The fuel used by TVA to produce the power it sells to Nantahala is a mix of relatively costly nuclear and fossil fuel. TVA's generation mix contains only a modest increment of hydroelectric generation.

of affiliated corporations for rate making purposes, being merely a step in the determination of costs properly allocable to the various classes of service rendered by a utility, is widely recognized as dependent upon the particular characteristics of the system or systems in question, and upon the facts and circumstances of each case. *See, e.g., Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 89 L.Ed. 1206 (1944); *Central Kansas Power Co. v. State Corporation Commission*, 221 Kan. 505, 561 P. 2d 779 (1977); *Georgia Power Co.*, 52 F.P.C. 1343 (1974). *See generally*, Annot., 16 A.L.R. 4th 454 (1982).

Moreover, as FERC itself has expressly recognized, "the question of whether to treat various entities as an integrated system for rate making purposes is not a purely factual question, but also rests on criteria which each rate making authority may deem relevant." *Nantahala Power and Light Co.*, Opinion No. 139-A, 20 F.E.R.C. ¶ 61,430, p. 61,869 (1982). Accordingly, in the parallel FERC wholesale rate case in which Nantahala's wholesale customers advocated the implementation of a roll-in, FERC, while adverting to the fact that the North Carolina Utilities Commission had, "based on a similar record, reached a different conclusion concerning rolled-in costing," *id.*, declined to order a roll-in for determining Nantahala's wholesale costs of service. The Fourth Circuit Court of Appeals, in affirming FERC's determination, stated that "[a] decision to order roll-in is essentially a matter of Commission discretion" which would not be overturned on appeal where supported by substantial evidence. *Nantahala Power and Light Co. v. FERC*, 727 F. 2d 1342, 1346 (1984).

[1] Therefore, it is clear that the North Carolina Utilities Commission has the authority, in the first instance, to determine for itself the relevant criteria to apply to the factual question of whether to treat Nantahala and Tapoco as an integrated system for rate making purposes and its determination will not be disturbed on appeal where supported by substantial evidence. The companies do not contend that the Commission decision is unsupported by substantial evidence; they merely argue that the Commission *ignored* evidence[12] tending to show that Nantahala and Tapoco are separate electric utility companies.

12. We will address this point more fully in Part II, D *infra*.

The Commission's decision of whether to implement a roll-in is based upon a factual predicate consisting of three basic propositions: (1) Tapoco is a North Carolina public utility, subject to the Commission's rate making authority; (2) Nantahala's and Tapoco's hydroelectric facilities constitute a unified, single system, operating under conditions rendering a roll-in appropriate; and (3) Alcoa is a statutory North Carolina public utility, subject to the imposition of a refund obligation in the exercise of the Commission's general rate making jurisdiction. In the record before us, we find plenary evidence in support of the Commission's determination that Nantahala and Tapoco constitute a single, integrated electric system and should be treated as such for the purposes of calculating Nantahala's retail rate base and costs of service.

Upon remand, the Commission held a separate *de novo* hearing on the question of its jurisdiction with respect to Tapoco and Alcoa. Based upon the testimony and exhibits presented at the *de novo* hearing and matters judicially noticed, the Commission, in an order entered 3 October 1980, found and concluded that both Tapoco and Alcoa were subject to its regulatory authority under Chapter 62 of the North Carolina General Statutes.

1.

[2] With respect to Tapoco, the Commission made certain findings of fact regarding its development and acquisition of hydroelectric facilities clothed with public service obligations in North Carolina, most notably, the facilities at Santeetlah and Cheoah. Specifically, the Commission found that Tapoco is a domesticated North Carolina corporation organized to produce and sell electricity; that Tapoco's articles of incorporation provide that one of its purposes is to provide power to the public and those articles authorize Tapoco to exercise the power of eminent domain; that Tapoco has a North Carolina certificate of convenience and necessity to operate the Cheoah and Santeetlah facilities, obtained when it purchased these facilities and certain transmission lines (owned by Nantahala) from its public utility affiliates, Carolina Aluminum Company and Nantahala; that this certificate is subject to the condition that Tapoco provide Nantahala with the power needed to serve the Villages of Tapoco and Santeetlah; that Tapoco's certificate of convenience and necessity

is still active, Tapoco never having petitioned to have its certificate abandoned; that Tapoco has the responsibility to make available a tap point on its station service transformer at the Cheoah power house for Nantahala's use in providing electricity for serving its customers in the Village of Tapoco; and that Nantahala is presently providing service to the Village of Tapoco and charging its customers there for the electricity provided on the basis of rates approved by the Commission. The Commission also made findings with respect to the electricity Tapoco delivers to TVA and Alcoa by virtue of the various intra- and intercorporate agreements discussed above.

The Commission then based its conclusion that Tapoco is a public utility in North Carolina and subject to its jurisdiction on three grounds:

1. It is a public utility within the meaning of G.S. § 62-3 (23)a.[13]

2. It is a public utility for rate-making purposes within the meaning of G.S. 62-3(23)b.[14]

3. It is a public utility by virtue of having obtained a certificate of public convenience and necessity some twenty-

13. N.C.G.S. § 62-3(23)a provides in pertinent part as follows:

"(23) a. 'Public utility' means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for:

"1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; . . . ."

14. N.C.G.S. § 62-3(23)b provides:

"(23) b. The term 'public utility' shall for rate making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation."

N.C.G.S. § 62-3(21) provides:

" 'Person' means a corporation, individual, co-partnership, company, association, or any combination of individuals or organizations doing business as a unit, and includes any trustee, receiver, assignee, lessee, or personal representative thereof."

five years ago, and having operated under that certificate since that time.[15]

Although Tapoco assigned error to the Commission's finding that it is a North Carolina public utility and argued in its brief to the Court of Appeals that the portions of the Commission's order which declare Tapoco to be a "public utility" under North Carolina law should be vacated and reversed, in its new brief to this Court, Tapoco does not challenge the Court of Appeals' affirmation of the Commission's determination that Tapoco is a statutory public utility. Rather, Tapoco presents a single and somewhat confused argument that the Commission "abused its regulatory authority by asserting jurisdiction over Tapoco when it did not and could not regulate Tapoco's rates and service."

Tapoco first argues to this Court, as it did to the Court of Appeals, that the Commission could not "divert" power from the Tennessee industrial load (Alcoa) served by Tapoco's four hydroelectric projects because these projects were licensed by FERC in 1955 to serve that load *exclusively* and the Commission is without authority to impose a state law limitation on the terms and conditions of Tapoco's federal license. Tapoco relies on *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 90 L.Ed. 1143, *reh'g denied*, 328 U.S. 879, 90 L.Ed. 1647 (1946) and *Town of Springfield v. Vermont Environmental Board*, 521 F. Supp. 243 (D. Vt. 1981) to support its "diversion" argument.

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15. N.C.G.S. § 62-110 provides:

"No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business."

In *Utilities Commission v. Telegraph Co.*, 267 N.C. 257, 148 S.E. 2d 100 (1966), we observed that it would be both arbitrary and in excess of the statutory authority of the Commission to grant a certificate of public convenience and necessity to conduct a business which is not a public utility. None of the respondent companies contends that the Commission acted in excess of its statutory authority in granting Tapoco its certificate of convenience and necessity in 1955.

The other portion of Tapoco's argument to this Court, however, was not presented to either the Commission or the Court of Appeals and was not made the basis of Tapoco's assignments of error. That argument, presented now for the first time in this appeal, is that Tapoco has been "misjoined" and should be dismissed as a party to this proceeding because the Commission *did not* grant relief with regard to Tapoco's rates in the Sub 29 (Remanded) proceeding. Accordingly, Tapoco now contends that it was "misjoined" as a party respondent and that under Rule 21 of the North Carolina Rules of Civil Procedure it should be "dismissed forthwith from the instant proceeding," and be awarded the costs of this appeal.

[3] We first note that pursuant to Rule 16(a) of the North Carolina Rules of Appellate Procedure, the scope of our review from a unanimous decision of the Court of Appeals is limited to consideration of the questions properly presented in the new briefs required by Rule 14(d)(1) and 15(g)(2) to be filed in this Court. Rule 16(a) further provides that 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 has properly presented for review to the Court of Appeals. However, questions properly presented for review in the Court of Appeals but *not* presented and discussed in the new briefs to this Court are deemed abandoned under Rule 28(a). Therefore, Tapoco is deemed to have abandoned and waived further review of the question of its public utility status under North Carolina Law.[16]

A corollary to the rule that this Court's scope of review is limited to questions properly presented to the Court of Appeals is the rule that a party may not present for the first time in its brief to this Court, a question raising issues of law not set out in the assignments of error contained in the record on appeal. App. R. 10. Consequently, the question of "misjoinder" under Rule 21 of the Rules of Civil Procedure, appearing as it has for the first time in Tapoco's new brief filed in this Court, has not been prop-

16. We have, however, under Rule 2 of the Rules of Appellate Procedure, reviewed the Commission's findings and conclusions in the course of our review of the questions properly preserved, find them to be supported by substantial evidence and affirm the Commission's determination as to Tapoco's public utility status on each of the three grounds specified in its orders entered in the Sub 29 (Remanded) proceedings.

erly presented for review and we need not address it in the course of our discussion.

[4] The only questions that Tapoco has correctly preserved for further review are, therefore, whether the Commission is preempted from implementing a roll-in methodology for setting Nantahala's retail rates by virtue of the fact that Tapoco's four hydroelectric plants are under federal license and whether the Commission's order places an indirect burden on interstate commerce by diverting the economic benefits of Tapoco's inexpensive hydroelectric power from its Tennessee industrial customer, Alcoa, to Nantahala's North Carolina public service customers. Inasmuch as Tapoco has merely joined in the brief of Alcoa on the latter point, we will discuss the Commerce Clause issues adverted to by Tapoco in the section of this opinion addressing Alcoa's constitutional argument. With respect to Tapoco's licensing argument, we have little trouble in concluding that the Commission's order has in no way contravened the terms and conditions of Tapoco's federal license.

Under Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823a, the Federal Power Commission (and now the FERC) has exclusive jurisdiction to license the construction and operation of hydroelectric projects on navigable rivers within the United States, and to fix the terms and conditions of any such license. Tapoco's argument that the issuance of its 1955 federal license to construct and operate the four plants of the "Tallassee Project" preempts the Commission from implementing a roll-in is based upon Tapoco's assertion that the plants were licensed by the FPC for "the express purpose of supplying power to Alcoa's Tennessee Operations." We find nothing in the licensing order to indicate that the FPC intended to reserve all of the hydroelectric production from (or economic benefit of) the four Tapoco dams for Alcoa's exclusive use. In its brief, Tapoco places great reliance upon the underscored language contained in a portion of the 1955 licensing order:

> [T]he energy being developed by the constructed developments of the project and the energy to be developed by the proposed development is and will continue to be delivered to the Tennessee Valley Authority, which in turn delivers an equivalent amount of energy to the Aluminum Company of

> America at Alcoa, Tennessee. . . . All the energy is used for aluminum production except for a small portion used for lighting in operators' villages. . . .
>
> * * *
>
> [T]he project is best adapted to a comprehensive plan for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes.

Deleted from the quoted portion of the licensing order, however, is the revealing opening phrase: "According to the joint application . . . ." It is therefore obvious that the language relied upon by Tapoco, rather than constituting an edict by the FPC that all of the energy produced by the developments comprising the "Tallassee Project," now solely owned by Tapoco, be dedicated to the permanent and exclusive use of Alcoa's private industrial operations, merely contains a restatement by the FPC of the assertions made by Tapoco and Carolina Aluminum Company in their joint licensing application. The order itself contains no express or implied directive from the FPC that the energy produced by these hydro projects be reserved for the sole and exclusive use of Alcoa in its Tennessee aluminum plants, either in the section containing FPC's findings of fact or in its decretal paragraphs.

Moreover, 16 U.S.C. § 802(b) requires that, prior to the issuance of a hydroelectric license, a licensee must submit evidence of compliance with state law "with respect to the right to engage in the business of developing, transmitting, and distributing power. . . ." *Cf.* N.C.G.S. § 62-3(23)a(1). At the time of application, on 25 October 1954, Carolina Aluminum was a North Carolina public utility carrying a public service load in this state and Tapoco was a Tennessee public utility carrying a public service load in that state. On 23 February 1955, before the license was granted by the FPC, Tapoco, which had earlier domesticated in North Carolina, was issued a certificate of convenience and necessity by the North Carolina Utilities Commission to own and operate the Santeetlah and Cheoah facilities. That certificate expressly noted that Tapoco had an obligation to serve the public with electric energy from the projects. When the federal license was issued, it also noted that Tapoco had an obligation to serve the public with electric energy from the projects.

In the 1955 licensing order, the FPC found as a fact that Tapoco and Carolina Aluminum each had submitted satisfactory evidence of compliance with the requirements of all applicable laws for its respective state insofar as necessary to effect the purposes of a joint license for the project, to the extent of the ownership and operation of the project by each applicant. The evidence submitted by joint applicant Carolina Aluminum included its compliance with North Carolina requirements. When, shortly thereafter, the FPC authorized transfer of Cheoah and Santeetlah from Carolina Aluminum and to Tapoco only, it noted that Tapoco had "submitted evidence of compliance with the requirements of all applicable state laws of Tennessee and North Carolina. . . ." 14 F.P.C. at 828.

On the basis of the foregoing, in its final order filed 28 January 1982 the Commission concluded, and we agree, that "[t]o the extent that the federal licenses for Tapoco's dams speak toward dedication of the electric energy, such dedication would of necessity include the using and consuming public of North Carolina." We therefore reject Tapoco's argument as to the preemptive effect of the federal license on the Commission's authority to implement a roll-in methodology in determining Nantahala's retail rates.[17] In any event, as will be discussed *infra*, the roll-in itself does not effectuate a diversion of Tapoco's actual energy production to the North Carolina public load; it merely accomplishes for bookkeeping purposes what is an accomplished fact in the organization and operation of the two companies: the allocation of the combined costs of production for the unified Nantahala-Tapoco system as between the jurisdictional North Carolina retail public load and the nonjurisdictional Alcoa industrial load.

17. We note in passing that the Administrative Law Judge presiding over the latest Nantahala wholesale rate case came to the identical conclusion regarding the intent and effect of the 1955 FPC licensing order. 30 F.E.R.C. ¶ 63,050, at p. 65,290-91. After observing that the FPC had apparently been given insufficient information about the features and consequences of the Alcoa system's coordination and exchange agreements with TVA, and the fact that Nantahala's steadily increasing public load was also serviced under the Original Fontana Agreement, the ALJ concluded that under these circumstances, "with the licensing order silent on such critical points, there is no reasonable basis to conclude that the Commission [FPC] intended to reserve for Alcoa's use alone all of the Tapoco power." *Id.* at 65,291.

2.

[5] The Commission also made findings of fact, amply supported by the evidence of record, as to the existence of a single, unified hydroelectric generating and transmission system consisting of the combined facilities of Nantahala and Tapoco and wholly owned by Alcoa. The evidence in support of these findings may be summarized as follows:

Nantahala and Tapoco are both wholly owned subsidiaries of a single corporate parent, Alcoa. Nearly all of the facilities of Nantahala and Tapoco are situated on the Little Tennessee River and its tributaries. The two power companies are located in contiguous areas in western North Carolina, with portions of Tapoco's physical plant intruding into Nantahala's service area. The Nantahala and Tapoco electric facilities are physically interconnected with each other, with one generation and one distribution connection at Tapoco's Santeetlah facility; power can be dispatched and transmitted from the facilities of one to the facilities of the other. Standing between the two companies' Little Tennessee generation sites is the Fontana project; Nantahala's hydro developments are all located upstream of the Fontana dam, while Tapoco's are all downstream, thus poised to receive the downstream benefits of the Fontana project. Nantahala's eleven developments are smaller and relatively more expensive than Tapoco's four larger developments. The combined resources of the two provide relatively low-cost power and energy under the coordination and exchange agreements with TVA.

The Original and New Fontana Agreements treat the facilities of Nantahala and Tapoco without discrimination and make them an integrated part of, and subject them as a unit to coordination by TVA. By the terms of these agreements, TVA receives the output of all of the hydro resources of both Nantahala and Tapoco, except for three small plants of Nantahala. In addition, the agreements call for Tapoco and Nantahala to turn over to TVA control of production and stream flow. Accordingly, TVA determines for Tapoco and Nantahala, as a single entity, both electric generation and stream flow and operates them as an integrated system and a coordinate part of TVA's own system. In turn, Tapoco and Nantahala jointly receive back from TVA certain entitlements of power which they divide between themselves

by the 1971 Apportionment Agreement. Coordination was regarded as an efficient and economical method to maximize production of electricity from the various plants and to enhance the overall reliability of the pool of power available to the combined system. It is evident from the terms of the Fontana agreements that Alcoa and TVA intended the Fontana project, once it was completed, to be operated together with other TVA generating plants in coordination with certain plants of the combined Nantahala-Tapoco system.

The intervenors' expert engineering witness, David A. Springs, testified at the remanded hearings that it is a "false and arbitrary assumption that NP&L [Nantahala] and Tapoco operate as isolated systems when in fact they do not." When witness Springs was asked whether the Nantahala and Tapoco facilities should be operated as a separate and independent system, he replied: "No, by coordinating them as one with TVA, the outputs of the generating resources are maximized." Springs added that, from an engineering standpoint, the Nantahala and Tapoco facilities should be operated as one utility. With regard to the question of whether Nantahala was designed to operate as part of an integrated system as opposed to operating as a stand-alone company, Springs stated, "NP&L could not have been designed the way it was to ever operate as an isolated system."

Not only was Nantahala designed to operate as an integral part of a larger utility enterprise, but its projects were developed and put into service in accordance with Alcoa's aluminum production needs rather than scheduled in accordance with the size of its public load. The greater portion of Nantahala's capacity, the Glenville (Thorpe) and Nantahala projects, were added in the early 1940's before there was a significant public load in need of their output. Conversely, since the mid-1950's no significant capacity has been added to the Nantahala system, despite clear signs that its public load would place increasingly greater demands upon its facilities. This pattern of development reflects the increased electric power demands of Alcoa on the combined system during the Second World War and Korean War, and its generally decreased and levelized demand in the post-war period.

Springs also testified to the propriety of using a roll-in methodology in determining the appropriate rate base and allocation of

cost responsibility for the customers served by Nantahala's facilities. Springs' conclusion, adopted by the Commission, that a roll-in is mandated in the case of Nantahala and Tapoco, is based upon his analysis of actual company cost responsibilities under the current and historical operating and contractual conditions tying the Nantahala and Tapoco facilities into a single, unified electric system. As Springs explained, cost-of-service rate making is simply a function of rationally assigning to various classes of customers cost responsibility for the facilities available for and used in their service. In cases where facilities are jointly used by two or more groups of customers under circumstances where, for example, a stand-alone method of costing fails to identify appropriate customer loads or where actual customer cost responsibility is distorted by unreasonable power pool agreements a roll-in methodology is appropriate for rate making purposes.[18]

In the case of Nantahala, Springs testified that actual customer cost responsibility for the facilities available for that service cannot be accurately computed on the basis of the percentage of return power entitlements it receives from TVA separate and apart from the total pool of power available to Nantahala and Tapoco as a combined system, because these entitlements reflect neither the generating facilities actually available for Nantahala's retail service, nor the actual use of those generating facilities by those customers. As the intervenors' witness explained:

> A cost-of-service study, whether it be rolled-in or single company, is simply a means of assigning to customer groups the appropriate cost responsibility for the demands the customers place upon the resources of the utility . . . a rolled-in cost-of-service approach [is appropriate] for NP&L and Tapoco, because it is impossible to separate out the functional relationship between the generating resources operated by these companies and the load they each serve.
>
> In a normal utility operation, the ownership of generating resources by particular operating companies reflects the identification of resources to customer loads. In the normal course of development, a utility company will develop the resources in the geographic area, which the customers

18. *See, e.g., Georgia Power Co.*, 52 F.P.C. 1343.

> would look to in order to serve their loads. Usually, companies will integrate their resources into a combined system, such as the Southern Company system, and experts might legitimately disagree as to whether it is more appropriate to measure customer demands for service on an individual company basis or a system-wide basis. This is because system-wide needs and the needs of customers of individual companies both impact [sic] the development, planning and operation of power supply resources. *However, in the case of NP&L and Tapoco, I find no significant pattern of power supply development, planning or operation on any basis other than a combined basis.* (Emphasis added.)

In short, it is apparent that the evidence of record overwhelmingly supports the Commission's finding and conclusion that "the Nantahala and Tapoco electric facilities constitute a single, integrated electric system and are operated as such by, and as a coordinated part of, the TVA system," and its further conclusion that, "for purposes of setting Nantahala's rates in this proceeding, the Nantahala and Tapoco systems should be treated as one entity with respect to all matters affecting the determination of Nantahala's reasonable cost of service applicable to its North Carolina retail operations."

3.

[6] Finally, with respect to Alcoa's status as a North Carolina public utility, the Commission correctly noted that despite the fact that Alcoa would not be a statutory public utility under the definitions contained in N.C.G.S. § 62-3(23)a and (23)b, it is a public utility under the definition contained in N.C.G.S. § 62-3(23)c, which provides:

> The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

N.C.G.S. § 55-2(9), in turn, provides as follows:

> "Parent corporation" means a corporation which is a dominant shareholder, as herein defined. A corporation through

> which, by virtue of its shareholdings alone, a parent corporation has power to exercise the control which makes the latter a parent corporation is itself a parent corporation. A parent corporation with respect to which another corporation is a parent corporation is a "subsidiary corporation."

Finally, N.C.G.S. § 55-2(6) states:

> "Dominant shareholder" means a shareholder of a particular corporation, domestic or foreign, who by virtue of his shareholdings has legal power, either directly or indirectly or through another corporation or series of other corporations, domestic or foreign, to elect a majority of the directors of the said particular corporation.

Applying these statutory definitions to the respondent corporations, the Commission concluded that (1) Alcoa, as the owner of all of the outstanding stock of Nantahala, a North Carolina public utility as defined by N.C.G.S. § 62-3(23)a, is a parent corporation of Nantahala within the meaning of N.C.G.S. § 62-3(23)c, and is itself a public utility under that section, and (2) that Alcoa's affiliation with Nantahala has had an effect on Nantahala's rates, as evidenced by the terms and results of the New Fontana and 1971 Apportionment Agreements.

We have reviewed the record with regard to these matters and find that the evidence fully supports the Commission's determination that Alcoa is a North Carolina public utility under N.C.G.S. § 62-3(23)c, by virtue of the effect Alcoa's "affiliation" with Nantahala has had upon Nantahala's rates. The historical and current operating conditions tying Tapoco and Nantahala together clearly show that Nantahala is part of a single utility enterprise, created by Alcoa as part of a plan to secure for itself, through the separate corporate entities of its public utility subsidiaries, the large quantities of low-cost power it requires for its aluminum smelting and fabricating operations. Alcoa's unified development of the Little Tennessee River through its subsidiary power companies resulted in the assigning of the system's least expensive utility resources to its exclusive service, through Tapoco, while relegating the relatively expensive portion of those resources to the system's public service load through Nantahala. This development, in turn, has had an enormous impact on the rates Nantahala charged to its retail customers.

Indeed, nearly every major document charting Nantahala's development contains self-referential language describing Nantahala and (later) Tapoco's projects as parts of "the Alcoa power system," that is, the Alcoa power generating and distribution system. For example, in its 1940 application to the Department of War for a national defense certificate of necessity to build its largest hydroelectric facilities, Nantahala stated that the justification for its intended developments at Glenville (Thorpe), Nantahala and Fontana were the enormous electric needs of Alcoa. The application described "the system" which these developments were to be added to as follows:

> At the present time, Alcoa receives power from three dams located on tributary waters of the Tennessee River at Calderwood, Tennessee, and Tapoco, North Carolina (Cheoah and Santeetlah developments). . . .
>
> . . . The new developments will be upstream from the present developments. It is contemplated that they will store water during winter months, and will be used in the dry season to produce additional power and also to make available additional water for the developments downstream. The estimated total addition to *the Alcoa power system* is 51,500 k.w., part of which will be produced at the new developments and part from additional water released for use downstream.
>
> The Glenville project will have installed generating capacity of 21,500 k.w. and will add 17,500 k.w. to *the system.* This power will be used as soon as available for the Alcoa pot line scheduled for January 1941.
>
> The Nantahala project will have installed generating capacity of 42,200 k.w. and will add an estimated 34,000 k.w. *to the system.* It will be completed about August, 1942 and will thereafter supply power for one of two Alcoa pot lines planned for January, 1942. (Emphasis added.)

Similarly, both the Original and New Fontana Agreements, by which Alcoa caused its subsidiaries' hydroelectric facilities to be coordinated in operation with the TVA system, contain references to Alcoa as the "Company" and to the "Company plants" as facilities owned by Nantahala and Tapoco. Article III of the New Fontana Agreement, entitled "Operation of Company's Hydroelectric System," states in part:

1. Definitions

For purposes of this agreement, "Company's plants" or "Company's hydroelectric plants" shall mean the following hydroelectric generating plants (and associated diversion dams) which are owned by Nantahala and Tapoco.

* * *

[There follows a list of eight of Nantahala's plants and four of Tapoco's plants.]

The words "transmission facilities of Company," "Company's transmission facilities," and words of similar import shall mean the transmission facilities of Tapoco [and] Nantahala. . . .

In like manner, Article II of the New Fontana Agreement describes the division of rights, benefits and obligations under that contract in terms of a single, integrated system, with Alcoa ultimately guaranteeing the performance of all obligations of the system members thereunder.

Wherever this agreement provides an obligation or right on the part of Company to generate, sell, or transmit electric power and energy or an obligation or right on the part of Company to own or operate facilities for the generation, sale or transmission of electric power or energy, such obligation or right shall be performed and discharged or enjoyed as the case may be by Nantahala or Tapoco. However, Alcoa warrants and represents to TVA that it will secure the performance of all of the obligations of Company under this agreement.

Of course, Alcoa's involvement in the development, design and operation of the hydroelectric resources of Nantahala and Tapoco is by no means limited to the role of guarantor described above. Perhaps the most succinct and telling account of this role and its purpose is found in the historical study of "the Alcoa story," published in 1952, and entitled *Alcoa: An American Enterprise*. The book, written by Charles C. Carr, who was for many years Director of Public Relations for the company, is a self-professed objective account of Alcoa's history as gleaned from

Alcoa records and files.[19] In the chapter concerning "Water Power," the author explained that in the aluminum business, which requires vast amounts of electricity to produce the metal, electricity is a commodity; an essential part of the cost of every pound of metal along with labor, raw materials, capital investment and the wearing out of equipment.

As early as 1893, Alcoa selected water power as the one source of cheap electric energy best suited to aluminum production. Actuated by the search for low-cost hydroelectric power from its earliest days, Alcoa formed a number of water and power companies in various parts of this country and Canada. When these proved insufficient for Alcoa's growing needs, "Alcoa looked elsewhere for power and located it, about 1909, in the mountains of Tennessee-North Carolina." Carr, *Alcoa: An American Enterprise*, at 93. As Carr observed, "[t]he story of Alcoa's power projects in North Carolina would make a chapter by itself." *Id.* at 95.

> Spurred on by necessity, Mr. Davis and his associates started to acquire riparian properties along the Little Tennessee River and its tributaries in 1910. Studies and plans that contemplated the *unified development of the entire river and its tributaries above Chilhowee, Tennessee, were undertaken.* The assurance of adequate power from that swift-flowing mountain river and its tributaries, *to be developed as needed*, gave Mr. Davis the vision of what is today this country's largest aluminum plant, at Alcoa, Tennessee. On March 6, 1914, the first pot lines of an aluminum reduction works started operating at this location.
>
> The Tallassee Power Company in North Carolina was acquired in 1914 and operated under that name until 1931 when it was changed to the Carolina Aluminum Company. *The Nantahala Power & Light Company was organized as a public utility on July 23, 1929, to develop as needed the power sites which had been owned by the Carolina Aluminum Company*

19. *See* Carr, *Alcoa: An American Enterprise*, "A Note of Explanation," at v-vi (1952). Aluminum Company of America holds the copyright to this publication in its name and portions of the book relevant to this discussion are included as an exhibit in the record before the Commission and on appeal. The intervenors' witness David A. Springs refers to the book in his testimony and the Commission referred to the book in its order.

on the upper reaches of the Little Tennessee and its tributaries, the Nantahala and Tuckasegee Rivers.

The Nantahala Power & Light Company, a wholly-owned Alcoa subsidiary, is essentially a utility company serving many western North Carolina communities with electricity to light their homes and to run their motors for commercial, farm and household use. *Its long time President was the late J.E.S. Thorpe, an Alcoa veteran of thirty years' service and well-known utility operator in the Southeast. Mr. Thorpe, who had served as head of Nantahala Power & Light Company for twenty-one years at the time of his death in 1950, was recently honored in a lasting manner by the Directors of Alcoa. The name of a mountain power development, originally known as the Glenville project, was changed to the Thorpe Development.*

Although its first duty is to serve the communities in its territories, Nantahala Power & Light Company has in its domain such large hydro projects as Glenville and Nantahala, which augment the supply of power in the North Carolina mountains available for aluminum-making.

* * *

Harnessing the swift-flowing Little Tennessee and its tributaries in their rush through the Great Smokey Mountains is a saga in which many Alcoa veterans have played a part. . . . (Emphasis added.)

Id. at 93-95.

Finally the author discusses what he considers to be the unusual degree of cooperation achieved between "Government" (TVA) and "private industry" (Alcoa) in developing the "fountainhead of the power projects on the Little Tennessee," the Fontana project. According to Carr, Alcoa had purchased nearly all the necessary land in the Fontana basin for development purposes, had found it necessary to become a purchaser of TVA power to supplement its own sources and then, in 1941, "to the surprise of many people who could see 'no good in TVA,' *Alcoa gave to the Governmental authority, without monetary fee, its site at Fontana, where most of the necessary land had been acquired, parcel by parcel, over many years.*" *Id.* at 97. With this

grant, went roadway relocations and engineering data Alcoa had assembled for the construction of the great dam and power project at the Fontana, North Carolina site.

> In return, TVA agreed to build Fontana, the great storage reservoir which would regulate the flow of water at Alcoa's hydro projects and Cheoah and Calderwood, as well as at TVA's downstream projects. Alcoa was influenced in its decision by the Water Power Act of 1920 [predecessor to the Federal Power Act], which would have required the Company to obtain from the Federal Power Commission a license to build Fontana. This license would have given the Government the right to "recapture" the project after fifty years.
>
> *A second part of the Fontana agreement gave TVA the right to control the impounding and release of water to all of Alcoa's hydroelectric developments on the Little Tennessee and to use this generating capacity as an integral part of the TVA power system. In return for this, Alcoa received from TVA approximately the number of kilowatt hours generated at Alcoa plants during a calendar year, and in addition 11,000 KW of primary power without cost. The first part of the Alcoa-TVA agreement, wherein the Fontana project regulates the flow of water at Cheoah and Calderwood, is in perpetuity. The second part, recited in this paragraph, can be cancelled by either party on three years' notice after January 1, 1952.*
>
> * * *
>
> *This agreement made possible the integrated operation of the water powers of Alcoa and TVA, including the Fontana project.* Its result was the maximum production of electric energy from the available water power, not only on the Little Tennessee River but also throughout the entire Tennessee Valley, which is served by the great Tennessee River and all its tributaries. (Emphasis added.)

Id. at 97-99.

Although Nantahala and Tapoco were operating under the New Fontana Agreement and the 1971 Apportionment Agreement during the test year relevant to this proceeding, these agreements were negotiated in the context of the prior Fontana

and apportionment agreements and the operating conditions established thereby. As we have seen, under the OFA, Alcoa (Tapoco) received the benefit of downstream storage derived from TVA's construction of the Fontana project, with no further capital investment by Alcoa. TVA released *in perpetuity* its right to claim downstream benefits against Alcoa in exchange for the transfer of title to the Fontana site. Alcoa caused Nantahala, a public utility with the power of eminent domain, to transfer its title to the Fontana site and its rights to develop that project to TVA, despite the fact that Nantahala was not permitted to be a signatory party of the OFA. Nantahala was not positioned to receive any portion of the downstream storage benefits because it owns no facilities downstream of the Fontana Dam, while Tapoco, and through it Alcoa, was positioned to receive all the downstream benefits because all of Tapoco's projects are downstream of the Fontana site. In addition, Alcoa gave up to TVA a large portion of the dependable capacity from the hydro projects owned by Nantahala and Tapoco.

The New Fontana Agreement, essentially an amendment to the OFA, was signed at the end of 1962, after approximately two years of negotiations between TVA and Alcoa. The 1962 Agreement essentially expanded the coordination of the two systems by fixing the availability of capacity and energy returned from TVA without regard to stream flow conditions. However, in the bargain, dependable hydro capacity was traded away in exchange for improvements in the availability of energy for aluminum production. This produced a significant increase in the degree of availability of secondary energy to Alcoa. This energy, subject to prolonged periods of interruption, is unsuited to the needs of a public load, which requires peaking capacity to meet fluctuating customer demands. As it had done with the OFA, Alcoa, now through its employee George Popovich, represented its own interests and those of Tapoco and Nantahala in the negotiations with TVA over the NFA's terms and conditions. Nantahala itself had no direct participation in the negotiations. Significantly, the Alcoa negotiation paper, entitled "NOTES ON MEETING WITH TVA —MARCH 2, 1962," refers to the pending transfer case and rate case then before the Commission as the "Nantahala problems."

