NORTH CAROLINA REPORTS

VOLUME 314

SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME
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THE SUPREME COURT
OF
NORTH CAROLINA

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JAMES G. EXUM, JR.[1]

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BURLEY B. MITCHELL, JR.
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HENRY E. FRYE
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WILLIS P. WHICHARD[3]

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RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

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1. Sworn in 26 November 1986 to replace Rhoda B. Billings.
2. Sworn in 26 November 1986 to replace Francis I. Parker.
3. Sworn in 26 November 1986 to replace Robert R. Browning.

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D. MARSH MCLELLAND[9]	Graham

1. Elected and took office 12-1-86 to replace Donald L. Smith.
2. Elected and took office 1-1-87 to replace D. Marsh McLelland.
3. Elected and took office 1-1-87 to replace Marvin K. Gray.
4. Elected and took office 1-2-87 to replace John R. Friday.
5. Elected and took office 1-1-87 to replace Joseph A. Pachnowski.
6. Appointed and took office 12-1-86 to replace Donald W. Stephens who became a Resident Judge on 12-1-86.
7. Appointed and took office 1-1-87 to replace Janet Marlene Hyatt who became a Resident Judge on 1-1-87.
8. Appointed 1-1-87.
9. Appointed 3-10-87.

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27B	GEORGE HAMRICK (Chief)	Shelby
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	JOHN KEATON FONVIELLE[28]	Shelby

---

1. Appointed and took office 11-10-86 to replace Narley Lee Cashwell who resigned 8-31-86.
2. Elected and took office 12-1-86.
3. Appointed and took office 1-22-87 to replace K. Edward Greene who was elected to the North Carolina Court of Appeals.
4. Appointed and took office 7-1-86 to replace Charles Lee Guy who retired April 1986.
5. Appointed and took office 1-12-87 to replace Lee Greer, Jr., deceased.
6. Elected and took office 12-1-86.
7. Appointed and took office 1-1-87 as Chief Judge.
8. Appointed and took office 2-11-87 to replace J. B. Allen, Jr.
9. Elected and took office 12-1-86.
10. Appointed and took office as Chief Judge 12-1-86 to replace Foy Clark who retired.
11. Elected and took office 12-1-86.
12. Appointed and took office as Chief Judge 12-5-86 to replace Thomas G. Foster, Jr.
13. Appointed and took office 1-19-87.
14. Appointed and took office 12-1-86 to replace James H. Dooley, Jr.
15. Appointed and took office as Chief Judge 12-1-86 to replace L. T. Hammonds, Jr.
16. Elected and took office 12-1-86.
17. Appointed and took office 1-23-87 to replace W. Reece Saunders, Jr.

DISTRICT	JUDGES	ADDRESS
28	EARL JUSTICE FOWLER, JR. (Chief)	Arden
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	ROBERT HARRELL	Asheville
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	LOTO J. GREENLEE	Marion
30	JOHN J. SNOW, JR. (Chief)[29]	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT[30]	Bryson City

18. Appointed and took office 2-13-87 to replace Lynn Burleson.
19. Elected and took office 12-1-86.
20. Appointed and took office as Chief Judge 12-1-86.
21. Elected and took office 12-1-86 to replace Samuel McD. Tate.
22. Elected and took office 12-1-86 to replace Livingston Vernon.
23. Elected and took office 12-1-86.
24. Appointed and took office 1-23-87 to replace W. Terry Sherrill who went on the Superior Court bench.
25. Appointed and took office as Chief Judge 1-16-87 to replace J. Ralph Phillips, deceased.
26. Elected and took office 12-1-86.
27. Appointed and took office 2-9-87.
28. Appointed and took office 1-9-87.
29. Appointed and took office 12-6-86 as Chief Judge.
30. Appointed and took office 12-2-86.

ATTORNEY GENERAL OF NORTH CAROLINA

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28	ROBERT W. FISHER	Asheville
29	ALAN C. LEONARD	Rutherfordton
30	ROY H. PATTON, JR.	Waynesville

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26	ISABEL S. DAY	Charlotte
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ADVISORY OPINION

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

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

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

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GENERAL STATUTES CITED AND CONSTRUED

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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 July 30, 1986, the following individuals were admitted:

RUSSELL FURBEE ETHRIDGE ..... Greenville, applied from the State of Michigan
REBECCA SAYRE RIFFE ..... Waseca, MN, applied from the State of West Virginia
PATRICIA DOROTHY RYAN . Washington, D.C., applied from the District of Columbia
RICHARD DUANE POLING ..... Charlotte, applied from the State of West Virginia
WILLIAM THOMAS ALBERTI .. Spartanburg, SC, applied from the State of Oklahoma
MARC HOWARD SHAPIRO ..... Cary, applied from the District of Columbia

Given over my hand and Seal of the Board of Law Examiners this 31st day of July, 1986.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 23rd day of August, 1986 and said persons have been issued certificates of this Board:

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ALBERT DOUGLAS BARNES ..... Greensboro
EDGAR LEM BARNES ..... Elizabethtown
WILLIAM JOEY BARNES ..... Statesville
SHARON TRACEY BARRETT ..... West Hartford, Connecticut
MARK BLAIR BARTA ..... Winston-Salem
JUNE LYNN BASDEN ..... Greensboro
VALERIE L. BATEMAN ..... Chapel Hill
JEFFREY ARTHUR BATTS ..... Winston-Salem
LINDA SUE BELLOWS ..... Greensboro
NATARLIN R. BEST ..... Goldsboro
JEFFREY HART BLACKWELL ..... Chapel Hill
LEMUEL SHOWELL BLADES IV ..... Columbia, South Carolina
JONATHAN A. BLUMBERG ..... Potomac, Maryland
LAWRENCE STEPHEN BOEHLING ..... Wilmington
REUBEN FOREST BOONE ..... Robersonville
MONICA MARIE BOUSMAN ..... Garner
WILLIAM MARK BOYUM ..... Cherokee
CHRISTOPHER W. BRAGG ..... Hubert
SAMUEL C. BRIEGEL ..... Raleigh
CLIFFORD PAUL BRITT ..... Winston-Salem
CYNTHIA ANN BROOKS ..... Pineville
JANET WALES BROWN ..... Durham
MATTHEW MICHAELIS BROWN ..... Statesville
PATRICIA LOU BROWN ..... Carrboro
ROBERT SCOTT BROWN ..... Chapel Hill
CHRISTOPHER GRAFFLIN BROWNING, JR. ..... Greenville
JERRY LAWRENCE BRUNER ..... Shannon
JOHN WALTER BRYANT ..... Scotland Neck
FAYE A. BURNER ..... Jacksonville, Florida
KARON BUSH ..... Chapel Hill
JAMES C. BUTT ..... Buies Creek
KEVIN WILLIAM BUTTERFIELD ..... Durham
VERNON JOHN CAHOON ..... Westport, Massachusetts
LISA JEFFRIES CALDWELL ..... Winston-Salem
STOKELY GRAY CALDWELL, JR. ..... Lexington, Virginia
HENRY CORWIN CAMPEN, JR. ..... Raleigh
THOMAS DIXON CARRUTHERS ..... Greensboro
CATHERINE I. CARTER ..... Dunn
JERONE C. CECELIC ..... Durham
JAMES JOSEPH CHAPMAN ..... Raleigh
KEVIN J. CHAPMAN ..... Fort Smith, Arkansas
DOUGLAS BROWNLIE CHAPPELL ..... Austin, Texas
MARY KAY CHERRY ..... Windsor
DAVID EDWARD CLARK ..... Garner
KATHY MICHELLE CLARK ..... Charlotte

J. STEWART CLONTZ ..... Greensboro
CLAIRE PIERCE COLE ..... Charlotte
CONSTANCE ANN COLLINS ..... Charlotte
RANDALL RAY COMBS ..... Buies Creek
TERESA L. CONRAD ..... Charlotte
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TERRI LYNN COOK ..... Georgetown, Kentucky
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ANNE ELIZABETH COWLEY ..... Spencer, Virginia
LINDA MARIE CRUCIANI ..... Charlotte
CHRISTOPHER JOHN CULP ..... Charlotte
AYMER LAUGHNER CURTIN ..... Gainesville, Florida
SEAN BALFOUR DAIL ..... Raleigh
M. ELIZABETH DAVENPORT ..... Nashville
JULIE ASBELL DAVIS ..... Elizabethtown
WILLIAM M. DAVIS, JR. ..... Elizabethtown
JENNINGS BRYAN DEANS, JR. ..... Concord, New Hampshire
ANDREW RALPH DEMPSTER ..... Fayetteville
BRADFORD A. DEVORE ..... Columbia, South Carolina
MATTHEW THOMPSON DILL ..... Jacksonville
PAMELA ROSE DISTEFANO ..... Durham
MERRIE CLAIRE DORMAN ..... Starkville, Mississippi
MICHAEL JAMES DUANE ..... Durham
KEVIN AUGUSTUS DUNLAP ..... Greer, South Carolina
DAVID LEE EADES ..... Nashville, Tennessee
ANITA CAROLE EARP ..... Durham
REBECCA ELIZABETH EGGERS ..... Boone
JAMES EDISON ELDRIDGE ..... Hillsborough
JAMES NICHOLAS ELLIS ..... Newport News, Virginia
JUDITH CAROL EMKEN ..... Winston-Salem
ANNA ENGELHARD-CALDWELL ..... Winston-Salem
DONALD W. ENNIS ..... Coats
CONSTANCE HOPE EVERHART ..... Sanford
TIMOTHY ALAN FARLEY ..... Watertown, New York
JOHN B. FINCH ..... Wake Forest
WALTER D. FISHER, JR. ..... Carrboro
PATRICIA ANNE FITZGERALD ..... Winston-Salem
TAMARA ALLEN FLEMING ..... Mocksville
PAUL TOWNSEND FLICK ..... Taylorsville
ROBIN LOYD FORNES ..... Greenville
DONNA JANE FOY ..... Gastonia
MARY LUCILLE FOY ..... Waynesville
DAVID ROBERT FRICKE ..... Winston-Salem
JANE THERESA FRIEDENSEN ..... Chapel Hill
JANE ELIZABETH FURR ..... Monroe
NATHAN T. GARRETT ..... Durham
JOAN CECELIA GEISZLER-LUDLUM ..... Wilmington
GEORGANN GERACOS ..... Jacksonville
JAY ANTHONY GERVASI, JR. ..... Nashville, Tennessee
RALPH LANE GILBERT III ..... Fallston

PHILIP ALAN GLASS ..... Clearwater, Florida
REBECCA HENDERSON GLASS ..... Clearwater, Florida
BILLY R. GODWIN, JR. ..... Dunn
SCOTT RICHARD GORELICK ..... Miami Beach, Florida
GARY ROBERT GOVERT ..... Chapel Hill
CHARLES L. GRAHAM, JR. ..... Mount Holly
TIMOTHY HUGH GRAHAM ..... Charlotte
DEBRA CARROLL GRAVES ..... Chapel Hill
JEFFREY P. GRAY ..... Sylva
MARSHA CHARLENE HUGHES GRAYSON ..... Salisbury
JAMES PRESTON GREEN, JR. ..... Durham
ELLEN MARIE GREGG ..... Coats
MARK FORESTER GRIFFIN ..... Greensboro
ROBERT HUGH GRIFFIN ..... Monroe
ALBERT E. GUARNIERI ..... Charlottesville, Virginia
CHRISTY MYERS GUDAITIS ..... Durham
VONNO LAMAR GUDGER III ..... Asheville
DAVID LAWRENCE GUNN ..... Winston-Salem
JOAL RECHELLE HALL ..... Browns Summit
EDWIN C. HAM ..... Hickory
MICHAEL BRADLEY HARROLD ..... Goldsboro
DONALD ERNEST HARROP, JR. ..... Wilmington
TERRI SMITH HART ..... Winston-Salem
JOCELYN BETH HARTLEY ..... Winston-Salem
ANDREW ROBINSON HASSELL ..... Greensboro
CAMILLA ROBINSON HAUPTFUHRER ..... Brooklyn Heights, New York
TODD JAMES HAYNES ..... Carbondale, Illinois
LAURA LUCILE HEDRICK ..... Lexington
BARBARA J. HELLENSCHMIDT ..... Durham
KAREN MANOS HENABRAY ..... Durham
JAMES HERSCHEL HENDERSON ..... Charlotte
LYNN D. HENRY ..... Burlington
BRIAN LEE HERNDON ..... High Point
E. PARKER HERRING ..... Raleigh
JOSEPHINE HERRING HICKS ..... Greenwood, South Carolina
AMBROSE JOHN HINNEGAN ..... Winston-Salem
REID GARRETT HINSON ..... Chapel Hill
ROBERT BRANSON HOBBS, JR. ..... Rocky Mount
RAYMOND M. HOBIN ..... Durham
SONJA M. HOLE ..... Danbury
JOSEPHINE LYNN HOLLAND ..... Raleigh
MICHAEL D. HOLT ..... Cary
JACK HOLTZMAN ..... Wendell
CLIFTON WALKER HOMESLEY ..... Statesville
JAMES RICHARD HOOD, JR. ..... Charlotte
JAMES F. HOPF ..... Chapel Hill
DOUGLAS RICHARD HOY ..... Elon College
BARRY LYNN HOYLE ..... Charlotte
GREGORY LYNN HUGHES ..... Durham
CHARLES THEODORE HUGUELET ..... Sylva

SARAH ELIZABETH HUNT ..... Farmville
GEORGE MARTIN HUNTER ..... Cleveland
BRADLEY LENARD JACOBS ..... Henderson, Kentucky
DENIS ELLIOT JACOBSON ..... Saratoga Springs, New York
BRUCE L. JAMES ..... Salisbury
EDWARD MONROE JAMES, SR. ..... Charlotte
JANE A. JEFFRIES-JONES ..... Winston-Salem
GRADY JESSUP ..... White Oak
J. MICHAEL JORDAN ..... Winston-Salem
JANICE ANGELA JOYNER ..... Candler
PETER JOSEPH JURAN ..... Durham
KATHRYN SARAH KABAT ..... Raleigh
DAWN A'CAY KELLY ..... Greensboro
FREDERICK KENNEDY III ..... Durham
ROBERT C. KERNER, JR. ..... Buies Creek
DOROTHY VIRGINIA KIBLER ..... Pfafftown
KENNETH WAYNE KING, JR. ..... Jacksonville
MICHAEL LEE KING ..... East Spencer
KIMBERLY JO KORANDO ..... Norman, Oklahoma
MARGARET A. KUSENBERG ..... Carrboro
ZEE BUCHANAN LAMB ..... Nags Head
CLARENCE RAY LAMBE, JR. ..... Kernersville
C. BARTON LANDESS ..... Charlottesville, Virginia
DAVID ROSS LANGE ..... Charlotte
STEPHAN FOSTER LAPPING ..... Chapel Hill
ROBERT ALAN LAUVER ..... Winston-Salem
JEFFREY TAYLOR LAWYER ..... Durham
TERESA FILARDI LAZZARONI ..... Burlington
ERNEST R. LEE ..... New Bern
PAMELA SUE LESLIE ..... Fayetteville
ROBERT ELI LEVIN ..... Raleigh
CYNTHIA DAYNE LEWIS ..... Charlottesville, Virginia
KENNETH WINSTEAD LEWIS ..... Winston-Salem
ROBERT J. LOPEZ ..... Chapel Hill
JESSICA ESSEX LORDEN ..... Durham
TAD WILLIAMS LOWDERMILK ..... Winston-Salem
ROBERT THEODORE LUCAS III ..... Charlotte
ANNIE L. LUDINGTON ..... Midland, Michigan
CRAIG T. LYNCH ..... Carrboro
MARJORIE KEYS LYNCH ..... Arlington, Virginia
MICHAEL STEWART MARR ..... Buies Creek
ELCHINO MIRO MARTIN ..... Charlotte
JAMES MATTHEW VENABLE MARTIN ..... Greensboro
VICKIE WINN MARTIN ..... Charlotte
GLORIA MCLAUGHLIN MCAULEY ..... Durham
JON HOYT MCCACHREN ..... Salisbury
ELIZABETH CARROLL MCCOLL ..... Greenville, South Carolina
BRIAN JAMES MCCRODDEN ..... Raleigh
DAVIS MCDONALD ..... Carrboro
KATHRYN LEE MCENIRY ..... Charlotte

MEREDITH J. MCGILL ..... Kings Mountain
PETER JAMES MCGRATH, JR. ..... Scranton, Pennsylvania
DEBRA J. MCNEIL ..... Chapel Hill
MARION DRANE MCNEIL ..... Jonesville
M. MELINDA MEADOR ..... Winston-Salem
JOHN ROBERT MEANS ..... Charlotte
RALPH WILLIAM MEEKINS ..... Coats
JOHN DAVID MEYERS, JR. ..... Lexington, Kentucky
DIANE GLADEN MILLER ..... Moncure
GEORGE N. MILLER ..... Matthews
LYNN IRENE MILLER ..... Charlotte
LESLIE LYNN MILLS ..... Mooresville
CAROLYN WHITNEY MINSHALL ..... Chapel Hill
BLAN VANCE MINTON ..... Chapel Hill
CAROLYN NORRELL MIYASHITA ..... Raleigh
MARK DREIER MONTGOMERY ..... Winston-Salem
DARLENE MOORE ..... Harrellsville
JAMES H. MOORE, JR. ..... Macon, Georgia
RICHARD HANCOCK MOORE ..... Oxford
WILLIAM JEFFREY MOORE ..... Pembroke
MARGARET ANNE MORGAN ..... Lillington
BARBARA RAND MORGENSTERN ..... Chapel Hill
MELANIE T. MORRIS ..... Hertford
ROBERT WILSON MORRIS ..... Winston-Salem
ADA F. GINTON MOST ..... Durham
DAVID CURTIS NEUMANN ..... Brevard
TIMOTHY DAVID NIFONG ..... Durham
EDWARD BEAM NOLAN, JR. ..... Shelby
EDWARD PROCTOR NORVELL ..... Salisbury
MARGARET A. NOWELL ..... Winston-Salem
JOEL NEESE OAKLEY ..... Greensboro
DEWEY THOMAS O'KELLEY III ..... Raleigh
JOHN M. OLESIUK ..... Winston-Salem
EDWARD ALAN O'NEAL ..... Swan Quarter
JOHN BARBOUR ORGAIN IV ..... Richmond, Virginia
LESLIE CALKINS O'TOOLE ..... Durham
REBECCA GRACE OWEN ..... Boone
MARK WEST OWENS III ..... Fountain
PATRICIA FLORIE PADGETT ..... Jacksonville
KAROL GAY PAGE ..... Durham
WILLIAM HOWARD PAGE, JR. ..... Chapel Hill
ROBIN R. PALENSKE ..... Carrboro
ELAINE STRICKLAND PAPPAS ..... Fayetteville
KENNETH D. PARAMORE ..... Greenville
MICHAEL R. PARRISH ..... Roanoke, Virginia
DAVID RANDOLPH PARSONS ..... Kill Devil Hills
ERNA AVARI PATRICK ..... Bamberg, South Carolina
BARRY GENE PEA ..... Durham
DOUGLAS EDWARD PECK ..... Hillsborough
ALEXANDER MCCLURE PETERS ..... Tarboro

McGlemre Powell Peters	Elizabeth City
Robert Macbeth Pitkin	Winston-Salem
Cathleen Margaret Plaut	Chapel Hill
Jeanne Lockwood Plowden	Sumter, South Carolina
Samuel Hawley Poole, Jr.	Southern Pines
William Darrell Pope	Burlington
Barbara Jill Powell	Charlottesville, Virginia
Laurie Bradsher Preddy	Chapel Hill
Eileen Clark Pruette	Durham
Teresa Puckett	Reidsville
Evelyn Marie Pursley	Durham
David Jefferson Quattlebaum	Greenville, South Carolina
Anita LeVeaux Quigless	Raleigh
Anthony Lee Register	Chapel Hill
Carolyn Anne Reid	Winston-Salem
Kathryn Byrd Remick	Fayetteville
Julia Flythe Renfrow	Greensboro
Elizabeth Martens Repetti	Winston-Salem
M. Annette Rhodes	Buies Creek
Garry Stephen Rice	Chapel Hill
Mark Vann Rich	Cary
Mark Edwin Richardson III	Chapel Hill
Alice Carmichael Richey	Chapel Hill
Paul Christian Ridgeway	Raleigh
Renee Cheryl Riggsbee	Durham
Elaine S. Rihtarchik	Rockville, Maryland
Suzanne Prince Roach	Raleigh
Daniel Gray Robertson	Advance
Leslie Stanley Robinson	Greenville
Victoria Lane Roemer	Winston-Salem
Ronald Richards Rogers	Carrboro
Thomas Mosser Roth III	Winston-Salem
Renee Rothrock	Fayetteville
F. Michael Sajovec	South Euclid, Ohio
Mary Olene Carter Sampson	Matthews
Jane Christine Sattler	Shelby
Jane Wylie Saunders	Carrboro
William Edward Schadel	Raleigh
Mark Andrew Scruggs	Buies Creek
Gregory Lowman Seibert	Raleigh
Marguerite Self	Talbott, Tennessee
Claire Kountz Shapack	Freehold Township, New Jersey
Edward Stephen Shapack	Freehold Township, New Jersey
Jenny L. Sharpe	Burlington
Eileen Frances Sheehan	Saxapahaw
Desmond Graham Sheridan	Carrboro
David Alan Shirlen	Charlotte
Emily Elisabeth Shore	Carrboro
Judith V. Siegel	Chapel Hill
Michael Casey Sigmon	Raleigh

DAVID ANDREW SIMPSON	Concord
WILLIAM G. SIMPSON, JR.	Columbia
TERESA LOUISE SMALLWOOD	Windsor
BELINDA A. SMITH	Youngsville
JOHN BREM SMITH	Mooresville
KIMBERLY LORIN SMITH	Arden
PETER ALLAN SMITH	Statesville
SCOTT HARTWELL SMITH	Shelby
TIMOTHY WAYNE SMITH	Pink Hill
BETH MURPHY SNOVER	Winston-Salem
ROY GERODD SOWERS III	Buies Creek
DENNIS WAYNE STANFORD	Fayetteville
ELLEN COLEMAN STARR	Winston-Salem
JUDITH ANNE STARRETT	Denver, Colorado
KIM KIRK STEFFAN	Hillsborough
GERALD KENNETH STEPHENS, JR.	Morganton
SARAH SUZANNE STEVENS	Mount Airy
CARON HALL STEWART	Buies Creek
VERNON KIRKLAND STEWART	Buies Creek
CYNTHIA ANN STUBBS	Chapel Hill
SUSAN ELIZABETH SUTTON	Wallace
MARTHA CATHERINE TAMSBERG	Apex
LEANN MARTIN TANNER	Buies Creek
RICHARD THOMAS TARRIER	Vilas
JAMES KEITH TART	Durham
THOMAS GREGORY TAYLOR	Columbus, Ohio
BEN S. THALHEIMER	Boone
JULIANNA COCHRAN THEALL	Athens, Georgia
JOHN HARROLD THOMAS	Richmond, Virginia
KATHRYN JEAN THOMAS	Chapel Hill
SUSAN VIRGINIA THOMAS	Charlotte
LINDA DIANE TINDALL	Pittsboro
ALLAN BRANDON TISE	Winston-Salem
JOHN WILLIAM TOTTEN II	Winston-Salem
MELISSA L. TRIPPE	Raleigh
JEFFREY BRIAN TURNBULL	Charlotte
SCOTT PADGETT VAUGHN	Winston-Salem
RANDY GERALD VESTAL	Durham
BRANCH WASHINGTON VINCENT III	Virginia Beach, Virginia
TAMARA LYNN WARD	Winston-Salem
SUSAN STARR WARREN	Danville, Virginia
TAMARA ROBIN WARSTLER	Littleton
NEIL DAVID WEBER	Carrboro
GAIL E. WEIS	Chapel Hill
MARK DEITZ WELCH	Bryson City
CHLOE WELLONS	Princeton
KELLEY ANN WHALEY	Chapel Hill
REGINA JAY WHEELER	Beaufort
TERESA LEIGH WHITE	Raleigh
NATHANIEL WHITFIELD	Durham

W. DUDLEY WHITLEY III ..... Littleton
ROBIN STANFORD WICKS ..... Maysville
BEVERLY KAY WILKINS ..... Enfield
ANNE THERESE WILKINSON ..... Durham
GEORGE PATTESON WILLIAMS III ..... Winston-Salem
LINDA JEAN WILSON ..... Wilmington
CLARKE K. WITTSTRUCK ..... Black Mountain
THOMAS DANIEL WOMBLE ..... Winston-Salem
JONATHAN WOOD ..... Riverdale, New Jersey
ROBIN C. WOODS ..... Durham
ISABEL BLOUNT WORTHY ..... Raleigh
JAMES F. WYATT III ..... Menlo, Georgia
HANNAH CATHERINE ELIZABETH YONAN ..... Winston-Salem
AMY F. HAHN ZACHARIAS ..... Charlotte

Given over my hand and Seal of the Board of Law Examiners this the 4th day of September, 1986.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 12th day of September, 1986 and said persons have been issued certificates of this Board:

GLENN ALTON BARFIELD ..... Pikeville
ANTHONY TODD BROWN ..... Raleigh
LOGAN TODD BURKE ..... Winston-Salem
JANE E. CARTER ..... Durham
BOYD BRENT CONNER ..... Asheville
DAVID SAMUEL COOPER ..... Raleigh
DOUGLAS EUGENE CURTIS ..... Toledo, Ohio
CLAYTON MONROE CUSTER ..... Winston-Salem
BENEDICT JOHN DEL RE, JR. ..... Holden Beach
CATHERINE M. E. EL-KHOURI ..... Andrews
JEFFREY RODMAN ELLINGER ..... Durham
WILLIAM M. EVANS ..... Charlottesville, Virginia
BRYANT WILLIAM GALBAUGH ..... Winston-Salem
EDWIN STEPHEN HARTSHORN III ..... Lenoir

JOSEPH CLAYTON HOLLADAY, JR. ..... Winston-Salem
CHARLES ROBERT HOLLOMAN, JR. ..... Raleigh
MICHAEL W. HUBBARD ..... Norfolk, Virginia
DAVID REID HUFFMAN ..... Macon, Georgia
LISA D. HYMAN ..... Columbia, South Carolina
ADDISON VANN IRVIN ..... Chapel Hill
H. FRASIER IVES ..... Matthews
GREGORY KEITH JAMES ..... Greenville
EDWARD J. JENNINGS ..... Charlotte
SIDNEY PHILLIPS JESSUP ..... Hertford
DAVID L. JOHNSON ..... Charlotte
CHRISTOPHER MARK KELLY ..... Lexington, Virginia
GRAHAM HUDSON KIDNER ..... Winston-Salem
LYNNE P. KLAUER ..... Hanover, Pennsylvania
STEPHEN MICHAEL LACAGNIN ..... Morgantown, West Virginia
ANDREW ALLISON LASSITER ..... Richmond, Virginia
JOHN LEE LLOYD ..... Burlington
STEPHEN M. LYNCH ..... Durham
A. WILLIAM MACKIE ..... Durham
KEVIN F. MACQUEEN ..... Dudley
PERRY MASTROMICHALIS ..... Raleigh
JAMES PATRICK MCLOUGHLIN, JR. ..... Manhasset, New York
R. WARD MEDLIN ..... West Palm Beach, Florida
JAMES G. MIDDLEBROOKS ..... Fairfax, Virginia
WILLIS EVERETTE MURPHREY IV ..... Winston-Salem
ELIZABETH M. O'NEILL ..... Winston-Salem
THOMAS JOSEPH POOLEY ..... Greensboro
WILLIAM EDWARDS PRICE ..... Carrboro
TERRI-JEAN PYER ..... Durham
CHERYL LYNN ROBINSON ..... Wilmington
ROBERT W. SIMMONS ..... Houston, Texas
MARK ALAN SPRINGFIELD ..... Rome, Georgia
W. EARL TAYLOR ..... Rocky Mount
DAVID BRADLEY THORNTON ..... Asheville
RICHARD KEITH WARTHER ..... Columbia, South Carolina
MICHAEL JOHN WENIG ..... Bloomington, Indiana
GREGORY LEON WOODS ..... Charlotte

Given over my hand and Seal of the Board of Law Examiners this the 17th day of September, 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 person duly passed the examinations of the Board of Law Examiners as of the 26th day of September, 1986 and said person has been issued a certificate of this Board:

MICHAEL ANTHONY GOHEEN ..... Charlotte

I DO FURTHER CERTIFY that the following named persons duly passed the examinations of the Board of Law Examiners as of the 3rd day of October, 1986, and said persons have been issued certificates of this Board:

FRAYDA S. BLUESTEIN ..... Apex
ERNEST CLARKE DUMMIT ..... Sanford

Given over my hand and Seal of the Board of Law Examiners this the 6th day of October, 1986.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individuals were admitted to the practice of law in the State of North Carolina:

On September 26, 1986, the following individuals were admitted:

RAY D. AJLUNI ..... Morehead City, applied from the State of Michigan
HAZEL MAE MACK ..... Winston-Salem, applied from the State of Pennsylvania
TODD CLARK CONORMON ..... Fayetteville, applied from the State of New York 2nd Department
JAMES BAXTER HINSON ..... Charlotte, applied from the State of Pennsylvania
DONALD ALAN KIRKMAN ..... New York, applied from the State of New York 1st Department

Given over my hand and Seal of the Board of Law Examiners this 6th day of October, 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 October 31, 1986, the following individuals were admitted:

RONALD E. DEVEAU ..... Manteo, applied from the State of Ohio
VERNON E. FAABERG ..... Minneapolis, MN, applied from the State of Minnesota
GLENN STUART HAYES ..... Denton, applied from the State of Virginia
WILLIAM CARL SHUMWAY ..... Hendersonville, applied from the State of Illinois
MARLENE ALPERN SPRITZER ..... Durham, applied from the State of Pennsylvania
CYNTHIA L. TURCO ..... New Bern, applied from the State of West Virginia

On November 10, 1986, the following individual was admitted:

HENRY RICHARD CRANE ..... Chapel Hill, applied from the State of Colorado

Given over my hand and Seal of the Board of Law Examiners this 12th day of November, 1986.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following named persons duly passed the examinations of the Board of Law Examiners as of the 12th day of December, 1986 and said persons have been issued certificates of this Board:

JOANNE M. ALLYN ..... Charlotte
VIRGINIA ELIZABETH HOLLIFIELD ARGES ..... Durham
JOEL ANDERSON BERLY III ..... Arlington, Virginia
GREGORY JOSEPH BREWER ..... Raleigh
MARK BRADLEY CHILDRESS ..... Carrboro
DAVID DANIEL DEETER ..... Winston-Salem
SUSAN HARMAN-SCOTT ..... Lexington
NICHOLAS EUGENE HARVEY, SR. ..... Kinston
BRADLEY REID KUTROW ..... Baltimore, Maryland
GLENN BALLARD LASSITER, JR. ..... Robbins
JAMES HARVESTUS LOCUS, JR. ..... Fayetteville
ELIZABETH MCMORRIS MCDOWELL ..... Charlotte
ROBERT N. SAFFELLE ..... Charlotte

KAREN BETH VANCE ..... Durham
LOUIS FOSTER WOODRUFF ..... Raleigh

Given over my hand and Seal of the Board of Law Examiners this the 29th day of December, 1986.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individuals were admitted to the practice of law in the State of North Carolina:

On December 12, 1986, the following individuals were admitted:

JERRY S. ANDERSON ..... Chapel Hill, applied from the State of Minnesota
JOHN F. GRAYBEAL ..... Chapel Hill, applied from the District of Columbia
JEANNE M. LIEBERMAN ..... Sugar Grove, applied from the State of New York 1st Department
CHARLES DAVID WHITE ..... Nashville, TN, applied from the State of Tennessee
DAVID J. WITHEFT ..... Raleigh, applied from the State of Illinois

On December 15, 1986, the following individual was admitted:

BERNARD B. SMYTH ..... Sewickley, PA, applied from the State of Pennsylvania

Given over my hand and Seal of the Board of Law Examiners this 29th day of December, 1986.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individuals were admitted to the practice of law in the State of North Carolina:

On January 22, 1987, the following individuals were admitted:

BRUCE ALLEN KONDRACIK ..... Chapel Hill, applied from the State of Illinois
EDWARD LINN MCVEY III ..... Greensboro, applied from the State of Ohio
ROGER LINWOOD YOUNG ..... Goldsboro, applied from the State of Pennsylvania

Given over my hand and Seal of the Board of Law Examiners this 30th day of January, 1987.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individuals were admitted to the practice of law in the State of North Carolina:

On February 25, 1987, the following individuals were admitted:

JOHN W. STEVENS ..... Rocky Mount, applied from the State of Wisconsin
JAMES A. ZELLINGER ..... Winston-Salem, applied from the States of New York and Connecticut

Given over my hand and Seal of the Board of Law Examiners this 26th day of February, 1987.

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 21st day of March, 1987, and said persons have been issued certificates of this Board:

FRED ALPHIN, JR. ..... Raleigh
JOHN ALLEN BOWMAN ..... Durham
ADAM HOUSTON BROOME ..... Chapel Hill
WILLIAM GRAHAM BUIE ..... Durham
THERESA LYNNE BUNCE ..... Clayton
STARR EUGENIA BURNS ..... Kings Mountain
RICKEY GLENN BUTLER ..... Buies Creek
LAWRENCE MICHEL CAMPBELL ..... Durham
MOZART ALVIN CHESSON ..... Raleigh
THEAOSEUS T. CLAYTON, JR. ..... Raleigh
THOMAS NORMAN COCHRAN ..... Hendersonville
CARL TAFT CONE ..... Greenville
ROBERT JAMES CONRAD, JR. ..... Charlotte
LISA MORGAN CRUTCHFIELD ..... New Bern
BETTY WINDLE DAVIS ..... Winston-Salem
MICHAEL S. DAVIS ..... Elizabethtown
MARY LEE DECKER ..... Winston-Salem
CHARLES ARCHIBALD EDWARDS ..... Raleigh
C. MARGARET ERRINGTON ..... Charlotte
RONALD DEAN EVERHART ..... Chapel Hill
D. KEITH FARMER ..... Winston-Salem
ELIZABETH DARDEN FRESHWATER ..... Morehead City
NEILL STANLEY FULEIHAN ..... Brevard
SAMUEL F. FURGIUELE, JR. ..... Boone
PANSY DENISE GLANTON ..... Durham
CAROLINE SEIBERT GORAY ..... Raleigh
LAURA GURNEE GRABAN ..... Greensboro
JEFFREY EUGENE GRAY ..... Taylors, South Carolina
RICHARD BARBEE GWATHMEY, JR. ..... Wilmington
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ROBERT ERWIN HAGEMANN ..... Chicago, Illinois
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RALPH GOODMAN HALL ..... Boone
FRANK WILLIAM HALLSTROM ..... Advance
EDWIN J. HAMLIN ..... Raleigh
GARY ALLEN HANSELL ..... Pittsboro
LISA YVETTE HARPER ..... Charlotte
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ELIZABETH BARRY HAYNES ..... Raleigh
JENNIFER ROKUS HEATH ..... Matthews
JILL B. HICKEY ..... Raleigh
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DAVID FRED HOKE ..... Raleigh
SUZANNE REBECCA HOLMES-FARLEY ..... Cambridge, Massachusetts
WILLIAM A. HOUGH III ..... Elizabethtown

FRANK CURTIS HOWE ..... Gastonia
GEORGE PATRICK HUNTER III ..... Charlotte
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ALBERT DAVID KIRBY, JR. ..... Clinton
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KRISTINE LOUISE LANNING ..... Garner
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KATHLEEN GAY LEE ..... Thomasville
CHARLES B. LEE, JR. ..... Charlotte
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STEVEN D. MCCLINTOCK ..... Charlotte
DONALD IKERD MCREE, JR. ..... Raleigh
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ROBIN NANNETTE MICHAEL ..... Asheville
KAREN HENK MILLER ..... Chapel Hill
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GLORIA B. YORK ..... Columbus, Ohio

Given over my hand and Seal of the Board of Law Examiners this the 6th day of April, 1987.

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

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina do certify that the following individual was admitted to the practice of law in the State of North Carolina:

On April 6, 1987, the following individual was admitted:

ROBERT PATRICK FITZSIMMONS
Wheeling, West Virginia, applied from the State of West Virginia

Given over my hand and Seal of the Board of Law Examiners this 7th day of April, 1987.

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

CLYDE M. PENLEY v. BETTY ROBERTS PENLEY AND HAMBURG VALLEY, INC.

No. 16A84

(Filed 3 July 1985)

1. Contracts § 27.1— contract to convey stock in family business—evidence of contract sufficient

There was sufficient evidence to go to the jury on plaintiff's claim that he was entitled to forty-eight percent of the stock in a Kentucky Fried Chicken business based on an oral contract with his wife where plaintiff had owned a tire business in Weaverville and defendant had worked in a Kentucky Fried Chicken business in Hendersonville; plaintiff had begun operating his tire business during the day and the Kentucky Fried Chicken business at night after his wife became ill; defendant requested that plaintiff come to Hendersonville and run the Kentucky Fried Chicken business after defendant's sister-in-law was no longer with the business; plaintiff did not want to give up his tire business; defendant told plaintiff that the business belonged to them both, that they would share everything they did, and that plaintiff would be a part of the business just as she was; plaintiff then worked eleven to twelve hour days seven days a week in the Kentucky Fried Chicken business, handling social security, unemployment and time sheets while defendant took care of the banking and the bills; plaintiff and defendant discussed how to use money left after bills; and defendant testified in a deposition that plaintiff was not paid a regular salary until they incorporated and that before then they had both simply taken money from the banking account as needed. The business was operated in an informal manner and it would not be unreasonable for the jury to find that defendant had agreed that, if plaintiff would devote his full time to the operation of the business, the business would be operated as a joint enterprise and they would share equally in its assets.

2. Contracts § 4.1— oral contract between husband and wife to convey stock in business—consideration

There was consideration for an oral contract between plaintiff husband and defendant wife to split the shares of an incorporated Kentucky Fried Chicken business equally, and the court correctly instructed the jury on consideration, where there were mutual promises to accept division of shares and to continue to operate the business as before, followed by the transfer of jointly owned property to the newly formed corporation. While there was conflicting evidence on whether the parties agreed to and in fact established plaintiff's partial ownership interest both before and after incorporation, and while the jury may have concluded that plaintiff joined the business solely because he was the husband of an ill wife, conflicts in the evidence are to be resolved by the jury. Furthermore, plaintiff's services before incorporation of the business could provide consideration because those services were based on expectations that his contributions would be rewarded by sharing the business equally. G.S. 1A-1, Rule 51.

3. Limitation of Actions § 4.6— breach of contract to issue stock—accrual of action

The Court of Appeals erred by ruling that plaintiff's action was barred by the statute of limitations where plaintiff joined his wife in the operation of a Kentucky Fried Chicken business which was later incorporated; the business was operated in an informal manner before and after incorporation, the board of directors never met and stock was never issued; the agreement was to have an equal number of shares issued to plaintiff and defendant; and there was no time limit for its performance. The statute of limitations began to run on the date the contract was breached, not the first date performance was possible; since there was no evidence that defendant refused to issue stock in the corporation prior to April of 1979 when defendant assumed exclusive control over the corporation and its assets, the statute of limitations began to run at that time and plaintiff was within its three year period. G.S. 1-52(1).

4. Corporations § 16— action to enforce oral contract to issue stock—not stock subscription

The Court of Appeals erred by concluding that an agreement that plaintiff and defendant would share equally the stock of a Kentucky Fried Chicken business was a stock subscription which was unenforceable under G.S. 55-43 because it was not in writing. This was not an action to enforce plaintiff's promise to take shares; rather plaintiff's action was an attempt to enforce defendant's promise or contract to issue shares to plaintiff.

5. Corporations § 4.1— agreement to share stock equally—not a stockholder's agreement

The Court of Appeals erred by considering an agreement that plaintiff and defendant would share equally the shares of a Kentucky Fried Chicken restaurant as a shareholder's agreement which was unenforceable under G.S. 55-73(b) because it was not in writing. G.S. 55-73 was not plaintiff's exclusive legal remedy, and plaintiff properly chose an alternate legal remedy based on defendant's oral contract to convey an interest in the corporation.

6. Declaratory Judgments § 1— declaratory judgment to enforce oral agreement to issue stock—written agreement not required

In an action in which plaintiff sought a declaratory judgment that he was the owner of forty-eight percent of the stock and half the assets of a Kentucky Fried Chicken restaurant, the Court of Appeals erred by determining that a declaratory judgment was not appropriate because there was no written instrument to interpret and because such a judgment was not available to determine issues of fact alone. A written agreement is not a requirement under G.S. 1-256 where a judgment or decree will terminate the controversy or remove an uncertainty. G.S. 1-253 *et seq.*, G.S. 1-254, G.S. 1-255, G.S. 1-261.

7. Contracts § 26— contract between husband and wife to issue stock in corporation equally—evidence of investments and purchasing equipment relevant

In an action in which plaintiff sought forty-eight percent of the stock in a Kentucky Fried Chicken restaurant operated by his wife, testimony concerning circumstances surrounding the parties' investment of money prior to incorporation and the source of funds used to purchase equipment for the business was relevant because it tended to establish that an agreement between the parties was entered into and as the basis for determining that such an agreement was supported by adequate consideration.

8. Corporations § 18— agreement to issue stock equally—failure to instruct on requirement for gift—no error

The trial court did not err by failing to instruct the jury on the requirement of delivery to consummate a gift where plaintiff's action for forty-eight percent of the stock in a Kentucky Fried Chicken business operated by his wife was premised on a contract supported by consideration, defendant's answer did not raise the theory, and defendant did not request a special instruction. G.S. 1A-1, Rule 51(b), Rule 21 of the North Carolina General Rules of Practice for Superior and District Courts.

9. Appeal and Error § 31.1— instruction on implied contract—no objection at trial

Defendant was barred from assigning error to the court's instruction on implied contract where she did not object to the instruction at trial. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure.

10. Trial § 5— lunch and recess—early resumption without defense counsel—no error

Defendant did not show prejudice where the court recessed for lunch until 2:15 p.m. but began its charge at 2:00 without defense counsel. Defense counsel returned just after 2:00 p.m. when the court was beginning the introductory parts of its charge, and defendant did not call the matter to the attention of the court or ask for curative instructions.

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

APPEAL by plaintiff, pursuant to G.S. 7A-30(2), from a divided panel of the Court of Appeals, *Penley v. Penley*, 65 N.C. App. 711,

310 S.E. 2d 360 (1984), reversing judgment entered 2 July 1982 in Superior Court, BUNCOMBE County, by *Friday, J.*, following a jury verdict for the plaintiff. Defendant's petition for discretionary review of additional questions pursuant to G.S. 7A-31 was allowed by the Supreme Court 6 March 1984.

Carter & Kropelnicki by Steven Kropelnicki, Jr., for plaintiff-appellant.

Elmore & Powell by Bruce A. Elmore, Sr., and Bruce A. Elmore, Jr., for defendant-appellee.

FRYE, Justice.

This case involves a struggle between a Buncombe County couple, now divorced, over the ownership of a Kentucky Fried Chicken business in Hendersonville, North Carolina. The plaintiff-husband claims he is entitled to 48 percent of the business which has now been incorporated. A jury, responding to the only issue placed before them, decided that the plaintiff was indeed entitled to ownership of 48 percent of the stock of the corporate defendant. On appeal by defendant-wife, the Court of Appeals reversed, holding that plaintiff-husband had failed to prove an enforceable agreement. One judge dissented, believing that the evidence was sufficient to support the jury's verdict in favor of plaintiff-husband and that the trial court's judgment should be affirmed. Essentially, we agree with the dissenting opinion.

FACTS

Plaintiff instituted this action by the filing of a complaint on 11 August 1981, naming as defendants his wife, Betty Roberts Penley, and the corporate defendant, Hamburg Valley, Inc. Allegations of the complaint were to the effect that the plaintiff and individual defendant were married to each other in 1949 and lived thereafter as man and wife until April 1979, when the individual defendant abandoned the plaintiff. While the plaintiff and individual defendant are citizens of Buncombe County, the corporate defendant is a North Carolina corporation with its principal place of business in Henderson County. According to the complaint, the plaintiff, in late 1967, was operating an automotive tire business in Weaverville, North Carolina, while the individual defendant had an interest in a restaurant, operated as a Kentucky

Fried Chicken franchise, in Hendersonville, North Carolina. During that year defendant-wife became ill and plaintiff, at defendant's request, began spending additional time at defendant's restaurant, in order to assure its continued operation. Subsequently, defendant-wife agreed that if plaintiff would devote his full time to the operation of the restaurant business, the parties would operate that business as a joint enterprise, share equally in the ownership of its assets and divide its returns equally. Thereafter, pursuant to the aforementioned agreement, the parties operated the restaurant "as a joint enterprise, dividing its returns evenly."

Plaintiff further alleged that in late 1977 a corporation was formed pursuant to an earlier oral agreement with defendant, whereby each of the parties was to own forty-eight percent of the shares of stock in the corporation and the parties' son would own four percent of the shares. From late 1977 through 9 April 1979, plaintiff and defendant-wife served as officers and directors of the corporate defendant, both parties devoting substantially all of their efforts to the operation of the corporation's business, receiving equal salaries and benefits as employees and shareholders of the corporation.

The complaint further alleged that defendant-wife abandoned the plaintiff-husband on 9 April 1979 and filed a civil action which she voluntarily dismissed on 2 July 1979 at which time she acknowledged the plaintiff-husband's ownership interest in the corporation and property which had been purchased with the proceeds of the defendant corporation and that the parties would continue to operate the business as in the past. Subsequently, on 31 December 1979, defendant-wife again abandoned the plaintiff and since that time "has wrongfully and intentionally denied the plaintiff any rights" in the corporate defendant, "either as an officer, employee, shareholder, or otherwise" and has "wilfully and wrongfully converted to her own use and benefit" proceeds from the operation of the corporate defendant and has otherwise "so conducted the business and affairs of the [corporate defendant] as to dissipate its assets and render the interest of [plaintiff] in that corporation essentially worthless."

Plaintiff alleged that he was entitled to judgment declaring him the owner of forty-eight percent of the shares of the cor-

porate defendant, to an accounting of the corporate transactions and of the individual defendant's transactions with regard to jointly owned property, to other injunctive relief, and to $250,000 in damages. In addition, he prayed for liquidation of the corporation pursuant to G.S. 55-125(a)(4), or in the alternative, for relief under G.S. 55-125.1, as the court deems appropriate.

Defendants' response was in the form of an answer and counterclaim presenting six defenses. The first defense was failure to state a claim upon which relief could be granted, together with a motion to dismiss pursuant to Rule 12 of the Rules of Civil Procedure. The second defense was a motion for summary judgment pursuant to Rule 56 on the ground that there was no genuine issue as to any material fact. The third defense admitted the residence of the parties, the marriage, plaintiff's interest in the Weaverville Tire Company, defendant's illness and "that she permitted the plaintiff at his request to assist her somewhat in the operation of the [Kentucky Fried Chicken] business." Defendants further admitted the filing of the Articles of Incorporation of the business "on or about the 29th day of December 1978" (sic) and that "from December 28, 1977 until April 9, 1979, both parties received equal salaries as employees of the corporate defendant." Most of the other allegations in the twenty-nine paragraphs of the complaint were denied. Defendants further admitted that defendant-wife filed a civil action in Buncombe County District Court, the reconciliation of the parties and her voluntary dismissal of the action. Defendants also admitted that defendant-wife had control of the corporate books and records of the corporate defendant and further admitted that no dividends were paid to the plaintiff "as he is not a stockholder."

The fourth and fifth defenses were as follows:

FOURTH DEFENSE

That if the Court finds there was any agreement between the Plaintiff and Defendant with regard to the ownership of the corporation which is enforceable at law or that the Plaintiff is otherwise entitled to be declared owner of a portion of the corporate stock, then the Defendants respectfully plead both the three-year and 10-year statutes of limitation in bar of the Plaintiff's claim.

FIFTH DEFENSE

That the Plaintiff has never paid any capital amount into the corporation nor participated in the corporate affairs and has waived any interest which he otherwise might have in the corporation.

With reference to the fourth defense, the parties stipulated that there would be no reliance by defendants on the statute of limitations except insofar as it could have been pled and relied on in a previous case filed by defendant-wife and to which the plaintiff filed his action and counterclaim on 27 March 1981.

The sixth defense and counterclaim alleged that beginning in the early 1970's and continuing until the parties separated on the 2nd day of January 1980, defendant-wife purchased with her sole and individual funds a number of items of real and personal property, including the real property and buildings upon which the Kentucky Fried Chicken franchise is located and others and had record title placed jointly in her name and the name of the plaintiff-husband, although it was never her intention to give the plaintiff a vested ownership interest in the property or to transfer control of the property to him. Defendants prayed that the relief requested by plaintiff be denied and that defendant-wife be named the true and sole owner of the property identified in the counterclaim. Subsequently, defendants were allowed to amend the answer in order to plead the Statute of Frauds.

Plaintiff's evidence consisted of his own testimony and that of his younger brother, Jim Penley; portions of the deposition of defendant-wife from a previous action; and several exhibits, including the Articles of Incorporation of Kentucky Fried Chicken of Hendersonville, Inc., and the amendment changing the name of the corporation to Hamburg Valley, Inc. Plaintiff's motion to amend the complaint to conform to the evidence was allowed without objection. Defendants' motion to dismiss was denied. Defendants then took a voluntary dismissal of their counterclaim, without prejudice.

Defendants' evidence consisted of the testimony of the individual defendant, Betty Penley, and Rebecca Hancock Inders, director of franchising for Kentucky Fried Chicken, and certain exhibits, including the franchise for the Kentucky Fried Chicken

outlet in Hendersonville, North Carolina, which was issued to Betty Penley. Defendants renewed their motion to dismiss, which was denied.

Following jury arguments by counsel for both parties and Judge Friday's charge, the following issue was, by prior stipulation, submitted to the jury: Is the plaintiff entitled to ownership of forty-eight percent of the stock of Hamburg Valley, Inc.? The jury answered the issue "Yes," and the trial court thereafter entered judgment that plaintiff is entitled to ownership of forty-eight percent of the stock of Hamburg Valley, Inc., retaining jurisdiction over the parties and subject matter "for entry of such further orders as may, from time to time, be appropriate."

Defendant-wife appealed to the Court of Appeals, asserting twenty-six assignments of error relating primarily to evidentiary issues, the judge's charge to the jury, and the manner in which the trial was conducted. Assignment Number 10 asserted error in the failure of the trial judge to dismiss plaintiff's case at the conclusion of the plaintiff's evidence and again at the conclusion of all of the evidence on the ground that the plaintiff's evidence and all of the evidence failed to prove and support any legal basis which would support any of the relief sought by the plaintiff. Assignment 26 asserted error in denial of defendants' motions to set aside the "judgment" as being contrary to the weight of the evidence and in the alternative for a new trial on the grounds that the evidence was insufficient to justify the verdict and that the verdict was contrary to law.

The Court of Appeals determined that the jury verdict in favor of plaintiff could be sustained only if "the plaintiff has proved a valid enforceable contract with either of the defendants." That court then held: (1) that the agreement between plaintiff-husband and defendant-wife was a pre-incorporation subscription as defined by G.S. 55-43(a) which was invalid because not in writing, signed by the party to be charged, and delivered by the subscriber as required by G.S. 55-43(b); (2) the agreement was in essence a shareholder's agreement which was unenforceable under G.S. 55-73(b) because not in writing; and (3) any agreement on the part of the husband and wife for the husband to join her in the business was not enforceable under contract law because not supported by valuable consideration, since plaintiff's

interest in the business evolved from his status as a husband, and not as a business partner.

In the alternative, the Court of Appeals held that a declaratory judgment was inapplicable on the record in this case because there was no written instrument to interpret and because the only question involved was one of fact which was decided by the jury. Finally, and again in the alternative, the Court of Appeals' majority held that the action was barred by G.S. 1-52(1), the three-year contract statute of limitations, since plaintiff's cause of action accrued as soon as the corporation was formed and the action was not instituted within the applicable period thereafter. Essentially, the Court of Appeals determined that the trial court erred in denying defendants' motion to dismiss and for judgment notwithstanding the verdict[1] and that under no view of the evidence could judgment in favor of the plaintiff be sustained. Consequently, the judgment of the trial court was reversed. The majority below found it unnecessary to discuss defendant-wife's assignments of error relating to the admission of evidence and the sufficiency of jury instructions.

The dissenting opinion in the Court of Appeals indicated that the parties entered into a partnership agreement prior to the proposed incorporation, that the plaintiff-husband's surrender of his partnership interest constituted valuable consideration for the agreement to split the stock of the corporate defendant, that the agreement was neither a pre-incorporation agreement nor a shareholder's agreement under the Business Corporation Act and that the claim was not barred by the statute of limitations, since the statute would not begin to run until demand had been made for the stock promised.

1. The record indicates that defendants' motion at the close of the plaintiff's evidence was "to dismiss Plaintiff's Complaint" rather than for a directed verdict in favor of defendant. At the close of all the evidence, defendants' counsel simply stated: "We would renew our motion, Your Honor."

We also note that there is no assignment of error relating to the trial judge's denial of defendants' motion for judgment notwithstanding the verdict. Assignment Number 26 assigns error to the denial of defendants' motion to set aside the judgment [sic] and for a new trial. A motion to set the *verdict* aside and for a new trial pursuant to Rule 59 is directed to the discretion of the trial judge while a motion for judgment notwithstanding the verdict pursuant to Rule 50 is to be decided as a question of law. *See Bryant v. Nationwide Insurance Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985).

PLAINTIFF'S APPEAL

A.

CONTRACT LAW

First, we address plaintiff's arguments on appeal. Because plaintiff's appeal is based solely on the existence of a dissent in the Court of Appeals, the scope of our review on plaintiff's appeal is limited to the issues raised in that dissent. N.C. Rules of Appellate Procedure, Rule 16(b) (1985). Additional issues raised by defendant pursuant to her petition for discretionary review will be discussed later in this opinion. The dissent essentially concluded that the resolution of "this case turns on an analysis of simple contract law." *Penley v. Penley*, 65 N.C. App. at 724, 310 S.E. 2d at 368. It is true, in fact, that plaintiff relied primarily on a theory of contract law during the trial of his case, in an effort to support his contentions that a partnership between him and his wife had been created. Therefore, we must determine whether there was sufficient evidence presented by plaintiff to go to the jury on the sole issue presented to it, namely, whether plaintiff was entitled to ownership of forty-eight percent of the stock in Hamburg Valley, Inc., premised on the implicit finding by the jury that a contract between the parties had indeed been created. If plaintiff did present sufficient evidence to go to the jury, then the Court of Appeals incorrectly concluded that the jury verdict for plaintiff must be reversed. Although not precisely identified as such by the Court of Appeals, it appears that the majority of the panel decided that defendant-wife's motion for judgment notwithstanding the verdict should have been granted by the trial judge.

Recently, this Court addressed the proper standards for determining when a judgment notwithstanding the verdict is appropriate. In *Bryant v. Nationwide Fire Insurance Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985) we stated:

> First, such a motion is essentially 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 review 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).

Id. at ---, 329 S.E. 2d at 337-38.

[1] In the instant case, the question then becomes whether there was sufficient evidence, considered in the light most favorable to the plaintiff-husband as non-movant, giving to that evidence the benefit of every reasonable inference that may legitimately be drawn from it, to support a jury verdict in his favor and thus prevent a directed verdict for defendant-wife. Since the parties stipulated that the only issue for the jury to decide was whether plaintiff-husband was entitled to ownership of forty-eight percent of the stock of the corporate defendant, the question presented by the motion for directed verdict was whether there was sufficient evidence presented by both parties, with contradictions, conflicts, and inconsistencies resolved in plaintiff-husband's favor, to permit the jury to answer "yes" to the issue presented.

Plaintiff testified that he went into the tire business in 1965, after going to night school for two years taking an automotive course in order that he could later branch off into automotive work and automotive parts business. He testified that defendant, his wife, started working the same year in the Kentucky Fried Chicken business and that he worked there on the weekends. In 1967, his wife became ill and at her request he began operating the chicken business at night and his tire business during the day. He further testified that in November of 1967, his wife looked at

the books and indicated that they did not have enough money to pay the taxes and bills; that subsequently, after her sister-in-law was no longer with the business, his wife asked him to come to Hendersonville with her and run the business; that he did not want to go because he did not want to give up his tire business but that she finally persuaded him and he gave the tire business to his brother and began working full time with the Kentucky Fried Chicken business. He further testified as follows:

> Q. Did you and Mrs. Penley have any more discussions about that before you went?
>
> A. Well, she kept asking me to go—if I'd come with her. If I'd go in with her. She kept asking me. And I kept telling her I didn't want to go. And I don't know how many times she asked me. And I just—I don't know how many times I told her that I did not. Maybe once—that I didn't want to go. Maybe once, or two. But finally she told me that if I'd go that—that—and go in with her that it would belong to both of us. We'd share everything that we did, money, the profits, the business, anything they did, why I'd be part of the business just like she was.
>
> Q. As a result of that, what did you do?
>
> A. I told her I—I told her I still wouldn't—didn't want to go. And she started crying and telling me that it belonged to me as much as it did her. And she wasn't able to do the work and she couldn't do the work, and if I didn't go that she was going to lose it. And that's when I agreed to go. And I wouldn't agree to go until she promised me that—that—that we'd save all that we could if I went.

Plaintiff testified that for a while thereafter he tried working both with the tire business in Weaverville and the restaurant in Hendersonville, but eventually "quit working in the tire business." "After those discussions I started opening and closing in Hendersonville . . . . I worked those 11-12 hour days, seven days a week. On the weekends, it would be more . . . . I took care of the social security and unemployment, the time books. She would take care of the money, the banking and paying the bills. There was money left over after paying the bills, there was money in the business and we would use it to pay the bills. When we got

enough to invest, we would talk about what we would invest in. And we would invest in something . . . ." Plaintiff also testified that part of the money was used to purchase equipment and construct a new building for the business.

Plaintiff's evidence included a portion of the deposition of Mrs. Penley as follows:

> Q. All right. When did your husband first start working full time in the Kentucky Fried business?
>
> A. '68.
>
> . . . .
>
> Q. Over what period of time did he continue to work in that business as a full-time proposition, on full-time basis?
>
> A. Up until a year and a half ago.
>
> . . . .
>
> Q. Was he paid a regular salary during that period of time?
>
> A. We both had a checking account, and also we had the Kentucky Fried Chicken, and it was just more or less if you needed money you got it.
>
> Q. You didn't pay any specific salary that was designated as salary, did you?
>
> A. Not until I incorporated.
>
> . . . .
>
> Q. And both of you had access to the funds of the corporation and to the profit of it.
>
> A. Yes, sir.

As the above evidence tends to show, the parties operated this business in an informal manner. Under these circumstances, it would not be unreasonable for the jury, considering the evidence in the light most favorable to the plaintiff, to find that, as alleged in the complaint, defendant-wife "agreed that if plaintiff would devote his full time to the operation of the restaurant business, the parties would operate that business as a joint enter-

prise, share equally in the ownership of its assets, and divide its returns equally." The evidence would also support a jury finding, as alleged in the complaint, that "[t]hereafter, pursuant to the aforementioned agreement, the parties did operate the restaurant as a joint enterprise, dividing its returns evenly." Thus, when the parties discussed incorporating the business in 1977, the jury could reasonably find that they were discussing incorporating a business jointly owned by them. These conclusions could easily support the theory that a contract, oral in nature, had been entered into by the parties.

[2] The majority in the Court of Appeals further concluded that such an oral contract would fail because it was not supported by valuable consideration and is therefore unenforceable. We disagree. The applicable law is stated in *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964):

> It may be stated as a general rule that 'consideration' in the sense the term is used in legal parlance, as affecting the enforceability of simple contracts, consists of *some benefit or advantage to the promisor, or some loss or detriment to the promisee.* (Emphasis added.) *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15; *Cherokee County v. Meroney*, 173 N.C. 653, 92 S.E. 616; *Institute v. Mebane*, 165 N.C. 644, 81 S.E. 1020; *Findly v. Ray*, 50 N.C. 125. It has been held that 'there is consideration if the promisee, in return for the promise, *does anything legal which he is not bound to do*, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' 17 C.J.S. 426. *Spencer v. Bynum*, 169 N.C. 119, 85 S.E. 216; *Basketeria Stores v. Indemnity Co.*, 204 N.C. 537, 168 S.E. 822; *Grubb v. Motor Co.*, 209 N.C. 88, 183 S.E. 730; *Stonestreet v. Oil Co.*, 226 N.C. 261, 37 S.E. 2d 676; *Bank v. Harrington*, 205 N.C. 244, 170 S.E. 916.

Id. at 147, 139 S.E. 2d at 368. (Emphasis original.)

The court further instructed the jury on the applicable law as follows:

> Now, you will recall that for the plaintiff, ladies and gentlemen, plaintiff has introduced evidence which he contends tends to show . . . that he did go over there and work

full-time, that he worked seven days a week, that he gave up his business in Weaverville in order to operate the Kentucky Fried Chicken store in Hendersonville . . . . And he says and contends that she promised him that he would receive 48 percent of the stock in this corporation, and he says and contends to you that he is entitled to 48 percent of the stock, that it was a family corporation . . . and that she promised him that he would have that much stock . . . .

And he says and contends to you that this promise was supported by valuable consideration, that he gave up his work over in Weaverville and started working over in Hendersonville full-time, that he lost this . . . business had to close over there in Weaverville because he was devoting full-time to the Kentucky Fried Chicken store, that he has worked there, built the business up, and that she promised . . . that he would have this much stock in the corporation as a result of his contribution to it . . . .

. . . .

Now, members of the jury, as the Court mentioned to you earlier, we have been dealing in this case with the law of contracts. Now the question may arise in your minds as to the definition of a contract. A contract, members of the jury, is an agreement between two or more competent parties based upon a sufficient consideration to do or not to do a particular thing, which agreement, if valid, the law will enforce. There is no contract unless the parties assent to the same thing in the same sense at the same time. There is a contract, however, if they do.

A contract is the coming together of two minds on a thing done or to be done. It results from the concurrence of the minds of two or more parties. It is not what either thinks, but what both agree.

Now, members of the jury, a contract in North Carolina may be express or implied. An express contract is one in which terms of the agreement are declared or expressed by the parties, orally or in writing, at the time the contract was entered into. [An implied contract arises when the intention of the parties is not expressed but an agreement in fact

creating an obligation is implied or presumed from their acts and words, when and where there are circumstances which, according to the ordinary course of dealings and common understanding of men, show a mutual intent to contract.]

Thereafter, the court charged the jury:

> Now, members of the jury, the Court instructs you that if you are satisfied [by the greater weight of the evidence] that the plaintiff and defendant did enter into an agreement whereby the plaintiff was supposed to receive 48 percent of the capital stock of this company, if you're satisfied by [the greater weight of the evidence] that this agreement was made, then the Court instructs you that you should answer the issue yes. On the other hand, ladies and gentlemen, if you are not so satisfied, or if you are unable to tell where the truth lies upon the issue, then you should answer that issue no.

We consider these charges to be a correct statement of the applicable law. Furthermore, the trial judge instructed the jury in accordance with G.S. 1A-1, Rule 51, which requires the judge to explain the law and to apply it to the evidence on all substantial features of the case. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972).

What then is the consideration to support the promise, on the part of each of the parties, to split the shares in the incorporated business equally between the two parties—husband and wife? It is their mutual promises to accept the division of shares and to continue to operate the business as before, followed by the transfer of jointly owned property to the newly formed corporation.

Plaintiff testified that they had discussed issuing 24 shares to plaintiff, 24 shares to defendant wife and two shares to the son but the attorney "advised us that it would be 48-48-4." He further testified that there was no change in the percentage of the shares to be received by him after he and his wife had agreed to share the stock equally. While at the attorney's office, plaintiff signed the articles of incorporation after discussing "the laws and the officers of the corporation." These articles listed plaintiff, defend-

ant-wife, and their son as initial directors and incorporators of the corporation.

Plaintiff's evidence included defendant-wife's deposition statement as follows:

> Q. So would it be fair to say that you operated as a family business up to that time?
>
> A. Well, it became a corporation, so I don't think that would be family, but it's still family.
>
> Q. It's a family-held corporation, isn't it?
>
> A. That's right.
>
> . . . .
>
> Q. So you both just started operating the business as a family business.
>
> A. Yes. And our son.

We now consider the Court of Appeals' analysis of the evidence in the light of *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979), and *Guano Co. v. Colwell*, 177 N.C. 218, 98 S.E. 535 (1919). The Court of Appeals concluded that plaintiff's interest in the restaurant business "evolved from his status as a husband, and not as a business partner." In effect, the court decided that the evidence was insufficient to rebut the presumption that services rendered by plaintiff-husband "in the wife's business" were performed gratuitously and therefore any promise on the part of the wife to issue stock in the corporation to plaintiff was unenforceable because not supported by consideration.

In *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979), this Court held that there is a "presumption that services rendered by a wife in her husband's business are gratuitously performed absent a special agreement to the contrary." *Id.* at 622, 256 S.E. 2d at 796. This presumption applies equally to a husband's services in his wife's business. *See Guano Co. v. Colwell*, 177 N.C. 218, 98 S.E. 535 (1919). In *Leatherman*, the Court found no evidence of any special agreement to rebut the presumption but recognized that there could be instances where evidence of an agreement to the contrary would make the services of one spouse to the other's business non-gratuitous.

Assuming, *arguendo*, that the correct rule to be formulated from *Leatherman* and *Guano Co.* is that, absent a contract or special agreement to the contrary, services performed by one spouse in the other spouse's business are presumed to be gratuitously performed, the evidence in the instant case is sufficient for the jury to find a "contract or special agreement to the contrary." The first contract or special agreement was the 1967 agreement that in exchange for plaintiff devoting his full time attention to the Hendersonville restaurant, defendant would share the business, the money, the profits with plaintiff and that "it would belong to both of us." Another contract or special agreement was entered into when the parties agreed to incorporate the business and split the stock "fifty-fifty," later "48-48-4," and continue to operate the restaurant as a family business. While the jury *may* have concluded from plaintiff's evidence that plaintiff joined the business in Hendersonville and worked long hours solely because he was the husband of an ill wife, the jury was not *required* as a matter of law to so find.

Defendant points to conflicting evidence which tends to rebut plaintiff's evidence that the parties agreed to and in fact established plaintiff's partial ownership interest in the business both before and after incorporation. For example, the 1976 tax return for which plaintiff supplied the information designated plaintiff as an employee rather than owner of the business. While this evidence is competent on the question of ownership of the business, it is not conclusive. *See Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E. 2d 243 (1948). The resolution of conflicts in the evidence, the credibility of witnesses, and the weight to be given any evidence is for the jury. *See State Automobile Mutual Ins. Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 206 S.E. 2d 210 (1974).

The Court of Appeals also stated that plaintiff's past services could not support defendant's subsequent promise to convey the stock to plaintiff. This usual presumption can be rebutted by evidence that the party rendering the services reasonably expected remuneration. Thus, the general rule that prevents past services from supplying the consideration necessary to support a subsequent promise "does not include cases in which the consideration is a legal liability which arose before the promise was made, and upon which the promise is based. Such forms of con-

sideration are sufficient." (Citations omitted.) *Jones v. Winstead*, 186 N.C. 536, 540, 120 S.E. 89, 90-91 (1923).

Plaintiff testified that when he initially decided to render his services to defendant full time, defendant told plaintiff that if he would "go with her that it would belong to both of us" and "I'd be part of the business just like she was." Therefore, the jury could find that plaintiff reasonably premised his decision to render services on a full-time basis on promises made to him by defendant-wife, which led plaintiff to reasonably conclude and expect that his contributions would be rewarded by sharing in the business equally. So plaintiff's past services and forfeiture of his then-existing business could also serve as the consideration necessary to support defendant-wife's later promise to have 48 percent of the shares issued to him. There was also evidence that plaintiff continued to devote his services to the business full time for some period of time after defendant made her alleged promise. Therefore, there was sufficient evidence from which a jury could conclude that the parties had entered into a contract, supported by valuable consideration in the form of services and management either before or after the promise was made. Accordingly, the Court of Appeals erred in holding that the agreement in question was unenforceable because not supported by valuable consideration.

B.

STATUTE OF LIMITATIONS

[3] Plaintiff next argues that the majority of the Court of Appeals panel erroneously held that the statute of limitations would bar plaintiff's action. For the purpose of determining whether the action is barred by the statute of limitations, the parties have stipulated that the governing date is 27 March 1981 rather than 11 August 1981, the date the complaint was filed. Preliminarily, we agree with the court below that the three-year contract limitations period provided in G.S. 1-52(1) is the applicable statute of limitations. However, we disagree with the particular date chosen by the majority for accrual of the action.

In general, an action for breach of contract must be brought within three years from the time of the accrual of the cause of action. G.S. 1-52(1); *Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d

147 (1966); *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413 (1962). A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. G.S. 1-15(a); *Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d 147; *Thurston Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413; *North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co.*, 32 N.C. App. 400, 232 S.E. 2d 846 (1977), *aff'd*, 294 N.C. 73, 240 S.E. 2d 345 (1978). The statute begins to run on the date the promise is broken. *Pickett v. Rigsee*, 252 N.C. 200, 113 S.E. 2d 323 (1960). A new promise to pay fixes a new date from which the statute runs. *Id.* In no event can a statute of limitation begin to run until plaintiff is entitled to institute action. *Reidsville*, 269 N.C. 206, 152 S.E. 2d 147.

Applying the law to the facts of the instant case, while it may be apparent that the organizational meeting of the initial board of directors *could* have been held on 5 January 1978 and that the board *could* have authorized the issuance of the stock on that date, it was not *required* to do so. In fact, the evidence tends to show that no board of directors ever met, no stock was issued to anyone, and that plaintiff and defendant-wife continued to manage the business in an informal manner after the incorporation. The agreement at issue was an agreement to have an equal number of shares of stock issued to Mr. and Mrs. Penley. This oral contract contained no specific time limit for its performance and certainly there was no breach of the agreement by not issuing the stock on the earliest possible date following the filing of the articles of incorporation. Rather, the breach occurred and the right to institute an action commenced, at the earliest, when defendant broke her promise or took action inconsistent with the promise she made to plaintiff. Action on defendant's part inconsistent with the promise made by her could have manifested itself when defendant refused to issue the stock as agreed or refused to honor plaintiff's demand for issuance of the stock to plaintiff or when defendant prevented plaintiff from jointly participating in the business—all such conduct evidencing an intention not to honor the agreement. There is no evidence that prior to April 1979 defendant refused to issue stock in the corporation as agreed, or that plaintiff made any demand upon his wife for issuance of the stock to him. Since plaintiff and defendant-wife con-

tinued after incorporation to manage the business jointly, without issuing stock to anyone, sharing equally in the proceeds of the business until April 1979 when defendant-wife assumed exclusive control over the corporation and its assets, April 1979 was the earliest date that plaintiff could have instituted an action for breach of the agreement. The statute thus began to run, not from January 1978—the first date when performance of the contract was possible, but from April 1979—the date that the contract was breached by failure to perform when required to do so under the agreement. April 1979 is well within the three-year limitations period ending 27 March 1981. Therefore, plaintiff's action is not barred by the statute of limitations.[2]

C.

BUSINESS CORPORATION ACT

Furthermore, plaintiff contends that the majority incorrectly concluded that the Business Corporation Act defeats his claim. We agree with plaintiff.

[4] The Court of Appeals determined that the agreement between plaintiff and defendant was essentially a stock subscription pursuant to G.S. 55-43. Since G.S. 55-43(b) requires such agreements to be in writing, that court concluded that this agreement was unenforceable. We do not agree with the court below that G.S. 55-43 is applicable to the present case. A stock subscription is defined in relevant part in G.S. 55-43(a) as follows:

> A preincorporation subscription is a *promise or contract to take shares* in a corporation to be organized and to pay the agreed price thereof to the corporation or to others for its benefit . . . . (Emphasis added.)

This is not an action in which defendant is trying to enforce plaintiff's *promise to take* shares. Rather, we view plaintiff's present action as an attempt to enforce defendant's *promise or contract to*

2. We find it unnecessary to discuss plaintiff's further contention that the action is not barred, since no shares in the subject corporation, Hamburg Valley, Inc., could have been issued until that corporation came into existence in June 1978 when it was created by amending the Articles of Incorporation of Kentucky Fried Chicken of Hendersonville, Inc., the original corporation. The June 1978 date would also be within the three-year statute of limitations period ending 27 March 1981.

issue shares to plaintiff, the number of shares to represent a certain percentage of ownership within a corporation to be formed. This seems evident from plaintiff's testimony on direct:

> Q. What did she say to you, Mr. Penley, about the ownership of the stock in that corporation?
>
> A. Well, *she agreed* that we would split it fifty-fifty.
>
> Q. Did you discuss it again with her after that?
>
> A. We talked about it before we went to the attorney's office, and she wanted to give her son a few shares, and I told her it didn't make any difference to me.
>
> Q. How did she want it divided at that time?
>
> A. She wanted it—we were talking in terms of fifty shares and—which would've been twenty-four for her, twenty-four for me, and two for her son.
>
> . . . .
>
> Q. Did Mrs. Penley make any statement to him, to the attorney, in your presence, about *what she wanted done* with the stock?
>
> A. I can't remember what was said.

Defendant-wife testified on direct as follows:

> Q. What, if any, interest was your husband getting out of the corporation?
>
> . . . .
>
> A. Forty-eight percent.
>
> Q. And how much percentage were you getting?
>
> A. Forty-eight percent.
>
> Q. And were you giving any to anybody else?
>
> A. The son three, or four . . . .

This testimony also indicates that plaintiff was endeavoring to enforce defendant's agreement to have issued to him a number of shares representing his ownership interest in the corporation to

be formed. Therefore, we reject the reasoning, analysis, and ultimate conclusion reached by the Court of Appeals on this particular issue.

[5] The majority in the Court of Appeals also considered the oral agreement between the parties to be a shareholder's agreement, unenforceable because not in writing as required by G.S. 55-73(b). Pigeonholing plaintiff's theory of recovery in such a narrow and inflexible fashion is incorrect in these circumstances. G.S. 55-73(b) provides, *inter alia*, that

> [N]o written agreement to which all of the shareholders have actually assented . . . which relates to any phase of the affairs of the corporation . . . shall be invalid . . . on the ground that it is an attempt by the parties thereto to treat the corporation as if it were a partnership or to arrange their relationships in a manner that would be appropriate only between partners.

Subsection (b), like the other two subsections of G.S. 55-73, simply abrogates, as to agreements within its purview, certain judicial doctrines which had formerly invalidated particular shareholders' agreements on those grounds which this section now disallows. *Blount v. Taft*, 295 N.C. 472, 246 S.E. 2d 763 (1978). While G.S. 55-73 has been referred to as the "heart" of the North Carolina Business Corporation Act with respect to close corporations, *see* Latty, *Close Corporations and the New North Carolina Business Corporation Act*, 34 N.C.L. Rev. 432, at 438-440 (1956), we do not view this statute as plaintiff's exclusive legal remedy. Plaintiff has properly chosen an alternate legal theory, premised primarily on defendant's oral agreement to convey an interest in the corporation—a question of simple contract law. Accordingly, we do not view the parties' agreement as an unenforceable shareholders' agreement.

D.

DECLARATORY JUDGMENT

[6] In the prayer of plaintiff's complaint, he requested judgment "declaring plaintiff to be the owner of 48 percent of the shares of stock of Hamburg Valley, Inc., and of one-half of all assets purchased by the parties from the proceeds of that corporation, re-

gardless of record or legal ownership of such property." The Court of Appeals determined that a declaratory judgment was inapplicable on the record in this case because there is no written instrument to interpret and because such a judgment is not available to determine issues of fact alone. G.S. 1-253 provides as follows:

> *Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.*
>
> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. *No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for.* The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (Emphasis added.)

G.S. 1-254 and G.S. 1-255 provide, in pertinent part, that any person interested under a "written contract," or other instrument or "as or through" a fiduciary or "in the administration" of an estate may obtain a declaration of rights or other legal relations thereunder. G.S. 1-256 then provides:

> *Enumeration of declarations not exclusive.*
>
> The enumeration of G.S. 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in G.S. 1-253 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

G.S. 1-261 provides as follows:

> *Jury trial.*
>
> When a proceeding under this Article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

G.S. 1-264 provides:

> *Liberal construction and administration.*

> This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered.

A declaratory judgment is not inappropriate in this action. While most of the cases seeking a declaratory judgment involve written agreements, this should not be a requirement where, pursuant to G.S. 1-256, "a judgment or decree will terminate the controversy or remove an uncertainty." Factual questions, pursuant to G.S. 1-261, can be determined by a jury and questions of law determined by the court.

We find nothing in the Uniform Declaratory Judgment Act, G.S. 1-253 *et seq.*, that prohibits plaintiff from proceeding thereunder to have his rights declared as to ownership of stock, if any, in the corporate defendant. We hold that the judgment entered by the trial court declaring the plaintiff to be "entitled to ownership" of 48 percent of the stock of defendant corporation while retaining "jurisdiction over parties and subject matter of this cause for entry of such further orders as may, from time to time, be appropriate" is not invalid on the grounds that a declaratory judgment is inappropriate to this case.

DEFENDANT'S CROSS-ASSIGNMENTS

We will now consider the issues raised pursuant to defendant's petition for discretionary review.

[7] Defendant brings forward the following assignments of error that were raised but not considered by the Court of Appeals. Defendant's first contention is that the court erred in allowing plaintiff to testify about certain circumstances surrounding the parties' investment of money prior to incorporation and the source of funds used to purchase equipment for the Kentucky Fried Chicken business. No legal authority is cited in support of this argument. Defendant essentially contends that this evidence was irrelevant to "any of the issues and could only have confused the jury." We disagree. "Strictly speaking, evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue." 1 Brandis on North Carolina Evidence § 77, at 285 (1982) (footnote citations omitted). This evidence was relevant to the only issue submitted to the jury because it tended to establish

that an agreement between the parties was entered into and also the basis for determining that such agreement, admittedly oral in nature, was supported by adequate consideration. Proof of the foregoing was relevant to the only material issue to be resolved, namely, whether plaintiff was entitled to ownership of 48 percent of the stock in the corporation to be formed.

[8] Defendant next contends that the court erred in failing to instruct the jury on the requirement of delivery to consummate a gift. As discussed earlier in this opinion, plaintiff's theory was premised on a contract supported by consideration. There is no basis for submitting instructions regarding a gift, as defendant's answer did not raise this theory; and, furthermore, defendant requested no special instruction pursuant to Rule 21 of the North Carolina General Rules of Practice for Superior and District Courts or Rule 51(b) of the North Carolina Rules of Civil Procedure. Under the circumstances, we find no error in the failure of the trial court to instruct on the need for delivery to consummate a gift.

Defendant's third and fourth contentions challenge the sufficiency of the trial court's summary of the evidence and contentions of the defendant. We have reviewed the judge's charges, and we do not find them to be in violation of Rule 51(a) of the North Carolina Rules of Civil Procedure, which provides, *inter alia*, that "the judge shall give equal stress to the contentions of the various parties."

[9] Next, defendant contends that the court erred in instructing the jury on the theory of implied contract when the theory was not supported by the evidence. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides in pertinent part:

> (2) *Jury Instructions; Findings and Conclusions of Judge.* No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Similarly, Rule 21 of the General Rules of Practice for the Superior and District Courts provides, in pertinent part:

> [A]t the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object *on the record* to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection. (Emphasis added.)

See Wall v. Stout, 310 N.C. 184, 188, --- S.E. 2d ---, --- (1984).

Indeed, in the present case the judge provided the parties with an opportunity to object after he had charged the jury. Defendant, however, failed to object to the instruction on implied contract and therefore Rule 10(b)(2) bars her from assigning error to this portion of the judge's instruction. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[10] Defendant's final contention is that the court erred in beginning the charge to the jury in the absence of defense counsel. Apparently the court began its charge before defense counsel had returned from lunch recess. Defense counsel contends that the court recessed until 2:15 p.m., but the court began its charge at 2:00 o'clock in the presence of plaintiff, defendant and plaintiff's attorneys. Defense counsel returned just after 2:00 p.m. and the court was beginning the introductory parts of its charge. Assuming, *arguendo*, that court had been recessed until 2:15 p.m., counsel failed to call this to the attention of the trial judge or to ask for curative instructions. We do not believe that defendant has shown any prejudice.

CONCLUSION

Having considered fully the contentions of plaintiff and defendant, and the authorities cited in support thereof, we are convinced that the trial judge correctly entered judgment on the jury verdict in favor of plaintiff. Accordingly, the decision of the Court of Appeals to the contrary is

Reversed.

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

STATE OF NORTH CAROLINA v. HILLARD ASHE

No. 283A84

(Filed 3 July 1985)

1. **Criminal Law § 101.4— jury request to review testimony refused—transcript not available—prejudicial error**

In a prosecution for first-degree murder, the trial court erred by refusing the jury foreman's request to review testimony on the grounds that the transcript was not available. The court was required to exercise its discretion in determining whether to grant the request and its response was not an exercise of that discretion. There was prejudice because defendant's alibi was the only contested issue and whether the jury fully understood and appreciated the evidence on the alibi question was material to the determination of defendant's guilt or innocence. G.S. 15A-1233(a).

2. **Criminal Law § 101.4— jury request to review testimony refused—failure to return entire jury to courtroom—prejudicial error**

In a prosecution for first-degree murder, the trial court erred by not summoning all the jurors to the courtroom to hear both the foreman's request to review testimony and the court's response. While G.S. 15A-1233(a) does not expressly say that the trial judge must have the jurors conducted to the courtroom, there is no doubt that the Legislature intended to place that responsibility on the judge presiding at trial. The failure to do so was prejudicial because all jurors should have been present to hear the request itself so that the court's response could be accurately assessed and properly understood. Moreover, although the foreman might have relayed the court's exact message, he might as easily have conveyed some altered message or phrased the judge's response in his own words in such a way as to alter its connotation and its import. G.S. 15A-1233.

3. **Jury § 3; Criminal Law § 101.4— errors in hearing and refusing jury's request to review testimony—no objection at trial—not waived**

Defendant's failure to object at trial did not waive the trial court's errors in refusing the jury's request to review testimony as a matter of law and in not returning the entire jury to the courtroom because the errors violated defendant's right to a trial by a jury of twelve and were contrary to a statutory mandate. G.S. 15A-1233(a), Art. I, § 24 of the North Carolina Constitution.

Justice MARTIN dissenting.

Chief Justice BRANCH joins in the dissenting opinion.

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

APPEAL by defendant pursuant to N.C.G.S. § 7A-27 from a judgment imposing life imprisonment, entered by *Judge Russell*

Walker at the 6 February 1984 Special Session of MACON County Superior Court, upon a verdict of guilty of first degree murder.[1]

Rufus L. Edmisten, Attorney General, by Elizabeth C. Bunting, Assistant Attorney General, and Ellen B. Scouten, Associate Attorney, for the state.

Herbert L. Hyde for defendant appellant.

EXUM, Justice.

The dispositive question presented is whether the trial court committed reversible error in denying a request to review portions of the testimony, made by the jury foreman after deliberations began, without requiring that all jurors be present to hear the court's response. We conclude that it did and remand the case for a new trial.

I.

In the evening of 21 August 1974, officers from the Cherokee County Sheriff's Department discovered Charles Clinton Odom dead in the bedroom of his mobile home. An autopsy revealed that Odom died as a result of one or more blows to the head with a blunt instrument. The crime lay unsolved for nine years.

In 1983 Robert Bryson came forward and gave investigators information about Odom's death. Bryson told police that he and his companions knew Odom owned a coin toss show in a traveling carnival and often carried large amounts of cash on his person. They formulated a plan to rob Odom as he returned home on the evening of 20 August. Both Bryson and Cathy Gunter made statements implicating Ted Killian, Lloyd Ashe, and Delbert Hickey, *but not the defendant*, in the crime.

Ted Killian was the state's chief witness against defendant. As a result of statements made by Gunter and Bryson, Killian

1. The crime for which defendant was convicted occurred on 20 August 1974 and was punishable under §§ 1 and 7, ch. 1201, 1973 Session Laws. Section 1 provided for a mandatory death sentence for first degree murder. Section 7 provided for mandatory life imprisonment if it were later determined that the death penalty as provided could not be constitutionally imposed. The United States Supreme Court held the mandatory death sentence provided in § 1 could not be constitutionally imposed in *Woodson v. North Carolina*, 428 U.S. 280 (1976). Thus Judge Walker imposed a sentence of life imprisonment pursuant to § 7.

had been charged with Odom's murder. He and his counsel worked out a plea bargain with the state pursuant to which Killian agreed to testify against defendant.[2] Before Killian was charged with Odom's murder on 6 January 1983, he had not told anyone about his involvement in the affair. He admitted that he was the one who struck the fatal blow resulting in Odom's death. He further admitted that at this time he was regularly consuming drugs and alcohol and that it was probable he was under the influence of drugs when he committed the crime. He said he had not consumed alcohol or drugs since he became married in 1975.

Killian testified as follows: He, defendant, Lloyd Ashe (defendant's brother), Carl Hickey, Cathy Gunter and Robert Bryson, believing that Charles Odom was in the habit of carrying large amounts of cash on his person, planned on the evening of 20 August 1974 to rob him. Pursuant to their plan, Killian and defendant went inside the trailer to wait for Odom to come home. Hickey and Lloyd Ashe waited behind the trailer. Gunter and Bryson remained in the automobile which was parked about a quarter of a mile from the trailer. The plan was to ambush Odom when he entered his trailer and "knock him out" before he could recognize who was present. Defendant "shimmied the door with a knife or something" to Odom's trailer and "I think . . . handed me a stick to knock Mr. Odom out with." When Odom entered the trailer door, Killian, with defendant standing at his side, hit Odom on the head with the stick, and Odom "fell back down into the yard." Defendant and Killian went out of the trailer and, together with Lloyd Ashe and Hickey, searched Odom's pockets. Odom "started coming to. When he started coming to, we ran off." Killian first learned that Odom was dead on 21 August 1974 but did not believe that he had killed him because "the paper stated he had died of natural causes." He said he first discovered he had killed Odom "when my lawyer went over the autopsy."

Defendant stipulated at trial to the truth of the conclusions of several physicians who examined Odom's body after his death including the testimony of the physician who performed the autopsy. In essence, defendant stipulated that: (1) Odom died from

2. In return for his testimony, Killian was allowed to plead guilty to second degree murder, sentenced to twenty years imprisonment and promised that he would not be incarcerated with his accomplices and the state would "look with favor" upon his parole when he became eligible.

one or more blows to the head with a blunt instrument; (2) Odom could have lived and moved himself for one hour or more after the blows occurred; and (3) the death was not an accident, but a homicide.

Defendant's only defense was alibi. On his behalf, Donna Gail Nichols testified that her husband was shot to death in Hayesville, North Carolina, on 17 August 1974 and was buried on 20 August.[3] Mrs. Nichols knew defendant who had been friends with her husband. She called defendant on 19 August 1974 and told him of the death of her husband, David Lee. She called defendant again on 20 August 1974 and asked him if he would return with her to Canton, Georgia, where she lived. She picked defendant up in Murphy around 5:30 or 6:30 p.m. on 20 August 1974 and they drove together to Canton, Georgia, which is about forty or forty-five miles northwest of Atlanta, arriving around 9:30 p.m. Defendant stayed with her until 24 August when she brought him back to Murphy.

Nichols also knew defendant's brother Jim. She was present in the courtroom in Cherokee County in 1983 when defendant's other brother, Lloyd, pled guilty to second degree murder of Odom. She knew that defendant had also been charged with the murder. When she learned that the date of the murder was 20 August 1974, she said to Jim Ashe, "My God Hillard [defendant] was with me at that time. He couldn't have been there."

Patricia Howard, Nichols' sister, corroborated Nichols. She recalled defendant being in Nichols' home on the day Nichols' husband was buried because it had made her angry. She testified, "I stayed [in Nichols' home] until a little after midnight. I was very angry. We had words because I didn't feel like it looked good for her to have another man in the house the same day that her husband was buried. And we had an argument to that effect. I guess that's one reason it sticks in my mind so much." Howard also recalled arguing with defendant on this evening, saying, "I told him I didn't think it looked proper that he was there whenever one of his best friends had been married to Donna." Howard was

3. Pursuant to a stipulation with the state, defendant offered in evidence a letter from the director of Ivie Funeral Home in Murphy dated 12 October 1983 certifying that funeral services were held on 20 August 1974 for David Lee Nichols, husband of the witness Donna Gail Nichols.

reluctant to come to court to testify but ultimately did so willingly and without subpoena because "I couldn't let somebody go to jail I knew was innocent, because I would never help someone I knew was guilty, or even thought was guilty either." She said, "I'm not overly fond of [defendant], but I do know him."

To rebut defendant's alibi testimony the state called Dorothy Thaxton. Thaxton testified that she was presently a neighbor of Nichols in Canton, Georgia, but she had not lived in Canton in 1974. Nevertheless she said that Nichols asked her if she would testify that defendant was at Nichols' home on the night Nichols' husband died. Thaxton said, "I told her I didn't know, I will have to think about it." Finally, Thaxton determined that she would not testify for defendant.[4]

In surrebuttal Nichols testified to "bad blood" between her and Thaxton because of an incident involving Nichols and Thaxton's children.

The state also offered evidence in rebuttal that defendant sometime in August 1974 was observed by Police Officer Grant Crawford committing a traffic violation. Crawford asked defendant for his driver's license and defendant refused to show it to him. Crawford then obtained a warrant charging defendant with exceeding a safe speed and failing to produce his driver's license. The warrant was issued and served by Crawford. Crawford could not recall the date except by reference to a date on a record in the police department. This record, the only record of this transaction available, was a green card maintained by the Murphy Police Department and originally prepared by Nada Pullium, then a secretary for the department. Pullium testified that she prepared the green card from a "white complaint form." The white complaint form was prepared by Pullium from a "yellow complaint form on each arrest" prepared by the officer. The green card, the last record prepared, contained the following notations: "8-21-74," "C," and "warrant pickup." The "C" stood for Officer Crawford. It was not clear from the testimony whether "8-21-74" referred to

4. Nichols, both during defendant's case in chief and surrebuttal, denied ever asking Thaxton to testify for defendant.

the date of the officer's action or the date Pullium prepared the green form.[5]

II.

[1] Having, in essence, this evidence before it, the jury retired for deliberations at 9:55 a.m. At 11:30 a.m. the jury foreman returned alone to the courtroom whereupon the following exchange took place:

> THE COURT: Mr. Foreman, the bailiff indicates that you request access to the transcript?
>
> FOREMAN: We want to review portions of the testimony.
>
> THE COURT: I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations.

It is this colloquy between the jury foreman and the trial court that forms the basis for defendant's major arguments on appeal. Defendant contends that the trial court erred in failing to exercise its discretion in determining whether the jury could review the evidence and in not having all jurors summoned to the courtroom so that his response could be communicated firsthand to them all rather than to the foreman alone. We think there is merit to this argument.

N.C.G.S. § 15A-1233(a) provides:

> 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

5. Mrs. Pullium testified that each day she would type from the yellow complaint form "onto a white complaint form. And then I would take a green card that we had set up on each person; and I would put the date and what the arrest was, and the officer and all on the green form." She also said, however, that if the officer brought in his papers early in the morning she usually typed up her forms that day. But if the officer brought in the information "late of the evening or at night, I would type them the next morning." She said that whatever she typed "concerning anything that Mr. Crawford may have deposited with [her] could have very well been typed the next day . . . ."

> 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. [Emphasis supplied.]

This statute imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue. Insofar as the statute requires the judge to exercise discretion, it is merely a codification of the common law rule. *See, State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980); *State v. Ford*, 297 N.C. 28, 252 S.E. 2d 717 (1979); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). Insofar as the statute requires the trial court to summon all jurors to the courtroom, it is a codification of a long-standing practice in the trial courts of this state.

In *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980), defendant was convicted of kidnapping and assault with intent to commit rape. The victim identified defendant as her assailant. The defense was alibi. Defendant offered the testimony of a waitress that at the time the alleged crime was committed defendant was in a restaurant where the waitress worked. After beginning deliberations, the jury requested that the waitress' testimony be read to it. Denying the request, the trial court said:

> No sir, the transcript is not available to the jury. The lady who takes it down, of course, is just another individual like you 12 people. And what she hears may or may not be what you hear, and 12 of you people are expected, through your ability to hear and understand and to recall evidence, to establish what the testimony was.

301 N.C. at 510-511, 272 S.E. 2d at 125. This Court concluded in *Lang* that the response by the trial judge was not an exercise of discretion and that the denial of the jury's request as a matter of law was error. The Court said:

> We hold that Judge Grist's comment to the jury that the transcript was *not available* to them was an indication that he did not exercise his discretion to decide whether the transcript should have been available under the facts of this case. The denial of the jury's request as a matter of law was error.

301 N.C. at 511, 272 S.E. 2d at 125.

Here, the question of whether the trial court exercised its discretion in denying the jury foreman's request to review the testimony is controlled by *Lang*. Here, as in *Lang*, the trial judge apparently felt that he could not grant the request because, as he said, "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence . . . ." This is in substance precisely the response the trial court made in *Lang*.[6] Thus, the trial court erred, as it did in *Lang*, in not exercising its discretion in denying the request.

[2] We think the trial court also erred in not summoning all the jurors into the courtroom to hear both the request and his response to it. N.C.G.S. 15A-1233(a) requires that all jurors "must be conducted to the courtroom" when the jury requests a review of the evidence. While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, we have no doubt that the legislature intended to place this responsibility on the judge presiding at the trial. The state argues that the statute requires the jury's presence only when the trial court *grants* the request to review portions of the testimony. When the trial court denies the request, the state argues, there is no possibility of misinterpretation or inaccurate relay of information which the statute is designed to guard against. Defendant contends the statute's purpose is "to prevent confusion in the relaying by one juror to the full jury the instructions of the court, even an instruction denying the request, and to prevent the appearance, at least, of less than a full public trial. A defendant, having the right to a trial by a jury of twelve, has the right to have all twelve jurors instructed consistently."

6. The existence of a transcript is, of course, not a prerequisite to permitting review of testimony. The usual method of reviewing testimony before a transcript has been prepared is to let the court reporter read to the jury his or her notes under the supervision of the trial court and in the presence of all parties.

We agree with defendant's position. The statute requires all jurors to be returned to the courtroom when the jury "requests a review of certain testimony or other evidence." We are satisfied the statute means that all jurors must be present not only when the request is made, but also when the trial court responds to the request, whatever that response might be. Our holding on this point is supported both by the language of the statute and the statute's purpose.

Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. Then, each juror, rather than determining for himself or herself the import of the request and the court's response, must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be.

Thus, we hold that for the trial court in this case to hear the jury foreman's inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of N.C.G.S. § 15A-1233.

III.

Having concluded that the trial court erred in not exercising its discretion in determining whether to permit the jury to review some of the evidence and in hearing the foreman's request and responding to it in the absence of the remaining jurors, we now consider whether these errors entitle defendant to a new trial. We conclude they do.

[1] Just as *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123, controls on the question of whether the trial court failed to exercise its discretion, it also controls on whether this failure amounts to reversible error. In *Lang*, as here, the only defense was alibi. Indeed, the alibi evidence here is considerably stronger than it was in *Lang* and the state's case against defendant considerably weaker than in *Lang*. In any event, the only contested issue in this case, as in *Lang*, is whether defendant was present and participated in the crime which he stipulated was committed. In *Lang* the court thought it important that the jury had requested a review of the testimony of defendant's alibi witness. In determining that failure to resolve the request as a discretionary matter was reversible error, the Court in *Lang* noted:

> [T]he requested evidence was testimony which, if believed, would have established an alibi for defendant. Ms. James' statements were in direct conflict with the evidence presented by the State. Thus, *whether the jury fully understood the alibi witness' testimony was material to the determination of defendant's guilt or innocence.*

301 N.C. at 511, 272 S.E. 2d at 125 (emphasis supplied).

The jury here did not expressly request a review of the testimony of defendant's alibi witness. Indeed, the jury foreman was not given an opportunity to specify which part of the testimony the jury wanted to review. The heart of this case, however, is the testimony concerning defendant's alibi, both that offered by defendant tending to support it and that offered by the state tending to rebut it. Neither the state's nor the defendant's evidence on the question of alibi stood unscathed at this trial. Both had its strengths and its weaknesses. The testimony of defendant's alibi witnesses had on its face the ring of truth, but Donna Nichols' credibility was called into question by the state's rebuttal witness, Dorothy Thaxton. Yet Thaxton's own credibility was questioned because of evidence of "bad blood" between her and Nichols. The state's evidence regarding the issuance of a warrant against defendant for a traffic violation in August 1974 was marred by the absence of any original record of the transaction and the cryptic nature and lack of clarity as to the meaning of the notations on the secondary record. With the alibi evidence in such a state and with alibi being the only contested issue in the case, it

is only reasonable to conclude that the jury desired to review evidence relating to it. We cannot say how the jury would have assessed the evidence had it been permitted to review it. It could have been influenced by the strengths of defendant's evidence and the weaknesses of the state's. But we can say as the Court said in *Lang* that whether the jury fully understood and appreciated the evidence on the alibi question "was material to the determination of defendant's guilt or innocence. Defendant was at least entitled to have the jury's request resolved as a discretionary matter, and it was prejudicial error for the trial judge to refuse to do so." 301 N.C. at 511, 272 S.E. 2d at 125.

[2] We conclude it was also prejudicial error for the trial court not to require that all jurors hear the foreman's inquiry and the court's response to it.

The state contends that no prejudice resulted to defendant because the jury foreman merely asked the judge for a review of testimony to which the judge responded in the negative. The state concedes that defendant would be entitled to a new trial if the judge had given further instructions or reviewed the testimony for a single juror. The state says the only message the foreman had to relay to his fellow jurors in this case was "No." Thus, there was little opportunity for inaccuracy in relaying or editorializing this simple message. We disagree.

The state's argument is premised upon facts not here present. First, as we have already said, all jurors should be present to hear the request itself, for it is only in light of the request, the manner and precision with which it is put, that the court's response can be accurately assessed and properly understood. Second, the trial court's response was not a simple "no" as the state contends. Rather, the court explained that it could not grant the foreman's request because no transcript existed, and that the jurors would have to rely upon their recollection of the evidence as best they could. Although the foreman might have relayed this exact message, he might as easily have conveyed some altered message or phrased the judge's response in his own words in such a way as to alter its connotation and its import. The manner in which he reported his request and the response might have led the other jurors to believe the trial court thought the evidence

which the jury wanted reviewed unimportant or not worthy of further consideration.

[3] Finally, the state argues that even if the trial court committed reversible error by refusing the jury's request as a matter of law and by responding to the jury foreman alone, defendant has waived the right to appeal on this issue by his failure to object at trial.

As a general rule, defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal. *See*, N.C. R. App. P. 10(a); *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982); *State v. Cooke*, 306 N.C. 132, 291 S.E. 2d 618 (1982); *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982); *State v. Lucas*, 302 N.C. 342, 275 S.E. 2d 433 (1981).

Where, however, the error violates defendant's right to a trial by a jury of twelve, defendant's failure to object is not fatal to his right to raise the question on appeal. *Bindyke*, 288 N.C. 608, 222 S.E. 2d 521; *Hudson*, 280 N.C. 74, 185 S.E. 2d 189.

Further, when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial. In *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925), this Court awarded defendant a new trial based upon the trial court's comment in the presence of the jury that defendant had the weakest voice or the shortest memory of any man he had ever seen. The Court held that these comments reflected an opinion of the trial court regarding the defendant's credibility in violation of the controlling statute which prohibited the expression of such opinions by the trial judge.[7] As such, defendant's failure to object at trial to the court's remarks was not fatal to his appeal. The court held:

> The fact that exception was not entered at the time the remark was uttered is immaterial. The statute is mandatory, and all expressions of opinion by the judge during the trial, in like manner with the admission of evidence made incompetent by statute, may be excepted to after the verdict. *Broom v. Broom*, 130 N.C. 562.

7. The statute cited was G.S. 564. The same prohibition against expression of opinion by the trial court is now contained in present N.C.G.S. § 15A-1232.

Id. at 115, 126 S.E. at 109. *See also State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Covington*, 48 N.C. App. 209, 268 S.E. 2d 231 (1980).

Similarly, we have held that although failure to object to introduction of evidence ordinarily waives the right to complain about it on appeal, where the particular evidence sought to be offered is specifically rendered incompetent by statute it is the duty of the trial court to exclude it *sua sponte*. Its failure to do so may on appeal be held reversible error notwithstanding defendant's failure to object at trial. *State v. McCall*, 289 N.C. 570, 223 S.E. 2d 334 (1976). For general statements of the rule, see *State v. Hunter*, 297 N.C. 272, 254 S.E. 2d 521 (1979); *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976); *State v. Strickland*, 290 N.C. 169, 225 S.E. 2d 531 (1976).

Both Art. I, § 24 of the North Carolina Constitution and N.C.G.S. § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Under the principles stated above, failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial.

For the reasons given, defendant is entitled to a

New trial.

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

Justice MARTIN dissenting.

The majority opinion grants this defendant a new trial based upon the following: (1) N.C.G.S. 15A-1233(a) requires the trial judge to exercise his discretion in deciding whether to grant a juror's request pursuant to this statute, in this case the trial judge failed to exercise his discretion, and this failure was prejudicial error; (2) N.C.G.S. 15A-1233(a) expressly mandates that the trial judge summon all jurors into the courtroom before hearing and passing upon a jury request pursuant to this statute.

I.

It is unquestioned that the defendant in this case failed to object to the action of the trial judge with respect to the request by the jury foreman. As the majority states, as a general rule a defendant's failure to object to alleged errors precludes raising the error on appeal. N.C. R. App. P. 10(a); *State v. Reynolds*, 307 N.C. 184, 297 S.E. 2d 532 (1982) (Exum, J.). The majority reasons that the trial court in this instance was acting contrary to a statutory mandate and therefore the defendant can raise the issue on appeal notwithstanding his failure to object at trial. The majority argues that where the trial judge is by statute expressly required to do or not to do a certain thing and violates the statute, this error can be reviewed, even though the defendant did not object at trial. I have no quarrel with this statement of the law. This principle is properly applied in a case such as *State v. Bryant*, 189 N.C. 112, 126 S.E. 107 (1925), cited by the majority. In that case the trial judge violated the statute which prohibits the trial judge from expressing an opinion as to whether a fact had been proven. The statute is now N.C.G.S. 15A-1232. It was formerly N.C.G.S. 1-180. This statute clearly says that "[the trial judge] must not express an opinion whether a fact has been proved."

Where is the statutory mandate in N.C.G.S. 15A-1233(a)? Contrary to the majority opinion, the statute does not expressly require the trial judge to conduct the jury to the courtroom. The statute simply says that "the jurors must be conducted to the courtroom." Of course, the judge is in charge of the proceedings during the trial and it can be argued that it was the ultimate responsibility of the trial judge to see that the jury was brought into the courtroom. However, that is a far cry from an express mandate such as that contained in N.C.G.S. 15A-1232. The remainder of 15A-1233(a) is not couched in mandatory language, but says that the judge "may" allow the testimony to be read and the judge "may" have additional evidence read to the jury. No direct mandate is made to the judge at any point in the statute. For this reason, I do not find that a transgression of this statute comes within the holding in *Bryant*, 189 N.C. 112, 126 S.E. 107.

It is to be noted that N.C.G.S. 15A-1446(d) does not list this type of error as grounds which may be asserted on appeal without objection having been made in the trial court. Clearly the de-

fendant in this case had ample opportunity to object to the action of the trial court, and he cannot, and evidently does not, argue that he should be allowed to urge this alleged error on appeal pursuant to N.C.G.S. 15A-1446(d)(12).

For these reasons, I think that the majority is wrong in holding that this Court should consider the alleged error of the trial judge in this case notwithstanding the fact that no objection was made by the defendant during the trial. Had such an objection been lodged, the trial court would have had an opportunity to correct any possible error.

II.

I agree that N.C.G.S. 15A-1233(a) requires the trial judge to exercise his discretion in determining whether to allow the jury to review a portion of the testimony. I also agree that under *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980), the trial judge failed to exercise that discretion. Having done so, it is then necessary to determine whether such error was prejudicial. *State v. Ford*, 297 N.C. 28, 252 S.E. 2d 717 (1979). I disagree with the majority in its holding that such failure constituted prejudicial or reversible error. In finding that the failure of the judge to exercise his discretion constituted prejudicial error, the majority relies, again, upon *Lang*. In *Lang* the defendant had produced evidence through Ms. Rena James, a waitress at a restaurant, that he was at the restaurant between 9:00 and 10:00 p.m. and, therefore, he could not have been the man who kidnapped the victim between 9:20 and 9:30 p.m. After the jury had deliberated for some time, it returned to the courtroom and requested that the transcript of the testimony of the witness Rena James be read to the jury. The trial judge denied the request, and this Court held that he did so without exercising his discretion. Upon reviewing the case to determine if the error was prejudicial, this Court found that the requested evidence would have established an alibi for the defendant if believed by the jury; further, that the evidence was in direct conflict with the state's evidence; and that the question of whether the jury fully understood Ms. James's testimony was material to a determination of defendant's guilt or innocence and that the jury had requested this specific evidence. Therefore, this Court held that the failure of the trial court to exercise its discretion was prejudicial.

Contrary to *Lang*, in this case, as the majority points out, we do not know what motivated the foreman of the jury to request "we want to review portions of the testimony." The writer of the majority opinion finds that the defendant relied upon alibi, as the defendant did in *Lang*, and therefore concludes that the foreman must have wanted to hear the testimony concerning the defendant's alibi. This conclusion is sheer speculation. There is nothing in the record in this case which indicates in any fashion what testimony the jury wanted to review. Simply because alibi was one of the factors in the case is no reason to presume that the jury wanted to review that portion of the testimony. The principal witness against the defendant was Ted Killian, who testified for the state pursuant to a plea arrangement. The jury, just as logically, could have wanted to review the testimony of Killian, because his testimony was indeed suspect. The statute under which he testified requires the jury to scan and scrutinize his testimony with care before they accept it. N.C. Gen. Stat. § 15A-1052(c) (1983). The witnesses Robert Bryson and Kathy Gunter had made statements implicating three other persons, including Killian, in the murder of Odom, but had not implicated the defendant. Therefore, the state's entire case turned on the evidence of Killian insofar as implicating the defendant as one of the perpetrators. Also, the jurors might well have wanted to review the testimony of Bryson and Gunter concerning their statements implicating all of the persons except this defendant as being the perpetrators of the murder. So, it appears to me that although the majority strains mightily to support its quantum leap that the jury wanted to hear the alibi testimony, it has failed to do so.

As there is no reasonable way to conclude what part of the transcript the jury wanted to review, there is no reasonable manner in which it can be determined that the defendant was prejudiced by the court's denial of the request without exercising its discretion. It must be remembered that the alleged error is not the court's denial of the jury's request but is, rather, that the court denied the request without exercising its discretion. *See State v. Dover*, 308 N.C. 372, 302 S.E. 2d 232 (1983). There has been no showing made in a reasonable manner that by the court's failure to exercise its discretion in denying the request a different result would have been reached at the trial. N.C. Gen. Stat. § 15A-1443(a) (1983). Stated differently, can this Court say as a

matter of law that had the judge denied the request in the exercise of his discretion, a reasonable possibility exists that a different result would have been reached at the trial? I think not.

Furthermore, the majority overlooks the statutory rules for determining prejudice as expressed in N.C.G.S. 15A-1443(a):

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.

15A-1443(a) establishes the test for determining prejudice arising from all errors (including state constitutional errors) except errors under the Constitution of the United States, which are governed by N.C.G.S. 15A-1443(b). Under this test defendant has failed to demonstrate prejudice.

Defendant received a fair trial, without prejudicial error.

Chief Justice BRANCH joins in this dissenting opinion.

JEAN LEE TETTERTON, ADMINISTRATRIX OF THE ESTATE OF ORLANDER B. TETTERTON, DECEASED v. LONG MANUFACTURING COMPANY, INC., AND REVELS TRACTOR COMPANY, INC.

No. 260PA84

(Filed 3 July 1985)

1. Appeal and Error § 3— constitutionality of G.S. 1-50(6) properly raised at trial

In a products liability action arising from the death of plaintiff's intestate while operating a tobacco harvester, the issue of whether G.S. 1-50(6) is constitutional was properly presented to the trial court and was properly before the Supreme Court where the petition for rehearing in the Court of Appeals included an affidavit signed by the presiding judge stating that the issue had been raised, presented, and argued at a hearing on a motion for summary judgment.

2. Constitutional Law § 20.1— statute of repose for products liability actions—no violation of equal protection

G.S. 1-50(6) does not violate the equal protection clauses of the state or federal constitutions because the act was intended to apply to manufacturers and retail sellers alike and does not discriminate between manufacturers and retail sellers of products. The statute also includes individuals engaged in the business of selling a product and bars all actions brought after six years whether those actions are characterized as first party actions, cross-claims, or counterclaims. G.S. 99B-1(3), G.S. 99B-2, G.S. 99B-4, G.S. 99B-1(4).

3. Constitutional Law § 19— statute of repose for products liability actions—not a special emolument

G.S. 1-50(6) does not grant an exclusive or separate emolument or privilege because the statute on its face does not create a special emolument or privilege. G.S. 1-50(5), Art. I, § 32 of the North Carolina Constitution.

4. Courts § 1— statute of repose for products liability action—no violation of open courts clause

G.S. 1-50(6) does not violate the open courts clause of the North Carolina Constitution by barring a claim before the death giving rise to the claim occurs because the time period is not so short that it would effectively abolish all claims. Art. I, § 18 of the North Carolina Constitution.

5. Statute of Limitations § 4.2— statute of repose for products liability actions—not unconstitutionally vague

G.S. 1-50(6) is not unconstitutionally vague in its use of "initial purchase for use or consumption" where the tobacco harvester in question was sold by defendant manufacturer to a dealer in 1974, the dealer sold it to a farmer in 1975, that farmer sold it to Revels Tractor Company, Inc. in 1981, and Revels sold it to plaintiff's intestate in 1981. The obvious intent of the Legislature was to limit the manufacturer's liability after a certain period of years had elapsed from the date of initial purchase for use or consumption; if every consumer's subsequent purchase was characterized as an initial purchase, the manufacturer's liability would extend indefinitely and the intent of the Legislature would be defeated.

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

ON discretionary review of the decision of the Court of Appeals, 67 N.C. App. 628, 313 S.E. 2d 250 (1984), affirming summary judgment entered in favor of defendant Long Manufacturing Company, Inc., during the 18 February 1983 civil non-jury session of PITT County Superior Court.

Gaylord, Singleton, McNally, Strickland & Snyder, by L. W. Gaylord, Jr., and Vernon G. Snyder, III, for plaintiff-appellant.

Young, Moore, Henderson & Alvis, by John E. Aldridge, Jr., and Robert C. Paschal, for defendant-appellant Revels Tractor Company, Inc.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Patricia L. Holland, for defendant-appellee Long Manufacturing Company, Inc.

FRYE, Justice.

FACTS

Factually, this matter is not complicated. Defendant-appellee Long Manufacturing Company, Inc. (hereinafter Long) manufactured a tobacco harvester on 10 April 1974. Thereafter, on 1 July 1974, Long sold the harvester to a dealer and distributor, who subsequently sold the tobacco harvester to a farmer on 7 March 1975. The farmer used the equipment on his farm until he sold it to defendant-appellant Revels Tractor Company, Inc. (hereinafter Revels) on 3 February 1981. On 7 July 1981, Revels sold the tobacco harvester to plaintiff-appellant's husband.

Plaintiff's husband was killed on 8 July 1981 while operating the tobacco harvester on his farm. Plaintiff alleged in her complaint "[t]hat the direct and proximate cause of the . . . death of plaintiff's intestate was the negligent design, manufacture and sale of said tobacco bulk harvester by defendant Long Manufacturing Company, Inc., in that the directions for the operation of the aforesaid 'lift control lever,' which operated the cable and forklift system supporting the trailer which collapsed, were inaccurately, misleadingly and defectively labeled." Plaintiff was appointed administratrix of the estate of her deceased husband, and she commenced an action against Long, the manufacturer, and Revels, the retailer, on 6 October 1981.

In its answer, Long pled as an affirmative defense the provisions of G.S. 1-50(6), the six-year statute of repose for product liability actions. Revels filed an answer denying liability and also cross-claiming against Long for indemnity and contribution. After the filing of the initial pleadings and the initiation of discovery, Long moved for summary judgment, relying upon G.S. 1-50(6) and alleging that the statute operated to bar any actions filed against it. On 18 February 1983, the trial court granted Long's motion for summary judgment, and the claims of plaintiff and Revels were dismissed. From this order, plaintiff and Revels appealed to the

Court of Appeals. That court affirmed the judgment of the trial court. Plaintiff and Revels thereafter petitioned for discretionary review to this Court, which was allowed.

I.

[1] The dispositive issue on this appeal is whether G.S. 1-50(6) is constitutional. We conclude that the statute is constitutional. The Court of Appeals declined to reach this precise issue because the record that was before that court did "not affirmatively disclose that the constitutionality of N.C. Gen. Stat. § 1-50(6) was raised, discussed, considered, or passed upon in the trial court." *Tetterton v. Long Manufacturing Company, Inc.*, 67 N.C. App. 628, 630, 313 S.E. 2d 250, 251 (1984). The Court of Appeals cited and relied upon *Midrex Corp. v. Lynch*, 50 N.C. App. 611, 274 S.E. 2d 853, *disc. rev. denied and appeal dismissed*, 303 N.C. 181, 280 S.E. 2d 453 (1981) to support its conclusion. In that case the court stated:

> The record does not contain anything in the pleadings, evidence, judgment or *otherwise*, to indicate that any constitutional argument was presented to the trial court. The appellate court will not decide a constitutional question which was not raised or considered in the trial court . . . . The record must affirmatively show that the question was raised and passed upon in the trial court.

Id. at 618, 274 S.E. 2d at 857-58. (Emphasis added.)

It is true that neither Long's motion for summary judgment nor the judgment itself, both of which are in the record on appeal, makes reference to the constitutionality of the statute relied upon by Long. This is entirely proper, since it is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law. *Mosley v. National Finance Co. Inc.*, 36 N.C. App. 109, 243 S.E. 2d 145, *cert. denied*, 295 N.C. 467, 246 S.E. 2d 9 (1978). We find, however, that the record does "otherwise" contain indications that the constitutional issue was before the trial court. Both plaintiff and Revels assigned as error the fact that the trial judge improperly granted Long's summary judgment motion because the statute relied upon was unconstitutional. Although not before the Court of Appeals when the case was initially heard and decided by that court, plaintiff and Revels

included in their petition for rehearing to that court an affidavit signed by Judge Reid, who presided at the hearing on the summary judgment motion. That affidavit stated:

> 3. That at the aforesaid hearing upon Motion for Summary Judgment, the issue of the constitutionality of G.S. 1-50(6) was timely raised, presented, and argued to the Court following submission to the Court by the parties of trial briefs specifically directed to their respective positions concerning the constitutionality or unconstitutionality of the said G.S. 1-50(6).

Thus, we conclude that the record indicates that the constitutional question was properly presented to and considered by the trial court and the Court of Appeals below and is properly before this Court on appeal.

II.

Plaintiff contends that G.S. 1-50(6) is unconstitutional because it violates (1) the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, § 19, of the North Carolina Constitution; (2) the prohibition against "exclusive or separate emoluments or privileges" in Article I, § 32, of the North Carolina Constitution; and (3) the "open courts" provision of Article I, § 18, of the North Carolina Constitution. Plaintiff also contends that G.S. 1-50(6) is unconstitutionally vague. Defendant, Revels Tractor Company, Inc., joins in plaintiff's equal protection argument. We will address each of these arguments separately.

In the case *sub judice*, all of the parties stipulated and agreed to the following:

> (4) For the sole purpose of this appeal, summary judgment on behalf of Long Manufacturing Company, Inc., would only be appropriate if plaintiff's action is barred by the applicable North Carolina statute of limitations;

This stipulation further refines the scope of inquiry on this appeal to a determination of whether plaintiff's action is barred by G.S. 1-50(6).

A.

G.S. 1-50(6), the statute in controversy, provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

As applied to the instant facts and to plaintiff's action against Long, farmer Jimmy Ray Casey initially purchased the tobacco harvester to be used on his farm on 7 March 1975. On 6 October 1981, more than six years after this initial purchase by farmer Casey, plaintiff commenced her action to recover for the death of her husband, who had subsequently purchased the equipment from defendant Revels on 7 July 1981. Long raised as an affirmative defense in its answer G.S. 1-50(6), a statute of repose which bars a products liability action if commenced more than six years after the date of initial purchase for use or consumption. Ultimately, plaintiff's action and defendant's cross-action were dismissed against Long based upon this statute.

In addressing the constitutional challenges to the statute, certain rules of statutory construction must be adhered to. In construing a statute to determine whether it is constitutional, our courts have consistently recognized that there is a strong presumption that an enactment of the legislature is constitutional. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Furthermore, reasonable doubts must be resolved in favor of sustaining the act. *Id.* Our Court has stated, "In considering the constitutionality of a statute, it is well established that the courts will indulge every presumption in favor of its constitutionality." *Painter v. Wake County Board of Education*, 288 N.C. 165, 177, 217 S.E. 2d 650, 658 (1975). A statute will not be declared unconstitutional unless it is clearly so, and all reasonable doubt will be resolved in favor of its validity. *Glenn v. Board of Education of Mitchell County*, 210 N.C. 525, 187 S.E. 781 (1936).

[2] Plaintiff contends "that G.S. 1-50(6) violates the equal protection clauses of both our State and Federal Constitutions on the basis that it impermissibly distinguishes between manufacturers and suppliers as sellers of products who are protected from liabili-

ty beyond the specified six-year period and retail businesses and private individuals as sellers of the identical products who are not granted the same protections." Revels also joins plaintiff in this argument. G.S. 1-50(6) was enacted in 1979 and incorporated into the products liability statute, Chapter 99B. This chapter describes the actions to which the statute applies. In pertinent part, G.S. 99B-1(3) provides:

> (3) "Product liability action" includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the *manufacture*, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, *selling*, advertising, packaging or labeling of any product. (Emphasis added.)

On the face of the statute, a product liability action includes one involving the manufacture and sale of a product. Within the act are definitions of a manufacturer[1] and a seller.[2] Furthermore, Sections 99B-2 and B-4 refer to the liability of a seller *and* manufacturer. On the face of this statute, it seems evident that this act, along with the applicable statute of repose contained within G.S. 1-50(6), was meant and intended to apply to manufacturers and retail sellers alike.

Even before Chapter 99B was enacted, product liability actions were brought against both manufacturers and sellers under a negligence theory. *See Prosser and Keeton on Torts* § 100 (5th ed. 1984). However, when the theory of recovery was breach of warranty, a plaintiff was prevented from bringing a claim against a manufacturer or seller if there was no contractual privity between the manufacturer or seller and plaintiff. *Davis v. Siloo*,

1. (2) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.

2. (4) "Seller" includes a *retailer*, wholesaler, or distributor, and means any individual or entity engaged in the business of selling a product, whether such is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product. (Emphasis added.)

Inc., 47 N.C. App. 237, 267 S.E. 2d 354 (1980), *disc. rev. denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980). In that situation, the plaintiff had to commence an action against the party with whom he was in privity, usually the retailer. *See Tedder v. Pepsi-Cola Bottling Co., Inc.*, 270 N.C. 301, 154 S.E. 2d 337 (1967); 63 Am. Jur. 2d, *Products Liability* § 596 (1984). In turn, the retail seller would have to sue the wholesaler, who would in turn have to sue the manufacturer. *Tedder*, 270 N.C. 301, 154 S.E. 2d 337. This particular view has been rejected by a large and growing number of jurisdictions. 63 Am. Jur. 2d, *supra*, § 632. In fact, our Court in *Kinlaw v. Long Mfg. Co.*, 298 N.C. 494, 259 S.E. 2d 552 (1979) held that privity was not required in an action brought by a purchaser against a manufacturer based on the theory of express warranty. G.S. 99B, our products liability chapter, expressly abrogates this privity requirement in certain cases based on implied warranty. N.C. Gen. Stat. 99B-2(b). Essentially, this enables a plaintiff to bring a direct action against the manufacturer based on a warranty theory absent privity of contract. These facts further support the conclusion that this statute was intended to apply to both retail sellers and manufacturers.

Plaintiff maintains that the purported effect of G.S. 1-50(6) would be "to abolish plaintiff's right of action against the manufacturer, defendant Long, as the party whose original negligence in the design, manufacture and sale of the tobacco harvester proximately resulted in the death of plaintiff's intestate. Correspondingly, plaintiff's right of action against defendant Revels Tractor Company, Inc., as the unfortunate retail seller of Long's defective product, is preserved." This argument by plaintiff does not persuade this Court that the statute is violative of either the State or Federal Constitution, since the statute does not distinguish between manufacturers and retail sellers of products who are protected from liability beyond the six-year period of repose. Furthermore, plaintiff's argument that an individual is not included within G.S. 1-50(6) is also meritless. Section 99B-1(4) provides that an individual is a seller within the meaning of the statute, if that individual is "engaged in the business of selling a product, whether such sale is for resale or for use or consumption." Thus, plaintiff's argument that the statute impermissibly distinguishes between these two groups is unpersuasive.

Within this equal protection argument, Revels and plaintiff also contend that Section 1-50(6) is unconstitutional, because it relieves the original manufacturer of liability, and then shifts all such liability to the subsequent supplier or dealer who is not protected by Section 1-50(6). In other words, Revels argues that even though the plaintiff's claim against the manufacturer might be barred by the six-year statute of repose, the cross-claim of a subsequent dealer or supplier should not be barred by Section 1-50(6). Section 1-50(6) clearly provides that "*no action* for the recovery of damages . . . based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." It is clear from this language that Section 1-50(6) excludes *all actions* brought after six years, whether these actions are first-party actions, cross-claims or counterclaims.

Furthermore, the mere characterization of the claimant's claim should not govern the applicability of the statute of repose contained in G.S. 1-50(6). Defendant Revels contends that since it occupies the position of a cross-claimant, its claim should survive the prohibition of Section 1-50(6), even though the first-party claimant's claim does not survive. This is merely an argument of form over substance. Taking defendant Revels' argument to its logical conclusion, the door would easily be opened to avoid the impact of Section 1-50(6). The legislative intent would be thwarted if this Court allowed Revels to do indirectly what it could not do directly, and the chief virtue of the statute, its certainty, would be destroyed. Therefore, we reject Revels' and plaintiff's equal protection argument.

B.

[3] Closely related to the parties' equal protection argument is plaintiff's claim that G.S. 1-50(6) grants "exclusive or separate emoluments or privileges" to the persons it protects in violation of Article I, § 32, of the North Carolina Constitution. This argument is also rejected.

This Court in *Lamb* addressed a similar challenge to G.S. 1-50(5), a statute of repose "designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Id.* at 427-28, 302 S.E. 2d at 873. Excluded from the protection of the statute

were materialmen, suppliers, manufacturers, and persons in actual possession and control of the property. Our Court held that the distinction between the groups was valid and constitutionally permissible. "The legislature could reasonably adjudge that the public welfare would be best served by the classification it chose to make. Therefore, the classification does not create a special emolument or privilege within the meaning of the constitutional prohibition." *Id.* at 439, 302 S.E. 2d at 879.

In the case *sub judice*, the statute does not on its face create a distinction between the groups as contended by plaintiff. Therefore, it does not create a special emolument or privilege within the meaning of the constitutional prohibition. Accordingly, we do not find the statute unconstitutional on this ground.

C.

[4] Plaintiff's next constitutional challenge is that the statute violates Article I, § 18, of the North Carolina Constitution, which states:

> *Courts shall be open.* All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Plaintiff argues that the effect of the statutory scheme is to bar the claim for plaintiff's intestate's death before the death ever occurred, thus denying her a remedy "for an injury done" in violation of Article I, § 18, of the North Carolina Constitution. This argument is also rejected.

In our recent case of *Lamb*, 308 N.C. 419, 302 S.E. 2d 868, an identical attack was made upon G.S. 1-50(5), discussed in Section B, *supra*. This Court concluded that G.S. 1-50(5) did not violate the "open courts" provision of our constitution. "We do not believe it correct to say that the statute bars a claim before the injury giving rise to the claim occurs. The statute's effect is that unless the injury occurs within the six-year period, there is no cognizable claim." *Id.* at 440, 302 S.E. 2d at 880. A well-reasoned analysis of opinions from other jurisdictions was included in *Lamb*. Ultimately, we rejected plaintiff's argument in that case.

In *Lamb* this Court further observed that "the legislature might pass a statute of repose that had a time period so short that it would effectively abolish all potential claims." *Id.* at 444, 302 S.E. 2d at 882, n. 7.

However, we are not convinced that this would occur in cases involving older durable goods, such as the tobacco harvester involved in the present case. In fact, in claims against manufacturers of older durable goods, "over 97 percent of product-related accidents occur within six years of the time the product was purchased . . . ." Mod. Unif. Prod. Liab. Act, Sec. 110 analysis, *reprinted in* 44 Fed. Reg. 62,714, at 62,733 (1979) citing Ins. Servs. Office, 1977 Products Liability Closed Claims Survey: A Technical Analysis of Survey Results; *see also* 1981 Legislative Research Commission Products Liability, Report of the General Assembly of North Carolina ("[N]ationwide data shows that most claims are filed before that [6-year] period is up. . . ." *Id.* at 5).

The enactment of the statute of repose was generally intended to shield these manufacturers of durable goods from "open-ended" liability created by allowing claims for an indefinite period of time after the product was first sold and distributed. Mod. Unif. Prod. Liab. Act *supra, reprinted in* 44 Fed. Reg., at 62,733.

> The advantages of these statutes are that they: (1) establish an actuarially certain date after which no liability can be assessed; and (2) eliminate tenuous claims involving older products for which evidence of defective conditions may be difficult to produce.

Id. (Citation omitted.)

The foregoing analysis and reasoning persuade us that plaintiff's constitutional challenge based upon the open courts provision of the North Carolina Constitution must be rejected.

D.

[5] Plaintiff's final challenge to G.S. 1-50(6) is that the built-in "accrual" date language—"initial purchase for use or consumption"—is unconstitutionally vague. Plaintiff maintains that reasonable arguments could be advanced for three separate dates as constituting the date of "initial purchase for use or consumption": (1) 1 July 1974, at which time defendant Long sold the Long

tobacco harvester to Quality Tractor Sales & Service; (2) 7 March 1975, at which time Quality Tractor Sales & Service sold the Long tobacco harvester to Jimmy Ray Casey; (3) 7 July 1981, at which time Revels Tractor Company, Inc., sold the Long tobacco harvester to plaintiff's intestate. Furthermore, plaintiff urges this Court, if it should determine that the statute is not unconstitutionally vague, to interpret the phrase to mean that 7 July 1981 was the "initial purchase."

Keeping in mind that plaintiff's challenge is based upon the application of the statute to defendant manufacturer, we do not find such language to be unconstitutionally vague. In construing this language, the normal rules of statutory construction apply: the intent of the legislature controls; words in a statute are normally given their natural and recognized meanings; and the statute will be interpreted so as to avoid absurd consequences. *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 276 S.E. 2d 422 (1981) (citations omitted).

The statute of repose was enacted as a part of the products liability act, which was the legislature's "response to the upheaval in product liability law of the 1970's." T. Dworkin, *Product Liability of the 1980's: "Repose is Not the Destiny" of Manufacturers*, 61 N.C. L. Rev. 33 (1982). The number of suits being brought against manufacturers was increasing during this period of time and the legislature sought to curtail such suits and to limit the manufacturers' liability by enacting product liability reform statutes.

> Proponents of statutes of repose contend that the most significant problem for industry in product liability actions is the long 'tail' or period of potential liability, facing manufacturers and sellers of products. Permitting a person to bring a product liability action within an indefinite period of time after the product reaches the stream of commerce subjects the *seller or manufacturer* to potential liability for an unlimited time after *his* contact with the product has ended. Manufacturers favor statutes of repose because they eliminate the 'tail' problems of older products.

F. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 593 (1981). (Emphases added.)

Thus, the obvious intent of the legislature in cases like the present one was to limit Long's, the manufacturer's, liability after a certain period of years had elapsed from the date of initial purchase for use or consumption. "Initial" is defined in Webster's Third New International Dictionary (1976) to mean "of or relating to the beginning: marking the commencement: incipient, first." The first purchase in this case "for use or consumption" was by farmer Casey. If plaintiff's argument was adopted and every consumer's subsequent purchase was characterized as an "initial" purchase, then the manufacturer's liability could extend indefinitely. Such a result would certainly defeat the intent of the legislature to limit the manufacturer's liability at some definite point in time. It would also produce an absurd consequence, since each new purchase by a party would effectively extend the time within which that party could commence an action against the original manufacturer. This, of course, could extend for an indefinite number of years, since some products have a useful life of many years in excess of six years.

By interpreting the statute in this manner, the manufacturer's potential liability would extend "for an unlimited time after *his* contact with the product has ended." McGovern, *supra* (emphasis added). There is no controversy regarding farmer Casey's purchase of the tobacco harvester for use or consumption. Therefore, in plaintiff's action against defendant Long, the manufacturer, the initial purchase for use or consumption was made by farmer Casey on 7 March 1975, more than six years prior to the time plaintiff commenced her action against defendant Long. We do not find this language to be unconstitutionally vague. Therefore, plaintiff's argument is rejected.

Defendant Revels raises an additional argument in its brief regarding an interpretation of this statute as applied to Revels' cross-action. However, for the purposes of this appeal, the dispositive issues concern the constitutionality of the statute as applied to plaintiff's action. As stated earlier in this opinion, the parties stipulated that summary judgment would only be proper if *plaintiff's action* is barred by the statute. We have already determined that the statute is constitutional and that plaintiff's action is barred. Therefore, we find it unnecessary to address Revel's final argument.

III.

As was true in *Lamb*, there is authority from other jurisdictions that will support both plaintiff's and Long's arguments herein. Recently, an appellate court in Indiana was faced with almost identical attacks against that state's statute of repose for products liability actions. *Scalf v. Berkel, Inc.*, --- Ind. App. ---, 448 N.E. 2d 1201 (1983). In that case a meat market employee brought a product liability action against the manufacturer of a meat grinding machine. The trial court granted defendant's summary judgment motion based upon the statute of repose, both parties agreeing "that the meat grinder [had been] delivered to the initial user or consumer more than ten years prior to the occasion of [plaintiff's] injury . . . ." *Id.* at ---, 448 N.E. 2d at 1202.

All of plaintiff's constitutional challenges to the statute of repose were very similar to those advanced by plaintiff in this case. The court in that case also rejected all of the challenges to the statute. Using a rational relationship test, the court concluded that the limitation period was reasonably related to the purpose of the statute, namely, "to eliminate problems associated with obtaining product liability [insurance] protection." *Id.* at ---, 448 N.E. 2d at 1206.

The constitutionality of G.S. 1-50(6) was challenged recently in a suit filed in the United States District Court for the Eastern District of North Carolina. *Brown v. General Electric Co.*, 584 F. Supp. 1305 (E.D.N.C. 1983). In that case, plaintiffs contended that as applied to them the statute violated the due process clause and on its face was violative of the equal protection clause of the Federal and North Carolina constitutions. Plaintiffs also argued that the statute violated the "open courts" provision of the North Carolina constitution. The District Court granted summary judgment for all defendants, including the manufacturer, after viewing G.S. 1-50(6) as a statute of repose and an absolute bar to plaintiffs' products liability action. *Id.* The Fourth Circuit Court of Appeals, in a per curiam opinion, affirmed the District Court, rejecting plaintiffs' constitutional challenges to the statute as did the court below. *Brown v. General Electric Co.*, 733 F. 2d 1085 (1984) (per curiam).

Similar challenges have been launched against statutes of repose in other jurisdictions and also rejected. *Wayne v. Ten-*

nessee Valley Authority, 730 F. 2d 392 (5th Cir. 1984); *Mathis v. Eli Lilly and Co.*, 719 F. 2d 134 (6th Cir. 1983); *Groth v. Sandoz, Inc.*, 601 F. Supp. 453 (D. Neb. 1984); *Drague v. Piper Aircraft Corp.*, 275 Ind. 520, 418 N.E. 2d 207 (1981); *Reeves v. Ille Electric Co.*, 170 Mont. 104, 551 P. 2d 647 (1976); *Josephs v. Burns*, 260 Or. 493, 491 P. 2d 203 (1971); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 382 A. 2d 715 (1978); *Harrison v. Schrader*, 569 S.W. 2d 822 (Tenn. 1978). Additionally, we recognize that there have been decisions contra in other jurisdictions. *Lankford v. Sullivan*, 416 So. 2d 996 (Ala. 1982); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980); *Overland Construction Company v. Sirmons*, 369 So. 2d 572 (Fla. 1979); *Saylor v. Hall*, 497 S.E. 2d 218 (Ky. 1973); *Kennedy v. Cumberland Engineering Co.*, --- R.I. ---, 471 A. 2d 195 (1984) (dissenting opinion); *Daugaard v. Baltic Cooperative Building Supply Association*, 349 N.W. 2d 419 (S.D. 1984) (dissenting opinion).

The lengthy and well-reasoned dissenting opinion authored by Justice Murray in *Kennedy* strongly criticized the majority for invalidating Rhode Island's statute of repose for products liability actions. Essentially, the dissent maintained that the result reached by the majority was incorrect and premised upon faulty reasoning in several areas. Justice Murray stated in his dissent:

> Charles Kennedy's injuries invoke sympathy and compassion. However, emotional concern in the absence of a clear constitutional mandate does not justify ambiguity in the field of products liability.
>
> In my view, policy determinations concerning economic issues are most properly made in the legislative arena where all the factors surrounding a particular problem may be weighed. When the Legislature is properly concerned with balancing competing interests to ensure a stable market for the manufacture of basic products and acts to do so by enacting a statute of repose, our inquiry should end. Our Legislature is at least as competent as this Court in making economic policy determinations.

Kennedy, 471 A. 2d at 206 (dissenting opinion).

As was stated in *Lamb*:

> [T]he General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter.

308 N.C. at 444, 302 S.E. 2d at 882 (citation omitted). As in that case, we reject the parties' constitutional challenges to the statute.

Accordingly, 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. CHARLES ALLEN GRIER

No. 471A84

(Filed 3 July 1985)

1. **Criminal Law § 40— unavailable witness—prior testimony—test for State's effort to locate**

The test for whether the prosecution can admit a transcript of prior testimony for an unavailable witness is not that the prosecution must exhaust all conceivable means in the effort to locate the witness, but only that it undertake in good faith some reasonable, affirmative measures to produce the witness for trial.

2. **Constitutional Law § 65; Criminal Law § 40— unavailable witness—prior testimony—State's effort to locate sufficient**

The recorded testimony of a witness at defendant's first trial for first-degree burglary and rape was properly admitted at defendant's second trial where the witness could not be located. The confrontation requirement that good faith efforts be made to locate the witness was satisfied by the repeated attempts of prosecutorial authorities to contact the witness at three known addresses where he could either be located or reached; repeated conversations and messages left with defendant's ex-wife; a visit to defendant's purported workplace; and the enlistment of the aid of the original district attorney who had had a good rapport with the witness. Moreover, there was evidence that the witness was afraid to testify because of an assault involving another member of his family and defendant's relatives.

State v. Grier

BEFORE *Kirby, J.*, at the 9 April 1984 Criminal Session of Superior Court, MECKLENBURG County, defendant was convicted of first-degree rape and first-degree burglary. A sentence of life imprisonment was imposed for the first-degree burglary offense, and a sentence of life imprisonment was also imposed for the first-degree rape offense. Pursuant to N.C.G.S. § 7A-27(a), defendant appeals. Heard in the Supreme Court 11 April 1985.

Defendant was originally charged in true bills of indictment, proper in form, with first-degree burglary of the dwelling house of James Lee, located at 2026 Thomas Avenue, Charlotte, North Carolina on 22 September 1981 and the first-degree rape of Marie Cable Lee on the same date and at the same location. The defendant was subsequently convicted of these offenses before Judge Ferrell in Superior Court, Mecklenburg County on 17 February 1981, and received life sentences for each offense. Defendant appealed to this Court and these convictions were reversed and the matter remanded to the Superior Court, Mecklenburg County for a new trial. *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983).

The central issue in the reversal of defendant's earlier convictions was the use of polygraph evidence by the State. Upon retrial, and prior to a jury being empaneled, the trial court heard a motion on the part of the State to allow the introduction of a portion of the transcript from the earlier proceedings containing the testimony of State's witness, Ronnie James Easterling, on the ground that Easterling was unavailable to testify before the jury. The defendant's identity as the perpetrator had been an issue in the first trial and Easterling had testified to the effect that he had overheard the defendant telling someone that defendant had been involved in a "lick" (a robbery) on Thomas Avenue.

The defendant opposed the State's motion and the trial court conducted a voir dire to determine the admissibility of the prior recorded testimony and particularly whether the witness was unavailable to testify. After hearing several witnesses presented by the State to demonstrate the efforts made by various members of the Mecklenburg County District Attorney's Office and Sheriff's Office, the trial court found that the State had made a good faith effort to locate the witness and that he was unavailable. Accordingly the court ruled that the State would be permitted to introduce portions of the transcript of Easterling's prior testimony,

after the elimination of any such portions to which objections were made by defense counsel and sustained by the trial court. Easterling's prior recorded testimony was presented to the jury during the trial by means of reading from the transcript, after it had been authenticated by the court reporter who reported the first trial. The record does not indicate that any other objections to any specific questions or answers were lodged by the defendant.

In addition to Easterling's testimony, the State presented evidence which tended to show that on 22 September 1981 at approximately 12:45 a.m., James Lee was watching television in the well-lit living room of his duplex apartment located at 2026 Thomas Avenue, Charlotte, North Carolina. Suddenly, a locked storm door to the living room was forced open and a tall black male entered, placed a pistol to Mr. Lee's head, and demanded his money. Mrs. Lee, who had been sleeping in her bedroom down the hall from the living room, was then awakened when her miniature poodle jumped from her bed and ran to the living room. Mrs. Lee came to the living room, but her husband told her to go back. The intruder then requested Mrs. Lee to come into the living room. Next, Mr. and Mrs. Lee were forced back into Mrs. Lee's bedroom and both were ordered to lie down upon the bed. While pointing the shotgun at Mrs. Lee and her husband, the intruder forced Mrs. Lee to have sexual intercourse with him.

After consummation of the rape, the intruder forced Mr. Lee to accompany him to another room of the house looking for valuables. While the intruder was looking around the bedroom, Mr. Lee reached behind a curtain for his shotgun, loaded it and went into the hall. There, Mr. Lee saw the intruder coming out of Mrs. Lee's bedroom with a portable television set. When Mr. Lee pointed the shotgun at the intruder, the man fell to the floor, rolled over, and knocked the shotgun upwards, causing it to discharge into the ceiling. Mr. Lee then ran back to his bedroom and the intruder got up, ran to the front door with the television, and as he went out of the door, fired three shots back toward the bedroom. Mr. Lee than ran to the front porch and fired a second shot, missing the intruder as he fled up the street.

Mr. and Mrs. Lee described the intruder as a black male with an "Afro hairdo" and bearded face. They stated that the intruder

was wearing white pants and a white coat trimmed in red. Mr. Lee described the intruder as being six feet eight inches tall; whereas Mrs. Lee described him as six feet tall. Both assisted the police in making a composite of the intruder. A few days after the burglary and rape, Mr. and Mrs. Lee were unable to identify the intruder from a photographic lineup. However, Mrs. Lee expressed the opinion that she could identify the intruder from a physical lineup. Thereafter on 2 October 1981, Mrs. Lee identified the defendant from a physical lineup, while Mr. Lee was unable to do so. An officer who conducted the lineup testified that the defendant was five feet nine inches tall.

Mr. Lee had identified a hair comb or "Afro pick-comb" that was found in his home after the incident. The hairs taken from the comb were found to be consistent with known hair samples taken from the defendant by a criminologist of the Microanalysis Section of the Charlotte-Mecklenburg Crime Laboratory.

The presence of semen was detected on Mrs. Lee's dress and the sheet on her bed. A PGM (enzyme) test of the semen on the sheet revealed a type 2-1. A test of the semen on Mrs. Lee's dress showed a weak type A and type 2-1 in the PGM grouping. Blood grouping tests of the defendant showed that he had a type A in an ABO grouping test and type 2-1 in a PGM grouping test. Blood grouping tests of Mrs. Lee revealed a type O in the ABO grouping and type 1-1 in the PGM grouping. Approximately twelve percent of the population has an ABO type A and a PGM type 2-1 in blood groupings.

The State also presented evidence by way of the transcript of the former trial that a few days after the rape, on 28 September 1981, Ronnie Easterling was interrupted by the loud conversation of the defendant with another person. At the time, Easterling was using a pay telephone near Polk's store on the corner of Pegram Street. The witness overheard the defendant say that he had made a "lick" (a robbery) on Thomas Avenue and that he was going there to get a little money box and shotgun. Easterling had also overheard the defendant say that the incident had been reported on television, that the old man had shot at him, and that some buckshot had brushed across his head.

The defendant presented evidence in the nature of an alibi. He testified that on the evening in question, he was at his moth-

er's apartment with his girlfriend, his brother and his brother's girlfriend. Defendant further testified that he had never been to the Lees' home, had never spoken with them, did not sexually assault Mrs. Lee and did not burglarize the Lee home. On cross-examination, defendant stated that the Lees' home was less than a mile from his own residence on Allen Street. Defendant admitted to having been convicted in the past of common law robbery as well as some other offense.

The defendant also presented the corroborative testimony of his now deceased sister, Shirley Howard, by way of the transcript of his former trial. However, the reading of Shirley Howard's testimony to the jury was not taken down by the court reporter at the subsequent trial, was not made a part of the transcript and is therefore not contained in the record on appeal.

The jury, after hearing arguments of counsel and after being instructed by the court, deliberated and returned verdicts of guilty as charged on both counts. At the sentencing phase of the trial, the trial judge found two factors in aggravation and no factors in mitigation of punishment for the first-degree burglary offense and imposed a sentence of life imprisonment. For the first-degree rape offense, a life term was also imposed. The trial court failed to specify that the sentences were to run consecutively; therefore, defendant's two life sentences are to run concurrently. N.C.G.S. § 15A-1354(a).

Lacy H. Thornburg, Attorney General, by William B. Ray, Assistant Attorney General, for the State.

Fritz Y. Mercer, Jr., for defendant appellant.

MEYER, Justice.

The sole issue presented for review is whether the trial court erred by allowing into evidence, over the defendant's objection, that portion of the transcript of evidence at defendant's former trial containing the testimony of State's witness Ronnie Easterling, who was not available to testify at defendant's subsequent trial for the same offenses. It is the defendant's contention that the witness was available and that the State failed to make the "good faith effort" to locate him prior to trial as required before this form of hearsay evidence may be admitted against a defend-

ant in a criminal action under the state and federal constitutions. For the reasons set forth below, we conclude that the prior recorded testimony of the unavailable witness was properly admitted into evidence at the defendant's second trial for the burglary of the Lee residence and the rape of Mrs. Lee and affirm the convictions and sentences imposed as a result of defendant's new trial.

As a general rule, the recorded testimony of a witness in a former trial will not ordinarily be admitted as substantive evidence in a later criminal trial as the prior testimony is considered hearsay, the admission of which would violate the accused's right of confrontation guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. If possible, the witness himself must be produced to testify *de novo*. *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597 (1980); *Mancusi v. Stubbs*, 408 U.S. 204, 33 L.Ed. 2d 293 (1972); *Barber v. Page*, 390 U.S. 719, 20 L.Ed. 2d 255 (1968); *State v. Prince*, 270 N.C. 769, 154 S.E. 2d 897 (1967); *State v. Cope*, 240 N.C. 244, 81 S.E. 2d 773 (1954).

However, despite the "preference for face-to-face confrontation at trial" reflected by the Confrontation Clause, *Ohio v. Roberts*, 448 U.S. at 63, 65 L.Ed. 2d at 606, it has long been held that an exception to the confrontation requirement will be recognized where a witness is unavailable to testify, but has given testimony at a previous judicial proceeding against the same defendant, and was at that time subject to cross-examination by that defendant. *Barber v. Page*, 390 U.S. at 722, 20 L.Ed. 2d at 258; *Mattox v. United States*, 156 U.S. 237, 39 L.Ed. 409 (1895); *State v. Graham*, 303 N.C. 521, 279 S.E. 2d 588 (1981); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977); *State v. Jackson*, 30 N.C. App. 187, 226 S.E. 2d 543 (1976); *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E. 2d 426 (1972). As we stated in *State v. Graham*, "[i]n such a situation, the transcript of the witness' testimony at the prior trial may be admitted as substantive evidence against the same defendant at a subsequent trial. The justification for this exception is that the defendant's right of confrontation is adequately protected by the opportunity to cross-examine afforded at the initial proceeding." 303 N.C. at 523, 279 S.E. 2d at 509.

In *State v. Smith*, 291 N.C. at 524, 231 S.E. 2d at 675, Justice Huskins, writing for the Court, established the three-pronged test which must be met prior to the admission of the prior recorded

testimony of a witness at a subsequent trial as follows: "(1) The witness is unavailable; (2) the proceedings at which the testimony was given was [sic] a former trial of the same cause, or a preliminary stage of the same cause, or the trial of another cause involving the issue and subject matter at which the testimony is directed; and (3) the current defendants were present at that time and represented by counsel."

As to the first requirement, the United States Supreme Court has held that "a witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a *good-faith effort* to obtain his presence at trial." *Barber v. Page*, 390 U.S. at 724-25, 20 L.Ed. 2d at 260 (emphasis added). *Accord Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597; *Mancusi v. Stubbs*, 408 U.S. 204, 33 L.Ed. 2d 293; *California v. Green*, 399 U.S. 149, 26 L.Ed. 2d 489 (1970). "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *California v. Green*, 399 U.S. at 189, n. 22, 26 L.Ed. 2d at 514 (Harlan, J., concurring). Ultimately, the question is whether the witness is unavailable *despite* good faith efforts undertaken prior to trial to locate and present that witness. *Ohio v. Roberts*, 448 U.S. at 74, 65 L.Ed. 2d at 613. The prosecution bears the burden of establishing this evidentiary predicate. *Id.* at 75, 65 L.Ed. 2d at 613.

The defendant in the present case challenges only the prosecution's showing as to the first prong of the three-prong *Smith* test, that of the unavailability of the witness Easterling. On the facts presented by the record, we hold that the trial court correctly determined that Ronnie Easterling's unavailability in the constitutional sense was established.

On voir dire to determine the admissibility of the prior recorded testimony of Ronnie Easterling, the State's evidence tended to show that the prosecution made repeated although unsuccessful attempts to locate Easterling and secure his attendance at defendant's upcoming trial. Calvin Murphy, an attorney and a former District Attorney involved in the initial prosecution of the defendant, testified that at the request of the District Attorney's Office, he attempted to locate the witness by calling an address where the witness formerly lived and by leaving a message for the witness to return his call. Easterling returned Mur-

phy's call at a time when Murphy was away from his office and left a message with Murphy's secretary, but Easterling could not be reached when his telephone call to Murphy was returned. Later, Murphy was given a Piedmont Courts address by the District Attorney's Office. When he went there, he saw a young lady, but the witness himself was not present. Murphy also testified that Easterling had been cooperative at the first trial and had voluntarily appeared, but that the District Attorney's Office was having difficulty in locating him for the subsequent trial.

Arthur F. Herron testified that he was employed by the Mecklenburg County Sheriff's Department as a Deputy Sheriff. Deputy Herron testified that he attempted to serve a subpoena on the witness at three different addresses during the month of February and also during the month of March 1984. Specifically, he had attempted to serve the subpoena during the morning shift on 28 March and again during the afternoon shift on 29 March. Deputy Herron encountered no one at the Louise Avenue or East 20th Street addresses provided to him, but did see the witness' girlfriend at the Piedmont Courts address in February.

Deputy Leroy Perry of the Mecklenburg County Sheriff's Department, who worked the shift opposite Deputy Herron, attempted to serve the subpoena on the witness at the residence of his mother at 821 East 20th Street on 28 March. The witness' mother told the deputy that the witness did not live there, that she did not know where he was, and knew nothing of the other two addresses given. Deputy Perry gave the mother information on a card with his name on it and told the mother that if the witness called or if she happened to get in touch with him, to give the witness his card and the information thereon.

Arthur Wholley testified that he was employed as an investigator with the District Attorney's Office for Mecklenburg County. Wholley was asked to locate Ronnie Easterling for the defendant's trial. He went through the files in his office and discovered three "leads" for the witness: his mother's address at 821 East 20th Street; a former wife, who worked as an Assistant Manager at the K-Mart on Independence Boulevard; and a sister who lived on Louise Avenue. Wholley prepared the subpoenas and discussed the leads and addresses where the witness might be located with the supervisor of the Sheriff's Office. Mr. Wholley

found the witness' ex-wife to be cooperative and he spoke with her several times. When the case came up in February, she told Wholley that the witness was living with a girlfriend at 206 McQuay Street in Piedmont Courts. At Wholley's request, the witness' ex-wife sent a message to the witness requesting him to call the District Attorney's Office regarding the defendant's case, but Easterling never called. Wholley had similar conversations with Easterling's ex-wife in March and was told that Easterling was afraid to contact the District Attorney's Office or to testify because of an assault involving a relative of the witness and the defendant's relatives.