It is evident that prior to this Court's action in *Utilities Commission v. Membership Corp.*, 260 N.C. 59, 131 S.E. 2d 865, Alcoa

personnel had believed that the sale to Duke was to be approved. Thus, an Alcoa memorandum entitled "*RE: FONTANA AGREEMENT*" dated 23 August 1960, concludes as follows:

> *One final note, the entire TVA proposal is based upon the sale of the Nantahala Power Company.* TVA proposed that if the sale was not complete at the time this new proposed contract becomes effective, they would increase the power available to us under the purchase contract to whatever amount is necessary for us to handle the Nantahala loads. . . . This would be done on a temporary basis and would be reduced concurrent with the transfer of the Nantahala properties to Duke. (Emphasis added.)

The final Alcoa memorandum after completion of all negotiations for the NFA, dated 6 November 1962, reflects the continuing intention on the part of Alcoa to accomplish the transfer of Nantahala's distribution system and public service load to Duke. However, no revisions were thereafter made to the NFA or to the purchase and apportionment agreements subordinate to it to take into account the growing public load serviced by Nantahala. In addition, the Commission found that the NFA's structure rendered it necessary for Nantahala to enter into the subordinate 1963 Apportionment Agreement with Alcoa, five days after the signing of the NFA, in order to secure Nantahala's participation in the TVA return entitlements. This was done by means of a monetary supplement from Alcoa to Nantahala and a guarantee of a certain share of power entitlements from the TVA return.

The Commission concluded that the foregoing evidence clearly demonstrates that the NFA was tailored to meet Alcoa's aluminum production needs without consideration of Nantahala's public service needs and that this arrangement had a considerable impact on Nantahala's rates.

By the time the 1971 Apportionment Agreement was signed, the interconnected power supply structure had long been in place, and Nantahala found itself without sufficient power to service its public load, which had been growing at an annual rate of approximately 8.5 percent. Having added no additional generating capacity, since 1957, and having failed to enter into other power supply contracts tailored to its public load requirements, Nantahala found itself in the position of having to make supplemental pur-

chases of power from TVA and passing those additional costs along to its public customers in the form of increased rates.

Again, it was an Alcoa employee, George Popovich, who conducted the 1971 apportionment study and devised the apportionment formula that was incorporated into the 1971 Agreement between Tapoco and Nantahala. Moreover, during the course of the negotiations "between" Nantahala and Tapoco over the division of return power entitlements, Popovich apparently represented the interests of *both* Nantahala and Tapoco at the "bargaining table." When questioned as to his role, Popovich conceded that he wore "both their hats" during these negotiations adding merely that in view of Nantahala's public utility responsibilities, "I think my Nantahala hat was bigger than my Tapoco hat." At this point, we note only that in its examination of the results of these contractual arrangements upon Nantahala's retail costs of service, the Commission came to precisely the opposite conclusion.

The net effect of Alcoa's "affiliation" with Nantahala is evidenced by a pattern of operation of Nantahala's power supply resources under the various Fontana and apportionment agreements largely inconsistent with and ultimately detrimental to, its ability to render service at just and reasonable rates to its retail customers. Further, as the Commission itself concluded, "Nantahala was not designed as, and is not in reality, a separate utility system but, rather, is a part of an integrated Alcoa system with Tapoco."

Moreover, Alcoa's involvement in the development of Nantahala's and Tapoco's North Carolina hydro resources does not stop with these contractual arrangements. Rather, as this Court noted in *Edmisten*, Alcoa's role also extends to "the ultimate operating and accounting policies of both utilities. The chief executive officers of both Nantahala and Tapoco report directly to an Alcoa vice president. Members of the board of directors of both utilities are employees of Alcoa." 299 N.C. at 435, 263 S.E. 2d at 586. Indeed, Nantahala's president, William M. Jontz, had his original employment conversations with Alcoa officials in Pittsburgh, Pennsylvania. Although his employment as president of

Nantahala began on 1 June 1976, he did not meet with the Nantahala Board of Directors until the latter part of July 1976.[20]

Similarly, the president of Tapoco is a direct employee of Alcoa serving in the dual status of power manager of Alcoa's Tennessee operations and president of the utility company. His sole office is located at Alcoa's south main plant at Alcoa, Tennessee. Furthermore, Alcoa owns 100 percent of the capital stock of Nantahala and Tapoco. The assistant controller of Alcoa, Robert D. Buchanan, testified that he has the "general responsibility for the financial accounting for Alcoa and its subsidiaries, and as such ha[s] responsibility for the books and records and financial policies of Tapoco and Nantahala."

The foregoing evidence manifestly demonstrates the substantial and detrimental impact Alcoa's "affiliation" has had upon Nantahala's rates and service to its North Carolina public utility customers, and fully supports the Commission's conclusion that Alcoa is a North Carolina public utility under the provisions of N.C.G.S. § 62-3(23)c.

In summary, the evidence of record gathered at the remanded hearings before the Commission in this general rate case establishes beyond question three basic propositions: (1) Tapoco is a North Carolina public utility; (2) the hydroelectric facilities of Nantahala and Tapoco constitute a unified, single system, operating under conditions rendering a roll-in rate making methodology appropriate; and (3) Alcoa is a statutory North Carolina public utility to the extent that its affiliation with Nantahala has affected Nantahala's rates.

20. Significantly, Nantahala's employment contract with its president describes the "major general objectives" of such employment to include both the company's management *and* the development of plans "for the possible sale or other disposition" of Nantahala, said goals to be accomplished "so that there is little or no adverse impact on the operations and assets of Nantahala's parent company [Alcoa] and its subsidiaries in North Carolina, including, but not limited to, . . . Tapoco, Inc. and Yadkin, Inc. . . ." Under the section governing base salary, the contract provides for achievement awards based upon the president's performance with respect to these objectives, "To be determined annually by the three-member [Alcoa] group among the Board of Directors of Nantahala. . . ." Finally, under provisions entitled "Nondisclosure," the president is not to engage in any act which would, *inter alia*, tend to prejudice the business of "Nantahala *or* of Nantahala's parent company [Alcoa] and its subsidiaries . . . Tapoco, Inc. and Yadkin, Inc.

D.

The Commission, after finding that Nantahala and Tapoco are a single, integrated electric system, joined the assets, properties, plants and working capital requirements of both companies into a unified rate base, totaled joint revenues and operating expenses, and assigned the combined system the rate of return approved for Nantahala alone in the 1977 proceedings. From these elements, a combined system revenue requirement was derived. These aspects of the Commission's order are not challenged by the companies. However, the controversy between the intervenors and the companies over the proper cost allocation methodology to be used in apportioning the combined revenues, expenses and investment of the unified system between the retail customers in North Carolina and the non-jurisdictional Alcoa industrial load in Tennessee lies at the heart of this appeal.

Generally speaking, the allocation methodology proposed by the companies through their expert witness Herbert J. Vander Veen assigns customer cost by utilizing the entitlements of the New Fontana Agreement and the 1971 Apportionment Agreement; whereas the allocation methodology proposed by the intervenors through their expert witness David Springs, and adopted by the Commission, is grounded upon the assignment of cost responsibility to the public load and to Alcoa on the basis of which load actually used the capability available from the generating facilities of the combined system. The jurisdictional allocation factors utilized by the Commission are generally accepted factors commonly employed by the Commission in setting intrastate retail rates for other public utilities serving in more than one jurisdiction. The unique problem posed by this case lies in the fact that Nantahala's available power supply was contractually reshaped by the quantity and design of the entitlements returned by TVA under the NFA and allocated to Nantahala under the 1971 Apportionment Agreement. In effect, the companies treated Nantahala as part of a unified system when dealing with Nantahala's contribution to the pool of power turned over to TVA and with respect to TVA's dispatch of Nantahala's facilities, but not when determining Nantahala's share of the entitlements returned to the Alcoa system. Thus, Nantahala's share was computed *as if* Nantahala were a stand-alone company. In the process, Nantahala

received little or no value in return for certain contributions it made to the integrated system.

The Commission, in rejecting the companies' proposed allocation methodology, reasoned that it would be unjust to Nantahala's retail rate payers to allocate demand and energy related costs on the basis of TVA return entitlements because the terms of the NFA had been structured to meet Alcoa's industrial needs and not Nantahala's public service needs. Moreover, the combination of the NFA and the 1971 Apportionment Agreement forced Nantahala to purchase costly additional power irrespective of its production capacity. The companies argue that the Commission was constrained by the doctrine of federal preemption to utilize the NFA demand and energy entitlements in determining Nantahala's demand and energy related costs because the NFA and 1971 Apportionment Agreement are FERC-filed wholesale rate schedules, the reasonableness of which may not be reinvestigated by state public service commissions, and the economic results of which must be accepted in setting retail rates. Additionally, they argue that the manner in which the Commission allocated the rolled-in costs places an impermissible burden upon interstate commerce by affording North Carolina customers a "first call" on both the energy output of the combined system and the economic benefits of Tapoco's lower-cost production. A proper understanding of our conclusion in Part II, A and B, *infra*, that the Commission is neither preempted by the Federal Power Act and Supremacy Clause nor forbidden by the Commerce Clause of the United States Constitution from implementing the rolled-in rate making methodology developed in this case, necessitates a brief review of the Commission's findings with respect to the power supply agreements at issue.

Initially, it must be pointed out that the Commission's discussion of the NFA and 1971 Apportionment Agreement occurred in the context of addressing the impropriety of basing *cost allocations* on demand and energy entitlements as contained therein. The Commission was not concerned with the reasonableness of the power exchange agreements and associated system costs *per se*, but with the question of which load should be held responsible for which portion of these costs in its rates. Put another way, it is evident that the Commission's in-depth examination of the terms of these contracts was undertaken as part of its process in choos-

ing between the competing jurisdictional cost allocation methodologies presented by the parties and not in an effort to either reform the contracts or to alter the actual flow of return power thereunder.

In some twenty pages of its rate reduction order, the Commission exposed and "fleshed out" the extensive network of detriments and inequities to Nantahala and its customers embedded in the terms of the NFA and 1971 Apportionment Agreement. In essence, the Commission found that a disproportionate amount of the capacity and energy resources of the combined Nantahala-Tapoco system, perfectly usable by the load characteristics of the Nantahala public load, were traded away to reform the TVA return entitlements to fit the needs and characteristics of an aluminum smelting and fabrication operation. Because Nantahala is structured, operated and treated as an integral unit of the combined system, rather than as a stand-alone company, the detriments it incurs under the integrated system's power supply contracts result in concealed benefits flowing to Tapoco, and ultimately to its parent and customer, Alcoa. While "costs" charged to the combined system under these contracts might be considered objectively fair and reasonable from the wholesale perspective, the public customers of Nantahala were found to have fared badly when that utility was artificially separated out of the unified system for allocation purposes, and then forced to bear the added responsibility for costs of purchased power from TVA.

The Commission found a number of specific inequities in terms of cost responsibility to Nantahala and concealed benefits to Alcoa arising out of both the NFA and 1971 Apportionment Agreement, and divided its treatment of these agreements into separate discussions. Another portion of the order analyzes the manner in which the companies employed the data contained in the agreements in developing their cost allocation methodology. Finally, the order discusses the mechanics of the allocation adopted by the Commission from the proposal of the intervenors and utilized in fixing Nantahala's rates. We will use the subject headings corresponding to those portions of the order in our summary of the discussion contained therein.

Concealed Benefits of the Apportionment Agreement

(1) Quantity of Nantahala's Production.

In 1962, Alcoa power consultant George Popovich determined that under the NFA, Nantahala should be apportioned annual energy entitlements guaranteed at minimum, to return to Nantahala an amount equivalent to its primary energy capability of 360 million kwh plus its actual production in excess of that amount, which was 79 million kwh of average energy; 66 million kwh when Nantahala's non-Fontana generation is taken out. Popovich's 1962 figures were derived from an independent engineering study made by Ebasco in 1960 for Nantahala, and accepted by Alcoa as the basis for Nantahala's entitlements under the 1963 Alcoa-Nantahala Apportionment Agreement. By that agreement, Nantahala received annually an average of 426 million kwh, of which 360 million kwh was guaranteed as a minimum. The 426 million kwh of return power was approximately the same amount as Nantahala contributed to TVA under the NFA. Yet despite these facts, when Popovich devised the 1971 Apportionment Agreement, Nantahala received only 360 million kwh annually. Thus, Nantahala was deprived of an average of 66 million kwh annually. The Commission concluded that this detriment to Nantahala constitutes a benefit to Tapoco that is passed on to Alcoa.

(2) Quantity of Nantahala's Peaking Capacity.

The 1960 Ebasco Study computed Nantahala's plant capacity, under the most adverse water conditions, at 85,400 kw. After deducting the three small plants excluded from the NFA, that capacity is 84,300 kw. Alcoa's acceptance of these computations is reflected in a number of internal documents cited by the Commission in its order. As was true of the energy entitlements, this study formed the basis of Nantahala's capacity entitlements in the 1963 Alcoa-Nantahala Agreement. Under it, Nantahala was permitted to use capacity without a pre-set limitation. Therefore, Nantahala was able to use actual capacity to the limits assigned by the 1960 Ebasco Study in meeting its customer demands. However, when Popovich conducted his study for the 1971 Apportionment Agreement, while accepting the most adverse water (*dependable*) capacity factor of 84,300 kw, he deducted 27,500 kw for the "largest unit out" to reach an *assigned* capacity of 54,300

kw. This deduction is for the Nantahala facility which forms upwards of 50 percent of the entire Nantahala generation system of 11 dams. Thus, under the 1971 Apportionment Agreement, Nantahala was assigned a peaking capacity of 54,300 kw. The result of this limitation is that any time Nantahala has to provide a customer demand in excess of 54,300 kw, it must pay a monthly demand charge to TVA for all power over that limitation. If the limitation were set at Nantahala's capacity level determined by the "loss of load probability" method, the monthly demand charge would be only the amount between 81,800 kw and the excess customer demand over and above that amount. The Commission concluded that demand costs thereby imposed on Nantahala for use of capacity between its assigned capacity of 54,300 kw and its actual capacity of 81,800 kw, would represent an expense to Nantahala and thus a savings to "its New Fontana Agreement sister, Tapoco," since the capacity constraints for the TVA return entitlements are jointly shared by them under the NFA.

The difference in amount between the capacity assigned to Nantahala under the 1971 Apportionment Agreement and what the Commission has determined its assured capacity to be results from the different methodologies employed by the companies and the intervenors in determining Nantahala's assured capacity. The intervenors' witness Springs testified that the proper reserve margin for Nantahala should be the margin used by TVA, which is "the loss of load probability" method. Use of this method would recognize that Nantahala is operated as part of the coordinated Alcoa-TVA system rather than as a stand-alone utility, and would result in a reserve requirement of about 3 percent. Using a 3 percent reserve in place of the "largest unit out" reserve, which, in this case is upwards of 50 percent, would establish a capacity under the most adverse water conditions of 81,800 kw as opposed to Popovich's calculation of 54,300 kw.

The Commission concluded that significant cost is shifted to Nantahala by the unfair and unwarranted limitation of its capacity to 54,300 kw; conversely, that expense, in the form of demand charges paid to TVA, is a concealed benefit to Alcoa. The basis for the Commission's conclusion that the capacity limitation assigned to Nantahala under the 1971 Apportionment Agreement was unwarranted lies in the Commission's rejection of the "larg-

est unit out" adjustment to actual capacity for reserves in computing Nantahala's assured capacity. The order states as follows:

> *If* Nantahala were a separate and independent system, a deduction of the "largest unit out" might be appropriate to determine assured capacity. *However, Nantahala is not and never has been a separate electric system—it was not so designed.* Nantahala's two largest facilities are Thorpe (previously Glenville), . . . and Nantahala, ... The Thorpe and Nantahala facilities comprise about 65% of Nantahala's entire system. At the time of their construction, *Alcoa obtained a certificate of necessity from the War Department and expressly argued and avowed that they were part of the Alcoa system.* . . .
>
> *Furthermore, for the past 40 years, both Nantahala and Tapoco have been operated as an integral part of the TVA electric system pursuant to the provisions of the Fontana and New Fontana Agreements. Moreover, when Alcoa negotiated these agreements with TVA, it did not bargain for return power from TVA as if Nantahala was an independent power system but rather the attributes of the Alcoa system were melded together, with the TVA system for evaluation purposes.* . . .
>
> *With Nantahala and Tapoco being thus integrated into and coordinated with the TVA system, it is not appropriate to determine Nantahala's assured capacity by configuring Nantahala as a single independent and isolated system and to use the "largest unit out" methodology.* Instead, Nantahala should be treated as part of the TVA system and the reserve margin used by TVA should be applied. TVA does not use a reserve of "largest unit out" but rather uses "the loss of load probability method." (Emphasis added.)

(3) Nantahala's Upstream Benefits.

Nantahala's projects are upstream of Tapoco's projects, with the exception of Santeetlah. As a consequence, water that is stored by Nantahala can be released to flow downstream and be used by Tapoco for production of electricity. Therefore, Nantahala's storage has a value to Tapoco which is undiminished by the fact that TVA's Fontana Project now lies between Nantahala

and Tapoco. A 1956 TVA study estimated the upstream storage benefits of the two major Nantahala projects to be a continuous relative contribution of 4,300 kw to Tapoco's downstream Calderwood and Cheoah projects. This is an equivalent of 37,668,000 kwh annually as an upstream benefit from Nantahala to Tapoco. However, under the 1971 Apportionment Agreement, Nantahala received no credit for this benefit to Tapoco, which was in turn passed on to Alcoa.

(4) Nantahala's Entitlement for Operating Its Properties in Accordance with the Fontana Agreement.

By the 1941 Fontana Agreement, Nantahala, at the instance of Alcoa, gave to TVA the right, *in perpetuity*, to control the storage and flow of water from its several hydroelectric projects. The Commission found that Nantahala's giving up of rights unquestionably constituted a loss of considerable value for which Nantahala was entitled to compensation. With the 1963 Alcoa-Nantahala Apportionment Agreement, Alcoa agreed to continue to pay to Nantahala monies for Nantahala's loss of those operational rights. Moreover, the agreement clearly showed that TVA was continuing to pay value for those rights, which value is reflected in the TVA return entitlement of the New Fontana Agreement. This fact was also reflected in the Commission's own earlier findings with respect to the TVA return entitlement in the year 1963 in Docket No. E-13, Sub 13. Yet despite the fact that the NFA includes in the TVA return entitlement a reimbursement by TVA for the right to operate Nantahala's projects, for which Alcoa previously paid $89,200 annually to Nantahala, no credit was given to Nantahala for that entitlement under the 1971 Apportionment Agreement. In other words, Nantahala receives neither an energy credit nor a monetary payment for the right given up. The Commission concluded that since the TVA payment for the operational rights, which is paid with energy in the NFA rate entitlement, did not go to Nantahala, it inured to the benefit of Tapoco, which in turn passed this benefit to Alcoa.

(5) Nantahala's Value to the TVA Interconnected System.

The Commission found that another failure of the 1971 Apportionment Agreement regarding Nantahala's participation is that the Popovich apportionment formula does not consider the

proper value to TVA of the fact that Nantahala, Tapoco and the TVA systems are interconnected.

> Interconnection is of considerable value to TVA completely aside from the fact that Nantahala's rate base includes in it certain assets devoted to the interconnection, which assets are entitled to earn a rate of return. Because Nantahala is not an isolated system, it should be receiving the usual benefits that accrue from coordinated operation. Yet, Nantahala does not receive the usual benefits of an interconnected and coordinated system.

Relying on Alcoa documents reflecting the path of its negotiations with TVA over the New Fontana Agreement, the Commission found that the integrated systems factor was recognized by Alcoa to be of great value to TVA, a recognition that Alcoa was able to capitalize on later in arriving at the final terms of the agreement. As indicated, some of the values of integration are the need for smaller reserves and the fact that TVA actually controls production of generation and storage waters. However, one of the larger benefits is the value in integration of Nantahala's projects that are upstream of TVA's Fontana Project. The Commission noted that in an integrated system such value is maximized; Nantahala's projects contributed upstream benefits not only to Tapoco's downstream projects, but also to TVA's downstream Fontana Project. In fact, the entire TVA Tennessee River system receives the benefit of the storage of all of these projects located on the Little Tennessee River. This is especially so given TVA's control of all of the Nantahala and Tapoco reservoirs under the terms of the Fontana Agreement. Based upon the results of a TVA study of combined downstream storage benefits, the Commission determined that Nantahala's annual upstream benefit to TVA is 70,956,000 kwh.

However, when the NFA bargain was struck, the TVA and the Alcoa systems agreed to cancel out their respective upstream benefits. The Commission observed that since Nantahala provided benefits upstream to both Tapoco and TVA, and TVA provided benefits upstream to Tapoco, it was Tapoco that gained by the mutual cancellation, to the detriment to Nantahala of the value of 70,956,000 kwh annually. The Commission further concluded that Nantahala should have received back an equivalent amount of

energy under the 1971 Apportionment Agreement from Tapoco. Because Nantahala received no such benefit under the Popovich apportionment formula, the Commission concluded that to Tapoco's benefit, Nantahala was deprived of one value of the interconnection with the TVA system. This concealed benefit flowing from Nantahala to Tapoco is, of course, passed on by Tapoco to Alcoa.

In summarizing its discussion of the detriments to Nantahala from the 1971 Apportionment Agreement, the Commission totalled the annual kilowatt-hours which Nantahala contributed in average production to the system and for which no credit was received in return and determined that Nantahala was deprived of a total value of 200,224,000 kwh annually. In addition to which, Nantahala received no credit for its peaking capacity over the 54,300 kw which was assigned to it, as a result of which Nantahala must pay additional demand charges to TVA when monthly demand exceeds assigned capacity. After quoting a portion of this Court's opinion in *Edmisten* regarding the terms of the 1971 Apportionment Agreement, the Commission concluded:

> Now that considerably more of the various detriments to Nantahala have been exposed and fleshed out, it is apparent that the 1971 Apportionment Agreement works an extensive injustice on Nantahala and its public rate payers, the gravity of which far exceeds even that envisioned by the Supreme Court.

Concealed Benefits of the New Fontana Agreement

The Commission found the concealed benefits flowing from Nantahala to Alcoa by virtue of the NFA to be entirely different in nature from those which flow from Nantahala to Tapoco, and ultimately to Alcoa from the 1971 Apportionment Agreement. The basic inequity to Nantahala arising out of the NFA is that the energy entitlement returned to Nantahala and Tapoco from TVA is structured to meet Alcoa's demand for a certain amount of stable electricity for purposes of aluminum production rather than a demand for a public load. Consequently, the NFA returns to the system an average of 218,300 kw of energy at a high load factor with minimal peaking deviation, which is principally designed to service Alcoa's pot lines and other production electrical

requirements. Even the interruptible and curtailable energy entitlement returned to Nantahala-Tapoco is in increments of wattage that conform to the demands of a pot line so that, if power is interrupted or curtailed, Alcoa can respond by cutting out a particular pot line.

Nantahala, on the other hand, has a fluctuating demand for energy which has peaks and valleys. Its electrical requirement is for assured, but constantly variable amounts of energy. Nantahala needs peaking capacity and its generation projects possess peaking capacity, yet the NFA traded away that peaking capacity to TVA. The Commission agreed with the intervenors that the trade-off of Nantahala's own peaking capacity, at a time when Nantahala's load required such peaking capacity, thus forcing the utility to purchase capacity back at a higher price from TVA, was not the result of "enlightened, arm's-length bargaining" and that the detriment resulting to Nantahala from the design of the NFA entitlements flows to Alcoa as a benefit.

In fact, the intervenors' evidence demonstrated that Alcoa reaped enormous benefits through the trade in the improvement of the availability of Tapoco's secondary energy production *from* a level of 42 percent average curtailment *to* an average curtailment rate of only 8 percent. In addition, Tapoco's generation statistics reflect the benefits of coordination with the Fontana Project and other forms of integration with TVA. These figures are inconsistent with the isolated system model utilized as a basis for the 1971 Apportionment Study. Again, it was evident that the two operating subsidiaries were treated as a single system for purposes of bargaining with TVA over the value of their combined contribution to the TVA system, and were only separated out as if they were independent systems for the purposes of dividing the return entitlements between them.

The Commission noted that "Alcoa was in direct control of the [NFA] negotiations, and, unlike the Nantahala ratepayers, has had every ability to protect its own interests during the negotiations. Respondents cannot now be heard to claim that they are dissatisfied with the NFA so as to place the cost responsibility for the deficiencies of that agreement upon Nantahala's ratepayers." In explanation of the design of the NFA, the Commission observed that during the negotiation stage of the NFA, the par-

ties contemplated the sale of Nantahala's distribution system to Duke. The sale would have left Nantahala with its generation, but without a public service load, so that all of its NFA entitlements would be satisfactory for delivery to Alcoa irrespective of quantity and design; in no manner was the NFA structured to meet Nantahala's public service needs.

Next, in passing, the Commission rejected the remedy of regulatory reformation of the NFA to properly award to Nantahala its just entitlements as, of necessity, somewhat hypothetical at this stage of the case. Rather, for cost allocation purposes, the Commission concluded that the "roll-in technique avoids the need for complete identification of inequities and is nicely suited as a proper alternative to reformation of contracts." On the basis of its discussion of the various "detriments" to Nantahala resulting in "benefits" to Alcoa, both directly and through Tapoco, and "upon careful consideration of the entire evidence of record," the Commission concluded that it should reject the companies' proposed allocation methodology in that "said methodology in all material respects is based upon the New Fontana Agreement and the Tapoco-Nantahala Apportionment Agreement." Under a separate heading, the Commission discussed the manner in which the companies employed the data contained in the NFA and the Apportionment Agreement in greater detail to show why their allocation methodology was not proper for computing Nantahala's retail costs of service.

The Mathematics of Allocation

In this portion of the order, the Commission described the competing allocation methodologies presented by the companies and the intervenors for determining Nantahala's demand and energy costs. In general, the method proposed by the companies' witness Vander Veen derived the demand and energy charges from the demand and energy entitlements allocated to Nantahala under the NFA and 1971 Apportionment Agreement.

Vander Veen's Nantahala-Tapoco roll-in cost of service study differs fundamentally from the study submitted by the intervenors' witness Springs in that Vander Veen includes the *entire* Alcoa load served by Tapoco *and* TVA for purposes of computing the Nantahala-Tapoco system's demand allocation factor. In other words, Vander Veen adjusted Tapoco's 1975 book figures to re-

flect a non-utility, 235 Mw direct power purchase by Alcoa from TVA pursuant to a separate, non-Fontana Alcoa-TVA purchase contract as if it were part of the Nantahala-Tapoco system's *generating* resources. With this non-utility addition to the system's power supply, Vander Veen performed a demand allocation which assumed that the system peak occurred at the hour of the Nantahala system peak in 1975, and that at that hour Tapoco had available to serve the Alcoa load both Tapoco's NFA entitlements and the full amount of the Alcoa purchase contract (as adjusted) of 235 Mw.

In addition, for demand cost allocation purposes, Vander Veen's method recognizes the distinction between firm and non-firm NFA entitlements. He used only the firm power available under the NFA to meet system demand, thus removing entirely the amount of capacity that can be curtailed and interrupted from the capacity available to serve system load. As the Commission found, the upshot of this technique is to render 90 Mw of actual return entitlements *valueless* for meeting the system demand at any time, whether or not power is actually curtailed, and even when there may be additional make-up demand. Another one-sixth (i.e., 15 Mw) of the 90 Mw interruptible power returned by TVA under the NFA was also taken out of Tapoco's demand allocation, so that a total of 105 Mw was removed for both the curtailable and interruptible power, and rendered valueless for cost allocation purposes. The effect on Nantahala's costs of Vander Veen's technique is to dramatically increase Nantahala's proportionate share of the demand charges even though both Nantahala and Tapoco take under the NFA and Tapoco takes three times as much power as Nantahala.

In contrast to the foregoing cost of service analysis, the intervenors' evidence showed, and the Commission accepted, that the non-utility direct industrial purchases that Alcoa makes from TVA are not properly considered a *utility* function of Tapoco, Nantahala or the combined utility system of both and so are not properly includable in the cost of service allocation. Furthermore, the demand credit Vander Veen assigns to Alcoa because of the interruption and curtailment features of the NFA is not supported by the actual features of the unified system. The Commission adopted the view taken by the intervenors' witness Springs

that use of only firm power available to meet system demand distorts rather than reflects customer cost responsibility.

> Although it is not unusual for an industrial customer to receive a credit for accepting interruptible power, the rationale for this is that the utility providing the service to that customer will save the cost of carrying reserves. The ability of a utility to provide such credits is limited by its need for reserves. There should be no credit for interruptions which do not result in cost savings to the supplying utility. Mr. Vander Veen's demand credit unfairly assigns to other customers the fixed costs necessary to generate the power traded to TVA for this curtailable and interruptible power. The fixed costs of investment, operation, and maintenance for these plants do not cease when TVA curtails delivery to Alcoa under the contractual arrangements.

The Commission accepted the intervenors' evidence that the return entitlements result from the investment, maintenance and operation costs necessary to make the hydroelectric generation of Nantahala and Tapoco available for TVA's demands. Ultimately, the companies' approach was found to unfairly burden the public customers by requiring them to bear costs properly assignable to Alcoa for the fixed costs necessary to generate the power traded to TVA. The Commission again described the reasons why the NFA trade-off distorted customer cost responsibility, and was therefore improper to use as a basis for computing Nantahala's demand and energy costs.

> In essence, the NFA is a trade-off of certain firm power and secondary power, available less than 50% of the time, for lesser amounts of firm and secondary power that are curtailable and interruptible but available more than 50% of the time, since any power available more than 50% of the time is usable by Alcoa in its aluminum smeltering [sic] operations. *The trade-off result is a considerable improvement in the value of Tapoco's energy useable for Alcoa's aluminum production. The trade-off has no value to the public load. Alcoa (Tapoco) should, therefore, take full cost responsibility for the demand-related costs associated with the capacity traded off.*

In conclusion, the Commission stated that the companies' proposed demand allocation technique would result in a "gross ineq-

uity" to Nantahala and the public load customers, and that demand and energy charges should properly be based upon the capabilities and needs of Nantahala and Tapoco outside of the TVA return entitlements.

Next, the Commission discussed the intervenors' proposed cost allocation methodology and concluded that in view of "the entire evidence of record with respect to the assignment of cost," this method would be employed to determine Nantahala's demand and energy related costs. The data accepted by the Commission as representing the capabilities and needs of the Nantahala-Tapoco unified system appropriate for use in the allocation of demand related costs is as follows:

A. Dependable Capacity for NP&L Projects	85.4 Mw
B. Dependable Capacity of Tapoco Projects	302.8 Mw
C. Total (A + B)	388.2 Mw
D. Less Reserve at 3%	11.3 Mw
E. Net *Firm* Capacity Available to Meet the Load (C – D)	376.9 Mw
F. Purchase Power of NP&L from TVA	50.4 Mw
G. Losses on F above (assumed 5%)	2.5 Mw
H. Total Net *Firm* Capability Available at Generation to Meet the System Requirements of NP&L and Tapoco (E + F + G)	429.8 Mw

Nantahala's peak load during the test year was 105,747 kw, which figure represents its maximum need during the year. Nantahala's demand responsibility for costing purposes was then calculated by dividing the total Nantahala-Tapoco system demand responsibility into Nantahala's maximum demand responsibility. Dividing 429,800 kw into 105,747 kw produces a Nantahala demand allocation of 24.60% of the system's demand responsibility. Using this allocation factor, the Commission assigned 24.60% of the Nantahala-Tapoco unified system demand costs to Nantahala and the balance to Tapoco (Alcoa).

While demand charge allocations must be computed based upon production capacity and capacity needs, energy charge allocations must be computed based upon the average energy available for the Nantahala-Tapoco unified system plus Nantahala's separate purchases from TVA. The data accepted by the Commission as appropriate for use in the allocation of energy related costs is as follows:

A. Average Energy Available from NP&L Projects (New Fontana Agreement Apportionment Study)	391,500 Mwh
B. Average Energy Available from Tapoco's Projects (New Fontana Agreement Apportionment Study)	1,373,600 Mwh
C. Total Average Energy Available from NP&L and Tapoco's Projects (A + B)	1,765,100 Mwh
D. NP&L Purchase of Energy from TVA	81,265 Mwh
E. Losses on D above (assumed 5%)	4,063 Mwh
F. Total Average Energy Available to Meet System Load (C + D + E)	1,850,428 Mwh

Nantahala's energy requirement during the 1975 test year was 453,548 Mwh. Nantahala's energy responsibility for costing purposes was then calculated by dividing the total Nantahala-Tapoco system energy responsibility into Nantahala's energy responsibility. Dividing 1,850,428 Mwh into 453,548 Mwh produces a Nantahala energy responsibility of 24.51%. Using this allocation factor, the Commission assigned 24.51% of the Nantahala-Tapoco unified energy costs to Nantahala and the balance to Tapoco (Alcoa).