In addition to these efforts, Wholley had twice gone to the address at 821 East 20th Street, but found no one at home. He had also been informed by the witness' ex-wife that Easterling was working on a construction job for the new Marriott Hotel on Tryon and Trade Streets and went to this location, but neither the foreman nor anyone else at the construction site knew of the witness. Wholley had also requested Calvin Murphy to attempt to contact Easterling because Murphy had a good rapport with him, but these attempts also proved to be unsuccessful. Meanwhile, the defendant's case had been set for trial on four different occasions. Because the District Attorney's Office and the Sheriff's Department had ultimately been unsuccessful in locating the witness, he was never actually served with any of the subpoenas issued in connection with defendant's second trial.

At the conclusion of the voir dire, the trial court found that the State had made a good-faith effort to locate the witness and that the witness was unavailable. The court further ruled that the State would, therefore, be permitted to read the unobjected to portions of Easterling's testimony from the transcript of the defendant's prior trial for the benefit of the jury. Later, the trial court made more detailed findings of fact and conclusions of law regarding the admissibility of Easterling's prior recorded testimony. The trial court found, *inter alia*, that the officers of the Sheriff's Department of Mecklenburg County made repeated efforts to locate the witness at the addresses given their office by the District Attorney; that the District Attorney who originally prosecuted the case also assisted in attempting to locate Easterling by visiting one of the addresses; that various members of the Sheriff's Office had attempted to reach Easterling by telephone

and in person, but ultimately failed to contact him; and that in addition to the foregoing, an investigator for the District Attorney's Office made personal efforts to locate Easterling, including repeated conversations with Easterling's ex-wife and visits to Easterling's purported place of employment. Furthermore, the trial court specifically found that "Investigator Wholley, in the course of his efforts to locate the witness, was advised that one reason why the witness was not responding to any of the efforts to locate him was his fear of testifying a second time in the trial."

Based upon the foregoing findings of fact, the trial court concluded as a matter of law that the witness, Ronnie Easterling, "is unavailable and after repeated efforts and repeated continuances of the trial in this criminal case is not available for trial; that he testified under oath at a former trial of this same cause and was extensively cross-examined, and that the defendant, Charles Grier, was present at the time when the defendant [sic] previously testified under oath at the former trial." We find no error in the trial court's determination that the witness was unavailable in the constitutional sense.

[1] The rule of *Barber v. Page*, 390 U.S. 719, 20 L.Ed. 2d 255, relied upon by the defendant, requires only that the prosecutorial authorities make a "good-faith effort" to obtain the presence of the witness at trial. The lengths to which the prosecution must go in that effort is a question of reasonableness. *See California v. Green*, 399 U.S. 149, 172, 26 L.Ed. 2d 489, 504 (Harlan, J., concurring). The defendant in this case argues that although the authorities made some efforts to locate Easterling, they did not do enough in that regard and that other measures were at their disposal which were never effectuated. The test, however, is not that the prosecution must exhaust all conceivable means in the effort to locate a witness, but only that they undertake, in good faith, *some* reasonable, affirmative measures to produce the witness for trial. *Barber v. Page* involved a situation in which *no* affirmative measures were made to locate the witness in question. Here, in contrast, the prosecution made repeated efforts to locate Easterling at the various addresses they had for him both in person and by telephone. That the witness remained unavailable *despite* these repeated efforts indicates neither a lack of good faith on the part of the prosecution nor a lack of reasonable affirmative measures undertaken to locate Easterling.

In *Ohio v. Roberts*, 448 U.S. 56, 65 L.Ed. 2d 597, the Supreme Court held that a good faith effort on the part of the prosecution was demonstrated by evidence showing that the prosecutor had served the witness with five subpoenas at her parents' home over a period of several months and had discussed the matter with her parents, who were also unable to locate the witness. Although with the aid of hindsight, it seemed that other steps might have been undertaken in the effort to locate the witness, who had apparently run away from home, the test of reasonableness was satisfied under the circumstances by "investigation at the last-known real address, and . . . conversation with a parent who was concerned about her daughter's whereabouts." *Id.* at 76, 65 L.Ed. 2d at 614.

[2] We also note that in this case, there was evidence that the witness had been cooperative at the first trial but was afraid to contact the District Attorney's Office or to testify by reason of an assault involving another member of the Easterling family and the defendant's relatives. The trial court specifically found that the witness was not responding to known efforts to locate him by reason of fear of testifying a second time in the trial of the defendant for these offenses. This creates a strong inference that a reason for the unavailability of the witness was in some measure due either to the connivance of the defendant or to the witness' actions to avoid the prosecution's attempt to locate him. It is well-established that a defendant is in no position to complain of his constitutional rights of confrontation and due process by the absence of a material witness if the witness' absence or unavailability is due to the procurement or connivance of the defendant. *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878); *State v. Maynard*, 184 N.C. 653, 113 S.E. 682 (1922); *State v. Small*, 20 N.C. App. 423, 201 S.E. 2d 584 (1974).

Under the circumstances of this case, the repeated attempts made by the prosecutorial authorities to contact the witness at the three known addresses where he could either be located or reached; the repeated conversations and messages left with the defendant's ex-wife; the visit to defendant's purported workplace and the enlistment of the aid of the original District Attorney who had a good rapport with the witness, in the effort to locate and present him to testify were sufficient to satisfy the confrontation requirement that "good-faith efforts" be made to locate

Easterling before his prior recorded testimony be admitted into evidence against the defendant at his second trial. *See also State v. Keller*, 50 N.C. App. 364, 273 S.E. 2d 354, *disc. rev. denied and appeal dismissed*, 302 N.C. 400, 279 S.E. 2d 354 (1981) (due diligence in searching for the absent witness shown by issuance of subpoena in the county of the trial, but not in the county of the witness' residence, where witness had left home, and interviews with his neighbors, family and former associates failed to disclose his whereabouts).

In conclusion, we hold that Ronnie Easterling was unavailable to testify at defendant's second trial despite the good faith efforts of the prosecution to locate and present him to testify in person and that Easterling's prior recorded testimony was properly admitted into evidence. In the trial of the defendant, we find

No error.

CLIFTON D. CAULDER, EMPLOYEE-PLAINTIFF v. WAVERLY MILLS, EMPLOYER-DEFENDANT, AND EMPLOYERS MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 258PA84

(Filed 3 July 1985)

1. **Master and Servant § 68— hazard of occupational disease—nature of substance—concentration in workplace**

For a substance to be a "hazard" of an occupational disease within the meaning of G.S. 97-57, it must be a substance peculiar to the workplace; that is, the substance is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed. G.S. 97-29, G.S. 97-30.

2. **Master and Servant § 68— last injurious exposure—substance which aggravates but does not cause occupational disease**

The evidence was sufficient to permit the Industrial Commission to find that plaintiff's last injurious exposure to the hazards of his lung disease occurred while employed by Waverly Mills even though he was exposed only to synthetic fibers during that period, and the Commission's finding that dust from synthetic fibers is not known to cause chronic obstructive lung disease did not preclude a conclusion that exposure to it constituted a last injurious

exposure to the hazards of the disease. All the evidence in the record shows that plaintiff's incapacity for work occurred only after he had worked for thirteen years for Waverly Mills in very dusty conditions; plaintiff had no incapacity for work when he began and was totally incapacitated when he quit; and there was medical testimony that the dusty conditions at Waverly Mills, including dust from synthetic fibers, could cause the worsening of plaintiff's lung disease.

Justice MEYER dissenting.

Chief Justice BRANCH joins in the dissent.

ON defendants Waverly Mills and Employers Mutual Insurance Company's petition for further review of a decision of the North Carolina Court of Appeals, 67 N.C. App. 739, 314 S.E. 2d 4 (1984), affirming an Industrial Commission's award against them.

Charles R. Hassell, Jr. for plaintiff appellee.

Hedrick, Eatman, Gardner, Feerick & Kincheloe by J. A. Gardner, III for defendant appellants.

EXUM, Justice.

The employee-plaintiff, Clifton Caulder, was a textile worker his entire working life, the last thirteen years of which he was employed by defendant Waverly Mills. His claim is for workers' compensation for incapacity to work caused by chronic obstructive lung disease. Concluding that Caulder's lung disease was occupational and compensable and that he was last injuriously exposed to the hazards of the disease while working for Waverly Mills and while Employers Mutual Insurance Company was on the risk, the Industrial Commission awarded Caulder compensation for total disability against defendants. The Court of Appeals affirmed and we allowed defendants' petition for further review of its decision.

Defendants do not challenge the Commission's findings or conclusions that Caulder suffers from chronic obstructive lung disease, the disease is occupational under N.C.G.S. § 97-53(13), and the disease has resulted in Caulder's total incapacity to work. Defendants challenge only those aspects of the Commission's award leading to its determination that Caulder was last injuriously exposed to the hazards of his disease while employed by Waverly Mills and that Employers Mutual was the carrier on the

risk when Caulder was so last exposed. Defendants contend that the Commission's findings leading to such determinations are not supported by the evidence and that the findings themselves preclude as a matter of law these challenged determinations.

The evidence and the Commission's findings are, in essence, that although Caulder was exposed to cotton dust when he worked for employers other than Waverly Mills from 1945 until 1967, he was exposed to almost no cotton dust during his employment with Waverly Mills from 1967 until 1980. Almost all of his exposure to dust during his employment with Waverly Mills was to the dust from synthetic fibers. Caulder was exposed exclusively to dust from synthetic fibers during the period when Employers Mutual was the compensation carrier on the risk from 1 July 1979 through February 1980. Inhalation of dust from synthetic fibers is not known to cause chronic obstructive lung disease.

Caulder's evidence is that although dust from synthetic fibers is not known to cause chronic obstructive lung disease, it can make such a disease already in progress worse and, in Caulder's case, did make it worse. The narrow legal question before us, therefore, is whether exposure to a substance which is not known to cause an occupational disease may nevertheless be a last injurious exposure to the hazards of such disease under N.C.G.S. § 97-57 if it makes the disease, already in progress, worse. The statute provides:

> Employer liable.—In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.

Two of our cases, *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983), and *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 22 S.E. 2d 275 (1942), make it clear that exposures to substances which can cause an occupational disease can be a last injurious exposure to the hazards of such disease under N.C.G.S. § 97-57 even if the exposure in question is so slight quantitatively that it could not in itself have produced the disease.

Haynes was a silicosis case in which the employee-plaintiff had worked in North Carolina feldspar mines for twenty-eight years. From 1927 to 1940 he worked for Tennessee Mineral Corporation where the "silica dust" in the mine "was pretty bad, and plaintiff was exposed to it constantly." 222 N.C. at 164, 22 S.E. 2d at 275. Plaintiff began working for defendant Feldspar Producing Company on 24 September 1940 until he quit on 24 January 1941 after having been diagnosed as having silicosis. Plaintiff testified he had had symptoms of the disease while he worked for Tennessee Mineral Corporation. Indeed, plaintiff's physician testified that in November 1937 plaintiff "had early silicosis, commonly referred to as silicosis one, without symptoms." 222 N.C. at 167, 22 S.E. 2d at 277. By November 1940 plaintiff had "moderately advanced silicosis with probable infection." *Id.* After it was explained to him that the expression "last injuriously exposed" as used in the statute "meant an exposure which proximately augmented the disease to any extent, however slight," plaintiff's physician testified in response to a hypothetical question: "You haven't left me much leeway. I have an opinion that it did constitute an injurious exposure." *Id.* The physician said he had examined plaintiff on 25 October 1938 "and found that he had silicosis one. On November 28, 1940, I examined him and found that he had moderately advanced silicosis with probable infection." *Id.* Plaintiff's physician also testified that he couldn't say whether plaintiff's silicosis had advanced at all after he had entered defendant's employment and that he couldn't say "that he is a bit worse off, not even 1% worse off, than he was on September 24, 1940. I can't say that he is 1% worse off or 1% better off." 222 N.C. at 168, 22 S.E. 2d at 277.

The Commission, after finding that plaintiff was last injuriously exposed at Feldspar Producing Company, made a compensation award against that company. This Court affirmed against defendants' contention that there was no evidence to support the award. The Court said, in essence, that when the evidence was considered in the light most favorable to plaintiff, both the affirmative answer of the physician to the hypothetical question and the physician's testimony on direct examination that plaintiff's disease had "advanced" from the time the physician examined him on 24 October 1938 until he next examined him on 28

November 1940 after he went to work for Feldspar was enough to support the award against Feldspar. The Court said:

> Perhaps on a comparative basis, the chief responsibility for plaintiff's condition morally rests upon his Tennessee employers; but not the legal liability. It must have been fully understood by those who wrote the law fixing the responsibility on the employer in whose service the last injurious exposure took place, that situations like this must inevitably arise, *but the law makes no provision for a partnership in responsibility, has nothing to say as to the length of the later employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure.*

222 N.C. at 170, 22 S.E. 2d at 279 (emphasis supplied).

In *Rutledge v. Tultex Corp.*, 308 N.C. at 89, 301 S.E. 2d at 362-63 (1983), we said:

> Under this statute, consequently, it is not necessary that claimant show that the conditions of her employment with defendant caused or significantly contributed to her occupational disease. She need only show: (1) that she has a compensable occupational disease and (2) that she was 'last injuriously exposed to the hazards of such disease' in defendant's employment. The statutory terms 'last injuriously exposed' mean 'an exposure which proximately augmented the disease to any extent, however slight.' *Haynes v. Feldspar Producing Company*, 222 N.C. 163, 166, 169, 22 S.E. 2d 275, 277, 278 (1942).

[1] By the phrase "hazards of the disease," as used in N.C.G.S. § 97-57, we are satisfied that the legislature intended to include more than substances which are capable in themselves of producing an occupational disease. The term "hazard" should be given its common and ordinary meaning, since nothing indicates the legislature intended it to have some other meaning and it has not acquired some technical meaning. "[W]here the words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is apparent or indicated by the context." *Pelham*

Realty Corp. v. Board of Transportation of North Carolina, 303 N.C. 424, 434, 279 S.E. 2d 826, 832 (1981); *accord State v. Koberlein*, 309 N.C. 601, 605, 308 S.E. 2d 442, 445 (1983). "Hazard" is defined by *Webster's Third New International Dictionary* 1041 (1976) as "a thing or condition that might operate against success or safety: a possible source of peril, danger, duress, or difficulty . . . a condition that tends to create or increase the possibility of loss."

An occupational disease does not become compensable under N.C.G.S. §§ 97-29 (total incapacity) or 97-30 (partial incapacity) until it causes incapacity for work. This incapacity is the basic "loss" for which the worker receives compensation under those statutes. A condition peculiar to the workplace which accelerates the progress of an occupational disease to such an extent that the disease finally causes the worker's incapacity to work constitutes a source of danger and difficulty to that worker and increases the possibility of that worker's ultimate loss. It constitutes, therefore, a hazard of the disease as the term "hazard" is commonly used.

We emphasize that in order for a substance to be a "hazard" of an occupational disease within the meaning of section 97-57, it must be, as we have indicated, a substance peculiar to the workplace. By this we mean that the substance is one to which the worker has a greater exposure on the job than does the public generally, either because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed.

Clearly, dust arising from the processing of synthetic fibers in textile plants, with which we here are concerned, is a substance to which, because of its nature, workers in those plants have a greater exposure than does the public generally. It is, therefore, a substance peculiar to the workplace.

[2] The legislature, recognizing that occupational diseases often develop slowly over long periods of time after exposures to offending substances at successive places of employment, determined by enacting section 97-57 to take "the breakdown practically where it occurs—with the last injurious exposure." *Haynes v. Feldspar Producing Co.*, 222 N.C. at 170, 22 S.E. 2d at 279.

All evidence in this record shows that Caulder's "breakdown," *i.e.*, his incapacity for work, occurred only after he had worked for some thirteen years for Waverly Mills in very dusty conditions. Caulder had no incapacity for work when he began work at Waverly; he was totally incapacitated for work when he quit. Dr. Kunstling testified that the dusty conditions at Waverly Mills' plants, including dust from synthetic fibers, could cause the worsening of Caulder's lung disease. He said a person "who has a preexisting lung condition who is put in a very dusty environment of whatever type may have problems as a result of that environment." He testified that "if an individual who has preexisting chronic obstructive pulmonary disease works in an environment that is very dusty for two years to the extent that it aggravates his symptoms if he remains in that environment . . . I believe that it probably would contribute . . . or exacerbate his condition to at least a slight degree." With regard to Caulder specifically, Dr. Kunstling testified, "I would feel that Mr. Caulder's work environment during this recent period of time [with defendant] had been somewhat harmful to him primarily based on his history that he did find it an irritating environment, and I think that the actual composition of the environment is probably not so important. In fact, it possibly could have been harmful to him had there been no cotton at all in the environment . . . . Mr. Caulder said he stopped working in February of 1980 because of respiratory symptoms, and I feel that whatever the work environment was at that time, it was contributing to his pulmonary symptoms."

This is enough evidence to permit the Commission to find, as it did, that Caulder's exposures to dust at Waverly Mills' plants, including the last plant at which he worked, "contributed to his pulmonary symptoms and was harmful to him" and that Caulder's last injurious exposure to the hazards of his lung disease occurred while employed by Waverly Mills and while Employers Mutual Insurance Company was on the risk. Neither does the Commission's finding that dust from synthetic fibers is not known to cause chronic obstructive lung disease preclude a conclusion that exposure to it constituted a last injurious exposure to the hazards of the disease.

For the foregoing reasons, the decision of the Court of Appeals is

Affirmed.

Justice MEYER dissenting.

Apparently conceding that the inhalation of synthetic fiber dust is not known to cause an occupational disease, the majority states the issue presented on this appeal as follows: "[W]hether exposure to a substance which is not known to cause an occupational disease may nevertheless be a last injurious exposure to the hazards of such disease under N.C.G.S. § 97-57 if it makes the disease, already in progress, worse."

First, I continue to adhere to the position expressed in my dissent in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). My position, there stated, is that any disease, in order to be compensable, must be an occupational disease, or must be aggravated or accelerated by an occupational disease or by an injury by accident arising out of and in the course of the employment.

Secondly, the majority readily concedes that in order for a substance to be a "hazard" of the disease it must be a *substance peculiar to the workplace*. Indeed, the majority states, "We emphasize that in order for a substance to be a 'hazard' of an occupational disease within the meaning of § 97-57, it must be, as we have indicated, a *substance peculiar to the workplace*." (Emphasis added.) It is as clear as the English language is capable of conveying that it is the *nature of the substance* itself which must be peculiar to the workplace and this test is not and cannot be met by the second alternative of the "either/or" test adopted by the majority. The majority expresses its new test as follows:

> By this we mean that the substance is one to which the worker has a greater exposure on the job than does the public generally, *either* because of the nature of the substance itself *or* because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed. (Emphasis added.)

Because we are not here concerned with whether the claimant has an occupational disease but only with the question of "last injurious exposure," the majority would have us completely disregard our treatment of similar terms in cases dealing solely

with whether the claimant had an occupational disease. The terms used by the majority here: "peculiar to the claimant's workplace" and the term "peculiar to the claimant's employment" used in determining the presence of an occupational disease are too similar to disregard. Their similarity demands a comparison.

In *Walston I* this Court, in an opinion by Huskins, J., said:

> Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated *by an occupational disease*, or by an injury by accident arising out of and in the course of the employment. G.S. 97-53(13); *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). (Emphasis added.)

Walston v. Burlington Industries, 304 N.C. 670, 679-80, 285 S.E. 2d 822, 828 (1982).

Unfortunately the members of this Court, including this writer, agreed to alter the opinion in *Walston I* by Order of the Court dated 8 March 1982 appearing at 305 N.C. 296, 285 S.E. 2d 822, and thus changed the last sentence of the above quoted portion of the opinion to read as follows:

> Disability caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or is aggravated or accelerated *by causes and conditions characteristic of and peculiar to claimant's employment.* (Emphasis added.)

I am now of the opinion that we acted in haste and that we should not have changed the wording of the original opinion and am of the further opinion that we should now repudiate that change. Nevertheless, the language as changed clearly states that the subsequent aggravating cause or condition must be "characteristic of and peculiar to claimant's employment." This clearly means, contrary to the majority's view in the case *sub judice*, that it *cannot* be a cause or condition *not* "*characteristic of and peculiar to* the claimant's workplace" *or* one to which the general public is equally exposed.

The reader of the majority opinion is distracted from this comparison of similar terms used in different contexts (*i.e.*, last injurious exposure and occupational disease) by what I would call "judicial sleight-of-hand."

The majority says that the "substance" requirement of the term "substance peculiar to the workplace" can be satisfied not only by evidence of the nature of the substance but also by unusually high "concentrations" of a substance. The all too obvious question raised by the majority opinion but left unanswered is whether the requirement of a "substance peculiar to the workplace" can be satisfied by showing "concentrations" greater than those to which the public generally is exposed of ordinary substances not necessarily characteristic of or peculiar to a particular employment or workplace. The majority's choice of wording for its new test is confusing at best. I suppose the meaning the majority intends to convey is "substance peculiar to the workplace" or "concentration peculiar to the workplace."

The majority's choice of words in describing synthetic dust may be revealing. The majority opinion describes the airborne material in defendant Waverly Mills' plant not as "synthetic fiber dust" but as "dust arising from the processing of synthetic fibers." Does the majority equate "dust" arising from the processing of synthetic fibers with "dust" arising from sources not peculiar to the workplace? Would the majority apply its new "either/or" test to "concentrations" of such ordinary substances as common store and schoolyard or construction yard dust, dampness in the local car wash, cooking fumes in the restaurant kitchen, or cigarette smoke in the company office? If this is the case then the majority's new "either/or" test is indeed nothing more than "judicial sleight-of-hand"—now you have the "substance peculiar to" requirement and now you don't—it having been satisfied by the showing of "concentrations" of a very ordinary substance not at all peculiar to the workplace. Under the "or" portion of the majority's new test it is of course the "concentration" which is peculiar and not the "substance."

If it is the synthetic fibers in the air of defendant Waverly Mills' plant, as the majority seems to agree, which is the "substance peculiar to the workplace" to which Mr. Caulder had a greater exposure than does the public generally, then the "or"

part of the majority's new test, *i.e.*, "concentrations," is unnecessary.

The majority's holding today could have a far-reaching, detrimental impact on the employment opportunities for a significant number of our textile workers. If, as I suspect, the majority has set out upon the path which I anticipate, this Court may effectively preclude the subsequent employment of textile workers who are unable to continue to work in that industry because of a lung disease. Since *Rutledge* began the process, this Court continues to create a situation in which, in order to reduce losses from claims for total, permanent disability from older workers previously employed in the textile industry, no employer will consider employing anyone who has worked in that industry for a significant number of years, or will employ them only after exhaustive pulmonary function tests. If that is the result it is not the employers or their insurance carriers who will be hurt but the textile workers.

I would vote to reverse the decision of the Court of Appeals and to hold that the claimant was not last injuriously exposed in his employment at Waverly Mills.

Chief Justice BRANCH joins in this dissent.

JAMES R. SMITH v. BARBARA WYITE SMITH

No. 668PA84

(Filed 3 July 1985)

Divorce and Alimony § 30— equitable distribution—marital misconduct affecting value of marital assets—may be considered

Misconduct during marriage which dissipates or reduces the value of marital assets for nonmarital purposes may properly be considered under G.S. 50-20(c)(12); marital fault or misconduct which does not adversely affect the value of marital assets is not a just and proper factor within the meaning of G.S. 50-20(c)(12). G.S. 50-20(c)(1)-(11), G.S. 50-16.2.

Justice MEYER dissenting.

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

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals reported at 71 N.C. App. 242, 322 S.E. 2d 393 (1984), vacating order by *Harrell, J.*, filed on 21 February 1983 in District Court, EDGECOMBE County. Heard in the Supreme Court 13 May 1985.

Moore, Diedrick, Whitaker & Carlisle, by Joy Sykes and J. Edgar Moore, for plaintiff appellant.

Evans & Lawrence, by Antonia Lawrence and Robert A. Evans, for defendant appellee.

MARTIN, Justice.

The primary issue in this case concerns whether marital fault or misconduct is a just and proper factor which may be found by a trial court under N.C.G.S. 50-20(c)(12) in determining an equitable division of marital property upon divorce. As we explain below, we hold that because it is consonant with the essential philosophy of equitable distribution, misconduct during the marriage which dissipates or reduces the value of marital assets for nonmarital purposes may properly be considered under N.C.G.S. 50-20(c)(12). Marital fault or misconduct which does not adversely affect the value of marital assets is not a just and proper factor within the meaning of N.C.G.S. 50-20(c)(12). We therefore modify and affirm the decision of the Court of Appeals.

This action began when plaintiff filed a complaint on 13 September 1982 seeking, inter alia, an absolute divorce from defendant, child support, and an equitable distribution of plaintiff and defendant's marital property. At hearings before the District Court, Edgecombe County, plaintiff and defendant stipulated that the sole issue for determination was the uncontested divorce and equitable distribution of their marital property. Among other things, the trial judge found as facts that plaintiff and defendant had been married since 1956 and had two children; that these two children had been living with plaintiff ever since defendant abandoned the family on 5 September 1981; that plaintiff was granted custody of the two children by a consent order filed 12 May 1982 in District Court, Edgecombe County; that the consent order filed 12 May 1982 divided the personal property of plaintiff and defendant; that plaintiff and defendant are owners as tenants by the entirety of a house and lot located at 116 Washington Place, Rocky

Mount, Edgecombe County; and that the plaintiff "was given sole possession of the marital home for the use and benefit of the two minor children until such time as the real property was equitably divided." Before concluding as a matter of law that the house and lot at 116 Washington Place was the only marital property to be divided, the trial judge further found as facts that:

> 14. The circumstances of the instant case and of the respective parties hereto warrant that an equal division of the marital property is not equitable based on the following facts:
>
> a. The Defendant abandoned the Plaintiff and the two minor children willfully, without justification, without the knowledge or consent of the Plaintiff and without any intent to renew the marital relationship.
>
> b. The Defendant is an excessive user of alcoholic beverages, having frequented illegal "whiskey houses" and having failed to properly supervise and care for the minor children prior to the separation.
>
> c. On several occasions the Defendant left the children with a babysitter until very late at night and on one occasion the babysitter called the Plaintiff father at three o'clock a.m. to pick up the minor children.
>
> d. During the year that the Plaintiff and Defendant have been separated, the Defendant has not visited with the children on a regular basis, having seen them approximately five or six times for a maximum period of a few hours, nor has the Defendant provided the minor children with clothing or other necessities.
>
> e. The Defendant is not at the present time contributing anything towards the support and maintenance of the minor children born and adopted to the marriage of the Plaintiff and Defendant.
>
> f. The Plaintiff needs continued possession and ownership of the former marital home for the benefit of the minor children.
>
> g. The Defendant holds the degree of Master of Library Science and is gainfully employed with the Nash County

Board of Education earning a net income of approximately $11,000.00 per year.

h. The Plaintiff is retired from the Marine Corps and has been required to support the minor children and provide for all of the household bills including the mortgage payment for the former marital home, with his retirement pay of approximately $800.00 to $900.00 per month.

i. The plaintiff provided for the Defendant to obtain her degree of Master of Library Science, thus advancing her career as a teacher and allowing her to earn a better salary.

j. The Defendant [sic] has made all of the monthly payments on the outstanding indebtedness on the marital home from his salary and retirement from the Marine Corps.

k. The Plaintiff has masonry, carpentry and other similar skills and has contributed substantially to the value of the home by making such improvements as enclosing the carport, building a brick barbeque, insulating, painting and other improvements. The Plaintiff has also provided the purchase price of the materials necessary to make these improvements.

l. During the time that the Plaintiff was overseas in connection with his service in the military, the Defendant provided the minor children with basic care such as cooking meals and buying clothes, the majority of the expenses being paid for by the Plaintiff father; however, the Defendant has not contributed in a meaningful way to the marriage since then, either financially or emotionally.

m. In all likelihood, the Plaintiff father will be required to provide all the costs of educating the minor children.

n. Any funds awarded to the Defendant mother from the equity in the former marital home would probably not be used in any manner to benefit the minor children, based upon the Defendant's past history of alcoholism and lack of responsibility.

The trial court then concluded, inter alia, that "[b]ased on the circumstances of the instant case, an equal division of the marital

property would not be equitable."[1] The court then entered an order (1) awarding plaintiff an absolute divorce from defendant, (2) awarding plaintiff sole ownership of the former marital home and lot at 116 Washington Place, Rocky Mount, (3) ordering defendant to execute a deed conveying all of her right, title, and interest in the marital home to plaintiff, and (4) decreeing that plaintiff shall be solely responsible for payment of the outstanding indebtedness on said property.[2] Defendant excepted to the entry of the order, assigning as error that part of the order which granted exclusive ownership of the marital home to plaintiff. Defendant aptly perfected her appeal to the Court of Appeals, and that court issued an opinion on 6 November 1984 vacating the judgment and remanding for further proceedings. Plaintiff's petition to this Court for discretionary review was allowed 30 January 1985.

N.C.G.S. 50-20(c) provides that upon divorce:

> (c) There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably. Factors the court shall consider under this subsection are as follows:
>
> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> (2) Any obligation for support arising out of a prior marriage;
>
> (3) The duration of the marriage and the age and physical and mental health of both parties;
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects;

1. Neither plaintiff nor defendant excepted to any of the trial court's findings of fact or conclusions of law.

2. For a general discussion of considerations that may arise when the marital home is among a limited number of assets to be distributed pursuant to an equitable distribution statute, see Comment, *The Marital Home: Equal or Equitable Distribution?*, 50 U. Chi. L. Rev. 1089 (1983).

(5) The expectation of nonvested pension or retirement rights, which is separate property;

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker;

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse;

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage;

(9) The liquid or nonliquid character of all marital property;

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party;

(11) The tax consequences to each party; and

(12) Any other factor which the court finds to be just and proper.

Although several of the trial court's findings of fact fall under the first eleven factors listed in 50-20(c), several others do not and thus must fall, if anywhere, under the catchall factor, 50-20(c)(12). Defendant contends that some of the findings which do not come within 50-20(c)(1)-(11) concern so-called marital fault, which, defendant alleges, is not a "just and proper" factor under the equitable distribution statute.

To decide whether marital misconduct or fault may be properly considered under 50-20(c)(12), we examine the legislative intent behind the equitable distribution statute.

As stated recently in *White v. White*, 312 N.C. 770, 775, 324 S.E. 2d 829, 832 (1985), "[e]quitable distribution reflects the idea

that marriage is a partnership enterprise to which both spouses make vital contributions and which entitles the homemaker spouse to a share of the property acquired during the relationship." In other words, "[t]he goal of equitable distribution is to allocate to divorcing spouses a fair share of the assets accumulated by the marital partnership." *Dissipation of Assets*, 1 Equitable Distribution Journal 1, 1 (No. 6, June 1984). *See also* L. Golden, *Equitable Distribution of Property* 255 (1983). The heart of the theory is that "both spouses contribute to the economic circumstances of a marriage, whether directly by employment or indirectly by providing homemaker services." L. Golden, *supra*, at 3.[3] The equitable distribution statute provides that, unless proven otherwise, such contributions are deemed to be equal during the course of the marriage. *White*, 312 N.C. 770, 324 S.E. 2d 829. Thus, even though title to the marital assets may be listed in the name of only one of the spouses during the course of the marriage, "the statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* [upon divorce] 'unless the court determines that an equal division is not equitable.' N.C.G.S. 50-20 (c)." *Id.* at 776, 324 S.E. 2d at 832.

Factors that a trial court must consider when making this determination are set forth in N.C.G.S. 50-20(c). All of the first eleven factors in the statute concern the economy[4] of the marriage, i.e., the source, availability, and use by a wife and husband of economic resources during the course of their marriage. By the principle of ejusdem generis, we must construe the statutory twelfth catchall factor consistently with the legislative purpose inherent in the first eleven statutory factors.

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3. As many commentators emphasize, these roles frequently overlap. "Increasingly in contemporary society the homemaker spouse will also be employed while the primary wage earner will perform many household and child rearing functions." L. Golden, *Equitable Distribution of Property* 2 n. 2 (1983).

4. The term "economy" has been defined to mean: "I. Management of a house; management generally. 1. The art or science of managing a household, *esp.* with regard to household expenses . . . b. The manner in which a household, or a person's private expenditure, is ordered . . . c. *concr.* A society ordered after the manner of a family." 3 Oxford English Dictionary 35 (1961). The term derives from the Greek words *oikonomos*, "one who manages a household," *oikos*, "house," and *nomos* (*nemein*), "manage or control."

> "In the construction of statutes, the *ejusdem generis* rule is 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. Lee, 277 N.C. 242, 244, 176 S.E. 2d 772, 774 (1970) (quoting *State v. Fenner*, 263 N.C. 694, 697-98, 140 S.E. 2d 349, 352 (1965)).

In accord with the economic contribution theory of equitable distribution, it is clear that only items affecting the marital economy are considered under the first eleven factors of N.C.G.S. 50-20(c).[5] Thus, under 50-20(c)(12), the only other considerations which are "just and proper" within the theory of equitable distribution as expressed by 50-20(c)(1)-(11) are those which are relevant to the marital economy. Therefore, we hold that marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under 50-20(c) and should not be considered. *Blickstein v. Blickstein*, 99 A.D. 2d 287, 472 N.Y.S. 2d 110 (1984); *Chalmers v. Chalmers*, 65 N.J. 186, 194, 320 A. 2d 478, 483 (1974) ("[t]he concept of fault is not relevant to such distribution since all that is being effected is the allocation to each party of what really belongs to him or her"). *See Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984). *See generally* L. Golden, *supra*, at 255.

The irrelevance to equitable distribution of misconduct not affecting the marital economy may be contrasted with conduct relevant to an award of alimony to a dependent spouse under N.C.G.S. 50-16.2. Under that statute many kinds of marital mis-

5. We note that an additional factor concerning the marital economy was recently added to N.C.G.S. 50-20(c). On 30 April 1985 our General Assembly enacted a bill reading in relevant part:

> "Section 1. G.S. 50-20(c) is amended by deleting the word 'and' after subsection (11) and by inserting a new subsection following subsection (11) to read: '(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution; and'. Sec. 2. This act shall become effective October 1, 1985."

conduct by the supporting spouse constitute grounds for an award of alimony. While noneconomic marital fault is thus relevant to alimony, it is irrelevant to the equitable distribution of marital property. This distinction is recognized by N.C.G.S. 50-20 (f), which states that "[t]he court shall provide for an equitable distribution without regard to alimony. . . ." *Accord* Va. Code § 20-107.3(F) (Supp. 1984). Although an award of alimony to a dependent spouse may be justified because of noneconomic marital misconduct by the supporting spouse, the only fault or misconduct that is "just and proper" under N.C.G.S. 50-20(c)(12) is that which dissipates or reduces marital property for nonmarital purposes. *See, e.g.*, Cal. Civ. Code § 4800(b)(2) (West Supp. 1985); Del. Code Ann. tit. 13, § 1513(a)(6) (1981); Ind. Code Ann. § 31-1-11.5-11 (b)(4) (Burns Cum. Supp. 1984); S.D. Codified Laws Ann. § 25-4-45.1 (1984); *In re Marriage of Schultz*, 105 Cal. App. 3d 846, 164 Cal. Rptr. 653 (1980); *In re Marriage of Kaladic*, 41 Colo. App. 419, 589 P. 2d 502 (1978); *In re Marriage of Block*, 110 Ill. App. 3d 864, 870-71, 441 N.E. 2d 1283, 1288-89 (1982); *In re Marriage of Hellwig*, 100 Ill. App. 3d 452, 426 N.E. 2d 1087 (1981); *Wireman v. Wireman*, 168 Ind. App. 295, 343 N.E. 2d 292 (1976); *Sharp v. Sharp*, 58 Md. App. 386, 473 A. 2d 499 (1984); *Grothe v. Grothe*, 590 S.W. 2d 238 (Tex. Civ. App. 1979); *In re Marriage of Anstutz v. Anstutz*, 112 Wis. 2d 10, 331 N.W. 2d 844 (Wis. Ct. App. 1983). Such conduct might be, e.g., the conveyance by one spouse of marital assets in contemplation of divorce. *See Hursey v. Hursey*, 326 S.E. 2d 178 (S.C. App. 1985). *Cf.* Cal. Civ. Code § 3518 (1970). Of course, such economic misconduct, if proved, is only one factor for the court to consider under N.C.G.S. 50-20(c) when determining whether an equal division of property is equitable. *See Armstrong v. Armstrong*, 181 Ind. App. 343, 346-47, 391 N.E. 2d 855, 857 (1979). Under 50-20(c) the trial court is required to consider all twelve factors listed in the statute when determining whether an equal division of marital property is equitable.

In the instant case a number of the findings of fact contained in the trial court's judgment pertain to fault or misconduct not affecting the value of the parties' marital property. Because the consideration of these factors was error, we hold that the case must be remanded for further proceedings not inconsistent with the principles enunciated in this opinion.

The decision of the Court of Appeals is

Modified and affirmed.

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

Justice MEYER dissenting.

I respectfully dissent. The majority finds that all of the first eleven listed factors concern the "economy of the marriage." Having so concluded, the majority, by the principle of *ejusdem generis*, construes factor (12), "*Any* other factor which the court finds to be just and proper" (emphasis added), to include only "economic fault." I disagree that all of the other eleven factors relate to economic matters—for instance, factor (3) "The duration of the marriage . . ." which has nothing at all to do with "the economy of the marriage."

Beyond the foregoing I believe that the legislature fully intended that the trial judge could and would consider what I shall call "moral" fault, or misconduct which causes the marriage to breakup—adultery, spouse abuse, alcoholism, drug abuse, incest, etc. Obviously, such misconduct would *not* fit within the narrow category of "economic" fault. If "moral" fault cannot be considered under factor (12), it cannot be considered at all in the distribution of marital property.

The majority implies that the proper arena for the consideration of non-economic fault is the determination of alimony payments. First, alimony, for one reason or another, is not always an issue before the court in divorce cases. Second, even when alimony is at issue, the "innocent" spouse may not be entitled to it because he or she is not a dependent spouse or has remarried, or for other reasons. In such situations, even the most egregious moral misconduct which has caused the marriage to end is without legal consequence and the equal distribution of marital property may have to be found equitable in spite of it. If the majority has thus incorrectly interpreted the legislature's intent, that body can readdress the issue and speak more plainly.

I would also add that on reconsideration of this case upon remand, the trial judge could, under the majority's interpretation, reach the same result by considering only factors constituting "economic" fault, such as factor (4).

WINSTON REALTY COMPANY, INC. D/B/A CENTURY 21-WINSTON REALTY, A CORPORATION v. G.H.G., INC., T/A SNELLING AND SNELLING, A NORTH CAROLINA CORPORATION

No. 580A84

(Filed 3 July 1985)

1. **Unfair Competition § 1— unfair and deceptive trade practice—contributory negligence not a defense**

Contributory negligence is not a defense to a Chapter 75 violation; the Legislature did not intend to create a statutory cause of action in G.S. 75-1.1 only for the remedy in G.S. 75-16 to be limited by a common law defense.

2. **Unfair Competition § 1— unfair and deceptive trade practice—trial court not required to submit to jury**

The trial court was not required to submit an issue to the jury concerning unfair and deceptive trade practices in an action arising from the failure of an employment agency to investigate the background and references of an applicant for employment as a bookkeeper. The jury answered the factual issues and the trial court then correctly ruled on the unfair and deceptive trade practice issue as a matter of law. G.S. 75-1.1.

3. **Unfair Competition § 1— personnel agency—violation of G.S. 95-47.6(2) and (9) —unfair and deceptive trade practice as matter of law**

In an action arising from allegedly false and fraudulent representations by an employment agency, the trial court correctly concluded as a matter of law that the jury's finding that defendant violated the provisions of either or both G.S. 95-47.6(2) and (9) constituted unfair and deceptive acts or practices. G.S. 75-1.1.

DEFENDANT appeals from a decision of the Court of Appeals, 70 N.C. App. 374, 320 S.E. 2d 286 (1984), one judge dissenting, affirming a judgment entered by *Johnson, J.*, at the 28 March 1983 Civil Session of Superior Court, CUMBERLAND County. Defendant's petition for discretionary review as to an issue not addressed in the dissenting opinion, filed pursuant to N.C.G.S. § 7A-31, was granted on 6 November 1984.

By complaint filed 24 March 1981, plaintiff alleged that the defendant personnel agency negligently failed to investigate the background and references of an applicant for employment that defendant had referred to plaintiff to fill a vacant position of bookkeeper at plaintiff's office. By amended complaint filed 17 May 1981, plaintiff further alleged that defendant violated N.C.G.S. §§ 95-47.6(2) and (9) by publishing and making false and

fraudulent representations to the plaintiff concerning the applicant and that such actions constituted unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1. The defendant denied plaintiff's allegation by answer filed 26 May 1981 and amended answer filed 21 June 1982 and pled the contributory negligence of plaintiff's principal Etowski in bar of all claims.

The case was tried before a jury. The trial court charged the jury that contributory negligence was a defense only to the negligence issues and not to the Chapter 75 issues. The jury answered the issue of contributory negligence against plaintiff on its claim for negligence but answered the Chapter 75 issues in favor of the plaintiff on its claim that the defendant published and made false and fraudulent statements. Plaintiff was awarded $19,000 in damages by the jury. The trial court then concluded and ruled as a matter of law that the acts found by the jury constituted unfair and deceptive trade practices and trebled the damages pursuant to N.C.G.S. § 75-16. From this judgment, defendant appealed to the Court of Appeals. A majority of that court affirmed the judgment below. 70 N.C. App. 374, 320 S.E. 2d 286 (1984).

Russ, Worth, Cheatwood & McFadyen, by Philip H. Cheatwood, Attorney for defendant-appellant.

Reid, Lewis & Deese, by Marland C. Reid, Attorney for plaintiff-appellee.

MEYER, Justice.

The principal issue presented by this appeal is whether contributory negligence may be a complete defense to alleged violations of Chapter 75 of the North Carolina General Statutes concerning unfair or deceptive trade practices. Defendant also assigns as error the trial court's failure to submit an issue to the jury as to whether defendant's acts constituted unfair or deceptive trade practices and its conclusion as a matter of law that defendant violated N.C.G.S. § 75-1.1 based on the jury's finding that defendant violated either or both N.C.G.S. §§ 95-47.6(2) and (9) concerning the regulation of employment agencies. For the reasons set forth below, we hold that contributory negligence is not a defense to a Chapter 75 violation and thus the trial judge did not err in failing to submit that issue to the jury concerning the unfair or deceptive trade practices claim. We also hold that a

violation of either or both N.C.G.S. §§ 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1. Therefore, we affirm the decision of the Court of Appeals.

N.C.G.S. §§ 95-47.6(2) and (9), which forbid false advertising and false representations by personnel agencies, provide as follows:

> § 95-47.6. Prohibited acts.
>
> A private personnel service shall not engage in any of the following activities or conduct:
>
> * * *
>
> (2) Publish or cause to be published any false or fraudulent information, representation, promise, notice or advertisement.
>
> * * *
>
> (9) Knowingly make any false or misleading promise or representation or give any false or misleading information to any applicant or employer in regard to any employment, work or position, its nature, location, duration, compensation or the circumstances surrounding any employment, work or position including the availability thereof.

In November 1979 Thomas Etowski, owner and operator of plaintiff corporation, telephoned defendant's Fayetteville, North Carolina office about his need for a bookkeeper. Mr. Etowski was familiar with the defendant, a private personnel agency, and its advertised claims that it was the "world's largest employment agency" and that its applicants were "pre-screened, qualified . . . [and] quickly available." Mr. Etowski placed a job order with defendant for a bookkeeper.

On 9 November 1979, defendant's representative, Penny Davis, a/k/a Lillian Blanchard, telephoned Mr. Etowski and referred an applicant, Rebecca Skinner, to fill his vacancy. Following an interview with Ms. Skinner that same day, Mr. Etowski telephoned Ms. Davis at defendant's office and asked whether Ms. Skinner's prior employers and other references had been checked. He was told that her in-state references had been checked but not those

out-of-state. Ms. Davis further represented Ms. Skinner as highly qualified and highly recommended. Plaintiff hired her on 9 November 1979. As plaintiff's bookkeeper, Ms. Skinner wrote and signed checks on company accounts, received rental payments, balanced the checkbook, verified bank statements, made bank deposits, and helped prepare the corporate tax returns.

In July 1980 Mr. Etowski discovered a shortage in his rental escrow account of $24,000. He also discovered that the corporate tax return had not been filed and that some company records, including bank statements, were missing. After referring the matter to the Cumberland County Sheriff's Department, Etowski learned that Rebecca Skinner had a criminal record in that county for worthless checks and forgery and that she had been under indictment for embezzling from another Fayetteville company at the time of her application with the defendant. She was subsequently indicted and pled guilty to embezzling from plaintiff and received a twenty-year prison sentence.

Defendant's evidence showed that at no time did Snelling and Snelling contact any references or former employers listed on the resume or application provided by Rebecca Skinner. Two of the former employers from whom Ms. Skinner embezzled, S. T. Wooten Construction Company and Fayetteville Aviation, Inc., both in-state employers, were listed. The defendant also conducted no background investigation on Ms. Skinner with regard to any criminal record.

[1] As to the first issue, defendant contends that contributory negligence is a complete defense to a cause of action based on violations of Chapter 75 and that the trial judge should have submitted the issue of contributory negligence to the jury. Defendant, however, cites only one case in support of its contention, *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 303 S.E. 2d 565, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). We find defendant's reliance on *Libby Hill* to be misplaced.

The plaintiff in *Libby Hill* brought an action against the defendants based on fraud, negligent misrepresentation, breach of express warranty and unfair and deceptive trade practices in violation of N.C.G.S. § 75-1.1. Plaintiff alleged that defendant sold it property and either culpably misrepresented or failed to disclose that the site was on or near land that had been used as a trash

dump and that the composition of the soil was such that it would not support a building of the type contemplated by plaintiff. Plaintiff's evidence showed that one of the defendants indicated the old trash dump ended "approximately" or "exactly" twenty feet inside the rear property line, that the alleged representation was made by pointing to a place on the property, and that no measurements were taken as a result of the pointing nor were any stakes or markers laid out. After finding the defendants' statements mere opinions upon which plaintiff unreasonably relied, the Court of Appeals held that all of plaintiff's claims were insufficient as a matter of law and appropriate for directed verdict, as the trial court had ruled.

Defendant points to the last paragraph of the *Libby Hill* opinion as supportive of its contributory negligence argument. There the Court of Appeals stated:

> Finally, plaintiff's claim for unfair and deceptive trade practices pursuant to G.S. 75-1.1 is similarly appropriate for directed verdict. In essence, a party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position. (Citation omitted.) Even if defendants misrepresented the location of the trash fill, this sophisticated plaintiff could and should have verified defendants' assertions. Surely any corporation contemplating a $100,000.00 venture would be expected to have exercised at least this minimal degree of prudence.

Id. at 700, 303 S.E. 2d at 569.

Although this language indeed appears supportive of appellant's contention, *Libby Hill* was not decided on the issue of contributory negligence and therefore, the language quoted is *obiter dictum*. Moreover, we expressly disavow such language.

It is the plaintiff's contention, and we agree, that the legislature did not intend to create a statutory cause of action in N.C.G.S. § 75-1.1 only for the remedy in N.C.G.S. § 75-16 to be limited by a common law defense. The remedial section for private enforcement reads as follows:

> If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person,

> firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment *shall* be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. (Emphasis added.)

N.C.G.S. § 75-16. This section clearly provides that once damages are assessed judgment shall be rendered for treble the amount of damages fixed by the verdict. It is silent as to both negligence and contributory negligence.

Plaintiff also correctly observes that our opinion in *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981), impliedly discounted the availability of contributory negligence as a defense to a Chapter 75 violation. In *Marshall* this Court examined in detail North Carolina's unfair and deceptive trade practice act, its intent and purpose. We found that the legislature's intent in enacting N.C.G.S. § 75-16 was to create a new, private cause of action for aggrieved consumers since traditional common law remedies were often deficient. *Id.* at 543, 276 S.E. 2d at 400. We also found that the purposes of the statutory provisions for treble money damages, N.C.G.S. § 75-16, and attorney's fees, N.C.G.S. § 75-16.1, were to encourage private enforcement in the marketplace and to make the bringing of such a suit more economically feasible. *Id.* at 548, 276 S.E. 2d at 403-04.

Furthermore, we held in *Marshall* that good faith is not a defense to an alleged violation of N.C.G.S. § 75-1.1 and that the intent of the actor is irrelevant. *Id.* at 548, 276 S.E. 2d at 403. We also stated that what is relevant is "the effect of the actor's conduct on the consuming public." *Id.* If the effect of the actor's conduct is of sole relevance, then it follows that plaintiff's alleged conduct here, contributory negligence, is not relevant. Where, as in the case *sub judice*, a private personnel agency advertises the availability of "prescreened, qualified" applicants and falsely and fraudulently represents to a prospective employer applicants whose experience and reliability has neither been investigated nor verified, then certainly such conduct would have a disastrous impact on the consuming public. "[T]he consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail

under the state's unfair and deceptive practices act." *Id.* (Citations omitted.) Clearly, in *Marshall* we strongly implied that a plaintiff's alleged contributory negligence is irrelevant in an action involving Chapter 75 conduct.

In concluding that the legislature intended the automatic trebling of any assessed damages, this Court, in *Marshall*, stated that "[t]o rule otherwise would produce the anomalous result of recognizing that although N.C.G.S. 75-1.1 creates a cause of action broader than traditional common law actions, N.C.G.S. 75-16 limits the availability of any remedy to cases where some recovery at common law would probably also lie." 302 N.C. at 547, 276 S.E. 2d at 402. Based on our analysis in *Marshall* and the language of N.C.G.S. § 75-16, we conclude that such an anomalous result would likewise be reached here if we allowed defendant to avail itself of plaintiff's alleged contributory negligence. Therefore, we hold that contributory negligence is not a defense to a Chapter 75 violation and that the trial court correctly refused to submit such issue to the jury.

[2] As to the second issue, defendant contends, and in his dissent from the opinion of the Court of Appeals Judge (now Chief Judge) Hedrick agrees, that the trial court should have submitted an issue to the jury concerning unfair and deceptive trade practices. This same issue was answered by this Court in *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). In *Hardy*, the trial court refused to submit a Chapter 75 issue to the jury concerning false representations made by defendants to plaintiff regarding the purchase of a used car. On appeal, we stated that "[o]rdinarily it would be for the jury to determine the facts and based on the jury's findings, the court would then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce." *Hardy*, 288 N.C. at 310, 218 S.E. 2d at 346-47. Based on stipulated facts, in *Hardy* we held as a matter of law that the false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in commerce in violation of N.C.G.S. § 75-1.1. *Id.* at 311, 218 S.E. 2d at 347. Although the facts in the present case were not stipulated, the jury answered the factual issues. The trial court then took the jury's findings, and correctly ruled on the unfair and deceptive trade practice issue as a matter of law.

[3] Finally, defendant contends that a Chapter 75 violation may not be based on the jury's finding that defendant violated the provisions of either or both N.C.G.S. §§ 95-47.6(2) and (9), because these provisions are regulatory in nature. Judge Hedrick stated in his dissent that "the court . . . has no authority to enter a judgment pursuant to Chapter 75 on a verdict disclosing only a violation of Chapter 95." We disagree.

Although defendant is correct in pointing out that Chapter 95 is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice based on the conduct proscribed by Chapter 95. N.C.G.S. § 95-47.6 prohibits private personnel services from engaging in specific conduct and activities, including the conduct specified in subsections (2) and (9) quoted above. Although the authority to enforce the Chapter 95 provisions rests with the Commissioner of Labor, it is obvious that the list of proscribed acts found in N.C.G.S. § 95-47.6 were designed to protect the consuming public. The Court of Appeals confronted a similar issue in *Ellis v. Smith-Broadhurst, Inc.*, 48 N.C. App. 180, 268 S.E. 2d 271 (1980), where the defendant contended plaintiff could not recover damages under N.C.G.S. § 75-1.1 because unfair and deceptive acts in the insurance industry were regulated exclusively by the insurance statutes, N.C.G.S. § 58-54.1, *et seq.*, which do not contain a right of private action. Chapter 95 similarly contains no right of private action. The *Ellis* court held that N.C.G.S. § 75-1.1 does provide a remedy for unfair trade practices notwithstanding that insurance is regulated by statute. 48 N.C. App. at 183, 268 S.E. 2d at 273. We find this reasoning persuasive and hold that a violation of either or both N.C.G.S. §§ 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1.

The jury in the present case found that defendant either published or caused to be published or knowingly made false or fraudulent representations in violation of N.C.G.S. §§ 95-47.6(2) and (9). Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346. The trial court then concluded as a matter of law that such violation constituted an unfair or deceptive trade practice violative of N.C.G.S. § 75-1.1. That statute provides, in pertinent part, as follows:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.
>
> * * *
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C.G.S. § 75-1.1. Defendant's actions undoubtedly were in commerce, as the jury found, and defendant failed to show that it was otherwise exempt from the operation of the statute's provisions.

We stated in *Marshall* that the determination of whether a trade practice is unfair or deceptive "usually depends upon the facts of each case and the impact the practice has in the marketplace." 302 N.C. at 548, 276 S.E. 2d at 403. (Citation omitted.) We further stated that:

> A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required.

Id. (Citations omitted.)

Evidence presented in the case *sub judice* showed that defendant failed to check any of Rebecca Skinner's references although its employee, Penny Davis, told Mr. Etowski that the in-state references had indeed been verified. This evidence indicates not simply the likelihood of deception, but further, actual deception. Accordingly, the issues submitted to the jury were sufficient to resolve the material controversy concerning whether defendant's actions constituted unfair and deceptive trade practices and the trial court correctly concluded as a matter of law that the jury's finding that the defendant violated the provisions of either or both N.C.G.S. §§ 95-47.6(2) and (9) constituted unfair and decep-

tive acts or practices in violation of N.C.G.S. § 75-1.1. The decision of the Court of Appeals is, therefore,

Affirmed.

STATE OF NORTH CAROLINA v. DONALD MELVIN KINCH

No. 434A84

(Filed 3 July 1985)

1. Constitutional Law § 40— counsel on appeal—compliance with Anders v. California

Defendant's counsel fully complied with the requirements of *Anders v. California*, 386 U.S. 738 (1967), where he stated in the brief that he found no merit in the assignments of error and requested the Supreme Court to review the record for any prejudicial error; he filed a brief referring to the three assignments of error that might arguably support the appeal; he furnished defendant with a copy of his brief as well as copies of the record, transcript, and the State's brief; defendant filed a *pro se* brief of twenty pages; and defendant's counsel appeared before the Supreme Court for oral argument of the appeal and made himself available for questions by the Court.

2. Rape and Allied Offenses § 5— first-degree rape—sufficiency of evidence

Assignments of error challenging the sufficiency of the evidence to sustain a charge of first-degree rape were wholly frivolous where the evidence, viewed in the light most favorable to the State, plainly showed that defendant had vaginal intercourse with the victim by force and against her will by threatening her with a loaded shotgun.

3. Rape and Allied Offenses § 6.1— instruction on second-degree rape not required

Defendant's contention that the trial court erred in failing to submit second-degree rape to the jury was wholly frivolous where all the evidence showed either first-degree rape or no rape at all.

4. Rape and Allied Offenses § 4.2— presence of semen—evidence of source not required

Laboratory proof of the source of semen was not a prerequisite to the admission of testimony that a medical examination disclosed the presence of semen in an alleged rape victim's vagina.

5. Criminal Law § 34.6; Rape and Allied Offenses § 4.1— knowledge of murder by defendant—competency to show victim's state of mind

Defendant's contention that the trial judge erred in failing to instruct the jury when he sustained an objection to testimony by an alleged rape victim

that she knew that defendant had killed a girl before was frivolous since (1) the testimony was competent to show the victim's state of mind when defendant threatened her with a shotgun which she knew to be loaded, and (2) defendant himself testified that he had been convicted of manslaughter and received a twenty-year sentence.

6. Arrest and Bail § 3.7— legality of arrest—failure to give Miranda warnings

Defendant's contention that he was not read his rights when he was arrested is wholly frivolous since it is not necessary to read a defendant his *Miranda* rights in order to make a lawful arrest, and defendant was advised by the arresting officers that he was being arrested on a charge of rape in compliance with G.S. 15A-401(c)(2)(c).

7. Criminal Law § 177— frivolous appeal—dismissal

Defendant's appeal from a conviction of first-degree rape was wholly frivolous and subject to dismissal.

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

APPEAL by defendant from judgment entered by *Martin (John C.), J.*, at the 9 April 1984 session of Superior Court, HARNETT County. Heard in the Supreme Court 10 June 1985.

Lacy H. Thornburg, Attorney General, by Marilyn Rich Mudge, Assistant Attorney General, for the state.

R. Allen Lytch for defendant.

MARTIN, Justice.

Defendant was convicted of rape in the first degree pursuant to N.C.G.S. 14-27.2(a)(2)(a). From the judgment of life imprisonment, he appealed to this Court. The record on appeal and transcript were duly filed. On 16 April 1985, defendant's counsel filed a brief on behalf of defendant.

In the record on appeal defendant's counsel made three assignments of error: denial of defendant's (1) motion to dismiss for insufficiency of the evidence, N.C.G.S. 15A-1227(a)(2); (2) motion to dismiss, N.C.G.S. 15A-1227(a)(3); and (3) motion for appropriate relief after verdict, N.C.G.S. 15A-1411. These three assignments of error are referred to in the brief filed by defendant's counsel.

Defendant's counsel does not argue any of the assignments of error in his brief. In the brief we find:

The attorney for the defendant respectfully asks that the Court review the record on appeal for possible prejudicial error since the defendant has been convicted of first degree rape and sentenced to life imprisonment. *State v. Poplin*, 304 N.C. 185, 282 S.E. 2d 420 (1981); *State v. McLean*, 282 N.C. 147, 191 S.E. 2d 598 (1972).

CONCLUSION

The attorney for the defendant abandons the three assignments of error. After careful review, he finds the assignments of error to be without merit, however, due to the seriousness of the offense, the defendant respectfully asks the Court to review the record for any prejudicial error.

On 23 May 1985 defendant's counsel wrote the following letter to defendant:

Mr. Donald M. Kinch
1300 Western Blvd.
Raleigh, North Carolina 27606

Re: Appeal of State vs. Donald M. Kinch
No. 434A84 (1985)

Dear Donald:

As I advised you in my letter of April 15, 1985, I filed a brief on your behalf with the Supreme Court of North Carolina requesting that they review the record and determine whether any prejudicial error occurred at your trial. In earlier correspondence I told you that I was preparing the record on appeal and that in my professional opinion, there was no error.

In accordance with the decision in *Anders v. California*, 386 U.S. 738 (1967), a United States Supreme Court case, I must also advise you that *you* may file *written* arguments directly with the Supreme Court of North Carolina yourself within the time period the court will continue to have the case under review.

To assist you in preparation of any arguments you might wish to submit, enclosed are copies of the court reporter's transcript of your trial, the record on appeal, the brief filed

on your behalf, and the State's brief. The address to which you should send any written arguments is:

J. Gregory Wallace
Clerk of Supreme Court of North Carolina
P.O. Box 1841
Raleigh, North Carolina 27611

If you choose to file additional arguments, you must do so *immediately.*

Please acknowledge receipt of this letter from me by signing the enclosed *copy* by the "X" and returning it in the enclosed self-addressed envelope.

If you have any questions please contact me.

Yours very truly,
s/ R. ALLEN LYTCH
R. Allen Lytch

Thereafter defendant filed a pro se brief.

[1] We hold that defendant's counsel has fully complied with *Anders v. California*, 386 U.S. 738, 18 L.Ed. 2d 493 (1967). He stated in his brief that he found no merit in the assignments of error and requested this Court to review the record for any prejudicial error. This is tantamount to a conclusion that the appeal is wholly frivolous. Counsel has filed a brief referring to the three assignments of error that might arguably support the appeal. A copy of the brief was furnished defendant, as well as copies of the record, transcript, and the state's brief. Defendant filed a pro se brief of twenty pages which is before this Court. Additionally, defendant's counsel appeared before this Court for oral argument of this appeal and made himself available for questions by the Court.

Pursuant to *Anders*, this Court must now determine from a full examination of all the proceedings whether the appeal is wholly frivolous.[1] In carrying out this duty, we will review the

1. Frivolous means "unworthy of serious attention; trivial." The American Heritage Dictionary of the English Language 528 (1980). "*Frivolous Appeal.* One in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed." Black's Law Dictionary 601 (5th ed. 1979).

legal points appearing in the record, transcript, and briefs, not for the purpose of determining their merits (if any) but to determine whether they are wholly frivolous. *Anders*, 386 U.S. 738, 18 L.Ed. 2d 493.

In order to review any such legal points, a brief review of the facts is necessary.

At trial the state's evidence tended to show that on Friday night, 7 January 1984, the defendant was out drinking at various nightspots in Dunn, North Carolina; he then returned to his home, where he and his girl friend had an argument. As a result of the argument, the defendant left his home with his shotgun about 2:00 a.m. and went to the home of the prosecutrix, Anna Adel Monk, a sixty-four-year-old widow who lives alone at 608 East Pope Street, Dunn. The defendant stood outside the home of Mrs. Monk and began calling her by name. She came to the door, and when she recognized the defendant, she opened the door. The defendant was upset and claimed he was in trouble and someone was shooting at him. Mrs. Monk knew the defendant as a schoolmate of her sons and she knew the defendant's girl friend, Gloria. The prosecutrix had been asleep when the defendant came to her house, and after letting him in, she returned to her bedroom in which a wood heater was located. She sat on the edge of her bed and listened to the defendant's story of his argument with his girl friend and how he was being pursued by someone. The prosecutrix noticed the shotgun and asked if it was loaded; she then asked the defendant to unload the shotgun, which he did. She offered to call the defendant's grandmother to come and take him to his mother's house, but the defendant refused, saying he did not want them to become involved. Mrs. Monk then told the defendant he would have to leave and again offered to call his grandmother, but again he refused. The defendant got ready to leave and picked up the shotgun. He reloaded the gun and then pointed it at Mrs. Monk and told her he wished to have intercourse with her. She tried to reach for the telephone, but the defendant shoved her back onto her bed, slapped her about the head, and began choking her. The prosecutrix, in fear of her life, consented to have intercourse with the defendant. After the defendant had sexual intercourse with Mrs. Monk, he fell asleep. Mrs. Monk immediately went to her neighbor's house to call the police. Officers Godwin and Beasley answered the call and found

the defendant asleep in Mrs. Monk's bed, naked from the waist down, with the odor of alcohol about his person. The defendant was arrested and the shotgun was found in the bedroom and confiscated by the officers. The results of the medical examination of Mrs. Monk shortly after the arrest of defendant disclosed the presence of semen in her vagina.

At the trial, the defendant's evidence tended to show that on Friday, 7 January 1984, the defendant had been out drinking. Later that night when he returned to his home he had an asthma attack and took his asthma medicine which tends to make him dizzy. He and his girl friend had an argument and he left, taking his shotgun with him. He went to Mrs. Anna Adel Monk's house and she let him in. The defendant had known Mrs. Monk for several years and she knew his family and his girl friend, Gloria. He told Mrs. Monk about the argument with his girl friend, that he thought someone was shooting at him, and that he had taken his asthma medicine and felt dizzy. The defendant testified that Mrs. Monk suggested he lie with her on her bed and rest and that she would wake him later. He testified that Mrs. Monk made sexual overtures to him but that he just lay there and went to sleep. The next thing he knew, he was wakened by two police officers who informed him he was being charged with raping Anna Adel Monk. The defendant denied having sexual relations with the prosecutrix on 7 January 1984; however, he did claim that he had once had sexual relations with the prosecutrix at a previous time and that she had propositioned him several times in the past.

[2] The three assignments of error set forth in the record challenge the sufficiency of the evidence to sustain the charge of rape in the first degree. Clearly, there was ample evidence to support the verdict of guilty of rape in the first degree. Rape in the first degree is committed when a person has vaginal intercourse with another person by force and against the will of the other person and employs or displays a dangerous or deadly weapon. N.C. Gen. Stat. § 14-27.2(a)(2)(a) (Cum. Supp. 1983). The evidence, viewed in the light most favorable to the state, plainly shows that this defendant had vaginal sexual intercourse with Mrs. Monk by force and against her will by threatening her with a loaded shotgun, a deadly weapon. There was substantial evidence to support the verdict. *State v. Roseman*, 279 N.C. 573, 184 S.E. 2d 289 (1971). A rational trier of fact could have found defendant guilty

beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, *reh'g denied*, 444 U.S. 890 (1979). The three assignments of error do not raise questions of law or fact "fit for consideration or discussion." *Bank v. Duffy*, 156 N.C. 83, 87, 72 S.E. 96, 98 (1911). We hold the assignments of error to be wholly frivolous.

[3] We turn now to consider the points in defendant's pro se brief. The first point we review is defendant's contention that the trial court erred in failing to submit rape in the second degree. The defendant denied having intercourse with Mrs. Monk. There was no evidence to support a verdict of rape in the second degree. All of the evidence shows either rape in the first degree or no rape at all. It is obvious that the trial judge was not required to submit the lesser offense. *State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984). This argument is wholly frivolous.

[4] Defendant next argues that the trial court erred in allowing evidence that a medical examination disclosed the presence of semen in Mrs. Monk's vagina. Defendant says this evidence was incompetent because there was no laboratory proof that the semen came from defendant. Patently, this argument is completely without merit. Mrs. Monk testified that defendant had a climax when he had intercourse with her. She further testified that she did not have intercourse with anyone else that day. The semen samples were taken shortly after the event. Of course, there is no requirement that there be laboratory proof of the source of semen before it can be introduced into evidence. The argument is indeed wholly frivolous.

[5] Defendant argues that the trial judge erred in failing to instruct the jury when he sustained an objection to testimony by Mrs. Monk that she knew that defendant had killed a girl before. We first observe that the testimony was competent to show the state of mind of Mrs. Monk when defendant threatened her with the shotgun which she knew to be loaded. *Cf.* 1 Brandis on North Carolina Evidence § 162(a) (1982); N.C.R. Evid. 803(3) (Cum. Supp. 1983). Defendant himself testified before the jury that he had been convicted of manslaughter and received a twenty-year sentence of imprisonment. The argument is devoid of merit and wholly frivolous.

[6] Last, defendant makes the completely frivolous argument that he was not read his "rights" when he was arrested. It is not necessary to read a defendant the Miranda rights in order to make a lawful arrest. Defendant was advised by the arresting officers that he was being arrested on a charge of rape in compliance with N.C.G.S. 15A-401(c)(2)(c). The argument is entirely frivolous.

[7] Upon our examination of all of the proceedings, we hold the appeal to be wholly frivolous and subject to dismissal. *Anders v. California*, 386 U.S. 738, 18 L.Ed. 2d 493. *See State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976).

Defendant also alleges that his sixth amendment right to effective assistance of counsel at trial was violated. We cannot properly determine this issue on this direct appeal because an evidentiary hearing on this question has not been held. Our decision on this appeal is without prejudice to defendant's right to file a motion for appropriate relief in the superior court based upon an allegation of ineffective assistance of counsel. N.C. Gen. Stat. § 15A-1415(b)(3) (1983).

Appeal dismissed.

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

JOSEPH CHESTER JORDAN, ADMINISTRATOR OF THE ESTATE OF JODIE PAGE JORDAN, PLAINTIFF v. WESLEY IRVEN JONES, JR.; TRAILWAYS SOUTHEASTERN LINES, INC.; AND CAROLINA COACH COMPANY, INC., DEFENDANTS/THIRD-PARTY PLAINTIFFS v. DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, THIRD-PARTY DEFENDANT

No. 391PA84

(Filed 3 July 1985)

Highways and Cartways § 7; Negligence § 29.1— negligence of DOT in placement of stop sign—summary judgment for DOT improper

Summary judgment was improperly entered for third party defendant Department of Transportation in an action arising from the failure of a bus driver to see a stop sign where the driver of the bus testified that the stop

sign was considerably further to the right of the intersection than normal and that he was traveling the road for the first time and did not see the stop sign; the regional safety director for Trailways testified that the stop sign was not clearly visible and was further from the road than normal; there had been nine accidents at the intersection in 1981; the Federal Highway Administration manual called for full signalization of an intersection when five or more accidents involving personal injury or property damage of $100 or more occurred within a twelve month period; a Trooper had filed a highway condition report stating that a caution light was urgently needed; the Department's Division Traffic Engineer had decided to install a flashing light; an expert in civil engineering and accident reconstruction concluded that a flashing light was required at the intersection; and a signal light was finally installed a short time after the accident from which this case arose. Defendant's forecast of evidence raised genuine issues of material fact concerning causation and DOT's negligence.

ON discretionary review of an unpublished decision of the Court of Appeals affirming the grant of summary judgment for third-party defendant by *Ferrell, J.*, at the 8 September 1983 Civil Session of Superior Court, BURKE County.

This suit arises from a traffic accident which occurred on 3 December 1981 near Morganton in Burke County. On that day the automobile in which plaintiff's decedent, Jodie Page Jordan, an infant, was a passenger was struck by a bus at the intersection of Drexel and Bethel Roads. The bus, which was owned by Carolina Coach Company and leased by Trailways Southeastern Lines, Inc., was driven by defendant Wesley Irven Jones, Jr.

The collision occurred when defendant Jones, an experienced bus driver, failed to see a "stop" sign as well as a "stop ahead" sign and continued north along Bethel Road into the intersection without stopping. There was evidence that the "stop" sign was further from the road than is usual for such signs. A short time after the accident the Department of Transportation (DOT) replaced the "stop" sign with a flashing light suspended in the center of the intersection.

After plaintiff-Administrator instituted this action for the wrongful death of his infant intestate, defendants filed a third-party complaint alleging that the negligence of the DOT was a proximate cause of the accident in question and, as a result, the DOT was liable to defendants if defendants were found to be liable to plaintiff. The trial court granted the DOT's motion for summary judgment on the issue of negligence. The Court of Ap-

peals affirmed the trial court's ruling and we granted defendants' petition for discretionary review.

Lacy H. Thornburg, Attorney General, by Ralf F. Haskell, Special Deputy Attorney General, and Sandra M. King, Assistant Attorney General, for the Department of Transportation.

Myers, Ray, Myers, Hulse and Brown, by John F. Ray, for defendant-appellants.

MEYER, Justice.

The sole question before the Court in this case is whether there exists any genuine issue of material fact concerning the DOT's alleged negligence to be submitted to a jury. We hold that defendants' forecast of the evidence raised genuine issues of material fact and that it was improper for the trial court to grant the DOT's motion for summary judgment.

To make out a case of actionable negligence the plaintiff must introduce evidence tending to show that (1) defendant failed to exercise proper care in the performance of a duty owed to plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances as they existed. *See Pittman v. Frost*, 261 N.C. 349, 134 S.E. 2d 687 (1964); 9 Strong's North Carolina Index 3rd § 29 (1977). Summary judgment is proper when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Baumann v. Smith*, 298 N.C. 778, 260 S.E. 2d 626 (1979). Although summary judgment is a useful tool in expediting the trial of cases and disposing of unfounded claims it is a drastic measure and should be used with caution, especially in a negligence case. *Williams v. Carolina Power and Light Co.*, 296 N.C. 400, 250 S.E. 2d 225 (1979).

Our examination of the record reveals that there are genuine and material issues of fact as to whether the DOT was negligent and whether its negligence was a proximate cause of the accident.

Defendant Jones, driver of the bus, testified that the "stop" sign was considerably further to the right of the intersection than is normal. John Davis, regional safety director for defendant Trailways, testified by deposition that the "stop" sign facing traf-

fic traveling north on Bethel Road, the direction defendant's bus was traveling, was not clearly visible and was located further from the road than is normal. Defendant Jones was traveling the road for the first time on the day of the accident and testified that he did not see the "stop" sign. All of this testimony was uncontradicted.

The *Manual of Uniform Traffic Control Devices*, U.S. Department of Transportation, Federal Highway Administration (1978), cited by the Court of Appeals in its decision, requires full signalization of an intersection when five or more accidents involving personal injury or property damage of one hundred dollars or more have occurred within a 12-month period. According to the deposition testimony of Sergeant L. S. Goodson there were a total of nine accidents at the intersection in 1981. On 3 October 1981 Trooper W. R. Thompson filed a highway condition report stating that a caution light was urgently needed. W. B. Cochran, Division Traffic Engineer for the Department, testified by deposition that he decided to install a flashing light about 7 October 1981. Based on the Goodson and Cochran depositions, James L. Parrish III, an expert in civil engineering and accident reconstruction, concluded that a flashing light was required at the intersection after the fifth accident on 27 April 1981. The signal light was finally installed on 8 December 1981.

This evidence is uncontradicted and clearly would be sufficient to allow a jury to conclude that the DOT was negligent and that its negligence was a proximate cause of the accident. Although defendant Jones' failure to see the "stop ahead" and "stop" signs was the last act of negligence which contributed to the accident, we cannot accept the DOT's contention that it was clearly the sole proximate cause of the accident. The very basis of the defendants' claim against the DOT is that defendant Jones failed to see the signs at the intersection because of the DOT's negligent failure to install proper signals. "It is well settled that there may be more than one proximate cause of an injury." *Adams v. Mills*, 312 N.C. 181, 194, 322 S.E. 2d 164, 172 (1984). A court may declare whether an act was the proximate cause of an injury only when the facts are not in dispute and only one inference may be drawn from them. *Id.* at 193, 322 S.E. 2d at 172. The evidence in the case at bar as forecast by defendants will

clearly support more than one inference of what proximately caused the accident.

Since defendants' forecast of the evidence raised genuine issues of material fact concerning both the DOT's negligence and causation, we hold that the trial court erred in granting the DOT's motion for summary judgment. The decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court, Burke County with instructions that the entry of summary judgment in favor of the DOT be vacated and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES ROBERT (DICK) SOUTHERN

No. 24PA85

(Filed 3 July 1985)

Criminal Law § 138— prayer for judgment continued—no prior conviction for sentencing purposes

The trial court erred at sentencing by concluding that certain convictions in which prayer for judgment was continued and no fines or other conditions imposed constituted "prior convictions" under the Fair Sentencing Act. G.S. 15A-1340.4(a)(1)(o) and G.S. 15A-1340.2(4).

ON the state's petition for discretionary review of a decision of the Court of Appeals, 71 N.C. App. 563, 322 S.E. 2d 617 (1984), finding no error in defendant's trial at the 10 January 1984 Session of CASWELL County Superior Court, *Judge Beaty* presiding, but remanding the case for a new sentencing hearing.

Lacy H. Thornburg, Attorney General, by Michael Smith, Associate Attorney, for the state appellant.

George B. Daniel and Ronald M. Price, by Ronald M. Price, for defendant appellee.

PER CURIAM.

The only question before us is whether the Court of Appeals was correct in determining that the trial court erred at sentencing by concluding that certain convictions in which prayer for judgment was continued and no fines or other conditions imposed constituted "prior convictions" under the Fair Sentencing Act, particularly N.C.G.S. § 15A-1340.4(a)(1)(o) and -1340.2(4). Believing that the Court of Appeals was correct, we conclude that its decision should be

Affirmed.