The methods, procedures and results of the intervenors' jurisdictional cost allocation methodology were adopted by the Commission in all material respects for determining Nantahala's retail costs of service. The practical effect of basing Nantahala's costs on actual combined system capabilities and needs was a decrease in the percentage of costs associated with the NFA and 1971 Apportionment Agreement recoverable from Nantahala's retail rate payers. The other "costs" actually incurred by the

unified system under the agreements were effectively allocated for rate making purposes to the systems' industrial customer, Alcoa, on whose behalf the Commission determined they were incurred.

To summarize, this matter was remanded for the purpose of determining whether a roll-in methodology was appropriate for Nantahala and Tapoco. Having determined that it was, and having identified those total system costs related to the supply of energy and those related to the demand for energy, the Commission was left with the task of allocating the appropriate demand and energy costs as between the North Carolina and Tennessee jurisdictional customers. The Commission then adopted the technique of cost allocation proposed by the intervenors' witness Springs, and allocated 24.60% of the combined demand costs and 24.51% of the combined energy costs to Nantahala's cost of service. These Nantahala percentages are calculated upon the relative contributions and needs of Nantahala as part of a combined system and not upon how Nantahala and Tapoco share in the New Fontana Agreement entitlements under the 1971 Apportionment Agreement. Although those contracts limit and rearrange the system's "energy" and "demand" availability, they do not allocate "cost of service" percentages between the retail consumers of the combined system's power. The roll-in and allocation of total system costs merely allowed the Commission to assign customer cost responsibility on the features of the actual system and not the system as reshaped by the New Fontana Agreement. The method does not ignore or alter the results of that agreement, it determines who is to bear the responsibility for the costs associated with the facilities and resources obligated thereunder. Having decided that Alcoa in negotiating the NFA effectuated a trade-off of dependable hydro capacity in return for improving the availability of energy for aluminum production, the Commission concluded that the aluminum production load should be assigned the responsibility for the investment costs and operation and maintenance expenses of the generating facilities for that traded capacity.

As the Commission stated in its order, one of the purposes for the roll-in method of rate making is to "cancel" or at least to "true up" the concealed benefits it found flowing to Alcoa under the power supply agreements. This is but another way of stating

that one purpose of the roll-in is to assign the appropriate cost responsibility for the respective customer demands upon the combined system's power supply resources. Obviously, use of the entitlements contained in these agreements, which do not reflect the investment costs and operation and maintenance expenses of the generating facilities upon which customer cost responsibility must be calculated, to then allocate costs would defeat the very purpose of the roll-in.

Moreover, as Nantahala itself recognizes in its brief, "the 1971 Apportionment Agreement is premised on the fact that Nantahala and Tapoco are separate entities and that the entitlements allocated to Nantahala *are deemed to arise* in exchange for Nantahala's generation just as the entitlements allocated to Tapoco *are deemed to arise* in exchange for Tapoco's generation." (Emphasis added.) The Commission, in rejecting the fiction that Nantahala and Tapoco were developed, designed and operated as separate corporate entities, also rejected the fiction that return entitlements *deemed to arise* in exchange for the value of the generation turned over to TVA can be used as accurate measures of the demand and energy related costs fairly attributable to Nantahala's provision of service to its retail rate payers.

It was the position of the intervenors' expert witness that the system-wide trade-off of costs and benefits under the NFA and 1971 Apportionment Agreement was detrimental to Nantahala's ability to provide service at just and reasonable rates to its public customers and unfairly shifted costs within the system to Nantahala which are properly attributable to Alcoa. Based upon substantial evidence of record, the Commission adopted this position and the roll-in technique proposed to measure and assign customer cost responsibility for the combined system's hydroelectric resources. The roll-in technique chosen by the Commission is fully supported by substantial evidence of record and is a determination which essentially rests within the discretion of the Commission in the exercise of its rate making function. As the United States Supreme Court has observed in reviewing a similar regulatory question, "judgment and discretion control both the separation of property and the allocation of costs when it is sought to reduce to its component parts a [utility] business which functions as an integrated whole." *Colorado Interstate Gas Co. v. FPC*, 324 U.S. at 591, 89 L.Ed. at 1217.

The companies do not argue, nor do we find, any error in judgment or abuse of discretion in the action of the Commission in the Sub 29 (Remanded) proceedings regarding the mechanics of the roll-in or the allocation formula utilized. Briefly stated, the principal arguments advanced by the companies are that the roll-in was impermissible under the doctrine of federal preemption because the two principal power supply contracts at issue are regulated by the FERC and that federal law prohibits the results obtained by the Commission under the roll-in as an undue burden on interstate commerce. We turn next to these and other remaining arguments of the companies concerning the order appealed from.

II.

A.

The New Fontana Agreement and its predecessor, the Original Fontana Agreement, effectuate power exchanges between Nantahala, Tapoco and TVA falling within the regulatory jurisdiction of the FERC under Part II of the Federal Power Act. Sections 205 and 206 of the Act, 16 U.S.C. §§ 824d and 824e, give FERC the authority to regulate wholesale rate schedules for the sale of electricity in interstate commerce. As we have seen, the OFA was never filed with FERC's predecessor, the FPC, as a tariff or rate schedule and the FPC never ruled upon the substantive terms of that agreement. The NFA was filed with the FPC "under protest" by Tapoco and Nantahala in response to the FPC's request that the companies do so. The NFA was formally designated "Tapoco Rate Schedule No. 3" and "Nantahala Rate Schedule No. 1" in 1966. No substantive review of its terms was undertaken by the FPC until Nantahala's wholesale customers raised the matter in 1978. The 1971 Apportionment Agreement, a contract affecting rates and charges under the Act, was not filed with the FPC until 1980, in conjunction with the foregoing complaint by Nantahala's customers. The contract was then designated as "Supplement 2 to Tapoco Schedule 3" and as a "Supplement to Nantahala Schedule No. 1." Again, substantive review of the operative effect of this agreement upon Nantahala's wholesale rates was not undertaken by FERC until 1980.

[7] Now, at the close of a forty-year period marked by an "apparent determination never willingly to submit any of its hydro

projects to the duly enacted requirements of Federal law," 2 F.P.C. at 390, Nantahala and Alcoa argue, in effect, that FERC's exclusive jurisdiction to regulate interstate wholesale power transactions and to set wholesale rates preempts the North Carolina Utilities Commission from implementing a jurisdictional cost allocation formula which fails to utilize the proportion of NFA demand and energy entitlements allocated to Nantahala under the 1971 Apportionment Agreement in determining Nantahala's retail costs of service. Before addressing the separate and specific contentions of the companies, we will briefly review the legal and regulatory framework under which these issues arise.

1.

The doctrine of preemption is based upon the Supremacy Clause of the United States Constitution. U.S. Const., art. VI, cl. 2. When Congress legislates in an area within the federal domain, it may, if it chooses, take for itself all regulatory authority over the subject, share the task with the states, or adopt as federal policy the state scheme of regulation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 91 L.Ed. 1447 (1947). The question in each case is the intent of Congress. *Id.* As the United States Supreme Court recently observed, "[m]aintaining the proper balance between federal and state authority in the regulation of electric and other energy utilities has long been a serious challenge to both judicial and congressional wisdom. On the one hand, regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States. . . . On the other hand, the production and transmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." (Citations omitted.) *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm.*, 461 U.S. 375, 377, 76 L.Ed. 2d 1, 6 (1983). The Federal Water Power Act, now Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823a, was enacted by Congress under its Commerce Clause powers in 1920. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340, 71 L.Ed. 2d 188, 196 (1982). The potential of water power as a source of electric energy led Congress to exercise its constitutional authority over navigable streams to regulate and encourage development of hydroelec-

tric power generation "to meet the needs of an expanding economy." *Id.* at 340, 71 L.Ed. 2d at 196, *quoting FPC v. Union Electric Co.*, 381 U.S. 90, 99, 14 L.Ed. 2d 239, 246 (1965).

Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, was enacted by Congress in 1935 as a "direct result" of the Supreme Court's holding in *Public Utilities Comm'n v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 71 L.Ed. 54 (1927) that the states lacked power to regulate the rates governing interstate sales of electricity for resale. It delegated to the FPC, now the FERC, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to source of production. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 71 L.Ed. 2d 188. This portion of the Act was intended to "fill the gap" created by *Attleboro* with the establishment of exclusive federal jurisdiction over such sales. *Id.*

> What Congress did was to adopt the test developed in the *Attleboro* line which denied state power to regulate a sale "at wholesale to local distributing companies" and allowed state regulation of a sale at "local retail rates to ultimate consumers."
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> . . . Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction making unnecessary . . . case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

FPC v. Southern Cal. Edison Co., 376 U.S. 205, 214, 215-16, 11 L.Ed. 2d 638, 646, *reh'g denied*, 377 U.S. 913, 12 L.Ed. 2d 183 (1964), *quoting Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 504, 86 L.Ed. 371, 375 (1942).

Exclusive federal jurisdiction in setting wholesale power rates was thought necessary because concurrent, conflicting state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Chicago and N.W. Transp. Co. v. Kaylo Brick & Tile Co.*, 450 U.S. 311, 317, 67 L.Ed. 2d 258, 265 (1981). A state's independent assessment of

wholesale, interstate rates "could seriously impair the Federal Commission's authority to regulate a field over which Congress has given the Federal Power Commission [FERC] paramount and exclusive authority." *Northern Gas Co. v. Kansas Comm'n*, 372 U.S. 84, 92, 9 L.Ed. 2d 601, 608 (1963).

[8] Thus, FERC is prohibited from regulating intrastate retail rates charged to ultimate consumers and the states are prohibited from regulating interstate wholesale rates charged to local distributing companies. The result is a blend of federal-state regulation, each body with exclusive authority in its respective field. *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A. 2d 1358 (1977), *cert. denied*, 435 U.S. 972, 56 L.Ed. 2d 63 (1978); *Public Serv. Co. of Colo. v. Public Utils. Comm'n of Colo.*, 644 P. 2d 933 (Colo. 1982).

[9] Wholesale rates charged under the Federal Power Act must be "just and reasonable." 16 U.S.C. § 824d(a). Utilities regulated by the act are required to file rate schedules with the FERC, which has authority to investigate and modify new schedules. 16 U.S.C. § 624d(b) and (d). As a result of FERC's exclusive power to establish reasonable rates for utilities subject to its jurisdiction, a utility subject to FERC jurisdiction "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the [FERC], and not even a court can authorize commerce in the commodity on other terms. [T]he right to a reasonable rate is the right to the rate which the [FERC] files or fixes. . . ." *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251, 95 L.Ed. 912, 919 (1951). Thus, the North Carolina Utilities Commission is preempted from directly or indirectly regulating the wholesale rate structure created by the New Fontana and 1971 Apportionment Agreements or inquiring into the reasonableness of those FERC-filed wholesale rate schedules when it acts in fixing Nantahala's retail rates.

Nantahala and Alcoa present a number of overlapping and somewhat confused arguments regarding their contention that the doctrine of federal preemption stands as a bar to the Commission's order. It appears, however, that in essence both Nantahala and Alcoa argue that the Commission has directly interfered with FERC's exclusive and paramount jurisdiction over the NFA and 1971 Apportionment Agreement by reviewing the reasonableness

of these contracts and has indirectly intruded upon that jurisdiction by disregarding or altering the level of costs and expenses attributed to Nantahala as if it were a stand-alone company under these contracts. We disagree.

With respect to the former argument, it is clear that the Commission's examination of the NFA and 1971 Apportionment Agreement was not undertaken in an effort to either establish wholesale rates or to modify agreements filed with and approved by the FERC. In its order reducing rates the Commission expressly rejected the remedy of reforming these agreements to award Nantahala its just level of entitlements and nothing contained in the Commission's order purports to change or modify a single word of the several contracts or agreements involved, or the actual flow of power thereunder.

The companies rely heavily upon the holdings in *Attleboro* and *Southern California Edison* to challenge the authority of the Commission to implement the roll-in methodology proposed by the intervenors. We find that reliance to be misplaced. In each of those cases the dispositive fact under the doctrine of federal preemption was the state commission's specific modification of a contract establishing a wholesale rate. In the instant case, neither the contracts themselves nor the wholesale rates fixed thereunder were changed by the Commission in its order. The roll-in was used solely to determine the unified rate base, operating costs and revenues of Nantahala and Tapoco and to allocate jurisdictional costs of service in the process of fixing Nantahala's retail rates to its North Carolina consumers. *Attleboro* and *Southern California Edison* confirm, rather than deny, the propriety of state regulation of retail electric power rates.

Nor are we persuaded by the companies' arguments that the Commission has indirectly intruded upon the federal regulatory domain by disallowing or altering the interstate wholesale costs and expenses borne by Nantahala under the NFA and the 1971 Apportionment Agreement. Rather, we find the Commission's treatment of those wholesale costs to be well within the field of exclusive state rate making authority engendered by the "bright line" between state and federal regulatory jurisdiction under the Federal Power Act.

The Utilities Commission is the administrative agency charged with the duty of regulating the intrastate retail rates of public utilities within the State of North Carolina. N.C.G.S. § 62-32. Under N.C.G.S. Chapter 62, the Commission is authorized to conduct hearings to investigate the propriety of proposed rate changes and to make such orders with regard to the proposed rate as may be just and reasonable. In fixing rates under N.C.G.S. § 62-133, the Commission must fix such rates "as shall be fair to both the public utility and to the consumer." N.C.G.S. § 62-133(a). The basic theory of utility rate making pursuant to that statute is that rates should be fixed at a level which will recover the cost of service to which the rate is applied, plus a fair return to the utility. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977). This provision of Chapter 62 lays down the procedure by which the Commission is to fix rates "which will enable the utility 'by sound management' to pay all of its costs of operation, including maintenance, depreciation and taxes, and have left a fair return upon the fair value of its properties." *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 680-81, 208 S.E. 2d 681, 687 (1974). However, the primary purpose of Chapter 62 is to assure the public of adequate service at a reasonable charge; the provisions of this Chapter designed to assure the utility of adequate revenues are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates. In addition such "corollaries" act as safeguards against arbitrary and unconstitutional administrative action. *Id.*

N.C.G.S. § 62-133 prescribes the formula which the Commission is required to follow in fixing rates for service to be charged by any public utility in pertinent part as follows:

> (b) In fixing such rates, the Commission shall:
>
> (1) Ascertain the reasonable original cost of the public utility's *property used and useful . . . in providing the service rendered to the public within* this State. . . .
>
> * * *
>
> (3) Ascertain such public utility's reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation. (Emphasis added.)

The fair value of the property described in paragraph (b)(1) is the rate base. Additionally, paragraph (c) of this statute allows the consideration of evidence of changes in costs, revenues, or the cost of the public utility's property used and useful "in providing the service rendered to the public within this State," within a reasonable time after the test period.

[10] Clearly, the statute limits the property upon which the North Carolina consumers are required to pay a return to the property used and useful in providing *intrastate* service. When the provisions of N.C.G.S. § 62-133(b)(1), (b)(3) and (c) are read *in pari materia*, *see Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982), it is apparent that the only operating expenses which the Commission may consider in setting intrastate rates for North Carolina public utilities are those incurred in the provision of service to the utility's North Carolina consumers. *See, e.g., Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 424, 430, 230 S.E. 2d 647, 651 (1976) (system-wide cost of service study which significantly varied from results produced by a study based solely on North Carolina data would be incompetent since, "North Carolina rates may not be structured by external system usage"); *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 366, 189 S.E. 2d 705, 751 (1972) (" 'North Carolina users of telephones are not to be required to furnish revenue to maintain applicant's financial condition which other states refuse to provide' "); *Utilities Commission v. State of North Carolina*, 239 N.C. 333, 345-46, 80 S.E. 2d 133, 141 (1954) ("Strictly speaking what is the fair value of applicant's investment in its intrastate business in this State and what constitutes a fair return thereon are the primary questions before the Commission for decision"). Accordingly, jurisdictional cost allocation is a necessary step in any general rate case involving a public utility or utility system whose separate companies are operated as a single enterprise serving both jurisdictional (intrastate retail) and non-jurisdictional consumers. *See also Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 89 L.Ed. 1206.

[11] Additionally, in construing the provisions of N.C.G.S. § 62-133, the Commission must also consider section (d) of that statute, which provides that the "Commission shall consider all other material facts of record that will enable it to determine what are reasonable and just rates." N.C.G.S. § 62-133(d) has been

construed as a device permitting the Commission to take action consistent with the overall command of the general rate statutes, but not specifically mentioned in those portions of the statute under consideration in a given case. *See, e.g., Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (Commission correctly considered non-statutory material factor concerning depreciation expenses in determining what are reasonable and just rates pursuant to N.C.G.S. § 62-133(d)). *See also Utilities Commission v. Public Staff*, 58 N.C. App. 453, 293 S.E. 2d 888 (1982), *modified and affirmed*, 309 N.C. 195, 306 S.E. 2d 435 (1983) (Commission must take other factors such as the efficiency of the company's operations into account in fixing its rates in a general rate case). In sum, the fixing of "reasonable and just" rates involves a balancing of shareholder and consumer interests. The Commission must therefore set rates which will protect both the right of the public utility to earn a fair rate of return for its shareholders and ensure its financial integrity, while also protecting the right of the utility's intrastate customers to pay a retail rate which reasonably and fairly reflects the cost of service rendered on their behalf.

[12, 13] The fundamental question as to whether certain expenditures are to be included in the operating expenses a utility is entitled to collect from its customers is one of fact to be ascertained by the regulating authority. *See generally*, 1 Priest, *Principles of Public Utility Regulation* 45 (1969). "If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce." *Mississippi River Fuel Corp. v. FPC*, 163 F. 2d 433, 437 (1947). *Accord Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A. 2d 1358. As a corollary to the foregoing proposition, it is also true that ordinarily, the Commission may, in a proper case, refuse to allow the utility to include in its reasonable operating expenses, the full price it actually paid for power as a result of its contractual power supply arrangements. *Utilities Comm. v. Intervenor Residents*, 305 N.C. 62, 286 S.E. 2d 770 (1982). This is especially so where the operating expense being investigated by the Commission is one incurred through a contract between or including the utility company and its affiliated companies, including parent corporations and subsidiaries of parent corporations. *Id.* In such

cases the burden of persuasion on the issue of reasonableness always rests with the utility; charges arising out of intercompany relationships between affiliated companies should be scrutinized with care and may be properly refused or disallowed in the absence of a showing of their reasonableness. *Id.*; *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705.

[14] A major operating expense which the Commission must necessarily consider in arriving at reasonable and just rates for Nantahala is the "cost" of power Nantahala incurs under the power supply agreements with its affiliates and TVA. However, the Commission's otherwise plenary authority to investigate transactions between a public utility and its affiliated companies, and to disallow operating expenses found to be imprudently incurred or allocated under such agreements, is limited by prior federal approval of the rate or price in question under the "filed rate" doctrine of *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 95 L.Ed. 912. There, the United States Supreme Court stated:

> We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.

Id. at 251-52, 95 L.Ed. at 919. Thus, neither the state public service commission nor the courts can unilaterally establish a different rate for wholesale electric power sold in interstate commerce because they are of the opinion that the FERC-filed or approved rate is unfair or unreasonable. *See Public Serv. Co. of Colo. v. Public Utils. Comm'n of Colo.*, 644 P. 2d 933.

Those state courts which have considered the question have uniformly agreed that a utility's costs based upon a FERC-filed rate must be treated as a reasonably incurred operating expense for the purposes of setting an appropriate retail rate. *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A. 2d 1358; *Public Serv. Co. of Colo. v. Public Utils. Comm'n of Colo.*, 644 P. 2d 933; *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 240 Miss. 405, 127 So. 2d 404 (1961); *City of Chicago v. Illinois Commerce Comm'n*, 13 Ill. 2d 607, 150 N.E. 2d 776 (1958); *Citizen Gas Users Ass'n v. Public Util. Comm'n*, 165 Ohio St. 536, 138 N.E. 2d

383 (1956); *Eastern Edison Co. v. Dept. of Public Util.*, 388 Mass. 292, 446 N.E. 2d 684 (1983); *Pike Cty. Light & Power v. Pennsylvania*, 465 A. 2d 735 (Pa. Cmwlth. 1983); *Washington Gas Light Co. v. Public Serv. Comm'n*, 452 A. 2d 375 (D.C. App. 1982), *cert. denied*, 462 U.S. 1107, 77 L.Ed. 2d 1334 (1983). "Otherwise, a State utilities commission could review the reasonableness of the FERC-filed wholesale rate in a proceeding establishing retail rates, in violation of the Federal Power Act." *Eastern Edison Co. v. Dept. of Public Util.*, 388 Mass. at 300, 446 N.E. 2d at 689; *Northern States Power Co. v. Minnesota P.U.C.*, 344 N.W. 2d 374 (Minn.), *cert. denied, Humphrey v. North States Power Co.*, 467 U.S. 1256, 82 L.Ed. 2d 850 (1984); *Northern States Power Co. v. Hagen*, 314 N.W. 2d 32 (N.D. 1981); *Office of Public Counsellor v. Indiana & Michigan Electric Co.*, 416 N.E. 2d 161 (Ind. App. 1961). *See also Northern Gas Co. v. Kansas Comm'n*, 372 U.S. 84, 9 L.Ed. 2d 601. *See generally*, 16 A.L.R. 4th 454, § 3(b).

Nantahala and Alcoa rely heavily upon the foregoing line of cases in support of their arguments that the utilization of the roll-in in the instant case violates the Supremacy Clause of the United States Constitution because it is inconsistent with federal jurisdiction over the NFA and the 1971 Apportionment Agreement. The companies contend, in effect, that the Commission's failure to base Nantahala's demand and energy related costs on the quantity and design of entitlements assigned to Nantahala on a stand-alone basis under these agreements is tantamount to a disallowance of costs actually borne by Nantahala and as such constitutes an impermissible, indirect intrusion into the federal regulatory domain. We reject the companies' various federal pre-emption arguments for two reasons: (1) their reliance upon the *"Narragansett-Northern States"* line of authority to establish a Supremacy Clause violation is misplaced and (2) their arguments rest upon the faulty premise that FERC deemed both the NFA and the 1971 Apportionment Agreement to be fair and reasonable to Nantahala, when in fact it expressly ruled that the latter agreement was "unfair" and refused to permit Nantahala to base its requested wholesale rate increase upon the costs incurred thereunder.

The rule requiring state commissions to "treat" costs based upon FERC-filed rates as reasonably incurred operating expenses, thus preventing the automatic disallowance of these costs, has not

been held to preclude state authority to determine whether these costs should be automatically passed through to retail consumers in the form of higher rates. For example, in the *Narragansett* case itself, the Rhode Island Supreme Court concluded that although the state utilities commission had to consider the cost of electricity to the local distributing company based upon its supplier's federally filed wholesale rate as an actual operating expense, it was not required to adjust Narragansett's retail rates to reflect the increased wholesale costs under its PPCA (Purchased Power Cost Adjustment) provisions. The court reasoned that in view of the state utilities commission's broad discretion over the operation of the PPCA under the applicable state statutes and the PPCA provisions, the commission was free to "treat the proposed rate increase as it treats other filings for charged rates under [state statute] and investigate the overall financial structure of Narragansett to determine whether the company has experienced savings in other areas which might offset the increased price for power." 119 R.I. at 568, 381 A. 2d at 1363.

The Colorado Public Utilities Commission and the Colorado Supreme Court have stated even more explicitly that state commissions have the authority to determine that certain FERC-regulated wholesale costs are not incurred for the benefit of retail customers and therefore need not be passed on to retail customers in their rate schedules. In *In Re Western Slope Gas Co.*, 31 P.U.R. 4th 93 (Colo. PUC 1979), *aff'd, Public Serv. Co. of Colo. v. Public Utils. Comm'n of Colo.*, 644 P. 2d 933, a natural gas utility sought to pass through the costs of its wholesale gas purchases in retail rates by means of purchased gas adjustment clauses. These costs, including surcharges to cover expenses of the Gas Research Institute ("GRI"), a research and development firm supported by the natural gas industry, were regulated by FERC. The Colorado Commission conceded that it was obligated to treat these costs as reasonably incurred operating expenses. However, the commission refused to allow the costs to be flowed through automatically to retail customers, stating that under *Narragansett*, it was free to determine whether those costs should be reflected in retail rates. 31 P.U.R. 4th at 107. The Colorado commission questioned the propriety of forcing retail customers to bear the expense due to their inability to exercise control over the expenditure of GRI

funds and because most of the benefits would flow to the gas utilities themselves and to other related private interests.

The Colorado Supreme Court upheld the commission's decision that these GRI expenses need not be passed through automatically to consumers. The court concluded that although FERC-regulated GRI expenses must be treated as reasonable and prudent operating expenses, the state commission had the authority to scrutinize such costs in a general rate case "to balance the interests of the utility investors and the ultimate consumers in arriving at a just and reasonable rate. . . ." 644 P. 2d at 941. The Colorado Supreme Court specifically recognized the Colorado commission's concern that GRI costs benefit a utility and its shareholders far more than the utility's customers. *Id.* at 941, n.10. The court concluded its opinion by stating, "[s]o long as the PUC considers the GRI adjustment charge as a reasonably incurred operating expense of a local distribution company, as it is legally required to do, its decision to refrain from automatically passing such charges on to the ultimate consumers falls within its administrative discretion." *Id.* at 942.

In *Washington Gas Light Co. v. Public Serv. Comm'n*, 452 A. 2d 375, the District of Columbia Court of Appeals faced the same question considered in *Public Serv. Co. of Colorado*. That is, whether increases including GRI expenses reflected in a utility's FERC-regulated wholesale gas costs should be passed through to retail customers in the form of a rate increase. The local commission had disallowed the increased GRI charges as reasonable operating expenses on the grounds that FERC's authority to approve these charges was the subject of an appeal pending at the time of the commission's decision and so the costs attributed thereto were not a "measurable and certain expense." 452 A. 2d at 385. The court reversed the commission's refusal to allow the increased GRI charges to be reflected in retail rates based upon its own independent inquiry into the reasonableness of the GRI charges on the grounds that the commission was without authority to disregard a FERC order which had not been stayed during proceedings for review and was therefore in full force and effect. *Id.* at 386.

However, in the course of its discussion, the court made it quite clear that it remained within the local commission's authori-

ty to determine that the expenses should not automatically be passed through to retail customers.

> FERC's jurisdiction [does not extend] to the issue of whether increased wholesale costs shall be passed through to retail customers by the local utility. The determination of the extent to which wholesale costs should be reflected in local utility rates lies exclusively with local utility commissions. *See* [*Narragansett*].

Id. at 385, n.15. *Accord Pike Cty. Light & Power v. Pennsylvania*, 465 A. 2d 735, 738 (FERC's jurisdiction extends to the setting of rates for out-of-state parent utility to charge local electric utility at wholesale; however, state utility commission has exclusive jurisdiction, as a matter of retail rate making, to determine whether it was just and reasonable for local utility to incur the parent's rates and charges as an expense of operation in light of available alternatives); *Kansas-Nebraska Natural Gas Co., Inc. v. State Corporation Commission*, 4 Kan. App. 2d 674, 610 P. 2d 121 (1980) (FERC's regulation of an advance payment contract with an affiliate does not preclude state public service commission's scrutiny of the agreement to determine, not whether the agreement was reasonable, but whether it was *required* for service to the local rate payers). *See also Eastern Edison Co. v. Dept. of Public Util.*, 388 Mass. 292, 446 N.E. 2d 684 (*Narragansett* and *Public Service Co. of Colorado* discussed with approval although holdings distinguished on the grounds that the Massachusetts statutes require automatic flow-through of all reasonably incurred fuel and purchased power expenses; Massachusetts commission had no authority to consider factors other than the companies' fuel costs).

Thus, several cases in the *Narragansett* line expressly recognize that a state commission retains the discretion to do exactly what the Commission has done in the instant case: determine that certain of a utility's costs were effectively incurred for the benefit of its shareholder, not its retail consumers, and therefore should be borne by the shareholder, and not by the utility's retail rate payers. The cases upon which Nantahala and Alcoa place principal reliance, *Northern States Power Co. v. Hagen*, 314 N.W. 2d 32, the related case of *Northern States Power Co. v. Minnesota P.U.C.*, 344 N.W. 2d 374, and *Office of*

Public Counsellor v. Indiana and Michigan Electric Co., 416 N.E. 2d 161, do not lead to a different conclusion.

Both *Northern States* cases involved an agreement which allocated losses incurred by an interstate utility enterprise operating in Minnesota and Wisconsin, when the Tyrone Nuclear Power Project (to be located in Wisconsin) was abandoned. The parties to the agreement, Northern States Power (NSP), a Minnesota corporation, and its wholly-owned subsidiary, Northern States Power-Wisconsin (NSP-W), a Wisconsin corporation, served, respectively, electric customers in four states, with NSP serving Minnesota, North Dakota and South Dakota and NSP-W serving only Wisconsin. Although NSP and NSP-W both originally owned an interest in Tyrone, NSP transferred its share in the project to NSP-W to comply with Wisconsin law. The transfer did not effect any change in the planned use of the project to serve the single system's various customers. NSP and NSP-W operated under the aforementioned Coordinating Agreement (CA), filed with FERC, by which they shared the total system cost of power generation in a ratio roughly proportionate to the ultimate use by the customers of each. The companies filed an amendment to the CA which was designed to allocate Tyrone abandonment costs under the same allocation formula by which the companies' wholesale rates are computed. FERC ultimately approved the amendment to the CA. Thereafter, NSP sought to "pass through" the Tyrone losses to its retail rate payers in its respective service areas, claiming that FERC's approval of the amended CA resulted in the establishment of an interstate wholesale rate which state commissions were preempted from reviewing for the purpose of retail rate making. However, both the North Dakota Public Service Commission and the Minnesota Public Utilities Commission rejected NSP's arguments that FERC approval of the amended CA automatically required the state commissions to allow NSP to treat its share of the Tyrone losses as a reasonable operating expense to be borne by NSP's North Dakota and Minnesota retail rate payers. The supreme courts of both states reversed the orders of their respective state commissions disallowing the Tyrone-related costs on the ground that the reasonableness of a formula wholesale rate filed and approved by FERC cannot be relitigated in a retail rate proceeding before a state utilities commission.

In *Northern States Power Co. v. Hagen*, the North Dakota court noted that NSP is required by the FERC order to pay a fixed wholesale rate for electricity to NSP-W which includes the amortization of the Tyrone losses. 314 N.W. 2d at 37. The court reasoned that since the North Dakota Public Service Commission had no direct jurisdiction over the interstate wholesale rates, "it would undermine the supremacy clause and the preemption doctrine for the PSC to indirectly assert jurisdiction over the wholesale rates by investigating the reasonableness of underlying [wholesale] costs in a proceeding involving retail rates." *Id.* at 38. The court concluded by stating that for purposes of fixing intrastate rates, the PSC must treat costs incurred under NSP's filed interstate wholesale rates as reasonable operating expenses. The Supreme Court of Minnesota, when faced with the identical question in *Northern States Power Co. v. Minnesota P.U.C.*, came to the identical conclusion and held that the Minnesota Public Utilities Commission was required to treat the Tyrone-related costs incurred under the FERC-approved wholesale rate formula as expenses for power purchased in determining retail rates. 344 N.W. 2d at 382.

It is thus evident that the *Northern States* cases are clearly distinguishable from the instant case in that they both involved the direct disallowance by the respective state commissions of wholesale costs approved by FERC in the exercise of its exclusive rate making authority. As we have previously stated, the Commission did not disallow any of the system costs incurred by both Nantahala and Tapoco under the NFA and 1971 Apportionment Agreement in determining the aggregate rate base and operating expenses of the rolled-in system. Rather, *all costs* attributed to Nantahala and Tapoco were *recognized and allowed* by the roll-in; the difference between "book" costs and "reasonable" costs resulting from the Commission's discretionary determination that only a certain percentage of Nantahala's book costs were incurred in serving the combined system's intrastate retail customers.

For similar reasons, we find the companies' reliance upon *Office of Public Counsellor v. Indiana & Michigan Electric Co.* to be misplaced. Again, the challenged action by the state public service commission in that case was the disallowance of a particular purchased power expense incurred by the local Indiana utility, Indiana & Michigan Electric Co. (I&M), under an interstate,

wholesale power agreement with its wholly-owned subsidiary, Indiana & Michigan Power Co. (IMP). IMP's principal assets are two nuclear power production units located in Michigan. IMP's total output of electric power is sold to I&M pursuant to a FERC-regulated power agreement which provides that I&M is entitled to all of the energy generated by IMP units, and in return, I&M is obligated to compensate IMP for all costs of production and purchase power, including a return on equity. The Public Service Commission of Indiana determined that the property of the Michigan subsidiary was "used and useful" in serving the customers of the parent local utility and should therefore be included in its rate base.