STATE OF NORTH CAROLINA v. ANN MAJORS

No. 126A85

(Filed 3 July 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 were equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value.

APPEAL by the State pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the North Carolina Court of Appeals, 73 N.C. App. 26, 329 S.E. 2d 388 (1985) (*Judge Becton* with *Judge Johnson* concurring and *Judge Martin* dissenting), ordering a new trial for error in the trial before *Judge Samuel E. Britt* and a jury at the November 1983 session of CUMBERLAND County Superior Court. Judge Britt sentenced defendant to prison for the term of fifteen years upon the jury's verdict of guilty of second degree murder.

Lacy H. Thornburg, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

Gregory A. Weeks, Assistant Public Defender, for defendant-appellee.

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.

THE GASTON COUNTY INDUSTRIAL FACILITIES AND POLLUTION CONTROL FINANCING AUTHORITY AND CAROLINA FREIGHT CARRIERS CORPORATION v. C. C. HOPE, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF COMMERCE

No. 111PA85

(Filed 3 July 1985)

ON discretionary review pursuant to G.S. 7A-31, prior to determination by the Court of Appeals, to review the judgment entered by *Davis, J.*, on 17 January 1985, in WAKE County Superior Court, affirming a denial by respondent of petitioners' application for approval of an industrial revenue bond project.

Lacy H. Thornburg, Attorney General, by William W. Melvin, Senior Deputy Attorney General, for the North Carolina Department of Commerce.

Robinson, Bradshaw & Hinson, P.A., by Robin L. Hinson and Edwin F. Lucas, III, for petitioner-appellant, The Gaston County Industrial Facility and Pollution Control Financing Authority.

PER CURIAM.

The judgment of the trial court is affirmed.

Affirmed.

Everett v. U.S. Life Credit Corp.

WILLIE EVERETT, JR.	)	
	)	
v.	)	ORDER
	)	
U.S. LIFE CREDIT CORPORATION	)	

No. 264P85

(Filed 10 July 1985)

THIS matter is before the Court upon the Petition of the plaintiff for discretionary review, under G.S. 7A-31, of a decision of the Court of Appeals filed 2 April 1985, reversing a judgment entered 14 March 1984 by *Galloway, J.*, in District Court, DURHAM County. The Petition is ALLOWED for the sole purpose of entering the following order.

> The Court of Appeals correctly determined that the absence of notice does not preclude the secured party from recovering reasonable expenses incurred in retaking the collateral under the circumstances of this case. Plaintiff, however, contends that the amount of the expenses claimed by the secured party are unreasonable—a question not passed upon by either court below. Accordingly, the mandate of the Court of Appeals is amended to read as follows: The judgment of the trial court is VACATED and the cause is REMANDED to the District Court, Durham County, for a determination of the extent to which the secured party's claimed expenses were reasonably incurred in retaking, holding and preparing the collateral for disposition.

By order of the Court in Conference, this 3rd day of July, 1985.

FRYE, J.
For the Court

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

ALFORD v. SHAW

No. 132PA85.

Case below: 72 N.C. App. 537.

Petition by All American Assurance Company for discretionary review under G.S. 7A-31 allowed 3 July 1985. Petition by several defendants for discretionary review under G.S. 7A-31 allowed 3 July 1985.

BOSTON v. WEBB

No. 183P85.

Case below: 73 N.C. App. 457.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

BOYD v. WATTS

No. 218PA85.

Case below: 73 N.C. App. 566.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 3 July 1985.

BRIGGS v. ROSENTHAL

No. 271P85.

Case below: 73 N.C. App. 672.

Petition by plaintiffs for writ of certiorari to North Carolina Court of Appeals denied 3 July 1985.

DRUMMOND v. CORDELL

No. 196A85.

Case below: 73 N.C. App. 438.

Petition by defendant for discretionary review under G.S. 7A-31 denied as to additional issues 3 July 1985.

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

DUBOSE STEEL, INC. v. BB&T

No. 237P85.

Case below: 72 N.C. App. 598.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 July 1985.

FORSYTH COUNTY v. SHELTON

No. 365P85.

Case below: 74 N.C. App. 674.

Petition by defendants for temporary stay pursuant to Rule 23(e) allowed 3 July 1985.

GRIFFIN v. BAUCOM

No. 283P85.

Case below: 74 N.C. App. 282.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 July 1985.

IN RE FORECLOSURE OF PROPERTY OF JOHNSON

No. 123PA85.

Case below: 72 N.C. App. 485.

Petition by heirs of Davis Johnson for discretionary review under G.S. 7A-31 allowed 3 July 1985.

IN RE McDONALD

No. 87P85.

Case below: 72 N.C. App. 234.

Petition by respondents for discretionary review under G.S. 7A-31 denied 8 July 1985.

CASES REPORTED

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

IN THE MATTER OF THE APPEAL OF
R. J. REYNOLDS TOBACCO CO.

No. 275P85.

Case below: 74 N.C. App. 140.

Petition by Forsyth County for discretionary review under G.S. 7A-31 denied 3 July 1985.

IPOCK v. GILMORE

No. 193P85.

Case below: 73 N.C. App. 182.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 July 1985. Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

MARTIN v. THARPE

No. 347P85.

Case below: 74 N.C. App. 607.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 3 July 1985.

MAUNEY v. MORRIS

No. 231PA85.

Case below: 73 N.C. App. 589.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 July 1985.

MORETZ v. RICHARDS & ASSOCIATES

No. 263PA85.

Case below: 74 N.C. App. 72.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 3 July 1985.

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

N. C. STATE BAR v. SHEFFIELD

No. 248P85.

Case below: 73 N.C. App. 349.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 July 1985.

NORTHWESTERN BANK v. WESTON

No. 246P85.

Case below: 73 N.C. App. 162.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 July 1985.

PORET v. STATE PERSONNEL COMM.

No. 403P85.

Case below: 74 N.C. App. 536.

Petition by State Personnel Commission for discretionary review under G.S. 7A-31 denied 18 July 1985. Petitions by State Personnel Director and Office of State Personnel for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 18 July 1985.

RADFORD v. NORRIS

No. 260P85.

Case below: 74 N.C. App. 87.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 July 1985.

SCALES v. TUCKER

No. 262P85.

Case below: 73 N.C. App. 696.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 July 1985.

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

SNOW v. DICK & KIRKMAN

No. 294P85.

Case below: 74 N.C. App. 263.

Petition by defendants for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. BARNES

No. 375P85.

Case below: 75 N.C. App. 360.

Petitions by Attorney General for discretionary review under G.S. 7A-31 and for writ of supersedeas denied 3 July 1985.

STATE v. BARRANCO

No. 247P85.

Case below: 73 N.C. App. 502.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 July 1985. Notice of Appeal under G.S. 7A-30 dismissed 3 July 1985.

STATE v. BURGESS

No. 178P85.

Case below: 73 N.C. App. 179.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. COATS

No. 272P85.

Case below: 74 N.C. App. 110.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 July 1985.

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

STATE v. CORBETT

No. 312P85.

Case below: 73 N.C. App. 700.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 July 1985.

STATE v. CORLEY

No. 363A85.

Case below: 75 N.C. App. 245.

Petition by Attorney General for writ of supersedeas allowed 3 July 1985.

STATE v. DAVIS

No. 282P85.

Case below: 74 N.C. App. 411.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. HIGHSMITH

No. 265P85.

Case below: 74 N.C. App. 96.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. JOHNSON

No. 374P85.

Case below: 75 N.C. App. 363.

Petition by Attorney General for writ of supersedeas under Rule 23 denied 3 July 1985.

STATE v. JONES

No. 191P85.

Case below: 73 N.C. App. 700.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. LEONARD

No. 313P85.

Case below: 74 N.C. App. 443.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. OWENS

No. 236P85.

Case below: 73 N.C. App. 631.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. SHOWN

No. 161P85.

Case below: 73 N.C. App. 150.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985. Motion by Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 3 July 1985.

STATE v. STRICKLIN

No. 396P85.

Case below: 75 N.C. App. 200.

Petitions by defendant for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 10 July 1985.

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

STATE v. TEMPLES

No. 239P85.

Case below: 74 N.C. App. 106.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE v. YORK

No. 329A85.

Case below: 74 N.C. App. 609.

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 July 1985.

WILSON v. WILSON

No. 165P85.

Case below: 73 N.C. App. 96.

Petition by defendant for discretionary review under G.S. 7A-31 denied 3 July 1985.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NANTAHALA POWER & LIGHT COMPANY, APPLICANT; TAPOCO, INC. AND ALUMINUM COMPANY OF AMERICA, RESPONDENTS v. RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; COUNTIES OF CHEROKEE, GRAHAM, JACKSON, MACON, AND SWAIN; TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; HENRY J. TRUETT, HOWARD PATTON, VERONICA NICHOLAS, O. W. HOOPER, JR., ALVIN E. SMITH, LARRY LYNN BAILEY; AND JACKSON PAPER MANUFACTURING COMPANY, INTERVENORS

No. 549A84

(Filed 13 August 1985)

1. **Electricity § 3; Utilities Commission § 36— electric rates—"stand alone" basis for Nantahala—insufficient consideration of "roll-in" evidence—insufficient findings**

The Utilities Commission erred in its order establishing Nantahala's retail rates on a "stand-alone" basis after a "roll-in" methodology had been utilized by the Commission and affirmed by the Supreme Court in two preceding general rate cases involving Nantahala, Tapoco and Alcoa by failing to accord more than minimal consideration to competent evidence suggesting the continued propriety of utilizing the "roll-in" methodology, and by failing to find facts with respect to the issues of whether Tapoco and Alcoa remain North Carolina public utilities, whether the properties of Nantahala and Tapoco constitute a unified single electric system despite new contractual arrangements between Nantahala and TVA and between Tapoco and TVA, and whether Alcoa still so dominates Nantahala as to require piercing of the corporate veil between them.

2. **Electricity § 3; Utilities Commission § 36— electric rates of Nantahala—indirect benefits to Alcoa from new agreements**

In evaluating the effect on Nantahala's costs of service of new "stand-alone" agreements between Nantahala and TVA and Tapoco and TVA, the Utilities Commission must address in a direct and final manner the issue of indirect benefits to Alcoa resulting from the exclusion of Nantahala from the 1983 Tapoco-TVA Exchange Agreement, and whether a roll-in will "cancel" or "true-up" any such indirect benefits as may be found to enure to Alcoa from this changed circumstance.

3. **Electricity § 3; Utilities Commission § 36— future rates of Nantahala—requiring financial support by Alcoa**

If the Utilities Commission again finds that Alcoa is a North Carolina public utility pursuant to G.S. 62-3(23)c, it may require Alcoa, as a public utility, to protect its subsidiary Nantahala financially as to future rates in much the same way as it has been held responsible for past locked-in rates.

4. Electricity § 3; Utilities Commission § 36— rolled-in rates of Nantahala—requiring periodic payments by Alcoa

Nantahala can be protected from any financial hardship that the Utilities Commission may determine to result from rolled-in future rates by requiring Alcoa to pay periodically (monthly) to Nantahala any revenue shortfall which appears in Nantahala's accounting data as a result of Alcoa's decision to maintain separate corporate entities for Nantahala and Tapoco.

5. Electricity § 3; Utilities Commission § 43— electric rates—refusal to establish new rate class—no unlawful discrimination

In a proceeding to establish the retail rates for Nantahala Power Company, the evidence supported the Utilities Commission's refusal to establish a new Large Industrial Service rate class which would apply only to Jackson Paper Manufacturing Company because such a rate class was not cost justified and would result in a revenue requirement deficit that would have to be made up by other rate classes. Nor did the Utilities Commission unlawfully discriminate against Jackson Paper Manufacturing Company in violation of G.S. 62-140 by its failure to establish a separate Large Industrial Service rate for its service.

APPEAL by intervenors pursuant to N.C.G.S. § 7A-29(b) from the final order of the North Carolina Utilities Commission entered 12 April 1984 in Docket No. E-13, Sub 44. Heard in the Supreme Court 11 March 1985.

This matter was initiated by Nantahala Power and Light Company ("Nantahala") on 1 February 1983 by the filing of an application with the North Carolina Utilities Commission (the "Commission") to adjust its rates so as to increase charges to its North Carolina retail customers by $1,443,000 and to revise its Purchased Power Cost Adjustment clause ("PPCA") applicable to all retail electric rates.

In its latest application for a rate increase, Nantahala alleged that it should no longer be subject to the rate levels based on the roll-in performed in its last preceding rate case (Docket No. E-13, Sub 35) because its investments and expenses relative to its North Carolina retail rates had been "drastically altered" due to a new power supply agreement entered into between Nantahala and the Tennessee Valley Authority ("TVA"), effective 1 January 1983. The new contract was apparently intended to replace, insofar as Nantahala was concerned, the 1962 New Fontana Agreement ("NFA") between TVA, Alcoa, Nantahala, and Tapoco and the 1971 Nantahala-Tapoco Apportionment Agreement (the "1971 Apportionment Agreement") which expired by their respective

terms on 31 December 1982. Inequities under these expiring contracts, according to Nantahala, had formed the basis of the Commission's prior decisions to implement a roll-in of the properties, investments, and revenues of Nantahala and Tapoco and therefore their expiration and replacement with a new TVA-Nantahala supplemental power purchase agreement obviated the need for a roll-in to be performed in setting Nantahala's retail rates.

In addition to the foregoing "changed circumstance," Nantahala alleged that its present rates as established in Docket No. E-13, Sub 35, were unreasonably low and failed to provide a fair rate of return to the utility necessary to provide service and attract capital for construction and other capital projects. Finally, Nantahala stated that an immediate rate increase was imperative in the face of Alcoa's intention to file an application with the Commission[1] to sell all of its stock in Nantahala, "fully evidencing its desire and intent to divorce itself completely from any interest in Nantahala other than as a holder of certain subordinated debt," so that Nantahala could establish a record of financial stability and obtain long-term debt and equity financing to meet the demands of its customers and undertake new construction. The historical test year data submitted by Nantahala in the Sub 44 proceeding is for the twelve-month period ending 31 December 1981; evidence of its new power supply agreement with TVA, executed on 22 December 1982, was alleged by Nantahala to be admissible under N.C.G.S. § 62-133(c), which allows public utilities to file for Commission consideration such relevant, material, and competent evidence showing actual changes in costs, revenues, or the value of property "based upon circumstances and events occurring up to the time the hearing is closed."

The matter was treated as an application for a general rate increase under N.C.G.S. § 62-137; and various parties, including the Attorney General of North Carolina and the Public Staff of the North Carolina Utilities Commission, on behalf of the using and consuming public, and certain individual rate payers, were permitted to intervene in the proceedings. With the exception of intervenor Jackson Paper Manufacturing Company, all of the in-

1. The record indicates that Alcoa has indeed carried through with its intention to apply to sell its interest in Nantahala to Nantahala's employees under an Employee Stock Option Plan filed in Docket No. E-13, Sub 51.

tervening parties (the "intervenors") moved to dismiss Nantahala's application on the basis of determinations contained in prior Commission Docket Nos. E-13, Sub 29 (Remanded) and Sub 35, in which a "roll-in" methodology of rate making was implemented, because the 1983 filing did not include Nantahala's parent, Aluminum Company of America ("Alcoa") and its affiliate, Tapoco, Inc. ("Tapoco") as parties and did not include financial data respecting Tapoco's rate base, expenses, and revenues. In the alternative, the intervenors moved to suspend the running of the 270-day hearing date period, defer the hearings, join Alcoa and Tapoco as parties, and requested consideration and implementation of the roll-in rate making methodology previously used by the Commission in setting Nantahala's intrastate retail rates. Jackson Paper Manufacturing Company's separate challenges to the proposed Nantahala rate increase do not concern the question of roll-in and will be treated separately herein.

Appeals by Nantahala, Alcoa, and Tapoco (the "companies") from the orders entered by the Commission in Docket Nos. E-13, Sub 29 (Remanded) and Sub 35, were pending at the time Nantahala initiated this third rate increase proceeding in a seven-year period. The Commission's orders in Sub 29 and Sub 35 have subsequently been affirmed by this Court in *Utilities Commission v. Nantahala Power and Light Co.*, 313 N.C. 614, 332 S.E. 2d 397 (1985), and *Utilities Commission v. Nantahala Power and Light Co.*, 314 N.C. 246, 333 S.E. 2d 217 (1985). The essence of these prior orders was the Commission's determination that the hydroelectric facilities and properties of Nantahala and Tapoco constitute a single, unified electric system and should be treated as such, or "rolled-in," for retail rate making purposes, and its further determination that the single system's corporate parent, Alcoa, should be held financially responsible for excessive rates collected by Nantahala under the "stand-alone" rate making model previously used by the utility in computing Nantahala's retail costs of service and revenue requirements.

Following a hearing on the intervenors' motion to dismiss, the Commission issued an order on 22 April 1983 denying the motions to dismiss or delay the hearings on Nantahala's rate increase request. In addition, the Commission deferred its ruling on

the motions to join Alcoa and Tapoco as parties, and made the following conclusions concerning the intervenors' motions to dismiss:

> The Commission further concludes that the Supreme Court's decision in *Utilities Commission v. Edmisten, Attorney General*, 299 N.C. 432 (1980) is not the law in this case. The *Edmisten* case remanded Docket E-13, Sub 29, to consider whether it should adopt a roll-in rate-making device to "true-up" alleged rate-making benefits flowing to Alcoa from Nantahala by virtue of the Fontana and Apportionment Agreements. Since the Fontana Agreement expired on December 31, 1982, and has been replaced by a new power supply arrangement between Nantahala and TVA, it would not be appropriate at this time to consider a roll-in device in this docket until that issue is properly raised through evidence at the hearing.

However, the Commission took "judicial" notice of its past orders regarding the relationship between Alcoa and its subsidiaries Nantahala and Tapoco and concluded that the terms and conditions of the new power supply agreement between Nantahala and TVA should be fully explored at the hearing to determine whether Nantahala's customers are fairly treated under the new arrangements with TVA. Accordingly, the Commission directed Nantahala to supply certain data applicable to the roll-in issue, including its new power supply agreement with TVA, to the Commission and further directed Tapoco to "assist and cooperate with Nantahala" in providing this data.

The intervenors subsequently filed motions seeking judicial notice and application of the doctrine of res judicata to certain facts established in Docket Nos. E-13, Sub 29 (Remanded) and Sub 35 regarding the public utility status of Tapoco and Alcoa, the propriety of a roll-in rate making methodology for Nantahala and Tapoco and the liability of Alcoa for the financial obligations of its public utility subsidiary Nantahala. In an order entered 9 August 1983, the Commission directed that Alcoa and Tapoco be joined as parties so that the applicant and the intervenors might have the fullest opportunity to explore the issues raised by the rate increase request. However, the Commission denied the intervenors' motion requesting judicial notice and the application of the doc-

trine of res judicata to the relevant factual findings contained in the Commission's previous orders. Rather, the Commission concluded that "these facts should be a matter of proof at the hearing in this case." In addition, the Commission agreed to take judicial notice of any relevant orders in Docket Nos. E-13, Sub 29 (Remanded) and Sub 35, if so requested by any party at the hearing.

Thereafter, hearings were held before a panel of the Commission in late September and early October 1983. The intervenors' renewed motion for judicial notice and application of the doctrine of res judicata to the requested factual determinations was also denied and all parties were permitted to present evidence on these and other relevant issues. On 29 November 1983, the Commission panel issued a "Notice of Decision and Order" and on 22 December 1983, issued an "Order Granting Partial Rate Increase," establishing Nantahala's rates on a "stand-alone" basis and approving virtually all of the rate increases proposed by the company. The rate schedules approved by the Commission panel reflected an increase of $1,335,857 in base rates and authorized a base unit cost of approximately 1.13 cents per kWh for purchased power, excluding gross receipts tax.

By its rate orders, the Commission: (1) adjusted the test year (1981) data to account for certain circumstances and events up to the time of the close of the hearing in October 1983 including recognition of the two new power supply agreements with TVA on the one hand and Alcoa, Tapoco, and TVA on the other, and which became effective on 1 January 1983; (2) found that no direct benefits now accrue to Alcoa as a result of the 1983 Nantahala-TVA Interconnection Agreement and the 1983 Tapoco-TVA Exchange Agreement (the "Fontana III Agreements") and that if any indirect benefits flow to Alcoa thereunder, these indirect benefits do not appear to be the result of any unlawful preference having been shown to Alcoa by Nantahala; (3) found that rolled-in rates would result in insolvency or bankruptcy for Nantahala absent (a) an accompanying order from the appropriate federal jurisdiction requiring the physical sale of Tapoco power to Nantahala, or (b) a guarantee of Nantahala's financial integrity by Alcoa; (4) found that the Nantahala electric system should be treated independently of Tapoco; (5) failed or declined to find that either Alcoa or Tapoco were North Carolina public utilities; (6)

failed or declined to find that Nantahala's and Tapoco's properties form a single, unified electric public utility system; and (7) failed or declined to find that Alcoa so dominates Nantahala as to warrant piercing the corporate veil between them and holding Alcoa responsible for Nantahala's financial obligations. In addition, the Commission declined to approve the proposed rate schedule, LIS (Large Industrial Service), which Jackson Paper Manufacturing Company had requested.

Thereafter, the intervenors filed a motion that issuance of the final order be held in abeyance pending the final adjudication of the matters raised in (1) Docket No. E-13, Sub 51, in which Alcoa proposes to sell its stock interest in Nantahala to a group of Nantahala's salaried employees using a leveraged ESOP buy-out, and (2) the consolidated cases pending before the Federal Energy Regulatory Commission ("FERC") (Docket Nos. ER82-774-000, *et al.*), in which the companies are seeking permission to terminate the NFA and 1971 Apportionment Agreement and place into effect the Fontana III Agreements and in which the majority of the present intervenors, including the Commission itself, are seeking an order from the FERC allocating or requiring the sale of Tapoco power and energy to Nantahala. This motion was denied upon issuance of the final order in the Sub 44 proceeding.

The Full Commission, upon the intervenors' appeal, issued its final order on 12 April 1984 affirming the panel order granting the increase in rates and denying the intervenors' exceptions and motions for reconsideration. Two Commissioners dissented from the Full Commission's order, for the principal reasons that: (1) the Nantahala-Tapoco properties continue to form a single electric system; (2) Alcoa continues to dominate Nantahala and the veil of corporate separateness between them should be pierced; (3) Nantahala's rate payers have been and are being systematically deprived of the less expensive power produced by the "Alcoa System's" hydroelectric facilities; (4) the potential bankruptcy of Nantahala is not a real threat, but rather is a fiction propagated by Alcoa; (5) the new power supply agreements with TVA are an improper mechanism for the allocation of power costs among the system's members or users; (6) the roll-in rate making technique remains appropriate in the case of Nantahala and Tapoco; and (7)

the Full Commission has underestimated its regulatory authority over Alcoa with respect to Nantahala's rates and service.

All of the intervenors filed timely exceptions and appealed from the final order of the Commission granting Nantahala a partial rate increase based upon a stand-alone rate making technique. Jackson Paper's exceptions and appeal concern the Commission's failure to approve the Large Industrial Service rate schedule proposed by that company, while the other intervenors' exceptions and appeal primarily concern the question of "roll-in" and Alcoa's continued liability for the financial integrity and obligations of its subsidiary Nantahala.

Lacy H. Thornburg, Attorney General, by Richard L. Griffin, Assistant Attorney General, for Using and Consuming Public.

Robert Gruber, Executive Director, by James D. Little, Staff Attorney, The Public Staff, for the Using and Consuming Public.

Crisp, Davis, Schwentker & Page, by Robert F. Page, for intervenor-appellants Counties of Cherokee, Graham, Jackson, Macon, and Swain; Towns of Andrews, Bryson City, Dillsboro, Robbinsville, and Sylva; Tribal Council of the Eastern Band of Cherokee Indians; and Henry J. Truett, Howard Patton, Veronica Nichols, O. W. Hooper, Jr., and Alvin E. Smith.

Hatch, Little, Bunn, Jones, Few and Berry, by David H. Permar, for intervenor-appellant Jackson Paper Manufacturing Company.

Hunton & Williams, by Edward S. Finley, Jr., for respondent-appellee Nantahala Power and Light Company.

LeBoeuf, Lamb, Leiby & MacRae, by Ronald D. Jones, David R. Poe, and Dennis P. Harkawik, of Counsel, for respondent-appellees Aluminum Company of America and Tapoco, Inc.

MEYER, Justice.

[1] The principal question raised by this appeal is whether the Commission erred as a matter of law in its order establishing Nantahala's retail rates on a "stand-alone" basis by failing to accord more than minimal consideration to competent evidence suggesting the continued propriety of utilizing the "roll-in" rate making methodology applied by the Commission in two preceding

general rate cases involving Nantahala, Tapoco, and Alcoa and affirmed by this Court in *Utility Commission v. Nantahala Power and Light Co.*, 313 N.C. 614, 332 S.E. 2d 397 ("*Nantahala I*"), and *Utilities Commission v. Nantahala Power and Light Co.*, 314 N.C. 246, 333 S.E. 2d 217 ("*Nantahala II*"). In this appeal, the intervenors contend that the four basic factual determinations which supported the 1981 Docket No. E-13, Sub 29 (Remanded) order implementing roll-in, affirmed in *Nantahala I*, and the 1982 Docket No. E-13, Sub 35, order implementing a roll-in, affirmed in *Nantahala II*, continue to be present and relevant to the fundamental question as to what is the just and reasonable level of rates for Nantahala to charge its retail customers under Chapter 62 of the North Carolina General Statutes.

These four basic factual issues or determinations raised by the intervenors in pre-hearing motion and through the presentation of evidence during the 1983 adjudicatory hearings, as stated in the pre-hearing motion, are as follows:

1. Tapoco, Inc., is a North Carolina electric public utility;

2. Aluminum Company of America (Alcoa) is a North Carolina electric public utility;

3. The properties of Nantahala and Tapoco constitute a unified single electric system;

4. Alcoa so dominates Nantahala as to pierce the veil of corporate separateness between them.

The intervenors challenge the Commission's order granting Nantahala a partial rate increase on a number of grounds. The intervenors contend, *inter alia*, that the Commission's findings and conclusions prejudice their substantial rights by: (1) the Commission's failure to accord more than minimal consideration to the evidence respecting the four issues raised by both pre-hearing motion and testimony at the rate hearings as shown by the lack of findings of fact on these issues; (2) the Commission's erroneous decision to treat Nantahala as a stand-alone company for rate making purposes; and (3) the Commission's error in determining that it could not set Nantahala's rates on a rolled-in basis absent a voluntary commitment on the part of Alcoa to support Nantahala financially should any revenue short-fall occur under a roll-

in. For the reasons set forth below, we reverse the final order of the Commission in Docket No. E-13, Sub 44, and remand the matter to the Commission for further proceedings in light of our recent decisions in *Nantahala I* and *Nantahala II*, and consistent with the opinion rendered herein.

We will review, in the following order: (1) the prior regulatory and judicial decisions involving the propriety of a roll-in rate making methodology for setting Nantahala's retail rates; (2) the evidence presented in the Sub 44 hearing with respect to the issues raised by Nantahala's rate increase request; (3) the Commission's consideration, or failure of consideration, of the four issues raised by the intervenors by pre-hearing motion and evidence presented at the hearings; (4) the Commission's decision to set Nantahala's rates on a stand-alone basis; (5) the Commission's determination that it lacked authority to require Alcoa to support Nantahala financially under a roll-in order; and (6) the Commission's failure to approve the "LIS" rate requested by Jackson Paper Manufacturing Company.

I.

This appeal is the fourth in a sequence that originated in 1976 with the filing of a rate increase application by Nantahala in Docket No. E-13, Sub 29.[2] In that general rate case, a number of the present intervening parties and rate payers brought to the attention of the Commission four issues which they argued would support the implementation of a roll-in of the properties and financial data of Nantahala and Tapoco for rate making purposes. Those issues concerned the public utility status of Alcoa and Tapoco under North Carolina law, the existence of a single, unified Nantahala-Tapoco hydroelectric utility system in western North Carolina, and the domination and manipulation of that single utility system by the common corporate parent, Alcoa, for its benefit to the significant detriment of the using and consuming public. In its 14 June 1977 order approving Nantahala's rate increase request, the Commission failed to consider these issues and established Nantahala's intrastate retail rates on a stand-alone basis, pursuant to and in recognition of costs incurred by

2. Where necessary to supplement this review we have taken judicial notice of our records in *Nantahala I* and *Nantahala II*. *See Bizzell v. Ins. Co.*, 248 N.C. 294, 103 S.E. 2d 348 (1958).

Nantahala under the terms of power supply agreements then in effect between and among Nantahala, Tapoco, Alcoa, and TVA. The two principal power supply agreements at issue were the 1962 New Fontana Agreement between Alcoa, Nantahala, Tapoco, and TVA and the 1971 Apportionment Agreement between Nantahala and Tapoco.

In *Utilities Commission v. Edmisten*, 299 N.C. 432, 263 S.E. 2d 583 (1980) ("*Edmisten*"), we reviewed the Sub 29 order and determined that the Commission's summary disposition of the intervenors' contentions regarding roll-in indicated that the Commission had accorded only minimal consideration to competent evidence, and further held that such a treatment constitutes error of law correctable on appeal. *Id.* at 437, 263 S.E. 2d at 588; N.C.G.S. § 62-94(b)(4). *See also Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469 (1961). Specifically, the order was reversed on the grounds that it was not sufficient for the Commission to consider only the specific indicia of a utility's economic status set out in N.C.G.S. § 62-133(b), but that the Commission must also consider "all other material facts of record which may have a significant bearing on the determination of reasonable and just rates" under N.C.G.S. § 62-133(d). 299 N.C. at 437, 263 S.E. 2d at 588. Accordingly, the matter was remanded with instructions to consider the evidence suggesting the propriety of the roll-in device; to obtain and consider information and data showing what Nantahala's cost of service to its customers would be if the roll-in rate making methodology were used; and to determine whether Nantahala's customers would benefit thereby.

Upon remand, the Commission focused on the four basic issues outlined above and (1) determined that Alcoa is a North Carolina public utility pursuant to N.C.G.S. § 62-3(23)c; (2) determined that Tapoco is a North Carolina public utility pursuant to N.C.G.S. §§ 62-3(23)a and (23)b and by virtue of its 1955 certificate of public convenience and necessity; (3) found that the Nantahala-Tapoco electric generation and distribution system constitutes a single, integrated electric system, designed, developed, and operated as such and coordinated as a single entity with the TVA system; (4) found that the 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 treated as a

stand-alone system, such that roll-in will result in a significant reduction in the cost of providing public utility service to the single system's retail customers; (5) determined that significant detriments and inequities to Nantahala arise out of both the NFA and the 1971 Apportionment Agreement and that concealed benefits flowing to Alcoa through its subsidiary Tapoco render use of those contracts inappropriate for determining the costs fairly attributable to the combined system's North Carolina public load; (6) determined that the rolled-in 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 demand and energy related costs and should be adopted for use in setting Nantahala's retail rates in the Sub 29 (Remanded) proceeding; and (7) found that Alcoa had so dominated Nantahala in certain contracts and transactions involving Nantahala, Tapoco, and others that Nantahala had been left, as of 1981, "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," so as to render Alcoa responsible for such portions of any refund obligation placed upon Nantahala as Nantahala itself is unable to make to its customers.

The roll-in methodology proposed by the intervenors in the Sub 29 (Remanded) proceedings was then adopted and implemented by the Commission, resulting in the lowering of Nantahala's retail rates and the imposition of a refund obligation upon Nantahala and Alcoa. As we noted in *Nantahala I*, 313 N.C. at 628, 332 S.E. 2d at 406, the roll-in method 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 are joined in one unified rate base; (b) the joint revenues and expenses of the single system are totalled; and (c) the combined system is assigned a rate of return. From these three elements, the combined system revenue requirement (expenses + rate base × rate of return) is derived. Next, the combined system cost of service is allocated between the public load customers in North Carolina and the industrial load customer (Alcoa) in Tennessee, using generally accepted jurisdictional allocation factors for setting the retail rates of public utilities operating in more than one state. Nantahala's retail rates under such a rate making methodology are lower than they would be un-

der a stand-alone computation because the cost of service per kilowatt-hour for the unified Nantahala-Tapoco system is lower than for Nantahala treated as a stand-alone electric system.

In *Nantahala I*, we noted that "[t]he propriety of the separation or rolling-in of properties 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." 313 N.C. at 644-45, 332 S.E. 2d at 416. In addition, we observed that "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 645, 332 S.E. 2d at 416 (*quoting Nantahala Power and Light Co.*, Opinion No. 139-A, 20 F.E.R.C. ¶ 61,430, p. 61,869 (1982)). After undertaking an exhaustive review of the design, development, and operation of the various corporate entities which have from time to time comprised the comprehensive Alcoa power system in western North Carolina during the twentieth century, we categorically affirmed the Commission's factual determinations regarding the public utility status of Alcoa and Tapoco, the existence of a single, unified Nantahala-Tapoco electric utility system, the historical domination of that single system by the common corporate parent Alcoa, and the Commission's decision to utilize the roll-in rate making methodology proposed by the intervenors. 313 N.C. at 644-84, 332 S.E. 2d at 416-38. Specifically, we held:

> 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.

Id. at 666, 332 S.E. 2d at 428.

Later, in addressing the respondent companies' arguments against the roll-in order arising under federal law, we described the legal and factual bases of the Sub 29 (Remanded) order:

> 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.
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> 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.
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> . . . 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.

313 N.C. at 700-02, 332 S.E. 2d at 448-49.

As to the evidence supporting the imposition of financial responsibility upon Alcoa for Nantahala's refund obligation, we stated:

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 subordi-

> nated 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.

313 N.C. at 730, 332 S.E. 2d at 465.

On 31 December 1980, during the pendency of the Sub 29 (Remanded) proceeding, but prior to the hearings and determination of the matter by the Commission, Nantahala filed an application in Docket No. E-13, Sub 35, seeking to increase its rates and charges for retail electric service in North Carolina effective 1 February 1981. As it had in the preceding Sub 29 application, Nantahala again failed to include data concerning its costs of service under a roll-in methodology in the Sub 35 application. The proposed increase in rates and charges was designed to produce approximately $2,147,853 of additional revenues for Nantahala's North Carolina retail operations based upon the level of operations in the test year 1979.

On 16 January 1981, the Public Staff and the Attorney General moved to dismiss the application, or, in the alternative, to defer hearing the case and to join Alcoa and Tapoco as parties to the proceeding. The intervenors argued that Nantahala's application was deficient for failure to include roll-in data, which, in the view of the moving parties, was required by our decision in *Edmisten*. The Commission, on 13 March 1981, issued an order denying the motions to dismiss or join additional parties, but requiring Nantahala to submit data and testimony in the Sub 35 docket on

the issue of utilizing a rolled-in cost of service treating Nantahala and Tapoco as a single system for rate making purposes. In that order, the Commission reasoned that a roll-in determination was required in Docket No. E-13, Sub 35, "independently and irrespective" of whether such a determination was as required in Docket No. E-13, Sub 29. The Commission observed that two different test years were at issue in the Sub 29 and Sub 35 dockets and that the earlier case had involved a rate base determined on fair value, whereas the Sub 35 case involved a rate base to be determined on original cost, and concluded that "the factual and legal framework of the two cases is such that a roll-in determination in the remanded case is not necessarily dispositive of whether a roll-in determination is required in the current case." Accordingly, the Commission treated the roll-in determination as a question of fact to be determined anew in the Sub 35 docket and ordered the appropriate data to be submitted. Alcoa and Tapoco were eventually ordered joined as parties to the proceeding, and on 8 June 1982 the Commission issued an order implementing a roll-in rate making methodology for Nantahala and Tapoco for the second time in a nine-month period.

All of the relevant power supply contracts and operating conditions at issue in the Sub 29 (Remanded) case, as well as all pertinent intercorporate structures between Nantahala, Tapoco, and Alcoa, had remained unchanged during the pendency of the Sub 35 proceedings. Accordingly, the Commission made essentially identical findings of fact with respect to the key factual issues undergirding the roll-in rate making methodology and Alcoa's liability for Nantahala's financial integrity. On the latter issue, however, the Commission's Sub 35 order contains a discussion of the new or additional evidence presented during the September 1981 and February and March 1982 hearings, which has some relevance to the arguments presented by the intervenors in the Sub 44 proceeding as to Alcoa's continued domination of Nantahala. These portions are as follows:

> *Alcoa's dominance over Nantahala is obviously and frequently documented in the results of various arrangements it has caused Nantahala and Tapoco to enter into. Such dominance has caused detriment to Nantahala and has resulted in the passing of concealed benefits to Alcoa. Other indications of dominance of Nantahala by Alcoa are* that its facilities are

integrated and interconnected into Tapoco's so as to form a single system; the majority of Nantahala's Directors are employees of Alcoa; and Alcoa Vice President has the proxy for selecting the board membership; under the President's new employment contract he receives incentive awards at the instance of a committee of directors, which committee would include only Alcoa employees since the other directors are subordinate to the president and would be excluded; *the decision to negotiate alone with TVA for a new agreement to replace the expiring New Fontana Agreement was forced upon Nantahala by the Alcoa-Tapoco decision to exclude Nantahala's interest from its negotiations with TVA*; and Alcoa controls accounting policies.

Alcoa's dominance over Tapoco is more blatant than its dominance over Nantahala. Tapoco's headquarters are at Alcoa, Tennessee; its president is a salaried employee of Alcoa serving Alcoa as its Alcoa, Tennessee, power supply manager; its vice presidents are Alcoa employees; it serves only its owner; it sells all of its NFA entitlements to Alcoa for a nominal 4½% profit; each corporate director is an Alcoa employee; Alcoa provides all Tapoco financing; and Alcoa controls the ultimate operation and accounting policies even to the extent of physically keeping Tapoco's financial records and books at Alcoa's Pittsburgh headquarters. (Emphasis added.)

Once again, on the basis of Alcoa's domination over its wholly owned public utility subsidiaries, Nantahala and Tapoco, the Commission imposed a refund obligation on Alcoa for any refunds which Nantahala was unable to make to its customers as a result of the Commission's order. The order of the Commission in Docket No. E-13, Sub 35, was affirmed by this Court in all material respects in *Utilities Commission v. Nantahala Power and Light Co.*, 314 N.C. 246, 333 S.E. 2d 217.

II.

As indicated by the Commission in the above-quoted portion of its order, negotiations to replace the NFA and 1971 Apportionment Agreement, both to expire by their respective terms on 31 December 1982, were underway at the time the Sub 35 rate increase request was pending before the Commission. Upon execu-

tion of the 1983 Fontana III Agreements between TVA and Nantahala, on the one hand, and TVA and Tapoco, on the other, Nantahala instituted its third rate increase request since 1976 in this, the Sub 44 proceeding.

Nantahala's application in Docket No. E-13, Sub 44, lacked roll-in data as had its two preceding applications. Eventually, the Commission ordered that such data be submitted and that Alcoa and Tapoco be joined as parties to the proceedings, denied the intervenors' pre-hearing motions designed to obviate the need to relitigate the four roll-in related issues adverted to earlier, and proceeded to hear witness testimony and received exhibits from all parties. Although the NFA and 1971 Apportionment Agreements were still in effect during the test year 1981, the focus of the Sub 44 hearings was on the effect of the 1983 Nantahala-TVA Interconnection Agreement ("1983 Interconnection Agreement") upon Nantahala's prospective costs of service pursuant to N.C.G.S. § 62-133(c).

At the hearings, the intervenors urged the Commission to continue to establish Nantahala's rates through application of the roll-in rate making technique in the Sub 44 proceeding. The intervenors maintained that the new contractual arrangements between Nantahala and TVA, and between Tapoco and TVA, merely constitute a continuation of the same pattern that existed in the past. Nantahala and Alcoa, on the other hand, argued that the basis for the roll-in applied in Docket Nos. E-13, Sub 29 (Remanded) and Sub 35, no longer exists and that under the 1983 Interconnection Agreement, the inequities of the NFA and 1971 Apportionment Agreement have disappeared.

In fact, the principal, if not the only, evidence of "changed circumstances" with regard to Nantahala, Tapoco, and Alcoa presented by the companies was the new power supply contract between Nantahala and TVA, certain testimony and exhibits from the parties negotiating that agreement, and the new Tapoco-TVA agreement. The evidence, taken as a whole, tends to show that the coordination and exchange arrangements between the Alcoa system and TVA, which were the subject of extensive discussion by both the Commission and this Court in *Nantahala I*, are essentially intended to continue, with some modifications, under the new agreement which took effect 1 January 1983 between TVA,

on the one hand, and Tapoco on behalf of the Alcoa system, on the other. This contract, the 1983 Tapoco-TVA Exchange Agreement ("1983 Exchange Agreement") is significant in this case by virtue of the fact that Nantahala's generating plants, which had been subject to the OFA and NFA, are excluded from its coordination and exchange arrangements. For the first time in over forty years, Nantahala is permitted to use its plants exclusively to serve its public load. The only Alcoa system plants subject to TVA control are Tapoco's four generating plants, including its North Carolina facilities at Santeetlah and Cheoah.

However, the 1983 Exchange Agreement is very similar to the preceding Fontana agreements between TVA and the Alcoa system in that Tapoco and TVA continue to exchange power with one another. Under its terms, the hydroelectric generation resources of Tapoco are turned over to TVA to be operated in the TVA system against the total TVA system load. In return, TVA delivers to Tapoco 185 MW of continuous (100%) load factor power, which Tapoco turns over directly to Alcoa. The amount of power returned is to match the output from Tapoco's plants over the total lifetime of the contract, which is expected to run for at least twenty years. In that respect, Tapoco's power supply contract is somewhat similar to the former arrangement under the OFA where return power entitlements were set on the basis of system output, rather than fixed in advance as they were under the NFA. Under the 1983 Exchange Agreement, TVA is to make available to the Alcoa system a fixed amount of power regardless of streamflow for the first ten years, with that amount adjusted or "trued-up" over the remaining ten years in accordance with the actual output from the Tapoco plants. This feature protects the Alcoa system against wide swings in the availability of power depending upon water conditions. The agreement does not, however, reflect any direct credit for the Tapoco peaking capacity turned over to TVA in the arrangement because TVA expects to be "long on capacity" during the first ten years of the contract and was therefore unwilling to put any compensable value on the peaking capacity which it received.

Like Tapoco, Nantahala approached TVA seeking a twenty-year exchange type agreement wherein Nantahala would obtain a levelized return of power protecting it against fluctuations due to water conditions. What Nantahala ultimately obtained, however,

is a ten-year "interconnection" agreement by which Nantahala purchases supplemental power from TVA at such times as its customer demand outstrips its generational capacity. In essence, this is a continuation of an arrangement begun in 1971 when Nantahala's return entitlements under the NFA and 1971 Apportionment Agreement combined to artificially limit Nantahala's available power supply. At that time, Nantahala was constrained to enter into a supplemental purchase power agreement with TVA to meet its needs. The 1983 Interconnection Agreement, effective 1 January 1983, contemplates that Nantahala will dispatch its own generating plants, selling surplus power to TVA at such times as its production exceeds its customer demand, and purchasing supplemental power from TVA to meet generational deficits. The 1983 contract does give Nantahala almost full credit for its peaking capacity and nearly full credit for its actual generation.

Under the pricing structure of the 1983 Interconnection Agreement, Nantahala is to pay TVA a two-part rate to cover TVA's demand and energy costs. The capacity portion of the rate is priced at TVA's average system capacity cost with hydro removed. That is, Nantahala is charged on the basis of average TVA costs for all generation, including the higher cost base load coal and nuclear capacity, with the exclusion of the lower cost hydro generation. The second part of the rate, the energy portion, is priced on the basis of TVA's incremental costs, plus an additional amount (an "adder") which TVA deems necessary to assess. The incremental costs represent the next and more expensive generating unit(s) to be utilized to produce the necessary energy on an hourly basis, and it is not the rate at which TVA's other preference or highest priority customers (like Nantahala) are billed. These customers generally pay a lower average cost, which was also the basis upon which Nantahala's purchases were priced under the 1971 Nantahala-TVA purchase power agreement. As a result of this two-part rate structure, Nantahala will be purchasing energy that includes only the highest cost energy on the TVA system at any point in time, and very little of the base load coal fired and nuclear energy will flow to Nantahala. The intervenors' witness David A. Springs testified that this pricing concept is not cost-related and will be very disadvantageous to Nantahala in the

future as its public load continues to grow and this incrementally priced energy becomes more costly to produce, as is anticipated.

The greatest change under the Fontana III Agreements is that Nantahala, by no longer enjoying the exchange concept, will suffer severe fluctuations in costs depending on streamflow conditions. This is so because Nantahala's hydro resources are no longer turned over to TVA to be operated by TVA against the TVA load in return for the delivery of fixed entitlements based on average annual generation. In relatively dry years when streamflow is low, Nantahala will have to purchase more replacement energy from the TVA system. During such years, TVA's cost of power will be greater as well, inasmuch as both systems are in essentially the same geographical area and both serve similar loads. This situation is aggravated by the fact that the energy purchased from TVA is priced at the higher energy cost on the TVA system at that particular point in time. In dry years, when Nantahala's purchases are high, TVA's incremental cost will be higher than average or wet years simply because the TVA system will be operating more costly generation for more hours during the year to replace both its and Nantahala's unavailable hydro power. Of course, in wet years, Nantahala's purchases will be considerably less.

Two other apparent disadvantages of the 1983 Interconnection Agreement are that the contract is only for a ten-year period (extendable on a year-to-year basis), subject to cancellation on five years' notice, and that under the earlier Fontana agreements, Nantahala was entitled to receive power or compensation for the value which it provided as part of the interconnected TVA-Alcoa power system. The new agreements provide no such benefit even though Nantahala, by virtue of operational coincidence, remains essentially interconnected with TVA, since its upstream water storage and release tends to coincide with that of TVA. In summary, there is a possibility that the 1983 Interconnection Agreement will remain in effect for a relatively short period of time, leaving Nantahala and its customers vulnerable to uncertainties in supply and price in the relatively near future, and therefore more vulnerable to rate increases.

The 1983 Exchange Agreement and the 1983 Interconnection Agreement, unlike their predecessors, were negotiated separately

between each of the Alcoa system generating companies and TVA. Although Alcoa had negotiated the Original and New Fontana Agreements, which controlled Tapoco's and Nantahala's electrical production rights as a single unit for forty years, Alcoa declined to negotiate for or with Nantahala for a replacement agreement. Instead, as the Commission itself found in its Sub 35 order, Alcoa decided that Nantahala should negotiate independently of Tapoco, as if it were a stand-alone utility. On 6 June 1977, S. Alfred Jones, an Alcoa official, sent a letter to TVA official Albert O. Daniels in confirmation of an earlier (2 June 1977) discussion in Chattanooga, Tennessee, concerning renegotiation of the New Fontana Agreement and the Alcoa-TVA Purchase Power Agreement. The letter states, in pertinent part, as follows:

> Our preliminary position in this matter was expressed as follows:
>
> *New Fontana Agreement (TV-23701A)*
>
> The parties to this Agreement are TVA, Tapoco, Inc., and Nantahala Power and Light Company. *It is our position that this contract be renegotiated to result in two distinct contracts; one between TVA and Nantahala, and another between TVA and Tapoco.*
>
> [Alcoa's position as to the specific terms of the Tapoco-TVA contract are outlined to include, *inter alia*, a contract term to parallel the remaining Federal Power Commission ("FPC") License period (2005); removal of TVA interruption rights, and establishment of a firm amount of power to Tapoco based, *inter alia*, upon historical generation from Tapoco developments.]
>
> *With regard to Nantahala, negotiations will be handled by that entity and should consider its resources separate from Tapoco.* We promise to promote an early meeting between Bill Jontz, President of Nantahala, and TVA to review Nantahala's position and matters of future mutual interest. (Emphasis added.)

Thus, when Nantahala first approached TVA about power supply negotiations in 1979, Nantahala officers had no apparent alternative but to proceed with separate negotiations with TVA. As late as 1981, TVA expressed a desire to Tapoco to continue

the same parties to the new agreement. Eventually, TVA agreed to separate negotiations sometime in 1981 after determining that there were no "disbenefits" or disadvantages to TVA under such an arrangement.

Looked at from the point of view of Nantahala, however, the evidence does not appear to support a conclusion that there were no disadvantages to separate negotiations. In fact, there had to be a considerable loss of negotiating strength for Nantahala by division of the total Alcoa forces in bargaining with TVA. The Tapoco-TVA Agreement is considerably better for Alcoa and Tapoco than the NFA. The record reveals that Tapoco achieved most of its negotiating goals, with the exception of receiving full credit for the dependable capacity given to TVA over and above Tapoco's 185 megawatt return entitlement. On the other hand, Nantahala's negotiating team could have used both the clout and leverage of Alcoa and Tapoco's resources to improve its bargaining position. For example, at one negotiating table Tapoco (Alcoa) was attempting to get credit for excess dependable capacity, while at another negotiating table Nantahala was negotiating for the purchase of deficit capacity. At one negotiating table, Tapoco (Alcoa) was tying down arrangements which resulted in levelized annual entitlements, while at another negotiating table Nantahala was being excised from the integrated operation and energy exchange concept. In addition, Alcoa, at one negotiating table, was purchasing its deficit power from TVA at standard rates based on average system costs, while at another table Nantahala had to accept incremental energy purchases from TVA at a far higher rate.

In addition to the evidence presented by the intervenors and the companies regarding the negotiations and operational terms of the Fontana III Agreements, the intervenors also presented voluminous evidence on the issues for which they had previously sought application of the doctrine of res judicata or judicial notice. Insofar as the intervenors' evidence concerns the historical development, design, operation, and location of the Nantahala and Tapoco hydroelectric system, the public utility status of Alcoa and Tapoco and Alcoa's domination of these subsidiary utility companies, the evidence of record in the Sub 44 proceeding is virtually identical to the evidence presented in the Sub 29 (Remanded) and Sub 35 proceedings, discussed at length in *Nantahala I.*

As to the factual circumstances concerning Tapoco's status as a North Carolina public utility, absolutely no change in condition has been shown to have occurred since entry of the Commission's prior orders. Similarly, the evidence again demonstrated the existence of a single electric system composed of the dams, transmission, and distribution lines of Nantahala and Tapoco by location, design, and history and owned by a single corporation parent, Alcoa. The only circumstance which has changed under the Fontana III Agreements is the fact that the hydro resources of the single system are no longer coordinated as a single unit by TVA by virtue of the contractual agreement with the Alcoa system as they were under the OFA and NFA. Under Fontana III, only the four hydroelectric plants of Tapoco are dispatched by TVA against the TVA load in exchange for return power entitlements. As a result of Nantahala's exclusion from the terms of the 1983 Tapoco-TVA Exchange Agreement, Nantahala dispatches its own generation and has accordingly been required to install $100,000 worth of equipment for dispatching purposes.

In all other material respects, the evidence introduced by the intervenors indicates that very little has changed in the conditions under which Nantahala and Tapoco operate. There has been no change in Nantahala's production capability or in its physical interconnection with Tapoco. Nantahala continues to serve the same assigned area, including the portion of North Carolina in which Tapoco Village, Santeetlah, and Cheoah are located; and Tapoco continues to own the Santeetlah and Cheoah power facilities. Obviously, no change has occurred in the history of the system's design and, in essence, Nantahala remains by its historical development a component part of a unified system, since it was not designed to operate as a stand-alone utility. The legacy of this development in terms of power supply is the undeniable fact that Nantahala's generation is still not adequate to serve its public load, and Nantahala is still constrained to purchase its supplemental power and energy from TVA. Under the terms of its new agreement, Tapoco exchanges power with TVA much the same as it did under the 1962 New Fontana Agreement, and Nantahala, under its 1983 Interconnection Agreement, continues to sell power to TVA when it has excess generation to dispose of.

In other words, the only change that has occurred with respect to the "single system" since the two prior rate orders

were entered by the Commission, and affirmed on appeal, is the single fact that new power supply contracts with TVA were entered into and, as an incident to the change, Nantahala dispatches its own generation. The evidence also indicates that under the new arrangements, Nantahala is dispatching its plants in much the same way as TVA had under the NFA.

The remaining factual issues which the intervenors contend were also raised and conclusively demonstrated by their evidence concern Alcoa's status as a statutory North Carolina public utility and Alcoa's domination of Nantahala to the detriment of the interests of Nantahala's public customers. Once again, the intervenors presented virtually identical evidence in support of both propositions as had been presented in the two preceding rate cases, where the Commission had conclusively found 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." This finding of fact, initially made in the Sub 29 (Remanded) order in September 1981, was repeated by the Commission verbatim in its June 1982 Sub-35 order, and affirmed on appeal in *Nantahala I* and *Nantahala II*.

Once again, the only relevant factual change in circumstance since entry of these orders has been the execution of the Fontana III Agreements. In all other respects, the evidence presented demonstrated no structural change in the relationship between Alcoa and its wholly owned subsidiary. In addition, the evidence indicates that although Nantahala is facing a period of financial need as it attempts to repair and expand its facilities by seeking an $8 million loan from outside sources, Alcoa will not provide a "comfort letter" for its subsidiary and has actually lessened its investment in Nantahala from its pre-1976 level. In that year, Alcoa converted half of its $19 million equity investment in Nantahala into $8.9 million of debt, which debt has now been reduced to $3.3 million. That is, Alcoa has withdrawn, in cash, approximately $5.5 million of its former equity investment in Nantahala during a period of financial need for the payment of Nantahala's refund obligations and other capital expenditures.

More to the point, however, is the significance of the new or additional evidence as to Alcoa's role in the Fontana III negotiations on the questions of corporate dominance and whether Alcoa's affiliation continues to have an effect on Nantahala's rates or service so that Alcoa remains a North Carolina public utility under the provisions of N.C.G.S. § 62-3(23)c. Although Nantahala presented evidence at the Sub 44 hearings that it had determined to negotiate the 1983 Interconnection Agreement without direction from Alcoa, the inescapable fact remains, as the Commission itself concluded in the Sub 35 order, that in the year 1977 Alcoa decided, without prior consultation with Nantahala officials, that Nantahala should negotiate a New Fontana Agreement renewal separate from Alcoa and Tapoco; a decision which effectively "forced" Nantahala into separate negotiations. Nantahala's president, William Jontz, was, as noted in *Nantahala I*, 313 N.C. at 666, n. 20, 332 S.E. 2d at 428, n. 20, then under contractual agreement with Alcoa to manage Nantahala so as to have "little or no adverse impact on the operations and assets" of Alcoa and its other subsidiaries. Jontz subsequently denied that he was even aware of the Alcoa decision to have separate negotiations and contracts.

Moreover, Nantahala was never shown to have approached Alcoa regarding joint negotiations and no studies were conducted by any of the parties to determine whether separate negotiations would be beneficial to Nantahala. As a result of the separate negotiations, Tapoco was able to enter into a contract with TVA similar to and more beneficial than the NFA. On the other hand, Nantahala was unable to enter into the kind of exchange agreement that it sought originally and that TVA originally had considered offering to Nantahala.

Although Nantahala was undeniably freed from some of the grosser inequities of the combined effect of the NFA and the 1971 Apportionment Agreement by its 1983 Interconnection Agreement with TVA, Nantahala was once again effectively put at a disadvantage by having its resources separated from those of the comprehensive Alcoa power system it had been a part of for over forty years. *See Nantahala I*, 313 N.C. at 669, 332 S.E. 2d at 430. Nantahala's vice president, N. Edward Tucker, conceded that Nantahala failed to obtain virtually any of its major goals in these negotiations—for example, an exchange contract, a twenty-year term, hydro credit, or average energy cost—which would have

been beneficial in view of its customer load and demand. Although Alcoa did not directly participate in the Nantahala-TVA negotiations as it had in the past, the weakened bargaining position in which Alcoa left Nantahala, after having been somewhat less than a fully independent public utility for most, if not all, of its corporate existence, may be viewed to have led directly to the results which followed.

Clearly, the issue raised by this evidence is not the objective fairness of each separate aspect of the 1983 Interconnection Agreement viewed in a historical vacuum, but rather the fairness of Alcoa's de facto contractual allocation of the power supply resources of western North Carolina between the public load served by Nantahala and the private industrial load served by Tapoco. Unfortunately, it is evident that the Commission has failed, in its order, to give this, and the other related issues raised by the intervenors' evidence, appropriate consideration *before* undertaking to answer the question, in its discretionary authority, of whether a roll-in rate methodology remains appropriate for setting Nantahala's retail rates.

III.

The Commission's Sub 44 orders which are under review in this appeal do not, except in the most minimal and indirect manner, deal with any of the four issues raised by the intervenors. Of the twenty-five findings of fact set forth in the panel order as subsequently adopted by the Full Commission, it cannot be said that any of them deal, in any final or adjudicative fashion, with the issues raised as to the public utility status of Alcoa and Tapoco, the existence of a single, unified electric system comprised of the properties of Nantahala and Tapoco, and the domination of that single system by its common parent Alcoa from the date of its inception until, at the very least, the date of the Commission's last preceding general rate order in the Sub 35 proceeding, 8 June 1982. Moreover, no finding of fact or discussion of the evidence addresses the far larger and more important question of Alcoa's role in the ultimate division and allocation of the power supply resources of the single Nantahala-Tapoco electric system. This issue is of central importance because the using and consuming public of North Carolina has been previously determined to have rights in this single system, given the way in

which its various resources were developed to carry both a public service obligation and a private customer responsibility.

Of the twenty-five findings of fact contained in the order appealed from, only Findings of Fact Nos. 6, 7, 8, 9, and 10 appear to address the roll-in related issues. Of these findings, not one addresses the issues of Tapoco and Alcoa as North Carolina public utilities, or of Alcoa's historic domination of Nantahala. To the extent that the intervenors' fourth issue, concerning the Nantahala-Tapoco single system, is treated at all, it is treated only by negative implication in Finding of Fact No. 9, in which the Commission states:

> *The Nantahala electric system should be treated independently of Tapoco* in this proceeding with respect to all matters affecting the determination of Nantahala's reasonable cost of service applicable to its North Carolina retail operations. *Under the 1983 Interconnection Agreement, Nantahala is a stand alone hydroelectric power company* which operates its 11 hydroelectric generation stations for the sole benefit of its customers, all of which are in North Carolina, without any obligation to or regard for the TVA or Tapoco hydro stations in North Carolina and Tennessee or for Alcoa's power use in Tennessee. (Emphasis added.)

Finding of Fact No. 6 catalogues the benefits of the 1983 Interconnection Agreement with respect to Nantahala's exclusive retention of its own generation; independent control of its generating facilities; control of its water releases; unfettered ability to sell its surplus power to TVA; and assured supply of supplemental and back-up power and energy from TVA, without limitation, at such times as the company's own generation cannot meet its load due to such exigencies as adverse water conditions or equipment outages. At the conclusion of this finding, the Commission states: "Nantahala's North Carolina retail rates should, therefore, be established in this proceeding in recognition of and pursuant to the more favorable terms and benefits of the 1983 Interconnection Agreement."

The issue of Alcoa's domination of Nantahala with respect to the 1983 Interconnection Agreement is never directly addressed in the order, as was the case with the single system issue. Rather,

it is indirectly touched upon in Findings of Fact Nos. 7 and 9. In relevant part, these findings state as follows:

> 7. The New Fontana Agreement and 1971 Apportionment Agreement resulted in substantial concealed benefits accruing to Alcoa to the significant detriment of the customers of Nantahala. No direct benefits now accrue to Alcoa as a result of the 1983 Interconnection Agreement to the detriment of Nantahala's customers. Furthermore, if any indirect benefits enure to Alcoa as a result of said agreement, any such indirect benefits do not appear to be the result of unlawful preference having been shown to Alcoa by Nantahala to the significant detriment of Nantahala's customers.
>
> . . . .
>
> 9. . . . Further, Alcoa receives no power or any other direct benefit from Nantahala's power generation. All of the benefits of the generation from Nantahala's entire hydroelectric system are retained exclusively for the use and benefit of the North Carolina customers of Nantahala, whose entire service is confined to its service area in North Carolina.

From a combination of its findings that under the 1983 Interconnection Agreement Nantahala "is" a stand-alone hydroelectric power company, retaining all of the benefits of its generation and passing no direct benefits to Alcoa, the Commission appears to have made its further finding of fact that "the roll-in methodology advocated herein by the Intervenors and previously utilized by the Commission in prior dockets in making cost of service allocations is not appropriate for use in setting Nantahala's retail rates in this proceeding."

N.C.G.S. § 62-79(a)(1) requires the Commission, in general rate cases, to consider controverted questions by making findings and conclusions and by setting forth the reason or basis therefor "upon all the material issues of fact, law or discretion presented in the record." The Commission must give more than minimal consideration to the evidence supporting an issue necessary to a proper determination of the rights of the parties and failure to do so is reversible error. *Edmisten*, 299 N.C. at 443, 263 S.E. 2d at 588. "'A failure to find facts essential to a determination of the

rights of the parties necessitates a remand to the . . . agency charged with that responsibility.'" *Utilities Comm. v. Farmers Chemical Assoc.*, 33 N.C. App. 433, 446, 235 S.E. 2d 398, 405, *disc. rev. denied*, 293 N.C. 258, 237 S.E. 2d 539 (1977) (*quoting Utilities Commission v. Membership Corporation*, 260 N.C. 59, 69, 131 S.E. 2d 865, 871 (1963)).

The intervenors contend that had the Commission addressed the issues (and evidence in support thereof) raised by them in a final and adjudicative fashion, it is likely that a different result would have been reached in this case. They contend that the question of whether to set Nantahala's rates on a rolled-in basis cannot be rationally answered without *first* addressing the issue of the single Nantahala-Tapoco public utility system and Alcoa's financial responsibility under Chapter 62 of the North Carolina General Statutes. In essence, the intervenors contend that the latest order of the Commission does not refute the findings, discussion, and conclusions reached by the Commission in the Sub 29 (Remanded) and Sub 35 orders, it merely misses the mark with respect to *all* material facts of record relevant to the question of what are reasonable and just rates for Nantahala *including but not limited to the new power supply agreements* between the member companies of the "Alcoa power system" and TVA. The companies do not challenge the fact that the Commission failed to address the issues raised by the intervenors. Rather, they argue that having decided the "ultimate" issue of roll-in against the intervenors, it became unnecessary for the Commission to answer the four other issues. We do not agree.

The Commission correctly determined in both this and the Sub 35 case that the factual and legal framework in any given general rate case may be such that a roll-in methodology appropriate at one point in time will not necessarily be warranted in a later proceeding. Therefore, the Commission properly deferred its decision as to whether to utilize the roll-in methodology developed in the Sub 29 (Remanded) case until the issue was properly raised through the evidence presented at the hearings on Nantahala's latest rate increase request. However, as between the same parties, on a substantially identical record, and within a one-year time span, the nature of the underlying issues which must necessarily be considered relevant to that question are not likely to vary. Having twice determined that it was necessary to

a proper resolution of the roll-in issue to determine the four other issues raised by the intervenors, it becomes incumbent upon the Commission to also address these issues directly and in a final and adjudicative fashion in the next ensuing general rate case involving the same parties and contentions. We find the Commission's total failure to address the issues raised by the intervenors in such a manner completely inconsistent with its previous determinations and orders in the Sub 29 (Remanded) and Sub 35 cases, as well as inconsistent with its pre-hearing determinations in this docket joining Alcoa and Tapoco as parties and ordering roll-in data to be supplied.

In our discussion of the evidence presented in the Sub 44 proceedings, we have not undertaken to say what weight the Commission is to give to the testimony of the various witnesses and exhibits presented or to the documentary evidence which, if believed by the Commission, would support essential findings that were not made on the four issues raised by the intervenors. The credibility of the evidence and the weight to be given to it are matters for the Commission to determine. *Nantahala I*, 313 N.C. at 744, 332 S.E. 2d at 473; *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974); *Utilities Comm. v. Farmers Chemical Assoc.*, 33 N.C. App. 433, 235 S.E. 2d 398. Because the Commission has failed to find facts essential to a determination of the rights of the parties with respect to the issues of the public utility status of Alcoa and Tapoco, the existence of a single, unified electric system comprised of the properties of Nantahala and Tapoco, and the domination of Nantahala by Alcoa so as to require piercing of the corporate veil between them, this matter must be remanded to the Commission for entry of the necessary findings and conclusions on these issues upon which it may base its order.

The remaining arguments presented by the intervenors regarding the Sub 44 order concern the Commission's decision to set Nantahala's rates on a stand-alone basis and the Commission's apparent determination that a roll-in methodology could not be utilized absent either a voluntary commitment on the part of Alcoa to support Nantahala financially as to future rolled-in rates or an order by FERC directing the physical sale of Tapoco power to Nantahala. We turn next to these questions.

IV.

As we have indicated, the Commission erroneously failed to consider and address all material factual issues necessary to answer the critical question of whether there *is*, in fact, a single Nantahala-Tapoco electric system despite the execution of the Fontana III Agreements and, if so, whether Nantahala's rates and service for its North Carolina rate payers will be improved if rates are set on a single system basis utilizing the roll-in methodology proposed by the intervenors and previously employed by the Commission on two occasions in setting Nantahala's retail rates. Nothing in the Sub 44 order purports to even address this question. The portions of the order which do discuss the roll-in methodology indicate that the Commission began and ended its analysis with its consideration of: (1) "the more favorable terms and benefits of the 1983 Interconnection Agreement" (Finding of Fact No. 6); (2) the fact that "[n]o direct benefits now accrue to Alcoa as a result of the 1983 Interconnection Agreement to the detriment of Nantahala's customers" (Finding of Fact No. 7); (3) the fact that "[u]nder the 1983 Interconnection Agreement, Nantahala is a stand alone hydroelectric power company" (Finding of Fact No. 9); and (4) the consequence that "[a]ll of the benefits of the generation from Nantahala's entire hydroelectric system are retained exclusively for the use and benefit of the North Carolina customers of Nantahala" (Finding of Fact No. 9). In consequence of the foregoing, Finding of Fact No. 9 concludes: "Thus, the roll-in methodology advocated herein by the Intervenors and previously utilized by the Commission in prior dockets in making cost of service allocation is not appropriate for use in setting Nantahala's retail rates in this proceeding."

In its discussion of these findings, the sole reason articulated by the Commission in support of its decision to not utilize the roll-in methodology is as follows:

> *The Commission reaffirms its previous findings and conclusions made in Docket Nos. E-13, Sub 29 (Remanded) and E-13, Sub 35, to the effect that the 1962 New Fontana Agreement and the 1971 Apportionment Agreement resulted in the accrual of substantial concealed benefits to Alcoa to the significant detriment of the customers of Nantahala. However, effective January 1, 1983, Nantahala entered into a*

separate agreement with TVA under which Nantahala retains, dispatches and controls the generation from its own hydroelectric generating plants, and under which Nantahala purchases supplemental and standby power from TVA. Effective January 1, 1983, Tapoco also entered into a separate agreement with TVA under which Tapoco conveys the generating output of its hydroelectric plants to TVA in return for entitlements from TVA which Tapoco uses to provide power to Alcoa in Tennessee. *The execution of these new agreements with TVA substantially removes the underpinnings upon which rested the Commission's previous determinations that the roll-in methodology was appropriate.* (Emphasis added.)

First, in view of the Commission's previous orders, the decision to base Nantahala's rates on its "stand-alone" book costs on such limited findings as those recited above—essentially that Nantahala is "better off" under the new agreement with TVA than under the former agreements with TVA and Tapoco—cannot be considered an exercise of sound and reasoned discretion on the part of the Commission. In addition, the Commission's discussion of the rationale behind the roll-in rate making technique utilized in the Sub 29 (Remanded) and Sub 35 proceedings indicates that in Docket No. E-13, Sub 44, the Commission took an unnecessarily and erroneously narrow and restrictive view of this Court's decision in *Edmisten*, 299 N.C. 432, 263 S.E. 2d 583, and of the scope of its own previous orders.

Although it is true that *one* of the purposes for the roll-in method of rate making is to "cancel" or at least to "true-up" concealed benefits that the Commission found flowing to Alcoa under the power supply agreements then in effect (*see Nantahala I*, 313 N.C. at 682-83, 332 S.E. 2d at 437), the central and overriding purpose of this technique remains its usefulness, for rate making purposes, in preventing Nantahala, as an integral unit in a comprehensive power system owned by a single corporate parent, from concealing excessive rates to its retail customers through the mechanisms of separate corporate structure and intercorporate contractual agreement. As we stated in *Edmisten*:

The "roll-in" device, or technique, 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. (Citation omitted.) This is especially true when both corporate entities are wholly owned by a parent corporation which benefits from the power generated by the system. This device does nothing more than recognize that the two corporate entities ought, for rate making accounting purposes, be treated as the one electrical power producing and distribution system which, in fact, they are. If then unlawful preferences are indeed accorded to Alcoa to the detriment of Nantahala's customers because of the separate corporate structures and the inter-corporate apportionment agreements, this rate making device would seem to eliminate them.

299 N.C. at 442-43, 263 S.E. 2d at 591.

In the present case, the Commission began its discussion of the stand-alone rate making technique by stating that "[i]n Docket No. E-13, Sub 29 (Remanded) and E-13, Sub 35, this Commission found that the Nantahala and Tapoco electric facilities constituted a single, integrated electric system and were operated as such by TVA as a coordinated part of the TVA system." Following this statement is a list of the evidence relied upon by the Commission in making that ultimate finding. The only fact which the Commission then points to as removing the "underpinnings" of its previous use of the roll-in is the fact that under the 1983 agreement, Nantahala retains, dispatches, and controls the generation from its own hydroelectric generating plants, rather than subjecting them as a unit with Tapoco's plants to TVA's control and receiving levelized entitlements in return for its generation and dispatching rights.

It is abundantly clear from the Commission's findings and conclusions that the decision to establish Nantahala's rates on a stand-alone basis, which resulted in an actual increase of 32 percent over the rates approved by the Commission less than one year earlier in Docket No. E-13, Sub 35, resulted from its failure to focus upon all the material issues raised by the evidence presented. Taken on a provision-by-provision basis, the 1983 In-

terconnection Agreement is an undeniable improvement over the NFA and 1971 Apportionment Agreement in that Nantahala is no longer deprived of even the benefits of its own generation and capacity and control over the dispatch of its own plants. However, the fact remains, as noted by the Commission in its order, that Nantahala can only "supply most of its customers' needs from its own hydroelectric generation during normal water conditions and average consumption periods." During low water or peak consumption periods, and over time, because of anticipated growth in customer load, Nantahala must supplement its available generation by outside purchases of power from TVA or some other source, and this generational deficiency remains the primary problem facing Nantahala and its rate payers.

The full impact of the decision, reflected in the 1977 Jones letter[3] that Nantahala negotiate separately with TVA at the expiration of the NFA and consider its resources separately from those of Tapoco can only be adequately assessed against the historical position of Nantahala's having been less than a fully independent public utility for forty years in terms of design, development, and long-term planning for the future needs of its customers. It would appear that the simple act of contractually severing Nantahala from the power exchange concept and unified operation of the hydroelectric resources of the Little Tennessee River, at a time when Nantahala's own generation is insufficient to meet the demands of its existing public load during periods of peak consumption and/or adverse water conditions, could only aggravate the difficult situation facing Nantahala and its rate payers in the future.

One of the more perplexing "findings" in the Sub 44 order appears to acknowledge this problem, if only indirectly. Finding of Fact No. 10 states: "Nantahala should actively and thoroughly investigate and pursue alternatives to purchasing power from TVA, including, in particular, power purchases from Tapoco, in order to secure for its retail ratepayers purchase power at the lowest possible cost." Nantahala's "pursuit" of power purchases from Tapoco is obviously the subject of the relief being sought before the "appropriate federal jurisdiction"—the FERC—which is re-

3. *See* discussion of this letter in Part II, *supra*.

ferred to in Finding of Fact No. 8, a remedy sought by both the intervenors and the Commission itself. Such an order is necessitated by Tapoco's apparent refusal to voluntarily sell power to its sister corporation Nantahala.

In the discussion of this finding, the Commission indicates that it is of the opinion that "[n]otwithstanding the fact that the 1983 Interconnection Agreement between Nantahala and TVA provides substantial benefits to the Company's retail rate payers which were not present under the 1962 New Fontana Agreement and the 1971 Apportionment Agreement," it remains the Commission's conclusion that some other form of power supply arrangement ought to be pursued by Nantahala. This discussion and conclusion would appear to acknowledge that despite the improvements represented by the terms of the 1983 Interconnection Agreement over its predecessor agreements, Nantahala has once again failed to enter into the type of long-term power supply contract necessary to meet the needs of a public utility which for the first time in forty years must "stand-alone" and attempt to satisfy its substantially increased public load, with no more generating capacity than it possessed nearly thirty years ago. *See Nantahala I*, 313 N.C. at 638, 332 S.E. 2d at 412.

When the OFA, NFA, and various apportionment agreements are viewed in their proper perspective, as mechanisms in a power supply arrangement which allocated the total hydro resources of the "Alcoa power system" between the private use of Alcoa and the public load of Nantahala, it would appear that the Fontana III Agreements are also power supply mechanisms which, taken together, indirectly benefit Alcoa by allocation of the system's more costly power to Nantahala, while Alcoa took, through its other subsidiary, Tapoco, the lower cost generation from the system's larger projects. This issue, concerning the nature and impact of "any indirect benefits" flowing to Alcoa by virtue of the new power supply agreements is only hinted at in the Commission's order. At no point does the Commission give any indication as to what those "indirect benefits" that it has perceived consist of, or of their impact on Nantahala's rates and service. Moreover, the Commission's conclusion that "if any indirect benefits enure to Alcoa as a result of said agreement, any such indirect benefits do not appear to be the result of unlawful preference having been shown to Alcoa by Nantahala to the significant detriment of Nan-

tahala's customers" is somewhat surprising in view of its previous determinations in the Sub 29 (Remanded) and Sub 35 cases that Nantahala, "an empty shell, unable to act in its own self-interest," had been "forced" into separate negotiations with TVA for a new agreement "by the Alcoa-Tapoco decision to exclude Nantahala's interest from its negotiations with TVA." Obviously, as the Commission has itself previously perceived, the question with respect to indirect benefits to Alcoa primarily involves the issue of *parental domination over the subsidiary*, which *results* in preferences being accorded the parent by the subsidiary, and not vice versa.

[2] Again, we have undertaken the foregoing discussion of the evidence and contentions of the parties in an effort to delineate the scope of the inquiry and nature of the issues which were not addressed by the Commission in the Sub 44 order, and which must be addressed in a final and adjudicative fashion upon remand of this case. In this regard, we note that in addition to the four issues specifically raised by the intervenors as discussed in Part III of this opinion, the Commission, in evaluating the effect of the new "stand-alone" agreements on Nantahala's costs of service, must address in a direct and final manner the issue of indirect benefits to Alcoa resulting from the exclusion of Nantahala from the successor agreement to the NFA, the 1983 Tapoco-TVA Exchange Agreement, and whether a roll-in will "cancel" or "true-up" any such indirect benefits as may be found to enure to Alcoa from this changed circumstance.