In reversing that decision, the Indiana court placed great emphasis on the fact that the contract by which the parent purchased the electricity from the subsidiary, which was subject to the exclusive jurisdiction of the FERC, included a provision specifically allowing the subsidiary a return on its equity so that a "fair rate of return under the contract is computed by the FERC." *Office of Public Counsellor*, 416 N.E. 2d at 164. Thus, the court concluded that for the state commission to include the subsidiary's assets in the parent's rate base would permit the state commission to determine a cost of service and rate of return for the subsidiary *other than* the FERC established rate and would constitute an impermissible collateral attack on the authority of the FERC.

> The FERC and the Commission do not share concurrent jurisdiction with regard to the proper rate of return on IMP assets. Rather, the FERC has exclusive jurisdiction over the regulation of wholesale interstate power sales. Any attempt by the Commission to assign a rate of return attributable to IMP's cost of power clearly encroaches upon the FERC's duties and powers.

Id. at 165.

Nantahala relies on the Indiana decision in support of its argument that the Commission's "attempt to roll-together Nantahala and Tapoco and allocate a lower level of costs and expenses to Nantahala than Nantahala actually incurs under the NFA and 1971 Apportionment Agreement constitutes an intrusion upon FERC jurisdiction over those agreements, similar in

nature to the discredited 'roll-in' of I&M and IMP by the Indiana Commission." We do not agree. Again, the roll-in of Nantahala and Tapoco resulted in no disallowance or alteration of FERC-approved costs, expenses or rates of return. Nantahala's retail rates could be lowered because a lesser quantum of higher cost Nantahala energy has been averaged with a higher quantum of lower cost Tapoco energy. As a result, the average cost of roll-in energy is lower than the cost of Nantahala-only energy. Moreover, it is obvious that the "roll-in" attempted by the Indiana commission entailed a far more direct intrusion into FERC's regulatory domain in the form of a redetermination of the FERC-established rate of return for IMP's property, which fell exclusively under FERC's jurisdiction by the very terms of the interstate power agreement. Here, FERC has no authority, either exclusive or concurrent, to determine Nantahala's rate of return on its assets or the costs of service associated with providing Nantahala's intrastate retail customers with electricity. Rather, these determinations fall within the exclusive rate making jurisdiction of the North Carolina Utilities Commission.

Indeed, state commissions have been held to expressly retain, under the "filed rate" doctrine, the authority to decline to automatically reflect operating expenses incurred under FERC-regulated rate schedules or contracts in the structure of intrastate retail rates where, for example, the state commission determines (1) that increases in FERC-approved charges in one area of the utility's operations were not offset by economies in other areas (*Narragansett*); (2) that certain FERC-regulated costs were not, either in whole or in part, primarily incurred for the benefit of retail rate payers, but rather for the benefit of the utility's investors (*Public Serv. Co. of Colo.; Washington Gas Light Co.*); (3) that in light of available alternatives, certain FERC-approved expenses charged by a parent to the local utility were not reasonably attributable to the costs of serving local rate payers (*Pike Cty. Light & Power*); and (4) that certain FERC-regulated payments between parent and subsidiary were not required for service to the local rate payers (*Kansas-Nebraska Natural Gas Co.*).

In this case, the Commission, in carrying out its duty to determine what are reasonable and just rates for Nantahala's intrastate retail customers to pay for electric service, made a

searching examination of "all material facts of record," as it is required to do by N.C.G.S. § 62-133(d), including but not limited to, the effect of the FERC-filed power supply contracts on Nantahala's costs of service. It also considered the entire historical development of the Nantahala-Tapoco electric system and the intercorporate allocation of the costs and benefits associated therewith.

The Commission's extensive and detailed findings of fact taken as a whole effectively demonstrate that certain portions of the operating expenses Nantahala incurs under the NFA and 1971 Apportionment Agreement were not incurred for the benefit of Nantahala's retail rate payers, were not required for their service and were not offset by compensating economies or benefits in other areas of the utility's operations. In addition, the Commission determined that Nantahala's parent Alcoa, which is also the single largest customer of the combined system, had so dominated Nantahala that the utility was unable to act either in its own self-interest or in the interests of its public customers and that through its domination, Alcoa had received substantial concealed benefits, by means of the contractual and intercorporate structure of the "Alcoa power system," to the corresponding detriment of Nantahala's ability to render service at reasonable and just rates to its public customers. In this regard, the Commission determined that one of the most fundamental of the concealed benefits flowing to Alcoa under the NFA was the trading away of hydroelectric capacity suitable for serving a public load, at a time of sustained growth in that load, in return for entitlements structured to be of far more value for aluminum smelting than for public service.

Accordingly, the Commission determined that to the extent that Alcoa had caused Nantahala to trade capacity and energy suitable and usable for serving its public load, the costs associated with that trade-off would be borne by Alcoa and not by the retail rate payers who lost the benefit of these resources and facilities of Nantahala through intercorporate transactions over which they had no control. This determination lies well within the sphere of state regulatory authority delineated in the *Narragansett-Northern States* line of cases relied upon by the companies in support of their preemption arguments.

[15] Moreover, none of the cases relied upon by the companies dealt with the particular situation presented by the facts in this case. In effect, the Commission has recognized that two affiliated North Carolina public utilities, Nantahala and Tapoco, both of whom are controlled by their parent-customer Alcoa, itself a North Carolina statutory public utility, were in substance providing a joint service to retail customers in North Carolina, as well as to Alcoa, although the public service in North Carolina was labeled as service from Nantahala alone. By means of the roll-in, the Commission set the "Nantahala" retail rates by combining the financial data of the two affiliates into a unified rate base, and determined on a conventional load responsibility basis what portion of the rolled-in system's costs should be borne by the non-Alcoa customers, to produce the same billing rates as would result from an explicitly joint service at lawful, nondiscriminatory rates. Thus, it disregarded only the fiction of Tapoco as a separate utility system serving only Alcoa, in order to ensure that the joint Nantahala-Tapoco service to North Carolina retail customers was provided at just and reasonable rates. Insofar as the Commission determined that Alcoa as corporate parent and private industrial customer had benefited at the expense of the public load from the corporate and power supply arrangements it imposed upon its subsidiaries, it was well within its regulatory authority to decide that the costs associated with those benefits would not be borne by the public consumers in the form of higher retail rates, but would be borne by the company's customer and sole shareholder, Alcoa.

In practice, the Commission's roll-in methodology accepted Nantahala's and Tapoco's entitlements under the NFA and 1971 Apportionment Agreement, and Nantahala's supplementary purchases from TVA, as elements of the combined Nantahala-Tapoco cost of service. The Commission then determined that it was inappropriate to allow Nantahala to collect all of its revenue requirements from its public customers on the theory that it was a stand-alone company, because Nantahala's "stand-alone" costs under the corporate and contractual arrangements were not incurred for their benefit, but as a result of Alcoa's corporate dominance for Alcoa's benefit. The Commission's finding of Alcoa domination, to the extent it is based on findings of concealed benefits to Alcoa from the NFA and 1971 Apportionment Agree-

ment, is not the same as a finding that those agreements were unjust and unreasonable as wholesale rate schedules or contracts affecting wholesale rates. Rather, it is a finding that to the extent that Alcoa, rather than Nantahala and its customers, benefited from those agreements, Alcoa should bear the corresponding costs (the difference between Nantahala's actual retail collections and the costs that reasonably should be borne by its retail customers).

[16] In short, contrary to the companies' assertions, the "filed rate" doctrine does not require that the Commission, in determining the proper costs to Nantahala's retail customers for the service provided to them, use demand and energy factors based upon the proportion of entitlements allocated to Nantahala alone under the NFA and 1971 Apportionment Agreement. Thus, we are unpersuaded by the arguments of Nantahala and Alcoa that this action on the part of the Commission directly or indirectly interferes with FERC's exclusive regulatory authority under the Federal Power Act.

2.

We are equally unpersuaded that the order conflicts with specific FERC actions taken with respect to the NFA and 1971 Apportionment Agreement. In fact, we find the Commission's rate making methodology to be consistent with FERC's own actions in the parallel wholesale rate case, *Nantahala Power and Light Co.*, Opin. No. 139, 19 F.E.R.C. ¶ 61,152 (1982) and Opin. No. 139-A, 20 F.E.R.C. ¶ 61,430, *affirmed on appeal, Nantahala Power and Light Co. v. FERC*, 727 F. 2d 1342.

The consolidated proceeding before the FERC involved a 1976 rate increase request filed by Nantahala and a 1978 complaint filed pursuant to Section 306 of the Federal Power Act by three of Nantahala's wholesale customers. Nantahala sought an annual rate increase based upon the test period ending 31 December 1975, effective for the period of 1 October 1976 to 1 March 1981. The customers alleged that the three companies, Alcoa, Nantahala and Tapoco, were in violation of the Federal Power Act by diverting, for the benefit and private use of Alcoa, hydroelectric power and facilities dedicated to public service. The customers argued that Alcoa had used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act, that the corporate structure and

resulting power supply agreements were unfair to Nantahala, and that the situation could be remedied by either a roll-in of Nantahala and Tapoco or by reformation of the power supply agreements to reflect a more fair and reasonable allocation of power and energy to Nantahala. Although the Administrative Law Judge rejected the single entity theory of the customers, and therefore their proposed roll-in remedy, he expressly found that the allocation of entitlements to Nantahala under the 1971 Apportionment Agreement was unfair. *See* 15 F.E.R.C. ¶ 63,014.

The ALJ concluded that it would be unjust to require Nantahala's wholesale customers to bear their proportionate share of the purchased power costs associated with the 1971 Apportionment Agreement and the Nantahala-TVA supplemental purchase contract. Instead, he determined that the rates should be set *as if* the 1971 Agreement allocated the NFA entitlements in a manner proposed by the FERC staff. Inasmuch as the rates computed on this basis were lower than the rates charged on the basis of Nantahala's book costs under those agreements, Nantahala was ordered to refund its customers the extra revenue it had collected to pay for the unnecessary TVA purchases. The ALJ also determined that Nantahala's PPAC was unlawful and that the 1971 Apportionment Agreement was a contract affecting rates and charges under Section 205(c) of the Federal Power Act, which should have been filed when made. However, the ALJ declined to impose sanctions for Nantahala's failure to timely file the agreement.

In Opinion No. 139, the FERC affirmed the ALJ's order in all material respects. *Nantahala Power and Light Company*, 19 F.E.R.C. ¶ 61,152. Once again, examination of the relevant power transactions and power supply agreements was undertaken primarily to resolve the "central question [of] whether a preponderance of the evidence supports a finding that Alcoa has used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act." *Id.* at p. 61,276. Although the FERC answered the question thus posed in the negative, and therefore rejected the customers' related contention that the two companies operate as an integrated system whose rates should be determined on a rolled-in basis, it expressly recognized that the North Carolina Utilities Commission has and may reach a different conclusion under state law on both the

status of Tapoco as a North Carolina public utility, *id.* at p. 61,277, n.21, and on the question of rolled-in costing, *see* 20 F.E.R.C. ¶ 61,430.[21]

The FERC briefly examined the circumstances surrounding the OFA and the NFA and concluded that the two agreements were the result of "arms length bargaining" and that "[t]he above history of the OFA and NFA indicates no intent on the part of any of the parties to ignore the needs of Nantahala's public service customers or deprive them of energy at just and reasonable rates." 19 F.E.R.C. ¶ 61,152 at p. 61,278. Continuing, the FERC stated: "The apportionment agreements are another matter. . . . *The alleged fairness of the 1971 Agreement is not supported by the record.* The 1963 Agreement gave Nantahala considerably greater benefits than does the 1971 Agreement, and there is no indication in the record as to why Nantahala, without consideration, gave up those benefits." *Id.* at pp. 61,278-79. (Emphasis added.)

In affirming the decision of the ALJ, the FERC determined that Nantahala should have received a greater share of the NFA entitlements and that a disproportionate share had been assigned to Tapoco. To remedy this inequity for rate making purposes, FERC adopted the staff's calculation of a fair share of entitlements for Nantahala based upon its actual relative contribution to the total net combined generation of the two companies' plants which is turned over to TVA under the NFA (22.50%) and then determined that Nantahala should have received 22.50% (or 404 million) of the 1,800 million kwh under the 1971 Apportionment Agreement. Since Nantahala had received only 360 million kwh under the 1971 Agreement, FERC reasoned that Nantahala had purchased from TVA 44 million kwh of energy more than it should have, and that these excessive purchases should not have been reflected in Nantahala's wholesale rates. Therefore, the FERC ordered that "Nantahala shall be required to refund, with interest, any amounts collected in excess of those which would

21. In its order denying rehearing (Opinion No. 139-A), FERC stated: "We recognize that the North Carolina Utilities Commission (NCUC), based on a similar record, reached a different conclusion concerning rolled-in costing. However, the question of whether to treat various entities as an integrated system for rate making purposes is not a purely factual question, but also rests on criteria which each rate making authority may deem relevant." *Id.* at p. 61,869.

have been payable by customers had Nantahala received entitlements as described in the preceding paragraphs." *Id.* at p. 61,280.

In its order denying the rehearing requested by all parties, 20 F.E.R.C. ¶ 61,430, FERC rejected the claims of Alcoa and Nantahala that Opinion No. 139 actually reallocated the NFA entitlements and that it would result in the confiscation of Nantahala's property by setting rates below Nantahala's actual costs. FERC explained that its order merely set rates *as though* a portion of the interruptible entitlements were allocated to Nantahala:

> *In determining just and reasonable rates in Opinion No. 139, the Commission did not choose to reform the 1971 Apportionment Agreement and was not concerned with the mechanics of how entitlements of energy from TVA are allocated to each party, as long as each party receives its fair share of energy based on that party's contribution of actual energy turned over to TVA.* The mechanics of the proportions of both primary and secondary energy available from TVA rests with the parties. Our concern is that each party receive its proper entitlement. *Nantahala entered into a 1971 contract which we find unfair. As a result, the company had to make purchases from TVA which otherwise would not have had to be made. Nantahala must bear the consequences of its acts and refund rates collected to recover the costs of the excess purchases.*

20 F.E.R.C. ¶ 61,430 at p. 61,871. The practical effect of FERC's rate making methodology was the allocation to Alcoa of the "excess" costs Nantahala was forced to incur under the 1971 Agreement.

On appeal taken from the FERC's orders, the Fourth Circuit Court of Appeals held that: (1) FERC's finding that the 1971 Apportionment Agreement was unfair to Nantahala was supported by substantial evidence, and (2) the decision of FERC that a "roll-in" or consolidation of Nantahala and Tapoco for rate making purposes was *not necessary* in this instance was also supported by substantial evidence. *Nantahala Power and Light Co. v. FERC*, 727 F. 2d 1342. With respect to the latter point, the court recognized that although the evidence *did suggest* the propriety of a roll-in, the decision to order a roll-in rests within the discre-

tion of the agency charged with rate making responsibility. *Id.* at 1348. As to FERC's determination that the NFA was not unfair to Nantahala, the court adverted to the fact that "substantial weight in the NFA went to Alcoa's needs," but reasoned that that fact alone "is not conclusive proof that Alcoa sacrificed the Customers' interests to that of the Alcoa aluminum operations. It should be expected that more emphasis would be given to Alcoa's requirements than Nantahala's given the fact that Tapoco is much bigger than Nantahala, and in the early years of the NFA, even some of Nantahala's power and energy was sold to Alcoa." *Id.* at 1349.

We find a number of points particularly noteworthy with regard to the federal regulatory actions discussed above. First, FERC's entire examination of the factual issues common to both the wholesale and retail rate cases was undertaken in an effort to resolve legal issues not before the Commission and vice versa. FERC's examination of the corporate structure of the Alcoa power system and the various intercorporate power transactions and agreements at issue was undertaken primarily in an effort to determine whether Alcoa had used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act, and having answered that question in the negative, FERC then declined to order the remedy of a roll-in.

[17] Contrary to the arguments of Nantahala and Alcoa, we conclude that FERC's analysis of the corporate structure and the various intercorporate power transactions and agreements at issue, and its finding that the evidence before it did not support the conclusion that Alcoa had used the separate corporate identities of Nantahala and Tapoco to frustrate the purposes of the Federal Power Act, does not preempt the Commission from determining that the evidence before it supports the conclusion that Alcoa had dominated Nantahala in such a manner as to require relief for Nantahala's retail customers under North Carolina law. Nor does FERC's having declined to order a roll-in of Nantahala and Tapoco for rate making purposes preempt the Commission from implementing such a rate making methodology under *its discretionary authority* in setting intrastate retail rates. Both the FERC and the Fourth Circuit Court of Appeals recognized that the decision to implement a "roll-in" (1) is based upon factors each regulatory body deems appropriate to the case before it; (2) rests within the discretion of the agency charged with such rate mak-

ing authority; and (3) is a matter upon which state and federal regulatory agencies may differ without the determination of the one necessarily binding the actions of the other.

We first observe that a fundamental factor in the differing treatment given by the federal and state regulatory bodies with respect to the NFA and the 1971 Apportionment Agreement arises out of their differing conclusions as to whether Nantahala is to be treated as a stand-alone company or as an integral unit in a single integrated and coordinated power system. The Commission's rejection of the companies' proposal to base Nantahala's energy and demand related costs on the entitlements it received under the contracts was based, in large part, on its findings that these entitlements were apportioned to Nantahala on the hypothetical and false assumption that Nantahala was developed and operated as a stand-alone utility company. No action taken by FERC may be said to preempt the Commission from rejecting a cost allocation formula based upon a factual premise that it has in turn properly rejected in the exercise of its rate making authority.

Moreover, with respect to FERC's treatment of the contracts themselves, it cannot be said that the findings of the Commission undermine an unequivocal FERC endorsement of the NFA and the 1971 Apportionment Agreement. FERC Opinion Nos. 139 and 139-A are far less inclusive in scope and approving in nature than the companies imply.

FERC did not, as both Alcoa and Nantahala repeatedly assert, find the NFA to be "just and reasonable," it merely determined that the contract was negotiated at "arms-length" and without the "intent" to "ignore" the needs of Nantahala's public customers. These findings are not tantamount to a determination that the contract equally benefits Nantahala's rate payers and Alcoa, or that its terms were required for or structured to be of benefit in service to those rate payers, which are matters the Commission was properly concerned with. More pointedly, and contrary to the assertions of Nantahala that FERC fully and unconditionally "deemed fair" the provisions of the 1971 Apportionment Agreement, FERC expressly found that agreement to be unfair to Nantahala and expressly refused to base Nantahala's rates to its wholesale customers upon the entitlements assigned to Nantahala under that agreement.

In fact, in setting those rates, FERC utilized a rate making methodology similar in principle to that implemented by the Commission—that is, FERC set Nantahala's wholesale rates on the lower level of energy related costs FERC determined Nantahala *should have* incurred given the relative contribution of its plants to the net generation Nantahala and Tapoco jointly turn over to TVA under the NFA. These determinations and the remedial rate making methodology employed by FERC were, in turn, fully affirmed by the Fourth Circuit Court of Appeals. It is therefore clear that the Commission's findings with respect to detriments Nantahala suffered by the terms of the 1971 Apportionment Agreement harmonize rather than conflict with findings by the FERC that the agreement was unfair to Nantahala.

The Commission's examination of the intercorporate agreements was undertaken in an effort to determine whether Nantahala and Tapoco function as a single, integrated electric system under North Carolina law and to determine what portion of the costs incurred by the "rolled-together" system under those contracts went to providing intrastate retail service to Nantahala's jurisdictional customers. Because the Commission determined that Nantahala incurred costs under the NFA and 1971 Apportionment Agreement that were, in effect, not required to serve its public customers and that it suffered substantial detriments thereunder, it declined to base Nantahala's demand and energy cost factors on the quantity and design of NFA entitlements Nantahala receives under the 1971 Apportionment Agreement.

The Commission, *in setting retail rates*, is no more bound to blindly apply specific rate schedules filed with and accepted by FERC, than is the FERC *in setting wholesale rates*—as opposed to *regulating* those specified rate schedules. The fact that the Commission chose a different rate making methodology than FERC to alleviate perceived inequities to Nantahala's retail customers and in so doing effectively allocated a greater proportion of system-wide costs to Alcoa (Tapoco) does not constitute a basis for rejecting the Commission's methods. State public service commissions need not follow FERC wholesale rate making methodologies; North Carolina regulatory policy, based upon factors appropriate to local utility regulation, may differ from FERC policy without necessarily coming into conflict with it. *See Public Systems v. FERC*, 709 F. 2d 73, 84 (D.C. Cir. 1983).

In view of these factors, and in light of our foregoing discussion of the respective spheres of federal and state rate making authority, we completely reject the various arguments presented by Alcoa and Nantahala on the question of federal preemption. These arguments are based, *inter alia*, upon the twin faulty premises that FERC has actually and directly approved the allocation scheme set up in the 1971 Apportionment Agreement and that the Commission's roll-in methodology impermissibly alters the costs associated with that contract and allocated to Nantahala. We have carefully examined the evidence of record, the actual mechanics of the roll-in and cost allocation performed by the Commission, and the relevant authorities on the question of federal preemption and conclude that the Commission has not crossed over the "bright line" between state and federal regulatory jurisdiction and intruded upon the federal domain, either directly or indirectly, in fixing Nantahala's retail rates in this proceeding.

B.

[18] The companies also argue that the Commission's order grants an unconstitutional preference to Nantahala's North Carolina customers over Tapoco's Tennessee customer (Alcoa) and impermissibly shifts the economic benefit of Tapoco power to Nantahala in violation of the limitation on state power implicit in the Commerce Clause of the United States Constitution (art. I, § 8, cl. 3) under the Supreme Court's decision in the *NEPCO* case, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 71 L.Ed. 2d 188. We agree with the companies' contention that *NEPCO* establishes that a state utilities commission may not grant its citizens a preferred right to the benefit of hydroelectric energy generated by a utility in that state solely to gain an economic advantage over the utility's out-of-state customers, and that the granting of such a preferred benefit, regardless of how it is effectuated, places a direct and substantial burden on interstate commerce in violation of the Commerce Clause. However, we do not agree that the rule announced in *NEPCO* invalidates the action of the Commission in this case.

In *NEPCO*, hydroelectric power was produced in New Hampshire by the New England Power Company (NEPCO) and transferred to an out-of-state consortium of companies which served

six states and operated a power pool which included NEPCO. NEPCO then bought power from the pool, based on its pro rata share of the total average cost of power in the pool. This arrangement appreciably increased NEPCO's intrastate costs of service because its own hydro-generated power is cheaper to produce than most of the other generating sources in the consortium. The New Hampshire Commission, acting pursuant to a specific New Hampshire statute, terminated NEPCO's right to export its hydroelectric energy, and ordered the company to make arrangements to sell the previously exported hydroelectric energy to customers within the state. As the Supreme Court noted, although the precise contours of the New Hampshire commission's order were unclear in that it did not require the physical severance of NEPCO's connections with the power pool, it appeared to require NEPCO to sell electricity to New Hampshire utilities at special rates adjusted to reflect the savings attributable to the exclusive use of low-cost hydroelectric generation. *New England Power Co.*, 455 U.S. at 336, 71 L.Ed. 2d at 193. The commission's staff economist proposed that NEPCO effectuate the ban by allocating the economic benefit of the low-cost hydroelectric power to New Hampshire customers through "billing mechanisms" which would reserve the savings resulting from hydroelectric generation exclusively for in-state customers. *See id.* at n. 3.

On appeal, the Supreme Court of New Hampshire rejected the arguments of NEPCO and its out-of-state customers that the order was preempted by Parts I and II of the Federal Power Act and that it imposed impermissible burdens on interstate commerce. The United States Supreme Court reversed, holding that the New Hampshire commission's order attempted to restrict the flow of privately owned and produced electricity in interstate commerce in a manner inconsistent with the Commerce Clause of the United States Constitution (art. I, § 8, cl. 3) and that Section 201(b) of the Federal Power Act, 16 U.S.C. § 824(b) (the "savings clause") does not provide an affirmative grant of authority to the state to do so.

In rejecting the New Hampshire court's ruling, the Supreme Court explained its prior decisions under the implied limitation on state power in the Commerce Clause.

> Our cases have consistently held that the Commerce Clause of the Constitution, Art. I, Sec. 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom. (Citations omitted.) Only recently, . . . we reiterated that "[t]hese cases stand for the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State'." (Citations omitted.)

New England Power Co., 455 U.S. at 338, 71 L.Ed. 2d at 194-95. Applying this anti-protectionist rule to the actions of the New Hampshire commission, the Court, with little trouble, concluded:

> The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. Moreover, it cannot be disputed that the Commission's "exportation ban" places direct and substantial burdens on transactions in interstate commerce. . . . Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance "simple economic protectionism." . . . (Citations omitted.)

Id. at 339, 71 L.Ed. 2d at 195. Thus, in *NEPCO*, the Supreme Court held invalid not only a state utility commission order that prohibits that export of hydroelectric generation from one state to another, but also an order which *exclusively* reserves to the citizens of the producing state the full economic benefit of such hydroelectric power.

However, unlike the action of the New Hampshire commission, the roll-in performed by the Commission in this case does not purport to prohibit the exportation of energy produced within North Carolina, nor does it divert the flow of Tapoco's power to

Nantahala. More importantly, the roll-in methodology used by the Commission does not exclusively reserve to the citizens of North Carolina the entire economic benefit of the unified system's low-cost in-state hydroelectric generation.

As we have stated, the purpose of the roll-in employed by the Commission was the determination of the costs of service for the combined Nantahala-Tapoco system and the allocation of those costs as between the intrastate retail customers in North Carolina and the out-of-state industrial customer (Alcoa) in Tennessee. The practice of rolling-together accounting data and allocating costs between jurisdictional and non-jurisdictional service is common throughout the United States and is no different than the rate making techniques employed by the Commission in setting intrastate retail rates for other companies, such as Duke Power or Carolina Power & Light, which serve customers in more than one state. *Cf. Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 89 L.Ed. 1206; *Central Kansas Power Co. v. State Corporation Commission*, 221 Kan. 505, 561 P. 2d 779. The roll-in merely assures that Nantahala's in-state retail customers are not overcharged in order to subsidize a non-jurisdictional customer and that their rates accurately reflect the costs of facilities used in serving their demands upon the system.

In contrast to the action taken by the New Hampshire commission, the North Carolina Utilities Commission accepted the continuation and operation of all existing power supply agreements between and among the companies and TVA, and addressed neither the dispatch or transmission of electricity nor the actual division of energy and demand entitlements between Nantahala and Tapoco. Both Nantahala and Tapoco continued to deliver the output of their generating facilities to TVA and to receive power in exchange for resale. Under the order, Tapoco continues to deliver its return power to Alcoa and Nantahala continues to sell its share to its intrastate customers.

To support their analysis that the roll-in methodology used by the Commission constitutes an undue burden on interstate commerce under the *NEPCO* decision, the companies rely almost exclusively on one statement contained in the fifty-seven page order of the Commission. The statement is to the effect that the intervenors' proposed allocation methodology (later adopted by

the Commission), *assumed* that the North Carolina public load had a "first call on the total electric energy output of the combined Nantahala-Tapoco system." The companies essentially contend that this statement shows that the Commission was engaging in the same sort of admittedly protectionist behavior as the New Hampshire commission in *NEPCO*.

Although the argument has a certain surface appeal, it fails upon closer examination. Here, the Commission characterized the allocation methodology as premised upon a "first call" concept at the very outset of its discussion of the relative merits of the respective jurisdictional cost allocation methodologies proposed by the intervenors and the companies. However, the Commission went on to devote approximately thirty pages of its order to an analysis of (1) how the power supply agreements, *inter alia*, limited and rearranged the combined system's "demand" and "energy" availability to the detriment of Nantahala and corresponding benefit to Alcoa; (2) the various ways in which the companies' use of the apportionment of NFA demand and energy entitlements as a basis for the allocation of demand and energy costs would result in Nantahala's retail customers bearing costs properly allocable to Alcoa's use of Nantahala's resources; and (3) the preferable features of the intervenors' cost allocation methodology, which is based upon actual system capability and actual jurisdictional load responsibility for costs associated with supplying the system's entire load. The allocation factors ultimately used by the Commission do not allocate capacity and energy *availability* or *usage* between the combined system's jurisdictional and non-jurisdictional customers, but rather allocate "demand" and "energy" *costs* between the respective loads.

Alcoa concedes that no "dollar costs" incurred by Nantahala under the NFA and 1971 Apportionment Agreement are eliminated by the Commission's roll-in, but argues that the roll-in favors Nantahala's North Carolina customers by relieving them of all costs that TVA "charges" for the Fontana exchange and shifting those costs to the Tennessee load of Alcoa by means of the jurisdictional cost allocation methodology. Under the companies' proposed allocation formula, Nantahala would be assigned a percentage of demand and energy related costs based upon the demand and energy entitlements it receives under the power supply contracts. This percentage was somewhat higher than the per-

centage of costs developed by the Commission on the basis of demand and energy costs related to actual system capability and customer load demand under the intervenors' allocation methodology. Accordingly, Alcoa argues that in assigning Nantahala a "lower" percentage of costs than Nantahala "incurs" under the contracts, the Commission granted a preference for the in-state customers over the out-of-state customer.

Obviously, Alcoa's argument completely ignores the findings of the Commission that Alcoa had traded benefits usable and required by Nantahala for its public load in return for entitlements mainly usable and required by Alcoa's aluminum operations and so had already gained substantial benefits at the expense of Nantahala's public customers. Contrary to the assertions of Alcoa, intra-system retail costs of service were not allocated by the NFA and 1971 Apportionment Agreement and therefore the Commission was not bound to use the demand and energy entitlements in computing Nantahala's demand and energy related costs. The roll-in did not relieve Nantahala of all costs associated with the Fontana exchange in contravention of federal authority over those contracts, it merely determined which portion of those costs Nantahala was entitled to recoup by means of charges to its retail customers.

Despite the Commission's initial characterization, the rates actually set for Nantahala do no more than reflect the proportion of system costs of service fairly attributable to the provision of intrastate retail service. Nowhere does the Commission's discussion or application of the roll-in methodology actually implement a "first call" concept. The Commission has not granted North Carolina customers a preference to the economic benefits of hydroelectric energy generated in North Carolina at the expense of Alcoa in Tennessee; it merely eliminated from Nantahala's existing rate structure preferences and inequities which were effectuated in the past by basing Nantahala's rates on the fiction that it was a stand-alone company. This traditional exercise of its rate making authority is simply not proscribed by the rule established in *NEPCO*, or in other commerce clause cases.

It is well-settled in modern commerce clause jurisprudence that the existence of a commerce clause violation depends, in any case, upon "the nature of the state regulation involved, the objec-

tive of the state, and the effect of the regulation upon the national interest in the commerce." *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 505, 86 L.Ed. 371, 376. The Supreme Court recently reformulated the basic test to be applied as follows:

> Where [a] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (Citation omitted.) If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, 397 U.S. 137, 142, 25 L.Ed. 2d 174, 178 (1970).

In *Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 76 L.Ed. 2d 1, the Court applied the *Bruce Church* test to the question of whether state public service commission *regulation* of wholesale electric rates charged by a rural power cooperative to its member retail distributors was forbidden by the Commerce Clause of the United States Constitution. The Court upheld such "even-handed" regulation, reasoning that (1) economic protectionism is not implicated by the traditional rate making functions of the state public service commissions;[22] (2) state regulation of wholesale rates charged by a rural power cooperative is well within the scope of "legitimate local public interest," particularly where the cooperative's basic operation consists of supplying power from generating facilities located within the state to member cooperatives, despite the fact that the cooperative is also tied into an interstate power grid; and (3) the effects on interstate commerce of state regulation of wholesale rates the cooperative charges its members are only incidental, so

22. *See also Kansas-Nebraska Natural Gas Co. v. City of St. Edward*, 234 F. 2d 436, 440 (8th Cir. 1956); *Zucker v. Bell Tel. Co. of Penn.*, 37 F. Supp. 748, 757 (E.D. Pa. 1974), *aff'd*, 510 F. 2d 971, *cert. denied*, 422 U.S. 1027, 45 L.Ed. 2d 684 (1975).

that the burden imposed on such commerce is not clearly excessive in relation to the putative local benefits.

In passing, the *Arkansas Electric* Court observed that despite the fact that most retail utilities receive a portion of the power they sell from out-of-state,

> [T]he national fabric does not seem to have been seriously disturbed by leaving regulation of retail utility rates largely to the States. Similarly, it is true that regulation of the prices AECC [the cooperative] charges to its members may have some effect on the price structure of the interstate grid of which AECC is a part. But, again, we find it difficult to distinguish AECC in this respect from most relatively large utilities which sell power both directly to the public and to other utilities.

461 U.S. at 395, 76 L.Ed. 2d at 17. Thus, it is clear that in the ordinary case, and absent acts of pure economic protectionism, state regulatory action affecting both jurisdictional and non-jurisdictional customers that imposes only incidental effects upon interstate commerce will not be found to offend the Commerce Clause of the United States Constitution.