V.

In their final argument, the intervenors challenge the Commission's determination that it could not set Nantahala's rates on a rolled-in basis absent either a voluntary commitment on the part of Alcoa to support Nantahala financially should any revenue shortfall occur under a roll-in, or an order by FERC directing the physical sale of Tapoco power to Nantahala. This determination appears to be contained within Finding of Fact No. 8, which states:

> *The roll-in methodology proposed herein by the Intervenors for pro forma purposes in fixing Nantahala's rates without any accompanying order from the appropriate federal jurisdiction requiring the physical sale of Tapoco power to Nantahala or a guarantee of Nantahala's financial integrity*

> *by Alcoa* will ultimately result in insolvency or bankruptcy of Nantahala and an inability of Nantahala to meet its customers' needs for electric power, and will not serve the best interests of Nantahala's customers or its service area in North Carolina. Further, if and when the federal jurisdiction having authority to allocate Tapoco power to the Nantahala service area should order such allocation, then the Commission can reopen this docket to readjust the rates of Nantahala to reflect the actual cost of such purchases from Tapoco as may be approved by said federal jurisdiction. (Emphasis added.)

The intervenors contend that the Commission's reasoning is flawed in two respects: (1) the Commission has grossly underestimated its regulatory authority over Alcoa, should it again determine that Alcoa is a North Carolina public utility under N.C.G.S. § 62-3(23)c, and (2) its analysis that rolled-in rates will lead Nantahala into bankruptcy is completely inconsistent with its own prior orders in Docket Nos. E-13, Sub 29 (Remanded) and Sub 35.

It is evident from this finding that the Commission's decision not to adopt the roll-in methodology rests, in part, upon its erroneous assumption that it is powerless to compel Alcoa's financial support of its subsidiary Nantahala's future rates. Such a determination on the part of the Commission is clearly erroneous. As we observed in *Nantahala I*, "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.' " 313 N.C. at 723, 332 S.E. 2d at 461. *See also id.* at 724, n.23, 332 S.E. 2d at 462, n.23. Further, in rejecting Alcoa's argument that the Commission lacked a legal basis for holding it financially responsible for Nantahala's refund obligation, we stated:

> 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, 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.

313 N.C. at 724, 726, 332 S.E. 2d at 462, 463.

[3] In its two previous orders implementing a roll-in rate making methodology, the Commission has not hesitated to place financial responsibility upon Alcoa for any portion of Nantahala's refund obligation as Nantahala is itself unable to pay while continuing to render adequate service to its customers. The relief ordered by the Commission, and affirmed by this Court, in the two prior rate cases is essentially the same relief sought by the intervenors in this case. There is no principal distinction between a refund financed by Alcoa to rate payers on the basis of excessive rates charged by Nantahala over a historic period and a periodic payment by Alcoa to Nantahala for any current or future revenue shortages on Nantahala's books which may result from prospective rolled-in rates. Both forms of relief are merely ancillary to the establishment of a just and reasonable rate schedule as approved by the Commission for Nantahala. Thus, assuming, *arguendo*, that the Commission again finds that Alcoa is a North Carolina public utility pursuant to N.C.G.S. § 62-3(23)c, it may also require Alcoa, as a public utility, to protect Nantahala financially as to future rates, in much the same way as it has been held responsible for past locked-in rates in *Nantahala I* and *Nantahala II*.

[4] In short, upon the appropriate findings of fact, the Commission is well-endowed with powers under the provisions of Chapter

62 of the North Carolina General Statutes to protect Nantahala from financial hardship as to any past rates collected in Docket No. E-13, Sub 44 which are determined to be excessive by requiring Alcoa to make refunds, just as had been required in the two prior general rate cases. As to future rates, Nantahala can be protected from any financial hardship that the Commission may determine to result from rolled-in rates simply by requiring Alcoa to periodically (monthly) pay to Nantahala any revenue shortfall which appears in Nantahala's accounting data as a result of Alcoa's decision to maintain separate corporate entities for Nantahala and Tapoco. If, as the intervenors contend, the evidence warrants findings that Alcoa designed the subsidiaries and the single system in such a manner that Nantahala's status as a stand-alone utility under the Fontana III Agreements works to the detriment of Nantahala and its customers under current operating conditions, then the Commission, should it choose to do so, would be acting well within its regulatory authority in calling upon Alcoa to support Nantahala financially.

One final aspect of the Commission's order which warrants comment is the discussion concerning Nantahala's access to Tapoco's hydro generation. In its discussion of Finding of Fact No. 8, the Commission correctly noted that the roll-in technique does not make the benefits of Tapoco's generation available to Nantahala. That is, the roll-in does not effectuate a diversion of energy and capacity entitlements returned to Tapoco by TVA under the system's exchange arrangements, it is merely an accounting technique to determine rate base, revenues, and to allocate costs among jurisdictional customers. The Commission goes on to state that the "Intervenors and this Commission have now requested relief before the Federal Energy Regulatory Commission (FERC), regarding the issue of access by Nantahala to Tapoco power, an issue which should properly be decided in that forum by FERC." The text that follows this statement merely repeats the contents of Finding of Fact No. 8, indicating that the Commission would reopen this docket should FERC order the requested relief.

On 26 February 1985, the Administrative Law Judge ("ALJ") presiding over the consolidated cases concerning the new power supply agreements with TVA issued an initial decision approving, with conditions, the proposed tariff changes effectuated by the execution of the Fontana III Agreements. Tapoco, Inc., Initial Deci-

sion, 30 F.E.R.C. ¶ 63,050 (1985). The ALJ found that in order to safeguard Nantahala and its rate payers from the effects of some of the proposed changes from the prior Fontana arrangements, approval of the Fontana III Agreements would have to be subject to specific conditions pursuant to Sections 205 and 206 of the Federal Power Act. In particular, the ALJ determined that to reduce the vulnerability of Nantahala's customers stemming from the fact that Nantahala will have to stand alone as an independent public utility for the first time in over forty years without having the wherewithal, from either a financial or electric generating standpoint, to meet its load, conditions would be necessary to allow Nantahala a "breathing space" while it attempts to become a self-sufficient public utility. *Id.* at pp. 65,286-91.

The conditions imposed in the order give Nantahala and its rate payers a priority to take some of the low-cost power from the Cheoah and Santeetlah hydroelectric plants which otherwise goes to Tapoco or Alcoa after the coordination and exchange arrangements occur with TVA, for a temporary period lasting until Nantahala has adequate and reliable generating capacity to serve its customers.

> In other words, the priority will end when Nantahala has enough capacity which not only allows the company to meet its customers' entire load, but also enables it to hold in reserve an amount sufficient to assure uninterrupted service at all times at a reasonable cost.
>
> A reasonable cost is perhaps the most pivotal factor here.

30 F.E.R.C. ¶ 63,050 at p. 65,288. After discussing alternative routes which Nantahala may take towards attaining self-sufficiency, the ALJ added:

> Apart from the self-generation or purchasing requirements set forth above, it will be sufficient to ascertain when and if Nantahala has fulfilled its generating capacity-obligation by using the guidelines set by the Southeastern Electric Reliability Council (SERC) . . . . On condition that both the guidelines of the SERC and the requirements outlined above have been satisfied, Nantahala would be deemed

> to be a truly independent public utility which no longer, on behalf of its ratepayers, would be entitled to a priority to the low-cost power that would revert to Tapoco or Alcoa.

Id. at pp. 65,288-89.

The ALJ's initial decision was quickly challenged by Tapoco, in particular, on various grounds. On 17 May 1985, the presiding judge ruled upon the motions for reconsideration submitted, and summarily rejected all of the companies' arguments against conditions imposed on the Fontana III Agreements. Tapoco, Inc., Rulings Upon Motions for Reconsideration of Initial Decision, 31 F.E.R.C. ¶ 63,056 (1985). Thus, the Commission may take the opportunity presented by the remand of this case for further proceedings to evaluate the impact of these decisions upon Nantahala's costs of service.

VI.

[5] The intervenor Jackson Paper Manufacturing Company presents two questions for review which are entirely separate from the roll-in issue. Jackson Paper argues that the Commission's decision refusing to establish a new rate class for Large Industrial Service (LIS) as proposed by Jackson Paper is not based upon substantial evidence and that it unlawfully discriminates against Jackson Paper in violation of N.C.G.S. § 62-140.

Jackson Paper correctly notes in its brief that upon appeal, orders entered by the Commission "shall be prima facie, just and reasonable," pursuant to N.C.G.S. § 62-94(e), but that this provision does not preclude an aggrieved party from showing that the evidence offered rebuts the prima facie effect of the order and that the order was unsupported by competent, material, and substantial evidence in view of the entire record. N.C.G.S. § 62-94(b)(5) and (6). However, we do not agree with appellant's contention that Finding of Fact No. 25, which states that "[t]he proposed rate schedule LIS (Large Industrial Service) should not be approved in this proceeding," is in fact unsupported by the requisite evidentiary showing. Nor do we agree with the contention that the Commission unlawfully discriminated against Jackson Paper by its failure to establish a separate LIS rate for its service.

Initially, we note that the burden of showing the impropriety of rates established by the Commission lies with the party alleg-

ing such error. *Utilities Comm. v. Carolinas Committee*, 250 N.C. 421, 109 S.E. 2d 253 (1959). "The rate order of the Commission will be affirmed if upon consideration of the whole record we find that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn." *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 10, 287 S.E. 2d 786, 792 (1982).

The evidence before the Commission shows that Jackson Paper acquired a paper mill located in Sylva, North Carolina, from Mead Paper Company in the 1970s. Jackson Paper remodeled the plant and radically changed the manufacturing process to produce fluted, corrugated material used in the manufacture of boxes. Jackson Paper started up its operations in 1982, one year after the test year 1981, and expected to reach a full production level of two hundred tons per day by early 1984. At full production, Jackson Paper will have a monthly non-coincident peak of 6,100 kW and a load factor of 85 to 90 percent. In addition, the evidence shows that Jackson Paper is the largest retail customer on Nantahala's system and that it is more than 50 percent larger and has a considerably higher load factor than Nantahala's next largest customer, Western Carolina University.

Nantahala's existing rate schedule for large industrial customers is its "Large General" ("LG") service schedule. The LG schedule as it existed prior to this case and as it was filed for the rates proposed in this case contained a demand limitation of 4,000 kw and stated: "Service for demands of 4,000 kw and over shall be under rate schedules to be filed with the North Carolina Utilities Commission."

At the hearing, three witnesses testified and presented exhibits on the subject of rate design: (1) Nantahala's witness, John K. Carson; (2) Jackson Paper's witness, Richard J. Rudden; and (3) the Public Staff's witness, Benjamin Turner. Nantahala's witness, Carson, sponsored the rate design ultimately adopted by the Commission. This schedule is a modification of Nantahala's old LG rate with the 4,000 kW demand limitation eliminated. Jackson Paper's witness, Rudden, recommended the establishment of a

new class of service for Nantahala, the LIS schedule, and offered a proposed rate design for that class.

In general, witness Rudden testified to differences in load characteristics between Jackson Paper and other large general service customers which might ordinarily justify a difference in rates charged to Jackson Paper to recover Nantahala's costs of service. Accordingly, Rudden recommended a new rate class for large industrial service customers, such as Jackson Paper, calculated on Nantahala's average or base costs rather than on the incremental costs Nantahala actually incurs in serving Jackson Paper. These "base" or "average" costs are the fixed costs of service separate from the costs of TVA purchased power. Rudden also recommended that Nantahala remove the current 4,000 kW limitation in the LG rate and make it available to all large general service customers. The proposed LIS class would be an option to those LG customers with demands exceeding 5,000 kW and whose load factors would make LIS more economical. At the time of the hearing, Jackson Paper was the only Nantahala customer which would qualify for the proposed LIS rate schedule.

In its discussion of the reasons why the proposed LIS rate would not be approved in this proceeding, the Commission stated that it "is unconvinced that the LIS rate schedule proposed for the Jackson Paper Manufacturing Company is cost justified . . . ." The evidence which apparently supports this conclusion is found in the immediately preceding discussion. After detailing the testimony by witness Rudden which would appear to support the LIS schedule solely from the perspective of load characteristics and average costs of service, the Commission stated:

> On cross-examination, Witness Rudden agreed that, while the LIS schedule would permit Nantahala to sell power at the rate of approximately 2.0 cents per kw[h], Nantahala must pay TVA 3.4 cents per kw[h] (based on a 100% load factor for purchased power) with the difference being made up by the other customer classes. In fact, Late-Filed Exhibit RJR-8 requested by Dr. Hammond shows that the overall increase in revenue requirement, after including the JPC load, will be $1,599,509; and only 56% of said $1,599,509 increase will be paid by Jackson Paper Company under the LIS rate

schedule, leaving a deficit which must be paid by the remaining rate classes.

Jackson Paper first challenges the Commission's determination by arguing that Rudden's testimony recommending the new rate class was uncontradicted and that there is no evidence supporting the Commission's conclusion that the proposed rate schedule should be rejected. However, even assuming, *arguendo*, that there had been no other evidence on the issue of rate design, the Commission may permissibly reject uncontradicted testimony. *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786. Even where there is no direct evidence in the record contrary to the expert's opinion, a regulatory body may use its own judgment in evaluating evidence as to a matter within its expertise and is not bound by the uncontradicted recommendations of experts. *Id.* Therefore, the Commission was not required to accept Rudden's testimony even if there had been no contrary expert testimony on the question of rate design. Moreover, the Commission needed no additional evidence contradicting Jackson Paper's expert in rejecting its proposal.

In its order, the Commission stated that it was unconvinced that the LIS rate schedule proposed by Jackson Paper is cost justified. The Commission based this conclusion on the fact that the additional costs imposed by Jackson Paper would not be recovered through rates under the LIS schedule. This is so because Nantahala would be required to purchase the power it actually sold to Jackson Paper from TVA at 3.4 cents per kWh and could only sell that power to Jackson Paper for 2.0 cents per kWh under the LIS schedule.

Jackson Paper argues that the reasons recited by the Commission in rejecting the LIS rates are faulty because Nantahala's average cost of power from all sources is less than 1.0 cent per kWh and that the 2.0 cents per kWh mentioned by the Commission does not include the cost of power Nantahala recovers through the purchased power adjustment clause.

Jackson Paper's argument would appear to be logically correct but for the fact that it fails to take into account the *time* at which the Jackson Paper load was added onto the Nantahala system. As Nantahala points out in its brief, this factor is crucial because the load on Nantahala's system exceeded the capacity of

Nantahala's hydroelectric generating stations long before Jackson Paper became a customer. Therefore, based on the actual source of power to serve Jackson Paper, all of Jackson Paper's peak purchases come from power Nantahala purchases from TVA at 3.4 cents per kWh. The rate of 2.0 cents per kWh to which Jackson Paper refers includes all purchased power costs for the test year. There would be no additional revenues from the PPCA during the test year and in the future Nantahala will actually be purchasing additional power at 3.4 cents per kWh[4] solely because Jackson Paper's new load must be served, but would only be receiving 2.0 cents per kWh for the power sold to it under the proposed LIS rate. Therefore, the Commission's conclusion that the LIS rate schedule is not "cost justified" is supported by substantial evidence in the record taken as a whole and will not be disturbed on appeal. *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786.

In addition, the Commission concluded that the LIS rate schedule would result in a revenue requirement deficit and that the remaining rate classes would be required to make up this deficit. Jackson Paper argues that this conclusion is irrelevant because leaving it on the LG rate schedule will also produce a deficit. Although it appears that the Commission has used a faulty example to illustrate its point, the principle remains sound: serving Jackson Paper on schedule LIS will unfairly increase rates to Nantahala's other customers in the long run, and the rates to these other customers will not increase as greatly if Jackson Paper is left on the LG schedule.

Jackson Paper makes a number of other arguments concerning the LG rate schedule established by the Commission in this case. However, all of these arguments are based upon cost of service calculations for Nantahala using *average* embedded costs; upon the proposed LIS schedule which is based on the *average* cost of providing power to Jackson Paper; and upon cost allocation factors which use *average* costs. The Commission, however, analyzed the LIS proposal on the basis of *incremental* costs to Nantahala to serve Jackson Paper. Whatever the abstract merit

4. We note that in view of the Administrative Law Judge's ruling on the Fontana III Agreements, the actual cost of purchased power may vary, but the principal involved would essentially remain the same.

of Jackson Paper's proposal may be, the company cannot escape the fact that it is the most recent large addition to Nantahala's already over-burdened system.

In fact, its witness, Rudden, admitted that Jackson Paper causes Nantahala to purchase additional power from TVA. Mr. Rudden further admitted that these additional energy requirements cause an increase in costs that will ultimately be spread over all of Nantahala's customers. This significant post-test year event and its implications cannot be viewed in isolation, and the Commission was properly concerned that the new rate schedule would not result in a fair and equitable recovery of the incremental costs imposed on Nantahala's system.

In order to accommodate the impact of Jackson Paper's load on the total Nantahala retail load, the Commission chose a compromise rate schedule which would permit Nantahala to receive approximately 2.3 cents per kWh for power sold to all customers on the LG schedule, including Jackson Paper. At this rate, Nantahala is unable to recover its entire incremental cost from Jackson Paper, but it is permitted to recover more of the actual cost of serving Jackson Paper than it would be under the proposed LIS rate. The rate established allows Nantahala to recover the average cost of serving all customers on the entire LG schedule. We conclude that the Commission properly exercised its discretion in refusing to single out one customer and set rates for that "class" based on the average costs of serving that isolated customer where the customer in question causes the utility to incur high incremental costs.

Although one of the goals of rate structure is the elimination of intra-class cross-subsidies, another goal is simplicity of rate structure. *Utilities Commission v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (1976). Obviously, it is impractical to have a separate class for each customer, despite the existence of some significant differences in load characteristics. Therefore, a balance must be struck. Based upon the record before us, we find no grounds upon which the Commission's choice between available options for rate design may be disturbed on appeal.

In its final argument, Jackson Paper maintains that the rate structure that results from the Commission's order is discriminatory in its failure to recognize the substantial differences in serv-

ice and conditions which exist between Jackson Paper and the other customers on the LG rate schedule. Jackson Paper cites *Utilities Commission v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (where substantial differences in services or conditions do exist, unreasonable application of the same rates may be discriminatory and thus improper), in support of its argument that the Commission's failure to establish the LIS rate for its service was unlawfully discriminatory. We do not agree.

Every rate schedule necessarily discriminates between customers within the class to which it applies to some extent. N.C.G.S. § 62-140, however, prohibits only *unreasonable* or *unjust* discrimination. *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 273 S.E. 2d 232 (1981). The burden of proving that a rate is discriminatory lies with the complaining party. *Id.* Jackson Paper argues that its witness Rudden's testimony established the requisite differences in condition which would justify a separate rate for LIS customers. However, as we stated in our discussion of the evidence supporting the Commission's rejection of the LIS proposal, the Commission need not accept an expert's uncontradicted testimony, even where such testimony tends to show substantial differences in the conditions of service justifying a separate rate schedule for a particular customer or class of customers. It may yet, in the proper exercise of its own expertise and discretion and based on evidence indicating that LIS rate was not cost justified, refuse to establish a separate rate class for Jackson Paper without unreasonably or unlawfully discriminating against it.

Under the Commission's order, Jackson Paper was placed in the existing class of large general service customers. Modification was made in the design of this rate to allow for significantly larger customers, such as Jackson Paper. The Commission merely refused to treat Jackson Paper differently than Nantahala's other customers for the reasons stated above. Jackson Paper is, as a result, classified under the LG schedule along with Nantahala's other large purchasers of power. It, therefore, continues to benefit from Nantahala's hydroelectric generation because Nantahala's rates are set to recover the average cost to serve the average customer on that schedule. Jackson Paper is not treated differently than Nantahala's other large purchasers of power in light of all the relevant circumstances, and thus unreasonable discrimination does not result from the Commission's order. Ac-

cordingly, the portion of the Commission's order which deals solely with Jackson Paper's rates is affirmed.

VII.

For the reasons stated, we reverse the portions of the Commission's final order of 12 April 1984 which address the issue of a roll-in rate making methodology in setting Nantahala's retail electric rates in Docket No. E-13, Sub 44, and approving the rate schedule filed by Nantahala on 13 December 1983. We affirm those portions of the order which concern the design of rates applicable to intervenor Jackson Paper Manufacturing Company. This case is remanded to the Commission for further proceedings in light of our decisions in *Nantahala I* and *Nantahala II*, and consistent with this opinion.

Affirmed in part.

Reversed in part and remanded.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY; ABITIBI-PRICE COMPANY; AIR PRODUCTS AND CHEMICALS, INC.; AMERICAN CYANAMID CORPORATION; BASF WYANDOTTE CORPORATION; CITY OF DURHAM; CLARK EQUIPMENT COMPANY; FLORIDA STEEL CORPORATION; INGERSOLL-RAND CORPORATION; KUDZU ALLIANCE; NORTH CAROLINA MUNICIPAL POWER AGENCY NO. ONE; OLIN CORPORATION; OWENS-ILLINOIS, INC.; PPG INDUSTRIES, INC.; PUBLIC STAFF NORTH CAROLINA UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; AND THE GENERAL TIRE AND RUBBER COMPANY v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. AND GREAT LAKES CARBON CORPORATION

No. 674A84

(Filed 13 August 1985)

1. Utilities Commission § 38; Electricity § 3— general rate case—interchange agreement—properly included in rate base

The Utilities Commission properly refused to exclude from Duke Power Company's rate base and allowable expenses that portion of operating expenses and undepreciated costs of the McGuire Nuclear Station equal to the percentage of its generation received by municipalities and cooperatives under the Catawba Sale Agreements, which allowed North and South Carolina

municipal and cooperative customers to purchase an interest in the McGuire and Catawba Nuclear Stations and which provided for an exchange of power between facilities in the event of an outage. Although a portion of the operating expenses and undepreciated capital costs of McGuire does not provide service to North Carolina retail customers, there was evidence to support the Commission's explicit finding that McGuire in its entirety is "used and useful" and the implicit finding that the portion of McGuire's capacity allotted to Catawba is "used and useful" in testimony that as a result of the exchange agreement Duke's system reliability was greatly enhanced by cushioning the effect of outages at McGuire and that the agreements benefited retail ratepayers by enabling Duke to complete the Catawba Station without having to issue and service substantial sums of additional debt. G.S. 62-133, G.S. 159B-8.

2. Utilities Commission § 38; Electricity § 3— general rate case—interchange agreement—Commission's order proper

The portion of the Utility Commission's order which stated that an agreement with municipal and cooperative customers for the exchange of power between facilities in the event of an outage should be reflected in Duke's fuel expenses and demand jurisdictional allocation factor was in the form required by G.S. 62-79(a) where the Commission set forth and discussed the contentions and evidence presented by both the appellants and Duke, then set forth its conclusion that it was proper to treat the costs of the McGuire Nuclear Station in the manner proposed by Duke due to the specified benefits received by retail ratepayers.

3. Utilities Commission § 27; Electricity § 3— test period—Commission's refusal to find abnormality—supported by evidence

The Utilities Commission in a general rate case is required to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period; however, there was evidence to support the Commission's refusal to find an abnormality where the record tended to show that any adjustment based on economic conditions would be largely speculative and the expert testimony relied on by appellants to show an abnormality, which the Commission was not bound to accept, was flawed in its methodology. G.S. 62-133(c).

4. Utilities Commission § 27; Electricity § 3— test period—adjustment for customer growth and changing economic conditions

In considering the test period in a general rate case, the Commission made proper findings under G.S. 62-79(a) with regard to adjustments for growth in the number of customers and changes in economic conditions where its order, read in its entirety, showed that the Commission accepted the Public Staff's customer growth adjustment except as it applied to industrial customers, used the actual number of industrial customers at the end of the test period so as not to bias the calculation, and rejected the adjustment for economic conditions proposed by appellants' expert apparently because that proposed adjustment took into account factors such as customer growth and abnormal weather for which adjustments had already been made.

5. Utilities Commission § 43; Electricity § 3.1— time of use rates—not available to all customers—not illegal discrimination

The Utilities Commission did not err by refusing to order Duke Power Company to make time of use rates immediately available to all customers where Duke's uncontradicted evidence showed that if time of use rates were made immediately available to all industrial and general service transmission customers, Duke's revenues would decrease without a corresponding reduction in costs, and the rates of all general service and individual customers would have to be increased. Because some customers would not benefit from time of use rates and some would not have time of use rates available, it was reasonable to allow Duke to continue to phase in time of use rates. There was no illegal discrimination because Duke's rates have been established by the Commission and its rate differentials and restrictions on the availability of time of use rates have been specifically held reasonable and approved by the Commission, there was neither allegation nor evidence of an attempt by Duke to coerce customers into paying unreasonable rates, and there was no showing that Duke favored its affiliates over other customers.

6. Utilities Commission § 24; Electricity § 3.1— time of use rates found more efficient than demand ratchets—time of use rates limited—no error

The Utilities Commission did not violate G.S. 62-79(a) in a general rate case by stating that it had found in a number of other cases that demand ratchets are a less efficient peak load pricing device than time of use rates, then continuing the use of demand ratchets and limiting the availability of time of use rates, where the Commission also found that it would not be advisable to make time of use rates immediately available to all transmission customers due to the revenue adjustment which would be required.

7. Utilities Commission § 43; Electricity § 3.1— revenues adjusted to offset losses from time of use rates—no error

The Utilities Commission in a general rate case did not err by adjusting Duke Power Company's rates by $1,500,000 to offset losses in revenue occasioned by the increased availability of time of use rates. There was nothing unreasonably discriminatory about permitting Duke to recover its revenue requirements from its general service and industrial customers, even though the cost of providing service to those customers had not increased due to the increased availability of time of use rates, because the adjustment was necessary to enable Duke to recover the rate of return approved by the Commission. G.S. 62-140(a).

8. Utilities Commission § 27; Electricity § 3— test period—estimated reduction for losses not occurring in test period—no error

The Utilities Commission did not err in a general rate case by taking into consideration an estimated reduction in revenue due to increased availability of time of use rates, even though the reduction did not occur during the test period, because the Commission is required by G.S. 62-133(b)(2) to estimate future revenues under the proposed rates. Moreover, G.S. 62-133(d) requires the Commission to consider all of the material facts of record which will enable it to determine what are reasonable and just rates.

Justice MARTIN dissenting.

APPEAL under N.C.G.S. 7A-29(b) by Carolina Utility Customers Association, Inc. and Great Lakes Carbon Corporation from orders of the North Carolina Utilities Commission entered in Docket No. E-7, Sub 373. Heard in the Supreme Court May 13, 1985.

Steve C. Griffith, Jr., George W. Ferguson, Jr., William L. Porter, Ronald L. Gibson, and Kennedy, Covington, Lobdell and Hickman, by Clarence W. Walker and Myles E. Standish, for Applicant-Appellee Duke Power Company.

Thomas R. Eller, Jr. for Intervenor-Appellant Carolina Utility Customers Association, Inc.

Byrd, Byrd, Ervin, Blanton, Whisnant and McMahon, P.A., by Sam J. Ervin, IV, for Intervenor-Appellant Great Lakes Carbon Corporation.

MITCHELL, Justice.

On November 30, 1983, Duke Power Company (hereinafter "Duke") filed an application with the North Carolina Utilities Commission (hereinafter "Commission") for an increase in its rates and charges for electric service to its retail customers in North Carolina so as to increase annual revenue by approximately $213,000,000 or 13.6%. In the application Duke proposed to make the rate increase effective December 30, 1983. In an order dated December 27, 1983, the Commission determined that the application constituted a general rate case, denied Duke's request for interim rates to become effective at the beginning of commercial operation of Unit Two at Duke's McGuire Nuclear Station, suspended the proposed rate increase for a period of up to 270 days, and ordered public hearings on the proposed rates and publication of notices of such hearings. The Commission set the test period as the twelve month period ending June 30, 1983. Various parties were permitted to intervene in the proceeding, including the appellants, Carolina Utility Customers Association, a group of industrial electricity users, and Great Lakes Carbon Corporation, a customer of Duke. Public hearings were held by the Commission in various areas of the State in March and April, 1984.

On June 13, 1984, the Commission issued an order which among other things granted Duke an increase in annual gross

revenues of $130,969,000 from its North Carolina retail operations. The Commission also ordered Duke to make electric service available under Duke's time of use rate schedules for general service (rate schedule "GT") and industrial (rate schedule "IT") customers. The order required that electricity be provided at the rates set in those schedules to all general service and industrial customers served by Duke and otherwise qualifying for such rates, provided that Duke did not incur any additional expenses not recovered through its approved rates and charges. On June 14, 1984, Duke filed a motion for reconsideration requesting that the Commission strike that part of the order requiring it to make service at the rates in its time of use schedules GT and IT available to such customers. On June 15, 1984, the Commission issued an order temporarily holding in abeyance that portion of its prior order regarding the availability of service at time of use rates.

After various motions by the intervenors, the Commission scheduled oral arguments on the issue of the time of use rates. On August 28, 1984, the Commission heard oral arguments from Duke, the Public Staff and various intervenors including the appellants. On October 8, 1984, the Commission issued an order which provided that electric service under time of use rate schedules GT and IT need not be made immediately available to all general service and industrial customers being served from Duke's transmission facilities but was to be made available to those customers at the time of Duke's next general rate case. On October 12, 1984, Duke filed revised rate schedules with the Commission in an attempt to comply with the October 8 order. That same day the Commission entered an order approving the revised rate schedules.

Appeal was taken from the following orders: (1) the June 13, 1984 order which granted the $130,969,000 annual gross revenue increase, (2) a June 15, 1984 order which approved rate schedules submitted by Duke in accordance with the June 13 order, (3) the July 3, 1984 order scheduling a hearing on reconsideration concerning Duke's request to strike that part of the June 13 order concerning electric service under time of use schedules, (4) the October 8, 1984 order rescinding that part of the June 13 order requiring that electric service under time of use rate schedules be made available for all general service and industrial customers

served by Duke's transmission facilities, and (5) the October 12, 1984 order approving Duke's revised rate schedules.[1]

The appellants first argue that the Commission committed prejudicial error in failing to exclude from Duke's rate base a portion of the undepreciated cost of the McGuire Nuclear Station and a percentage of McGuire's operating costs. This argument is based on the appellants' contentions concerning certain contracts known as the Catawba Sale Agreements which were entered into by Duke and the other owners of the Catawba Nuclear Station. It is therefore necessary to examine the history and provisions of those agreements.

Unit Two of the McGuire Nuclear Station became fully commercial on March 1, 1984. While the McGuire Station was being completed, Duke entered into a series of contracts known as the Catawba Sale Agreements. The first sale under those agreements occurred in 1978 when Duke sold a 75% interest in Unit Two of the Catawba Nuclear Station to the North Carolina Municipal Power Agency No. 1, a joint agency composed of a group of North Carolina municipalities which had been wholesale purchasers of power from Duke. The Commission approved the sale finding that it would serve the public interest by reducing the cost of electricity to both the members of the North Carolina Municipal Power Agency No. 1 and Duke customers.

Acting under the sale agreements Duke in 1981 sold a 75% interest in Unit One of the Catawba Nuclear Station to its North Carolina and South Carolina cooperative customers. The Commission also approved this sale finding that it was in the public interest. The Commission found that the sale would relieve Duke of some of the burden of obtaining financing for its construction program. The Commission further noted that the joint ownership of Catawba Unit One would benefit Duke customers as well as the cooperatives.

Under the sale agreements Duke in 1982 sold its remaining 25% interest in Unit Two of the Catawba Nuclear Station to the

1. Great Lakes Carbon Corporation is already served on time of use rate schedule IT. Therefore, it did not join certain of the exceptions regarding the availability of voluntary time of use rate schedules GT and IT or the Commission's actions pertaining to the "flattening" of the utility's nonresidential rate schedules.

Piedmont Municipal Power Agency, a joint agency formed by a group of Duke's South Carolina municipal customers. At the time of the hearing before the Commission in the present proceeding, this sale had not been consummated due to an appeal from the order of the South Carolina Public Service Commission authorizing the transaction. That order was later approved by the Supreme Court of South Carolina in *Palmetto Alliance, Inc. v. South Carolina Public Service Commission*, 282 S.C. 430, 319 S.E. 2d 695 (1984). As a result of these sales Duke is left with a 25% ownership interest in Catawba Unit One and no ownership interest in Catawba Unit Two.

In order to minimize the impact of power outages at the McGuire and Catawba Stations to both Duke and the municipalities and cooperatives, a provision in each of the Catawba Sale Agreements provides for an exchange of power between the facilities in the event of such an outage. Under this exchange agreement if the McGuire Station is out of service, Duke will be entitled to a percentage of the electricity generated by each of the Catawba units equivalent to Duke's percentage ownership interest in the combined capacity of the McGuire and Catawba Nuclear Stations. Similarly, if the Catawba Station is out of service, the municipalities and cooperatives will be entitled to a portion of the electricity generated by the McGuire Station equivalent to their percentage ownership interest in the combined capacity of the McGuire and Catawba Nuclear Power Stations.

Under the exchange agreement the municipalities and cooperatives pay to Duke the production costs of any power purchased by them from the McGuire Nuclear Station. Similarly, Duke pays the municipalities and cooperatives the Catawba Nuclear Station's production costs of any power purchased from their ownership interest in Catawba. The production costs paid by both parties generally cover the marginal cost of the generation of electricity at each plant and do not reflect the fixed costs of the plant.

At the time of the hearing, the McGuire Nuclear Station had been completed but the Catawba Nuclear Station was still under construction. Catawba Unit One was expected to come into service in 1985, Catawba Unit Two in 1987.

At the hearing John Wilson testified on behalf of Carolina Utility Customers Association. He advocated that the Commission readjust Duke's retail jurisdictional test year cost allocation so as to remove that portion of McGuire's plant and operating expense allocation that is associated with capacity and energy sold to the Catawba purchasers. This proposal was designed to reflect the fact that power from McGuire was being sold to the Catawba purchasers at a price which did not include Duke's fixed costs. Under Wilson's proposed adjustment Duke's North Carolina retail revenue requirement would be decreased by $33,521,000 per year.

William Stimart, Duke's Vice President for Regulatory Affairs, testified in opposition to the adjustment proposed by Wilson. He stated that because it provided an assured source of power in the event of an outage at the McGuire Station, the exchange agreement would provide net benefits to both Duke and its retail customers. He also testified that the Catawba Sale Agreements should be viewed in their entirety, not on a "piecemeal basis." He further testified that the Catawba Sale Agreements benefited retail ratepayers by enabling Duke to complete the Catawba Station without having to issue substantial sums of additional debt and by allowing the other joint owners of Catawba to finance their share of the plant at a lower capital cost than is available to Duke.

With regard to the exchange agreement the Commission found:

> The Commission concludes that it is proper to reflect the Catawba-McGuire Reliability Exchange provisions of Duke's contracts for the purchase and sale of the Catawba plants to the North Carolina Municipal Power Agency No. 1, North Carolina Electric Membership Cooperative and Saluda River Membership Cooperative in this proceeding in the manner proposed by the Company and accepted by the Public Staff. In support of this conclusion it is observed that the reliability exchange is embodied in contracts which have been approved by this Commission. These contracts should be either accepted or rejected in their entirety. Undesirable features of the contracts cannot be isolated and removed without changing the overall intent and effects of the contracts. If the Commission were to not reflect the reliability exchange features

> of the contracts, it would be inappropriate for the Commission to reflect the benefits associated with the sale. Among these benefits are the reliability exchange from the Catawba buyers ownership interests in Catawba to Duke's ratepayers, the reduced cost of building Catawba due to the municipal and EMC financing advantages, and the current low embedded cost of Duke's debt compared to what it would have been had Duke been required to sell bonds. Finally, it is observed that additional benefits associated with Catawba Unit No. 1 will begin accruing to Duke's North Carolina retail ratepayers in the late summer or early fall of 1984. Nuclear fuel is now scheduled to be loaded into Catawba Unit 1 in July of this year. During the pre-commercial testing of the Catawba Unit, which will commence shortly after fuel loading, it is very likely that substantial fuel savings will occur. Such savings will be placed in a deferred account and subsequently amortized as a reduction to the cost of service. As previously stated, it is anticipated that these savings will begin to accrue in late summer or early fall of 1984. Ratepayers should begin receiving the benefit of this deferred reduction in fuel cost in the summer or early fall of 1985.

The appellants argue that the Commission erred in failing to exclude from Duke's rate base a percentage of the undepreciated cost of the McGuire Station to reflect the percentage of electricity generated by the plant that was being sold to the municipal power agencies and cooperatives and by failing to exclude a similar percentage of McGuire's operating costs.

Before examining the appellants' contentions, we deem it wise to take note of certain relevant principles. The Commission, not the courts, has been vested with the authority to regulate the rates of public utilities. N.C.G.S. 62-2. The rates established by the Commission must, however, be fair and reasonable to both the utility and the consumer. N.C.G.S. 62-133. Rates fixed by the Commission are deemed prima facie just and reasonable. N.C.G.S. 62-94(e). The party attacking the rates established by the Commission bears the burden of proving their impropriety. *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982). The order of the Commission will not be disturbed if upon consideration of the entire record we find the decision is not affected by error of law and the facts found by the Commission are supported

by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. *Id.* Naturally, an appellant may show on appeal that the order is not supported by competent, material and substantial evidence. *Id.; Utilities Commission v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (1976).

The appellants' argument centers on N.C.G.S. 62-133. N.C.G.S. 62-133(b)(1) provides in pertinent part that in fixing the rates for any public utility the Commission shall:

> Ascertain the reasonable original cost of the public utility's property *used and useful or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State*, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress).

(Emphasis added.) N.C.G.S. 62-133(c) states that:

> The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable feature revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in cost, revenues or the cost of the public utility's property *used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within the State*, including its construction work in progress which is based upon circumstances and events occurring up to the time the hearing is closed.

(Emphasis added.) N.C.G.S. 62-133 clearly provides that the rate base and allowable operating expenses of a utility are limited to those costs incurred in providing service to the company's North Carolina retail customers. *See, e.g., Utilities Commission v. Ed-*

misten, 291 N.C. 424, 230 S.E. 2d 647 (1976); *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). The appellants' basic contention is that the portion of the operating expenses and undepreciated capital costs of the McGuire Nuclear Station equal to the percentage of McGuire's generation received by the municipalities and cooperatives pursuant to the exchange agreement does not provide service to North Carolina retail customers and must therefore be excluded from Duke's rate base and allowable expenses pursuant to N.C.G.S. 62-133. We disagree.

[1] Our task is to determine whether the evidence before the Commission supports a determination that the portion of McGuire which is utilized to produce energy as required under the exchange agreement is or will be "used and useful" during or within a reasonable time after the test period in providing service to the public within North Carolina. Whether property is "used and useful" in this regard is a question of fact to be determined by the Commission upon competent and substantial evidence. *Utilities Commission v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). The utility bears the burden of proving that the property is "used and useful." *Id.*

Our analysis begins with a brief examination of the Joint Municipal Electric Power and Energy Act. The Act, codified at Chapter 159B of the General Statutes, was enacted in 1975 and authorizes North Carolina municipalities to act jointly to acquire and own electrical generation and transmission facilities. The Act reflects a legislative finding that due to the increased capital and operating costs of public utilities in North Carolina, it had become necessary for utilities to postpone or curtail construction of generation and transmission facilities. The General Assembly concluded that the creation of joint power agencies would help assure an adequate and economical supply of electric power. N.C.G.S. 159B-2.

Originally the Act did not expressly permit municipal power agencies to own plants jointly with public utilities. However, in 1977 the Constitution of North Carolina was amended by the adoption of Article V, Section 10 which specifically authorized such ownership arrangements. The General Assembly enacted N.C.G.S. 159B-5.1 which effectuates the provisions of Article V, Section 10. Also, under N.C.G.S. 159B-8 municipalities par-

ticipating in joint projects are authorized to enter into contracts for the exchange, pooling and transmission of electric power produced by such projects with any public utility which owns generation, transmission or distribution facilities in this or any other State. These constitutional and statutory provisions reflect the legislature's conclusion that joint ownership arrangements and exchange agreements such as the Catawba Sale Agreements are in the public interest and should be encouraged. Since such agreements are generally in the public interest, it is logical to assume that the facilities used to effectuate them provide benefits to the public.

The appellants did present evidence that electricity from McGuire was sold to the municipalities and cooperatives at a price which did not recover the capital costs of the McGuire Station. This would support the appellants' argument for the exclusion of a portion of those costs from Duke's North Carolina rate base. Duke, however, presented evidence that the Catawba Sale Agreements and the exchange provisions therein produced a significant benefit to Duke's retail customers. Duke witnesses testified that as a result of the exchange agreement Duke's system reliability was greatly enhanced by cushioning the effect of any outages at the McGuire Station. This testimony was uncontradicted.

In *Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983), we discussed the characteristics of interchange agreements by which various utilities could buy and sell electric power with other utilities. We acknowledged the benefits of such arrangements stating:

> These interconnections, and the interchange and exchange agreements that result, enhance reliability by allowing any particular interconnected utility to receive excess power from systems located anywhere on the grid. Such enhanced reliability obviates the need for the high reserve capacity that would otherwise be needed by the utility to meet its peak demand in times of highest usage or when generating units are out of service. By sharing reserves the interconnected systems not only enhance reliability but also reduce the need for capital expenditures necessary to fulfill their reserve needs if they were not interconnected. The ability to

> interchange and purchase and sell power among interconnected utilities also allows the utilities to schedule plant outages for necessary maintenance and repair at particular times when it might otherwise be impossible. It makes possible staggered construction of large new generating units among interconnected systems.

Id. at 198, 306 S.E. 2d at 437. Although in that case we were concerned with an exchange agreement between separate utilities rather than one between joint owners of separate generating facilities, the advantages of increased system reliability are equally applicable here. Without the exchange agreement an outage at McGuire would require Duke to replace the lost power from other less efficient generating facilities or through costly purchases from other utilities. In either case retail rates to consumers would almost certainly rise to reflect those additional costs.

As noted previously, the Commission was of the opinion that the exchange agreement should be viewed as an inseparable part of the Catawba Sale Agreements. We agree. Evidence was presented which tended to show that the Catawba Sale Agreements provided benefits to North Carolina ratepayers in addition to the advantages flowing from the reliability exchange. If found to exist, these benefits should also be considered in order to arrive at an equitable rate determination.

Duke witness Stimart testified, and the Commission determined, that the Catawba Sale Agreements benefited retail ratepayers by enabling Duke to complete the Catawba Station without having to issue and service substantial sums of additional debt and by allowing the joint owners of Catawba to finance their share of the plant at a lower capital cost than that available to Duke. The appellants offered no evidence to contradict this claim. Stimart testified that because Duke did not have to issue additional debt to complete Catawba, North Carolina retail ratepayers were saved $28,000,000 annually. The evidence clearly tends to show that Duke's North Carolina retail ratepayers benefited in several ways from the Catawba Sale Agreements. This evidence was competent and substantial, and supports the Commission's explicit finding that McGuire in its entirety is "used and useful" and its implicit finding that the portion of McGuire's capacity allocated to Catawba is "used and useful." This is true even

without regard to the savings resulting to the North Carolina customers of the North Carolina municipalities and cooperatives. We, therefore, hold that the Commission properly refused to exclude from Duke's rate base and allowable expenses that portion of the operating expenses and undepreciated costs of McGuire equal to the percentage of its generation received by the municipalities and cooperatives under the exchange agreement.

[2] The appellants also contend that the part of the order which stated that the exchange agreement should be reflected in Duke's fuel expenses and demand jurisdictional allocation factor is not in the form required. N.C.G.S. 62-79(a) states:

> 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.

The appellants' first argument in support of this contention is based on the Commission's conclusion that the exchange agreement affects North Carolina retail ratepayers by requiring them to pay for McGuire capacity which does not directly serve them at the time. They argue that this conclusion is correct and shows the error in that part of the Commission's order requiring Duke's North Carolina retail customers to pay for any of the costs or expenses of McGuire associated with the generation of power for exchange with Catawba under the exchange agreement. We disagree. As noted previously, Duke presented plenary evidence that the exchange agreement as well as other attributes of the Catawba Sale Agreements will benefit Duke's North Carolina retail customers. These benefits are not at all times direct, yet they are nevertheless real. We detect no inconsistency between the Commission's conclusion as to the exchange agreement's effect on North Carolina ratepayers and the Commission's implicit determination that the portion of McGuire used to generate

power for exchange with Catawba under the agreement is "used and useful" in providing service to the public in North Carolina.

The appellants further argue that the Commission failed to resolve a material legal issue raised by the testimony of the appellants' witness Wilson. This argument is meritless. The order resolves all "material issues of fact, law or discretion presented in the record" pertaining to the exchange agreement. In its order the Commission set forth and discussed the contentions and evidence presented by both the appellants and Duke concerning the inclusion of a portion of the costs of McGuire attributable to the production of power for exchange with Catawba. It then set forth its conclusion that it was proper to treat the costs of McGuire in the manner proposed by Duke due to the specified benefits received by the retail ratepayers. The portion of the Commission's order concerning the reliability exchange agreements fully comports with N.C.G.S. 62-79(a).

[3] The appellants next contend that the Commission erred in determining Duke's probable future revenues by failing to adjust Duke's test period operating revenues to account for abnormally low test period industrial sales. As noted previously N.C.G.S. 62-133 (c) provides:

> The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

Thus, the utility's rates are based upon a historic twelve month test period. The theory behind the use of a recently ended test

period in fixing rates to be charged in the near future is that the rates in effect during the test period will produce the same rate of return in the near future on the company's property as they produced in the test period, adjusted for known changes in conditions. *Utilities Commission v. Duke Power Company*, 305 N.C. 1, 287 S.E. 2d 786 (1982); *Utilities Commission v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972). Because there may be abnormalities in the test period, N.C.G.S. 62-133 allows the Commission to make *pro forma* adjustments to revenue and expenses to reflect the effect of certain future conditions as though those conditions had prevailed throughout or at the end of the test period, and to adjust for abnormalities and changes in conditions. *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982).

In order to normalize the test period in the present case, which was the twelve month period from July 1, 1982 to June 30, 1983, Duke proposed certain adjustments to its operating revenues. One proposed adjustment was to increase Duke's test period revenues by $18,033,000 to normalize test period sales for weather conditions. This adjustment was unchallenged by either the appellants or the Public Staff. Duke also proposed that test period revenues be adjusted upward by $10,706,000 to reflect customer growth through the end of the test period. The customer growth adjustment proposed by Duke increased revenues to reflect the actual number of customers at the end of the test period. Duke calculated that had the actual number of customers served at the end of the test period been customers during the entire test period, Duke's revenues would have increased by $10,706,000. These adjustments had the effect of decreasing Duke's revenue requirement and therefore reducing the amount of the increase in rates required.

The Public Staff proposed a consumer growth adjustment of $14,525,020 to Duke's revenues. The difference between Duke's proposed adjustment and that of the Public Staff was the result of the different methodologies used. In calculating its adjustment the Public Staff did not use the actual number of customers at the end of the test period. Instead it used a regression analysis based on data from January 1, 1981 to December 31, 1983 to determine a "normalized" end-of-period level of customers. According to the

Public Staff, this removed any abnormality in the end-of-period numbers used by Duke.

The witness Wilson testified on behalf of Carolina Utility Consumers Association and proposed a consumer growth adjustment of $22,789,000. Wilson contended that Duke's industrial sales during the first half of the test period were abnormally low due to economic conditions existing during that time. He adjusted test period industrial sales by comparing actual industrial kilowatt-hour (hereinafter "kwh") sales in the second half of 1982 with the level of industrial kwh sales at the average growth rate from 1980 to 1983. He used the difference in the actual industrial kwh sales for the last six months of 1982 and the level expected from the application of the industrial kwh sales derived from the average growth as the appropriate minimum adjustment to kwh sales level at the average price per kwh for the industrial class. This method produced an adjustment to North Carolina retail test period revenues of $22,789,000.

Duke presented rebuttal evidence with respect to the proposals of the Public Staff and Wilson. With regard to the Public Staff's position, Duke witness Stimart noted that the regression analysis is based on a thirty-six month period ending six months beyond the conclusion of the test period. He testified that this resulted in the Public Staff's predicted consumer growth being higher than it should have been. Stimart also said that if the regression methodology had only utilized data through the end of the test period, the Public Staff's analysis would have produced an end-of-period number of industrial customers comparable to the actual number of industrial customers at the termination of the test period.

In response to the adjustment proposed by Wilson, Stimart noted that the test period retail sales had increased over test period retail sales for Duke's last general rate case and that the test period had already been adjusted for weather variances and consumer growth. He went on to testify that Wilson's proposed adjustment to test period sales was not appropriate because it was based only on a partial analysis of unadjusted sales for a portion of the fiscal cycle, it was distorted by variations in the actual number of bills before and after the test period, and it was distorted by figures reflecting the fact that the summer of 1983

was abnormally warm which caused greater electric usage by industrial customers.

William Lee, Chairman of the Board and Chief Executive Officer of Duke, also testified. He stated that industrial sales had decreased in four of the past ten years.

In its order the Commission summarized the evidence and the contentions of the parties. It stated that the regression analysis methodology used by the Public Staff, including the use of data from outside the test period, was generally appropriate for determining a normalized end-of-period level of customers because it removes the variability inherent in using actual customer levels at the end of the test period. The Commission then stated that it was appropriate to use average kwh sales per customer in consumer growth calculations so long as it does not unduly bias the calculations.

The Commission rejected Wilson's proposed adjustment as being too uncertain. It stated that if it were appropriate to adjust industrial kwh sales to reflect abnormal conditions during the test period, then that variable should be isolated so as to exclude the effects of growth in the number of customers and abnormal weather which had already been taken into account. Wilson's methodology failed in this regard. Based on these determinations, the Commission concluded that an adjustment to revenues of $12,892,000 was appropriate. The Commission made no adjustment to normalize economic conditions.

The appellants contend that the Commission erred by failing to adjust Duke's test period operating revenues to account for abnormally low test period industrial sales caused by depressed economic conditions existing during the first half of the test period. We agree with the appellants' argument that the Commission *must* make *pro forma* adjustments for abnormalities which existed during the test period. For reasons which we will discuss here, however, we have determined that the evidence did not require the Commission to find that any abnormality existed as to economic conditions during the test period. The appellants' contention that the Commission erred in this regard is rejected.

N.C.G.S. 62-133(a) mandates that the Commission fix rates that are fair both to the utility and the consumer. N.C.G.S.

62-133(c) establishes the use of a twelve month test period for setting rates. N.C.G.S. 62-133(c) further provides:

> [T]he Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues, or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

These statutory provisions compel the conclusion that the Commission is *required* to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period. This conclusion is supported by language in a number of prior cases. *E.g., Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 14, 287 S.E. 2d 786, 794 (1982) ("Duke correctly argues that to properly reflect probable future costs and revenues, the Commission must increase its test year expenses, *i.e.*, depreciation expense by $3,879,000 thereby reducing its net income by this same amount. This adjustment is consistent with the Commission's statutory mandate and is appropriate."); *Utilities Commission v. Virginia Electric and Power Co.*, 285 N.C. 398, 417, 206 S.E. 2d 283, 297 (1974) (The test year period "is the basis for a reasonably accurate estimate of what may be anticipated in the near future *if, but only if, appropriate pro forma adjustments are made for abnormalities which existed in the test period . . .* .") (emphasis added); *Utilities Commission v. City of Durham*, 282 N.C. 308, 321, 193 S.E. 2d 95, 104-05 (1972) (speaking to a proposed adjustment due to abnormal weather the Court stated, "The statute does not require the Commission to make an adjustment for a slight variation between the weather of the test period and the weather of an average year . . . . Where, however, as in the present record, the evidence is clear and undisputed that the heating season of the test period was abnormally cold (or abnormally warm), the Commission is clearly authorized, *if not required*, by N.C.G.S. 62-133(b)(2) to make a reasonably approximate adjustment for such abnormality in the test period experience"). (Emphasis added.)

However, the Commission is not required to make a *pro forma* adjustment unless it finds that an abnormality having a probable impact on the utility's revenues and expenses existed during the test period. Whether such an abnormality existed is a factual determination to be made by the Commission and is conclusive on appeal if supported by competent, material and substantial evidence. *See Utilities Commission v. General Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). The Commission failed to find that industrial sales were abnormal during the first half of the test period due to the depressed condition of the economy or for any other reason. There was competent, material and substantial evidence to support the Commission's refusal either to make such a finding or to adopt Wilson's proposed adjustment.

Initially the record tends to show that any adjustment based on economic conditions would be largely speculative. In four of the previous ten years Duke's industrial sales had fallen compared to the prior year. In the other six years sales had increased. Considering the uncertainty of the economy, it would have been difficult at the time of the hearing to ascertain whether the country was in the middle of a recovery or at the end of a recovery and thus whether industrial sales were likely to grow or decline during the time the rates were to be in effect. The Commission was therefore warranted in believing that industrial sales in the second half of 1983 were no better indicator of normalized industrial sales for the second half of 1982 than actual industrial sales for that period.

Furthermore, the Commission concluded that even had it adjusted industrial kwh sales to reflect any abnormally depressed economic conditions during the test period, that variable should be isolated to exclude the effects of customer growth and unusual weather which had already been considered. The conclusion that Wilson's methodology failed in this respect and was flawed is amply supported by the evidence. Duke witness Stimart testified that the proposed adjustment was flawed because it was based solely on a partial analysis of unadjusted sales for a portion of the fiscal cycle, it was distorted by variations in the actual number of bills before and after the test period, and it was distorted because it took into account again the fact that energy usage was greater in the summer of 1983 due to abnormally warm weather.

Finally, we note that Wilson's testimony that his adjusted industrial sales figures were a better indicator of normalized industrial sales than were the actual test year industrial sales was opinion testimony. It is well settled that the Commission is not bound by expert opinion testimony, even where it is undisputed. *E.g., Utilities Commission v. Southern Bell Telephone Co.*, 307 N.C. 541, 299 S.E. 2d 763 (1983); *Utilities Commission v. Duke Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982). Therefore, even if there had been no evidence contradicting it, the Commission still would have been free to reject this testimony.

[4] The appellants also contend that the Commission's order with respect to the issues of adjustments for growth in the number of customers and changes in economic conditions violated N.C.G.S. 62-79(a) which requires the Commission to state its findings and conclusions on all material issues of fact, law or discretion presented in the record as well as the reasoning supporting them. The appellants argue that the Commission failed to make proper findings with regard to adjustments for growth in the number of customers and changes in economic conditions. We do not agree.

With regard to the customer growth adjustment, the Commission specifically stated that it was "of the opinion that the regression analysis methodology used by the Public Staff is the appropriate method to use in most instances for determining a normalized end-of-period level of customers by rate schedule." The Commission went on to state that it found appropriate use of "average kwh sales per customer in customer growth calculations to the extent that such average kwh sales per customer do not unduly bias the calculations." This sentence refers back to the Commission's earlier discussion of industrial growth in which it recognized that the actual growth in the number of customers during the period might not include the same ratio of high-use industrial customers as is contained in the kwh per customer data utilized in the calculations. When read in its entirety the order shows that the Commission accepted the Public Staff's customer growth adjustment except as it applied to industrial customers. For industrial customers, the Commission used the actual number of industrial customers at the end of the test period so as not to bias the calculation. The Commission rejected the adjustment for economic conditions proposed by Wilson, apparently because that

proposed adjustment took into account the effects of factors such as customer growth and abnormal weather for which adjustments had already been made. The Commission then made a $12,892,000 adjustment based on its findings and conclusions.

[5] The remaining assignments of error and contentions are brought forward solely by Carolina Utility Customers Association. It first contends that the Commission erred by refusing to order Duke to make time of use rates immediately available to all customers. We do not agree.

Under time of use rates a customer is charged varying rates according to the time of day or year that the customer uses electricity. Time of use rates are voluntary and only those customers who are able to reduce their bills will utilize time of use rates. The reduction in billings naturally reduces a utility's revenues. There is, however, no immediate corresponding decrease in the utility's cost of service because of the lag time necessary to educate the large body of residential and industrial customers to the benefits of time of use rates and because some of the customers who switch to time of use rates will obtain a reduction in their bills even if they do not alter their usage pattern. Therefore, a utility's overall rates ordinarily must be increased temporarily for the short run if time of use rates are made available to enable the utility to recover its revenue requirement. Customers have been encouraged to utilize time of use rates because of the belief that time of use rates will ultimately alter the customers' usage patterns and decrease the growth of the peak demand for power from the system, thereby avoiding the need of operating inefficient plants or building additional capacity. This produces limited immediate savings, however, because many customers will alter their usage patterns only over a long period of time.

Duke began to experiment with time of use rates in 1978. In 1981, the Commission authorized Duke to phase-in its time of use rates to make them more available to its general service and industrial customers pursuant to voluntary time of use schedules GT and IT. Schedule IT is Duke's time of use rate schedule for industrial customers which by its own terms states that such rates are:

> Available on a voluntary and limited basis to the individual establishment which is in one of the following categories: establishments receiving initial permanent service after April 16, 1981 on this Schedule; or establishments served in an area where the Company operates its bi-direction communications system; or a random selection of establishments not served from the Company's distribution lines; or establishments previously served on this Schedule.

In its application in the present proceeding, Duke proposed to continue to phase-in the availability of time of use rates under Schedules GT and IT. Duke witness Hatley testified that Duke was attempting to make Schedules GT and IT available to all general service and industrial customers on an equal basis. He testified that Duke was making its power line carrier bi-direction communications equipment available throughout the system to distribution customers[2] and was following the same phase-in pattern with time of use rates. Because transmission customers[3] were not served by the power line carrier bi-direction communications system, however, a different method was needed to make time of use rates available to them. Therefore, the schedule provides that transmission customers will be chosen randomly for time of use rates.

To determine the number of transmission customers who will be offered time of use rates, Duke determines the percentage of customers who are served in areas where Duke operates its power line carrier bi-direction communications equipment and then randomly selects a number of transmission customers and makes Schedules IT and GT available to those customers to equalize the percentage of transmission customers who have Schedules IT and GT available to them. The only other customers who have Schedules IT and GT available to them are customers who accepted service under Duke's experimental time of use rates and customers coming onto the system after April 16, 1981, the date service was initially provided pursuant to Schedules IT

2. Distribution customers are those customers served by low voltage distribution lines and tend to be smaller users of electricity, including residential customers.

3. Transmission customers are those customers served by high voltage transmission lines and tend to be larger users of electricity.

and GT. According to Duke, its phase-in methods would make time of use rates available to all general service and industrial customers by 1987.

In connection with the increased availability of time of use rates due to the expansion of the power line carrier bi-direction communications equipment and random selection of additional transmission customers, Duke proposed that the Commission make an adjustment in the rates of its general service and industrial customers of approximately $1,500,000 to permit it to recover the level of revenues found by the Commission to be just and reasonable. Duke witness Hatley testified that the adjustment accounted for the fact that existing general service and industrial customers who would be offered service under Schedules GT and IT would receive a $1,500,000 reduction in their bills without making any change in their usage pattern. Without an increase in rates to reflect the increased availability of Schedules GT and IT, it is apparent that Duke would be unable to achieve the rate of return found to be reasonable by the Commission.

In its order, the Commission required Duke to:

> [M]ake voluntary time of use rate schedules GT and IT available to all general service and industrial customers having appropriate metering facilities and located at or near transmission facilities and otherwise qualifying, *provided such service is offered on the basis that the Company will incur no additional expenses not recovered through its approved rates and charges.*

(Emphasis added.) It is readily apparent that the Commission intended to allow Duke to adjust its rates to reflect the increased availability of time of use rates by the amount necessary to recover the rate of return found by the Commission to be just and reasonable. The $1,500,000 adjustment the Commission allowed Duke, however, related not to the increased availability of time of use rates to all transmission customers but only to the number of customers Duke had proposed to offer time of use rates due to its random selection of additional transmission customers. In order to correct this error, Duke filed a motion for reconsideration with respect to that portion of the order dealing with time of use rates. The Commission subsequently entered an order holding in abeyance that portion of its order relating to the

increased availability of time of use rates. The Commission also scheduled oral argument with respect to this matter.

At the hearing on reconsideration Donald Denton, Duke's Senior Vice-President for Marketing and Rates, testified that Duke had no objection to making time of use rates available on a systemwide basis to all its transmission customers. He stated, however, that this increased availability of time of use rates would cause a decrease in Duke's revenues of $16,700,000. Therefore, if Duke were required to make time of use rates available to all transmission customers, the Commission would need to allow an increase in rates to industrial and general service customers of $16,700,000 in order for Duke to recover the revenues approved by the Commission in its order.

Based on the evidence presented the Commission struck that portion of the order relating to time of use rates and ordered that

> Duke shall continue to phase in the availability of TOU rate schedules GT and IT in the same manner the Company has been following until such time as it files its next general rate case. The Company shall make the necessary revenue reallocations in its next general rate case in order to make such TOU rates available to all transmission level customers.

The appellant contends that the availability limitation provisions of Schedules GT and IT as approved by the Commission constitutes an unreasonable discrimination against Duke's retail customers who would benefit from time of use rates if they were available. The question of illegal discrimination in utility rates is governed by N.C.G.S. 62-140(a) which provides in pertinent part:

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage. 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.

In construing this provision we have stated that "[t]he long-established question of law with respect to rate differentials is not whether the differential is merely discriminatory or preferential; the question is whether the differential is an *unreasonable* or *unjust* discrimination." *Utilities Commission v. Bird Oil Company,*

302 N.C. 14, 22, 273 S.E. 2d 232, 237 (1981) (emphasis original). The applicable standard of review when an appellant alleges unreasonable discrimination is whether the Commission's order is supported by competent, material and substantial evidence. *See Utilities Commission v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (1976).

We have previously stated that it is not improper to create rate differentials based on substantial differences in quantity of use, *time of use*, manner of service and the cost of rendering service. *Utilities Commission v. Bird Oil Company*, 302 N.C. 14, 273 S.E. 2d 232 (1981). Therefore, it is clear that time of use rates are not discriminatory. The appellant argues, however, that when time of use rates are made available to any users, they must be offered to all users as soon as possible. We do not agree.

Duke's uncontradicted evidence showed that if time of use rates were made immediately available to all industrial and general service transmission customers, Duke's revenues would decrease by $16,700,000. Since there would be no immediate corresponding reduction in Duke's costs, the rates of all general service and industrial customers would have to be increased for the short run in order for Duke to recover the level of revenue previously determined by the Commission to be just and reasonable. However, there are transmission customers who would not benefit from time of use rates and distribution customers who would not have time of use rates available to them. In view of the rate shock which would be experienced by these customers, it was reasonable for the Commission to allow Duke to continue to phase-in time of use rates. Otherwise, those customers not switching to time of use rates would experience unreasonably sharp increases in their rates even though there would be no corresponding increase in Duke's costs for continuing to provide them electric service. We note that at least one other jurisdiction has ruled that it is reasonable to permit the phasing in of time of use rates in view of the substantial increase in expense to the utility that would result from the immediate implementation of such rates. *New York State Council of Retail Merchants, Inc. v. Public Service Commission*, 45 N.Y. 2d 661, 384 N.E. 2d 1282, 412 N.Y.S. 2d 358 (1978).

The appellant directs our attention to *North Carolina Public Service Company v. Southern Power Co.*, 179 N.C. 18, 101 S.E. 593 (1919). In that case the defendant utility company demanded that the plaintiff pay a substantially higher rate than it charged other purchasers, many of whom were industrial customers affiliated with the utility. We stated that the plaintiff was entitled to receive the lowest rate charged by the utility for power sold to similar customers under similar conditions. Otherwise, we said the defendant would be engaging in illegal discrimination against the plaintiff.

In the case *sub judice*, however, Duke's rates have been established by the Commission and its rate differentials and restrictions on the availability of time of use rates have been specifically held reasonable and approved by the Commission. There is neither an allegation nor any evidence of an attempt by Duke to coerce customers into paying unreasonable rates. Finally, there is no showing that Duke has favored its affiliates over other customers. The appellant's reliance on *Southern Power Company* is misplaced.

[6] The appellant also argues that the Commission's finding of fact with respect to time of use rates and the use of demand ratchets[4] are contradictory. In its original order the Commission stated that in a number of other cases involving Virginia Electric Power and Light Co. and Carolina Power and Light Co. it had found that demand ratchets are a less efficient peak load pricing device than time of use rates and that time of use rates would be a reasonable alternative to demand ratchets. The appellant argues that the Commission violated N.C.G.S. 62-79(a) by making this finding and then on reconsideration, continuing the use of demand ratchets and limiting the availability of time of use rates. This argument is meritless.

It is true that in its original order the Commission stated that time of use rates were a "reasonable alternative" to demand

4. As stated by the appellants in their brief, a contract billing demand ratchet is a provision that requires a customer to pay a certain percentage of its maximum demand in a stated period, without regard to whether it actually reaches that demand in that period. Generally, the percentage is somewhere between the demand the customer actually placed on the system and the maximum it contracted to put on the system, but did not.

ratchets. In fact, the Commission expressed a preference for time of use rates over demand ratchets. However, on reconsideration the Commission found that it would not be advisable to make time of use rates immediately available to all transmission customers due to the revenue adjustment which would be required. As discussed previously herein this decision was supported by competent, material and substantial evidence. Therefore, the Commission's findings are not inconsistent with its ultimate decision.

[7] In its final argument, the appellant contends that the Commission erred by adjusting Duke's rates by $1,500,000 to offset losses in revenue occasioned by the increased availability of time of use rates. As previously noted the Commission permitted Duke to increase its general service and industrial rate schedules by $1,500,000 in order to recover the level of revenue approved by the Commission. This increase was necessary due to the fact that some customers who switch to time of use rates will be able to reduce their bills without a reduction in power usage and with no corresponding decrease in Duke's cost. Duke calculated the $1,500,000 figure by determining which customers would be offered time of use rates and comparing their actual bills during the test year with the bills they would have received under the time of use rate schedules.

The appellant claims that the adjustment is an unreasonable discrimination prohibited by N.C.G.S. 62-140(a). The appellant's argument appears to be that because the cost of providing service to general service and industrial customers has not increased due to the increased availability of time of use rates, it is unreasonably discriminatory to require those customers unable to receive time of use rates to pay for the benefits received by those who are able to take advantage of such rates. However, as we have previously discussed at length herein, the adjustment was necessary to enable Duke to recover the rate of return approved by the Commission, and not because of an increase in the cost of service. There is nothing unreasonably discriminatory about permitting Duke to recover its revenue requirements from its general service and industrial customers.

[8] The appellant also contends that the Commission's acceptance of Duke's argument concerning revenue loss resulting from

implementation of time of use rates was based upon its use of revenue erosion projections prohibited by N.C.G.S. 62-133(c). As discussed previously that statute directs the Commission to determine Duke's costs, expenses and revenues based on a twelve month test period. Under the statute the Commission must also consider relevant, material and competent evidence "tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period . . . which is based upon circumstances and events occurring up to the time the hearing is closed."

The Commission made findings required by N.C.G.S. 62-133(c) based on the test period and actual changes in costs and revenues occurring within a reasonable time after the test period concerning the undepreciated cost of Duke's property and future gross revenues under the present rates. Based on these and other determinations, the Commission found that Duke would require annual gross revenues of $1,694,259,000 in order to earn a reasonable rate of return on its rate base. This necessitated a $136,969,000 increase in annual gross revenues. Under N.C.G.S. 62-133(b)(5) the Commission was then required to set rates which would permit Duke to recover this revenue. In doing this the Commission was required by N.C.G.S. 62-133(b)(2) to estimate Duke's revenues under the proposed rates. The Commission did so and determined that it was necessary to make the $1,500,000 adjustment for services provided under the time of use rate schedules in order for Duke to recover the level of revenue found to be reasonable by the Commission.

The appellant argues that because the revenue erosion occasioned by the increased use of time of use rates was merely projected and had not actually occurred at the time of the hearing, it was not an "actual change" which was "based upon circumstances and events occurring up to the time the hearing is closed." Therefore, the appellant argues that it was error for the Commission to make the $1,500,000 adjustment. However, N.C.G.S. 62-133(c) merely requires the Commission to determine the utility's costs, present and future revenues under current rates and cost of property used and useful through the use of an historic twelve month test period adjusted for actual changes in costs and revenues occurring within a reasonable time after the

test period. Under N.C.G.S. 62-133(b)(4) the Commission must then fix a rate of return on the cost of the utility's property so as to enable it to receive a fair return for its shareholders. Under N.C.G.S 62-133(b)(2) the Commission must then estimate the future revenues under the proposed rates. This permits the Commission to ascertain the rate adjustment necessary to permit the utility to recover the approved level of revenue. In order for the Commission to accurately estimate future revenues under the proposed rates it was necessary and proper for the Commission to take into consideration the estimated reduction in revenue which would occur due to the increased availability of time of use rates.

Finally, we note that pursuant to N.C.G.S. 62-133(d) the Commission must consider all other material facts of record which will enable it to determine what are reasonable and just rates. The projected decrease in revenue to be occasioned by the increased availability of time of use rate schedules is clearly a "material fact of record" which the Commission was required to take into account when setting Duke's rates.

To summarize we hold: (1) the Commission properly refused to exclude from Duke's rate base and allowable expenses a percentage of the operating expenses and of the undepreciated capital costs of the McGuire Nuclear Station to reflect the percentage of electricity generated by the plant and received by the municipal power agencies and cooperatives pursuant to the exchange agreements contained in the Catawba Sale Agreements, (2) the Commission did not err in failing to accept certain proposed adjustments to Duke's test period revenues, (3) the Commission did not err in failing to require Duke to make time of use rates immediately available to all customers, and (4) the Commission properly increased Duke's rates by $1,500,000 to offset losses of revenue due to the increased availability of time of use rates.

For the reasons discussed herein, the orders of the Utilities Commission which are the subject of this appeal are affirmed.

Affirmed.

Justice MARTIN dissenting.

I respectfully dissent because of my disagreement with the majority on its resolution of the first issue discussed. While I agree with the majority that in principle exchange agreements may be beneficial to the public, the record does not support application of this principle in this particular rate case. Endorsing in principle the fact that an exchange agreement may enhance the reliability of power supply to Duke's customers (as well as possibly providing other benefits), such benefits were not made available to Duke's retail ratepayers during or within a reasonable time after the conclusion of the test year in the present case. *See* N.C. Gen. Stat. § 62-133 (1982). Such benefits will inure to these customers only if and when the two Catawba units are completed and thereby become available as backup suppliers of power in the event the McGuire station is unable to supply power to Duke's retail ratepayers. It is clear from the record that neither unit of the Catawba station had been completed at the time the Commission's order was entered in 1984 and was not even scheduled to be completed until sometime the following year. The test year ended 30 June 1983. Duke's retail ratepayers were thus not receiving *any* benefits from the so-called exchange agreements since no exchange of power was even possible during the test year in this case or soon thereafter. The only "benefit" these ratepayers received from Duke's implementation of the alleged exchange agreement during the test year was the privilege of having included in the retail rate base costs associated with power sold to the owners of interest in the still uncompleted Catawba plants.

While I might agree that Duke's retail ratepayers should participate in paying costs resulting from agreements made by Duke which benefit these ratepayers, it is only fair that such an obligation arise only when the ratepayers actually begin to receive these benefits. At least one unit of the Catawba station is yet incomplete as this opinion is being issued and the other may also be unfinished. As with other nuclear power plants, the ultimate completion of the Catawba station may drag on for many years. By the majority's reasoning, Duke's retail ratepayers are footing the bill for costs associated with power they will never use and with benefits they certainly were not receiving during the test year and may not receive for many years, if ever.

I further disagree with the majority's view that the retail ratepayers received benefits during the test year because the exchange agreements may have enabled Duke and the other owners of Catawba to finance the construction of the Catawba station at costs lower than might have been incurred had the exchange agreements not been implemented. With this kind of argument Duke will always be able to claim that its retail ratepayers are receiving benefits (and thus must pay the costs of service provided to other, nonjurisdictional power consumers) merely by proposing unjustifiably high rates and then proposing a cost reduction that will "benefit" ratepayers. Any such cost reductions are pure speculation; this sort of argument should not be endorsed by this Court.

For these reasons I dissent from the majority's opinion.

STATE OF NORTH CAROLINA v. JAMES LEE PRIMES

No. 694A84

(Filed 13 August 1985)

1. **Searches and Seizures § 3; Convicts and Prisoners § 2— detention of inmate and seizure of clothing—no violation of Fourth Amendment**

In a prosecution for first degree murder, the seizure of defendant's clothing was not unlawful as being a product of an unconstitutional detention where defendant was a prison inmate. Within prison walls, the Fourth Amendment inquiry is whether the detention and questioning is reasonable given the particular facts and circumstances; here, there was a real need and ample justification for every action taken against defendant; the invasion of defendant's personal rights at each stage was minimal and escalated only as the need for more intrusive invasions escalated. Fourth Amendment to the United States Constitution.

2. **Jails and Jailers § 1; Convicts and Prisoners § 2— correctional superintendent's authority to detain inmate**

In a prosecution for the murder of a dental technician by a prison inmate, articles of clothing seized from defendant after he was detained by a correctional superintendent were not inadmissible on the grounds that the superin-

tendent lacked authority to arrest defendant. Whether defendant was arrested when he was detained by the superintendent was immaterial, given his status as an inmate and the superintendent's reasonableness in detaining him. A correctional superintendent has the inherent authority to help control the prison environment and maintain security. G.S. 15A-401.

3. Criminal Law § 128.2— S.B.I. chemist testified out of order—chain of possession later ruled insufficient—no mistrial

In a prosecution for first degree murder, the trial court did not abuse its discretion by refusing to grant a mistrial where the court allowed an S.B.I. chemist to testify out of order concerning hair and fiber found on trousers seized from defendant, the court warned the jury that the chemist's testimony could later be stricken, the court later ruled that the State had not established a sufficient chain of custody to permit introduction of the trousers, and the court gave a very thorough and explicit instruction to the jury reminding them not to consider the testimony for any purpose. Moreover, there was substantial additional evidence establishing defendant's presence at the crime scene.

4. Homicide § 21.5— evidence of first degree murder sufficient—felony murder

The State's evidence was sufficient to go to the jury on the theory of first degree murder despite defendant's statements to a fellow inmate which tended to show that defendant acted in the heat of passion where the State sought a first degree murder conviction under the felony murder rule based on defendant's alleged attempted rape of the victim; the victim was discovered on the floor with her clothes partially displaced; the pathologist who examined the body concluded that his findings were consistent with a homicidal strangulation and attempted rape; three inmates testified that defendant on different occasions had expressed either an intent or a desire to have sexual relations with the victim; and another inmate testified that defendant had told him after the killing that he had gone to the victim's office, made sexual advances, and been ordered out.