Again, the roll-in, as employed by the Commission, does no more than establish the overall cost of operation of a single, unified Nantahala-Tapoco system and allocates the proper portion of those costs to North Carolina retail customers for the purpose of fixing just and reasonable rates for Nantahala. Such even-handed and traditional rate making operations do not implicate the national concern with "economic protectionism" discussed in the *Bruce Church* case. Moreover, the setting of retail electric rates for Nantahala's customers is clearly a legitimate North Carolina interest with a significant impact in this state. Not a word of the contracts or agreements properly regulated by FERC has been changed, and the fact that the price charged by Nantahala to its retail customers may have some *de minimis*, incidental effect on the price structure of the interstate "grid" of which Nantahala is a part is not clearly excessive in relation to the substantial public interest in the establishment of just and reasonable electric rates for ultimate North Carolina consumers. *See Arkansas Elec. Coop. Corp. v. Arkansas Public Serv. Comm'n*, 461 U.S. 375, 76 L.Ed. 2d 1. Accordingly, we conclude that the Commission's order does not

impose an undue burden on interstate commerce and is not, therefore, prohibited by the Commerce Clause of the United States Constitution.

We take this opportunity to note that an amicus curiae brief has been submitted in this appeal on behalf of the State of Tennessee and one of its agencies, the Tennessee Department of Economic and Community Development. The State of Tennessee is concerned that any increase in power costs at Alcoa's Tennessee facilities resulting from the Commission's order will create the danger of Alcoa's curtailment of production, with consequent layoffs of many local residents there. The State joins in the position of the companies (Alcoa, Tapoco) that the Commission's order interferes with FERC's exclusive jurisdiction to regulate the way in which energy is allocated and sold in interstate commerce and in the companies' argument that the roll-in order has the practical effect of allocating the power output and the economic benefit of Tapoco's operations to Nantahala in contravention of both federal authority and the federal constitution. The legal issues adverted to in the amicus brief are, of course, addressed in our discussion of the arguments presented by the companies themselves. We are fully cognizant of the broader concerns expressed by the State of Tennessee; however, we find no impermissible preferences or reallocation of resources to be embodied in the Commission's order. Rather, we conclude that the order grants precisely the relief which the State of Tennessee requests in its brief, that is, the order "ensure[s] all affected persons and entities of fair treatment in the allocation of power resources."

C.

Both Nantahala and Alcoa challenge the rate reduction and refund obligation imposed by the Commission for the locked-in period of this docket (1977-1981). Nantahala argues that implementation of the roll-in methodology causes it to suffer a revenue shortfall which affects its financial stability and amounts to confiscation of its properties in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and art. I, § 19 of the North Carolina Constitution (the "law of the land" provision). Alcoa attacks both the Commission's authority to impose liability upon it for Nantahala's refund obligation and the results of that imposition as confiscatory under the federal con-

stitution. We find no merit in any of the companies' arguments concerning the rate reduction or refund obligation.

1.

As indicated in Part I of this opinion, Nantahala initiated this proceeding in 1976 to establish new rates based upon the 1975 test year data so as to increase its charges to North Carolina retail customers by $1,830,791. On 14 June 1977, the Commission issued an order in Docket No. E-13, Sub 29, permitting Nantahala to put into effect revised rates so as to produce $1,598,918 in additional gross revenues. This rate increase was based upon the assumption, later and properly rejected by the Commission, that Nantahala was a stand-alone company, that its stand-alone reasonable expenses, including interest on its outstanding debt, were $9,827,514, and that its stand-alone authorized gross revenues were $11,067,000. Under the roll-in methodology used in the remanded proceedings, Docket No. E-13, Sub 29 (Remanded), Nantahala is authorized, through its rates, to collect revenues in the amount of $9,032,000 (exclusive of purchased power costs), while Nantahala's rolled-in reasonable expenses are determined to be $8,322,000. The refund imposed of $2,035,000 annually, was based upon the difference between the revenues being collected under the 14 June 1977 order in the amount of $11,067,000 and the revenues authorized in the 2 September 1981 order in the amount of $9,032,000. In other words, the refund obligation is the difference in amount between Nantahala's actual rate collections between June 1977 and August 1981, and what those collections would have been under the rolled-in rates, plus interest.

a.

[19] Nantahala contends that the roll-in sets revenues for the utility which are below its "actual" or "book" expenses and thus requires it to operate at a loss. The company arrives at its revenue shortfall conclusion by subtracting its rolled-in authorized revenues from the expenses authorized in the 1977 order on the premise that Nantahala was a stand-alone company. That is, by subtracting the $9,032,000 in gross revenues authorized under the roll-in from the $9,827,514 in reasonable expenses determined for the 1975 test year on the stand-alone premise, Nantahala arrives at an approximate $800,000 "revenue shortfall." Nantahala uses the same methodology in comparing rolled-in authorized revenues

to stand-alone authorized revenues under the 1977 order in support of its argument that the approximately $2 million annual reduction in revenues from the previously established level will deplete the utility of earnings with which to pay an equity return to its shareholder or to furnish capital for plant expansions and new service connections as its load grows. It is Nantahala's contention that the Commission, on remand, did not determine that the expenses it had earlier found reasonable would not actually be incurred by Nantahala, or that the losses thus engendered would be ameliorated by the roll-in, and that the ultimate result of the roll-in will be Nantahala's financial insolvency.

The obvious flaw in Nantahala's "revenue shortfall" argument lies in the company's failure to compare authorized rolled-in revenues to authorized rolled-in expenses. In the order appealed from, Finding of Fact No. 17 authorizes Nantahala, through its rates, to collect revenues in the amount of $9,032,000 (exclusive of purchased power costs) while Finding of Fact No. 14 recognizes Nantahala's reasonable expenses to be $8,322,000. The difference between the two figures represents profit. Consequently, Nantahala is permitted to earn a proper income over and above the rolled-in expenses that the Commission has determined were reasonably incurred in the provision of service to Nantahala's retail customers.

The fact that Nantahala claims it *actually* has incurred a higher level of expenses under the various inter-corporate agreements among itself, its affiliates and TVA is not dispositive; it is for the Commission, and not the company, to determine what portion of those total expenses are to be reflected in the retail rates charged Nantahala's North Carolina customers. It must be remembered that this is a general rate case, and that under N.C. G.S. Chapter 62, the Commission must fix such rates "as shall be fair to both the public utility and to the consumer." N.C.G.S. § 62-133(a). While the Commission is to fix rates that will enable the utility *by sound management* to pay all of its costs of operation and have left a fair return upon the fair value of its properties, it is not required to guarantee the return requested by the utility where the facts and circumstances warrant otherwise. *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681. As noted earlier, the primary purpose of Chapter 62 is to assure the public of adequate service at a reasonable charge; the provi-

sions of this chapter of the General Statutes designed to assure the utility of adequate revenues do not take precedence over, but "are in the nature of corollaries to the basic proposition that the public is entitled to adequate service at reasonable rates. . . ." *Id.* at 680, 208 S.E. 2d at 687. Furthermore, as this Court noted in *Utilities Comm. v. Telephone Co.*, the question of whether rates prescribed under Chapter 62 are so unreasonable and unjust to the company and its stockholders, and so amount to an unconstitutional confiscation of a utility's property necessarily "involves an inquiry as to what is reasonable and just for the public. . . . The public cannot properly be subject to unreasonable rates in order simply that stockholders may earn dividends." 285 N.C. at 682, 208 S.E. 2d at 688, *quoting Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 596-97, 41 L.Ed. 560, 566 (1896).

Having found that Nantahala's parent/customer Alcoa had already received substantial concealed benefits at the expense of Nantahala's retail rate payers under the NFA and 1971 Apportionment Agreement, the Commission was entitled to weigh that benefit in balancing the interests of Nantahala's rate payers and the utility's sole shareholder, Alcoa. In view of the Commission's determination that unsound or "absentee" management decisions on the part of Nantahala, and parental domination on the part of Alcoa, left the utility with insufficient resources to meet its steadily increasing public load and lacking in contractual power supply arrangements tailored to meet its public service needs at reasonable prices, it was well within the Commission's rate making authority to shift the onus of those managerial shortcomings from the pockets of Nantahala's retail rate payers to the corporate offices of the "Alcoa power system." In short, we reject Nantahala's arguments that the rolled-in rates cause it to operate at a loss and in so doing confiscate its property.

b.

In essence, the Commission set Nantahala's rates and ordered refunds so as to return to Nantahala's retail customers the benefits which the Commission found had been unfairly diverted to Alcoa by means of Alcoa's domination of Nantahala. The principal amount of the refund obligation imposed on Nantahala is $18,962,000. By December 1983, that figure had grown to

$25,568,433. Nantahala's entire net worth as of 31 December 1983 was $15,700,000. Thus, the full extent of the costs unfairly imposed upon Nantahala's rate payers under the 1977 order was substantially greater than Nantahala itself could afford to return; the economic benefits in question had already been flowed-through to Alcoa. Therefore, to prevent the frustration of its ability to effectively protect Nantahala's customers, the Commission ordered Alcoa, over whom the Commission had previously asserted jurisdiction as a statutory public utility pursuant to N.C. G.S. § 62-3(23)(c), to pay Nantahala's refund obligations to the extent that Nantahala itself is unable to do so and continue to render adequate service. Thus, Nantahala is not left bereft of resources with which to meet its obligations.

Nantahala, however, contends that its *potential* refund obligation coupled with the rate reduction prevented the utility from attracting either debt or equity financing which will be needed to meet both its service obligation and its anticipated need to expand its facilities as growth in demand on its system occurs. Nantahala observes that the Commission's order places the refund obligation on Nantahala whether or not Alcoa can be forced to contribute, so that if Alcoa is determined not to be liable for these refunds, Nantahala will be obligated to refund the entire amount. The utility implies in its brief that this situation has placed a "chill" on its credit rating. In addition, Nantahala points out that Alcoa contends that it bears no refund liability and has stated that it will make payments "only after exhaustion of all federal and state judicial remedies and legal rights." On this basis, Nantahala argues that the requirement that it make refund payments to customers far in excess of its net worth or what it could obtain in complete liquidation of its assets also results in an unconstitutional confiscation of its property. Because Nantahala's argument concerning the refund obligation turns upon the determination of Alcoa's refund liability, we will now address the challenges Alcoa presents to the Commission's order holding it responsible for so much of the refund obligation as Nantahala is itself unable to pay.

2.

Alcoa has abandoned its argument that it is not a statutory public utility under N.C.G.S. § 62-3(23)(c), as found by the Commis-

sion and affirmed by the Court of Appeals. However, the company now argues that the Commission lacks the authority to impose any refund obligation upon Alcoa on this basis and, in any event, lacks the authority to charge Alcoa with the obligation to refund any revenues collected by Nantahala prior to 3 October 1980, the date on which the Commission ruled that Alcoa was a statutory public utility. We conclude that the Commission acted well within its regulatory authority in imposing the obligation upon Alcoa to pay any part of the refund obligation for the entire locked-in period of this docket that Nantahala is itself unable to pay.

Alcoa's challenge to the Commission's basic authority to order it to pay any portion of Nantahala's refund obligation may be summarized as follows: (A) Alcoa's status as a public utility under N.C.G.S. § 62-3(23)(c) does not, in itself, give the Commission a basis for imposing liability on it for Nantahala's refund; (B) there is no legal or factual basis for the Commission to reach that result by either "piercing the corporate veil" between Alcoa and Nantahala or by applying the "no profits to affiliates" rule; and (C) federal regulation of the companies and transactions at issue prohibits piercing of the corporate veil. None of these contentions has any merit.

a.

[20] Initially, we note that in a general rate case, the Commission is empowered to fix rates for *any* public utility subject to the provisions of Chapter 62. Ordering refunds is an inherent part of the rate making function of the Commission. *See Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (refunds to customers ordered to remedy excessive utility charges arising out of improperly approved fuel cost adjustments in retail rates). Moreover, pursuant to N.C.G.S. § 62-30, the Commission is vested with broad authority to insure the effective regulation of public utilities in North Carolina, including "all such . . . powers and duties as may be necessary or incident to the proper discharge of its duties."

N.C.G.S. § 62-3(23)(c) denominates the parent of a public utility to be, itself, a public utility to the extent "that such affiliation has an effect on the rates or service of such public utility." Alcoa first argues that this statutory provision is "merely jurisdictional" and permits the Commission to "assert" its regulatory authority over

the parent corporation, but fails to provide a basis for remedial action should the affiliation be found to have a detrimental effect on the subsidiary. Next, Alcoa maintains that no other provision of the General Statutes gives the Commission such remedial jurisdiction over a statutory public utility, so that the Commission lacked a legal basis for holding Alcoa liable for Nantahala's refund obligation. We disagree.

Under Alcoa's interpretation of N.C.G.S. § 62-3(23)(c) it is difficult to conceive of what the "assertion" of such an empty regulatory authority would consist of. The very language of this provision indicates that it must have been the purpose of the legislature to empower the Commission to hold the corporate parent or affiliate of a public utility financially accountable for any adverse effects of that affiliation on the subsidiary's rates or service as a necessary adjunct to the discharge of its statutory duties under N.C.G.S. § 62-30. Furthermore, Alcoa's reading of N.C.G.S. § 62-3(23)(c) is wholly at odds with the general powers and duties granted the Commission under Chapter 62 of the General Statutes.[23]

It is beyond dispute that Nantahala's financial stability and hence its ability to serve the public depends on Alcoa's ultimate legal responsibility to stand behind the refund obligation. The broad grants of authority to the Commission to ensure the effective regulation of Nantahala and the full protection of Nantahala's customers would be rendered nugatory if, upon a finding that its parent's affiliation had severely and detrimentally affected Nantahala's rates and ability to effectively provide service in its franchise area, the Commission were powerless to order remedial action against the parent corporation. Therefore, we reject Alcoa's restrictive interpretation of the purpose of N.C.G.S. § 62-3(23)(c) and the scope of the Commission's statutory powers.

23. For example, N.C.G.S. § 62-42(a)(5) authorizes the Commission to enter orders directing a public utility to do ". . . any other act necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity. . . "; subsection (b) permits an order to be directed to "two or more public utilities"; and N.C.G.S. § 62-32 authorizes the compelling of a public utility to render reasonable service at reasonable rates.

b.

The provision of electric service and the development of the hydroelectric resources of North Carolina are enterprises in which the public has a special interest, and which are accordingly subject to special duties and regulation. N.C.G.S. § 62-2; *Public Service Co. v. Power Co.*, 179 N.C. 18, 101 S.E. 2d 593 (1919); *North Carolina Public Service Co. v. Southern Power Co.*, 282 F. 837 (4th Cir. 1922), *cert. denied*, 263 U.S. 508, 68 L.Ed. 413 (1924). When a public utility is affiliated with other corporations, it is often necessary to look beyond corporate form to determine the actual scope of the public service enterprise in question, in order to prevent evasion of the obligations imposed on that public service enterprise. *See generally* Berle, *The Theory of Enterprise Entity*, 47 Col. L. Rev. 343, 343-45, 348-52 (1947). This Court has repeatedly recognized the propriety of "piercing the corporate veil" in the context of utility regulation. In *Utilities Comm. v. Morgan, Attorney General*, 277 N.C. 255, 177 S.E. 2d 405 (1970), *aff'd on rehearing on other grounds*, 278 N.C. 235, 179 S.E. 2d 419 (1971), Justice Lake, writing for the Court, stated:

> It is well established that the doctrine of the corporate entity may not be used as a means for defeating the public interest and circumventing public policy. . . . In order to prevent such a result, a parent corporation and its wholly-owned subsidiaries may be treated as one. (Citations omitted.)

277 N.C. at 272, 177 S.E. 2d at 416. *Accord Utilities Commission v. Intervenor Residents*, 305 N.C. 62, 286 S.E. 2d 770; *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705.[24] *See generally* 64 Am. Jur. 2d, Public Utilities, § 202 (1972); 16 A.L.R. 4th 454, § 4. Indeed, the inherent authority of the Commission to

24. In the *Morgan*, *Intervenor Residents* and *Telephone Company* cases this Court has recognized that the Commission should closely scrutinize transactions between a public utility and an *unregulated* affiliate, in order to prevent either the utility enterprise from effectively earning a greater profit than the Commission had determined to be reasonable, or from concealing or diverting profits from the public utility to the affiliate. Surely the Commission has no less authority to regulate the results of transactions between a jurisdictional or statutory public utility and its affiliated operating public utility than it has to regulate transactions between an unregulated affiliate and a public utility. We therefore reject, in passing, Alcoa's argument that the Commission could not also rely on the "no profits to affiliates" rule to hold it liable for Nantahala's refund obligation.

pierce the corporate veil between a public utility and its parent corporation in order to prevent the evasion of effective regulation was implicitly recognized in an early commercial rate discrimination case involving Nantahala and its parent/customer Alcoa. *Utilities Commission v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (Barnhill, J., concurring) (Nantahala may not structure its rates so as to accord its parent Alcoa an unreasonably favorable rate).

Therefore, once the Commission determined that Alcoa was a statutory public utility under N.C.G.S. § 62-3(23)(c), it could rely upon the doctrine of "piercing the corporate veil" between Nantahala and its parent to hold Alcoa financially responsible for Nantahala's refund obligation to the extent its affiliation had adversely affected Nantahala's rates as "necessary or incident" to the proper discharge of its regulatory duties under Chapter 62. N.C.G.S. § 62-30. Accordingly, we reject Alcoa's argument that there is no statutory or legal basis for its refund liability.

[21] Alcoa next maintains that "as a matter of law" there is no factual basis in the record before the Commission for piercing the corporate veil between it and Nantahala. Alcoa's argument may be summarized as follows: (1) North Carolina law requires a finding of corporate domination utilized by the parent to commit fraud or injustice with respect to the transaction attacked; (2) the Commission's determinations are based solely on the fact of Alcoa's 100 percent stock ownership of Nantahala and its conclusion that the NFA and 1971 Apportionment Agreement were negotiated so as to benefit Alcoa at the expense of Nantahala's customers, thereby leaving Nantahala an "empty shell"; (3) stock ownership, without more, is no basis for piercing the corporate veil and the "empty shell" characterization cannot stand as a basis for domination or injury to the rate payer because both the NFA and 1971 Agreement "have been thoroughly regulated (and approved) by FERC"; and (4) a state commission is preempted from determining that the Nantahala-Alcoa relationship resulted in fraudulent wholesale rate schedules once these rate schedules have been determined to be reasonable by FERC. Although these contentions have a certain logical appeal, they are patently lacking in merit as a matter of both law and fact.

In its order reducing rates and imposing the refund, the Commission found as a fact that:

> Alcoa has so dominated certain transactions and agreements affecting its wholly owned subsidiary Nantahala that Nantahala has been left but an empty shell, unable to act in its own self interest, let alone in the interest of its public utility customers in North Carolina.

In the concluding portion of the Commission's extensive discussion of evidence demonstrating Alcoa's control over the design, development and operation of Nantahala from its inception, the Commission stated:

> The Commission must conclude that Alcoa has so dominated these transactions and agreements affecting its wholly owned subsidiary Nantahala that Nantahala has been left but an empty shell, unable to act in its own self interest, let alone in the interest of its public utility customers in North Carolina. Alcoa's domination of Nantahala in these transactions has resulted in Nantahala's collecting, through its base rates, excess revenue from its customers in the amount of approximately $2,035,000 a year since June 14, 1977. Moreover, this inequity is further magnified by the fact that Nantahala has collected significantly additional excess revenues through operation of its Purchased Power Adjustment Clause.

First, it is apparent that there is nothing in the Commission's order which indicates that "fraud" was either an express or implied concern of the Commission. Rather, detrimental domination forms the basis of Alcoa's refund obligation. Next, Alcoa misconceives the need to demonstrate "fraud" in order to pierce the corporate veil between affiliated companies that comprise a single enterprise, whether that enterprise be a public utility or an unregulated business concern. Although we have previously acknowledged the propriety of disregarding separate corporate identities where a parent is found to have used its subsidiary as a mere "instrumentality" for the commission of fraud upon some third party, this Court has never limited the doctrine of piercing the corporate veil to the situation of fraud alone. In *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967), the very case Alcoa relies upon in its brief, we stated the three elements which must be proved under the "instrumentality rule" as follows:

(1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and

(2) Such *control* must have been *used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights*; and

(3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. (Emphasis added.)

Id. at 670-71, 157 S.E. 2d at 358, *quoting Lowendahl v. Baltimore & O. R. Co.*, 247 A.D. 144, 157, 287 N.Y.S. 62, 76, *aff'd*, 272 N.Y. 360, 6 N.E. 2d 56 (1936). Clearly, despite the fact that the second element *includes* control and domination of the subsidiary or affiliate for the commission of some "fraud," it is by no means limited thereto and in fact, expressly includes domination for the commission of some unspecified "wrong," to "perpetrate the violation of a statutory or other positive legal duty," *or* an act in "contravention" of the complainant's "legal rights."

In fact, our courts have pierced the corporate veil between two corporations, or between a corporation and its sole shareholder(s), to prevent the frustration of public policy in numerous cases where fraud was not involved. *See, e.g., Waff Brothers, Inc. v. Bank*, 289 N.C. 198, 221 S.E. 2d 273 (1976) (to prevent a judgment debtor's meritorious claim from being defeated); *Henderson v. Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968) (to prevent a finance company from evading the usury laws); and *Freeman v. Development Co.*, 25 N.C. App. 56, 212 S.E. 2d 190 (1975) (to enable recovery on meritorious contract and quasi-contract claims). Most recently, this Court held that the corporate veil between affiliated corporations will be pierced to prevent the owner of a rental property to escape liability for the tortious conduct of its affiliated operating company. *Glenn v. Wagner*, 313 N.C. 450, 329 S.E. 2d 326 (1985).

Significantly, in *Glenn v. Wagner*, we *relaxed* the showing to be made by the party seeking to extend liability for corporate

obligations beyond the confines of a corporation's separate entity by holding that in certain cases involving affiliated corporations (as distinct from parent and subsidiary corporations), the domination sufficient to pierce the corporate veil need not be limited to the particular transaction attacked. Rather, the separate corporate entity would be disregarded in those cases in which one affiliated corporation is shown to be "without a separate and distinct corporate identity and is operated as a mere shell, created to perform a function for an affiliated corporation or its common shareholders" without the necessity of proving that the control was also exercised over the *particular* transaction attacked. 313 N.C. at 457, 329 S.E. 2d at 331.

In reaching this result, Chief Justice Branch, writing for the Court, emphasized the fact that the theory of liability under the instrumentality rule is essentially an equitable doctrine.

> Its purpose is to place the burden of the loss upon the party who should be responsible. Focus is upon the reality, not form, upon the operation of the corporation, and upon the defendant's relationship to that operation. It is not the presence or absence of any particular factor that is determinative. Rather, it is a combination of factors which, when taken together with an element of injustice or abuse of corporate privilege, suggest that the corporate entity attacked had "no separate mind, will or existence of its own" and was therefore the "mere instrumentality or tool" of the dominant corporation.

Id. at 458, 329 S.E. 2d at 332. *Glenn v. Wagner* merely reiterated our earlier rule permitting the corporate veil between a parent and subsidiary corporation to be pierced where the parent has dominated the subsidiary and the subsidiary is "a shield for [the parent's] activities in violation of the declared public policy or statute of the State, *or* for the purpose of fraud. . . ." *Waff Brothers*, 289 N.C. at 210, 221 S.E. 2d at 280. (Emphasis added.)

Moreover, even if Alcoa were correct as to the other elements necessary to pierce the corporate veil under North Carolina law, the evidence supporting the Commission's imposition of refund liability upon Alcoa more than met the most restrictive of the various tests for inter-corporate liability—the so-called "*Lowendahl*" test—as articulated in *Huski-Bilt* and *Ac-*

ceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E. 2d 570 (1966). As we indicated in Part I, C, 3 of this opinion, there is ample evidence of record of Alcoa's financial and managerial control over Nantahala from the time of its inception up until the present day, and plenary evidence demonstrating that this control extended to the ultimate operating and accounting policies of its subsidiary.

The entire historical pattern of Nantahala's development is replete with instances of the manner in which Alcoa dominated the development, sale and operation of Nantahala's hydroelectric resources and facilities, and subordinated these resources to what Alcoa considered to be the paramount needs of its aluminum smelting and fabrication operations in Alcoa, Tennessee. For example, Nantahala added generating capacity, vastly in excess of the amounts required to service its public load, for the express purpose of meeting Alcoa's expanding production needs prior to and during the war years at mid-century. Yet, in the last thirty years, Alcoa has caused Nantahala to remain inert in terms of obtaining additional capacity, either through development of additional generating facilities or through long-term purchase power agreements with others tailored to Nantahala's particular needs, as Alcoa's electricity requirements have leveled off, despite substantial constant growth in Nantahala's public load. As we observed earlier, Alcoa's unified development of the hydroelectric resources of its public utility subsidiaries was undertaken in the paramount interest of obtaining low-cost hydroelectric power for itself. Or, as more succinctly stated by Justice Barnhill in *Utilities Commission v. Mead Corp.*, 238 N.C. at 467-68, 78 S.E. 2d at 302:

> If they [the Commission] will only cut through the form to the substance, they will find just another hydroelectric power producing agency of Alcoa, retailing just enough of its production—less than 20%—to permit it to pose as a *quasi*-public corporation with the right to use the water power resources of this State, exercise the power of eminent domain, and enjoy the other monopolistic privileges accorded a public utility while it was, in fact, created and exists primarily to serve its master which seeks and must have low-cost hydroelectric power.

Justice Barnhill's 1953 observation that historically Nantahala has been no more than "another hydroelectric power producing agency of Alcoa" was fully borne out by the evidence before the Commission in 1981, as the Commission properly so found.

Furthermore, the evidence with respect to Alcoa's complete domination of Nantahala's "policy and business practice in respect to the transaction attacked," as found by the Commission, is both direct and overwhelming.

The three basic power supply contracts affecting Nantahala's rates are the 1941 Original Fontana Agreement, the 1962 New Fontana Agreement and the 1971 Nantahala-Tapoco Apportionment Agreement. Each of these contracts was, in whole or part, in effect during the 1975 test year. Although Nantahala was not even a party to the OFA, it gave to TVA the right of control of its energy production and water storage and turned over to TVA, through Alcoa, land, constituting the site for the massive Fontana Project. In return, Alcoa received 11,000 MW of energy for 20 years and its subsidiaries received power and energy entitlements dependent upon the level of generation controlled by TVA. The Commission found that the OFA still conveys significant benefits to Alcoa. Pursuant to the NFA, to which Nantahala was a *signatory* but *not* a *negotiating party*, Nantahala and Tapoco agreed to turn over their energy production to TVA in return for 218,300 kw annual assured energy. The Commission found and concluded that the evidence clearly demonstrates that the NFA was tailored to meet Alcoa's aluminum production needs without consideration of Nantahala's public service needs in western North Carolina.

From 1963 to 1971 Nantahala received its portion of the return entitlements under the 1963 Alcoa-Nantahala Apportionment Agreement. Under that agreement, Nantahala was provided 360 million kwh minimum production, plus Nantahala's actual production in excess of that figure, and additionally, Alcoa paid to Nantahala $89,200 annually for 25,600,000 kwh of energy received from TVA for TVA's use of Nantahala's flood control and storage rights. In 1971, with Nantahala facing the need to service an increasing public load, Alcoa employee George Popovich undertook the development of an apportionment formula by which Nantahala and Tapoco would contractually share the TVA entitlement

of 218,300 kw annual assured energy. The Popovich formula was incorporated into the 1971 Agreement between Nantahala and Tapoco, with Alcoa's employee Popovich representing the interests of *both* companies at the bargaining table. Under the 1971 Agreement, Nantahala rather than retaining or even increasing its allocation, was deprived of 66 million kwh average energy production annually in comparison to its 1963 Agreement with Alcoa. Since the production allowance in the TVA return entitlements was jointly shared by Nantahala and Tapoco under the NFA, the 66 million kwh detriment to Nantahala constituted a benefit to Tapoco that was passed on to Alcoa. Furthermore, the 1971 Agreement credited Nantahala with an assigned generating capacity of 54,300 kw, whereas its actual dependable generating capacity was determined to be 81,800 kw. Since the capacity allowance in the TVA return entitlements was also jointly shared by Nantahala and Tapoco under the NFA, any capacity needs of Nantahala between its assigned and its actual capacity represented an expense to Nantahala and, thus, a saving to Tapoco that was passed on to Alcoa as a concealed benefit.

In addition, under the 1963 Agreement, Nantahala received credit for relinquishing control of its flood control and storage rights to TVA, in the form of an annual payment of $89,200 from Alcoa. Despite the fact that the NFA included in the TVA return entitlement a reimbursement by TVA for the right to operate Nantahala's projects, the 1971 Agreement gave no credit to Nantahala for that reimbursement, and thus the reimbursement represented a savings to Tapoco that was passed on to Alcoa. Although the loss of the right to control the storage and flow of water for Nantahala's facilities constituted a loss of considerable value for which Nantahala was entitled to compensation, Nantahala received neither payments nor entitlements in consideration for relinquishment of these valuable rights. Additionally, the value to Tapoco of TVA's upstream Fontana Dam was not figured into the apportionment.

Singularly lacking in the foregoing review is any evidence of the separate mind, will or existence of Nantahala as a corporation with its own identity. The Commission properly found that Nantahala and Tapoco were designed and operated as a single system and that by virtue of the terms of the Fontana Agreements, Nantahala is effectively precluded from exercising a separate will

regarding energy production. Moreover, no Nantahala employee has yet been identified who dealt with other parties at arm's length concerning the utilization of its generating resources for supplying power for Nantahala's public service obligations. To the contrary, and as found by the Commission, "Alcoa's dominance is obviously and frequently documented in the results of various arrangements it has caused Nantahala and Tapoco to enter into."

In summary, the evidence of record shows that the Fontana Agreements and the 1971 Apportionment Agreement resulted in direct inequities to Nantahala and concealed benefits to Alcoa. The situation was further aggravated because the TVA return entitlements in the NFA were entirely designed to meet Alcoa's aluminum production needs and were not suitable for Nantahala's public service needs. Nantahala had energy production capacity and it had peaking capacity from its own generating stations, yet Nantahala gave up that energy production capacity and that peaking capacity with the result that it had to buy higher cost power from TVA to meet its peaking responsibilities and its energy production responsibilities. The totality of this evidence shows convincingly that Alcoa has controlled the policy and business practice of Nantahala's energy production through a series of contractual arrangements orchestrated by Alcoa primarily to serve its own best interests.

The evidence as to Alcoa's use of its control over Nantahala to commit the wrong, or violation of duty complained of by the intervenors, was equally substantial. Fundamentally, the record shows that Nantahala continually failed to protect its rights in its dealings with Alcoa and Tapoco concerning the power supply vital to fulfilling its public service responsibilities. For example, the NFA is silent as to any interest of Nantahala in receiving an assured portion of the return entitlements given by TVA in exchange for receiving the entire output of the Nantahala-Tapoco generating resources, except to state that the rights and benefits to Alcoa may be allocated as Alcoa, Tapoco and Nantahala see fit. The silence as to Nantahala's interest is understandable only in light of the fact that during the year 1962 Nantahala had no reason to bargain at arm's length for power suited to its public service load because the attempt to sell its distribution system to Duke Power Company was pending and had in fact received initial approval by the Commission. Alcoa's own internal documents

indicate that should the sale have not been completed by the effective date of the NFA, TVA would *temporarily* increase the power available to the Alcoa system in an amount sufficient to meet Nantahala's needs, thus implying that the NFA was itself in no manner intended to provide Nantahala with a 20 year power supply suitable for a growing public load. However, no fundamental changes in the terms of the NFA exchange were made following this Court's reversal of the prior order of the Commission approving the sale to Duke. The circumstances surrounding execution of the NFA ultimately required Nantahala to deal separately with Alcoa, outside the NFA, for recognition of its interests.

Again, this arrangement demonstrates that although Alcoa bargained with TVA concerning the value of Nantahala's generating resources as part of a unified utility system, the structure of the NFA return entitlements suited Alcoa, not Nantahala. Later, by the terms of the 1971 Apportionment Agreement, Nantahala effectively waived certain valuable contractual rights it had been accorded under the 1963 Agreement with Alcoa *and* simultaneously received a lesser share of the TVA entitlements at a precise point in time when its load was quickly outstripping its ability to serve under the terms of the NFA exchange. The 1971 Agreement represents more than a failure of consideration to Nantahala; there was diminution of past consideration in contravention of Nantahala's legal rights.

Nantahala is a public utility with a franchise to serve the electrical needs of most of six western North Carolina counties and, in the test year, served upward of 30,000 customers. In return for the various quasi-monopolistic privileges Nantahala receives as a public utility, Nantahala has a duty to serve its customers without concealment of excessive rates. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705. By virtue of the domination of Alcoa, Nantahala was found to have been passing concealed benefits on to Alcoa which has resulted in excessive rates to its customers. This constitutes unjust action by Alcoa in contravention of Nantahala's legal rights and obligations. That this domination and unjust action in contravention of Nantahala's rights and obligations proximately caused the injury and loss complained of is, therefore, self-evident.

c.

[22] Alcoa does not directly challenge the evidentiary support for the Commission's findings and conclusions. Rather, Alcoa argues that "federal regulation and approval of the New Fontana Agreement is conclusive evidence that Alcoa does not dominate or control Nantahala through that Agreement" and "also bars a determination of either fraud or injustice to Nantahala's customers." Again, the Commission did not, and need not, find "fraud" in the agreements in order to hold Alcoa responsible for the refund obligation. Therefore, we need not address Alcoa's argument that the Commission is preempted from finding fraud in FERC-approved rate schedules. *See also* Part II, A, *supra.* In essence, Alcoa's remaining arguments boil down to the proposition that extensive prior investigation and regulation of the activities of Alcoa and Nantahala by both state and federal regulatory agencies precludes the Commission as a matter of law from finding either domination or injustice in the Alcoa-Nantahala relationship.

In light of the record of Alcoa's repeated and largely successful efforts over the last 40 years to evade, avoid and preclude federal and state regulatory oversight of its subsidiaries' energy producing operations and the various intercorporate power supply agreements between and among them and TVA, we find Alcoa's argument both factually and legally insupportable.[25] Alcoa has failed to demonstrate that any aspect of federal regulatory action with respect to Nantahala and Tapoco preempts the Commission's findings and conclusions with respect to piercing the corporate veil between itself and its public utility subsidiary.[26] It must be remembered that the Commission is charged with the regulation of public service enterprises, which require special State oversight to protect consumers from abuses of their quasi-monopoly power, in order to ensure fairness to the public. N.C. G.S. § 62-2, -30. *Manufacturing Co. v. Aluminum Co.*, 207 N.C. 52, 175 S.E. 2d 698. The Commission's oversight jurisdiction with regard to Nantahala's intrastate retail rates is exclusive, and its determination that Alcoa was legally responsible for Nantahala's excessive intrastate retail rates rests well within the realm of

25. *See* Discussion Part I, B, *supra.*

26. *See* Discussion Part II, A, *supra.*

regulatory control reserved to the states under the Federal Power Act. 16 U.S.C. § 824(b).

In summary, there is ample evidence in the record of Alcoa's financial and managerial control over Nantahala from the time of its inception, and the use of that control to impose upon Nantahala contracts in Alcoa's interest rather than in the interest of Nantahala, amounting to complete domination of policy and business practice "so that the corporate entity as to [these] transaction[s] had at the time no separate mind, will or existence of its own. . . ." *Huski-Bilt*, 271 N.C. at 671, 157 S.E. 2d at 358; *Acceptance Corp.*, 268 N.C. at 9, 149 S.E. 2d at 576. Furthermore, because Alcoa's domination resulted in the sacrifice of a public utility's resources to the needs of a private industrial concern, Alcoa's control may indeed be said to have been used to commit wrong or to perpetrate the violation of a statutory duty owed Nantahala's customers. *Id.* Finally, the aforesaid control and breach of duty may clearly be said to have proximately caused the injury complained of, *id.*, that is, higher rates for Nantahala's customers. We therefore reject Alcoa's argument that no factual or legal basis exists for the Commission to "pierce the corporate veil" between itself and Nantahala.

d.

In its final arguments concerning the refund obligation, Alcoa maintains (1) that it was "surprised" at being declared a public utility and that it cannot be required to pay refunds based upon Nantahala's overcollections prior to 30 October 1980, the date on which it "became" a public utility; and (2) that the refund obligation is confiscatory.

1.

[23] The mere statement of Alcoa's first contention reveals the underlying fallacy of the argument: Alcoa did not "become" a North Carolina statutory public utility in 1980. This date marks the advent of no new North Carolina law expanding the definition for the first time. Nor does it mark any dramatic change in Alcoa's relationship with its subsidiaries such that the designation "public utility" was *then* appropriate for the first time. Instead, 30 October 1980 merely marks that date of the Commission's determination that, based upon Alcoa's ownership of Nan-

tahala's stock (a fact existing since 1929) and on the basis of the various intercorporate transactions and agreements, dating back at least to 1941, Alcoa satisfied the criteria for public utility status under N.C.G.S. § 62-3(23)(c). In essence, Alcoa was found to have been a "public utility" having an effect on Nantahala's rates and service for many years. Based upon this finding, and upon the Commission's findings of detrimental domination, Alcoa can properly be held to pay any refunds Nantahala is ordered to pay in this proceeding, but is unable to satisfy out of its own financial resources. Inasmuch as Alcoa is not asked to pay refunds attributable to any past period (that is, prior to the 1977 rate increase), the concept of retroactive rate making is not implicated by the refund obligation ordered.

2.

[24] We also reject Alcoa's argument that the result of the Commission's order is a confiscation of its property under the rule established in *FPC v. Hope Gas Co.*, 320 U.S. 591, 88 L.Ed. 333 (1944) (the fixing of just and reasonable rates involves a balancing of the investor and the consumer interests; the investor's interests include a rate of return sufficient to produce revenue for operating expenses, service on debt and stock dividends). While it is true that Nantahala has neither supplied Alcoa with power nor paid a dividend to Alcoa since early 1979, these facts do not render the rates established confiscatory under the circumstances of this case. The Commission's order does no more than strike a fair and reasonable balance between the long-neglected interests of Nantahala's customers and the corporate parent whose self-interest has been so long and so well served through intercorporate domination and control. Thus, we find no merit in the arguments presented by either Nantahala or Alcoa with respect to confiscation of their property.

Finally, with respect to Alcoa's liability for Nantahala's refund obligation, we must point out that Alcoa itself has repeatedly undertaken in the past to warrant or otherwise back up its subsidiaries' performance obligations. In both Fontana Agreements, Alcoa warranted that it was backing up or securing the performance of its subsidiaries (including Nantahala) in carrying out the coordination and exchange agreements with TVA. These undertakings by Alcoa certainly undercut Alcoa's intimations that

it was surprised in any manner by being held responsible for the obligations of its wholly-owned subsidiary on the basis of its parental impact upon Nantahala's rates and service.

3.

[25] Nantahala presents one final set of arguments concerning the extent of the refund obligation. First, Nantahala contends that it cannot be required to refund revenue collected prior to 6 March 1979, because this revenue was derived from rates approved by the Commission which were not subject to being refunded prior to the Court of Appeals' reversal of the Commission's approval of the 1977 rates in Docket No. E-13, Sub 29. 6 March 1979 is the filing date of the Court of Appeals decision in *Utilities Comm. v. Edmisten, Atty. General*, 40 N.C. App. 109, 252 S.E. 2d 516, *aff'd in part and rev'd in part*, 299 N.C. 432, 263 S.E. 2d 583. Next, Nantahala contends that if it is responsible for all refunds dating to June 1977; it can only be required to refund the excess of its collected revenue over the revenue allowed in its most recently approved prior rate case, which would be in Docket No. E-13, Sub 23. We find no merit in either of these contentions.

a.

Briefly, by order of the Commission dated 14 June 1977, Nantahala was authorized to put new and increased rates into effect. This order was appealed to the Court of Appeals in the aforementioned case. That court reversed and remanded the order, stating:

> The order of the Commission dated 14 June 1977 authorizing increased rates for Nantahala and approving a new purchased power cost adjustment clause is vacated and set aside.

40 N.C. App. at 119, 252 S.E. 2d at 522. The effect of that decision, if left standing, would have been to require an immediate refund of the increased rate collections as of 6 March 1979. Subsequently, this Court stated:

> The Commission's order of 14 June 1977 authorizing an increase in Nantahala's rates was vacated by the Court of Appeals. The effect of the Court of Appeals' decision was stayed, however, by this Court's issuance of a writ of supersedeas pending the outcome of this appeal. Although

> that writ is hereby dissolved, we believe that essential fairness to all the parties is best served by allowing the increased rates to remain in effect, conditioned upon Nantahala's guarantee that it will in the future *refund to its customers any overcharges should the new rates ultimately be determined excessive.* Accordingly, we reverse the Court of Appeals' setting aside of the order of 14 June 1977 and direct the Commission to obtain adequate assurances of Nantahala's willingness and continued ability *to refund such overcharges as may ultimately result from imposition of the 1977 rate schedule.* (Emphasis added.)

299 N.C. at 444, 263 S.E. 2d at 592.

Upon remand to the Commission, the Commission ordered Nantahala to file an undertaking to refund, stating that:

> [T]he Supreme Court has given this Commission a clear mandate to obtain adequate assurances of Nantahala's willingness and continued ability to refund such overcharges as may ultimately result from the imposition of the 1977 rate schedule. . . .

Thereupon, Nantahala filed an undertaking, wherein Nantahala agreed:

> [T]o refund in a manner to be prescribed by the Commission the amount, if any, found to be owing to its customers should the rates approved by the order of 14 June 1977 be ultimately determined to be excessive. . . .

In its 2 September 1981 Order Reducing Rates and Requiring Refund, the Commission directed Nantahala to make a full and complete refund of all overcollections charged after 14 June 1977, when the higher rates had been put into effect. This order of the Commission is no different in substance from the order to refund overcharges collected under excessive rates which are ultimately disapproved as mandated by our decision in *Utilities Comm. v. Edmisten, Atty. General,* 291 N.C. 451, 232 S.E. 2d 184. In that case, an order of the Commission permitting Duke Power Company (and also CP&L and VEPCO) to collect a surcharge was disapproved on appeal. We stated:

> [T]his matter is remanded to the Court of Appeals for the entry of a judgment by it remanding the matter to the Commis-

> sion for the entry of an order by the Commission vacating its order authorizing the surcharge and directing Duke to make the appropriate refunds to its customers on account of revenues unlawfully collected from them pursuant to the surcharge.

Id. at 474, 232 S.E. 2d at 198.

Nantahala contends that refunds may not be ordered for pre-1979 overcollections because these occurred under rates approved by the Commission on 14 June 1977 which were not subject to any undertaking to refund until 6 March 1979, when the Court of Appeals vacated the 1977 order. Nantahala, relying upon *Utilities Comm. v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972), *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 926 and *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. 598, 242 S.E. 2d 862 (1978), argues that only rates that were imposed unlawfully or were permitted to go into effect, subject to an undertaking to refund, may be refunded. Nantahala further contends that because the subject rates were initially approved by the Commission, they are automatically deemed "just and reasonable" under N.C.G.S. § 62-132; therefore, they cannot be considered "unlawful" for purposes of requiring a refund at a later date. This, Nantahala contends, would constitute "retroactive" rate making, in excess of the Commission's authority, because N.C.G.S. § 62-132 permits the Commission to award refunds only where rates that it *allows* to go into effect, as opposed to rates which it *approves*, are later determined to be unreasonable. Next, Nantahala argues that it did not execute an undertaking to refund regarding the 1977 rates until after 6 March 1979, so that only overcollections after that date may be refunded under the line of cases cited above.

Nantahala's argument, although not without logical appeal, confuses the issue with respect to the refund ordered in this case. As Nantahala itself observed in its brief, both *Edmisten* cases cited above discussed the authority of the Commission under N.C.G.S. § 62-132[27] to award refunds to rate payers, where a utili-

27. N.C.G.S. § 62-132 provides:

"The rates established under this Chapter by the Commission shall be deemed just and reasonable, and any rate charged by any public utility different from

ty collects rates *different and higher than those approved by the Commission.* This statute and the cases cited by Nantahala have no applicability to the situation under discussion. Here, excessive rates, initially but erroneously approved by the Commission, were permitted to remain in effect pending the ultimate resolution of the contested factual issue concerning the appropriate rate making methodology to utilize when fixing Nantahala's retail rates. N.C.G.S. § 62-132 cannot be relied upon to transmute an excessive rate into a "just and reasonable" rate by virtue of labeling such rates as rates "established by the Commission." Therefore, the distinction recognized under that statute with respect to the need for an undertaking to refund before refunds may be ordered on the basis of revenue collected under "established" rates has absolutely no bearing on the extent of Nantahala's refund obligation.

Moreover, it is elementary that the Commission's approval of any rate is always subject to judicial review. It is equally well-settled that rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they are changed or modified on appeal or by the further action of the Commission itself. *In re Utilities Co.*, 179 N.C. 151, 101 S.E. 619 (1919). *See also R.R. v. R.R.*, 173 N.C. 413, 92 S.E. 150 (1917). Thus, the 1977 rates were only *presumed* to have been lawfully approved by the Commission until the 1977 order was reviewed by our appellate courts. When, upon appellate review *and* further action by the Commission itself, the 1977 rates were determined to be excessive, Nantahala's rate payers became entitled to recover *all* overcharges collected pursuant thereto. The various dates upon which appellate decisions were entered in this case have ab-

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those so established shall be deemed unjust and unreasonable. Provided, however, that upon petition filed by any interested person, and a hearing thereon, if the Commission shall find the rates or charges collected to be other than the rates established by the Commission, and to be unjust, unreasonable, discriminatory or preferential, the Commission may enter an order awarding such petitioner and all other persons in the same class a sum equal to the difference between such unjust, unreasonable, discriminatory or preferential rates or charges and the rates or charges found by the Commission to be just and reasonable, nondiscriminatory and nonpreferential, to the extent that such rates or charges were collected within two years prior to the filing of such petition."

solutely no bearing upon the temporal extent of Nantahala's refund obligation.

The premise underlying such a refund obligation is that rates which are found to be excessive are then *considered* to have been illegal from the outset and are not considered to have become illegal only as of the date on which the appellate court has found them to be so. *See Louisville & N. R. Co. v. Greenbriar Distillery Co.*, 170 Ky. 775, 187 S.W. 296 (1916). The Commission's order with respect to the temporal extent of the refund obligation is, therefore, compatible with the mandate of this Court in *Edmisten* and well within the Commission's inherent authority to order a public utility to refund monies which were overcollected from its customers under excessive and unlawful rates. *See* N.C.G.S. §§ 62-30, -130, -132; *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184.

In answer to the additional point raised by Nantahala in this regard, we hold that the concept of "retroactive rate making" has no application in the instant proceeding. The rates ultimately fixed and the refund ordered by the Commission in the Sub 29 (Remanded) proceeding were not collectible for past service, but for service rendered in the locked-in period of this docket.

b.

[26] Finally, Nantahala challenges the Commission's action in measuring the excess revenue collected by the rates set under the roll-in rather than upon any excess revenue collected over and above what would have been collected under Nantahala's prior rate schedule, established in Docket No. E-13, Sub 23. While it is true that the rates ultimately established by the Commission in the Sub 29 (Remanded) proceeding were actually lower than the rates which Nantahala had in effect prior to 14 June 1977 by virtue of its earlier rate case (Sub 23), this fact is irrelevant to the amount of excess revenues which Nantahala's customers are entitled to receive under the rates properly established in the Sub 29 (Remanded) proceeding.

The Sub 23 rates were effectively superseded by the 1977 rates. Had the Court of Appeals decision in the original appeal from the Sub 29 proceeding been permitted to stand without appeal, the effect would have been dismissal of the Sub 29 rate in-

crease request and the Sub 23 rates would, indeed, have been effectively reinstated. However, when this Court permitted the 1977 rates to remain in effect and remanded the case for further consideration, the Sub 29 proceeding was effectively continued until such time as the Commission modified its 14 June 1977 order and reduced Nantahala's rates. At no point in time were the Sub 23 rates "resurrected." Therefore, its refund obligation may not be measured against Nantahala's earlier, superseded rates, but must be calculated on the basis of overcharges actually levied and collected from the retail rate payers during the entire 1977-1981 period.

D.

[27] Finally, both Alcoa and Nantahala challenge the Commission's order on the grounds that the Commission failed to make independent findings of fact as to the propriety of the roll-in device in fixing Nantahala's rates. The companies primarily base their argument on certain phrases contained in the Commission's 2 September 1981 order referring to statements contained in this Court's opinion in *Edmisten*, 299 N.C. 432, 263 S.E. 2d 583, as "findings." Nantahala contends that the Commission has thereby shown that it has either improperly taken this Court's observations or concerns as facts binding upon it or has chosen to disregard substantial quantities of evidence that roll-in is inappropriate and that the NFA and 1971 Apportionment Agreement do not convey hidden benefits to Alcoa. Alcoa approaches the issue somewhat differently. It contends that the remanded hearing as to its status and liability for the refund obligation was not truly "*de novo*" because the Commission accorded an improper presumption of validity to findings made in the prior Sub 29 hearing and to purported "findings" contained in our decision in *Edmisten*. Alcoa argues that the effect of this was to improperly shift the burden of proof onto Alcoa to rebut or disprove findings established in a case to which Alcoa was not then a party, in violation of Alcoa's due process right to be heard on all issues affecting it.

Although we fully agree with the Court of Appeals that the Commission's use of such phraseology is "unfortunate," we completely reject the companies' arguments that the findings actually made by the Commission on all issues addressed in the remanded

proceedings were anything less than fully independent and fully supported by substantial, if not overwhelming, evidence of record. In *Edmisten*, we remanded the matter to the Commission for the purpose of considering the propriety of treating Nantahala and Tapoco as a single utility enterprise and determining whether Nantahala's customers would benefit by application of a rolled-in rate making methodology. As we indicated in Part I, A of this opinion, our discussion of these factual issues was limited to the purposes of demonstrating the legal basis for reversal of the 1977 order—failure to accord more than minimal consideration to material facts of record bearing upon the determination of reasonable rates for Nantahala—and the legal significance of evidence indicating that Nantahala had structured its economic affairs so as to afford an unfair preference to its parent Alcoa at the detriment of its intrastate retail rate payers.

This Court in *Edmisten* did not, as it indeed could not, "find facts"; that duty is imposed solely on the Commission. N.C.G.S. § 62-94; *Utilities Comm. v. Coach Co.*, 260 N.C. 43, 132 S.E. 2d 249 (1963). In addition, the weight of the evidence presented is also for the Commission, and not the court, to decide. *Utilities Comm. v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95. Even a cursory reading of the 1981 order shows that the Commission's references to this Court's opinion are included in an evident effort to demonstrate that, upon remand, and in keeping with the directive of this Court, adequate consideration was given to the material facts of record highlighted by this Court in its opinion. Moreover, the clearest proof of the Commission's exercise of its independent judgment in gathering and weighing evidence that dealt with the roll-in question and the issue of Alcoa's liability for its subsidiary's refund lies in the extensive and detailed discussion of the Evidence and Conclusions for Findings of Fact Nos. 4, 5, 6, 7 and 21. This discussion embraces almost one-fourth of the nearly sixty page order reducing rates and ordering refund payments. It is clearly based upon the many volumes of testimony taken and scores of exhibits received upon remand, and not upon any observations of this Court.

Nantahala's argument concerning the Commission's factual findings amounts to little more than a disagreement with the *result* reached by the Commission as to whether a roll-in should be performed and which jurisdictional cost allocation methodology

would most accurately reflect the cost of service attributable to Nantahala's intrastate retail customers. Although there was evidence of record which would perhaps support the position taken by Nantahala with respect to the roll-in, that does not entitle Nantahala to a reversal of the order. The test upon appeal from a determination of the Commission is whether the Commission's findings of fact are supported by competent, material and substantial evidence in view of the entire record. N.C.G.S. § 62-94 (b)(5). Nantahala does not even attempt to argue that the challenged findings are not supported by substantial evidence and we have no difficulty in holding that they are. Nantahala merely argues that the Commission has "ignored" evidence to the contrary.

Although the Commission must consider and determine controverted questions by making findings of fact and conclusions of law, and set forth the reasons and bases therefor "upon all the material issues of fact, law, or discretion," N.C.G.S. § 62-79(a)(1), it need not comment upon every single fact or item of evidence presented by the parties. Accordingly, we find no merit in any of Nantahala's arguments concerning the findings of fact supporting the Commission's rate reduction and refund order. Rather, we conclude that the Commission, after careful consideration of all the evidence presented upon remand, adequately weighed and discussed all the material issues of fact raised thereby and properly reached its own independent decision as to the propriety of and necessity for the roll-in and the method for implementing it.

Alcoa's argument that the Commission denied it a fair hearing by relying on "fact finding" by this Court and findings made by the Commission in the Sub 29 hearing is based almost exclusively on a single paragraph in the Commission's order, which states:

> These findings by the Supreme Court, that Nantahala and Tapoco constitute a single, integrated electric system and should be treated as one system for rate-maing purpose [sic], have been carefully considered by the Commission for purposes of this proceeding. However, since Alcoa and Tapoco were not parties to the original proceeding that led to the June 14, 1977 Order, the Commission has allowed them and Nantahala to introduce evidence in the remand proceeding to challenge the findings of the Supreme Court.

Alcoa argues that the foregoing statement indicates that the Commission improperly shifted the burden of proof and that its requirement that Alcoa disprove "findings" from a prior hearing at which it was not even present influenced the Commission's ultimate determinations concerning Alcoa's liability. Alcoa reasons that had it been accorded a proper *de novo* hearing, the result could well have been different; therefore, the Commission's order should be reversed. We do not agree.

The paragraph relied upon by Alcoa in its argument follows a discussion by the Commission of certain conclusions by this Court in *Edmisten* as to the existence, sufficiency, and legal significance of evidence adduced in the Sub 29 proceeding which indicated that Nantahala and Tapoco were designed and operated as a single system and ought therefore be treated as such for rate making purposes under a roll-in device or methodology. Immediately following the quoted paragraph is a lengthy recital of the evidence supporting the Commission's conclusion that the Nantahala and Tapoco electric facilities *do* constitute a single, integrated system, are operated as such and are coordinated as such with the TVA system, and its further conclusion that the two companies' financial data should be rolled-in for rate making purposes as this would benefit Nantahala's customers. The mere fact that the Commission's ultimate findings and conclusions regarding the roll-in are consonant with this Court's earlier discussion of certain aspects of the original evidence does not invalidate the entire Sub 29 (Remanded) proceedings or order. Nothing in the record before us indicates that the Commission improperly placed a burden on Alcoa or otherwise denied it a fair hearing. In fact, at the remanded hearing, the Commission permitted all participants the right to present any appropriate evidence on the relevant issues and to cross-examine all witnesses. The Commission never stated that Alcoa had "failed to rebut" any presumptions or to carry any particular "burden of proof," and the evidence was more than sufficient for the Commission to have reached the conclusion that it did as to Alcoa's liability without the benefit of any presumptions or other procedural devices. Under the circumstances of this case, the Commission's unfortunate use of the phrase "findings by the Supreme Court" does not itself warrant reversal of the Commission's order.

We also reject Alcoa's argument that it did not receive a true *de novo* hearing on all issues affecting its status and liability as a statutory public utility and that this constitutes reversible error. The record reveals that upon remand, the Commission recognized the right of both Tapoco and Alcoa to be heard *de novo* on such issues as affected them and upon which they desired *de novo* consideration of evidence. Specifically, the Commission ordered:

> Tapoco and Alcoa are entitled to be heard, *de novo* on the prior record compiled in the proceeding, but only as the further consideration of such evidence affects them. Such *de novo* hearing includes cross-examination and the right to offer evidence on their own behalf which addresses matters previously addressed. Since the prior record in this case is lengthy, and since many of the issues already determined will not affect Tapoco and Alcoa, it will be incumbent upon the Respondents to specify in advance of the hearing the issues on which they desire to be heard. The Commission can appreciate that until the Intervenors and Public Staff have stated their positions, Respondents may not know on what issues they desire to be heard *de novo*. The Commission may schedule a pre-hearing conference after all direct testimony has been prefiled in order to resolve some of these problems.

During the remanded hearings, the Commission accepted various portions of the original hearing without change by any party, such as the capital structure, embedded cost of debt, proper equity, and overall rates of return established for Nantahala in the 14 June 1977 order. No party offered any evidence upon those aspects of the case. However, as to the contested issues of public utility status, the propriety of the roll-in and the jurisdictional cost allocation method to be used, all parties, including Nantahala, Alcoa and Tapoco, were permitted to present such evidence as they desired.

All three companies, Nantahala, Alcoa and Tapoco, introduced testimony and extensively cross-examined the intervenors' witnesses. At no time did the Commission deny a request by Alcoa or Tapoco to put on evidence or cross-examine witnesses from the first set of hearings with respect to particular facts. Although not expressly directed to do so by this Court, the Com-

mission in effect afforded all parties a *de novo* hearing with respect to *any issue* properly raised by them. In every material respect, the remanded proceedings were conducted as *de novo* hearings on both the jurisdictional and substantive issues involved in this case. Any matters not expressly redetermined from the original hearing were matters which were not in controversy and which were, if anything, favorable to Nantahala, and therefore to Alcoa. Accordingly, we reject Alcoa's assertion that the "hearing below was an arbitrary and capricious drama," in which its due process right to be heard on all issues affecting it was not respected. To the contrary, we conclude that all parties received a full and fair hearing at all stages of the original and remanded proceedings and that the Commission's order was, in all respects, based upon fully independent and well substantiated findings of fact and conclusions of law.

III.

We have carefully reviewed the lengthy record compiled in this proceeding, the many and complex arguments presented by the parties and the amici curiae, and the relevant authorities cited by the parties in their briefs and those later submitted to this Court as additional authority. For the reasons stated in Parts I and II of this opinion, we conclude that the Utilities Commission has properly decided all factual and discretionary issues related to the roll-in, rate reduction and refund obligation based upon competent, relevant and substantial evidence in view of the entire record. We further conclude that the order reducing rates and requiring refunds for Nantahala's intrastate retail rate payers is free from any statutory or constitutional infirmity.

Specifically, we hold that: (1) the Commission correctly determined that Tapoco is a public utility in North Carolina, subject to its regulatory authority and jurisdiction; (2) the Commission's order has in no way contravened the terms and conditions of Tapoco's federal license to operate hydroelectric plants in North Carolina and Tennessee and the Commission is not, therefore, preempted from implementing the roll-in by virtue of Part I of the Federal Power Act and the Supremacy Clause of the United States Constitution; (3) the Commission properly determined that a roll-in for rate making purposes was mandated in the case of Nantahala and Tapoco on the grounds that (a) Nantahala has

not been designed, developed and operated as a stand-alone electric system, (b) the Nantahala and Tapoco electric facilities constitute a single integrated electric system, and (c) the two corporate affiliates should be treated as a single utility system for rate making purposes, in view of their historical development, actual operating conditions and the fact that Nantahala's customer cost responsibility cannot be accurately determined using a "stand-alone" model; (4) the Commission correctly determined that Alcoa is a North Carolina public utility under the provisions of N.C.G.S. § 62-3(23)(c) by virtue of the substantial and ultimately detrimental impact Alcoa's affiliation has had upon Nantahala's rates; (5) the roll-in methodology utilized by the Commission is not barred under the Supremacy Clause of the United States Constitution (a) either by virtue of Part II of the Federal Power Act or (b) by virtue of federal regulatory action in a parallel wholesale rate case; (6) utilization of the roll-in does not grant a preference to Nantahala's North Carolina customers and does not impermissibly interfere with interstate commerce in violation of the Commerce Clause of the United States Constitution; (7) application of the roll-in methodology as developed by the Commission, with its resulting reduction in retail rates and refund obligation, does not impermissibly impair Nantahala's ability to earn a proper rate of return on its investment and does not amount to a confiscation of its properties; (8) the Commission acted well within its regulatory and rate making authority in imposing the obligation upon Nantahala's parent Alcoa to pay any portion of the refund obligation for the entire locked-in period of Docket No. E-13, Sub 29 (Remanded) as Nantahala is financially unable to make; (9) prior federal and state regulation of Nantahala and Alcoa, the various transactions and the agreements affecting Nantahala's power supply does not prohibit or preempt the Commission from piercing the corporate veil between Alcoa and its wholly-owned subsidiary to hold Alcoa financially responsible for Nantahala's refund obligation; (10) the results obtained under the roll-in do not amount to a confiscation of Alcoa's property; (11) the Commission properly ordered Nantahala to refund to its North Carolina retail customers all revenue collected under the rates approved by the Commission Order issued 14 June 1977, to the extent that said rates produced revenue in excess of the level of rates approved in the Sub 29 (Remanded) proceedings and Order issued 2 September 1981; and (12) all parties received a full and fair hearing at all

stages of the original and remanded proceedings and the Commission's order is, in all respects, based upon fully independent and well substantiated findings of fact and conclusions of law.

For the foregoing reasons, the decision of the Court of Appeals upholding the Commission's order reducing Nantahala's retail rates and requiring refunds to its North Carolina retail customers is

Affirmed.

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

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION	)	
v.	)	ORDER
NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.	)	

No. 227A83

(Filed 16 July 1985)

NANTAHALA Power and Light Company's (hereinafter "Nantahala") Motion for Writ of Supersedeas filed herein on 17 July 1985 is DENIED.

The orders of the North Carolina Utilities Commission, affirmed by this Court on 3 July 1985, requiring Nantahala to make refund payments to its customers are temporarily stayed to and including the 31st day of July 1985 but no longer. The temporary stay allowed by this order will expire automatically at 12:01 a.m. on 1 August 1985 without the necessity of any further order by this Court. The purpose of the stay is to permit Nantahala to seek a writ of certiorari and stay from the United States Supreme Court.

By order of the Court in Conference, this 18th day of July 1985.

MITCHELL, J.
For the Court

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION	)	
v.	)	ORDER
NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.	)	

No. 227A83

(Filed 18 July 1985)

THE Aluminum Company of America's (hereinafter "Alcoa") Petition for Writ of Supersedeas filed herein on 12 July 1985 is DENIED.

The orders of the North Carolina Utilities Commission, affirmed by this Court on 3 July 1985, requiring Alcoa to assist in the making of refund payments to customers of Nantahala Power and Light Company are temporarily stayed to and including the 31st day of July 1985 but no longer. The temporary stay allowed by this order will expire automatically at 12:01 a.m. on 1 August 1985 without the necessity of any further order by this Court. The purpose of the stay is to permit Alcoa to seek a writ of certiorari and stay from the United States Supreme Court.

The stay granted herein is conditioned upon the filing with this Court of confirmation by the Aluminum Company of America and Federal Insurance Company that the Bond (Bond No. 80965200) dated 8 February 1984 and filed in this cause on 9 February 1984 remains in full force and effect during the pendency of the stay herein granted.

By order of the Court in Conference, this 16th day of July 1985.

MITCHELL, J.
For the Court

APPENDIXES

AMENDMENT NORTH CAROLINA
SUPREME COURT LIBRARY RULES

AMENDMENTS TO STATE BAR RULES
RELATING TO LEGAL SPECIALIZATION

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

AMENDMENT

NORTH CAROLINA SUPREME COURT LIBRARY RULES

Pursuant to Section 7A-13(d) of the General Statutes of North Carolina, the following amendment to the Supreme Court Library Rules as promulgated December 20, 1967 (275 N.C. 729) and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), July 19, 1982 (305 N.C. 784), November 8, 1983 (309 N.C. 829), and June 21, 1984 (311 N.C. 773) has been approved by the Library Committee and hereby is promulgated:

Section 1. Appendix I. Official Register, State of North Carolina, is amended by the following addition:

(12) The Director of the Office of Administrative Hearings.

Section 2. This amendment shall become effective March 18, 1986.

This the 18th day of March, 1986.

Frances H. Hall
Librarian

Approved: JAMES G. EXUM, JR.
Chairman, For the Library Committee

AMENDMENTS TO STATE BAR RULES RELATING TO LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 13, 1984, and October 25, 1985.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, as appear in 221 NC 581 and as amended in 268 NC 734, 274 NC 606, 277 NC 742, 302 NC 637, 307 NC 725, and 308 NC 823 be and the same is hereby amended by adding the following:

There is hereby created, pursuant to Section 5. Standing Committees of the Council. J. (3.2) of the Committee on Legal Specialization the following designated areas in which certificates of specialty may be granted:

1. Bankruptcy Law
2. Estate Planning and Probate Law
3. Real Property Law
   (a) Real property—residential
   (b) Real property—business, commercial, and industrial.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment 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 a regular quarterly meeting unanimously adopt said amendment 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 14th day of November, 1985.

B. E. JAMES
Secretary

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 2nd day of December, 1985.

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 2nd day of December, 1985.

BILLINGS, J.
For the Court

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 17, 1986.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, k. Board of Legal Specialization, as appears in 221 NC 581 and as amended in 268 NC 734, 274 NC 606, 277 NC 742, 302 NC 637, 307 NC 725, 308 NC 823, and 312 NC --- be and the same is hereby amended by adding a new section 7.7 to read as follows:

> 7.7 The Board may adopt uniform rules waiving the requirements of 7.4 and 7.5 for members of a Specialty Committee at the time the initial written examination for that specialty is given and permitting said members to file application to become a Board Certified Specialist in that specialty upon compliance with all other required minimum Standards for Certification of Specialists. Should such an applicant be certified by the Board as a specialist, said certification shall terminate on the earlier of (i) two years after said applicant ceases to be a member of the Specialty Committee; or (ii) when such person's examination results are determined.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment 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 21st day of March, 1986.

B. E. JAMES
Secretary

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 26th day of March, 1986.

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 26th day of March, 1986.