5. Criminal Law § 181— sentence of life imprisonment after mandatory death sentence ruled unconstitutional—life sentence erroneously declared a nullity

The trial court erred by declaring a life sentence a nullity where defendant was initially sentenced to death on 21 April 1976 as mandated by the then existing statute and gave notice of appeal; the United States Supreme Court declared North Carolina's mandatory death penalty statute unconstitutional; the State sought dismissal of the appeal because it was not perfected and resentencing of defendant; defendant's counsel informed the court that defendant did not wish to perfect his appeal; the State's motion to dismiss was granted and defendant was sentenced to life imprisonment in 1979; defendant filed a motion for a new trial alleging ineffective assistance of counsel; and defendant's right to appeal was reinstated and the life sentence was declared a nullity by a different judge in 1984. The actions of the trial judge in entering a sentence of life imprisonment was in accord with the directives issued by the North Carolina Supreme Court in similar cases.

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

ON appeal from defendant's conviction of first degree murder, entered at the 21 April 1976 Criminal Session of WAKE County Superior Court, *Judge Godwin* presiding. Defendant initially received the death penalty but was resentenced to life imprisonment on 15 October 1979 upon defendant's motion following the United States Supreme Court's decision in *Woodson v. North Carolina*, 428 U.S. 280 (1976), declaring the state's mandatory death penalty statute unconstitutional.

Lacy H. Thornburg, Attorney General, by J. Michael Carpenter, Special Deputy Attorney General, for the state.

L. Michael Dodd for defendant appellant.

EXUM, Justice.

Defendant by this appeal presents three issues for determination: (1) Whether certain evidence was seized from defendant, a prisoner, during a period in which he was unlawfully detained, in violation of the Fourth Amendment of the Federal Constitution[1] or in violation of certain North Carolina statutes; (2) whether the court erred in denying defendant's motion for mistrial, and (3) whether the court erred in denying defendant's motion to dismiss. We answer these questions in the negative and find no error in defendant's trial.

I.

The evidence offered by the state tended to show the following:

On 19 May 1975, Jennette Fish was employed as a dental assistant at the Triangle Correctional Center, a minimum custody facility adjacent to Central Prison in Raleigh. Defendant was an inmate at the Triangle facility assigned to work duty in the den-

1. Defendant makes no argument resting on any provision of the North Carolina Constitution; consequently we address this issue only in terms of Fourth Amendment jurisprudence developed by the United States Supreme Court.

tal clinic. Fish was working alone in the dental clinic on 19 May, since her supervisor was attending a conference, and had been instructed not to see patients but to prepare paper work.

Two coworkers of Fish were with her until approximately 2 p.m., at which time they observed her unlocking and entering her office. One of them, Jacob Lane, warned Fish that she was alone on the hall.

Louis Smith, a dental technician at Triangle, escorted defendant and another inmate to the dental lab shortly after 12:30 p.m. Approximately an hour later, defendant complained that he was sick and returned to the Triangle facility. Defendant was seen entering the dental office where Fish worked at approximately 3:45 p.m. by honor grade inmate James Brooks.

At approximately 4:55 p.m., J. R. Inscoe, a correctional superintendent at Triangle, encountered defendant in the hallway as Inscoe moved toward the restroom. Defendant was perspiring and said he wished to speak with Inscoe. Inscoe asked him to wait. When Inscoe returned, defendant informed him that something was wrong with "the lady in the dental clinic." Defendant said she was lying on the floor and that he tried putting water on her but she didn't move.

Inscoe escorted defendant to the nearby control center and left him there. He then entered the dental clinic and discovered the body of Fish. Her face and neck were swollen and discolored and her clothes partially displaced. Inscoe then returned to defendant and removed him to an inner office. After calling an ambulance, Inscoe later returned to defendant and, for the first time, noticed scratches on defendant's neck. At this point, Inscoe placed a guard outside the office containing defendant. State Bureau of Investigation agents later seized several articles of clothing from defendant, including a pair of white socks containing a hair similar in color, racial origin and microscopic details to the victim's.

The pathologist's report concluded that Fish's death was consistent with a homicidal strangulation and attempted rape, occurring some four to six hours prior to his examination at 9:05 p.m.

Several of defendant's fellow inmates testified that defendant approached them at various times between 2:30 and 4 p.m. and stated that he was in trouble and needed money with which to es-

cape. In addition, three inmates testified that defendant, on various occasions prior to Fish's death, expressed sexual desires for the victim and his intent to approach her sexually.

Richard Crisp, a cellmate of defendant's after Fish's death, testified that defendant said he didn't mean to hurt Fish or to kill her. He approached her sexually and when she ordered him to get out and threatened to "put the man on him," he began "working up on her." When Fish hit defendant in the neck, he strangled and killed her.

Defendant presented no evidence at trial.

II.

[1] Defendant contends the trial court erred by admitting into evidence a pair of white socks worn by defendant at the time he was detained by Correction Superintendent Inscoe on 19 May 1975 and subsequently seized from his person by SBI agents. Examination of the socks disclosed presence of a hair similar in color, racial origin and certain microscopic details to that of the victim, thus tending to place defendant near the victim at some point.

Defendant contends the socks were inadmissible as evidence because they were obtained during an illegal search and seizure. He contends that he encountered Corrections Superintendent Inscoe in the hall around 4:55 p.m. and commented to Inscoe that something was wrong with the lady in the dental clinic. Inscoe told defendant to wait and proceeded en route to the restroom. Inscoe then returned, took defendant to the control center and told him to remain there. Defendant contends that he was under arrest from this point on. Only at this point, after defendant was already in custody, did Inscoe proceed to the dental clinic where he discovered the body of Fish.

Defendant argues that he was arrested by Superintendent Inscoe at a time when Inscoe possessed neither an arrest warrant nor sufficient information to support probable cause to believe that a crime had been committed and that defendant committed it. Thus, his entire detention was illegal and under *Henry v. United States*, 361 U.S. 98 (1959), the search conducted pursuant to it was illegal and any evidence seized during it was inadmissible.

In support of his argument, defendant relies heavily upon Inscoe's testimony that "prior to going to the dental office, I had him [defendant] seated at the control center, in custody of the officer at that location." He also relies upon the trial court's conclusion of law, made following voir dire on the motion to suppress, that "the defendant was in actual custody of Superintendent Inscoe in connection with the death of Mrs. Fish from about 4:55 o'clock p.m. on May 19th, 1975, until after his clothing, . . . [was] seized by Agent Davenport; . . ."

The state responds that despite Inscoe's testimony and the trial court's conclusion of law, defendant was not under arrest at 4:55 p.m. when Inscoe asked him to remain at the control center. Rather, he was merely the subject of an administrative detention, a device recognized by the United States Supreme Court in *Hewitt v. Helms*, 459 U.S. 460 (1983), as appropriate in circumstances involving possible inmate misconduct. Defendant was not under arrest, the state contends, until much later when Inscoe removed him to a private office under guard. By this time, Inscoe knew: (1) he had encountered defendant perspiring and in an agitated condition in the hall outside the dental clinic; (2) Fish had been killed; (3) defendant had admitted being with the victim and trying to rouse her with water and (4) defendant had visible scratches on his neck. These circumstances taken together were clearly sufficient to justify Inscoe in arresting defendant without a warrant, the state contends.

While both parties apparently assume the resolution of this issue turns upon whether defendant was "under arrest" when first detained by Superintendent Inscoe at 4:55 p.m., or merely under administrative segregation, we take a somewhat different tack.

The more fundamental question is whether the Fourth Amendment requires probable cause before prison officials could detain defendant, an inmate in the state prison system, within the confines of the prison where defendant was already in custody. If, in this context, no such arrest was required, then whether Inscoe "arrested" defendant by asking him to remain at the control center is immaterial.

The issue of constitutional rights and protections vis-a-vis the prison environment is not a new one. The United States Supreme

Court in a number of opinions has examined the effect upon an individual's constitutional rights of being incarcerated for the commission of crimes. That Court has held that persons sentenced to prison are not stripped of all constitutional rights at the prison gate. Rather, basic constitutional rights adhere inside as well as outside the prison walls. *See, Wolff v. McDonnell*, 418 U.S. 539 (1974); *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*) (invidious discrimination is as intolerable within a prison as without); *Johnson v. Avery*, 393 U.S. 483 (1969) (prisoners retain constitutional rights to petition government for redress of grievances, including a reasonable right of access to the courts); *Pell v. Procunier*, 417 U.S. 817 (1974) (prisoners retain First Amendment rights not inconsistent with status as prisoners or objectives of system); *Haines v. Kerner*, 404 U.S. 519 (1972) (prisoners retain the protections of due process); *Cruz v. Beto*, 405 U.S. 319 (1972) (*per curiam*) (prisoners retain the right to a reasonable opportunity to exercise religious freedom).

However, the Supreme Court has also stressed that incarceration "carries with it the circumscription or loss of many significant rights." *Hudson v. Palmer*, --- U.S. ---, 82 L.Ed. 2d 393, 401 (1984). The Court's insistence that prisoners be accorded basic constitutional rights extends only to "those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Id.*

> [S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. 'Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.' *Price v. Johnston*, 334 U.S. 266, 285 (1948); see *Jones v. North Carolina Prisoners' Labor Union, supra*, at 125; *Wolff v. McDonnell, supra*, at 555; *Pell v. Procunier, supra*, at 822. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. *Jones v. North Carolina Prisoners' Labor Union, supra*, at 125; *Pell v. Procunier, supra*, at 822. There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.' *Wolff v. McDonnell, supra*, at 556.

Bell v. Wolfish, 441 U.S. 520, 545-46 (1979). The restriction of certain rights is justified by the need to maintain an orderly and secure prison environment, *id.*, and also serves as a reminder "that under our system of justice, deterrence and retribution are factors in addition to correction." *Hudson v. Palmer*, --- U.S. ---, 82 L.Ed. 2d 393, 401-02. Thus, the curtailment of certain rights is justified simply by an inmate's status as prisoner as well as by institutional needs.

Applying these general principles to the present case, we are guided by several decisions of the United States Supreme Court wherein appellant prisoners alleged that certain practices of prison officials violated the Fourth Amendment prohibition against unreasonable searches and seizures.

In *Hudson v. Palmer*, --- U.S. ---, 82 L.Ed. 2d 393 (1984), an inmate at Bland Correctional Center in Bland, Virginia, charged that an unannounced "shake-down" search of his cell by prison officials was conducted solely to harass him and was unreasonable under the Fourth Amendment. The district court granted summary judgment in favor of prison officials. The Fourth Circuit Court of Appeals reversed on this point, however, holding that a prisoner enjoys a "limited privacy right" in his cell entitling him to protection against searches designed solely to harass or humiliate. Thus, the shake-down of a single prisoner's cell was permissible only if done pursuant to an established plan reasonably designed to deter or discover possession of contraband or on reasonable belief that the particular prisoner possessed contraband. The Supreme Court reversed, holding that:

> [S]ociety is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.

Id. at 402-03.

The *Hudson* Court stressed the volatile nature of the prison environment and the duty of prison officials to assure the safety

of prison staff, administrative personnel, and visitors. *Id.* at 403. It reasoned:

> Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy within his cell. . . . We strike the balance in favor of institutional security, which we have noted is 'central to all other corrections goals,' *Pell v. Procunier*, 417 U.S. at 823, 41 L.Ed. 2d 495, 94 S.Ct. 2800, 71 Ohio Ops. 2d 195. A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that '[l]oss of freedom of choice and privacy are inherent incidents of confinement.' *Bell v. Wolfish*, 441 U.S. at 537, 60 L.Ed. 2d 447, 99 S.Ct. 1861.

Id. at 403-04. Finally, the Court rejected the lower court's holding that unannounced individual cell searches must be pursuant to a central plan. "A requirement that even random searches be conducted pursuant to an established plan would seriously undermine the effectiveness of this weapon. . . . We share the . . . view that wholly random searches are essential to the effective security of penal institutions." *Id.* at 404-05.

In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court examined the scope of constitutional rights guaranteed to pretrial detainees during their confinement prior to trial. The case began as a class action on behalf of detainees at the Metropolitan Correctional Center, a short-term custodial facility in New York City primarily designed to house pretrial detainees. The facility also housed some convicted inmates, primarily those awaiting sentencing or transfer to other facilities and those whose presence was required at trial or were sentenced for contempt. A number of inmates filed an action on behalf of convicted inmates and pretrial detainees protesting many practices of prison officials. The complaint alleged, among other things, violations of statutory and

constitutional rights arising from overcrowding, lengthy confinement, lack of sufficient facilities and staff, etc. Among the practices challenged was the prison's policy of requiring inmates to expose their body cavities for visual inspection as part of strip searches conducted after every contact visit with a person from outside the institution. Prison officials argued that cavity searches were necessary to discover and deter smuggling of drugs, weapons and other contraband into the facility.

Both the district court and the Court of Appeals disapproved the strip searches, absent probable cause to believe the particular inmate was concealing contraband. The court of appeals labeled the searches a "gross violation of personal privacy" which "cannot be outweighed by the government's security interest in maintaining a practice of so little actual utility." *Id.* at 558.

The Supreme Court reversed, holding that while body cavity searches, of all the practices challenged by appellants, gave the most cause for concern, these searches did not violate the Fourth Amendment. The Court phrased the issue as whether visual body cavity searches could ever be conducted on less than probable cause of persons already lawfully in custody. The Court expressly assumed that both convicted prisoners and pretrial detainees retain some Fourth Amendment rights. It stressed, however, that the Fourth Amendment prohibits only unreasonable searches and the searches at issue, in the context of the prison environment, were not unreasonable. The Court reasoned:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *E.g., United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Schmerber v. California*, 384 U.S. 757 (1966). A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband

> is all too common an occurrence. And inmate attempts to secrete these items into the facility by concealing them in body cavities are documented in this record, App. 71-76, and in other cases. *E.g., Ferraro v. United States*, 590 F. 2d 335 (CA6, 1978); *United States v. Park*, 521 F. 2d 1381, 1382 (CA9 1975). That there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testament to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises.

Id. at 559. The Court concluded that a balancing of "the significant and legitimate security interests of the institution against the privacy interests of the inmates," justified the searches at issue. *Id.* at 560.

These authorities demonstrate that application of the Fourth Amendment prohibition on unreasonable searches and seizures within prison walls is not necessarily identical to its application in society at large. It is beyond dispute that an ordinary citizen may not be detained against his will for questioning or search in connection with a crime absent a valid arrest warrant or the existence of probable cause. As both *Hudson* and *Bell* instruct, however, in the prison context the inquiry is not necessarily whether sufficient grounds exist to search and seize, but whether the search and detention are reasonable given the particular facts and circumstances of the situation. That is, our courts have determined that search and seizure grounded upon less than probable cause is *per se* unreasonable in society at large. The same is not necessarily true in every search and seizure case within the prison environment. Defendant's argument in the present case, therefore, may fail even if we accept, arguendo, his contention that he was detained by Superintendent Inscoe at 4:55 p.m. before Inscoe possessed sufficient information regarding Fish's death to constitute probable cause. Resolution of the question presented depends rather on "a balancing of the need for the particular search [and detention] against the invasion of personal rights that the search [and detention] entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). When all the circum-

stances of this case are put on the scales and balanced according to the foregoing principles, we are satisfied that defendant's detention was well within the Fourth Amendment's reasonableness requirement.

Superintendent Inscoe encountered defendant in the hall outside the dental clinic. Defendant appeared agitated and was perspiring. He informed Inscoe "there's something bad wrong with the lady in the dental office . . . Well, she's lying on the floor and I went over and put some water on her but she didn't move." At this point Inscoe instructed defendant to have a seat at the control center. He then entered the dental clinic and discovered the victim's body. After some lapse of time, Inscoe returned to the control center, inquired whether defendant was hungry and asked him to move to Inscoe's office. No guard was posted. After a further period of time, Inscoe returned to his office to check on defendant. Defendant was leaning forward with his elbows on his knees. The neck of defendant's shirt was dropped open and as Inscoe approached to speak with defendant, he noticed two scratches on defendant's neck. At this point, Inscoe stationed a guard outside the office door with instructions to keep defendant therein. Defendant's clothes were thereafter seized by SBI agents.

The initial actions of Inscoe in asking defendant to remain at the control center were reasonable. Defendant had apprised Inscoe in very general terms of a problem in the dental clinic. Defendant's statement suggests he was with the victim at some point. Inscoe acted reasonably in keeping defendant close by while he investigated the situation. Inscoe's first responsibility was to offer aid, if possible, to the victim. This he tried to do. However, it was reasonable to detain defendant during this period lest more information become necessary from defendant. Later, after discovery of the brutal scene in the clinic, Inscoe acted reasonably in continuing to detain defendant. Defendant had reported what turned out to be a murder. He had admitted his presence there. His appearance when first encountered by Inscoe was agitated and nervous. Defendant was at that point at least a possible witness and source of information concerning a criminal act. Later, after discovering the scratches on defendant's neck, Inscoe acted reasonably in viewing defendant as a suspect and placing him under guard.

Thus on one side of the scale there are facts demonstrating a real need and ample justification for every action taken against defendant at the time it was taken by Superintendent Inscoe. On the other side of the scale there are facts showing that Inscoe's invasion of defendant's personal rights at each stage were minimal, escalating only as the need for more intrusive invasions escalated. We conclude, therefore, that all of Inscoe's actions in detaining defendant met the Fourth Amendment's test of reasonableness. The subsequent search of his person and seizure of his clothes were not, therefore, unlawful as being the product of an unconstitutional detention.

Our decision on this point is supported by *Hayes v. United States*, 367 F. 2d 216 (CA10 1966), which reached the same result as we on facts very much like those before us.

[2] Defendant also contends the state failed to demonstrate that Inscoe had statutory authority to arrest defendant. N.C.G.S. § 15A-401 allows a law enforcement officer to arrest a suspect, without a warrant, if he has probable cause to believe the person has committed an offense. Since the state offered no evidence that Inscoe was empowered to arrest defendant, defendant argues the arrest was invalid and any evidence seized thereby was inadmissible.

We find no merit in this argument. We have already held that whether defendant was arrested or not at 4:55 p.m. is immaterial, given his status as an inmate and our conclusion that Superintendent Inscoe acted reasonably in detaining him. Moreover, Inscoe was a correctional superintendent at the facility. As such, it could hardly be disputed that his position carried with it the inherent authority to help control the prison environment and maintain security, including detaining defendant until prison officials could deal with the extraordinary series of events which unfolded before them.

III.

[3] By his next assignment of error, defendant contends the trial court committed prejudicial error in failing to declare a mistrial after it ruled certain evidence inadmissible which had already been put before the jury during the testimony of a witness called out of order by the state.

Upon the state's motion, the trial court exercised its discretion to allow Malcolm Davis, a chemist with the State Bureau of Investigation at the time of Fish's death, to testify out of order since, at the time of trial, he lived in Tennessee. Davis testified regarding his examination of a pair of white trousers seized from defendant upon which were discovered five hairs identical in color and race to the victim's, and a red fiber identical to fibers removed from a sweater the victim was wearing when discovered.

Later in the trial when the state attempted to introduce the white pants into evidence, the trial court, upon defendant's objection, ruled the evidence inadmissible finding that the state had failed to establish a sufficient chain of custody to permit introduction of the evidence. Defendant thereupon moved for a mistrial, which motion was denied. Defendant now claims the trial court abused its discretion by failing, *ex mero motu*, to require the state to introduce evidence at a voir dire prior to Davis's testimony which would have demonstrated the evidence's inadmissibility, and in failing to declare a mistrial due to the irreparable injury visited upon defendant via Davis's testimony.

We disagree. The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion. *State v. Smith*, 301 N.C. 695, 272 S.E. 2d 852 (1981); *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978). "It is well settled in this jurisdiction that when the court withdraws incompetent evidence and instructs the jury not to consider it, any prejudice is ordinarily cured. *E.g.*, *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970); *State v. Moore*, 276 N.C. 142, 171 S.E. 2d 453 (1970)." *State v. Smith*, 301 N.C. 695, 697, 272 S.E. 2d 852, 855 (1981). Thus, it follows that where the trial judge withdraws incompetent evidence and issues a cautionary instruction to the jury to disregard it, the court's refusal to grant a mistrial based upon the prior introduction of such evidence to the jury will ordinarily not amount to an abuse of discretion.

Such is the case here. The trial judge in the present case took great care in allowing Davis to testify out of turn to warn the jury that Davis's testimony could later be stricken and excluded from its consideration if the state failed to lay a proper foundation for its admission. Later, upon determining that the

state failed to meet this burden, the court gave a very thorough and explicit instruction to the jury reminding them of his earlier warning and repeatedly instructing them not to consider the testimony at issue for any purpose.

Under the circumstances of this case we think the curative instruction was sufficient to cure any possible prejudice inuring to defendant by virtue of Davis's earlier testimony. The disputed testimony was, in essence, cumulative. The hair and fiber found upon defendant's pants at most tended to place him in close proximity to the victim at some point. The state eventually produced other competent evidence to this same effect. SBI agents testified that a similar hair was found upon defendant's socks, which were properly admitted into evidence. Also, Superintendent Inscoe testified that defendant admitted having been with the victim and attempting to rouse her by putting water on her. Given the additional substantial evidence of defendant's presence at the crime scene offered by the state and the court's curative instructions removing Davis's disputed testimony from the jury's consideration, we are satisfied there was no abuse of discretion in the trial court's failure to declare a mistrial.

IV.

[4] Finally, defendant contends that the trial court erred in denying his motion to dismiss the charge of first degree murder made at the close of the state's evidence and the close of all the evidence and in failing to submit the case to the jury only on the lesser included offense of voluntary manslaughter. The state offered the testimony of Richard Elmer Crisp, a fellow inmate who shared a cell with defendant following Fish's death. Crisp testified that he and the defendant discussed the case and defendant told him "I didn't mean to hurt her and I damn sure didn't want to kill her. She made me mad and I slapped her and then I panicked." Defendant contends that the state's own evidence thus demonstrates that defendant acted in the heat of passion upon adequate provocation rather than with premeditation or malice. We disagree.

Defendant relies heavily in his argument upon the testimony of Crisp elicited by the state. While this testimony does tend to support the notion that defendant acted in the heat of passion, this testimony alone does not resolve the issue. The state is not

bound by exculpatory statements elicited by it and attributed to defendant if other competent evidence cast doubt upon its veracity. "The introduction by the state of an exculpatory statement made by a defendant does not preclude the state from showing the facts concerning the crime to be different, and does not necessitate a nonsuit if the state contradicts or rebuts the defendant's exculpatory statement." *State v. May*, 292 N.C. 644, 658, 235 S.E. 2d 178, 187, *cert. denied*, 434 U.S. 928 (1977). Thus, if the state produced evidence which would support the charge of first degree murder, then the submission of that charge to the jury was proper, notwithstanding Crisp's testimony.

In evaluating the other evidence offered by the state, two points are important. First, on a motion to dismiss, all evidence, whether direct or circumstantial, must be considered in the light most favorable to the state and the state is entitled to every reasonable inference to be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Second, the state did not proceed under a theory of premeditation and deliberation in this case. The prosecutor announced at the outset of the trial that the state was seeking a first degree murder conviction under the felony murder rule based on defendant's alleged attempted rape of the victim. The trial court so instructed the jury and submitted the case to it only on a felony-murder theory. Thus, Crisp's statement, going as it does to the issue of premeditation and deliberation, would not preclude a conviction of first degree murder, even if believed by the trial jury.

The state's evidence tended to show that the victim was discovered on the floor of the dental clinic with her clothes partially displaced. The pathologist who examined the body concluded that his findings were consistent with a homicidal strangulation and attempted rape. In addition, three inmates testified that defendant on different occasions expressed either an intent or a desire to have sexual relations with the victim. Another inmate, Terry Lee Sykes, testified that he was defendant's close friend and that defendant told him after he was back in Central Prison for killing Fish that he went to Fish's office and "cracked on her," meaning that he made sexual advances, and she ordered him to get out. When viewed in the light most favorable to the state, this evi-

dence was clearly sufficient to justify submission of the case to the jury on a theory of first degree felony murder.

We find no merit in defendant's assignments of error regarding the guilt phase of his trial.

[5] We deem it advisable, however, to comment upon the sentencing phase of defendant's case. Defendant was initially sentenced to death on 21 April 1976 as mandated by the then existing statute. Defendant gave notice of appeal in open court. On 2 July 1976, the United States Supreme Court declared North Carolina's mandatory death penalty statute unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280 (1976). On 15 October 1979, the state instituted proceedings before Judge Robert Gaines seeking dismissal of the appeal for defendant's failure to perfect it and resentencing of defendant in light of *Woodson*. Judge Gaines, upon being informed by defendant's counsel that defendant did not wish to perfect the appeal, granted the state's motion to dismiss and resentenced defendant to life imprisonment.

On 25 April 1984, defendant filed a motion for appropriate relief alleging ineffective assistance of counsel and seeking a new trial. After hearing this motion Judge Anthony Brannon found that defendant had never knowingly and willingly waived his right to appeal. He therefore reinstated defendant's right to appeal. He also declared the life sentence imposed by Judge Gaines a nullity.

This Court was required to respond to the *Woodson* decision in a number of cases wherein the death penalty was imposed at trial. *State v. Woods*, 293 N.C. 58, 235 S.E. 2d 47 (1977); *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977); *State v. May*, 292 N.C. 644, 235 S.E. 2d 178 (1977); *State v. Squire*, 292 N.C. 494, 234 S.E. 2d 563 (1977); *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *State v. Gray*, 292 N.C. 270, 233 S.E. 2d 905 (1977); *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977). In each of those cases, this Court vacated the death penalty and remanded the case with instructions to the superior court to enter a judgment of life imprisonment without requiring the presence of defendant. *Id.* The actions of Judge Gaines in entering a sentence of life imprisonment in the present case was in accord with the directives issued by this Court in similar cases. Thus, while Judge Brannon may have properly found that defendant never knowingly and volun-

tarily waived his right of appeal, it was error for him to nullify that part of Judge Gaines' order converting defendant's original death sentence to one of life in prison. That portion of Judge Brannon's order is therefore reversed and the sentence imposed by Judge Gaines is reinstated.

No error in the trial.

Life sentence reinstated.

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

BICYCLE TRANSIT AUTHORITY, INC. v. DR. RITCHIE BELL, INDIVIDUALLY AND TRADING AS ABIES RENTALS, WALTER TRIPLETTE AND LIVINGSTON LEWIS

No. 134A85

(Filed 13 August 1985)

1. **Contracts § 7— breach of covenant not to compete—issue of law—summary judgment proper**

In an action in which the sole issue was whether the acts of one defendant constituted a violation of a noncompetitive agreement, the Court of Appeals erred by holding that there was a material issue of fact as to whether the covenant not to compete had been breached where there was no substantial controversy as to the facts alleged in the materials the parties submitted on behalf of their motions for summary judgment.

2. **Contracts § 7— covenant not to compete—reasonable terms—enforceable**

A covenant not to compete was enforceable where the agreement was limited to seven years within Durham and Orange Counties, was reasonable as a matter of law, was not overbroad, and was reasonably necessary to protect plaintiff's interests.

3. **Contracts § 7.3— breach of covenant not to compete—lease of adjoining premises to competitor—plaintiff entitled to summary judgment**

Plaintiff was entitled to summary judgment on the issue of whether defendant breached a covenant not to compete given in the sale of a bicycle business by defendant to plaintiff where defendant leased the adjoining premises to a third party with knowledge that the third party intended to establish therein a bicycle business that would compete with plaintiff and loaned the third party money to enable him to set up the competing business.

Justice MEYER dissenting.

Justice MITCHELL joins in the dissenting opinion.

ON appeal by defendants from the decision of a divided panel of the Court of Appeals reported at 72 N.C. App. 577, 324 S.E. 2d 863 (1985), reversing summary judgment for defendants entered 27 December 1983 in Superior Court, ORANGE County, and by grant of plaintiff's petition for certiorari concerning an additional issue. Heard in the Supreme Court 12 June 1985.

Haythe & Curley, by Samuel T. Wyrick III and Emily R. Copeland for plaintiff.

Erdman, Boggs & Harkins, by Harry H. Harkins, Jr., and Sessoms & Marin, by Stuart M. Sessoms, Jr., for defendants.

MARTIN, Justice.

The primary issues presented for review are (1) whether the Court of Appeals erred in holding that summary judgment was inappropriate for any party because there was a material question of fact as to whether the covenant not to compete had been breached, and (2) if summary judgment was appropriate given the record before the trial judge, whether it was properly entered in favor of one or more defendants. For reasons set forth below, we hold that whether the covenant not to compete was breached is a question of law and therefore the Court of Appeals erroneously remanded the case for determination of whether conduct of one or more of the defendants amounted to a breach. In addition we hold that the trial judge erroneously entered summary judgment in favor of defendants. The decision of the Court of Appeals is reversed and the case remanded to that court for remand to Superior Court, Orange County, with direction to enter summary judgment in favor of plaintiff to the extent set forth below.

In 1973 the three defendants formed a corporation known as Carolina Bikeways, Inc. The defendants were the sole shareholders of Bikeways for most of its existence. Sometime prior to 1980 defendant Bell leased to Bikeways approximately 1,700 square feet of space in a building he owned on West Main Street, Carrboro, North Carolina, so that Bikeways could operate a bicycle sales and repair business known as "The Clean Machine." The de-

fendants conducted the business of Clean at that location until August 1980. On or about 1 August 1980 Bikeways sold to plaintiff, Bicycle Transit Authority, Inc., all of its assets pursuant to a contract of sale. Ancillary to the contract of sale, and incorporated by reference therein, were a lease to plaintiff of that portion of the building formerly occupied by Bikeways trading as The Clean Machine and a covenant by all defendants not to compete with plaintiff. This covenant provides as follows:[1]

> 1. *Covenant.* The Parties of the First Part [defendants] hereby agree that for a period of seven (7) years from July 30, 1980, they will not jointly or severally (unless they have obtained the Party of the Second Part's [plaintiff] prior written consent) directly or indirectly be employed by, be associated with, be under contract with, own, manage, operate, join, control or participate in the ownership, management, operation, or control of, or be connected in any manner with, any business which is a competitor of the Party of the Second Part in Durham County or Orange County, North Carolina. The Parties of the First Part acknowledge that remedies at law for any breach of the foregoing will be inadequate and that the Party of the Second Part shall be entitled to injunctive relief. In consideration for such covenant, the Party of the Second Part agrees to pay to the Parties of the First Part (to be divided among the Parties of the First Part as they themselves shall decide and determine) the sum of $30,000. The $30,000 shall accure [sic] interest at the rate of 10% per annum for the period of two years from August 4, 1980, thereby making the unpaid principal and accrued interest the sum of $36,000 at the end of the second full year. This sum of $36,000 shall be paid in a lump sum to the Parties of the Second Part on August 3, 1987. However, at the end of the two year period referred to above, the $36,000 principal and accrued interest thereon shall continue to accrue interest

1. The contract containing this covenant also includes a provision in which defendants agreed to provide plaintiff with consultation services through 3 August 1982 for additional consideration of $24,000. The noncompetition and consulting agreement was incorporated by reference into the Agreement for Purchase and Sale of Proprietorship executed among the parties the same day. The agreement for purchase and sale also contains a less detailed covenant not to compete. For purposes of this opinion when referring to "the covenant," we mean that covenant set forth in the text of this opinion.

at the rate of 10% per annum, which interest shall be paid in equal quarterly installments in the amount of Nine Hundred Dollars ($900.00) each until the above-styled $36,000 sum becomes due and payable on August 3, 1987. The payment of all interest and principal amounts due hereunder shall be by means of a check made jointly payable to the Parties of the First Part and delivered on their behalf to Michael J. Mulligan, Esq., Suite 210, Croisdaile [sic] Office Park, Durham, North Carolina 27705. Delivery of any said payment to Michael J. Mulligan, Esq., shall constitute a full acquittance of the Party of the Second Part for said sum.

On or about 6 October 1982 defendant Bell leased to Alan Garrett Snook a portion of the building occupied by plaintiff. After the lease agreement was executed, Snook orally sublet the premises to Performance Bicycle Shop, Inc. (PBS), a closely-held corporation of which Snook is president and majority shareholder. In lieu of the immediate payment of rent, Snook gave defendant Bell a personal promissory note due 30 September 1983 to cover the first two months' rent of the leased premises. Snook testified by way of deposition that it was his intent to repay the note and interest from funds paid to him by PBS. Under Snook's control, PBS began to sell bicycle parts and accessories from the premises. Although most of PBS's business is conducted through telephone and mail orders, it also caters to a walk-in clientele. The lease agreement between Bell and Snook specifically provides that "the leased premises shall be used by the Lessee to operate a mail order and walk-in bicycle business and may be used for any other lawful purpose."[2] The rent for the premises is paid directly to Bell by PBS.

On 4 November 1982 plaintiff filed a complaint against Bell alleging that he violated the terms of the noncompetition and consulting agreement and that he engaged in unfair and deceptive trade practices affecting commerce. Bell's answer denied these allegations and counterclaimed for attorney's fees and for install-

2. Before executing the lease Bell was well aware that Snook intended to sell bicycle parts and accessories at the leased premises. Sometime in late August or early September 1982, before the lease agreement was signed, Bell and Snook walked through the premises to be the subject of the lease. At that time Snook discussed with Bell the purposes of Snook's business, showed Bell his first catalogue, and told Bell that he sold bicycle parts and components.

ment payments together with interest due but unpaid under the terms of the covenant executed by defendants and plaintiff. Plaintiff subsequently amended its complaint by adding the other two defendants as parties and seeking injunctive relief and attorney's fees. Plaintiff replied to Bell's counterclaim by alleging that plaintiff is excused from any payments due under the noncompetition agreement because Bell materially breached the contract, the consideration for the contract failed, and because of his course of conduct Bell is estopped from claiming any payments otherwise due under the agreement. Ultimately both plaintiff and defendants moved for summary judgment. At a hearing before the superior court all parties stipulated that "the sole legal issue in dispute . . . [is] whether the acts of the defendant Bell as alleged by the plaintiff constituted a violation of the non-competitive covenants contained in the contracts between the parties." On 27 December 1983 the superior court entered an order denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment. The court ordered plaintiff to pay defendants[3] monies due under the noncompetition agreement and the costs of the action. Plaintiff appealed to the Court of Appeals which reversed and remanded for trial because of the existence of "a jury question whether Bell's conduct fell within the contractual anti-competitive provisions." Defendants appealed pursuant to N.C.G.S. 7A-30(2), and plaintiff's petition for certiorari to consider the issue whether plaintiff should have been granted summary judgment was allowed 23 April 1985.

[1] As this Court said recently:

> 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

3. In their appellate briefs defendants acknowledge that having previously assigned their interests in the quarterly payments due under the contract to defendant Bell, Triplette and Lewis are not entitled to recover the judgment from plaintiff. Defendants state that the judgment should therefore be amended to read "defendant" instead of "defendants" where appropriate.

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).

Broadway v. Blythe Industries, Inc., 313 N.C. 150, 152-53, 326 S.E. 2d 266, 268-69 (1985). Both plaintiff and defendants argue that the sole issue for determination, that is, whether the acts of Bell constituted a violation of the noncompetitive covenant, is a matter of law and that there is no factual issue to be determined by a jury trial. We agree. There is no substantial controversy as to the facts alleged in the materials the parties submitted on behalf of their respective motions for summary judgment. The dispute solely concerns the legal significance of those facts. *See Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). We therefore

reverse the Court of Appeals because it erroneously held there was a material question of fact whether Bell's conduct breached the anti-competitive covenant.

We now turn to the questions whether summary judgment was properly entered in favor of defendants or whether it should have been entered in favor of plaintiff.[4]

In brief, defendants argue that Bell did not breach the covenant not to compete for two reasons:

> First, there has been no breach of the literal language of the non-competitive covenant, in that Dr. Bell has no contract or connection with a competitor of plaintiff. The lease complained of by plaintiff is between Dr. Bell and Mr. Snook, not between Dr. Bell and PBS, or any other competing entity. Secondly, even if the court finds a connection between Dr. Bell and PBS, the mere leasing of a place of business to a potential or actual competitor does *not* constitute a violation of the non-competitive covenants of the contract.

In opposition, plaintiff argues that before Bell executed the lease to Snook, Bell knew that Snook would sublease the premises adjacent to plaintiff's business to a competitor of plaintiff and that the mere fact that Snook's corporation was technically the competitor should not shield Bell from liability. The lease to Snook contains an option to purchase the entire building, including the portion leased to plaintiff, during the period 30 September 1985 to 1 October 1986. It is also noted that plaintiff's lease expires 31 July 1987 and does not contain any renewal provisions. Plaintiff points out that Bell not only leased the premises to Snook for the purpose of operating a bicycle parts and accessories business, but Bell also loaned Snook $1,722.91 at nine percent interest for eleven and one-half months to cover the first two months of rent on the premises at issue. Snook testified by deposition that the matter of the loan was a "typical business negotiation. You try to get as good a deal as you can . . . ." According to plaintiff this clearly shows that Bell violated the language and the spirit of the covenant.

4. We agree with the parties that the judgment was technically erroneous in allowing defendants Lewis and Triplette to recover against plaintiff. *See* note 3 *supra*.

[2] We first address the issue of whether the covenant is valid and enforceable. As this Court stated in *Jewel Box Stores v. Morrow*, 272 N.C. 659, 662-63, 158 S.E. 2d 840, 843 (1968):

> It is the rule today that when one sells a trade or business and, as an incident of the sale, covenants not to engage in the same business in competition with the purchaser, the covenant is valid and enforceable (1) if it is reasonably necessary to protect the legitimate interest of the purchaser; (2) if it is reasonable with respect to both time and territory; and (3) if it does not interfere with the interest of the public. . . .
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> . . . .
>
> The reasonableness of a restraining covenant is a matter of law for the court to decide.

Defendants do not argue that the covenant is unreasonable with respect to time and territory, and we hold that as to these factors the covenant is reasonable. The covenant is limited to a period of seven years within the North Carolina counties of Durham and Orange. These restrictions are reasonable as a matter of law. *See, e.g., id.* (agreement not to compete with jewelry business for ten years within ten miles); *Sineath v. Katzis*, 218 N.C. 740, 12 S.E. 2d 671 (1940) (agreement not to compete with dry cleaning plant for fifteen years within county); *Sea Food Co. v. Way*, 169 N.C. 679, 86 S.E. 603 (1915) (agreement not to compete with fish dealership within one hundred miles of city for ten years). *See generally*, Annot., 46 A.L.R. 2d 119 (1956); Annot., 45 A.L.R. 2d 77 (1956). In addition, defendants do not argue that the covenant as written is so broad in scope as to either interfere with the interests of the public or that it is not reasonably necessary to protect the legitimate interest of the purchaser,[5] and we hold that it is not overbroad and is reasonably necessary to protect plaintiff's interests. Instead, defendants argue that under any reasonable interpretation of the covenant, Bell's acts did not rise to the level of a breach.

5. Indeed, the document of which the covenant is a part states expressly that "WHEREAS, the parties acknowledge that this Agreement is absolutely necessary to the successful acquisition of the business by the [plaintiff]. . . ."

It is elementary that when interpreting a contract the intent of the parties is our polar star:

> "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." . . . When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning. . . .
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> . . . .
>
> "Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it."

Lane v. Scarborough, 284 N.C. 407, 410, 200 S.E. 2d 622, 624-25 (1973) (citations omitted).

We turn first to the language of the covenant. Acknowledging that the agreement containing the covenant was "absolutely necessary to the successful acquisition of the business by the [plaintiff]," defendants agreed

> that for a period of seven (7) years from July 30, 1980, they will not jointly or severally (unless they have obtained the [plaintiff's] prior written consent) directly or indirectly be employed by, be associated with, be under contract with, own, manage, operate, join, control or participate in the ownership, management, operation, or control of, or be connected in any manner with, any business which is a competitor of the [plaintiff] in Durham County or Orange County, North Carolina.

Generally, parties are free to contract to anything as long as it is not illegal, unconscionable, or against the public interest. *See generally* 17 Am. Jur. 2d *Contracts* § 155 (1964). We have held above that the contract does not adversely affect the public's interest in, e.g., free trade. *Compare Ice Cream Co. v. Ice Cream Co.*, 238 N.C. 317, 77 S.E. 2d 910 (1953) (agreement not to compete which extended into a territory where the business did not originally operate was held to be detrimental to the public interest and therefore void); *Shute v. Shute*, 176 N.C. 462, 97 S.E. 392 (1918). The sole issue remaining, therefore, is whether given the broad language of the covenant defendant Bell's behavior breached the contract.

Not surprisingly, case law discussing whether particular behavior of a party breached a covenant not to compete turns on the scope of the covenant involved. See, e.g., cases discussed in Annot., 1 A.L.R. 3d 778 (1965) and Annot., 14 A.L.R. 2d 1333 (1950). Generally, when deciding whether a party has breached a restrictive covenant ancillary to the sale of a business, courts will interpret the covenant in the light of the purpose of the parties to provide against competition by the covenantor and hold that in order to carry out such purpose the parties must comply not only with the letter of the contract but its spirit as well. Annot., 14 A.L.R. 2d 1333. As one court stated:

> The agreement is not to be narrowly, technically, construed. . . . We read in the reports: "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." (*Harm v. Frasher*, 181 Cal. App. 2d 405, 417 [5 Cal. Rptr. 367].) "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." (*Brown v. Superior Court*, 34 Cal. 2d 559, 564 [212 P. 2d 878].) "When a person sells the contents of a store and agrees not to engage in the same business in the same city as long as the purchaser continues in business, the contract is construed as carrying with it the good will of the business." (*Mahlstedt v. Fugit*, 79 Cal. App. 2d 562, 566 [180 P. 2d 777].) "When the good will of a business is sold, it is not the patronage of the general public which is sold, but that patronage which has become an asset of that business.

> . . . The law implies in every contract a covenant that neither party will do anything that will deprive the other of the fruits of his bargain." (*Bergum v. Weber*, 136 Cal. App. 2d 389, 392 [288 P. 2d 623].)

Harrison v. Cook, 213 Cal. App. 2d 527, 530, 29 Cal. Rptr. 269, 271 (1963). *Accord Tillis v. Cotton Mills and Cotton Mills v. Tillis*, 251 N.C. 359, 363, 111 S.E. 2d 606, 610 (1959) ("Parties to an executory contract . . . impliedly promise not to do anything to the prejudice of the other inconsistent with their contractual relations. . . .").

[3] It is clear from the terms of the covenant at issue in the present case that the parties intended a very general restriction on the defendants with respect to any acts which would promote competition with Bicycle Transit Authority, Inc. in the circumscribed territory within the period of time specified. We hold that Bell breached the covenant not to compete by leasing to Snook the premises adjoining those he had rented to plaintiff with knowledge that Snook intended to establish therein a bicycle business that would compete with plaintiff and by loaning money to Snook to enable him to set up this competing business. By so doing, Bell violated at a minimum the provisions of the covenant that he not be directly or indirectly associated with, be under contract with, or be connected in any manner with any business which is a competitor of plaintiff.

> In holding that assistance rendered to another who is engaged or about to engage in a competing business is a breach of a covenant not to compete, we use the test ordinarily applied which is one of weighing the effect of such assistance on the business of the covenantee. If such assistance creates an effect which was as injurious to the covenantee as if the covenantor had acted for himself, or if such assistance was such as would result in mischief, the covenantor has generally been held to have breached his covenant to not compete. *See, Wilson v. Delaney*, 137 Iowa 636, 113 N.W. 842 (1907); Annot., 1 A.L.R. 3d 778, 788.

Arizona Chuck Wagon Service, Inc. v. Barenburg, 17 Ariz. App. 235, 237, 496 P. 2d 878, 880 (1972). *See generally* Annot., 1 A.L.R. 3d 778, § 3[b]. *See, e.g., Diagnostic Laboratory v. PBL Consultants*, 136 Ariz. 415, 666 P. 2d 515 (Ct. App. 1983); *Dowd v. Bryce*,

95 Cal. App. 2d 644, 213 P. 2d 500 (1950); *Langenback v. Mays*, 207 Ga. 156, 60 S.E. 2d 240 (1950); *The Vendo Co. v. Stoner*, 105 Ill. App. 2d 261, 245 N.E. 2d 263 (1969); *Nichols Stores v. Lipschutz*, 120 Ohio App. 286, 201 N.E. 2d 898 (1963). *But see Foyer Key Sung v. Ramirez*, 121 Misc. 2d 313, 467 N.Y.S. 2d 486 (1983). Bell had complete control of the opportunity for the establishment of a competing business in the premises leased to Snook. By leasing to Snook, Bell also positioned himself to receive profits from Snook's business in the form of rents paid out of the profits made from competing with plaintiff. After arm's length negotiation and for valuable consideration, the parties entered into a valid covenant not to compete; it is obvious that defendant Bell's behavior breached both the letter and the spirit of the contract. We hold, therefore, that because Bell breached the covenant not to compete, summary judgment was improperly entered in favor of defendants.

Because the parties stipulated that the sole issue before the trial judge was "whether the acts of defendant Bell as alleged by the plaintiff constituted a violation of the non-competitive covenants contained in the contracts between the parties," the issue of what remedy may be appropriate for plaintiff is not before this Court. We note that in *Marshall v. Miller*, 302 N.C. 539, 550, 276 S.E. 2d 397, 404 (1981), except as expressly modified, this Court adopted the opinion of the Court of Appeals, which included the following language:

> Where the same course of conduct gives rise to a traditionally recognized cause of action, as, for example, an action for breach of contract, and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the breach of contract, or for violation of G.S. 75-1.1, but not for both.

Marshall v. Miller, 47 N.C. App. 530, 542, 268 S.E. 2d 97, 103 (1980).

We therefore hold that plaintiff is entitled to summary judgment on the issue of whether Bell's acts breached the covenant not to compete. The case is remanded to the Court of Appeals for remand to Superior Court, Orange County, for entry of partial summary judgment in favor of plaintiff and for a determination of damages or such other relief as may be appropriate.

Reversed and remanded.

Justice MEYER dissenting.

I cannot agree with the majority that the leasing of property to a potential competitor violates the particular covenant not to compete which is the subject of this action. If the plaintiff wanted protection from leases to competitors it could have bargained for that protection and specifically included it in the lease or covenant.

The majority characterizes Dr. Bell's act in accepting a note for the first two months rent as "loaning money to Snook to enable him to set up his competing business." This is nothing short of a complete mischaracterization of the facts. In reality, the evidentiary forecast demonstrates simply that, because of the lessee's financial inability to pay the first two months rent, Dr. Bell took a promissory note for it. The majority also carelessly concludes that Dr. Bell "positioned himself to receive profits from Snook's business in the form of rents paid out of the profits made from competing with plaintiff." This is but another mischaracterization of the facts. Dr. Bell's lease did not call for a sharing of the profits of Snook's business, nor was Dr. Bell's right to receive rents in any way tied to the profits or losses of Snook's business. Snook's "intent to repay" the note from funds generated by PBS, as noted by the majority, is legally irrelevant to the question of whether a breach has occurred in this case. Dr. Bell was to receive rents, the source of which was not specified in the lease, and the rents were to be paid regardless of the success or failure of the business or whether it even continued in existence. The relationship between Dr. Bell and Mr. Snook is that of landlord and tenant and nothing more. The majority should feel no need to bolster its holding in this way. The only real foundation for the holding that Dr. Bell has violated his covenant not to compete is the bare act of leasing the adjoining property to Mr. Snook.

I emphatically dissent from the majority's unnecessary establishment of a new rule that a covenantor who complies with the letter of his covenant not to compete may nevertheless violate it by violating "the spirit" of the covenant. I shudder to think of the number of cases that will come to our courts under this new rule. As authority for its new rule the majority cites language from a

twenty-year-old California court decision which upheld a covenant not to compete in the same city "so long as the purchaser continues in business," a provision without any time restriction and one which the courts of this state would not enforce. *Harrison v. Cook*, 213 Cal. App. 2d 527, 530, 29 Cal. Rptr. 269, 271 (1963). Remarkably, the majority cites as being in "accord" the North Carolina case of *Tillis v. Cotton Mills and Cotton Mills v. Tillis*, 251 N.C. 359, 111 S.E. 2d 606 (1959). *Tillis* not only is clearly *not* in accord with the California decision, it did not even involve a covenant not to compete. *Tillis* was an action by a contract carrier to recover for the breach by a shipper of an executory contract for the shipper's alleged frustration of performance by the carrier of the executory contract.

Moreover, the establishment of this new rule concerning violation of "the spirit" of a covenant not to compete is completely unnecessary to the majority's final holding. The majority concludes that "Bell's behavior breached both the letter and the spirit of the contract." Having found a violation of the "letter" of the covenant, it was unnecessary to even address, much less hold, that the covenant could be violated by a violation of "the spirit" of that covenant. This Court should not decide the important issue of whether an act which might violate only "the spirit," as opposed to the letter, of a covenant not to compete constitutes a breach of such a covenant until it is directly presented and is fully briefed and argued.

For the foregoing reasons, I cannot vote to remand this matter for entry of summary judgment for the plaintiff.

Justice MITCHELL joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ROGER BLACKSTOCK

No. 638A84

(Filed 13 August 1985)

1. Criminal Law § 99.2— question by trial judge—no expression of opinion

The trial judge's question as to whether certain marks shown in a photograph were on the victim's neck "prior to the Defendant placing his hand around your throat" did not constitute a prejudicial expression of opinion that

defendant was the assailant where the victim had testified at length as to defendant's identity based on her prior acquaintance with him and her opportunity to observe him during the crimes, the victim had picked defendant's picture out of a photographic lineup shortly after the crimes occurred, and the victim had clearly testified that it was defendant who placed his hands around her neck and choked her.

2. **Rape and Allied Offenses § 1— first degree rape—first degree sexual offense—serious bodily injury—change of former statute**

In enacting the current first degree rape statute, G.S. 14-27.2, and the first degree sexual offense statute, G.S. 14-27.4, the legislature intended to change the substance of former G.S. 14-21 to the end that the element of "infliction of serious bodily injury" would no longer be limited to the period of time when the victim's resistance was being overcome or her submission procured, nor would the infliction of serious personal injury be limited to the person who was the victim of the rape or the first degree sexual offense.

3. **Rape and Allied Offenses § 1— first degree rape—first degree sexual offense—serious personal injury—when applicable**

The element of infliction of serious personal injury upon the victim or another person in the crimes of first degree sexual offense and first degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape.

4. **Criminal Law §§ 98.1, 128.2— emotional outburst by victim—failure to declare mistrial or give curative instruction**

In a prosecution for first degree rape, first degree sexual offense, assault with a deadly weapon with intent to kill, and common law robbery, the trial court did not abuse its discretion in refusing to grant a mistrial when the victim had an emotional outburst during the jury instructions in light of the court's prompt action in having the victim removed from the courtroom and the otherwise compelling case against defendant. Nor did the trial court err in failing to give a curative instruction with regard to the victim's outburst absent a request by defendant for such an instruction.

APPEAL by defendant from *Martin, J.*, at the 16 July 1984 Criminal Session of GUILFORD County Superior Court.

The evidence at trial tended to show that on the evening of 12 December 1983 Cynthia Simmons was at her Greensboro home with her five-year-old son. Ms. Simmons heard a knock at her door, looked out a window and saw a man she identified as defendant. She testified that she recognized defendant at the time

as a man who had been in her home on several previous occasions to install and repair appliances. On the evening in question defendant told Ms. Simmons that his truck had broken down while he was in the neighborhood repairing appliances and asked to use her telephone. Ms. Simmons admitted defendant and he briefly used her phone. After completing a call he told Ms. Simmons that someone was coming to pick him up. Ms. Simmons put her son to bed, and then went to her kitchen to make a cup of tea. At that time defendant approached Ms. Simmons from behind, placed his hands over her nose and mouth, and dragged her into the living room. After telling her that he had a gun in his jacket pocket and that he meant business, he instructed Ms. Simmons to remove her clothes and to lie down on the living room floor. He then had sexual intercourse with her and forced her to commit oral sex. After moving her to a couch in the living room, defendant had forcible sexual intercourse with her a second time.

Defendant then instructed Ms. Simmons to put her clothes back on and asked whether she had money in the house. She and defendant went to a bedroom where she gave him a wallet and money. Ms. Simmons testified that defendant continued to keep his hand in his pocket and that she continued to believe that he was armed. They returned to the living room and defendant took Ms. Simmons' gold necklaces. He told her that he did not know what he was going to do with her but that he was going to have to do something because he knew that she would tell on him. The two then heard a knock on the door and defendant instructed Ms. Simmons to answer it and to refrain from doing anything that would give him away. Defendant put his hand back in his pocket and reminded Ms. Simmons that he had a gun. She went to the door and spoke for a while to a neighbor's child who was delivering a package that the United Parcel Service had left with his family. When the child left, Ms. Simmons returned to sit on the living room couch and defendant again asked Ms. Simmons if she was going to tell. Defendant then pulled Ms. Simmons up from the couch, put his hands around her neck and choked her until she lost consciousness. When she regained consciousness Ms. Simmons' head was bleeding and she saw a bloodstained piece of wood lying nearby.

After going to a neighbor's house to report the crime, Ms. Simmons was taken to a hospital where she was hospitalized for

eight days. A physician who examined her in the emergency room testified that she had a very severely injured scalp, facial swelling and diffused bleeding. He testified that the wounds would have been life-threatening had she not received medical treatment. Ms. Simmons later re-entered the hospital for reconstructive surgery.

While at the hospital for the first time, Ms. Simmons picked defendant's picture out of a photographic lineup as the man who attacked her on 12 December. Other evidence at trial tended to show that semen found on the victim's clothing was consistent with that of the blood grouping of defendant. The neighbor child who delivered the package to the prosecuting witness testified that defendant was the man he saw in Ms. Simmons' living room on the night of the attack.

Defendant testified that he was at his home or was jogging at the time of the incident.

The jury found defendant guilty of first degree rape, first degree sexual offense, assault with a deadly weapon with intent to kill, inflicting serious bodily injury and common law robbery. The trial judge sentenced defendant to imprisonment for two consecutive life terms for the rape and sexual offense convictions, twenty years for the assault conviction, and ten years for the robbery, the ten-year and twenty-year sentences to run concurrently with the life terms. Defendant appealed pursuant to N.C.G.S. § 7A-27(a). We allowed his motion to bypass the Court of Appeals on the assault and robbery convictions on 23 January 1985.

Lacy H. Thornburg, Attorney General, by Walter M. Smith, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by David W. Dorey, Assistant Appellate Defender, for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error defendant contends that the trial judge committed prejudicial error in questioning the prosecuting witness by intimating an opinion as to the controverted fact of the assailant's identity. Ms. Simmons, the prosecuting witness, was testifying concerning a photograph showing injuries to her neck and face when the following exchange occurred:

THE COURT: Were those marks on your neck prior to the Defendant placing his hand around your throat?

THE WITNESS: No, they were not.

It is well established by our case law and statutory enactments that it is improper for a trial judge to express in the presence of the jury his opinion upon any issue to be decided by the jury or to indicate in any manner his opinion as to the weight of the evidence or the credibility of any evidence properly before the jury. *See* N.C. Gen. Stat. § 15A-1222 (1983); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). Even so, every such impropriety by the trial judge does not result in prejudicial error. Whether the judge's comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Greene*, 283 N.C. 482, 206 S.E. 2d 229 (1974). Thus, in a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge's action intimated an opinion as to a factual issue, the defendant's guilt, the weight of the evidence or a witness's credibility that prejudicial error results. *State v. Yellorday*, 297 N.C. 574, 256 S.E. 2d 205 (1979). In this connection it is well settled that it is the duty of the trial judge to supervise and control the course of a trial so as to insure justice to all parties. In so doing the court may question a witness in order to clarify confusing or contradictory testimony. *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229.

Defendant relies on *State v. Oakley*, 210 N.C. 206, 186 S.E. 244 (1936), to support his position. In *Oakley* a couple testified that shortly after a man had broken into their home, they spotted and pointed out to law enforcement officers tracks in fresh snow leading away from their home. Thereafter, when an officer was describing the tracks he found, the trial judge told him he could not testify, at that point, as to who made the tracks. Shortly afterwards, in the course of the same witness's testimony the judge asked, "You tracked the defendant to whose house?" 210 N.C. at 208, 186 S.E. at 246. On appeal this Court found that question to be prejudicial error, noting that the question amounted to an opinion by the trial judge that the State had proven the tracks to be those of the defendant, when in fact, this had not been proven

by the State. In making this decision the Court also noted the circumstantial nature of the State's evidence.

On the other hand the State points to *State v. Cureton*, 215 N.C. 778, 3 S.E. 2d 343 (1939), *overruled on other grounds, State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), and to *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973), as governing this assignment of error.

In *Cureton* a witness had testified that the defendant shot the victim four times and then testified that the defendant had shot deceased a fifth time. At that point the trial judge asked the witness when the defendant shot the deceased the last time. This Court rejected the defendant's contention that the judge's question amounted to an expression of opinion that the defendant did the shooting, noting that the witness had already testified that the defendant did the shooting and that the judge's question was merely for clarification.

In *McEachern* defendant was charged with rape. Before there was any testimony from the victim that she had been raped the trial judge asked the prosecuting witness, "Let me ask you a question of clarification before you go further, you were in the car when you were raped?" *Id.* at 59, 194 S.E. 2d 789. Finding prejudicial error, the Court reasoned that the trial judge *assumed* that a rape had occurred before it was established by any evidence before the jury. In reaching its conclusion the Court distinguished *Oakley* and *Cureton* in the following manner:

> These two cases are distinguishable. In *Oakley* the court's question expressed an opinion that the tracks were made by defendant. This crucial proof had not been shown by other evidence. In *Cureton* the fact that defendant had shot the deceased was supported by ample evidence, and the judge's question only sought clarification as to when and where the shooting took place. The defendant did not deny that he shot the deceased and in fact later testified that he fired the fatal shots, but that he did so in self defense.

283 N.C. at 61, 194 S.E. 2d at 790.

In the instant case Ms. Simmons had testified at length as to defendant's identity, stating that she had previously known him and relating that she was in his presence for a long period of time

under conditions which permitted her to see defendant clearly. She picked defendant's picture out of a photographic lineup shortly after the crime occurred, and had clearly testified that it was defendant who placed his hands around her neck and choked her.

We do not believe that a juror could reasonably infer that the judge's question amounted to an expression of an opinion as to defendant's guilt or innocence or as to any issue to be decided by the jury or as to the weight of the evidence or the credibility of the witness. Obviously the trial judge sought clarification as to whether the marks shown in the photograph were there *before* the alleged assault on the victim. Therefore, under the rationale of *Cureton* and *McEachern*, we hold that the trial judge did not commit prejudicial error by questioning the prosecuting witness about the marks on her neck.

Defendant assigns as error the failure of the trial judge to dismiss the charges of first degree rape and first degree sexual offense. It is his position that there was no evidence before the jury to show that a serious personal injury was inflicted upon the victim during the course of the respective crimes.

The pertinent portions of the rape statute and the sexual offense statute are as follows:

§ 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

. . . .

(2) With another person by force and against the will of the other person, and:

. . . .

b. Inflicts serious personal injury upon the victim or another person. . . .

§ 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

. . . .

(2) With another person by force and against the will of the other person, and:

. . . .

b. Inflicts serious personal injury upon the victim or another person. . . .

The trial judge in the mandate of his instructions to the jury on the charge of first degree rape stated:

> So, I charge that if you find from the evidence beyond a reasonable doubt that on or about December the 12th, 1983, that Roger Blackstock engaged in vaginal intercourse with Cynthia Simmons and that he did so by grabbing her, telling her that he had a gun, and by threatening to harm her, and that this was sufficient to overcome any resistance which Cynthia Simmons might make, and that Cynthia Simmons did not consent and that it was against her will, and that the Defendant inflicted a laceration upon Cynthia Simmons' head, and that this was a serious personal injury, it would be your duty to return a verdict of guilty of first degree rape. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree rape.

He also submitted the charge of second degree rape in the same manner except there was no requirement that the State prove beyond a reasonable doubt that defendant inflicted serious personal injuries upon Ms. Simmons.

The trial court also correctly submitted the charges of first degree sexual offense and second degree sexual offense, noting that first degree sexual offense and second degree sexual offense differed only in that the State did not have to prove the infliction of serious personal injury on Ms. Simmons in order to convict on the charge of second degree sexual offense.

Defendant argues that the serious injury relied upon by the State occurred a substantial time after both criminal offenses had terminated and therefore could not be relied upon as an element of first degree rape or first degree sexual offense. This argument presents a question of first impression concerning the statutory

construction of our rape and sexual offense statutes, N.C.G.S. § 14-27.2 and N.C.G.S. § 14-27.4.

The cardinal principle of statutory construction is that the intent of the legislature is controlling. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). Further, in construing a statute with reference to an amendment it is presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of the statute. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). "Where a statute has been repealed and substantially re-enacted by a statute which contains additions to or changes in the original statute . . . the additions or changes are treated as amendments effective from the time the new statute goes into effect." 73 Am. Jur. 2d *Statutes* § 391 (1974).

In seeking to find the legislature's intent, we find it necessary to examine the language of N.C.G.S. § 14-21 before its repeal and replacement by our current rape statute, N.C.G.S. § 14-27.2 and the first degree sexual offense statute, N.C.G.S. § 14-27.4. *See* Act of May 29, 1979, ch. 682, § 1, 1979 Session Laws 727. Prior to the 1979 enactment of N.C.G.S. § 14-27.2, the pertinent portion of the first degree rape statute provided:

> If the person guilty of rape is more than sixteen years of age, and the rape victim *had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her*, the punishment shall be death.

N.C. Gen. Stat. § 14-21 (repealed 1979) (emphasis added).

Under the present rape statute N.C.G.S. § 14-27.2, one of the elements of first degree rape is proof of the infliction of "serious personal injury upon the victim or another person." N.C. Gen. Stat. § 14-27.2(a)(2)(b) (1981). The same legislature enacted the newly created first degree sexual offense statute in which the identical language concerning the infliction of serious personal injury was inserted as one of the elements of first degree sexual offense. N.C. Gen. Stat. § 14-27.4(a)(2)(b) (1981).

[2] Our examination of the history of these legislative enactments and the actual language of the prior and present statutes leads us quickly to conclude that the legislature intended to

change the substance of former N.C.G.S. § 14-21 to the end that the element of "infliction of serious bodily injury" would no longer be limited to the period of time when the victim's resistance was being overcome or her submission procured. Nor would the infliction of serious personal injury be limited to the person who was the victim of the rape or the first degree sexual offense.

The case of *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981), contrasted our previous statute, N.C.G.S. § 14-21, with the present statute, N.C.G.S. § 14-27.2, in considering the use of a deadly weapon in first degree rape. The Court noted that the former statute required the State to prove that the weapon was *used* to overcome the victim's resistance or to procure submission. In contrast the Court held that the current statute requires only a showing that a dangerous or deadly weapon was employed or displayed *in the course of the rape*. Thus, *Sturdivant* stands for the proposition that if a weapon is employed or displayed *in the course of the rape period* it is sufficient to support the verdict of guilty upon a charge of first degree rape.

There remains the question of the time frame in which the serious personal injury must be inflicted in order to be used as an element to support a conviction of first degree rape or first degree sexual offense. We find guidance in the decisions of our Court and other jurisdictions in their considerations of the felony murder rule. This is so because in the crimes under consideration and in first degree murder under the felony murder rule, there must be distinct acts or occurrences within a certain time frame in order to sustain a first degree conviction.

North Carolina General Statute § 14-17 provides in part that a murder "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree. . . ." N.C. Gen. Stat. § 14-17 (1983).

In interpreting this statute we have held that a killing is committed in the perpetration of a felony "when there is *no break in the chain of events leading from the initial felony to the act causing death*, so that the homicide is *linked to or part of the series of incidents, forming one continuous transaction*." *State v. Thompson*, 280 N.C. 202, 212, 185 S.E. 2d 666, 673 (1972) (quoting

40 Am. Jur. 2d *Homicide*, § 73 (1968)) (emphasis added). Furthermore, this Court has held that it is immaterial whether the felony occurred prior to or immediately after the killing so long as it is a part of a series of incidents forming one continuous transaction. *State v. Williams*, 308 N.C. 47, 67, 301 S.E. 2d 335, 348, *cert. denied*, --- U.S. ---, 104 S.Ct. 202 (1983).

In a discussion of the Delaware felony murder rule, the Supreme Court of that state has held that it suffices if the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it, or to conceal it. *Parson v. State*, 222 A. 2d 326, 332 (Del. 1966), *cert. denied*, 386 U.S. 935 (1967) (citing 1 Anderson, Wharton's Criminal Law and Procedure § 252).

[3] We conclude that our legislature intended and we therefore hold that the element of infliction of serious personal injury upon the victim or another person in the crimes of first degree sexual offense and first degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape.

In the case before us the serious personal injury inflicted upon the victim was one in a series of incidents in the same criminal episode which occurred before defendant left the home of the victim. The injury was clearly inflicted for the purpose of concealing the assailant's criminal acts or of aiding in his escape.

The trial judge correctly denied defendant's motions to dismiss the charges of first degree rape and first degree sexual offense.

By his next assignment of error, defendant contends that the trial court erred in refusing to instruct the jury that the serious personal injury must be inflicted at the same time as the rape and sexual offenses in order to find the defendant guilty of those

crimes in the first degree. Our disposition of the previous assignment of error answers this issue adversely to defendant. We overrule this assignment of error.

[4] By his final assignment of error, defendant contends that the trial court erred in failing to grant a mistrial and in taking no remedial action after the prosecuting witness had an emotional outburst during the jury instructions. The trial judge noted for the record that during his summary of the evidence:

> [T]he prosecuting witness, Cynthia Simmons, became hysterical; that she made a loud noise in the courtroom and broke down and was sobbing; that the Court indicated to the prosecutor to have Ms. Simmons removed from the courtroom; the prosecutor, in the company of at least two bailiffs, did have Ms. Simmons removed from the courtroom; that she has remained absent from the courtroom for the rest of the Jury instructions and for the rest of the proceedings to this point in the trial.

After the completion of the jury instruction, defendant moved for a mistrial in the jury's absence. The trial court denied his motion, stating that "the incident was not of sufficient prejudice to defendant to require a mistrial."

North Carolina General Statute § 15A-1061 provides in pertinent part that:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

N.C. Gen. Stat. § 15A-1061 (1983).

We have held that whether a motion for mistrial should be granted is a matter which rests in the sound discretion of the trial judge. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982); *State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). A mistrial is appropriate only when there are such serious improprieties as

would make it impossible to attain a fair and impartial verdict under the law. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622.

In *State v. McGuire*, 297 N.C. 69, 254 S.E. 2d 165 (1979), this Court discussed the reason for deferring to a trial judge's determination of these matters.

> When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. "Not every disruptive event occurring during the course of trial requires the court automatically to declare a mistrial," and if in the sound discretion of the trial judge it is possible despite the untoward event, to preserve defendant's basic right to receive a fair trial before an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

297 N.C. at 75, 254 S.E. 2d at 169-70 (quoting *State v. Sorrells*, 33 N.C. App. 374, 376-77, 235 S.E. 2d 70, 72, *cert. denied*, 293 N.C. 257, 237 S.E. 2d 539 (1977)) (citations omitted).

We do not believe the trial judge abused his discretion in refusing to grant a mistrial in the case before us. After the witness's initial outburst, the judge demonstrated the inappropriateness of the outburst by promptly directing the removal of the witness and by resuming his instructions to the jury. Furthermore, the evidence against defendant was strong. We conclude that in light of the trial court's prompt actions and the otherwise compelling case against defendant, the witness's emotional outburst was not so prejudicial to defendant as to result in reversible error.

By the same assignment of error, defendant contends that the trial court should have given a curative instruction with regard to the witness's outburst in his charge to the jury. Defendant argues that the judge's failure to give such an instruction "was to send a message to the jury that such activity was part of a normal trial."

We first note that defendant's attorney made no request for a curative instruction or other remedial action with regard to this matter. Our rule has long been that where a charge fully instructs the jury on substantive features of the case, defines and applies the law thereto, the trial court is not required to instruct on a subordinate feature of the case absent a special request. *See State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). The trial judge in this case witnessed the outburst and was in a position to gauge its effect on the jury. He acted promptly and directed that the witness be immediately removed and continued his instructions to the jury. Aside from defendant's failure to request a curative instruction, such an instruction may well have highlighted the witness's emotional state; indeed it is possible that the defense attorney declined to request a curative instruction because of the likelihood that it would emphasize the witness's outburst. We find no error in the court's failure to give a curative instruction with regard to this matter. This assignment of error is overruled.

After a careful examination of the entire record, we conclude that defendant received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; SWAIN COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE, GRAHAM AND JACKSON COUNTIES; TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBBINSVILLE, AND SYLVA; AND THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; DEROL CRISP v. NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.

No. 111A84

(Filed 13 August 1985)

1. **Utilities Commission § 55— judicial review of findings by Utilities Commission**

An appellate court will not disturb the findings of fact of the Utilities Commission as long as, upon an examination of the whole record, they are supported by competent, material, and substantial evidence. G.S. 62-94.

2. **Utilities Commission § 49— electric rate case—consideration of testimony in prior proceeding**

The Utilities Commission did not err in considering the testimony of a witness in a prior proceeding where Alcoa and Tapoco, in response to a motion to join them as parties in the present proceeding, incorporated by reference the testimonies and briefs filed with the Commission in the prior proceeding.

3. **Electricity § 3; Utilities Commission § 56— similarly worded findings in two proceedings**

The fact that five of the findings of fact in the present proceeding and in a prior proceeding to determine Nantahala's retail rates are similarly worded does not indicate that the Utilities Commission did not consider evidence presented before it in the present proceeding where the issues addressed in the findings were the same in the two proceedings and the Commission resolved them consistently.

4. **Electricity § 3; Utilities Commission § 36— electric rates of Nantahala—hidden benefits to Alcoa**

The record supported a finding by the Utilities Commission that Alcoa was the recipient of hidden benefits arising out of certain wholesale power transactions and agreements between and among Nantahala, Tapoco, Alcoa and TVA.

5. **Electricity § 3; Utilities Commission § 36— integration of facilities of Nantahala and Tapoco**

The record supported findings by the Utilities Commission that (a) Nantahala has not been designed, developed, or 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.

6. Electricity § 3; Utilities Commission § 36— electric rates—liability of Alcoa for Nantahala's refunds

Contrary to the contention of Nantahala, the Utilities Commission's order does require Alcoa as Nantahala's parent to pay refunds which Nantahala is unable to make.

7. Electricity § 3; Utilities Commission § 36— electric rates—finding that Tapoco does not wheel power purchased by Alcoa

The evidence supported findings by the Utilities Commission that Tapoco does not wheel power Alcoa purchases from TVA to serve Alcoa in Tennessee, that even if Tapoco did wheel this power, it was not integrated within the combined Tapoco-Nantahala system with respect to the public load served by these utilities, and that the costs associated with this purchased power thus should not be "rolled in" when determining Nantahala's retail rate base.

8. Electricity § 3; Utilities Commission § 36— electric rates—roll-in methodology

The Utilities Commission did not err in using a roll-in methodology for determining Nantahala's costs which considered the actual Nantahala-Tapoco combined system capabilities rather than the way in which Nantahala and Tapoco share entitlements under certain interstate wholesale power agreements between and among Nantahala, Tapoco, Alcoa and TVA.

ON appeal by respondents from the decision of the Court of Appeals reported at 66 N.C. App. 546, 311 S.E. 2d 619 (1984), affirming orders entered 8 June 1982, 12 August 1982, and 1 September 1982 by the North Carolina Utilities Commission in Docket No. E-13, Sub 35. Heard in the Supreme Court 10 September 1984.

This litigation began on 31 December 1980 when Nantahala Power and Light Company (Nantahala) applied to the North Carolina Utilities Commission for authority to adjust and increase its retail electric rates and charges and to place into effect a revised Purchased Power Cost Adjustment Clause applicable to all retail electric rates. The rates and charges proposed by Nantahala were based on a test period ending 31 December 1979 and were proposed to become effective for service rendered on and after 1 February 1981. On 16 July 1981 the Commission joined Aluminum Company of America (Alcoa) and Tapoco, Inc. as parties to the proceeding. Adjudicatory hearings in this general rate case began in September 1981, and on 8 June 1982 the Commission entered an order increasing rates to some extent and requiring a refund of monies that Nantahala had overcharged its retail ratepayers. Alcoa was ordered to make the refunds to the extent that Nantahala is unable to do so. Respondents appealed, and the Court of

Appeals affirmed. Respondents appealed to this Court pursuant to N.C.G.S. 7A-30(3).

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Assistant Attorney General, for the Using and Consuming Public.

Robert Gruber, Executive Director, The Public Staff, by James D. Little, Staff Attorney, for the Using and Consuming Public.

Joseph A. Pachnowski for the County of Swain and the Town of Bryson City.

Crisp, Davis, Schwentker & Page, by William T. Crisp and Robert B. Schwentker, for Henry J. Truett, Counties of Cherokee, Graham, Swain, Jackson, Towns of Andrews, Dillsboro, Robbinsville, Bryson City, Sylva, and the Tribal Council of the Eastern Band of the Cherokee Indians.

Western North Carolina Legal Services, Indian Law Unit, by Larry Nestler, for Derol Crisp.

Hunton & Williams, by Edward S. Finley, Jr., for Nantahala Power and Light Company.

LeBoeuf, Lamb, Leiby & MacRae, by Ronald D. Jones and David R. Poe, for Aluminum Company of America and Tapoco, Inc.

MARTIN, Justice.

A number of questions of law at issue in this case have been resolved by this Court's recent opinion in *State ex rel. Utilities Commission v. Nantahala Power and Light Company*, 313 N.C. 614, 332 S.E. 2d 397 (1985) (Nantahala Sub 29 (Remanded)). We therefore refer to that opinion for an explanation of the following holdings which apply equally to the instant case: (1) Tapoco and Alcoa are North Carolina public utilities subject to the Commission's regulatory authority and jurisdiction;[1] (2) utilization of a roll-in theory does not violate the Federal

1. We reject Tapoco's argument that the Commission erroneously involuntarily joined Tapoco as a party to these proceedings. Rule 19 of the North Carolina Rules of Civil Procedure provides in part:

Power Act or the supremacy clause or the commerce clause of the Constitution of the United States; (3) application of a roll-in methodology such as is used in this case 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; (4) prior federal and state regulation of Nantahala, Tapoco, and Alcoa and various transactions and the power supply agreements affecting Nantahala's power supply do not prohibit or preempt the Commission from piercing the corporate veil between Alcoa and Nantahala; (5) the Commission acted within its regulatory authority in imposing an obligation upon Alcoa to pay any part of the refund obligation arising from reduction in retail rates that Nantahala is financially unable to make, and this obligation does not amount to a confiscation of Alcoa's property.

[1] With the aforesaid issues already resolved as a matter of law, we now turn to those issues peculiar to this proceeding. We begin with Alcoa's and Nantahala's contentions that certain of the Commission's findings of fact are not supported by evidence of record. It is well established that an appellate court will not disturb the findings of fact of the Utilities Commission as long as, upon an examination of the whole record, they are supported by competent, material, and substantial evidence. N.C. Gen. Stat.

"Rule 19 Necessary joinder of parties

"(a) Necessary joinder. Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

"(b) Joinder of parties not united in interest. The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; *but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.*" (Emphasis added.)

See Strickland v. Hughes, 273 N.C. 481, 160 S.E. 2d 313 (1968) (decided under former N.C.G.S. 1-73); *Moore v. Massengill*, 227 N.C. 244, 41 S.E. 2d 655 (1947) (same). *See generally* W. Shuford *N.C. Civil Practice and Procedure* § 19-4 (1981). The decision whether to order joinder of proper parties rests within the sound discretion of the Utilities Commission in its authority as an adjudicatory body. N.C. Gen. Stat. § 62-60 (1982). Tapoco has failed to establish that the Commission abused its discretion in ordering Tapoco joined as a party in the instant proceedings.

§ 62-94 (1982); *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983); *State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 299 S.E. 2d 763 (1983).

Preliminarily, we address Alcoa's contention that although the Commission stated in its 13 March 1981 ruling that it would determine whether roll-in is appropriate in Sub 35 independently and irrespective of whether such a determination is required in Docket No. E-13, Sub 29, certain parts of the Commission's 8 June 1982 order clearly show that the Commission in effect merely adopted its Sub 29 (Remanded) order for the purpose of determining the outcome of this proceeding instead of making independent findings and conclusions. Alcoa points out, for example, that the June 8 order refers to a "witness Popovich" who testified during the Sub 29 proceedings but not during the proceedings in the instant case. In addition, Alcoa contends that findings of fact 4, 5, 6, 17, and 20 of the June 8 order are so similar to findings of fact 4, 5, 6, 19, and 21 of the Sub 29 (Remanded) order that it is clear that the two orders are "essentially identical."

[2] We might be impressed by the agility of Alcoa's legal stratagems but for its occasional opacity. It is true that witness Popovich testified during proceedings in Sub 29; however, in the "Response on Behalf of Aluminum Company of America and Tapoco, Inc. to Motion to Join Alcoa and Tapoco as Parties" filed in Sub 35 on 6 February 1981, we find the statement that "Tapoco and Alcoa hereby incorporate by reference the testimonies and briefs filed with this Commission in Docket No. E-13, Sub 29."[2] As Alcoa presented the Commission with the opportunity to consider witness Popovich's testimony in the instant case, it is curious that Alcoa is now trying to argue that the Commission erroneously did so.

[3] Further, the fact that five of the findings of fact in the two proceedings are similarly worded does not indicate that the Commission did not consider evidence presented before it in the proceedings in the instant case. The issues addressed in the findings to which Alcoa refers us arose in both the Sub 29 (Remanded) and the Sub 35 cases, and because the Commission resolved them con-

2. In the instant case Nantahala, too, incorporates by reference part of its brief to this Court in the Sub 29 (Remanded) appeal.

sistently, it is not particularly strange that its findings are similarly worded.[3] There is no error with respect to this aspect of the Commission's order in the present case, and we hold that Alcoa's rights to due process were not violated by the manner in which the Commission proceeded.

We now address Alcoa's contention that several of the Commission's findings of fact are unsupported by evidence of record and that the roll-in theory the Commission used in the present case was inappropriate because based on the erroneous findings of fact. Alcoa alleges that the following six points were not supported by evidence of record:

> (1) that testimony of witness Popovich was properly before the Commission in this proceeding;
>
> (2) that Tapoco does not wheel power Alcoa purchases from the Tennessee Valley Authority (TVA) to serve Alcoa in Tennessee;
>
> (3) the Commission's decisions to include in the roll-in calculations power Nantahala purchased from TVA to serve Nantahala's North Carolina load but to exclude power Alcoa purchased from TVA to serve Alcoa's Tennessee load;
>
> (4) the Commission's calculation of "hidden benefits" to Alcoa arising out of the Original Fontana Agreement, the New Fontana Agreement, and the Apportionment Agreement;
>
> (5) the Commission's determination of the appropriateness of piercing the corporate veil between Alcoa and Nantahala;
>
> (6) that the Nantahala and Tapoco facilities are integrated and coordinated with one another and therefore rolling their costs together was appropriate.

We have discussed and disposed of the first contention earlier in this opinion. The fifth point is governed by our conclusions to the

3. We note that the New Fontana Agreement and the 1971 Apportionment Agreement were still in effect during the test period in which rates were based in the instant case.

contrary in Nantahala Sub 29 (Remanded). Thus, we now turn to the remaining contentions.

[4] Because it concerns the question of whether a roll-in is appropriate to any extent, we address the fourth point first. Alcoa argues that the record does not support the Commission's finding that Alcoa received concealed benefits and therefore it is inappropriate to use any form of roll-in to rectify past inequities. The basis of Alcoa's argument is that "[t]he calculation of 'hidden benefits' that the Commission used to justify the imposition of rolled-in rate making in the first place (*see* R pp 183-208), was repudiated by the only witness to offer testimony as to the existence of hidden benefits." Upon an examination of the transcript, we do not find the direct repudiation alleged by Alcoa. In addition, there is ample evidence in the form of exhibits justifying the Commission's determination that Alcoa was the recipient of hidden benefits. We cannot agree with this assignment of error.

[5] Alcoa also contends that evidence placed before the Commission during the proceedings in this case contradicted evidence which was before the Commission in the Sub 29 (Remanded) case concerning the physical integration of the Tapoco-Nantahala system. Therefore, the Commission's determination that the system is physically integrated is erroneous, and because this factual predicate to the use of roll-in has not been established, the use of any roll-in methodology was also error. We again disagree. Although respondents did introduce additional evidence concerning this issue during proceedings in the instant case, we find that the record amply supports the Commission's findings that (a) Nantahala has not been designed, developed, or 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. The Commission properly determined that a roll-in methodology for rate making in this case was appropriate. The assignment of error is meritless.

[6] We also reject Nantahala's contention that the Commission's 8 June 1982 order is deficient as a matter of law because although

it sets retail electric rates prospectively and anticipates that Nantahala may not be able financially to pay refunds anticipated because of rate reductions, it does not require Alcoa as Nantahala's parent to pay refunds which Nantahala is unable to make. To the contrary, the Commission's finding of fact 20 states in part that "to the extent Nantahala is financially unable to make the revenue refunds required in this Order, Alcoa shall refund all or any portion of the aforementioned revenue refunds that Nantahala is financially unable to make." Earlier findings of fact in the order specify that refunds are required for rate reductions provided for in this rate case. At the end of the order the Commission further states: "IT IS, THEREFORE, ORDERED as follows: . . . 7. That, to the extent Nantahala is financially unable to make revenue refunds required under Ordering Paragraph No. 3 above, Alcoa shall refund all or any portion of the aforementioned revenue refunds that Nantahala is financially unable to make." Nantahala's assignment of error is meritless.

[7] We now turn to the issue of whether Tapoco wheels to Alcoa power which Alcoa owns. In its 8 June 1982 order the Commission found as a fact that Tapoco does not wheel certain power which Alcoa buys directly from TVA for Alcoa's sole use for its industrial plant operations in Tennessee. The Commission further reasoned that, assuming for purposes of argument that Tapoco did wheel this power, such power was not integrated within the combined Tapoco-Nantahala system. For both of these reasons the Commission declined to "roll-in" the costs associated with this purchased power when determining Nantahala's retail rate base. The Commission also concurred with the intervenors' contention that "should the separate $52 million of Alcoa purchases directly from TVA be rolled into the total power purchases of the Nantahala-Tapoco unified system, those purchases should be allocated entirely to Alcoa."

Alcoa argues that the Commission's findings were erroneous because all of the evidence shows that Tapoco does in fact wheel the power Alcoa purchases from TVA and therefore, because this power traversed the Tapoco-Nantahala system, its costs should have been rolled into the Commission's calculations.

As the Commission noted, "wheeling" is a term used to denote the transmission of one utility's power over another utili-

ty's system. *See Town of Norwood v. Fed. Energy Reg. Com'n*, 587 F. 2d 1306, 1307 n.2 (1978); *Utah Power and Light Company v. Morton*, 504 F. 2d 728 (1974); *Idaho Power Company v. Federal Power Commission*, 346 F. 2d 956, 957 n.1 (1965). Although evidence in the record conflicts as to whether Tapoco wheels power to Alcoa, the Commission's determination that Tapoco does not wheel is supported by competent, material, and substantial evidence and therefore we do not disturb it. A key exhibit in this regard is a contract identified by Alcoa's witness H. J. Vander Veen as the FERC Rate Schedule which governs the alleged wheeling agreement. This contract which became effective in 1968 and continues until 1 March 2005, states in part:

> It is desirable to reduce to writing the arrangement between Tapoco, Inc. (Tapoco) and Aluminum Company of America (Alcoa) under which power delivered to Alcoa (from Tapoco and other sources) is transformed and switched at the high voltage substation facilities of Tapoco, located adjacent to the Alcoa, Tennessee works of Alcoa. Accordingly it is proposed that we agree as follows:
>
> (a) At the substation facilities mentioned above, Tapoco will perform such necessary transformation and switching of power delivered to Alcoa as Alcoa shall direct. . . .

The language in these paragraphs indicates that the contract governs merely the transformation and switching of Alcoa's power at substations adjacent to Alcoa plants. This substation facilities contract does not concern or address the transmission of power over Tapoco lines denoted by the term "wheeling." We find the Commission's determination that Tapoco does not wheel Alcoa's power to be supported by material and substantial evidence of record and therefore do not disturb it.

We note, however, that the Commission properly determined that even if Tapoco does, arguendo, wheel power which Alcoa purchases from TVA for use at Alcoa's Tennessee plants, the costs associated with such purchases should not be considered as a component of the roll-in methodology. As the Commission observed, no showing was made that this power was integrated within the Tapoco-Nantahala system with respect to the public load served by these utilities. As this Court stated in *Nantahala Sub 29 (Remanded)*, 313 N.C. at 678, 332 S.E. 2d at 435, "the Commission

accepted that the non-utility direct industrial purchases that Alcoa makes from TVA are not properly considered a *utility* function of either Tapoco, Nantahala or the combined utility system of both and so are not properly includable in the cost of service allocation." We agree with the Commission's reasoning on this point and find it to be equally applicable to the present case. Therefore costs associated with such purchases were also properly excluded in the roll-in calculations performed by the Commission in the instant case.

[8] We now turn to other findings that respondents contend are not supported by evidence of record. Both Alcoa and Nantahala allege that the commission made several mathematical errors when using the roll-in technique. Specifically, they argue that the Commission's attributions of capacity to Nantahala and Tapoco individually were erroneous and therefore the roll-in methodology using such figures resulted in erroneous computations. The basis for these alleged errors is the fact that instead of adopting the roll-in methodology proposed by respondents' witnesses, a methodology which would have determined the utilities' capacities based on return entitlements set forth in the New Fontana Agreement, the Commission adopted the intervenors' methodology. Under the latter, Nantahala's costs were determined by a consideration of actual combined system capabilities, not by the way in which Nantahala and Tapoco share in the New Fontana Agreement entitlements (as determined by the 1971 Apportionment Agreement). We hold that the Commission did not err in using the roll-in methodology proposed by the intervenors; therefore the Commission did not err by using the capacity assignments which it did. As we stated in *Nantahala Sub 29 (Remanded)*, 313 N.C. at 683, 332 S.E. 2d at 438.

> 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 Commission did not abuse its discretion in adopting the roll-in methodology which it did, and within this methodology its calculations of capacity were not erroneous. Therefore we reject respondents' arguments concerning these issues.

Alcoa goes on to argue that the Commission ignored certain evidence placed before it with respect to an alternative roll-in methodology proposed by John C. Romano, an engineer with the Public Staff.[4] There is no evidence that the Commission ignored this study when deciding which roll-in methodology would be appropriate in this proceeding. As we held earlier, the Commission did not abuse its discretion in employing the particular methodology which it did. We hold that all parties received a full and fair hearing during the proceedings in this case. Respondents' assignment of error is meritless.

The foregoing issues are determinative of this appeal. We hold that there is no merit to any of respondents' assignments of error. Therefore we affirm the decision of the Court of Appeals.

Affirmed.

STATE OF NORTH CAROLINA v. LAWRENCE MORRIS LYSZAJ

No. 712A84

(Filed 13 August 1985)

1. Criminal Law § 91— motion for speedy trial dismissal—properly denied

Defendant's Speedy Trial Act motion to dismiss was properly denied where defendant's claim that he was served with a fugitive warrant in March of 1981 was not supported by the record presented on appeal; it was apparent from the record that defendant was not served with criminal process until December 15, 1983; 241 days elapsed before his trial on August 13, 1984; and 132 days were excludable for defendant's motions and for continuances granted for the ends of justice, leaving a total of 109 days. G.S. 15A-701(b)(7), G.S. 15A-701(b)(1)(d), G.S. 15A-701(a)(1).

4. It is Nantahala's position that the Commission properly rejected Romano's proposed roll-in because of flaws in its methodology.

2. Constitutional Law § 53— speedy trial—delays attributable to defendant

Defendant was not denited his constitutional right to a speedy trial where much of the considerable delay was attributable to motions on behalf of defendant and there was nothing in the record other than defendant's bald assertions to indicate that he desired a speedy trial or that he was prejudiced by the delay. Sixth Amendment to the Constitution of the United States.

3. Criminal Law § 91— Interstate Agreement on Detainers—motion for speedy trial dismissal—properly denied

There was no error in the denial of defendant's motion for a speedy trial dismissal under the Interstate Agreement on Detainers, which requires trial within 120 days of the arrival of defendant in the receiving state, where defendant had been imprisoned in Virginia, temporary custody was granted to North Carolina on December 15, 1983, and defendant was not tried until August 13, 1984, 241 days later. All but the initial 53 days were properly excluded where the delays were for a good cause shown in open court with defendant or his attorney present. G.S. 15A-761.

4. Criminal Law § 87.1— prosecutor's leading question—no abuse of discretion

There was no abuse of discretion where the trial court permitted the prosecutor in a prosecution for armed robbery, conspiracy to commit armed robbery, and first degree burglary to ask a witness if her identification of defendant was independent of any photographs she may have seen. Permitting leading questions is within the discretion of the trial court and the exercise of that discretion will not be reversed on appeal absent abuse of discretion.

5. Criminal Law §§ 66.9, 66.14— pretrial photographic identification—not impermissibly suggestive—in-court identification of independent origin

In a prosecution for armed robbery, conspiracy to commit armed robbery, and first degree burglary, pretrial identification procedures were not so impermissibly tainted as to give rise to a substantial likelihood of irreparable misidentification and the in-court identifications of defendant were of independent origin where two white males entered the home of Lloyd Turner and his wife, both Mr. and Mrs. Turner sat in the den with the first man to enter their home for approximately forty-five minutes while the second man went through the house, the first man was sitting directly in front of Mr. Turner and beside Mrs. Turner on the couch within three or four feet of both of them, there was a light on in the den which was bright enough to enable both Mr. and Mrs. Turner to see clearly the features of the first man, two groups of six photographs each were exhibited to Mr. and Mrs. Turner a few days later and each separately picked out defendant's picture, the sheriff stated to the Turners in presenting the pictures "look through these and see if you recognize one or both of the men who robbed you," and Mr. and Mrs. Turner had gone to Virginia on two occasions and positively identified defendant as the first man to enter their house the night they were robbed.

6. Burglary and Unlawful Breakings § 5.2— burglary—nighttime—early evening hours sufficient

The trial court correctly denied defendant's motions to dismiss a burglary charge, based on the contention that the nighttime element of burglary was in-

tended to protect people asleep in their homes and was not meant to be extended to the early evening hours, where the victims testified that the crime occurred at approximately 8:30 p.m. on December 9 and one victim testified that it was after dark when defendant arrived at their home.

APPEAL by the defendant from judgments entered by *Judge J. Herbert Small* at the August 13, 1984 Criminal Session of Superior Court, PASQUOTANK County.

The defendant was charged in separate bills of indictment with armed robbery, conspiracy to commit armed robbery, and first degree burglary. He entered a plea of not guilty to each charge. The jury found the defendant guilty of all the offenses charged. By judgments entered August 15, 1984, the defendant was sentenced to life imprisonment for his conviction for armed robbery, life imprisonment for his conviction for first degree burglary, and ten years imprisonment for his conviction for conspiracy to commit armed robbery.

The defendant appealed his convictions for armed robbery and first degree burglary and the resulting life sentences to the Supreme Court as a matter of right. Heard in the Supreme Court June 11, 1985.

Lacy H. Thornburg, Attorney General, by Grayson G. Kelley, Assistant Attorney General, for the State.

James A. Beales, Jr., for the defendant-appellant.

MITCHELL, Justice.

The defendant's primary argument is that his statutory and constitutional rights to a speedy trial were violated. He also contends that the trial court erred in permitting the prosecutor to ask a leading question. Finally, the defendant contends that the trial court erred in allowing the first degree burglary charge to go to the jury because the evidence was insufficient to support a finding that the crime in question occurred at night.

The record on appeal indicates that criminal warrants were issued on December 16, 1980, charging the defendant with armed robbery, conspiracy to commit an armed robbery, and first degree burglary in Pasquotank County, North Carolina. Early in 1981, the defendant was incarcerated on unrelated charges in the

prison system of the State of Virginia. The defendant was still in custody there on April 26, 1982, when the Grand Jury of Pasquotank County returned true bills of indictment against the defendant for the same crimes charged in the 1980 warrants.

The defendant remained in custody in Virginia until December 15, 1983, when temporary custody of him was granted to the State of North Carolina under the Interstate Agreement on Detainers. N.C.G.S. 15A-761 to 767. At that time he was arrested under the North Carolina warrants. After several delays, the defendant's case was called for trial at the August 13, 1984 Session of Criminal Superior Court for Pasquotank County. The State offered evidence which tended to show that two men entered the home of Lloyd and Betty Turner at about 8:30 p.m. on December 9, 1980, and robbed them at gunpoint. During the trial the Turners identified the defendant as one of the men. The defendant offered alibi evidence to the effect that he was in the Norfolk, Virginia area on the date in question.

On March 14, 1984, the defendant filed a motion to dismiss under the provisions of the Speedy Trial Act, N.C.G.S. 15A-701, *et seq.*, and the Constitution of the United States. On June 14, 1984, Judge Peel denied this motion. Judge Watts granted the defendant's motion to continue from February 7, 1984 through March 19, 1984, because counsel had not had time to prepare and because Judge Watts had been District Attorney in charge of these cases at the time the defendant was indicted. Judge Peel granted the State's motion to continue from March 19, 1984 through April 9, 1984, on the grounds that defense counsel needed more time to prepare his pretrial motions, the trial of other cases prevented the trial of this case during the session, and a judge's conference had been scheduled for Thursday and Friday of that term. Judge Peel granted another motion by the State to continue from April 14, 1984 to April 16, 1984, due to the defendant's inability to go forward on his pretrial motions. The final continuance from April 18, 1984 through May 14, 1984, was granted for the defendant by Judge Peel because the defense counsel had not had adequate time to prepare the pretrial motions.

On August 10, 1984, the defendant filed a motion to dismiss under the provisions of the Interstate Agreement on Detainers, G.S. 15A-761 to 767, alleging that he had been denied his right to

a speedy trial. Judge Small denied this motion in an order filed on August 16, 1984. The defendant's trial began on August 13, 1984.

[1] In his first assignment of error, the defendant contends that the trial court improperly denied his motion to dismiss under the Speedy Trial Act. We conclude that the defendant has not shown that the timing of his trial violated the provisions of the Act.

N.C.G.S. 15A-701(a)(1) provides that the trial of a defendant charged with a criminal offense shall begin within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last. The defendant contends that he was served with criminal process when he was served with a fugitive warrant in March, 1981. Therefore, according to the defendant, the event which should trigger the running of the statutory period was the indictment on April 26, 1982. The defendant argues that since that date he has desired to return voluntarily to North Carolina to face these charges. He alleges that the long delay in his return was caused by the lack of a diligent and good faith effort by North Carolina authorities to secure his return.

The defendant, however, produced no evidence of the existence or service of any fugitive warrant or of a written waiver of extradition. Our review is limited to what is presented in the record on appeal. *Long v. City of Charlotte*, 306 N.C. 187, 293 S.E. 2d 101 (1982); *State v. Morgan*, 225 N.C. 549, 35 S.E. 2d 621 (1945). Relying on the record, it is apparent that the defendant was not served with criminal process until the warrants for his arrest were executed on December 15, 1983. It was on that date then that the 120 day statutory period commenced.

A period of 241 days elapsed between December 15, 1983, and the defendant's trial, which began on August 13, 1984. Certain exclusions, however, may be made under the Speedy Trial Act from this time period.

G.S. 15A-701(b)(1)(d) provides that delays resulting from hearings on any pretrial motions or the granting or denial of such motions be excluded from the computation of the 120 day period. Included in this excluded period is "all delay from the time a motion or other event occurs that begins the delay until" a final ruling on the motion or a final resolution of the event causing the delay.

The defendant made two motions to dismiss. The first was filed on March 8, 1984, and was ruled upon on June 14, 1984. Therefore, exclusion of a period of 99 days from the time requirements of the Act was proper. The second motion was filed on August 10, 1984, and was ruled upon on August 16, 1984. The defendant's trial, however, began on August 13, 1984, so only three of these days should be excluded.

G.S. 15A-701(b)(7) provides that exclusions may also be made for delays "resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding." In the present case, continuances were granted on this basis for a total of 95 days. However, since only 30 of these days did not overlap the period during which the first motion to dismiss was pending, only those 30 days can be excluded from the 120 day period.

Taking all of the foregoing excludable days into account, the 241 day period between the service of criminal process and the trial is decreased by 132 days to a total period of 109 days. Thus, the defendant's trial fell within the 120 day period prescribed by the Speedy Trial Act.

[2] The defendant also assigns as error the denial of his constitutional right to a speedy trial. Both the fundamental law of this State and the Sixth Amendment to the Constitution of the United States guarantee those formally accused of crime the right to a speedy trial. *State v. Avery*, 302 N.C. 517, 276 S.E. 2d 699 (1981). *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). The primary factors to consider in determining whether this right has been violated are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to defendant resulting from the delay. *Barker v. Wingo*, 407 U.S. 514 (1972); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. denied*, 429 U.S. 1049 (1977); *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976).

The defendant points to the three and one-half year delay between the issuance of the initial warrants and his trial and argues that the causes for the delays were largely outside of his control. He claims that he was willing to return to North Carolina but did not as a result of North Carolina's failure to make a good faith effort to obtain his presence. He also points out that he did not waive his right to a speedy trial. Finally, the defendant argues that the delay prejudiced his defense in that he was required at trial to rely on his memory of events that had taken place over three years earlier.

Although the delay was considerable, much of it was attributable to the motions on behalf of the defendant. Also, there is nothing in the record other than bald contentions by the defendant to indicate that he desired a speedy trial, or that he was prejudiced in any way by the delay. This assignment is without merit.

[3] The defendant next assigns as error the denial of his motion to dismiss for the State's failure to provide him a speedy trial as required by the Interstate Agreement on Detainers, N.C.G.S. 15A-761, Article IV(c), which states:

> In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

The defendant had been imprisoned in Virginia. Under the Interstate Agreement on Detainers, temporary custody of the defendant was granted to the State of North Carolina on December 15, 1983. The defendant asserts that his trial did not take place within 120 days of his arrival in North Carolina. As noted earlier, the defendant's trial did not take place until August 13, 1984, some 241 days after his arrival.

The trial court concluded that the trial of the defendant had been delayed from February 6, 1984 until August 13, 1984 for good cause shown in open court with the defendant or his attorney present and excluded that period of time in computing the 120 days from the time of his arrival in North Carolina. We agree.

Between December 15, 1983, and February 6, 1984, a period of 53 days of the 120 days ran. The cases were continued by the trial court for good cause shown and on the defendant's motion, from February 7, 1984 until March 19, 1984. The defendant set forth two grounds for his motion. First, that counsel had not had adequate time to prepare the cases for trial, and secondly, the presiding judge should recuse himself since he was the elected District Attorney during the investigation of the defendant's case and at the time the defendant was indicted. Due to motions filed by the defendant to dismiss the cases for want of a speedy trial and to obtain the attendance of out-of-state witnesses, the trial court thereafter continued the cases for good cause shown, from term to term until August 6, 1984. The trial court then found it necessary to continue the trial from August 6, 1984 to August 13, 1984, due to the assignment of Judge Watts to the August 6, 1984 session, since he had previously recused himself from the trial of the defendant. The trial court therefore was correct when it excluded all but the initial 53 days of the period between the time the defendant was returned to North Carolina and the date of his trial. This time period was well within the 120 day period prescribed by the Interstate Agreement on Detainers.

[4] Under his next assignment of error the defendant contends that the trial court improperly allowed the prosecutor to ask a leading question on the issue of the identity of the defendant as the perpetrator of the crimes charged. The prosecutor asked the witness, Lloyd Turner: "Is your identification here today of the defendant as the first man you saw on December 9, 1980, independent of any photographs that you may have seen?" The defendant argues that this question should not have been allowed in this form and that its admission caused irreparable harm to the defendant. We disagree.

It is within the discretion of the trial court whether counsel shall be permitted to ask leading questions. The exercise of such discretion, in the absence of an abuse thereof, will not be reversed on appeal. *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Beatty*, 226 N.C. 765, 40 S.E. 2d 357 (1946). A ruling committed to a trial court's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision. *White v. White*, 312 NC. 770, 324 S.E. 2d 829 (1985). *See Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). No such show-

ing has been made in the present case, and this assignment is overruled.

[5] In his next assignment of error the defendant argues that the trial court erred in allowing the testimony of Lloyd Turner and Betty Turner identifying him at trial as the man who had robbed them. He contends that the evidence resulted from pretrial identification procedures which were so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. The defendant maintains that the pretrial photographic lineup was unnecessarily suggestive because the police made comments to the Turners suggesting that a photograph of their burglar was in the lineup and because the nature of the photographs was highly suggestive. As a result, the defendant argues that the in-court identifications of him by the Turners should have been excluded at trial. We disagree.

Whether a pretrial identification procedure is so suggestive as to give rise to a very substantial likelihood of irreparable misidentification must be determined by a consideration of all of the circumstances in each case. *Simmons v. United States*, 390 U.S. 377 (1968). 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. The 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. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *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).

A *voir dire* examination was held upon the defendant's objection to the identification testimony. The trial court found upon competent and substantial evidence that on the evening of December 9, 1980, two white males entered the home of Lloyd Turner and his wife Betty Turner. Both Mr. and Mrs. Turner sat in the den with the first man to enter their home for approximately forty-five minutes while the second man went through the house. The first man was sitting directly in front of Mr. Turner and be-

side Mrs. Turner on the couch. He was within three or four feet of both of them. There was a light on in the den which was bright enough to enable both Mr. and Mrs. Turner to see clearly the features of the first man.

A few days later, Sheriff Sawyer exhibited to Mr. and Mrs. Turner two groups of six photographs each. In one group was the picture of the defendant, and in the second group was a picture of another man identified as Robert Huntoon. Mr. and Mrs. Turner each separately picked out the defendant's picture in the first group of pictures as the first man to enter their house when they were robbed. Each identified Huntoon as the second man to enter the house.

When presenting the pictures to the Turners for viewing, the sheriff stated to each, "Look through these and see if you recognize one or both of the men that robbed you." He did not suggest that they should pick any particular picture.

On two occasions Mr. and Mrs. Turner went to Virginia and positively identified the defendant as being the first man to enter their home on the night they were robbed. The last such occasion was in December, 1983.

The trial court concluded that the in-court identifications of the defendant by Mr. and Mrs. Turner were based upon their recollection of what they saw on December 9, 1980, while they were being robbed and held at gunpoint. Neither was influenced by any photographic lineup or by any view of the defendant they may have had while he was in custody. The trial court then allowed the in-court identifications of the defendant by Mr. and Mrs. Turner to be admitted.

Upon careful examination of the record, the briefs, the transcript and the photographic array viewed by the Turners, we have concluded that the pretrial identification procedure was not impermissibly suggestive. *See Simmons v. United States*, 390 U.S. 377 (1968); *State v. Harris*, 308 N.C. 159, 301 S.E. 2d 91 (1983). However, even if the pretrial identification procedure was impermissibly suggestive, we find adequate support for the trial court's ruling that the in-court identifications were admissible as being of independent origin based solely upon Mr. and Mrs. Turner's observations at the scene of the crime. The factors to be

considered in determining whether in-court identifications are admissible 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 those factors we find more than adequate evidence in the record to support the trial court's holding that the Turners' in-court identifications were admissible as being of independent origin. We are bound therefore by the trial court's ruling. *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). This assignment of error is overruled.

[6] In his final assignment of error, the defendant contends that the trial court erred by denying his motion to dismiss the charge of burglary on the ground that there was insufficient evidence to support a finding that the crime occurred during the nighttime. This contention is without merit.

In testing the sufficiency of the evidence to sustain a conviction and to withstand a motion to dismiss, the reviewing court must determine whether there is substantial evidence of each essential element of the offense and that the defendant was the perpetrator. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). To warrant a conviction of burglary in either the first or second degree, the State must show *inter alia* that the crime charged occurred during the nighttime. *State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972). The law considers it to be nighttime when it is so dark that a person's face cannot be identified except by artificial light or moonlight. *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. McKnight*, 111 N.C. 690, 16 S.E. 319 (1892).

The defendant recognizes that both Lloyd Turner and Betty Turner testified that the crime occurred at approximately 8:30 p.m. on December 9, 1980, and that Betty Turner testified that it was after dark when the defendant arrived at their home. The defendant, however, contends that the nighttime element of the crime of burglary was intended to protect people who are asleep in their homes and was not meant to be extended to the early evening hours. We do not agree and instead conclude that there was substantial evidence introduced at trial tending to show that the offense charged occurred during the nighttime. *See State v. Smith*, 307 N.C. 516, 299 S.E. 2d 431 (1983).

The defendant received a fair trial free from prejudicial error.

No error.

J. TRAVIS SKINNER AND BARBARA R. SKINNER v. E. F. HUTTON & COMPANY, INC., JOHN HUDSON, AND DONALD FONTES

No. 614A84

(Filed 13 August 1985)

1. **Actions § 5; Corporations § 16.1 — insider information — action against stockbrokers — *in pari delicto* doctrine inapplicable**

The fact that a plaintiff has dealt in securities for gain upon purported inside information will not give rise to the common law defense of *in pari delicto* in an action under state law against a corporate insider or securities professional who provided the information.

2. **Corporations § 16.1; Unfair Competition § 1 — unfair trade practices statute — inapplicability to securities transactions**

Securities transactions are beyond the scope of the unfair trade practices statute, G.S. 75-1.1.

APPEAL by the plaintiffs under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 70 N.C. App. 517, 320 S.E. 2d 424 (1984), affirming in part and reversing in part an order entered by *Judge Henry V. Barnette, Jr.* on August 8, 1983, in Superior Court, DURHAM County. Heard in the Supreme Court on April 8, 1985.

Haythe & Curley, by Samuel T. Wyrick, III, Christie Speir Price and James Arthur Pope, for the plaintiff appellants.

Manning, Fulton & Skinner, by Howard E. Manning and Michael T. Medford, for the defendant appellees.

Thad Eure, Secretary of State, amicus curiae, by Eugene J. Cella, Staff Attorney.

MITCHELL, Justice.

[1] The primary issue presented is whether the doctrine of *in pari delicto* provides a defense to claims under state law when

defendant stockbrokers induce plaintiffs to buy securities by representing that they have "inside information" which will result in those securities increasing in value. We conclude that the mere fact that the plaintiffs in such cases have attempted to act upon inside information unlawfully does not cause the doctrine of *in pari delicto* to raise an affirmative defense which will defeat otherwise valid claims for relief asserted under state law. We also must decide whether securities transactions are beyond the scope of N.C.G.S. 75-1.1 prohibiting unfair trade practices. We conclude that securities transactions are beyond the scope of that statute.

In their complaint the plaintiffs Skinners allege in pertinent part that they maintained general margin accounts with the defendant E. F. Hutton and Company, Inc. for their stock trading. In 1981 the defendants Hudson and Fontes, registered representatives and account executives with E. F. Hutton, encouraged the plaintiffs to "load up" on securities in two companies the defendants represented as take-over candidates. The defendant Fontes told Travis Skinner that he had "inside information that corporate take-overs were imminent that would shortly drive up the price of Washington National Corporation [hereinafter WNT] and Academy Insurance Group [hereinafter ACIG] which securities were being traded either on an exchange or over the counter." Relying on the advice of Hudson and Fontes that take-overs of WNT and ACIG definitely were going to take place soon, the Skinners purchased 3,850 shares of WNT for $109,850 and 4,100 shares of ACIG for $81,484 through their margin accounts at E. F. Hutton.

Fontes told the plaintiffs that the WNT take-over would take place by the end of May 1981. No such take-over occurred nor did the price of the WNT securities increase. Hudson and Fontes first told the plaintiffs that the ACIG take-over would occur by July 28, 1981. After that date had passed they stated that the take-over of ACIG would be complete by August 28, 1981. This did not occur. No take-over occurred.

The plaintiffs also allege in their complaint that on at least two occasions they could have sold a good number of their WNT shares at a substantial profit. They did not due to Fontes' strong urging not to sell and his representations that the WNT take-over was imminent and certain. In order "[t]o cut their losses and free

their capital by the year end, Plaintiffs sold all their holdings in WNT and ACIG in October, November and December 1981, absorbing losses of at least $47,526.84 in stock losses, brokers' commissions, margin interest, and a margin call." The plaintiffs allege that these losses are the direct result of their reliance to their detriment on the false representations of the defendants.

The plaintiffs seek to recover on alternative claims for relief for fraud, constructive fraud and negligent misrepresentation. They seek both compensatory and punitive damages. They also seek treble damages under N.C.G.S. 75-16 and reasonable attorney's fees under N.C.G.S. 75-16.1 upon the theory that their allegations establish that the plaintiffs have committed unfair or deceptive acts or practices in violation of N.C.G.S. 75-1.1. By their complaint the plaintiffs also seek to have the defendants held jointly and severally liable.

The trial court held that the "plaintiffs' purported claims are barred as a matter of law by the doctrine of *in pari delicto*, except as to commissions and margin interest received by Defendants." The plaintiffs appealed. The defendants cross appealed and assigned as error the trial court's failure to dismiss all of the plaintiffs' claims. Although stating that the appeals were interlocutory in nature, the Court of Appeals chose to treat them as though "allowed under certiorari and to review the parties' appeals on their merits." 70 N.C. App. at 518, 320 S.E. 2d at 425. The majority of the panel in the Court of Appeals held "that the *in pari delicto* defense must work as a bar against all the claims for relief asserted by the plaintiffs, including those for commissions and margin interest." 70 N.C. App. at 522-23, 320 S.E. 2d at 428. Therefore, the Court of Appeals affirmed in part and reversed in part. One judge having dissented in the Court of Appeals, the plaintiffs appealed as a matter of right under N.C.G.S. 7A-30(2).

On appeal we review the holding of the Court of Appeals that the trial court was required to grant the defendants' motion to dismiss under N.C.G.S. 1A-1, Rule 12(b)(6) for failure to state any claim upon which relief might be granted. Such a motion tests the legal sufficiency of the complaint, and in ruling on "the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether

the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979). When the complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, however, the motion will be granted and the action dismissed. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 166 (1970). The defendants contend that the doctrine of *in pari delicto* causes the complaint in the present case to disclose just such an unconditional affirmative defense.

The defendants specifically contend that the complaint shows on its face that the plaintiffs were "tippees" who received and acted upon purported nonpublic "inside information" and took steps to profit by this knowledge to the exclusion of the general public. The defendants argue that such conduct by the plaintiffs violated *inter alia* antifraud provisions of The North Carolina Securities Act[1] such as N.C.G.S. 78A-8 and federal prohibitions against trading in securities on inside information, such as those contained in the general antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, promulgated thereunder. For purposes of this appeal, we assume *arguendo* without deciding the question that the plaintiffs were "tippees"[2] and in violation of all pertinent provisions of North Carolina and federal law prohibiting trading in securities on inside information. Nevertheless, the doctrine of *in pari delicto* does not give rise to an affirmative defense requiring dismissal of the plaintiffs' claims.

The common law defense by which the defendants seek to shield themselves from liability in the present case arises from the maxim *in pari delicto potior est conditio possidentis* [*defendentis*] or "in a case of equal or mutual fault . . . the condition of the party in possession [or defending] is the better one." Black's Law Dictionary 711 (rev. 5th ed. 1979). The defense and the maxim describing it are products of Roman law. *See generally*

1. The plaintiffs have not sought to assert a claim under The North Carolina Securities Act, N.C.G.S. Chapter 78A, nor do they contend on this appeal that any such claim would have merit. We express no view as to whether the plaintiffs might have a claim under that Act.

2. The plaintiffs have argued that there was never any real "inside information" and that they could not therefore have been "tippees."

Grodecki, In Pari Delicto Potior Est Conditio Defendentis, 71 Law Q. Rev. 254 (1955). Under Roman law the defense was limited to contract actions to recover money paid under an illegal or immoral contract. *Id.* In such cases the Roman law left the parties as it found them. This Court and others, however, have not limited the defense to contract actions. In *Lloyd v. R. R.*, 151 N.C. 536, 540, 66 S.E. 604, 605-06 (1909), for example, this Court stated:

> It is very generally held—universally, so far as we are aware—that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the State. In Waite's Actions and Defenses, Vol. 1, p. 43, the principle is broadly stated as follows: "No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which the law declares to be illegal," . . . .

(Citations omitted.) *See also* 37 Am. Jur. 2d *Fraud and Deceit* § 303 (1968). Nevertheless, we reject the defense entirely in the present case.

In their complaint the plaintiffs seek to pursue only claims under North Carolina common law and statutes. Therefore, any question concerning whether the *in pari delicto* defense applies to those claims is a question exclusively of North Carolina law as to which this Court is authoritative and final. *White v. Pate*, 308 N.C. 759, 766, 304 S.E. 2d 199, 204 (1983); *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 610, 304 S.E. 2d 164, 170 (1983). *See Missouri v. Hunter*, 459 U.S. 359 (1983). However, we pay great deference in any event to decisions of the Supreme Court of the United States when they address issues similar to those before us in a given case.

In resolving the questions concerning the applicability of the *in pari delicto* defense to the plaintiffs' state law claims in the present case, we find the reasoning of a recent opinion of the Supreme Court of the United States compelling. In *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. ---, 86 L.Ed. 2d 215, 105 S.Ct. --- (1985), a securities broker and an officer of a corporation were alleged to have fraudulently induced investors to purchase stock in the corporation by divulging false and materially incomplete information about the corporation on the pretext that it was accurate inside information. The investors

brought a private action against the broker and corporate officer in United States District Court alleging that this scheme violated the Securities Exchange Act of 1934 and certain rules promulgated by the Securities and Exchange Commission. The District Court dismissed the complaint on the ground that, because the investors themselves had violated the same laws under which recovery was sought by trading on what they believed was inside information, they were *in pari delicto* with the broker and corporate insider and thus were barred from recovery. The United States Court of Appeals for the Ninth Circuit reversed, concluding that "securities professionals and corporate officers who have allegedly engaged in fraud should not be permitted to invoke the *in pari delicto* doctrine to shield themselves from the consequences of their fraudulent misrepresentations," even though the investors had violated federal securities laws themselves. *Berner v. Lazzaro*, 730 F. 2d 1319, 1320 (9th Cir. 1984). The Supreme Court affirmed.

In its opinion the Supreme Court pointed out that the *in pari delicto* defense traditionally has been narrowly limited to situations in which the plaintiff was *equally* at fault with the defendant. It then rejected the notion that an investor who engages in trading on purported inside information "is necessarily as blameworthy as a corporate insider or broker-dealer who discloses the information for personal gain. Notwithstanding the broad reach of [federal statutes and rules] there are important distinctions between the relative culpabilities of tippers, securities professionals, and tippees in these circumstances." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. ---, 86 L.Ed. 2d 215, 105 S.Ct. --- (1985). The Supreme Court then went on to state:

> Moreover, insiders and broker-dealers who selectively disclose material nonpublic information commit a potentially broader range of violations than do tippees who trade on the basis of that information . . . . *Such conduct is particularly egregious when committed by a securities professional*, who owes a duty of honesty and fair dealing toward his clients. *Cf.* 3 Pomeroy § 942a, at 741. Absent other culpable actions by a tippee that can fairly be said to outweigh these violations by insiders and broker-dealers, *we do not believe that*

> *the tippee properly can be characterized as being of substantially equal culpability as his tippers.*

472 U.S. at ---, 86 L.Ed. 2d at 226-27, 105 S.Ct. at --- (emphasis added).

Based upon the previously quoted reasoning and other factors set forth in its opinion, the Supreme Court held:

> Accordingly, a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

472 U.S. at ---, 86 L.Ed. 2d at 224, 105 S.Ct. at ---.

Although we are in full agreement with most of the reasoning relied upon by the Supreme Court of the United States, we believe that the rule it has adopted will be difficult and impractical to apply in actual cases and will make it almost impossible for attorneys or their clients to know in advance whether any particular actions will give rise to the *in pari delicto* defense. Further, any potential for the application of the defense in cases such as this will give some encouragement to the few dishonest securities professionals to engage in such "particularly egregious" conduct. Based on reasoning similar to that relied upon by the Supreme Court and previously quoted herein, we therefore conclude that the defense has no place in cases such as this. The doctrine of *in pari delicto*, with its complex scope, contents and effects, should not be recognized as a defense to claims under state law concerning securities transactions involving the transfer of purported inside information by corporate insiders or securities professionals to plaintiffs who have acted upon such information for their own gain and suffered damages as a result. *Cf. Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968) ("the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."). Therefore, we hold that with regard to claims under North Carolina law, the fact that a plaintiff has dealt in

securities for gain upon purported inside information will not give rise to the common law defense of *in pari delicto* in an action by such plaintiff against an insider or securities professional providing the information.

For the foregoing reasons, that part of the opinion of the Court of Appeals holding that the trial court erred in failing to dismiss all of the plaintiffs' claims must be and is reversed. We hold that the trial court erred in dismissing any of the plaintiffs' claims on the ground that the doctrine of *in pari delicto* gave rise to an affirmative defense to them.

[2] Having determined that the *in pari delicto* defense has no applicability in the present case, it becomes necessary for us to address an additional issue. The plaintiffs allege among other things that "Defendants' conduct, as alleged, constitutes an unfair and/or deceptive act affecting commerce within the meaning of N.C.G.S. 75-1.1." The plaintiffs contend that they are therefore entitled to recover treble damages under N.C.G.S. 75-16 and reasonable attorneys' fees under N.C.G.S. 75-16.1. The defendants argue on appeal, on the other hand, that securities transactions are beyond the scope of N.C.G.S. 75-1.1. We agree with the defendants.

In *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E. 2d 567 (1978), *cert. denied*, 296 N.C. 583, 254 S.E. 2d 32 (1979), our Court of Appeals held that commodities transactions are not within the scope of N.C.G.S. 75-1.1. The Court of Appeals based its holding on the fact that there existed a "pervasive" federal scheme for regulating commodities transactions. Further, it recognized that application of the statute to commodities transactions would expose a party violating the statute to a host of legislatively created sanctions in addition to those sought in the private action. We find the reasoning of the Court of Appeals in *Hunsucker* persuasive and equally applicable in the present case involving securities transactions. We also think it important that our research reveals no case in which a state court has held that its unfair trade practices act extends to securities transactions.

It is also important to note that N.C.G.S. 75-1.1 is identical to § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). As a result, this Court has held "that federal decisions interpreting the FTC Act may be used as guidance in determining the scope and meaning of G.S. 75-1.1." *Marshall v. Miller*, 302 N.C. 539, 542,

276 S.E. 2d 397, 399 (1981). "Thus, the fact that no federal court decision has applied § 5(a)(1) of the FTC Act to securities transactions is additional evidence of the scope of § 75-1.1." *Lindner v. Durham Hosiery Mills, Inc.*, 761 F. 2d 162, 167 (4th Cir. 1985).

We hold that securities transactions are beyond the scope of N.C.G.S. 75-1.1. We find persuasive the view that our holding in this regard

> is consistent with § 75-1.1's purpose to protect the consuming public, the North Carolina cases holding that other federal or state statutes may limit the scope of § 75-1.1, the absence of any other state court decision holding that securities transactions are subject to a similar Unfair Trade Practices Act, and the absence of any federal court decision holding that securities transactions are subject to § 5(a)(1) of the FTC Act. We do not believe that the North Carolina legislature would have intended § 75-1.1, with its treble damages provision, to apply to securities transactions which were already subject to pervasive and intricate regulation under the North Carolina Securities Act, N.C. Gen Stat. § 78A-1 *et seq.* (1981), as well as the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1982), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982). Furthermore, to hold that § 75-1.1 applies to securities transactions could subject those involved with securities transactions to overlapping supervision and enforcement by both the North Carolina Attorney General, who is charged with enforcing § 75-1.1, and the North Carolina Secretary of State, who is charged with enforcing the North Carolina Securities Act.

761 F. 2d at 167-68.

That part of the decision of the Court of Appeals affirming the trial court's Rule 12(b)(6) dismissal of the plaintiffs' claim for relief under the Unfair Trade Practices Act, N.C.G.S. 75-1.1, must be and is affirmed. As indicated, however, that part of the trial court's order must be affirmed for different reasons than those relied upon by the Court of Appeals. That part of the decision holding that the *in pari delicto* defense required the trial court to dismiss any of the plaintiffs' claims is reversed. This case is remanded to the Court of Appeals for its further remand to the

Superior Court, Durham County for proceedings consistent with this opinion.

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

THOMAS E. OATES AND WIFE, ANITA R. OATES v. JAG, INC.

No. 124PA84

(Filed 13 August 1985)

1. **Negligence § 2; Sales § 6.4— negligent construction of house—third purchaser—recovery in negligence**

A subsequent purchaser can recover in negligence against the builder of the property if the subsequent purchaser can prove that he has been damaged as a proximate result of the builder's negligence.

2. **Negligence § 2; Sales § 6.4— negligent construction of house—third purchaser—defects not obvious**

In an action by the third owner of a house against the builder for negligent construction, the Court of Appeals erred by ruling that the defects were not latent where there were no allegations that the defects were obvious or discoverable and many of the defects listed in the complaint were of such a nature that a jury could find that they would not ordinarily be discovered by a purchaser during a reasonable inspection.

3. **Limitation of Actions § 4.2; Negligence § 2— negligent construction of house—statute of limitations**

The proper statute of limitations to be applied to an action for negligent construction by the third purchaser of a house was G.S. 1-50(5)(a), and plaintiffs' action was not barred by that statute where defendant acquired the unimproved lot on which plaintiff's house was subsequently built on 16 February 1978, defendant constructed the house in which plaintiffs now live and sold it to the first purchaser on 26 October 1978, and plaintiffs filed their complaint on 30 April 1982. Plaintiffs' claim was not barred by the three-year limitation of G.S. 1-52(5) because G.S. 1-50(5)(f) prevents the three-year statute of limitations from accruing until the injury becomes or should reasonably become apparent; plaintiffs purchased their house in 1981 and filed their action in 1982, well within the three year discovery provision and the six-year period from defendant's last act or omission.

ON plaintiffs' petition for discretionary review pursuant to G.S. 7A-31 of a decision of the Court of Appeals, 66 N.C. App. 244, 311 S.E. 2d 369, affirming the order entered by *Smith, J.*, during

the 23 August 1982 Civil Session of WAKE Superior Court, dismissing plaintiffs' action under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Brown & Johnson, by C. K. Brown, Jr., for plaintiff-appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Sanford W. Thompson, IV, and John W. Liles, Jr., for defendant-appellee.

FRYE, Justice.

The precise issue to be answered in this appeal is whether an owner of a dwelling house who is not the original purchaser has a cause of action against the builder and general contractor for negligence in the construction of the house, when such negligence results in economic loss or damage to the owner. We conclude that such a cause of action exists.

On 10 February 1981, the plaintiffs purchased and acquired as tenants by the entirety a dwelling house and lot located in Wake County, North Carolina. This real property was formerly owned by the defendant as unimproved real estate. During the year 1978, the defendant improved the lot by constructing upon it the residence and dwelling house now owned by the plaintiffs. The defendant sold the house and lot to an original purchaser who subsequently sold it to a second purchaser. Plaintiffs purchased the dwelling house from the second purchaser.

According to the allegations in the complaint, the plaintiffs, after moving into the house, "discovered numerous defects, faulty workmanship and negligent construction of the residence," consisting of, among other things, the installation of a drain pipe which had been cut, the failure to use grade-marked lumber, the failure to comply with specific provisions of the North Carolina Uniform Residential Building Code pertaining to certain weight bearing requirements, improper and insufficient nailing on bridging and beams, and faulty and shoddy workmanship. As a result of these specific acts of negligence, plaintiffs alleged they suffered economic loss and were forced to undergo extensive demolition and repair work to correct the defective, dangerous and unsafe

conditions caused by the defendant's negligence. Plaintiffs demanded judgment against defendant in the sum of $25,000.

Defendant answered, denying any negligence, and specifically pleading the "statute of limitations, latches [sic], assumption of risk, accord and satisfaction, and act of God" as affirmative defenses. Defendant furthermore requested that plaintiffs' action be dismissed for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 27 August 1982, Judge Donald L. Smith allowed defendant's motion to dismiss pursuant to Rule 12(b)(6). Plaintiffs appealed to the Court of Appeals. That court concluded that the complaint failed to state a claim upon which relief could be granted on the sole ground that plaintiffs did not buy the home from defendant and that there had never been a contractual relationship between plaintiffs and defendant. From that decision, plaintiffs' petition for discretionary review was allowed by this Court.

A.

[1] We first address the Court of Appeals' decision that plaintiffs' complaint failed to state a valid claim for relief and that dismissal was proper. Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure when one or more of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981); *Schloss Outdoor Advertising Company v. City of Charlotte*, 50 N.C. App. 150, 272 S.E. 2d 920 (1980).

The Court of Appeals premised its decision primarily on the fact that there was an absence of contractual privity between plaintiffs and defendant. That court concluded that because (1) an implied warranty of fitness is available only to the initial vendee against a vendor-builder; (2) North Carolina has not extended products liability negligence concepts to the construction of houses or buildings; and (3) in the purchase of homes and buildings the traditional doctrine of *caveat emptor* applies, there

could be no action in North Carolina by a purchaser of a dwelling house, once removed from the original vendee, against the original builder for negligent construction.

It is generally true that many jurisdictions deny a subsequent purchaser relief against the seller-builder for latent defects based upon a traditional implied warranty theory. *See* 10 A.L.R. 4th 385 (1981) (this annotation collects and analyzes the cases that have adopted differing views regarding the issue of whether an implied warranty should extend from a builder to a remote purchaser with whom the seller-builder has no contractual privity). However, we disagree with the Court of Appeals' reasoning in support of its decision that plaintiffs should be denied relief solely because plaintiffs were subsequent purchasers and lacked contractual privity with defendant-builder.

Plaintiffs' complaint, on its face, is replete with specific allegations of negligence on the part of defendant. The action in the instant case sounds in negligence, not implied warranty. In addressing this same question, a Florida intermediate appellate court stated:

> [T]he absence of contractual privity between plaintiff and defendant does not affect plaintiff's tort claim, provided plaintiff can establish the existence of a duty between the parties, and defendant's breach of such duty, with the proximate result that plaintiff suffered the damages of which it complains . . . .
>
> The duty owed by a defendant to a plaintiff may have sprung from a contractual promise made to another; however, the duty sued on in a negligence action is not the contractual promise but the duty to use reasonable care in affirmatively performing that promise. The duty exists independent of the contract. Existence of a contract may uncontrovertibly establish that the parties owed a duty to each other to use reasonable care in performance of the contract, but it is not an exclusive test of the existence of that duty. Whether a defendant's duty to use reasonable care extends to a plaintiff not a party to the contract is determined by whether that plaintiff and defendant are in a relationship in which the defendant has a duty imposed by law to avoid harm to the plaintiff.

Navajo Circle, Inc. v. Development Concepts Corp., 373 So. 2d 689, 691 (Fla. 2d Dist. Ct. App. 1979) (citations omitted).

Therefore, regardless of the validity of any claim based on breach of an implied warranty, plaintiffs' complaint sufficiently states a claim for negligence. In fact, plaintiffs' complaint alleges five specific violations of the North Carolina Uniform Residential Building Code. The North Carolina Uniform Residential Building Code has been held to have the force of law and a violation thereof is negligence *per se*. *Drum v. Bisaner*, 252 N.C. 305, 113 S.E. 2d 560 (1960); *Sullivan v. Smith*, 56 N.C. App. 525, 289 S.E. 2d 870, *cert. denied*, 306 N.C. 392, 294 S.E. 2d 220 (1982) and cases cited therein.

In *Simmons v. Owens*, 363 So. 2d 142 (Fla. 1st Dist. Ct. App. 1978), plaintiff purchased a home from a seller who had been the original vendee from the vendor-builder. Plaintiff filed a complaint against the original vendor-builder, alleging, *inter alia*, the builder had "negligently constructed the house contrary to the City of Tallahassee Building Code . . ." and that the house contained a latent defect causing damage to plaintiff's home. The trial court dismissed plaintiff's complaint for failure to state a cause of action.

On plaintiff's appeal, the builder argued that the trial court correctly dismissed the complaint because the plaintiff was a remote purchaser and could not sue under a theory of implied warranty. *Id.* at 143. A divided panel of the District Court of Appeals rejected defendant's argument, observing that the defendant had failed "to refer us to a single case which holds that the purchaser of a used home may not sue the contractor for negligent construction where a latent defect causes damage to the house." *Id.* That court reasoned:

> We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy for recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or

> they must accept financial responsibility for their negligence. In our judgment, building contractors should be held to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by their negligence. Prosser, Torts, p. 519 (2d ed. 1955). But this is for our Supreme Court to decide. *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). We urge it to do so.

Id.

Although the Florida Supreme Court does not seem to have addressed the precise question as yet, we are nonetheless persuaded by the reasoning contained in the intermediate appellate court's decision. Indeed, courts in other jurisdictions have recognized a similar rule. *Woodward v. Chirco Construction Co., Inc.*, 141 Ariz. 514, 687 P. 2d 1269 (1984); *Cosmopolitan Homes, Inc. v. Weller*, 663 P. 2d 1041 (Colo. 1983) (dissenting opinion); *Coburn v. Lenox Homes, Inc.*, 173 Conn. 567, 378 A. 2d 599 (1977); *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983) (en banc); *Newman v. Tualatin Development Co., Inc.*, 287 Or. 47, 597 P. 2d 800 (1979); *Terlinde v. Neely*, 275 S.C. 395, 271 S.E. 2d 768 (1980); *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1st Dist. 1969); *Wright v. Creative Corp.*, 30 Colo. App. 575, 498 P. 2d 1179 (1972); *see generally, Annot.*, 10 A.L.R. 4th 385 (1981). The reasoning of the Court in *Simmons* convinces us that a subsequent purchaser can recover in negligence against the builder of the property if the subsequent purchaser can prove that he has been damaged as a proximate result of the builder's negligence.

B.

[2] The Court of Appeals also concluded that the defects in the instant case were not latent. Therefore, it was decided by that court that plaintiffs should be subjected to the maxim of *caveat emptor* or let the buyer beware. *Oates*, 66 N.C. App. at 247, 311 S.E. 2d at 371. This conclusion is justified, the court said, because "[t]he specific defects were obvious or discoverable upon a reasonable inspection by the plaintiffs. . . ." *Oates*, 66 N.C. App. at 248, 311 S.E. 2d at 371. With this, we cannot agree. Nowhere in the pleadings is there any allegation that the defects were obvious or discoverable. In fact, many of the specific defects contained and listed within the complaint are of such a nature that a

jury could find they would not ordinarily be discovered by a purchaser during a reasonable inspection.

[3] In its brief to this court and the Court of Appeals, defendant further argues that plaintiffs' action is barred by G.S. 1-52(5).[1] We disagree. The proper statute to be applied in this case is G.S. 1-50(5)(a),[2] which provides:

> (5)a No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

That statute furthermore provides:

> (5)b For the purpose of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> . . . .
>
> 2. Actions to recover damages for the negligent construction or repair of an improvement to real property.

In the instant case, defendant acquired the unimproved lot on which plaintiffs' house was subsequently built by defendant on 16 February 1978. Thereafter, defendant improved the real estate by constructing on the lot the house in which plaintiffs now live. The house was sold by defendant to the first purchaser on 26 October 1978. Plaintiffs filed their complaint on 30 April 1982. Regardless of which date is selected in this case to determine when the statute begins to run, whether it be 16 February or 26 October 1978, it is abundantly clear that plaintiffs filed their action within six years from either date. Therefore, plaintiffs' action is not barred by the applicable statute of repose.

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1. This statute of limitations applies to actions for criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

2. This statute is more properly labeled a statute of repose. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 202 S.E. 2d 868 (1983).

Defendant also argues that the three-year statute of limitations contained within G.S. 1-52(5) acts as an absolute bar to plaintiffs' claim and that G.S. 1-50(5) cannot revive that claim. This argument lacks merit. G.S. 1-50(5)(f) provides:

> (5)f This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

This subsection does not support defendant's argument. First, subsection (5)f contains a specific discovery provision that operates in conjunction with G.S. 1-52. That discovery provision prevents the three-year statute of limitations from accruing "until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant." In the instant case, the claimant-plaintiffs did not purchase the home until 10 February 1981. Thus, even if plaintiffs should have reasonably discovered the defects on that date and G.S. 1-52 should have then begun to run, plaintiffs would still have had three years from that date to commence an action, or until 10 February 1984, provided that not more than six years had elapsed since the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement by defendant. There are no facts alleged to indicate the later date for determining when the six-year period of repose would begin to run. The house was sold to the first vendees on 26 October 1978, and construction must have begun sometime after defendant purchased the lot in February of that same year. Regardless of the precise date in 1978 when the later act occurred, six years would not terminate until the year 1984. Plaintiffs' complaint was filed and their action commenced in 1982, well within the six-year period of repose. Thus, even if, as defendant contends, G.S. 1-52 is

the proper statute of limitations, plaintiffs would still have timely filed the instant action.

In conclusion, we reject the argument that plaintiffs' claim would be barred by G.S. 1-52(5), since the complaint was filed within three years after the date they purchased the home, the earliest date contained in the record to indicate that the defects could have become apparent to plaintiffs. Nor does G.S. 1-50(5) bar plaintiffs' action because six years had not elapsed since the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement by defendant. Accordingly, the decision of the Court of Appeals must be reversed. The case is remanded to that court for further remand to the trial court for proceedings not inconsistent with this opinion.

Reversed and remanded.

EDNA B. HARRIS v. WILLIAM S. WALDEN AND WIFE, MARY SUE WALDEN

No. 641PA84

(Filed 13 August 1985)

1. **Appeal and Error § 6.8; Rules of Civil Procedure § 56.7— denial of summary judgment—no review after trial on merits**

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

2. **Adverse Possession § 25.2— continuous possession of property—insufficient evidence**

The trial court's finding that "defendants and their predecessor in possession, each individually, actually possessed the tract in dispute continuously and without interruption in a hostile and exclusive fashion openly and notoriously" was unsupported by the evidence where the only evidence of adverse possession by defendants was testimony by the male defendant that he walked the boundaries he claims in 1973 and that his son built a rifle range in the area, but such acts are more in the nature of trespasses than acts of dominion indicating ownership, and where the evidence showed no act of possession by defendants' predecessor other than one instance of timber cutting in 1965.

3. **Adverse Possession § 6— tacking possession—insufficient evidence**

The trial court's findings that defendants and their predecessors were in privity as to "possession and use" of the disputed land and that "use of the

defendants' predecessor lapped with that of the defendant and extended for a period of greater than seven years" were unsupported by the evidence where defendants purchased their land in 1973 and the evidence showed only that defendants' predecessors cut timber from the disputed area in 1965 but there was no evidence of possession of such area by defendants' predecessors between 1966 and 1973.

ON petition by defendants for discretionary review of a unanimous decision of the Court of Appeals, 70 N.C. App. 616, 320 S.E. 2d 435 (1984), reversing the judgment in favor of defendants entered by *Saunders, J.*, on 9 May 1983 in Superior Court, BURKE County. Heard in the Supreme Court 16 May 1985.

Simpson, Aycock, Beyer & Simpson, by Samuel E. Aycock and Michael Doran, for plaintiff appellee.

McMurray & McMurray, by John H. McMurray, for defendant appellants.

MARTIN, Justice.

The first question presented by this appeal is whether the Court of Appeals erred in entering parital summary judgment for plaintiff. Plaintiff's motion for summary judgment was denied by Judge Grist, and the case proceeded to trial where judgment was entered for the defendants. We find that the Court of Appeals erroneously entered partial summary judgment for the plaintiff, and we therefore reverse the decision of the Court of Appeals.

Secondly, after reviewing the findings of fact to which plaintiff excepted, we find the trial judge's conclusion that defendants acquired title to the disputed land by adverse possession for seven years under color of title is not supported by the evidence and findings of fact. Because several of the findings made by the trial judge were in error, we find that plaintiff is entitled to a new trial.

The plaintiff, Edna Harris, and the defendants, William S. Walden and wife, Mary Sue Walden, own contiguous tracts of land in Burke County. The deeds held by both plaintiff and defendants contain a description of an overlap area of approximately fourteen acres. On 27 January 1981, Mrs. Harris brought the present action against the Waldens, seeking to quiet title to the overlap area and to recover damages for trespass. The Waldens

filed an answer and counterclaim alleging superior legal title to the overlappage and, alternatively, claiming ownership by adverse possession. Plaintiff's motion for partial summary judgment was denied by Judge Grist. Judge Saunders, sitting without a jury, found that although plaintiff possessed superior record title, the defendants were entitled to ownership of the lappage due to adverse possession for seven years under color of title. The Court of Appeals held that plaintiff, by establishing a marketable title pursuant to N.C.G.S. 47B-2(a), had presented prima facie evidence of ownership which the defendants had the burden to rebut by coming forward with evidence of adverse possession. The court further held that defendants' failure to support their claim of adverse possession by the factual showing required under Rule 56 of the North Carolina Rules of Civil Procedure entitled the plaintiff to summary judgment. The Court of Appeals reversed the decision of the trial judge and remanded the case to the superior court for entry of partial summary judgment as to ownership and for trial on the issue of damages.

The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972). After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury.

[1] The denial of a motion for summary judgment is an interlocutory order and is not appealable. An aggrieved party may, however, petition for review by way of certiorari. *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. rev. denied*, 302 N.C. 217 (1981). To grant a review of the denial of the summary judgment motion after a final judgment on the merits, however, would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict. This would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. Support for

our holding is found in *MAS Corp. v. Thompson*, 62 N.C. App. 31, 302 S.E. 2d 271 (1983); *Oil Co. v. Smith*, 34 N.C. App. 324, 237 S.E. 2d 882 (1977); *Boyles Galvanizing & Plating Co. v. Hartford Acc. & Ind. Co.*, 372 F. 2d 310 (10th Cir. 1967); *Home Indemnity Co. v. Reynolds & Co.*, 38 Ill. App. 2d 358, 187 N.E. 2d 274 (1962); Annot., 15 A.L.R. 3d 899, 922 (1967).

We find that the Court of Appeals improperly reviewed the denial of the summary judgment by the trial court and therefore improperly entered partial summary judgment for the plaintiff. Accordingly, we reverse the decision of the Court of Appeals.

The second issue we must address is whether the judgment in favor of defendants entered by the trial judge was supported by sufficient evidence presented at trial. Among the findings of fact made by Judge Saunders are the following:

> 15. The property descriptions in Plaintiff's Exhibit 1 and Defendants' Exhibit 1 conflict, creating a lappage according to surveyor, Chiswell, of some 14.94 acres.
>
> 16. The tract in dispute, topographically, is rolling, hilly land with slopes from 10 to 30 degrees.
>
> 17. It is suitable for timbering, hunting, or gathering firewood. It is not arable.
>
> 18. In 1965 the defendants' predecessor in title and grantor, who resided on the property of which the defendants claim the disputed tract is a part, employed a timber cutter, Doyle Gragg.
>
> 19. Witness Gragg testified that he cut timber up to the line he understood to be the property line for the defendants' grantor, said line being bounded by Point 4 to Point 1 to Point 2 and 3.
>
> 20. Gragg cut this timber for three months in 1965 and saw the plaintiff's husband on several occasions as he cut, conversed with him, cut to the described line, and was not ordered off that land.
>
> . . . .
>
> 22. Plaintiff offered Plaintiff's Exhibit 26 which was a recorded boundary line agreement, filed in Burke County, to

which the plaintiff was a signatory in 1961, settling a boundary line agreement with adjacent neighbors, not the present parties-defendant or their grantors, which noted in the duly recorded boundary line deed agreement that the "commonly understood" line separating the plaintiffs and defendant grantor's property was from Point 4 to Point 1.

. . . .

27. Defendant Walden, who resides on the property adjacent to the disputed tract which he claims, testified that he had walked the property line of the disputed tract; that his son had set up a rifle range in the area and shot into the disputed tract; that he has cut firewood on the tract, hunted it, and posted it; and that he has asked people who were not invited to leave it.

28. In 1979 the defendant cut the timber on the property to the line extending from Point 4 to Point 1.

29. He did this despite a letter from an attorney hired by the plaintiff to protest this action.

30. In 1979 he blazed the line, and in this year refused to permit a surveyor employed by the plaintiff to survey the tract.

31. The plaintiff waited until January 1981, to file the lawsuit.

32. The defendants' deed, Defendants' Exhibit 1, is a muniment of title, constituting color of title.

33. The property claimed by the defendants under color of title, plus seven years, is included within a tract claimed by the plaintiff who has marketable title.

34. The defendants have the junior claim in this lappage, the plaintiff has the senior claim.

35. The defendants and their grantor are in privity, both as to identity of property description and possession and use to the defendants' tract bounded and inclusive of Point 5 to Point 4 to Point 1 to Point 2 to Point 3.

36. The defendants and their predecessor in possession made such use of the disputed tract to which it was susceptible.

37. The defendants and their predecessor in possession, each individually, actually possessed the tract in dispute continuously and without interruption in a hostile and exclusive fashion openly and notoriously.

38. The use of the defendants' predecessor lapped with that of the defendant and extended for a period of greater than seven years.

Judge Saunders thereupon concluded "that the defendants are entitled to a Judgment based upon a superior claim arising out of color of title and adverse possession for a period of greater than seven years, having proved that entitlement by the greater weight of the evidence."

Plaintiff excepts to findings of fact 17, 18, 19, 22, 35-38, and the court's conclusion of law. 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 court's findings support its conclusion of law. *Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 328 S.E. 2d 282 (1985).

Finding of fact 17 states that the land is suitable for timbering, hunting, or gathering firewood, but that it is not arable. The evidence offered at trial established that the disputed land was "rolling, hilly land with slopes from 10 to 30 degrees" but failed to show that the land was unfit for cultivation. Therefore, the finding that the land is not arable is unsupported by competent evidence.

Plaintiff excepted to that portion of finding of fact 18 which states that "defendants' predecessor in title," T. M. Kincaid, "resided" on the land in question. The record fails to indicate whether his residence was located on the disputed land. While this portion of finding of fact 18 is unsupported by the evidence at trial, the rest of the finding, which states that Kincaid hired Doyle Gragg to cut timber in 1965, is supported by Gragg's own testimony.

Because plaintiff's exception to finding of fact 19 was not argued in her brief, we find the exception to be waived. N.C.R. App. P. 10(a).

In finding of fact 22 the trial court found that a 1961 boundary line agreement between plaintiff and an adjoining neighbor established a "commonly understood" boundary line between plaintiff's land and that of the defendants. After careful review of the agreement, we conclude that this finding is unsupported by the evidence presented at trial. The dashed line shown on the survey map which is a part of the agreement, and which line defendants claim to be the "commonly understood" boundary line, appears to have been made in order to establish the location of a concrete monument by way of reference to a steel pin located approximately seventy feet to the north of the monument. The line defendants would have us recognize as the boundary between their land and that of Mrs. Harris was only for the purpose of establishing the situs of points found in the boundary line agreement. Nothing in the exhibit supports a finding that it was a commonly understood boundary line between the parties.

Findings of fact 35-38 deal with defendants' claim of title by adverse possession. These findings, however, are not specific findings of fact based on evidence but are actually conclusions of law.

In *Locklear v. Savage*, 159 N.C. 236, 237-38, 74 S.E. 347, 348 (1912), Justice Walker succinctly defined adverse possession as follows:

> What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner.

[2] Defendants purchased their property in 1973. The plaintiff instituted this lawsuit in January of 1981. The only evidence of adverse possession offered by defendants prior to the year 1975 was Mr. Walden's testimony that he walked the boundaries he claims in 1973 and that his son built a rifle range in the area. There was no evidence presented that the rifle range was located on the disputed property, and in fact plaintiff's surveyor testified that it appeared to be located to the west of the claimed boundary line. Under the facts of this case, these acts are more in the nature of trespasses than acts of dominion indicating ownership. In addition, the evidence showed no act of possession by defendants' predecessors other than one instance of timber cutting in 1965. Therefore, finding 37, which states that "[t]he defendants and their predecessor in possession, each individually, actually possessed the tract in dispute continuously and without interruption in a hostile and exclusive fashion openly and notoriously," is based on an insufficient showing of the evidence.

[3] T. M. Kincaid and wife were the immediate predecessors in title to the defendants. In 1965 T. M. Kincaid cut timber from the disputed area. The evidence at trial failed to show any act of possession of the disputed property on the part of the Kincaids at any time prior to 1965 or between 1966 and 1973. Because there was no evidence of possession of the disputed property by the Kincaids between 1966 and 1973, it was error for the trial judge to find that the Waldens and T. M. Kincaid were in privity as to "possession and use" of the disputed property. *Vanderbilt v. Chapman*, 172 N.C. 809, 90 S.E. 993 (1916). For the same reason, it was error for the court to find that "[t]he use of the defendants' predecessor lapped with that of the defendant and extended for a period of greater than seven years." Given the absence of any evidence of possession for a period of seven years prior to the conveyance by the Kincaids to defendants, there is no way for the Kincaids' period of use in 1965 to be tacked onto that of the defendants. *Paper Company v. Jacobs*, 258 N.C. 439, 128 S.E. 2d 818 (1963). Findings 35 and 38 are thus unsupported by the evidence as offered at trial.

Because there was no evidence offered at trial tending to show the use to which the disputed tract was susceptible, finding 36 was also made in error. The evidence showed only that the land was rolling, hilly land with slopes from 10 to 30 degrees.

Such a description fails to indicate the use which could be made of the land.

Based on our review of the record and the arguments of counsel, we conclude that the contested findings of fact made by the trial court are not supported by sufficient evidence; therefore, the court's conclusion that defendants are entitled to the disputed land by virtue of adverse possession for seven years under color of title is not supported by the findings of fact. Accordingly, we find that the judgment entered in favor of the defendants was in error and that plaintiff is entitled to a new trial.

As plaintiff is being granted a new trial on the basis of error in the above findings, we find it unnecessary to discuss plaintiff's assignment of error concerning findings of fact not made by the trial judge.

For the foregoing reasons, the decision of the Court of Appeals is reversed and the case is remanded to that court for further remand to the Superior Court, Burke County, for a

New trial.

STATE OF NORTH CAROLINA v. KENNY DAMPIER

No. 505A84

(Filed 13 August 1985)

1. Criminal Law § 75.8— interrogation by Georgia officers—invoking right to counsel—subsequent initiation of interrogation by North Carolina officers

Where defendant invoked his Fifth Amendment right to counsel in the presence of Georgia authorities while being questioned about crimes in Georgia, North Carolina officers were not charged with defendant's request for counsel made to the Georgia authorities when they questioned defendant about unrelated crimes committed in North Carolina, and their initiation of questioning of defendant about the North Carolina crimes did not violate the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). Furthermore, under the totality of the circumstances, defendant's incriminating statements about the North Carolina crimes, made after appropriate Miranda warnings, were voluntarily and knowingly made.

2. Criminal Law § 75.4— interrogation of defendant—no Sixth Amendment right to counsel

Although the State had "narrowed its focus" upon defendant when North Carolina officers questioned defendant in Georgia about crimes committed in North Carolina, defendant's Sixth Amendment right to counsel had not attached when he was questioned about the North Carolina crimes where it is apparent that the State had not at that time committed itself to prosecute.

BEFORE *Albright, J.*, at the 2 April 1984 Criminal Session of Superior Court, DAVIDSON County, defendant was convicted of two counts of first-degree murder. From a sentence of two consecutive life terms, defendant appeals as a matter of right. N.C.G.S. § 7A-27(a).

On 10 February 1977 the bodies of 66-year-old Myrtis Miller and her three-year-old granddaughter, Crystal Dawn Miller, were found in their Lexington, North Carolina home. In addition to having had their throats cut, both had been beaten and repeatedly stabbed. From 12 February 1977 until sometime before his 4 April 1984 conviction for these murders, defendant was in the custody of the Georgia Department of Corrections serving a prison sentence following a guilty plea to first-degree murder for a killing that occurred in Georgia on 9 February 1977.

At trial, counsel for defendant moved to suppress any statements that defendant may have given as violative of the fifth and sixth amendments to the United States Constitution made applicable to the states through the fourteenth amendment. Because the State failed to give advance written notice of its intent to offer defendant's statement against him, the trial judge conducted a voir dire hearing at trial on the admissibility of defendant's confession. At the conclusion of that hearing the trial court overruled defendant's motion to suppress.

Lacy H. Thornburg, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Charles H. Harp, II, Attorney for defendant-appellant.

MEYER, Justice.

Defendant raises one issue on appeal to this Court: whether defendant's confession should have been suppressed as violative of defendant's fifth, sixth, and fourteenth amendment rights to

counsel as guaranteed by the United States Constitution. For the reasons stated herein, we have concluded that defendant's statement was properly admitted into evidence and we therefore find no error.

Based on testimony presented during the voir dire hearing, the trial judge made extensive findings of fact. Those findings may be summarized as follows:

At about 6:30 a.m. on 12 February 1977, defendant was arrested in a Savannah, Chatham County, Georgia hotel pursuant to Georgia warrants charging auto theft, armed robbery, and first-degree murder. Upon his arrest, defendant was advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). Defendant was neither interrogated nor did he make any statement following his arrest. At 10:05 a.m. that same morning, defendant was re-advised of his constitutional rights and informed of the Georgia charges being brought against him. At that time, defendant invoked his right to have counsel present during further custodial interrogation. Defendant's right not to be further questioned was "scrupulously honored by the Georgia officers," and the interrogation immediately ceased. The Georgia authorities neither attempted to question, nor in fact did they question, defendant about the North Carolina crimes as they were unaware of them at the time.

Pursuant to investigative leads derived from Chatham County District Attorney Andrew Ryan, authorities from North Carolina arrived in Savannah on 13 February 1977. This investigative team consisted of Davidson County Sheriff Paul McCrary, SBI Special Agent John Burns, Davidson County District Attorney H. W. Zimmerman, and former Davidson County Chief Deputy Jack Everhart. At about 6:00 p.m. that afternoon, Sheriff McCrary and Agent Burns requested that "if possible" defendant be brought from his jail cell to an interview room. After defendant was seated, the sheriff informed him of the meeting's purpose: to gather information concerning the Davidson County murders. Sheriff McCrary then "carefully warned" defendant of the same constitutional rights read to him the day before by Georgia authorities. Each right was read to defendant and he in turn read each right to himself and acknowledged an understanding thereof.

Subsequently, Sheriff McCrary read to defendant the following "waiver of rights":

> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Defendant immediately acknowledged an understanding of this waiver and signed the written waiver form. In addition, the trial judge found that somewhere in this process, "the defendant of his own volition and not in response to any question propounded by the Sheriff or Agent Burns made the statement [that] his 'conscience was bothering him in regard to the little girl.'"

Immediately after signing the waiver of rights form, defendant gave an oral statement to the officers concerning the North Carolina murders. That statement was reduced to writing, and after having read it completely, defendant signed it. In corroboration of his statement, defendant drew a map of the Davidson County residence, including the specific location of the Millers' bodies. At no time during the interrogation by Sheriff McCrary and Agent Burns did defendant attempt to invoke either his right to remain silent or his right to counsel.

Defendant contends that the confession given to North Carolina authorities is governed by the rule articulated in *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981), and should have been suppressed. The trial court concluded as a matter of law that "it was not constitutionally impermissible for Sheriff McCrary and Agent Burns to question the defendant about the Davidson County murders, notwithstanding the fact that the defendant had earlier invoked his right to remain silent and his right to have counsel present during custodial interrogation, during questionning [sic] by the Chatham County police officers regarding unrelated criminal charges in Chatham County, Georgia." We agree. Facts found by the trial courts are binding on the appellate courts when supported by competent evidence, but the conclusions drawn therefrom are not binding and are reviewable. *State v. Booker*, 306 N.C. 302, 293

S.E. 2d 78 (1982); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968).

[1] Our first concern, and one raised by the State, is whether the rule in *Edwards* should be applied retrospectively to the case *sub judice*. We note that *Edwards* was decided some four years after defendant was questioned in Georgia, yet some three years before he was tried in a North Carolina court. The State asks that we apply the reasoning of *Solem v. Stumes*, 465 U.S. 638, 79 L.Ed. 2d 579 (1984), which holds that reliance on *Edwards* by federal courts is misplaced when undertaking collateral review of police conduct prior to that decision. The Supreme Court has subsequently held, however, that *Edwards* does apply to cases pending on direct appeal when the rule was announced. *Shea v. Louisiana*, --- U.S. ---, 84 L.Ed. 2d 38 (1985). *Edwards* was decided in 1981. The questioning and indictment of Dampier took place in 1977 and his case was not tried until 1984. Because of the particular chronology of this case this Court might avoid addressing the *Edwards* issue altogether. However, because we believe *Edwards* is inapplicable for reasons other than chronology, we address that issue.

In *Edwards*, the defendant was arrested, taken to a police station, advised of his *Miranda* rights and questioned. After initially denying any criminal involvement, Edwards sought to make a deal but stated, "I want an attorney before making a deal." Questioning immediately ceased and Edwards was sent to jail. The next morning, two detectives from the same police agency sought to question Edwards about the same crimes for which he had earlier asserted his fifth amendment right to counsel. Although Edwards told the jailer he did not wish to talk to anyone, he was told he "had to" talk. After hearing the taped statement of an accomplice, defendant then implicated himself in the suspected crime. Evidence concerning Edwards' confession was admitted at trial, and he was convicted.

The United States Supreme Court found that Edwards' fifth amendment right to counsel had been violated and held that:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an ac-

> cused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. (Footnote omitted.)

Edwards, 451 U.S. at 484-85, 68 L.Ed. 2d at 386. More recently, the Supreme Court stated that *Edwards* established "in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044, 77 L.Ed. 2d 405, 411 (1983) (plurality opinion).

Because of factual distinctions, however, the rule in *Edwards* is inapplicable to the case at bar. In *Edwards*, the defendant's subsequent interrogation was conducted by officers from the same agency as those to whom he had earlier requested an attorney, and the inculpatory statement given by him involved the same crime for which his right to counsel was previously invoked. In contrast, this defendant invoked his right to counsel only in the presence of Georgia authorities. The subsequent interrogation was by North Carolina authorities and the ensuing inculpatory statement involved crimes wholly separate from those for which he previously invoked his right to counsel. The trial court specifically found that:

> 41. The interrogation by Sheriff McCrary and Agent Burns was not a continuation or resumption of the interrogation initiated by the Georgia officers and did not in any way constitute a re-interrogation on the Georgia cases; rather, the interrogation by Sheriff McCrary and Agent Burns was independent and unrelated to the Georgia cases, and instead focused exclusively on the Davidson County murders, crimes different in time and place of occurrence from the Chatham County cases for which the defendant had been arrested and initially interrogated by the Chatham County authorities.

We find these factual distinctions, as did the trial court, too significant to require application of the *Edwards* rule. *See McFadden v. Commonwealth*, 225 Va. 103, 300 S.E. 2d 924 (1983) (questioning of defendant properly initiated by officers who had no knowledge of defendant's prior exercise of fifth amendment right

to counsel toward officers from different jurisdiction regarding other remote incidents of crime); *State v. Willie*, 410 So. 2d 1019 (La. 1982) (defendant's refusal to answer FBI agent's questions about federal crimes without an attorney should not be construed as a per se invocation of his fifth amendment right as to independent state offenses so as to require all interrogation as to the latter to cease). *But see United States v. Scalf*, 708 F. 2d 1540 (10th Cir. 1983) (once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect); *State v. Routhier*, 137 Ariz. 90, 669 P. 2d 68 (1983), *cert. denied*, 464 U.S. 1073, 79 L.Ed. 2d 221 (1984) (factual distinction as to unrelated subject matter does not hold any legal significance for fifth amendment purposes).

Furthermore, we find that the strictures of *Miranda* do not as a matter of law require us to reach the result urged by defendant. In *Miranda*, the Supreme Court held that:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. . . . The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

384 U.S. at 444-45, 16 L.Ed. 2d at 706-07. The procedural safeguards formulated by *Miranda* were designed to dispel the compulsion inherent in custodial interrogation. *Id.* at 457, 16 L.Ed. 2d at 713. It is undeniable that defendant invoked his right to counsel to Georgia authorities regarding the Georgia crimes being investigated by them. However, it is equally undeniable that defendant, after appropriate *Miranda* warnings, failed to invoke any of his fifth amendment rights in the presence of the North Carolina officers. The trial judge specifically found that defendant "knew full-well all of his constitutional rights, including his right to remain silent and his right to have counsel present during custodial interrogation." During the interrogation by the North

Carolina officers, defendant, with full knowledge of his fifth amendment rights, chose not to invoke them.

Based on our reading of the record, it is apparent that both the North Carolina and Georgia authorities handled their investigations with adequate regard for defendant's constitutional rights, especially in view of the fact that the *Edwards* decision was still some four years away. The voir dire testimony supports the trial judge's findings of fact which in turn support his conclusions of law. We hold that under the facts of this case, the North Carolina officers were not charged with defendant's request for counsel made to Georgia authorities concerning unrelated Georgia offenses and that their initiation of questioning was not prohibited. Consequently, we find no violation of defendant's fifth amendment rights under the *Edwards* rule.

Having found no violation of the *Edwards* rule, we must next determine whether under the totality of the circumstances defendant's statement was voluntarily and knowingly made. *State v. Schneider*, 306 N.C. 351, 293 S.E. 2d 157 (1982); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511. "[T]he burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Bradshaw*, 462 U.S. at 1044, 77 L.Ed. 2d at 412.

It is evident from the findings of fact summarized above that defendant fully understood both his constitutional rights and the written waiver of those rights which he signed. The trial court also found that defendant was in full control of his mental and physical faculties when he made his statement and that no one threatened him or promised anything in return for the statement. The trial court concluded that defendant made his statement "freely, voluntarily, and understandingly, without duress, coercion, or inducement, and after affirmative waiver by the defendant in writing of his constitutional rights. . . ." This conclusion is fully supported by the findings of fact which are based on competent testimony. Therefore, we hold that under the totality of the circumstances defendant did knowingly and voluntarily waive his fifth amendment right to have counsel present during custodial interrogation before he made any statements to the North Carolina officers.

[2] Defendant also asserts that his sixth amendment right to counsel had attached at the time he was questioned by authorities from North Carolina and that this right was violated when defendant was questioned in the absence of counsel. We find no merit in this contention. It is well-settled that the sixth amendment right to counsel attaches only upon the initiation of adversary judicial criminal proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed. 2d 411 (1972); *State v. Baugus*, 310 N.C. 259, 311 S.E. 2d 248, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 76 (1984). "It is only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and immersed in the complexities of a formal criminal prosecution that the sixth amendment right to counsel is triggered as a guarantee." *State v. McDowell*, 301 N.C. 279, 289, 271 S.E. 2d 286, 293 (1980), *cert. denied*, 450 U.S. 1025, 68 L.Ed. 2d 220, *reh'g denied*, 451 U.S. 1012, 68 L.Ed. 2d 865 (1981).

Although the State had "narrowed its focus" upon defendant when questioned in Georgia, it is apparent that the State had not committed itself to prosecute. Indeed, the record shows that defendant was not indicted for the North Carolina murders until 14 February 1977, the day after he was questioned about them. Furthermore, counsel was not appointed to represent defendant in North Carolina until 10 June 1983. Therefore, we hold that defendant's sixth amendment right to counsel had not attached when he was questioned by the North Carolina authorities about the offenses for which he was later convicted.

For the foregoing reasons, we find

No error.

STATE OF NORTH CAROLINA v. JERRY ARNOLD

No. 357A84

(Filed 13 August 1985)

1. **Rape and Allied Offenses § 4.1— first degree sexual offense against nine-year-old boy—other acts admissible**

In a prosecution for committing a first degree sexual offense against a nine-year-old boy, there was no error in admitting testimony concerning sexual acts other than the crime charged where the testimony clearly tended to prove that the defendant engaged in a scheme whereby he took sexual advantage of the availability and susceptibility of his young nephews each time they were left in his custody.

2. **Rape and Allied Offenses § 6; Criminal Law § 95.1— first degree sexual offense against nine-year-old boy—testimony of other acts—no limiting instruction**

In a prosecution for a first degree sexual offense with a nine-year-old boy where testimony of other sexual acts was admitted to show a common scheme or plan, there was no error in failing to give a limiting instruction because defendant failed to request the instruction or to object to the instructions given. N.C. Rules of App. Procedure 10(b)(2).

3. **Rape and Allied Offenses § 4.1— first degree sexual offense—testimony of another act excluded after similar testimony admitted—no error**

In a prosecution for a first degree sexual offense against a nine-year-old boy, there was no prejudice where the court permitted testimony of other similar sexual offenses, then interrupted testimony of another similar offense and instructed the jury that it was not to consider that testimony.

4. **Criminal Law § 95.1— objection sustained and motion to strike allowed—no error in not instructing jury to disregard testimony**

The trial court did not err in a prosecution for a first degree sexual offense against a nine-year-old boy by not instructing the jury ex mero motu to disregard testimony to which it had sustained an objection and allowed a motion to strike.

5. **Constitutional Law § 30; Criminal Law § 87— first degree sexual offense—testimony of codefendant pursuant to plea bargain—no written notice**

The trial court did not err in a prosecution for a first degree sexual offense against a nine-year-old boy by permitting a codefendant to testify pursuant to a plea arrangement without the written notice required by G.S. 15A-1054(c). The remedy for a violation of this requirement is a recess; here, the court ordered a ten minute recess even though defendant neither objected nor requested a recess.

6. **Rape § 4.1; Criminal Law § 87— first degree sexual offense—testimony not too vague or indefinite**

In a prosecution for a first degree sexual offense against a nine-year-old boy, testimony by a codefendant who was allowed to plead guilty to a lesser offense was not so vague and indefinite that it should have been excluded.

7. **Criminal Law § 158.2— judge leaving courtroom during closing arguments—not reflected in record—arguments not recorded—no error**

In a prosecution for a first degree sexual offense against a nine-year-old boy, defendant's contention that the trial judge erred by leaving the courtroom during closing arguments was not properly before the court where there was nothing in the record to show that the judge did in fact leave the courtroom; furthermore, the arguments were not recorded, the Court could not say that anything transpired which harmed defendant, and the arguments of counsel are presumed proper.

APPEAL by the defendant from a judgment of *Judge Charles B. Winberry* entered February 8, 1984, in Superior Court, ONSLOW County.

The defendant was tried on an indictment, proper in form, charging him with committing a sexual offense with a nine-year-old boy. The defendant pleaded not guilty. The jury found him guilty of first degree sexual offense, and he was sentenced to the mandatory term of life imprisonment by the trial court. He appealed to the Supreme Court as a matter of right under N.C.G.S. 7A-27(a).

Lacy H. Thornburg, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for the State.

Popkin and Coxe, P.A., by Samuel S. Popkin, for the defendant appellant.

MITCHELL, Justice.

The defendant brings forward several assignments of error in which he argues that certain evidence was improperly admitted. He also contends that the trial court committed prejudicial error by leaving the courtroom during the final arguments to the jury by counsel. The defendant also contends that the trial court erred in permitting the prosecutor during her argument to refer to the fact that he had brought a Bible into the courtroom. These assignments and contentions are without merit.

The State presented evidence which tended to show that the defendant, Jerry Arnold, is the uncle of the victim of the crime charged, Douglas Davis. About May 30, 1983, Douglas, who was then nine years old, and his two brothers, twelve-year-old David and seven-year-old Eric, went to the defendant's trailer to watch a movie on cable television. Walter Barlowe, the boys' half-cousin, was also at the trailer. Douglas testified that while they were all watching the movie, the defendant stated to him that his brothers had been "doing something" with him and that he wanted Douglas to do it also. Douglas, Barlowe and the defendant then went into the bedroom. The defendant then ordered Douglas to perform fellatio on him. Douglas complied with the demand. He was also told to perform fellatio on Barlowe, which he did.

The defendant then called Eric into the bedroom. He told Eric to perform fellatio on him, and Eric did. Douglas then was again ordered to and did perform fellatio on both the defendant and Barlowe. Douglas testified that the defendant threatened that he would do "bad things" to him if he told anyone about what had occurred.

Sometime after these events, Douglas once again went to the defendant's trailer to watch a movie. Douglas testified that while he was using the bathroom, the defendant came in and forced him to perform fellatio. Douglas testified that the defendant then told him that "Every time we met like that, I got to suck it." Douglas also stated that at a time subsequent to the events in the trailer, he and his brothers were out by the defendant's turkey pen. The defendant came up and ordered them to pull their pants down so that he could "look." Both Eric and Douglas told their mother about what had transpired at the trailer.

David Davis, the victim's older brother, testified that sometime around May 30 he, his two brothers, Walter Barlowe and the defendant were watching a movie in the defendant's trailer. At some point during the afternoon Douglas, Eric, Barlowe and the defendant went into the back bedroom and stayed for about ten minutes. David also testified concerning a trip he took with the defendant to New Bern. He stated that on the way to New Bern the defendant ordered him to pull down his pants. When he refused the defendant pulled them down himself and fondled David's penis. David also testified that once when he was

in the defendant's trailer, both the defendant and Walter Barlowe fondled his penis. He also corroborated Douglas's account of the incident at the turkey pen.

Patricia Davis, the boys' mother, testified that as a result of overhearing a conversation between the boys, she questioned them concerning possible sexual activity. Eventually the boys admitted that the defendant and Barlowe had engaged in sexual acts with them. She testified that when asked why they had not informed her of this sooner, the boys told her that the defendant had threatened them.

Walter Barlowe testified for the State pursuant to a plea arrangement. He stated that sometime near the end of May he was in the defendant's trailer watching a movie on cable television with the defendant and the Davis brothers. The defendant told Douglas and Eric to go into a bedroom. Douglas was then instructed to perform fellatio on both the defendant and Barlowe. Barlowe testified that he believed Eric performed fellatio on the defendant also. He further testified that on previous occasions, he and the defendant had engaged in sexual activities with one another.

The defendant testified in his own behalf. He denied ever engaging in any sexual acts with the Davis brothers or with Walter Barlowe. He further testified that he was involved in other activities at the time of the alleged incident at the trailer. Specifically, he testified that on May 29 he drove his daughter to camp in Arapahoe, North Carolina. He stated that he did not return from this trip until after dark. The next day he drove back to the camp to take some items to his daughter. Three of the defendant's nieces accompanied him. He returned sometime between 4:00 and 5:00 p.m. and then drove to Jacksonville to fill a prescription for his son. The defendant produced several witnesses, including his daughter, his son and two of the nieces who corroborated his testimony. Several witnesses testified as to the good character and reputation of the defendant.

At the close of all the evidence, the defendant moved to dismiss the charge against him. The motion was denied, and the case was submitted to the jury. The defendant was found guilty and sentenced to the mandatory term of life imprisonment.

[1] The defendant initially contends that the trial court erred in allowing Douglas and David to testify about sexual acts other than the crime charged that the defendant had committed against them and their brother Eric. The trial court did not err by admitting this testimony.

As a general rule the State is not permitted to introduce evidence tending to show that a defendant has committed an independent offense even though it is of the same nature as the charged offense. *State v. Moore*, 309 N.C. 102, 305 S.E. 2d 542 (1983); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In *McClain* Justice Ervin writing for the Court enumerated eight exceptions to this general rule. The sixth exception is as follows:

> Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

240 N.C. at 176, 81 S.E. 2d at 367. This Court has been quite "liberal in admitting evidence of similar sex crimes" under this exception. *State v. Effler*, 309 N.C. 742, 748, 309 S.E. 2d 203, 207 (1983). We have held specifically admissible evidence showing other similar sex crimes committed by the defendant against the same victim. *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Hobson*, 310 N.C. 555, 313 S.E. 2d 546 (1984). The trial court did not err in permitting Douglas to testify as to the other sexual acts committed by the defendant against him.

Douglas's testimony that the defendant forced Eric to perform fellatio on him and David's testimony that the defendant engaged in sexual acts with him were also admissible under the common plan or scheme exception set forth in *McClain*. This testimony clearly tended to prove that the defendant engaged in a scheme whereby he took sexual advantage of the availability and susceptibility of his young nephews each time they were left in his custody.

[2] The defendant also contends that even if the disputed testimony was admissible under *McClain*, the trial court erred by failing to instruct the jury that the evidence could only be considered for the purpose of showing a common scheme or plan. The

defendant failed to request such an instruction or to object to the instructions given by the trial court and therefore waived the right to raise this issue on appeal. N.C. R. App. P. 10(b)(2). The failure to give such a limiting instruction is not "plain error" as set forth in *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983).

[3] The defendant notes that at one point when David began to testify concerning still another incident involving himself and the defendant, the trial court interrupted and instructed the jury that it was not to consider this testimony and allowed a motion to strike. The defendant says that this action was inconsistent with the trial court's prior rulings regarding testimony of similar sexual acts committed by the defendant. The defendant, however, could not possibly have been prejudiced by this later ruling, since it excluded evidence against him.

[4] The defendant next contends that the trial court erred on two occasions in failing to instruct the jury *ex mero motu* to disregard testimony to which it had sustained an objection and allowed a motion to strike. The defendant did not request that the trial court so instruct the jury on either occasion. In light of the fact that the objections were sustained and the motions to strike were allowed promptly in the presence of the jury, the jurors must have been aware that the questions and answers were not to be considered by them. *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966). Under such circumstances the trial court was not required to specifically instruct the jury *ex mero motu* that it is not to consider the testimony. *See State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974); *State v. Phillips*, 5 N.C. App. 353, 168 S.E. 2d 704 (1969). Moreover, in its charge to the jury, the trial court specifically instructed the jury that it must disregard any evidence to which an objection had been sustained or a motion to strike allowed.

[5] In his next assignment the defendant contends that the trial court erred in permitting Walter Barlowe to testify against him. Prior to trial the prosecutor agreed to reduce the charge against Barlowe to one of second degree sexual offense in exchange for his pleading guilty and giving truthful testimony. N.C.G.S. 15A-1054(c) provides:

> When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of

> the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

It is undisputed that the State failed to comply with the statutory requirement to give the defendant written notice that a plea arrangement had been made whereby Barlowe would be permitted to plead guilty to the reduced charge in exchange for his truthful testimony against the defendant. The failure of the State to comply with this requirement did not, however, compel the suppression of the testimony. Instead the remedy for such a violation is for the trial court to grant a recess upon motion by the defendant to permit the defendant to prepare to cross-examine the witness. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982); *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978). Here, the defendant neither objected nor requested a recess. The trial court nevertheless ordered a ten minute recess. The defendant neither objected to the length of the recess nor requested additional time to prepare his cross-examination of Barlowe. The defendant has shown no error by the trial court concerning this testimony.

[6] The defendant next contends that the trial court erred in admitting certain testimony by Barlowe concerning sexual acts he witnessed between the defendant and Eric. After testifying that Douglas had performed fellatio on him Barlowe was asked what Eric was doing during that time. Barlowe responded, "I believe Eric sucked on Jerry's (penis) too, if I remember correctly." The defendant specifically complains that this testimony should have been excluded as vague and indefinite. We disagree. Whatever degree of equivocation this testimony suggests would go to its weight, not to its admissibility. The defendant had full opportunity on cross-examination to attack the veracity and reliability of Barlowe's testimony on this point. This assignment of error is overruled.

[7] The defendant next contends that the trial judge committed prejudicial error by leaving the courtroom during the closing

arguments to the jury by counsel. The only indication that the trial court was absent during the arguments is the defendant's statement to that effect in one of his exceptions inserted in the transcript after the trial. There is simply nothing in the record on appeal to show that the judge did in fact leave the courtroom during the arguments. As a result the issue the defendant seeks to have us address is not properly before us.

Furthermore, it is well established that the absence of the judge from the proceedings will not constitute reversible error unless the record shows that something occurred which would harm the defendant. *See, e.g., Thomas v. State*, 150 Ala. 31, 43 So. 371 (1907); *People v. Morehouse*, 328 Mich. 689, 44 N.W. 2d 830 (1950), *cert. denied*, 341 U.S. 922 (1951); *Howard v. State*, 77 Tex. Crim. 185, 178 S.W. 506 (1915). Apparently neither the defendant nor the State asked that the arguments be recorded and transcribed as they are not found in either the trial transcript or the record on appeal. Therefore, even if the issue were before us, we would be unable to say that anything transpired which harmed the defendant.

In his final assignment of error the defendant contends that the trial judge erred in allowing the prosecutor to refer in her jury argument to the fact that he had brought a Bible into the courtroom. The defendant claims that this constituted a thinly veiled innuendo that the trial had brought him a new found belief in God. As previously noted, however, the jury arguments were not recorded. "We cannot accept the statements of counsel as sole support for the remarks challenged." *State v. Smith*, 17 N.C. App. 694, 195 S.E. 2d 369, *cert. denied*, 283 N.C. 394, 196 S.E. 2d 276 and *cert. denied sub nom, Shelton v. North Carolina*, 414 U.S. 975, 38 L.Ed. 2d 218, 94 S.Ct. 287 (1973). Assignments of error concerning jury arguments by counsel at trial are properly presented for review by this Court when such arguments by counsel are preserved and brought forward on appeal. It is only then that we may consider fully the context in which the argument complained of was made and whether any improper argument was induced error. *See State v. Hunter*, 297 N.C. 272, 254 S.E. 2d 521 (1979); *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Hunt*, 37 N.C. App. 315, 246 S.E. 2d 159, *disc. rev. denied*, 295 N.C. 736, 248 S.E. 2d 865 (1978). The arguments of counsel in the

present case are, therefore, presumed proper, and this assignment of error is overruled.

The defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. EDWARD CARL SCOTT

No. 19A85

(Filed 13 August 1985)

Automobiles and Other Vehicles § 128— DUI—prosecutor's argument on public sentiment—improper

In a prosecution for involuntary manslaughter arising from a fatal traffic accident where defendant was also charged with driving under the influence, the trial court erred by not sustaining defendant's objection to the prosecutor's closing argument that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." The argument was improper because it went outside the record and appealed to the jury to convict defendant because impaired drivers had caused other accidents.

APPEAL by the defendant under N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 71 N.C. App. 570, 322 S.E. 2d 613 (1984) finding no error in judgments entered by *Judge Wiley F. Bowen* on August 4, 1983, in Superior Court, CUMBERLAND County. Heard in the Supreme Court on June 11, 1985.

Lacy H. Thornburg, Attorney General, by Grayson G. Kelley, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Geoffrey C. Mangum, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The sole question presented by this appeal is whether certain statements by the prosecutor in his closing argument to the jury

resulted in reversible error. We conclude that they did and that the defendant must receive a new trial.

All of the charges for which the defendant was convicted arose from one fatal traffic accident. The defendant was indicted, pled not guilty, and was convicted by a jury for the felony of involuntary manslaughter and the misdemeanors of driving under the influence of alcohol and driving too fast for existing conditions. The trial court entered judgments and sentences on these counts which were appealed to the Court of Appeals and now to this Court. The defendant pled guilty to other counts arising from the same accident and did not appeal his conviction for those.

The evidence taken in the light most favorable to the State tended to show that the defendant was driving a 1972 Cadillac at approximately 100 miles per hour on U.S. Highway 401 south of Fayetteville at 4:30 a.m. on February 6, 1983. Driving conditions were poor because the highway was wet from rain and snow. The defendant's car had rounded a curve and was entirely or partially on the wrong side of the road when it struck a vehicle traveling in the opposite direction and occupied by Edwin Newton, Jr., who died in the wreck.

After the wreck the defendant was questioned at the hospital where he had been taken. He admitted drinking two beers during the evening. A witness testified that he had seen the defendant at a disco club with a beer in his hand during the evening but had not seen him drink any of the beer. The witness stated that the defendant "didn't seem drunk, but seemed like he was high." At the hospital, the defendant refused to submit to a blood test saying that he did not want to be stuck with any needles. He was injured and undergoing treatment at the time this statement was made. The test had been requested because an officer at the scene of the wreck had observed beer cans in the defendant's car and detected an odor of alcohol.

Witnesses called by the defendant gave testimony tending to show that he did not drink any alcoholic beverages and that his driving was normal shortly before the wreck. The defendant's evidence directly tended to show that his speed was not excessive and his driving was not reckless at the time of the wreck. Further, it tended to show that he was driving to the right of the center line of the highway.

The issue before us was properly presented to the Court of Appeals but not addressed in the opinion of the majority there. The defendant contended there, as he does before this Court, that the trial court committed reversible error by overruling his objection to the prosecutor's argument to the jury. The part of the prosecutor's argument objected to by the defendant and properly brought forward and presented for appellate review was as follows:

> Now, we often hear, we often read in the paper or hear on television or anything else, something that happens, there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway. And, you know, you read these things and you hear these things and you think to yourself, "My God, they ought to do something about that." . . .
>
> . . . .
>
> Well, ladies and gentlemen, the buck stops here. You twelve judges in Cumberland County have become the "they".

We conclude that the defendant's assignment and contention concerning this argument by the prosecutor have merit.

As we have noted the dual roles of a prosecutor as an impartial representative of the people, on the one hand, and as a zealous advocate for conviction, on the other, involves a delicate balance. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975). Although the misstep by the prosecutor seems to have been inadvertent, the trial court's failure to correct it upon timely objection requires that the convictions fall in the present case. The motive of the prosecutor in such instances is not as important as the probable effect upon the jury.

The impropriety of the prosecutor's argument in the present case does not arise from his having told the jury that "the buck stops here" or that the jurors had become "judges" in the case or had "become the 'they'." These statements correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). Permitting the

jury to act as the voice and conscience of the community is required because the very reason for the jury system is to temper the harshness of the law with the "commonsense judgment of the community." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). In a criminal case such as this, therefore, "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970). The prosecutor's statements along these lines were not error.

The prosecutor fell into improper argument, however, when he emphasized to the jury that "there's a lot of public sentiment at this point against driving and drinking, causing accidents on the highway." This argument was improper because it went outside the record and appealed to the jury to convict the defendant because impaired drivers had caused other accidents. *See, e.g., State v. Phifer*, 197 N.C. 729, 150 S.E. 353 (1929); *State v. Tuten*, 131 N.C. 701, 42 S.E. 443 (1902).

Further, such statements could only be construed as telling the jury that the citizens of the community sought and demanded conviction and punishment of the defendant. In this regard we find a recent decision of the Court of Criminal Appeals of Texas instructive. Although noting that it was proper to tell a jury that they were the voice and conscience of the community, that Court concluded that it was improper to demand punishment because of the citizen's desires. *Prado v. State*, 626 S.W. 2d 775, 776 (Tex. Crim. 1982). It pointed out that by such arguments, "[t]he State was asking the jury to lend an ear to the community rather than a voice." *Id.* We agree.

Statements about demands by the public for convictions and punishments for driving impaired are properly made to the legislature which has the responsibility for enacting laws which directly reflect the will of the public. When made to a jury in a court of law, however, such statements amount to an invitation to ignore the evidence and to hark to a pack already hot on the trail and in full cry. Therefore, such statements about the sentiments of the citizens of the community are improper.

The State does not contend that the improper statement of the prosecutor was an induced response to any argument by counsel for the defendant. Indeed, a review of the arguments of the prosecutor and counsel for the defendant, which are correctly included in their entirety in the record on appeal, clearly shows that the improper statement was not induced.

The State recognizes that the defendant objected to the improper statement by the prosecutor. However, it points out that the defendant must still show that the trial court's error in failing to sustain the objection or otherwise correct the impropriety prejudiced his right to a fair trial. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). Although we agree with this statement of the law, it is of little assistance to the State since the defendant made the necessary showing.

The State contends that the improper argument to the jury in the present case was harmless because the prosecutor told the jury "nothing they had not already heard a thousand times." The State argues that the defendant's trial came at a time when driving under the influence was being hotly debated in the legislature and elsewhere throughout North Carolina and that

> the media had bombarded the public with articles and broadcasts on this subject for months prior to this trial. Every issue in this trial involved the topic of drunk driving. The jurors in this case were therefore totally saturated with the issue of drunk driving long before the prosecutor added his brief remarks.

As this Court has pointed out in response to a similar but not identical argument, however:

> This may be true, and yet it does not affect the spirit of the law which seeks by well-established rules to prevent the possibility of prejudice. An opposite course would do away with the entire law of evidence and permit the introduction of all testimony of every kind and description competent or incompetent, relevant or irrelevant, that either side may see fit to offer.

State v. Tuten, 131 N.C. at 704, 42 S.E. at 443. The present case was hotly contested at trial. The defendant offered evidence through his own testimony and that of others tending to rebut

almost every element of the crimes for which he was tried. We think it entirely possible that the improper argument of the prosecutor made a difference in the result reached by the jury.

It is largely in the discretion of the trial court to decide when and how it will correct the potential effects of an improper argument by counsel, either by stopping the argument or by proper instructions to the jury. *See State v. Tuten*, 131 N.C. at 704, 42 S.E. at 443. Perhaps the trial court could have prevented reversible error in this case by one or the other of these methods. *Cf. State v. Best*, 265 N.C. 477, 479, 144 S.E. 2d 416, 417 (1965) (the prosecutor's improper argument to "take these drunken drivers off of the streets so we can get home tonight" was cured by the trial court's prompt action in sustaining the defendant's objection and instructing the jury not to consider the argument). Here, however, the trial court overruled the defendant's objection to the prosecutor's improper argument.

The improper part of the prosecutor's argument was brief, and he did not return to or dwell upon the matters therein. Therefore, it seems clear that the prosecutor had no improper motive. Nevertheless, it has long been the view of this Court that:

> The motive of the [prosecutor] in making the statement is not as important as its probable effect upon the jury. The best of motives sometimes lead to the most dangerous results, and if in the calmer deliberation of an appellate tribunal we see that the defendant may have been prejudiced by the inadvertent act of court or counsel, and thus deprived of that impartial trial that is guaranteed to him by the law of the land, it is our duty to grant him a new trial.

State v. Tuten, 131 N.C. at 703-04, 42 S.E. at 443. Here we perform that duty. The decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for its further remand to the Superior Court, Cumberland County, with instructions to grant the defendant a new trial.

Reversed.

WAYNE GRAY EVANS v. WILLIAM R. ROBERSON, JR., SECRETARY OF THE DEPARTMENT OF TRANSPORTATION FOR THE STATE OF NORTH CAROLINA

No. 489A84

(Filed 13 August 1985)

Automobiles and Other Vehicles § 2.8— odometer alteration—violation of motor vehicle laws—denial of license reinstatement

The crime of odometer alteration prohibited by G.S. 20-343 is a "violation of any provision of the motor vehicle laws" within the meaning of G.S. 20-28.1(c) and thus can serve as a basis for denial of reinstatement of a driver's license following permanent revocation even though it is not a moving violation.

APPEAL of right pursuant to G.S. 7A-30(2) by defendant from the decision of a divided panel of the Court of Appeals, 69 N.C. App. 644, 317 S.E. 2d 715 (1984), affirming judgment entered by *Freeman, J.*, in favor of plaintiff during the 23 August 1983 Session of Superior Court, YADKIN County.

No appearance or brief for plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by Millard R. Rich, Jr., Deputy Attorney General, for defendant-appellant.

FRYE, Justice.

On defendant's appeal, the issue is whether the Court of Appeals correctly affirmed the trial court's conclusion that because odometer alteration is not a moving violation it cannot serve as a basis for denial of reinstatement of driver's license following permanent revocation. Our answer is no.

I.

The uncontroverted material facts are:

1. Plaintiff's North Carolina driver's license was permanently revoked by defendant effective 18 June 1980, based on his conviction of three or more moving violations while plaintiff's license was suspended. Defendant's order of revocation was entered pursuant to G.S. 20-28.1.

2. Plaintiff has not been convicted of a moving violation since that date.

3. Plaintiff was convicted on 14 October 1981 in Yadkin County District Court, for seven violations of G.S. 20-343 for unlawfully altering the odometers of seven motor vehicles with the intent to change the number of miles indicated thereon. The seven violations occurred between 31 March and 27 May 1981.

4. On 4 May 1981, plaintiff made application to defendant for a probationary license pursuant to G.S. 20-28.1(c). Defendant conducted a hearing on plaintiff's application before Hearing Officer Wayne Murdock on 14 July 1983.

5. Defendant denied plaintiff a probationary driver's license following the above hearing, holding as a matter of law that plaintiff was not eligible for a probationary license under the provisions of G.S. 20-28.1(c) because plaintiff's convictions in 1981 of violating G.S. 20-343 were violations of the motor vehicle laws of North Carolina.

The trial court additionally found that plaintiff would have been issued a new license but for the convictions for odometer alteration. Based on these facts, the trial court concluded that the license reinstatement was improperly denied. It further concluded that plaintiff's convictions for odometer alteration were a form of commercial fraud. For that reason, the court determined that the convictions bore no relation to highway safety and they were not meant to be included within the meaning of the phrase "any provision of the motor vehicle laws" which is contained in G.S. 20-28.1(c). The Court of Appeals agreed. We reverse.

II.

G.S. 20-28.1(c) provides in pertinent part as follows:

> [A]ny person whose license has been suspended or revoked under this section permanently may apply for a license after three years. Upon the filing of such application, the Division may, with or without a hearing, issue a new license upon satisfactory proof that the former licensee has not been convicted within the suspension or revocation period of a violation of any provision of the motor vehicle laws, alcoholic beverage laws, or drug laws of North Caroalina or any other state . . . .

G.S. 20-343 provides in pertinent part as follows:

> *Unlawful change of mileage.*—It is unlawful for any person or his agent to disconnect, reset, or alter the odometer of any motor vehicle with the intent to change the number of miles thereon . . . .

The question to be answered is whether the phrase "any provision of the motor vehicle laws," contained within G.S. 20-28.1(c) should be interpreted to include a violation of G.S. 20-343. Defendant argues the legislature intended the inclusion. The Court of Appeals disagreed.

The Court of Appeals reasoned that only "moving violations" constitute threats to safety on the public highways and since G.S. 20-343 is not a moving violation it is not to be included in the phrase, "any provision of the motor vehicle laws" within G.S. 20-28.1(c). Additionally, the Court of Appeals reasoned that violations of alcohol and drug laws were included in G.S. 20-28.1(c) because such violations could indicate the violator would be under the influence of such substances while driving. Finally, the Court of Appeals essentially agreed with the trial court that a violation of G.S. 20-343 was simply a form of commercial fraud. It therefore concluded that the legislature did not intend a violation of this statute to be "a violation of any provision of the motor vehicle laws" within the context of G.S. 20-28.1(c).

III.

"The intent of the legislature controls the interpretation of a statute." 12 N.C. Index 3d, Statutes § 5.1, at 66 (1978); *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). "When the language of the statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." 12 N.C. Index 3d, *supra* § 5.5, at 70; *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386; *State v. Camp*, 286 N.C. 148, 209 S.E. 2d 754 (1974).

It is clear that G.S. 20-28.1(c) provides that a violation of *any* provision of the motor vehicle laws is a basis for denying reinstatement. The language of the statute is clear and unambiguous. If the legislature wished not to include G.S. 20-343 within the scope of G.S. 20-28.1(c) it could have done so. It is also clear that

G.S. 20-343 is a provision within the chapter entitled "Motor Vehicles." As Judge Whichard pointed out in his dissent, "That G.S. 20-343 is a provision of the motor vehicle laws is beyond dispute, and that defendant was convicted of seven violations of G.S. 20-343 while his license to drive was permanently revoked is uncontroverted. The express language of G.S. 20-28.1(c) thus precluded issuance to defendant of a new license to drive." *Evans v. Roberson*, 69 N.C. App. 644, 649, 317 S.E. 2d 715, 718 (1984).

We find no support for the conclusion reached by the trial court and the Court of Appeals that "any provision of the motor vehicle laws" as contained in G.S. 20-28.1(c) means only those provisions of the motor vehicle laws involving moving violations or those involving highway safety. The fact that other provisions of the statute use only moving violations as criteria for revoking or suspending a license is not controlling. Arguably, even some of these "moving violations" have relatively little to do with highway safety. Both fraudulent use of a driver's license and lack of liability insurance may be grounds for suspension and revocation, although neither seems directly related to highway safety. *See* N.C. Gen. Stat. § 20-16(a)(6) and N.C. Gen. Stat. § 20-16(c).

We note with interest the unanimous decision of the Court of Appeals in an analogous case, *In re Harris*, 37 N.C. App. 590, 246 S.E. 2d 791 (1978). In that case, the applicant was denied reinstatement under a similar statute, G.S. 20-19(e). G.S. 20-19(e), since amended, allowed reinstatement following revocation for impaired driving unless the applicant had been convicted of "a violation of any provision of motor vehicle laws, liquor laws or drug laws of North Carolina or any other state . . . ." This language is essentially the same as that of the statute before us, and the phrase, "any provision of [the] motor vehicle laws," is practically identical.

The applicant in *Harris* was denied reinstatement because of a misdemeanor conviction of public drunkenness. He challenged the "liquor laws" language as unconstitutionally vague, indefinite and overbroad. The Court of Appeals, however, affirmed the denial, saying the three categories of laws mentioned by the statute were broad and that it appeared "the legislature was demanding complete compliance with *all* laws governing the use of drugs, alcohol, and motor vehicles." *In re Harris*, 37 N.C. App. 590, 594, 246 S.E. 2d 532, 535 (1978) (emphasis original).

Although *Harris* is not binding on this Court, we are persuaded by the Court of Appeals' reasoning which lends support to defendant's contention that all motor vehicle laws and not just moving violations were considered by the legislature and that placement of G.S. 20-343 in the motor vehicle laws was not inadvertent.

In summary, we hold that the crime of odometer alteration prohibited by G.S. 20-343 is a violation of the motor vehicle laws of North Carolina as that term is used in G.S. 20-28.1(c). The Court of Appeals erred in affirming the trial court's finding to the contrary. The decision of the Court of Appeals is reversed and the cause is remanded to that court for further remand to the Superior Court, Yadkin County, in order that the ruling of the Division of Motor Vehicles may be reinstated.

Reversed and remanded.

STATE OF NORTH CAROLINA v. MARK A. SPEARS

No. 622A84

(Filed 13 August 1985)

1. **Criminal Law § 138.42— sentencing—necessity for finding non-statutory mitigating factor**

Although failure to find a statutory mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's consideration of a non-statutory factor which is (1) requested by defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect is a matter entrusted to the sound discretion of the sentencing judge under G.S. 15A-1340.4(a), and his failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion.

2. **Criminal Law § 138.42— defendant's aid to victim—failure to find as mitigating factor**

In sentencing defendant for assault with a deadly weapon inflicting serious injury, the trial court did not abuse its discretion in failing to find as a non-statutory mitigating factor that defendant rendered aid to his victim where defendant's testimony unequivocally showed that defendant's decision to take the victim to a medical facility was motivated by a purely selfish concern about the effect of her possible death on his ultimate punishment and that remorse played little role in his decision to aid the victim.

BEFORE *Britt, J.*, at the 5 October 1983 Session of Superior Court, CUMBERLAND County, defendant was convicted of assault with a deadly weapon inflicting serious injury and was sentenced to ten years imprisonment. Defendant appeals as of right from the decision of the Court of Appeals, one judge dissenting, affirming his conviction and sentence. N.C.G.S. § 7A-27(a).

Lacy H. Thornburg, Attorney General, by Michael Smith, Associate Attorney, for the State.

Adam Stein, Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

The sole question presented for review is whether defendant is entitled to a new sentencing hearing by virtue of the trial judge's failure to find as a non-statutory mitigating factor that the defendant rendered aid to his victim. Because defendant has not demonstrated that the trial judge abused his discretion in failing to find this non-statutory factor in mitigation of defendant's sentence, we find no error.

At trial, the witnesses for both the State and the defense testified that the defendant and two female companions, Kathy Williams and Judy Gibson, drove around together on the afternoon of 19 November 1982, drinking beer and smoking marijuana. After riding for awhile, the three went to a wooded area in order to continue these activities. The State's witnesses testified that as they were preparing to leave the wooded area, the defendant pulled out a shotgun and attempted to sexually assault one of the women. Both women testified that as they tried to run away, the defendant shot Judy Gibson and then struck her with the shotgun. Defendant, on the other hand, testified that the gun went off during a struggle with Ms. Gibson, that Ms. Gibson then came at him with a knife, that he hit her hard with the butt of the gun, and that she fell to the ground. Defendant then placed Gibson in his truck and took her to the Urgent Care Center. Defendant placed Ms. Gibson by the door, knocked on it, and left.

Dr. Menno Pennink testified that the victim was found on the steps of the Urgent Care Center. The medical records indicated that the victim was found bleeding from the head and was in hy-

povolemic shock. Because of the extent of her injuries Ms. Gibson was transported to the emergency room of Cape Fear Valley Hospital and underwent surgery for skull fractures and extensive scalp lacerations. After the verdict, defense counsel requested that the trial judge find as a factor in mitigation of sentence that after the assault, defendant took Ms. Gibson from the woods to the Clinic for treatment of her injuries. The trial judge refused to find the mitigating factor submitted by the defendant.

The presumptive sentence for assault with a deadly weapon inflicting serious injury, a Class H felony, is three years. N.C.G.S. § 15A-1340.4(f)(6). At the sentencing hearing, the trial judge found one aggravating factor (prior convictions punishable by more than sixty days' confinement) and no mitigating factors. After concluding that the aggravating factors outweighed the mitigating factors, N.C.G.S. § 15A-1340.4(b), the trial judge sentenced defendant to the maximum ten year prison term. N.C.G.S. § 14-1.1(a)(8).

In order for the trial court to impose a sentence greater than the presumptive term, the trial judge must make written findings of aggravating and mitigating factors. N.C.G.S. § 15A-1340.4(b). 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. *Id.*

N.C.G.S. § 15A-1340.4(a) specifically provides that, in determining factors in aggravation and mitigation, the trial judge "*must* consider" certain factors enumerated in that statute which are commonly referred to as "statutory factors." This Court has clearly established that the sentencing judge has a duty to find a *statutory* mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Even in the absence of a specific request by counsel, the sentencing judge has a duty to examine the evidence to determine if it would support one of the statutorily enumerated factors. *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984).

In contrast, N.C.G.S. § 15A-1340.4(a) provides that the judge "*may* consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or

not such aggravating or mitigating factors are set forth herein. . . ." (Emphasis added.)

Rendering aid to the victim is not a statutory mitigating factor. However, defendant requested that the trial judge make such a finding in mitigation. Defendant argues that once counsel requests that a non-statutory mitigating factor be considered by the trial judge, it should be subject to the same requirements as the statutory factors. That is, if the evidence meets the standards for proof of statutory sentencing factors enunciated by this Court in *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (uncontradicted, substantial and manifestly credible), the trial judge would be required to find the requested non-statutory mitigating factor, and failure to do so would be error requiring resentencing. We do not agree.

The language of N.C.G.S. § 15A-1340.4(a) clearly differentiates between the mandatory consideration of the statutory factors and the permissive consideration of other non-enumerated factors. In *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451, we recognized the permissive nature of this directive and stated that although the defendant had failed to show that he testified truthfully against another felon for the prosecution, the fact that he agreed to testify as part of his plea bargain "may be of some mitigating value should the trial court consider it to be such *as he is permitted but not required to do under N.C.G.S. § 15A-1340.4 (a)*." *Id.* at 222, 306 S.E. 2d at 456. (Emphasis added.) In addition, in *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688, we alluded to the discretionary nature of the non-statutory mitigating factors, noting that unlike the statutory factors, the trial judge is *not required* to consider whether the evidence supports the existence of such factors in the absence of specific requests by defense counsel. *Id.* at 73, 320 S.E. 2d at 690. (Emphasis added.)

[1] Therefore, we hold that although failure to find a *statutory* mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's consideration of a non-statutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge under N.C.G.S. § 15A-1340.4(a). Thus, his failure to find such a non-

statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion.

[2] Turning next to the question of whether the trial judge abused his discretion in failing to find that defendant's rendering of aid to the victim was a factor in mitigation of his sentence, we find no such abuse demonstrated in the record in this case.

Although we agree with defendant that rendering aid to the victim of the assault has mitigating value, *see State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983), we do not agree with his further assertion that the evidence as to defendant's conduct in this case was such that the trial judge abused his discretion in failing to find such conduct as a mitigating factor. It is noteworthy that in *Bondurant*, a case involving sentencing for a capital offense, we stated that an important factor in finding that the defendant's death sentence was disproportionate was the fact that the defendant had expressed concern for the victim's life or remorse for his action by attempting to secure immediate medical attention for the deceased. *Id.* at 694, 309 S.E. 2d at 182.

In contrast, here defendant's evidence showed, at best, a motivation for rendering aid to his victim, which could be interpreted in two ways: (1) either as concern for his victim's life; or (2) as a purely selfish concern about the effect of her possible death on his ultimate punishment. In explanation of his conduct in taking Ms. Gibson to the Urgent Care Center, defendant testified that following the assault, "I got scared and I thought I had done and killed the girl." He stated further that "[t]hings happened so fast; and once I realized I hurt her that bad, I thought she was going to die and I was scared for myself just as much as for her because, like I say, I'm on probation, and I feel like she was going to die and I wouldn't be able to tell what my story was against her story. . . ."

Thus, while rendering aid to the victim could, in the appropriate case, be considered as a mitigating factor in the sound exercise of the trial judge's discretion, the trial judge in this case did not abuse his discretion in rejecting the submitted factor. The general purposes of sentencing to be considered by the trial judge include giving the defendant the benefit of any factors which tend to "diminish his culpability." N.C.G.S. § 15A-1340.4. The defendant's testimony in this case unequivocally shows that remorse

played little role in his decision to aid Ms. Gibson and that his concern was for his own self-interest. Therefore, although defendant's objective conduct in bringing Ms. Gibson to the Urgent Care Center was commendable, the evidence of his motivation supports the trial judge's discretionary decision not to find in this conduct evidence of diminished culpability on the part of the defendant sufficient to mitigate his sentence.

We note that the legislature has made several additions to the list of statutory factors in mitigation at different times since the Act was established in 1979. *See* 1981 N.C. Sess. Laws ch. 179, sec. 1 (voluntary acknowledgment of wrongdoing), 1983 N.C. Sess. Laws ch. 606, sec. 1 (honorable military discharge). We agree with the dissenting judge on the Court of Appeals that as a policy matter, actions by a defendant in rendering aid to his victim should be encouraged, and that legislative consideration of making such circumstances a statutory mitigating factor would be appropriate. We decline to reach this goal under the guise of judicial construction.

For the foregoing reasons, the Court of Appeals is

Affirmed.

Cowart v. Skyline Restaurant

GENEVA COWART, EMPLOYEE PLAINTIFF	)	
v.	)	ORDER
SKYLINE RESTAURANT, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER, DEFENDANTS	)	

No. 321A85

(Filed 13 August 1985)

UPON motion of the plaintiff, filed herein on 26 July 1985, stating that plaintiff and defendants have reached a compromise settlement of their differences, subject to approval by the North Carolina Industrial Commission, this cause is remanded to the North Carolina Court of Appeals for the entry of an order further remanding the case to the North Carolina Industrial Commission for consideration of a compromise settlement agreement to be submitted to the North Carolina Industrial Commission by the parties hereto for its consideration and approval.

It is further ordered that the plaintiff's motion for permission to withdraw appeal is hereby allowed.

By order of the Court in conference, this 13th day of August 1985.

FRYE, J.
For the Court

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; CHEROKEE, GRAHAM AND JACKSON COUNTIES; TOWNS OF ANDREWS, BRYSON CITY, DILLSBORO, ROBINSVILLE AND SYLVA; AND THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS

v.

NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.

ORDER

No. 111A84

(Filed 27 August 1985)

THE Motion for Writ of Supersedeas filed herein on 20 August 1985 by The Aluminum Company of America (hereinafter "Alcoa") is DENIED.

The Motion for Writ of Supersedeas filed herein on 22 August 1985 by Nantahala Power and Light Company (hereinafter "Nantahala") is DENIED.

The orders of the North Carolina Utilities Commission, affirmed by this Court on 13 August 1985, requiring refunds of approximately $15.6 million to customers of Nantahala and making Alcoa responsible for those refunds to the extent Nantahala is financially unable to pay them, are temporarily stayed to and including the 30th day of September 1985 but no longer. The temporary stay allowed by this order will expire automatically at 12:01 a.m. on 1 October 1985 without the necessity of any further order by this Court. The purpose of the stay is to permit Alcoa and Nantahala to seek a writ of certiorari and stay from the Supreme Court of the United States.

The stay granted herein is conditioned upon posting with the North Carolina Utilities Commission of a good and sufficient bond in the amount of $16,000,000.00, by Alcoa, covering any and all obligations of itself and/or Nantahala under the orders of the

North Carolina Utilities Commission (Commission Docket No. E-13, Sub 35) affirmed in the decision and judgment entered by this Court on 13 August 1985.

By order of the Court in Conference, this 27th day of August 1985.

MITCHELL, J.
For the Court

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

CITY OF HENDERSON v. EDWARDS

No. 362P85.

Case below: 75 N.C. App. 199.

Petition by defendants Edwards for discretionary review under G.S. 7A-31 denied 13 August 1985. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 13 August 1985.

COOPER v. COOPER

No. 366P85.

Case below: 74 N.C. App. 785.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

DAWSON v. CHRISCOE

No. 295P85.

Case below: 74 N.C. App. 411.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

FORSYTH CO. v. SHELTON

No. 365P85.

Case below: 74 N.C. App. 674.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 August 1985. Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 13 August 1985.

FORSYTH CO. BD. OF SOCIAL SERV. v.
DIV. OF SOCIAL SERV.

No. 194PA85.

Case below: 73 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 August 1985.

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

GASKINS v. THOMPSON

No. 333P85.

Case below: 74 N.C. App. 607.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 August 1985.

GILBERT ENGINEERING CO. v. CITY OF ASHEVILLE

No. 310P85.

Case below: 74 N.C. App. 350.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 August 1985.

GUPTON v. McCOMBS

No. 318P85.

Case below: 74 N.C. App. 547.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 August 1985.

HARRIS v. SCOTLAND NECK RESCUE SQUAD, INC.

No. 453P85.

Case below: 75 N.C. App. 444.

Petition by defendants and third party plaintiffs for discretionary review under G.S. 7A-31 denied 13 August 1985. Petition by defendants and third party plaintiffs for writ of supersedeas and temporary stay denied 13 August 1985.

HERBERT v. BABSON

No. 324P85.

Case below: 74 N.C. App. 519.

Petition by defendants (Babsons) for discretionary review under G.S. 7A-31 denied 13 August 1985.

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

IN RE ESTATE OF LONGEST

No. 339P85.

Case below: 74 N.C. App. 386.

Petition by Shuping for discretionary review under G.S. 7A-31 denied 13 August 1985. Motion by Burroughs to dismiss appeal for lack of substantial constitutional question allowed 13 August 1985.

IN RE FORECLOSURE OF FORTESCUE

No. 397P85.

Case below: 75 N.C. App. 127.

Petitions by Fortescue for discretionary review under G.S. 7A-31 and for writ of supersedeas denied 1 August 1985.

IN THE MATTER OF BAXLEY

No. 341P85.

Case below: 74 N.C. App. 527.

Petition by Baxley for discretionary review under G.S. 7A-31 denied 13 August 1985.

INS. CO. v. CONSTRUCTION CO.

No. 326PA85.

Case below: 74 N.C. App. 424.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 13 August 1985.

JOHNSON v. TOWN OF GARLAND

No. 344P85.

Case below: 74 N.C. App. 607.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 13 August 1985.

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

McLEOD v. McLEOD

No. 299P85.

Case below: 74 N.C. App. 144.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 13 August 1985.

NATIONWIDE INS. CO. v. OJHA

No. 379P85.

Case below: 72 N.C. App. 355.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 13 August 1985.

ROWE v. ROWE

No. 267P85.

Case below: 74 N.C. App. 54.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 August 1985.

SHAW v. WOODARD

No. 406P85.

Case below: 75 N.C. App. 363.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 13 August 1985.

SIDES v. DUKE UNIVERSITY

No. 320P85.

Case below: 74 N.C. App. 331.

Petition by defendant (Duke University) for discretionary review under G.S. 7A-31 denied 13 August 1985. Petition by defendants (Harmel and Miller) for discretionary review under G.S. 7A-31 denied 13 August 1985.

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

SMITH v. PRICE

No. 332PA85.

Case below: 74 N.C. App. 413.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 August 1985.

STATE v. ANTHONY

No. 331P85.

Case below: 74 N.C. App. 590.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. BONHAM

No. 296P85.

Case below: 74 N.C. App. 411.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. BRYSON

No. 434P85.

Case below: 76 N.C. App. 163.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. BURCH

No. 311P85.

Case below: 71 N.C. App. 458.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 13 August 1985.

STATE v. CARTER

No. 340P85.

Case below: 74 N.C. App. 437.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. DAVIS

No. 355P85.

Case below: 74 N.C. App. 608.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 13 August 1985.

STATE v. FERRELL

No. 354P85.

Case below: 75 N.C. App. 156.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 13 August 1985. Notice of appeal by Attorney General under G.S. 7A-30 dismissed 13 August 1985.

STATE v. FRANKS

No. 368P85.

Case below: 74 N.C. App. 661.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. GRAHAM

No. 154P85.

Case below: 73 N.C. App. 179.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

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

STATE v. GREEN

No. 323P85.

Case below: 74 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. HITCHCOCK

No. 322P85.

Case below: 75 N.C. App. 65.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. JONES

No. 426P85.

Case below: 75 N.C. App. 615.

Petition by defendant for writ of supersedeas and temporary stay denied 23 July 1985.

STATE v. LATTA

No. 450P85.

Case below: 75 N.C. App. 611.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 13 August 1985. Petition by Attorney General for writ of supersedeas and temporary stay denied 13 August 1985.

STATE v. MCKEITHAN

No. 342P85.

Case below: 74 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

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

STATE v. MAYFIELD

No. 356P85.

Case below: 74 N.C. App. 601.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 13 August 1985.

STATE v. SINGLETARY

No. 419P85.

Case below: 75 N.C. App. 504.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985. Petition by defendant for writ of supersedeas and temporary stay denied 13 August 1985.

STATE v. SWIMM

No. 289PA85.

Case below: 74 N.C. App. 309.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 13 August 1985.

STATE v. TRIPP

No. 370P85.

Case below: 74 N.C. App. 680.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

STATE v. WILLIAMS

No. 335P85.

Case below: 74 N.C. App. 609.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

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

WARREN v. CITY OF ASHEVILLE

No. 325P85.

Case below: 74 N.C. App. 402.

Petition by defendant for discretionary review under G.S. 7A-31 denied 13 August 1985.

WHITE OAK PROPERTIES v. TOWN OF CARRBORO

No. 304P85.

Case below: 71 N.C. App. 360.

Petition by defendants for discretionary review under G.S. 7A-31 denied 13 August 1985.

WILLIFORD v. CRABTREE

No. 273P85.

Case below: 73 N.C. App. 701.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 13 August 1985.

STATE OF NORTH CAROLINA v. BILLY DON WILLIAMS

No. 272A84

(Filed 5 September 1985)

1. **Indictment and Warrant § 6.2— probable cause for issuance of arrest warrant**

Information an officer presented to a magistrate was sufficient to establish probable cause for the issuance of warrants for defendant's arrest where it included a statement made by a codefendant in the presence of the officer's colleagues that "If I did what you say, [defendant] was with me when I did it," and it also included a photograph of defendant and a composite of the perpetrator prepared by the victim the morning of the crimes. Therefore, statements made by defendant and items seized from his car were not obtained as a result of an illegal arrest.

2. **Searches and Seizures § 13— warrantless search by consent**

Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress, or fraud, consented to the search. In determining whether consent is free and voluntary, the court must look to the totality of the circumstances which were present at the time of the search.

3. **Searches and Seizures § 14— consent to search—cooperation made known to district attorney**

An officer's statements to defendant that his cooperation would be made known to the district attorney were not such an inducement as to render involuntary defendant's consent to a search of his automobile where the record did not reveal the slightest hint that defendant was led to believe that he could expect any easier or preferred treatment in exchange for his consent to the search, and where defendant certainly knew, as a result of his age and experience with police practices and procedures, that the district attorney would be made aware of his cooperation as a matter of routine practice.

4. **Criminal Law § 75.2— waivers of counsel—statements by officer—cooperation made known to district attorney**

An officer's statements to defendant that his cooperation would be made known to the district attorney were not such an inducement as to render involuntary his oral and written waivers of counsel.

5. **Criminal Law § 75.11— assertion of right to counsel—subsequent confession—initiation of conversation by defendant**

An officer's delivery of an inventory receipt form to defendant after defendant had invoked his right to counsel did not constitute an "initiation" of conversation with defendant by the officer as that term was used in *Edwards v. Arizona*, 451 U.S. 477 (1981). Furthermore, the officer's return to the jail the next day after defendant asserted his right to counsel was not an initiation of conversation in violation of *Edwards*, but was instead a continuation of a conversation begun by defendant the prior evening, where the officer handed defendant the inventory receipt and turned to walk away; defendant indicated

his desire to "tell his side of the story" after he had some sleep and a shower; the officer told defendant he would return the next morning; and when the officer returned the next morning, he had a jailer contact defendant and ask him whether he still desired to speak with the officer. G.S. 15A-223(b).

6. Criminal Law § 75.11— assertion of right to counsel—voluntariness of subsequent waiver of right

Defendant's waiver of counsel and his written statement, made after having previously invoked his right to counsel, were voluntarily and knowingly made under the totality of the circumstances where defendant himself initiated the conversation following the assertion of his constitutional rights, defendant was readvised of his *Miranda* rights, defendant expressly waived his rights in writing, and the waiver was not induced by the officers.

7. Rape and Allied Offenses § 6.1— first degree rape—instructions on lesser offenses not required by defendant's statement

In a prosecution for first degree rape, defendant's statement that he "struggled to penetrate without an erection" did not constitute a denial of penetration which required the trial court to instruct on the lesser included offenses of attempted first degree rape and assault on a female.

8. Criminal Law § 115— denial by defendant—necessity for instructing on lesser offense

Where a defendant denies having committed a complete offense, such as first degree murder, but there is evidence as to every element which negates that denial, application of *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645, would be proper, and the jury would be correctly charged to find the defendant guilty of first degree murder or not guilty. However, where the defendant denies only an element of the offense, such as penetration in the crime of first degree rape, rather than the complete offense, *Strickland* would be inapplicable and it would be incumbent upon the trial judge to place that issue before the jury, which would necessarily include an instruction on some lesser included offense of first degree rape.

9. Burglary and Unlawful Breakings § 7— first degree burglary—instruction on lesser offenses not required by defendant's statement

In a prosecution for first degree burglary, defendant's statement to officers did not constitute evidence that he did not intend to commit the specified felonies of first degree rape and armed robbery when he entered the victim's mobile home so as to require the trial court to instruct on misdemeanor breaking and entering where defendant indicated that he agreed to go to the mobile home so that his codefendant could collect some money from his girlfriend; defendant admitted having watched the codefendant enter the mobile home wearing a mask and wielding a "swordlike" knife; defendant admitted that he then watched as the codefendant threatened the girl; and in spite of this, defendant entered the mobile home through a window after having failed to gain entrance through the door.

10. Burglary and Unlawful Breakings § 6.3— first degree burglary—felonious intent—instruction in the disjunctive

In a prosecution for first degree burglary upon an indictment charging a breaking and entering with an intent to commit first degree rape *and* armed robbery, the trial court did not err in instructing the jury that defendant must have intended "to commit rape *or* robbery with a dangerous weapon, *or* both" at the time of the breaking and entering.

11. Criminal Law § 102.9— jury argument—untruthfulness of defendant's statement

The district attorney's comments during jury argument on the untruthfulness of defendant's written statement which had been introduced by the State were proper where the record contained other evidence introduced by the State to contradict defendant's written statement.

12. Criminal Law § 102.9— jury argument—comment on defendant's "morality and character"

Although the district attorney's comment during jury argument that defendant wouldn't even begin to register on a scale of "morality and character" was inappropriate, such comment did not so exceed the bounds of permissible argument as to require the trial court to sustain defendant's objection thereto where the comment was primarily directed toward defendant's written statement and the lack of credibility derived therefrom.

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

BEFORE *Sitton, J.*, at the 30 January 1984 Criminal Session of Superior Court, BUNCOMBE County, defendant was tried and convicted of first-degree rape, first-degree burglary, and robbery with a dangerous weapon. He received the following sentences: for first-degree rape, life imprisonment; for first-degree burglary, fifteen years to run consecutively to the life sentence; and, for armed robbery, fourteen years to run consecutively to the above sentences. Defendant appeals of right from the imposition of a life sentence. N.C.G.S. § 7A-27(a). Defendant's motion to bypass the Court of Appeals on the other convictions and sentences was allowed 31 May 1984. Heard in the Supreme Court 15 May 1985.

The evidence at trial tended to show that on 5 August 1983, eighteen-year-old Mary Luanne Odom resided with her mother, Nina Odom, in a mobile home in Fairview, North Carolina. Luanne Odom testified that at approximately 2:00 a.m., a man wearing a stocking over his head and carrying a knife appeared in her doorway. The intruder bound and gagged Miss Odom, then he rifled her room. After some fifteen minutes had elapsed, the man placed

his hand on Luanne Odom's left leg. She then kicked him in the stomach and caused him to drop his knife. Only after the knife was picked up by a second man and returned to the first man did Luanne Odom realize that there were two men in her bedroom.

After the second man returned the knife to the first man, Luanne Odom was tied to her bed. Her hands were bound to the headboard with nylon hose, and her right leg was secured to the bed with the cord of an electric blanket. Each man then proceeded to have forced sexual intercourse with Luanne Odom while the other held her left leg.

On direct examination, Luanne Odom identified defendant as the first man who entered her bedroom without permission and who had sexual intercourse with her. She also identified one of the knives taken from defendant's trunk as the one defendant used to threaten her. In an earlier trial, Luanne Odom had identified codefendant Shannone Wayne McClintick as the second man who had sexual intercourse with her.

Michael W. Wright, a crime scene investigator for the Buncombe County Sheriff's Department who testified for the State, stated that he arrived at the Odom residence following the assault. Upon his arrival at approximately 4:00 a.m., Officer Wright discovered a bent window screen lying on the ground beneath an open window near the front of the Odoms' mobile home. Inside Luanne Odom's bedroom, Officer Wright discovered nylon stockings tied to the headboard of the bed and lying on the mattress and an electric blanket control cord tied to the foot of the bed. In addition, Officer Wright observed bed clothing in disarray and an open desk drawer.

Dr. Gary R. Whitaker testified that he was on duty as an emergency physician at Memorial Mission Hospital in Asheville, North Carolina, on 5 August 1983. At approximately 4:45 a.m., he performed a physical examination on Luanne Odom. Based on his findings, Dr. Whitaker concluded that something had been recently inserted into Miss Odom's vagina "under rather insensitive circumstances."

Cathy Buckner and Officer Margaret Mull also testified for the State. Ms. Buckner, a registered nurse at Memorial Mission Hospital, testified as to certain oral statements made by Luanne

Odom while in the emergency room on the morning of the assault. Officer Mull's testimony concerned, *inter alia*, a written statement taken from Miss Odom and a composite drawing of the first perpetrator, both made following her examination at the hospital. The testimony of both of these witnesses was consistent with that offered by the victim.

Defendant presented no evidence in his behalf. On 2 February 1984, verdicts of guilty were returned on all three indictments.

Lacy H. Thornburg, Attorney General, by Guy A. Hamlin, Special Deputy Attorney General, for the State.

David Belser for the defendant-appellant.

MEYER, Justice.

We note at the outset of our discussion that defendant has abandoned Assignments of Error Nos. 1 through 8, 12, 16, 21, and 22 by failing to advance any argument in his brief to support them. N.C.R. App. P. 28(a). On the basis of his ten remaining assignments of error, defendant contends that the trial court erred (1) by denying his motion to suppress certain evidence, (2) by improperly charging the jury, and (3) by allowing prejudicial statements in the State's closing argument. We find each of these contentions meritless.

I.

Defendant was arrested at his fiancee's home in Swannanoa, North Carolina, at approximately 2:30 p.m. on 9 September 1983. Shortly thereafter, Officer Donald R. Cole of the Buncombe County Sheriff's Department arrived at the scene carrying the warrant for defendant's arrest that had been issued earlier that day. Officer Cole, who was familiar with the defendant from a prior criminal matter, advised defendant of his *Miranda* rights, including his right to remain silent and his right to have counsel present during questioning. Defendant orally waived those rights and before questions were asked of him, stated to Officer Cole, "I need some help." Officer Cole told defendant that he needed his cooperation and further informed him that the District Attorney would be made aware of that cooperation. Defendant then signed a written consent to search form, obtained the keys to his car, and opened

its trunk. In the trunk of defendant's car, Officer Cole found two knives.

After the search, defendant was transported to the Buncombe County courthouse, where he was questioned by Officers W. K. Ingle and Margaret Mull of the Buncombe County Sheriff's Department. At that time, defendant requested the assistance of counsel, and all questioning ceased. Officer Cole was then informed of defendant's request.

Some thirty minutes after defendant invoked his right to counsel, Officer Cole delivered to defendant an inventory of the items seized from his automobile. The two spoke briefly. As a result of that discussion, Officer Cole agreed to return the next morning, if defendant still so desired, and discuss the events leading to defendant's arrest.

The next day, Officer Cole obtained a generally inculpatory written statement from the defendant. The statement contained a detailed account of the actions of the defendant and codefendant, McClintick, on the night in question. Essentially, defendant admitted his participation in the acts for which he was indicted and tried, but stated that he believed that the victim was McClintick's girlfriend and implied that their actions were, therefore, consented to.

In apt time, counsel for defendant moved to suppress all statements that defendant may have made, oral and written, and the knives obtained as a result of the warrantless but consensual search of his car. The trial court conducted an extensive voir dire hearing on defendant's motion to suppress in the absence of the jury and made findings of fact and conclusions of law. At the conclusion of that hearing, the trial court denied defendant's motion to suppress. Defendant's statement was introduced at trial by the State through the testimony of Officer Cole.

Defendant first assigns error to the trial court's denial of his motion to suppress certain statements made by him and physical evidence seized during the search of his car. Specifically, defendant contends that there was no probable cause for his arrest, that the consent to search his car and waivers of counsel were not voluntarily and knowingly made, and that his written statement was given in violation of his right against compelled self-incrimi-

nation as guaranteed by the Fifth Amendment to the United States Constitution.

[1] Defendant initially argues that the information Officer Cole presented to the magistrate was insufficient to establish probable cause and that the warrants issued for his arrest were therefore invalid, citing *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824 (1979) (evidence obtained by the exploitation of an arrest unsupported by probable cause must be suppressed).

Although the trial judge did not specifically state in his findings what evidence was presented to the magistrate, he did find that "certain" evidence was presented. The record is clear in this regard.

Probable cause refers to those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. *Beck v. Ohio*, 379 U.S. 89, 13 L.Ed. 2d 142 (1964); *State v. Zuniga*, 312 N.C. 251, 322 S.E. 2d 140 (1984).

The trial judge found as fact that "certain information" was furnished to the magistrate by Officer Cole. The record reveals that this information included a statement made by codefendant McClintick in the presence of Officer Cole's colleagues. That statement was, "If I did what you say, Billy Don Williams was with me when I did it." Additionally, Officer Cole showed the magistrate a photograph of defendant and the composite of the perpetrator prepared by Luanne Odom the morning of her rape. "It is well recognized that a description of either a person or an automobile may furnish reasonable ground for arresting and detaining a criminal suspect." *State v. Jacobs*, 277 N.C. 151, 154, 176 S.E. 2d 744, 746 (1970) (citations omitted).

We hold that defendant's arrest was supported by probable cause to believe that defendant had committed the crimes for which he was later convicted.

Defendant next argues that the knives taken from his car following the consent search should have been suppressed because that consent was not given freely, voluntarily, and understandingly but was instead "the product of promises and inducements of hope." Defendant bases this contention on the alleged

trust relationship which defendant perceived to exist between himself and Officer Cole. Defendant further argues that this perception, combined with Officer Cole's repeated statements to defendant that his cooperation would be made known to the District Attorney, created strong "suggestions of hope" which render his consent involuntary. We cannot agree.

[2] Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress, or fraud, consented to the search. *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977). In determining whether consent is free and voluntary, the Court must look to the totality of the circumstances which were present at the time of the search. *Id.*

While testifying on voir dire, both defendant and Officer Cole admitted knowing each other as a result of previous criminal matters involving the defendant. Both also stated that in one of those matters a charge of common law robbery was reduced to larceny and as a result, defendant received a suspended sentence. Officer Cole testified that he arrived at the scene of the arrest pursuant to a request from defendant. Once there, he had defendant's handcuffs removed because of his familiarity with him. Officer Cole then told defendant that he had been truthful with him regarding previous criminal matters and that he expected defendant to be truthful in this case, too. However, Officer Cole denied having reminded defendant of the specifics of any previous case. Finally, Officer Cole admitted to having stated to defendant several times that he would advise the District Attorney's office of his cooperation.

To some extent, defendant's testimony on voir dire was inconsistent with that of Officer Cole's. Defendant readily acknowledged Cole's promises to advise the District Attorney of his cooperation. However, according to defendant, it was not he who asked for Cole but Cole who asked if defendant wished to speak with him. Defendant further stated that before he gave his consent, Officer Cole reminded him that he had helped him before and that he would do everything he could to help him in this instance.

The trial judge made the following findings of fact pertinent to the issue of defendant's consent to search his car:

That the Defendant has been previously arrested, based upon his testimony, approximate [sic] six times, and has been incarcerated or confined at the Buncombe County Sheriff's Department and understands their procedure as to booking and lockup and that he understood the use of the phone and further understood and had experience with having been advised of his Constitutional Rights; that no promises, offers of reward or inducements by any law enforcement officer were made to the Defendant to make any oral or written statement or to consent to the search of his vehicle; that the allowance of the officer for the Defendant to have his handcuffs removed from his back and placed on his hands in front and to smoke, nor the statement made by officer Donnie R. Cole that he would advise the District Attorney's Office of his cooperation were sufficient to constitute an inducement on behalf of the Defendant to make a statement; . . . .

That there is lack of evidence in regard to the Defendant's statement that he trusted the officer and that the officer had helped him on a previous occasion, there being a mere dropping of the charges of common law robbery to larceny by the District Attorney, and there being insufficient evidence in regard to this officer causing said lesser included offenses to be accepted as pleas for the offenses against the Defendant on prior occasions, or a prior occasion.

Based on these findings, the trial court concluded as a matter of law that:

[T]he consent given by the Defendant to the officer on the afternoon of September 9th, 1983, was given freely, voluntarily, understandingly and without any coercion, duress or fraud upon the Defendant; that based upon the totality of the circumstances at the time, the Court concludes that the search was a valid search, with the consent of the Defendant, and that the objects taken from the vehicle as a result of the search are such as to come within the purview of the search; . . . that there was no threat or suggest [sic] of violence or show of violence to persuade or induce the Defendant to . . . sign any consent form to search . . . .

Findings of fact that are supported by competent evidence are binding on appeal. *State v. Booker*, 306 N.C. 302, 293 S.E. 2d

78 (1982). However, the conclusions of law drawn from those findings are reviewable by the appellate courts. *Id.*

Having resolved any conflicts in the voir dire testimony against the defendant, the trial court specifically found that there was no evidence to support defendant's subjective perception that Officer Cole had "helped" defendant on a previous occasion and would, therefore, "help" him with this matter. This finding of fact is supported by competent evidence and is binding on appeal. The trial court made a further "finding," more in the nature of a conclusion, that Officer Cole's express promise to defendant that the District Attorney would be informed of any cooperation was not sufficient to constitute an inducement to the defendant to make a statement and that "no promises, offers of reward or inducements were made to the Defendant to make any oral or written statement or to consent to the search of his vehicle."

[3] Defendant relies on *State v. Fuqua*, 269 N.C. 223, 152 S.E. 2d 68 (1967), to argue that Officer Cole's promise created strong "suggestions of hope" of aid which rendered his statement and his consent to search involuntary in light of all the circumstances. In contrast to the situation in this case, the defendant in *Fuqua* was told by a police officer that the officer would *testify* as to the defendant's cooperation if the defendant would give a statement. Accordingly, we held that such a statement by a person in authority gave the defendant a clear hope for lighter punishment if he confessed, which rendered his confession involuntary and inadmissible. *Fuqua*, 269 N.C. at 228, 152 S.E. 2d at 72. Thus, *Fuqua* is clearly distinguishable from the case under discussion, and defendant's reliance upon it is misplaced.

More to the point is our fairly recent holding in *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982). In *Branch*, police officers promised the defendant "that we would talk with the District Attorney if he made a statement which admitted his involvement." 306 N.C. at 109, 