BILLINGS, J.
For the Court

The following amendment to the Rules and Regulations of the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 18, 1986.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, Standing Committees of the Council, as appears in 221 NC 581 and as amended in 268 NC 734, 274 NC 606, 277 NC 742, 302 NC 637, 307 NC 725, 308 NC 823, 312 NC ---, and 313 NC --- be and the same is hereby amended by adding the following:

14. Standards of the Specialties of Bankruptcy Law, Estate Planning and Probate Law, and Real Property Law

The standards for the specialties listed in Section 13 above are as follows:

I. Standards for Certification as a Specialist in Bankruptcy Law

(See Attached Standards)

II. Standards for Certification as a Specialist in Estate Planning and Probate Law

(See Attached Standards)

III. Standards for Certification as a Specialist in Real Property Law

(See Attached Standards)

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar has been duly adopted by the Council of the North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment 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 24th day of April, 1986.

B. E. JAMES
Secretary

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 6th day of May, 1986.

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 6th day of May, 1986.

BILLINGS, J.
For the Court

STANDARDS FOR CERTIFICATION AS A SPECIALIST IN BANKRUPTCY LAW

1. **Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Bankruptcy Law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. **Definition of Specialty**

The specialty of Bankruptcy Law is the practice of law dealing with all laws and procedures involving the rights, obligations and remedies between debtors and creditors in potential or pending federal bankruptcy cases and state insolvency actions.

3. **Recognition as a Specialist in Bankruptcy Law**

If a lawyer qualifies as a specialist in Bankruptcy Law by meeting the standards set for the specialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Bankruptcy Law."

4. **Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in Bankruptcy Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. **Standards for Certification as a Specialist in Bankruptcy Law**

Each applicant for certification as a specialist in Bankruptcy Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification as a specialist in Bankruptcy Law:

A. **Licensure and Practice**

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B. **Substantial Involvement**

An applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Bankruptcy Law.

1. Substantial involvement shall mean during the five (5) years preceding the application, the applicant has devoted an average of at least five hundred (500) hours a year to the practice of Bankruptcy Law, but not less than four hundred (400) hours in any one (1) year.
2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.
3. Practice equivalent shall mean, after admission to the bar of any state, District of Columbia, or a U.S. territorial possession:
   a. Service as a Judge of any Bankruptcy Court, service as a Clerk of any Bankruptcy Court, or service as a standing trustee.
   b. Corporate or government service, including military service, after admission to the bar of any state, the District of Columbia, or any U.S. territorial possession, but only if the bankruptcy work done was legal advice or representation of the corporation, governmental unit, or individuals connected therewith.
   c. Service as a Deputy or Assistant Clerk of any Bankruptcy Court, as a research assistant to a Bankruptcy Judge, or as a law professor teaching bankruptcy and/or debtor-creditor related courses may be substituted for one (1) year of experience to meet the five (5) year requirement.

C. **Continuing Legal Education**

An applicant must have earned no less than thirty-six (36) hours of accredited continuing legal education (CLE) credits in Bankruptcy Law, during the three (3) years preceding application with not less than six (6) credits in any one (1) year.

D. **Peer Review**

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of

lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be a judge of any Bankruptcy Court.

2. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

3. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E. **Examination**

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Bankruptcy Law.

1. **Terms**

The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the Specialty Committee.

2. **Subject Matter**

The examination shall cover the applicant's knowledge and application of the law in the following topics:

a. All provisions of the Bankruptcy Reform Act of 1978, as amended, and legislative history related thereto, except subchapters III and IV of Chapter 7 and Chapter 9 of Title II, United States Code;

b. The Rules of Bankruptcy Procedure effective as of August 1, 1983, as amended;

c. Bankruptcy crimes and immunity;

d. State laws affecting debtor-creditor relations, including, but not limited to, state court insolvency proceedings; Chapter 1C of the North Carolina General Statutes; the creation, perfection, enforcement, and

priorities of secured claims; claim and delivery; and attachment and garnishment; and

e. Judicial interpretations of any of the above.

6. **Standards for Continued Certification as a Specialist**

The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A. **Substantial Involvement**

The specialist must demonstrate that, for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty as defined in Section 5.B.

B. **Continuing Legal Education**

Since last certified, a specialist must have earned no less than sixty (60) hours of accredited continuing legal education credits in Bankruptcy Law with not less than six (6) credits earned in any one (1) year.

C. **Peer Review**

The specialist must comply with the requirements of Section 5.D.

D. **Time for Application**

Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. **Lapse of Certification**

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. **Suspension or Revocation of Certification**

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 5.

7. **Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in Bankruptcy Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

STANDARDS FOR CERTIFICATION AS A SPECIALIST IN ESTATE PLANNING AND PROBATE LAW

1. **Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Estate Planning and Probate Law as a field of law for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. **Definition of Specialty**

The specialty of Estate Planning and Probate Law is the practice of law dealing with planning for conservation and disposition of estates, including consideration of federal and state tax consequences; preparation of legal instruments to effectuate estate plans; and probate of wills and administration of estates, including federal and state tax matters.

3. **Recognition as a Specialist in Estate Planning and Probate Law**

If a lawyer qualifies as a specialist in Estate Planning and Probate Law by meeting the standards set for the specialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Estate Planning and Probate Law."

4. **Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in Estate Planning and Probate Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. **Standards for Certification as a Specialist in Estate Planning and Probate Law**

Each applicant for certification as a specialist in Estate Planning and Probate Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification as a Specialist in Estate Planning and Probate Law:

A. **Licensure and Practice**

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An

applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B. **Substantial Involvement**

The applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Estate Planning and Probate Law.

1. Substantial involvement shall be measured as follows:

a. **Time Spent**

During the five (5) years preceding the application, the applicant has devoted an average of at least five hundred (500) hours a year to the practice of Estate Planning and Probate Law, but not less than four hundred (400) hours in any one (1) year.

b. **Experience Gained**

During the five (5) years immediately preceding application, the applicant shall have had continuing involvement in a substantial portion of the activities described in each of the following paragraphs:

(i) Counseled persons in estate planning, including giving advice with respect to gifts, life insurance, wills, trusts, business arrangements and agreements, and other estate planning matters;

(ii) Prepared or supervised the preparation of (i) estate planning instruments, such as simple and complex wills (including provisions for testamentary trusts, marital deductions and elections), revocable and irrevocable inter vivos trusts (including short-term and minors' trusts), business planning agreements (including buy-sell agreements and employment contracts), powers of attorney and other estate planning instruments, and (ii) federal and state gift tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with gift tax returns;

(iii) Handled or advised with respect to the probate of wills and the administration of decedents' estates, including representation of the personal representative

before the Clerk of Superior Court, guardianship, will contest, and declaratory judgment actions; and

(iv) Prepared, reviewed or supervised the preparation of Federal Estate Tax Returns, North Carolina Inheritance Tax returns, and Federal and State Fiduciary Income Tax returns, including representation before the Internal Revenue Service and the North Carolina Department of Revenue in connection with such tax returns and related controversies.

2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

3. Practice equivalent shall mean:

a. Receipt of an LL.M. degree in taxation or estate planning and probate law (or such other related fields approved by the Specialty Committee and the Board from an approved law school) may substitute for one (1) year of experience to meet the five (5) year requirement;

b. Service as a trust officer with a corporate fiduciary having duties primarily in the area of estate and trust administration, may substitute for one (1) year of experience to meet the five (5) year requirement; and

c. Service as a law professor concentrating in the teaching of taxation or estate planning and probate law (or such other related fields approved by the Specialty Committee and the Board). Such service may be substituted for one (1) year of experience to meet the five (5) year requirement.

C. **Continuing Legal Education**

An applicant must have earned no less than seventy-two (72) hours of accredited continuing legal education (CLE) credits in Estate Planning and Probate Law during the three (3) years preceding application. Of the seventy-two (72) hours of CLE, at least forty-five (45) hours shall be in Estate Planning and Probate Law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

D. **Peer Review**

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of lawyers or judges, all of whom are familiar with the competence and qualification of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee of the submitted references and other persons concerning the applicant's competence and qualification.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E. **Examination**

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Estate Planning and Probate Law.

1. **Terms**

The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the Specialty Committee.

2. **Subject Matter**

The examination shall cover the applicant's knowledge and application of the law in the following topics:

a. Federal and North Carolina gift taxes;

b. Federal estate tax;

c. North Carolina inheritance tax;

d. Federal and North Carolina fiduciary income taxes;

e. Federal and North Carolina income taxes as they apply to the final returns of the decedent and his or her surviving spouse;

f. North Carolina law of wills and trusts;

g. North Carolina probate law, including fiduciary accounting;

h. Federal and North Carolina income and gift tax laws as they apply to revocable and irrevocable inter vivos trusts;

i. North Carolina law of business organizations, family law and property law as they may be applicable to estate planning transactions; and

j. Federal and North Carolina tax law applicable to partnerships and corporations (including S Corporations) which may be encountered in estate planning and administration.

6. **Standards for Continued Certification as a Specialist**

The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A. **Substantial Involvement**

The specialist must demonstrate that for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty, as defined in Section 5.B.

B. **Continuing Legal Education**

Since last certified, a specialist must have earned no less than one hundred twenty (120) hours of accredited continuing legal education credits in Estate Planning and Probate Law. Of the one hundred twenty (120) hours of CLE, at least seventy-five (75) hours shall be in Estate Planning and Probate Law, and the balance may be in the related areas of taxation, business organizations, real property, and family law.

C. **Peer Review**

The specialist must comply with the requirements of Section 5.D.

D. **Time for Application**

Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. **Lapse of Certification**

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. **Suspension or Revocation of Certification**

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 4.

7. **Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in Estate Planning and Probate Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

STANDARDS FOR CERTIFICATION AS A SPECIALIST IN REAL PROPERTY LAW

1. **Establishment of Specialty Field**

The North Carolina State Bar Board of Legal Specialization (hereinafter referred to as the Board) hereby designates Real Property Law, including the subspecialties of Real Property—Residential Transactions and Real Property—Business, Commercial and Industrial Transactions, as a field of law, for which certification of specialists under the North Carolina Plan of Legal Specialization is permitted.

2. **Definition of Specialty**

The specialty of Real Property Law is the practice of law dealing with real property transactions, including title examination, property transfers, financing, leases and determination of property rights. Subspecialties in the field are identified and defined as follows:

2.1 Real Property Law—Residential Transactions

The practice of law dealing with the acquisition, ownership, leasing, financing, use, transfer and disposition of residential real property by individuals.

2.2 Real Property Law—Business, Commercial and Industrial Transactions

The practice of law dealing with the acquisition, ownership, leasing, management, financing, development, use, transfer and disposition of residential, business, commercial and industrial real property.

3. **Recognition as a Specialist in Real Property Law**

A lawyer may qualify as a specialist by meeting the standards set for one or both of the subspecialties. If a lawyer qualifies as a specialist in Real Property Law by meeting the standards set for the Real Property Law—Residential Transactions subspecialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law—Residential Transactions." If a lawyer qualifies as a specialist in Real Property Law by meeting the standards set for the Real Property Law—Business, Commercial and Industrial Transactions, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law—Business, Commercial and Industrial Transactions." If a lawyer qualifies

as a specialist in real property law by meeting the standards set for both the Real Property Law—Residential Transactions subspecialty and the Real Property Law—Business, Commercial and Industrial Transactions subspecialty, a lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Real Property Law—Residential, Business, Commercial and Industrial Transactions."

4. **Applicability of Provisions of the North Carolina Plan of Legal Specialization**

Certification and continued certification of specialists in Real Property Law shall be governed by the provisions of the North Carolina Plan of Legal Specialization as supplemented by these Standards for Certification.

5. **Standards for Certification as a Specialist in Real Property Law**

Each applicant for certification as a specialist in Real Property Law shall meet the minimum standards set forth in Section 7 of the North Carolina Plan of Legal Specialization. In addition, each applicant shall meet the following standards for certification in Real Property Law:

A. **Licensure and Practice**

An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of the application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

B. **Substantial Involvement**

An applicant shall affirm to the Board that the applicant has experience through substantial involvement in the practice of Real Property Law.

1. Substantial involvement shall mean during the five (5) years preceding the application, the applicant has devoted an average of at least five hundred (500) hours a year to the practice of Real Property Law, but not less than four hundred (400) hours in any one (1) year.

2. Practice shall mean substantive legal work done primarily for the purpose of legal advice or representation, or a practice equivalent.

3. Practice equivalent means service as a law professor concentrating in the teaching of Real Property Law. Teach-

ing may be substituted for one (1) year of experience to meet the five (5) year requirement.

C. **Continuing Legal Education**

An applicant must have earned no less than thirty-six (36) hours of accredited continuing legal education (CLE) credits in Real Property Law during the three (3) years preceding application with not less than six (6) credits in any one (1) year.

D. **Peer Review**

An applicant must make a satisfactory showing of qualification through peer review by providing five (5) references of lawyers or judges, all of whom are familiar with the competence and qualifications of the applicant in the specialty field. All references must be licensed and in good standing to practice in North Carolina. An applicant also consents to the confidential inquiry by the Board or the Specialty Committee at the direction of the Board of the submitted references and other persons concerning the applicant's competence and qualifications.

1. A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

2. The references shall be given on standardized forms provided by the Board with the application for certification in the specialty field. These forms shall be returned directly to the Specialty Committee.

E. **Examination**

The applicant must pass a written examination designed to test the applicant's knowledge and ability in Real Property Law.

1. **Terms**

The examination(s) shall be in written form and shall be given annually. The examination(s) shall be administered and graded uniformly by the Specialty Committee.

2. **Subject Matter**

The examination shall cover the applicant's knowledge in the following topics in Real Property Law or in such subspecialty or subspecialties as the applicant has elected:

a. Title examinations, property transfers, financing, leases, and determination of property rights;

b. The acquisition, ownership, leasing, financing, use, transfer, and disposition of residential real property by individuals; and

c. The acquisition, ownership, leasing, management, financing, development, use, transfer, and disposition of residential, business, commercial, and industrial real property.

6. **Standards for Continued Certification as a Specialist**

The period of certification is five (5) years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Section 6.D. below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the Board of all applicants for continued certification.

A. **Substantial Involvement**

The specialist must demonstrate that, for each of the five (5) years preceding application, he or she has had substantial involvement in the specialty as defined in Section 5.B.

B. **Continuing Legal Education**

The specialist must have earned no less than sixty (60) hours of accredited continuing legal education credits in Real Property Law as accredited by the Board with not less than six (6) credits earned in any one (1) year.

C. **Peer Review**

The specialist must comply with the requirements of Section 5.D.

D. **Time for Application**

Application for continued certification shall be made not more than one hundred eighty (180) days nor less than ninety (90) days prior to the expiration of the prior period of certification.

E. **Lapse of Certification**

Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such lapse, recertification will require compliance with all requirements of Section 5, including the examination.

F. **Suspension or Revocation of Certification**

If an applicant's certification has been suspended or revoked during the period of certification, then the application shall be treated as if it were for initial certification under Section 5.

7. **Applicability of Other Requirements**

The specific standards set forth herein for certification of specialists in Real Property Law are subject to any general requirement, standard, or procedure adopted by the Board applicable to all applicants for certification or continued certification.

AMENDMENTS TO
RULES OF APPELLATE PROCEDURE

Rules 18, and 20 of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, are hereby amended to read as in the following pages. Rule 19 of those Rules is hereby repealed and reserved for future use.

Inasmuch as these rules make the procedures for direct appeals from administrative agencies to the appellate division consistent with the rules for bringing appeals from the courts of the trial division which we amended on 27 November 1984, to be effective 1 February 1985, these amendments shall be applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985.

Adopted by the Court in Conference this 27th day of February, 1985. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

EARL W. VAUGHN
For the Court

ARTICLE IV. DIRECT APPEALS FROM ADMINISTRATIVE AGENCIES TO APPELLATE DIVISION

RULE 18

TAKING APPEAL; RECORD ON APPEAL— COMPOSITION AND SETTLEMENT

(a) **General.** Appeals of right from administrative agencies, boards, or commissions (hereinafter "agency") directly to the appellate division under G.S. 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as hereinafter provided in this Article.

(b) **Time and Method for Taking Appeals.**

(1) The times and methods for taking appeals from an agency shall be as provided in this Rule 18 unless the statutes governing the agency provide otherwise, in which case those statutes shall control.

(2) Any party to the proceeding may appeal from a final agency determination to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within 30 days after receipt of a copy of the final order of the agency. The final order of the agency is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final agency determination from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Composition of Record on Appeal.** The record on appeal in appeals from any agency shall contain:

(i) an index of the contents of the record, which shall appear as the first page thereof;

(ii) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the agency over persons or property sought to be bound in the proceeding, or a statement showing same;

(iii) copies of all other notices, pleadings, petitions, or other papers required by law or rule of the agency to be filed

with the agency to present and define the matter for determination;

(iv) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the agency from which appeal was taken;

(v) so much of the evidence taken before the agency or before any division, commissioner, deputy commissioner, or hearing officer of the agency, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all errors assigned, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(vi) where the agency has reviewed a record of proceedings before a division, or an individual commissioner, deputy commissioner, or hearing officer of the agency, copies of all items included in the record filed with the agency which are necessary for an understanding of all errors assigned;

(vii) copies of all other papers filed and statements of all other proceedings had before the agency or any of its individual commissioners, deputies, or divisions which are necessary to an understanding of all errors assigned unless they appear in the verbatim transcript of proceedings which is being filed pursuant to Rule 9(c)(2) and (3);

(viii) a copy of the notice of appeal from the agency, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3); and

(ix) exceptions and assignments of error to the actions of the agency, set out as provided in Rule 10.

(d) **Settling the Record on Appeal.** The record on appeal may be settled by any of the following methods:

(1) **By Agreement.** Within 60 days after appeal is taken, the parties may by agreement entered in the record on appeal

settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 60 days after appeal is taken, file in the office of the agency head and serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon him, an appellee may file in the office of the agency head and serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Conference or Agency Order; Failure to Request Settlement.** If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the agency head to convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and a time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request

upon the agency head. The agency head or his delegate shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency; provided, however, that when the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

(e) **Further Procedures.** Further procedures for perfecting and prosecuting the appeal shall be as provided by these Rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time.** The times provided in this Rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

Adopted: 13 June 1975.

Amended: 21 June 1977;
7 October 1980—18(d)(3)—effective 1 January 1981;
27 February 1985—applicable to all appeals in which the notice of appeal is filed on or after 15 March 1985.

RULE 19

(PARTIES TO APPEAL FROM AGENCIES)

REPEALED

RESERVED FOR FUTURE USE

Adopted: 13 June 1975.

Amended: 21 June 1977—19(d).

Repealed: 27 February 1985—effective 15 March 1985.

RULE 20

MISCELLANEOUS PROVISIONS OF LAW GOVERNING IN AGENCY APPEALS

Specific provisions of law pertaining to stays pending appeals from any agency to the appellate division, to pauper appeals therein, and to the scope of review and permissible mandates of the Court of Appeals therein shall govern the procedure in such appeals notwithstanding any provisions of these rules which may prescribe a different procedure.

Adopted: 13 June 1975.

Amended: 27 February 1985—effective 15 March 1985.

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

§ 2. Review of Decision of Lower Court and Matters Necessary to Determination of Appeal

The scope of review in the Supreme Court from a unanimous decision of the Court of Appeals is limited to consideration of the questions properly presented in the new briefs. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 614.

§ 6.4. Appeals Related to Party Matters

The denial of a bar applicant's motion for the production of documents and for a free transcript was not immediately appealable, but the denial of the applicant's motion to sue as a pauper and his motion for a jury trial could be immediately appealed. *In re McCarroll*, 315.

§ 26. Exceptions to Judgment

Where petitioners excepted in apt time to the granting of a directed verdict, the appeal itself was an exception to the judgment, and petitioners satisfied the requirements of Rule 10 of the Rules of Appellate Procedure even though they failed to make assignments of error or to group exceptions. *West v. Slick*, 33.

§ 64. Affirmance or Reversal

Where one member of the Supreme Court did not participate in the consideration of a case and the remaining six justices are equally divided, the decision of the Court of Appeals is affirmed without precedential value. *Forbes Homes, Inc. v. Trimpi*, 168.

ARBITRATION AND AWARD

§ 2. Agreements to Arbitrate as Bar to Action

A contract clause providing that the parties shall arbitrate disputes under the contract did not prevent plaintiff from enforcing a claim of lien for architectural services pursuant to G.S. 44A-13. *Adams v. Nelsen*, 442.

The trial court was not "ousted" of jurisdiction in an action to recover for architectural services by an arbitration clause incorporated into the complaint by reference where defendants failed to apply to the court for an order to compel arbitration, and defendants' Rule 12(b)(6) motion to dismiss was insufficient to invoke the arbitration provision pursuant to G.S. 1-567.3. *Ibid.*

Defendants could not successfully demand arbitration of a contract dispute after the applicable statute of limitations for breach of contract had run. *Ibid.*

A party does not impliedly waive his right to arbitration when he pursues an action in court by filing a complaint. *Ibid.*

ARCHITECTS

§ 3. Liability for Defective Conditions

Plaintiff's claim against defendant architects and engineers arising out of their design and supervision of improvements to realty was governed by the six-year statute of repose set forth in the 1963 version of G.S. 1-50(5) rather than by the four-year statute of repose contained in the statute dealing with professional malpractice claims, G.S. 1-15(c). *Trustees of Rowan Tech. v. Hammond Assoc.*, 230.

The statute of repose set forth in G.S. 1-50(5) applies to all actions against architects where plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect. *Ibid.*

ATTORNEYS AT LAW

§ 2. Admission to Practice

A bar applicant had no right to a jury trial in his appeal to the superior court from an order of the Board of Law Examiners denying his application to take the N. C. Bar examination. *In re McCarroll*, 315.

The trial court did not err in denying a bar applicant's motion to sue as a pauper. *Ibid.*

§ 5.2. Liability for Malpractice

In a legal malpractice action arising from defendant attorney's representation of plaintiff in a medical malpractice case, affidavits offered by plaintiff were insufficient to forecast proof that defendant breached his duty of reasonable care in his preparation for and conduct of the medical malpractice trial, failed to establish material issues of fact as to whether defendant was negligent in failing to exercise his best judgment, and failed to forecast evidence that would show that defendant's alleged negligence was a proximate cause of the loss of plaintiff's medical malpractice suit. *Rorrer v. Cooke*, 338.

§ 7.1. Validity of Contingent Fee Contract

The Court of Appeals should not have upheld intervention by plaintiff's former attorneys in a domestic action for recovery in quantum meruit after holding that their contingent fee contract was void as against public policy. *Thompson v. Thompson; Stepp, Groce, Pinales & Cosgrove v. Thompson*, 313.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

Where defendant was provided with proposed testimony that defendant told the witness he was going to "take care of" the victim, the trial court properly ruled that testimony by the witness that defendant stated that "he might get somebody to shoot" the victim was admissible because there had been substantial compliance with discovery statutes. *S. v. Pridgen*, 80.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.5. Sufficiency of Evidence of Breaking and Entering Generally

The breaking of and entry through an interior door is sufficient so long as the other elements of burglary are present. *S. v. Freeman*, 539.

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residential Premises

There was no error in denying defendant's motion to dismiss breaking and entering and larceny charges where there was plenary evidence to support defendant's convictions. *S. v. Todd*, 110.

§ 7. Instructions on Lesser Included Offenses

The trial court erred by not instructing the jury on the lesser-included offense of misdemeanor breaking and entering where there was some evidence which may have convinced a rational trier of fact that defendant did not form the requisite intent to commit larceny at the time he broke and entered the deceased's apartment. *S. v. Peacock*, 554.

§ 8. Sentence and Punishment

The trial court correctly ordered defendant's burglary sentence to run consecutively with a prior manslaughter sentence. *S. v. Warren*, 254.

CONSPIRACY

§ 3. Nature and Elements of Criminal Conspiracy

Defendant could properly be convicted and sentenced for both conspiracy to commit murder and accessory before the fact to murder. *S. v. Gallagher*, 132.

§ 6. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of conspiracy to murder her husband. *S. v. Gallagher*, 132.

CONSTITUTIONAL LAW

§ 23.4. Due Process; Actions Affecting Businesses or Corporations

The prejudgment interest statute, G.S. 24-5, does not violate the due process clause of the U.S. Constitution or the law of the land clause of the North Carolina Constitution. *Lowe v. Tarble*, 460.

§ 24.7. Service of Process on Nonresident Individuals

A defendant who made occasional visits to see his daughter in this state and mailed monthly support checks to plaintiff at her North Carolina residence did not have the constitutionally required minimum contacts with North Carolina to allow a child support action to be maintained against him in this state. *Miller v. Kite*, 474.

§ 24.9. Right to Trial by Jury

A bar applicant had no right to a jury trial in his appeal to the superior court from an order of the Board of Law Examiners denying his application to take the N. C. Bar examination. *In re McCarroll*, 315.

§ 30. Discovery; Access to Evidence and other Fruits of Investigation

Where defendant was provided with proposed testimony that defendant told the witness he was going to "take care of" the victim, the trial court properly ruled that testimony by the witness that defendant stated that "he might get somebody to shoot" the victim was admissible because there had been substantial compliance with discovery statutes. *S. v. Pridgen*, 80.

§ 34. Double Jeopardy

Defendant was not put in jeopardy twice for the same offense by indictments for first-degree kidnapping and first-degree rape where there was evidence of a sexual assault in addition to the rape. *S. v. Price*, 297.

§ 51. Delay in Securing Indictment

Defendant's Sixth Amendment right to a speedy trial was not violated by a five-year delay between a killing and her indictment for murder. *S. v. Gallagher*, 132.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

North Carolina's jury selection process in first-degree murder cases is constitutional. *S. v. Freeman*, 539.

There was no error in "death qualifying" the jury. *S. v. Peacock*, 554.

§ 67. Identity of Informants

Defendant's motion to require the State to disclose the name of a confidential informant was properly decided on statutory grounds where defendant did not present or argue the motion to the trial court on constitutional grounds. *S. v. Creason*, 122.

CONSTITUTIONAL LAW — Continued

§ 78. Cruel and Unusual Punishment Generally

The North Carolina legislature acted within constitutional bounds in enacting legislation designed to identify habitual criminals and to authorize enhanced punishment. *S. v. Todd*, 110.

A life sentence given an habitual offender upon convictions of felonious breaking or entering and felonious larceny was upheld under facts showing defendant's propensity to steal and unlawfully possess firearms, his threat against law enforcement officers, and his attempted escape during trial. *Ibid.*

§ 80. Life Imprisonment Sentences

A mandatory life sentence for first-degree rape did not constitute cruel and unusual punishment under the U.S. or North Carolina Constitutions. *S. v. Peek*, 266.

CONTEMPT OF COURT

§ 1.1. Distinction between Civil and Criminal Contempt

Criminal contempt is applied in punishment of an act already accomplished which tends to interfere with the administration of justice, while civil contempt is applied where the proceeding is to preserve the rights of private parties. *O'Briant v. O'Briant*, 432.

§ 5.1. Sufficiency of Notice of Show Cause Order

Plaintiff was not given sufficient notice under G.S. 5A-15 of a criminal contempt hearing. *O'Briant v. O'Briant*, 432.

CONTRACTS

§ 2.2. Time for Acceptance

A time limit for acceptance of an offer contained in a prospective purchaser's written offer to purchase real property did not become a term of the seller's subsequent counteroffer so as to transform the counteroffer into an option contract or irrevocable offer for the time stated in the original offer to purchase. *Normile v. Miller and Segal v. Miller*, 98.

Where a seller manifested her intention to revoke a counteroffer made to plaintiff prospective purchasers by entering into a contract to sell the property to a third party, and notice of this revocation was communicated to plaintiffs by a real estate agent who told them the property had been sold, plaintiffs' attempts thereafter to accept the counteroffer was ineffective. *Ibid.*

CORPORATIONS

§ 1.1. Disregarding Corporate Entity

The rule with regard to piercing the corporate veil encompasses both situations where there is direct stock ownership of a subsidiary corporation by a parent corporation and where stock control is exercised through a mutual shareholder. *Glenn v. Wagner*, 450.

Domination sufficient to pierce the corporate veil need not be limited to the particular transaction attacked. *Ibid.*

In an action which related to disregarding the corporate entity of affiliated corporations rather than piercing the veil to reach a dominant shareholder, the court's

CRIMINAL LAW — Continued

§ 50.2. Opinion of Nonexpert

Testimony that the witness sold decedent a watch a month before he "got killed" did not amount to a prejudicial invasion of the province of the jury in a murder case. *S. v. Wilson*, 516.

§ 53.1. Medical Expert Testimony as to Cause and Circumstances of Death

A pathologist was qualified to give his opinion that one gunshot wound was inflicted at close range and that a second wound was inflicted with the barrel of the weapon more than six inches from the skin. *S. v. Pridgen*, 80.

A doctor who performed an autopsy could give an opinion as to the time of death based on the probable lapse of time between the victim's last ingestion of food and the victim's death. *Ibid.*

§ 65. Evidence as to Emotional State

A witness was properly permitted to state his opinion that defendant did not appear to be grieving at the funeral of her husband. *S. v. Gallagher*, 132.

§ 66. Evidence of Identity by Sight

The trial court properly permitted two witnesses to testify that the driver of a car was the same size and about the same height and weight as defendant. *S. v. Pridgen*, 80.

§ 66.2. Evidence of Identity by Sight; Effect of Uncertainty of Witness

The trial court did not err in allowing photographic identification testimony by a witness who testified that she had identified defendant's photograph as the one most closely resembling a man she saw on the night of the crime but that she couldn't be sure. *S. v. Pridgen*, 80.

§ 66.6. Suggestiveness of Lineup Procedure

Although pretrial photographic and lineup identification procedures were made suggestive by an officer's comments that the witness should point out the individual who was at her motel on the night in question, the evidence supported the trial court's determination that the pretrial identification procedures did not create a substantial likelihood of misidentification and were not impermissibly suggestive. *S. v. Wilson*, 516.

§ 66.14. Independent Origin of In-Court Identification as Curing Improper Pretrial Identification

The court did not err by denying defendant's motion to suppress identification testimony where there was no substantial evidence of impermissibly suggestive State action in the pretrial identification procedure and where the trial court properly concluded that the witnesses' in-court identifications of defendant were of independent origin. *S. v. Freeman*, 539.

§ 66.15. Sufficiency of Independent Origin of In-Court Identification in Cases Involving Lineups

The evidence supported the trial court's ruling that a witness's in-court identification of defendant was based solely upon the witness's observations of defendant at the scene of the crime and was admissible as being of independent origin from suggestive pretrial photographic and lineup identification procedures. *S. v. Wilson*, 516.

CRIMINAL LAW — Continued

§ 71. Shorthand Statements of Fact

Testimony that the witness "ran into the room where [the victim] had been stabbed" was admissible as a shorthand statement of fact based upon an instantaneous conclusion of the mind. *S. v. Wilson*, 516.

§ 75.9. Confessions; Volunteered Statements

There was no error in the admission of statements made to an officer without Miranda warnings where defendant called to the officer from his cell while the officer was putting gas in his patrol car. *S. v. Todd*, 110.

§ 80. Records and Other Writings

A certified copy of the title history of a 1975 Vega showing defendant as the owner at the time of a robbery-murder was relevant in a prosecution for the murder and was not rendered inadmissible by the fact that the witness failed to testify that the vehicle identification or license tag number in the certificate of title matched those of the Vega driven by defendant. *S. v. Wilson*, 516.

§ 80.1. Records; Foundation and Authentication

A motel's daily records were sufficiently authenticated for admission into evidence where a witness's testimony, when coupled with the records themselves, established that the records were made in the normal course of business and at or near the time of the transactions described therein. *S. v. Wilson*, 516.

§ 85.3. Character Evidence Relating to Defendant; State's Cross-Examination of Defendant

In a prosecution for first-degree sexual offense with a seven-year-old child, there was no error in the cross-examination of defendant and his witnesses. *S. v. Burgin*, 404.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

Even if cross-examination of defendant about men she had lived with but not been married to after her husband was killed was improper for impeachment purposes, such error was not prejudicial to defendant. *S. v. Gallagher*, 132.

§ 86.10. Credibility of Defendant; Accomplices; Corroboration

There was no error in admitting an accomplice's testimony which implicated defendant. *S. v. Todd*, 110.

§ 89.2. Corroboration of Witnesses

Copies of telephone bills were admissible to corroborate a witness's testimony that he made certain telephone calls without testimony concerning the accuracy of the copies of the bills by the owner of the residence to which the original bills were sent. *S. v. Gallagher*, 132.

§ 89.9. Impeachment of Witness; Prior Statements

Testimony by defendant that she made a prior statement under oath in an affidavit which she believed to be untrue was admissible to impeach her even if the prior statement under oath was in fact correct. *S. v. Gallagher*, 132.

Cross-examination of defendant about her use of life insurance proceeds from her husband's death to purchase a home was competent to corroborate the testimony of a State's witness. *Ibid.*

CRIMINAL LAW — Continued

§ 92.3. Consolidation of Multiple Charges against same Defendant

Defendants are entitled to dismissal if they can show that the prosecution withheld indictment on additional charges solely in order to circumvent statutory joinder requirements. *S. v. Warren*, 254.

The trial court did not err in denying defendant's motion to dismiss burglary and larceny charges for failure to join where defendant's previous indictment for murder and conviction of voluntary manslaughter arose from the same incident. *Ibid.*

§ 92.4. Consolidation of Multiple Charges against same Defendant Held Proper

The trial court did not abuse its discretion in granting the State's motion to join a false pretense charge against defendant attorney with charges against defendant for embezzlement of funds from his law firm and malfeasance of a corporate agent. *S. v. Kornegay*, 1.

§ 101.4. Conduct or Misconduct During Deliberation of Jury

The trial judge did not abuse his discretion when he denied the jury's request that the court read back some of the testimony and instructed the jury that all twelve jurors should use their own memory. *S. v. Burgin*, 404.

§ 102.6. Particular Comments in Jury Argument

The trial court did not err by overruling defendant's objection to the portion of the prosecutor's argument in which he explained the role of the judge, prosecutor, and defense attorney. *S. v. Price*, 297.

§ 113.7. Charge as to Acting in Concert and Aiding and Abetting

The trial court in a first-degree murder case properly instructed the jury on aiding and abetting and acting in concert. *S. v. Pridgen*, 80.

The evidence supported an instruction on the concept of acting in concert in a felony-murder prosecution. *S. v. Wilson*, 516.

§ 117. Charge on Character Evidence

The trial court did not err in its instructions on character evidence where the testimony was given in the form of personal opinion and was not competent character evidence. *S. v. Peek*, 266.

§ 122.2. Additional Instructions upon Jury's Failure to Reach Verdict

The trial judge did not err in his additional instructions to the jury when the foreman told him the jury was having trouble reaching a verdict. *S. v. Peek*, 266.

§ 131.2. New Trial for Newly Discovered Evidence; Sufficiency of Showing

The trial court properly denied defendant's motion for appropriate relief in a first-degree murder case based on newly discovered evidence consisting of testimony that a certain car was seen in the vicinity of the crime scene three hours before the victim's body was discovered. *S. v. Pridgen*, 80.

§ 135.4. Separate Sentencing Proceeding in Capital Case

The trial court did not err in denying defendant's motion to present both the opening and closing arguments at the penalty phase of a first-degree murder trial. *S. v. Wilson*, 516.

§ 138. Severity of Sentence and Determination Thereof

An additional finding in aggravation that defendant has an antisocial personality disorder was proper where the trial judge clearly enunciated the basis upon which his finding was made. *S. v. Todd*, 110.

CRIMINAL LAW — Continued

When a trial judge makes findings of aggravating and mitigating factors in the sentencing phase of crimes coming within the Fair Sentencing Act, the judge is not bound by the findings of a jury during the sentencing phase of a capital case that certain mitigating factors exist. *S. v. Freeman*, 539.

The trial court did not abuse its discretion in sentencing defendant to the maximum terms for first-degree burglary and two counts of felonious assault without weighing aggravating and mitigating factors where there was one aggravating factor and no mitigating factors. *Ibid.*

§ 141. Sentence for Repeated Offenses

An habitual felon may be indicted as such in a separate bill, and it is not necessary to re-empanel a jury once that jury has been properly empaneled. *S. v. Todd*, 110.

The trial court did not err by failing to grant defendant's motion to dismiss an habitual felon prosecution where the evidence clearly established that defendant had been convicted or had pled guilty to three felony offenses, none of which were committed prior to his eighteenth birthday. *Ibid.*

§ 146. Nature and Grounds of Appellate Jurisdiction in Criminal Cases in General

Where defendant's appeal was grounded solely on a dissent in the Court of Appeals which disagreed only with the majority's treatment of the second question presented to that court, only the second question was properly before the Supreme Court for review. *S. v. Reilly*, 499.

§ 177. Determination and Disposition of Cause

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 and stands without precedential value. *S. v. Hunt*, 593.

DEEDS

§ 20.7. Restrictive Covenants; Enforcement Proceedings

The Court of Appeals erred by directing the trial judge to enter an order relieving defendant of a final judgment where defendant had begun a second residence on his property in violation of restrictive covenants, plaintiffs had obtained a permanent injunction against the construction of the second residence, the trial judge had ordered the incomplete structure removed, and defendant sought relief from the order on the grounds that he planned to convert the existing incomplete structure into a garage. *Buie v. Johnston*, 586.

DIVORCE AND ALIMONY

§ 19.5. Alimony; Effect of Separation Agreements and Consent Decrees

The parties to a separation agreement consent judgment do not have an election to enforce such judgment by contempt or to proceed in an independent action in contract. *Doub v. Doub*, 169.

§ 20.3. Attorney's Fees

In a divorce action in which defendant sought attorney's fees for a previous appeal and for her current action to hold plaintiff in contempt, the trial court intended to rule on the merits when entering an involuntary dismissal only with respect to counsel fees claimed for services rendered in the contempt action. *Whedon v. Whedon*, 200.

DIVORCE AND ALIMONY — Continued

§ 24.1. Determining Amount of Child Support

A child support order was remanded where the evidence before the court tended to show that defendant's monthly living expenses were $847.00 but the court "found" that only $777.00 was reasonable; determining how much of defendant's expenses are reasonable is a conclusion of law, which should be supported by findings. *Plott v. Plott*, 63.

The trial court did not abuse its discretion by applying a formula to determine defendant's share of child support. *Ibid.*

§ 24.9. Child Support Proceedings; Findings

A child support order was remanded where the facts underlying a determination of one of the factors relied upon by the trial judge were not stated in appropriate findings. *Plott v. Plott*, 63.

EASEMENTS

§ 4.3. Creation by Deed or Agreement; Construction and Effect of Agreement

Questions of material fact existed as to whether a lease provision created an easement in adjoining land owned by the lessors into which the lessee's underground radio wires extended and, if so, whether defendant Housing Authority's construction of buildings over portions of the radio wires on land purchased from the lessors amounted to an interference with the wires within the meaning of the lease and whether this injured plaintiff. *Century Communications v. Housing Authority of City of Wilson*, 143.

§ 6.1. Creation of Easements by Prescription; Burden of Proof, Presumptions, and Evidence

In an action to restrain the blocking of public access and to create an easement over unpaved and unimproved roads that cross respondents' Outer Banks property, the Court of Appeals erred by holding that the evidence failed as a matter of law to identify specific and definite routes of use. *West v. Slick*, 33.

Where petitioners contended that two roads across respondents' Outer Banks property were "neighborhood public roads," but the State Board of Transportation adopted a resolution providing for the acquisition of a right of way in a third road in the area, the two roads were no longer the "necessary" means of ingress and egress from petitioners' dwelling houses; however, the evidence was sufficient to take the case to the jury under the third part of G.S. 136-67. *Ibid.*

In an action in which petitioners contended that two unpaved roads across respondents' Outer Banks property had become public roads through prescription based on continuous and open public use for over twenty years, there was abundant evidence that the public had used the two roads openly, notoriously and continuously for decades without permission as the primary means of access to Corolla and the Currituck Banks; moreover, assuming a requirement of public maintenance, there was sufficient evidence to take the case to the jury. *Ibid.*

ELECTRICITY

§ 3. Rates

The Utilities Commission correctly determined that Tapoco, Inc., is a North Carolina public utility subject to its regulatory authority and jurisdiction. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 614.

ELECTRICITY — Continued

The Utilities Commission's order implementing a roll-in of the properties, revenues and expenses of Tapoco with those of Nantahala for the purpose of setting Nantahala's retail rates in no way contravened the terms and conditions of Tapoco's federal license to operate hydroelectric plants in North Carolina and Tennessee and was not prohibited by Part I of the Federal Power Act and the Supremacy Clause of the U.S. Constitution. *Ibid.*

The evidence supported a determination by the Utilities Commission that Alcoa is a North Carolina public utility by virtue of the effect Alcoa's "affiliation" with Nantahala has upon Nantahala's rates. *Ibid.*

The Utilities Commission was not preempted from implementing a roll-in methodology for determining Nantahala's rates by virtue of the Supremacy Clause of the U.S. Constitution and the Federal Energy Regulatory Commission's exclusive jurisdiction under Part II of the Federal Power Act over certain wholesale power transactions and agreements between and among Nantahala, Tapoco, Alcoa and TVA. *Ibid.*

Utilization of a roll-in method for determining Nantahala's rates does not grant a preference to Nantahala's North Carolina customers and does not impermissibly interfere with interstate commerce in violation of the Commerce Clause of the U.S. Constitution. *Ibid.*

Application of a roll-in methodology for determining Nantahala's rates, with its resulting reduction in retail rates and refund obligation to Nantahala's retail customers, does not impermissibly impair Nantahala's ability to earn a proper rate of return on its investment and does not amount to a confiscation of its properties. *Ibid.*

The Utilities Commission acted within its regulatory and rate making authority in imposing the obligation upon Nantahala's parent, Alcoa, to pay any portion of a refund obligation to Nantahala's retail customers which Nantahala is financially unable to make. *Ibid.*

The Utilities Commission's imposition of an obligation upon Alcoa to pay any portion of a refund obligation to Nantahala's retail customers which Nantahala is financially unable to pay does not amount to a confiscation of Alcoa's property. *Ibid.*

The Utilities Commission properly ordered Nantahala to refund excess revenue measured by rates determined by a roll-in methodology in this proceeding rather than by what would have been collected under Nantahala's prior rate schedule. *Ibid.*

EMBEZZLEMENT

§ 1.1. Classes of Persons Subject to Embezzlement Statute

Defendant attorney's act of depositing legal fees in his own account rather than in the account of his law firm, a professional corporation, was a violation of the malfeasance of corporate agents statute although defendant was the sole shareholder of the corporation, and associates in the law firm were properly permitted to testify that they had not authorized defendant to deposit legal fees generated by the corporation in his own account. *S. v. Kornegay*, 1.

§ 4. Indictment

An incompetent's wife had a special property interest in funds which had been recovered for the incompetent and deposited in a law firm's trust account so that there was no fatal variance between the evidence and an indictment charging

EMBEZZLEMENT — Continued

defendant attorney with embezzlement of funds belonging to the wife "individually," and an allegation in the indictment that the funds belonged to the wife "as guardian ad litem" was mere surplusage. *S. v. Kornegay*, 1.

§ 5. Evidence

In a prosecution of defendant attorney for embezzlement of funds of a professional corporation, evidence of an agreement that all legal fees generated by defendant and his two associates would be property of the corporation and distributed pro rata was relevant to show the revenue to which the corporation was entitled, and evidence that defendant's two associates were entitled to shares of the corporate stock was relevant to the determination of whether defendant had acted with criminal intent to defraud the corporation and the two associates. *S. v. Kornegay*, 1.

§ 6.1. Instructions

The trial court's instructions were adequate to inform the jury that they must find that defendant acted with a corrupt intent when he converted the monies in question, and the court did not err in refusing to give defendant's requested instruction on corrupt intent. *S. v. Kornegay*, 1.

EMINENT DOMAIN

§ 2. Acts Constituting a Taking

Questions of material fact existed as to whether a lease provision created an easement in adjoining land owned by the lessors into which the lessee's underground radio wires extended and, if so, whether defendant Housing Authority's construction of buildings over portions of the radio wires on land purchased from the lessors amounted to an interference with the wires within the meaning of the lease and whether this injured plaintiff. *Century Communications v. Housing Authority of City of Wilson*, 143.

FALSE PRETENSE

§ 3.1. Sufficiency of Evidence

The evidence was sufficient to support conviction of defendant attorney for obtaining $21,000 from a client by false pretense by representing to the client that he had settled a suit against her for $125,000 when in fact he had settled the suit for $104,000. *S. v. Kornegay*, 1.

GAS

§ 1. Regulation

The Utilities Commission's findings and conclusions were inadequate as a matter of law to support its conclusion that a rate increase was just and reasonable where the Commission also allowed the elimination of the Curtailment Tracking Rate, which would result in another increase, without findings that the increase was just and reasonable. *State ex rel. Utilities Comm. v. N. C. Textile Manufacturers Assoc., Inc.*, 215.

The Commission erred by finding that a plan proposed by cities to whom wholesale service was provided was administratively unfeasible where there was no evidence that the plan would be difficult to administer. *Ibid.*

The Transportation Rate was to be included on remand in the determination of whether presently charged rates were discriminatory, but the issue of whether the Transportation Rate was unjust as a matter of law was not argued before the Commission and was not to be included on remand. *Ibid.*

The Utilities Commission erred by excluding new customers from the calculation of the Industrial Sales Tracker. *Ibid.*

§ 1.1. Reasonableness of Classification of Customers

The Utilities Commission erred by not addressing the question of unreasonable discrimination among and within the classes of service where the evidence before the Commission made it clear that there was substantial discrimination between the various classes of customers. *State ex rel. Utilities Comm. v. N. C. Textile Manufacturers Assoc., Inc.*, 215.

HIGHWAYS AND CARTWAYS

§ 11.2. Neighborhood Public Roads; Actions to Enjoin Obstructions

In an action to restrain the blocking of public access and to create public roadways over unpaved and unimproved roads that cross respondents' Outer Banks property, the Court of Appeals erred by holding that the evidence failed as a matter of law to identify specific and definite routes of use. *West v. Slick*, 33.

HOMICIDE

§ 2. Principals and Accessories

Defendant could be convicted as an accessory before the fact to murder on an indictment charging murder for an offense which occurred on 1 October 1978. *S. v. Gallagher*, 132.

§ 12.1. Indictments; Premeditation and Deliberation; Perpetration of Felony

Where the State made out a prima facie case on both the theories of felony murder and premeditation and deliberation, the State was not required to elect a theory under which the case would be submitted to the jury. *S. v. Wilson*, 516.

§ 15. Relevancy and Competency of Evidence in General

Testimony concerning the location of defendant's house was relevant to establish that defendant's opportunity to murder the victim was enhanced by the proximity of his house to the crime scene. *S. v. Pridgen*, 80.

Testimony regarding the route one might take from the street where a murder victim was last seen to the street where the body was found was relevant to establish the opportunity for defendant to commit the crime. *Ibid.*

A witness was properly permitted to state his opinion that defendant did not appear to be grieving at the funeral of her husband. *S. v. Gallagher*, 132.

§ 15.4. Expert and Opinion Evidence

A pathologist was qualified to give his opinion that one gunshot wound was inflicted at close range and that a second wound was inflicted with the barrel of the weapon more than six inches from the skin. *S. v. Pridgen*, 80.

A doctor who performed an autopsy could give an opinion as to the time of death based on the probable lapse of time between the victim's last ingestion of food and the victim's death. *Ibid.*

HOMICIDE — Continued

A medical doctor who examined the victim's body at the crime scene could properly state an opinion as to the position of the body when the fatal wound was inflicted. *Ibid.*

§ 18.1. Particular Circumstances Showing Premeditation and Deliberation

Testimony that a murder victim was alive when he clutched grass found in his hand was relevant to establish that the murder was committed with premeditation and deliberation and that the victim was shot at the crime scene. *S. v. Pridgen*, 80.

Testimony that defendant made statements a few months before her husband's death that she hated her husband and wished he was dead was competent to show premeditation, deliberation, motive and intent. *S. v. Gallagher*, 132.

§ 21.5. Sufficiency of Evidence of First Degree Murder

There was sufficient evidence of premeditation and deliberation to support a charge against defendant of first-degree murder, and the circumstantial evidence was sufficient to support a jury finding that defendant was the perpetrator of the crime. *S. v. Pridgen*, 80.

§ 21.6. Sufficiency of Evidence of First Degree Murder; Homicide during Perpetration of Felony

The State's evidence was sufficient to support inferences that the victim was killed during the commission of an armed robbery and that defendant perpetrated or aided in the perpetration of the robbery and killing so as to support defendant's conviction of first-degree murder under the felony murder rule. *S. v. Wilson*, 516.

§ 30. Submission of Guilt of Lesser Offenses

There was no error in the court's failure to instruct the jury on second-degree murder where a rational jury considering the State's evidence could only conclude that defendant was guilty of first-degree murder or that he was not the killer and was not guilty. *S. v. Freeman*, 539.

§ 32.1. Appeal and Review; Harmless Error

Defendant was not prejudiced by submission of a first-degree murder charge on the theory of premeditation and deliberation where he was convicted of first-degree murder specifically on the basis of the felony murder rule. *S. v. Wilson*, 516.

HUSBAND AND WIFE

§ 13. Separation Agreement; Enforcement

The parties to a separation agreement consent judgment do not have an election to enforce such judgment by contempt or to proceed in an independent action in contract. *Doub v. Doub*, 169.

INDICTMENT AND WARRANT

§ 8.4. Election between Offenses

The trial court did not err in waiting until the close of all the evidence to require the State to make an election between the offense of embezzlement and the offense of malfeasance of a corporate agent. *S. v. Kornegay*, 1.

Where the State made out a prima facie case on both the theories of felony murder and premeditation and deliberation, the State was not required to elect a theory under which the case would be submitted to the jury. *S. v. Wilson*, 516.

INSANE PERSONS

§ 12. Sterilization of Mental Defective

Before an order authorizing the compulsory sterilization of a mentally retarded person can be entered, petitioner must prove by clear, strong and convincing evidence that there is a substantial likelihood that respondent will engage in sexual activity likely to cause impregnation and must satisfy certain "best interests" standards. *In re Truesdell*, 421.

INSURANCE

§ 110.1. Liability for Costs and Interest

Prejudgment interest provided for by G.S. 24-5 was a cost within the meaning of the contract which the insurer was obligated to pay. *Lowe v. Tarble*, 460.

§ 136. Actions on Fire Policies

The trial court correctly charged the jury on an insurance company's affirmative defense of misrepresentation. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 362.

The trial court erred by granting defendant insurance company's motion for judgment n.o.v. on the issue of misrepresentation during the investigation of plaintiff's claim. *Ibid.*

JUDGES

§ 3. Emergency Judges

Defendant failed to show that search warrants were invalid on the ground that the emergency judge who signed them had not opened court at the time he issued the warrants in chambers. *S. v. Kornegay*, 1.

§ 7. Misconduct in Office

A political candidate's campaign committee is not a "political organization" to which a judge or judicial candidate may contribute. *In re Wright*, 495.

JURY

§ 2. Special Venires

Defendant was not prejudiced when the trial court ordered the sheriff to randomly recruit jurors during the selection process where defendant failed to exhaust his peremptory challenges. *S. v. Wilson*, 516.

§ 6. Voir Dire Examination; Practice and Procedure

The trial court did not err in denying defendant's motion for sequestration and individual voir dire of prospective jurors in a capital case. *S. v. Wilson*, 516.

§ 6.4. Voir Dire; Questions as to Belief in Capital Punishment

The trial court did not err in denying defendant the opportunity to rehabilitate jurors challenged for cause due to their opposition to the death penalty by asking questions in the nature of comments by defense counsel concerning the obligations and duties of a citizen as a juror. *S. v. Wilson*, 516.

§ 7.12. Challenges for Cause; What Constitutes Disqualifying Scruples against Capital Punishment

Prospective jurors challenged for cause due to their beliefs regarding capital punishment were properly dismissed. *S. v. Wilson*, 516.

JURY — Continued

§ 7.14. Manner and Time of Exercising Peremptory Challenges

The trial court did not abuse its discretion in refusing to permit defendant to exercise his remaining peremptory challenge to excuse a juror after the jury had been empaneled and opening statements had been made when it came to the court's attention that the juror was a receptionist in a dental office at which the State's chief witness was a patient. *S. v. McLamb*, 572.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

The information possessed by officers at the time they arrested defendant was sufficient to cause a reasonable person acting in good faith to believe that defendant was guilty of kidnapping. *S. v. Thompson*, 157.

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Lien of Person Dealing Directly with Owner

A contract clause providing that the parties shall arbitrate disputes under the contract did not prevent plaintiff from enforcing a claim of lien for architectural services pursuant to G.S. 44A-13. *Adams v. Nelsen*, 442.

LANDLORD AND TENANT

§ 13. Termination Generally

In order to evict a tenant occupying low income public housing for failure to pay rent or utilities as called for in the lease, there must be a finding of fault on the part of the tenant in failing to make the rental payment. *Maxton Housing Authority v. McLean*, 277.

A public housing authority was not entitled to evict defendant from a public housing project for failure to make rental and water and sewer payments because defendant rebutted the presumption that good cause existed to terminate the lease by showing lack of fault on her part in failing to make such payments. *Ibid.*

§ 13.2. Renewals

No perpetual lease or right to perpetual renewals may be found to have been created unless the lease agreement contains the terms "forever," "for all time," "in perpetuity" or words unmistakably of the same import. *Lattimore v. Fisher's Food Shoppe, Inc.*, 467.

A lease which did not contain the customary words of perpetuity or words unmistakably of the same import was not ambiguous and parol evidence was not admissible. *Ibid.*

LARCENY

§ 7.3. Sufficiency of Evidence of Ownership of Property Stolen

There was a fatal variance between an indictment charging larceny of property from the owner of a building and evidence that the stolen property belonged to the building owner's daughter who had a business in the building. *S. v. Downing*, 164.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

Evidence that defendant's girl friend had possession of a watch taken in a robbery-murder one to three weeks after the killing and that defendant sold the watch a week later supported the application of the doctrine of possession of recently stolen goods to link defendant to the crimes. *S. v. Wilson*, 516.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Negligence Actions

Plaintiff's claim against defendant architects and engineers arising out of their design and supervision of improvements to realty was governed by the six-year statute of repose set forth in the 1963 version of G.S. 1-50(5) rather than by the four-year statute of repose contained in the statute dealing with professional malpractice claims, G.S. 1-15(c). *Trustees of Rowan Tech. v. Hammond Assoc.*, 230.

§ 4.3. Accrual of Cause of Action for Breach of Contract

Summary judgment was properly entered for defendants on the basis of the statute of limitations where plaintiff first complained of leaks in its roof within two months after occupying its newly-built facility in 1973 and plaintiff's complaint was filed in 1981. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 488.

MASTER AND SERVANT

§ 10. Duration and Termination of Employment

In the statute relating to hiring State employees dismissed from an exempt policy-making position, G.S. 126-5(e), the phrase "such employee shall have priority to any position that becomes available for which the employee is qualified" means that if the employee is qualified for a job in State government which is available, he must be offered this job before it can be filled by anyone else by promotion or otherwise. *Department of Correction v. Hill*, 481.

§ 55.4. Workers' Compensation; Relation of Injury to Employment

An employee suffered injuries by accident arising out of and in the course of his employment when he was killed in an airplane crash while returning from Georgia after having flown an airplane there to pick up his superior who had flown a second airplane there to have new FAA numbers painted on it. *Pollock v. Reeves Bros., Inc.*, 287.

§ 56. Workers' Compensation; Causal Relation between Employment and Injury

An employee was entitled to recover workers' compensation for injuries suffered in a plane crash under the special errand rule and under the principle that when a superior directs a subordinate employee to go on an errand or perform some duty beyond his normal duties, an injury sustained in the course of that task is compensable. *Pollock v. Reeves Bros., Inc.*, 287.

§ 60.1. Workers' Compensation; Injuries Sustained while Acting in Interest of Self

Assuming that an employee had personal business to conduct in Georgia when he flew an airplane to Georgia to pick up a superior who had flown a second airplane there to have FAA numbers painted on it, an award of workers' compensation benefits for injuries suffered by the employee in a plane crash on the return trip would be justified under the dual purpose rule. *Pollock v. Reeves Bros., Inc.*, 287.

MORTGAGES AND DEEDS OF TRUST

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase-Money Mortgages and Deeds of Trust

A holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing such land may not release his security and then sue on the note but must look exclusively to the property conveyed in seeking to recover any balance owed. *Barnaby v. Boardman*, 565.

MUNICIPAL CORPORATIONS

§ 31. Zoning Ordinances; Judicial Review in General

A petition to the superior court for a writ of certiorari to review a decision of a board of aldermen denying a conditional use permit must be filed within a reasonable time, and the superior court did not err in concluding that a petition filed forty-five days after the board mailed notice of denial was filed within a reasonable time. *White Oak Properties v. Town of Carrboro*, 306.

NARCOTICS

§ 5. Verdict

A verdict of guilty of possession of LSD with intent to sell or deliver did not lack unanimity because the intent of the legislature was to prevent the transfer of controlled substances; "sell" and "deliver" are synonymous. *S. v. Creason*, 122.

A verdict finding that defendant "feloniously did sell or deliver" cocaine was ambiguous and fatally defective, but verdicts finding defendant guilty of possession of cocaine with intent to "sell or deliver" were not fatally ambiguous because they were in the disjunctive form. *S. v. McLamb*, 572.

NEGLIGENCE

§ 36. Nonsuit for Intervening Negligence

In an action for the wrongful death of a child crushed by drainage pipe at a construction site, it could not have been held upon the materials before the trial court that the negligence of the general contractor insulated the common carrier which delivered and unloaded the pipe. *Broadway v. Blythe Industries, Inc.*, 150.

§ 51. Attractive Nuisances

In an action for the wrongful death of a child based on attractive nuisance, summary judgment should not have been entered for the common carrier which delivered and unloaded large concrete storm drainage pipe at a construction site. *Broadway v. Blythe Industries, Inc.*, 150.

PROCESS

§ 9.1. Personal Service on Nonresident Individuals in another State; Minimum Contacts Test

A defendant who made occasional visits to see his daughter in this state and mailed monthly support checks to plaintiff at her North Carolina residence did not have the constitutionally required minimum contacts with North Carolina to allow a child support action to be maintained against him in this state. *Miller v. Kite*, 474.

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

The statute of repose set forth in G.S. 1-50(5) applies to all actions against architects where plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect. *Trustees of Rowan Tech. v. Hammond Assoc.*, 230.

RAPE AND ALLIED OFFENSES

§ 1. Nature and Elements of the Offense

The State's evidence was sufficient to describe a sexual offense and to take the case to the jury where defendant forcibly and with the threatened use of a knife made his victim disrobe and perform oral sex on him. *S. v. Goodson*, 318.

§ 4. Relevancy and Competency of Evidence

Evidence that defendant was seen tearing and throwing into a trash basket identification cards bearing the name "David" was relevant since defendant had used that name when he approached his victim. *S. v. Goodson*, 318.

§ 10. Carnal Knowledge of Female under Twelve; Competency and Relevancy of Evidence

In a prosecution for the kidnapping and rape of a ten-year-old third grader in which defendant claimed that the victim could give detailed descriptions of his house and car only because she was coached, the court properly excluded testimony that two women had been seen looking into his house because there was no evidence of when the women were seen, of their identity, or that the victim had been coached. *S. v. Price*, 297.

ROBBERY

§ 4.2. Common Law Robbery Cases where Evidence Held Sufficient

The evidence was sufficient for the jury on the issue of defendant's guilt of common law robbery. *S. v. Bates*, 580; *S. v. Bates*, 591.

§ 4.3. Armed Robbery Cases where Evidence Held Sufficient

Evidence that defendant's girl friend had possession of a watch taken in a robbery-murder one to three weeks after the killing and that defendant sold the watch a week later supported the application of the doctrine of possession of recently stolen goods to link defendant to the crimes. *S. v. Wilson*, 516.

§ 5.4. Instructions on Lesser Included Offenses

The trial court did not err by instructing the jury on robbery with a dangerous weapon but not on the lesser-included offense of common law robbery where the only reasonable inference from the evidence was that a glass vase as used by defendant was a dangerous weapon. *S. v. Peacock*, 554.

RULES OF CIVIL PROCEDURE

§ 41.2. Dismissal in Particular Cases

The trial court did not abuse its discretion in dismissing defendant's motion for appellate counsel fees without prejudice where the evidence supported the inference that the trial judge determined that defendant had a meritorious claim but had simply and excusably failed to bring forth the necessary evidence at the hearing. *Whedon v. Whedon*, 200.

§ 59. New Trials

In an action to collect under a fire insurance policy, the Court of Appeals erred by reversing the trial judge's grant of a new trial where a review of the record indicates that there was no manifest abuse of discretion by the trial judge. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 362.

RULES OF CIVIL PROCEDURE — Continued

§ 60. Relief from Judgment or Order

The Court of Appeals erred by directing the trial judge to enter an order relieving defendant of a final judgment in an action to enforce restrictive covenants because all discretion was removed from the trial judge. *Buie v. Johnston*, 586.

SALES

§ 6.4. Warranties in Sale of House by Builder-Vendor

The standard of reasonableness applies in determining whether a dwelling has been recently completed for purposes of the implied warranty of habitability, and whether a dwelling completed four and one-half years before plaintiffs received a deed was recently completed was a question of fact for the jury. *Gaito v. Auman*, 243.

The effect of occupation by tenants prior to the passage of the deed to the initial vendee is but one factor which a factfinder should consider in determining whether defendant is liable for breach of an implied warranty of habitability. *Ibid.*

A jury could find that a defective air conditioning system in a recently completed dwelling constituted a breach of the implied warranty of habitability. *Ibid.*

SCHOOLS

§ 14. Criminal Liability of Parents for Failure to Send Children to School

Plaintiff's home instruction of his children met the standards for qualification as a nonpublic school under our compulsory school attendance statutes. *Delconte v. North Carolina*, 384.

The legislature did not intend statutes relating to compulsory school attendance to preclude home instruction simply because of some intrinsic meaning attached to the word "school." *Ibid.*

SEARCHES AND SEIZURES

§ 2. Searches by Particular Persons

A secretary in defendant's law office was not acting as an agent of the State when she handed over copies of defendant's business and personal records to the S.B.I. prior to the issuance of a search warrant, and the copied records were thus not obtained through an unreasonable search and seizure conducted by the State or its agents. *S. v. Kornegay*, 1.

§ 8. Search and Seizure Incident to Warrantless Arrest

Defendant's motion to suppress evidence seized as a result of his unlawful arrest was properly denied where the information possessed by officers at the time they arrested defendant was sufficient to cause a reasonable person acting in good faith to believe that defendant was guilty of kidnapping. *S. v. Thompson*, 157.

§ 20. Application for Warrant

Defendant failed to show that search warrants were invalid on the ground that the emergency judge who signed them had not opened court at the time he issued the warrants in chambers. *S. v. Kornegay*, 1.

§ 23. Application for Warrant; Sufficiency of Showing Probable Cause

An affidavit was sufficient to establish probable cause to believe that a search of the records of a law firm and defendant's personal records would reveal that de-

SEARCHES AND SEIZURES — Continued

fendant had fraudulently misappropriated corporate funds of the law firm, embezzled trust account funds and obtained money from a client by false pretense or embezzlement. *S. v. Kornegay*, 1.

§ 30. Contents of Warrant; Description of Place to Be Searched

Search warrants were not required to state specifically that the applications were incorporated by reference in order for the applications to be a part thereof where each warrant clearly stated that the location of the place to be searched and the description of the items to be seized were set forth in the application attached to it. *S. v. Kornegay*, 1.

§ 31. Contents of Warrant; Description of Property to Be Seized

It was immaterial that statements charging a specific offense and facts establishing probable cause were not included in the particular portion of an affidavit attached to a search warrant designating a law firm's savings account passbook as an item to be seized. *S. v. Kornegay*, 1.

A description in a warrant of items to be seized, including directions to seize all checkbooks, cancelled checks, deposit slips, bank statements, trust account receipts, check stubs, books and papers which would tend to show a fraudulent intent or elements of the crime of false pretense or embezzlement, was as specific as the circumstances and nature of defendant attorney's activities permitted and was sufficiently particular to meet constitutional requirements. *Ibid.*

§ 47. Motion to Suppress; Admissibility and Competency of Evidence on Voir Dire

Defendant's motion to require the State to disclose the name of a confidential informant was properly denied under G.S. 15A-978 because there was corroboration of the existence of the informant independent of the testimony in question and the evidence sought to be suppressed was seized pursuant to a search warrant. *S. v. Creason*, 122.

STATE

§ 2.1. Tidelands and Marshlands

The rule that passage by the public by foot, vehicle and boat must be free and substantially unobstructed over the entire width of the foreshore was affirmed. *West v. Slick*, 33.

§ 12. State Employees

In the statute relating to hiring State employees dismissed from an exempt policy-making position, G.S. 126-5(e), the phrase "such employee shall have priority to any position that becomes available for which the employee is qualified" means that if the employee is qualified for a job in State government which is available, he must be offered this job before it can be filled by anyone else by promotion or otherwise. *Department of Correction v. Hill*, 481.

TAXATION

§ 25.7. Ad Valorem Taxes; Factors Determining Market Value Generally

The Property Tax Commission erred in adopting the methods of appraisal of the market value of a railroad's property by a witness for the Department of Revenue whose methods were designed to arrive at value only from the standpoint of the seller-owner. *In re Southern Railway*, 177.

VENDOR AND PURCHASER – Continued

A jury could find that a defective air conditioning system in a recently completed dwelling constituted a breach of the implied warranty of habitability. *Ibid.*

WITNESSES

§ 1.2. Age; Children as Witnesses

The trial court did not abuse its discretion by permitting a ten-year-old kidnapping and rape victim to testify. *S. v. Price*, 297.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina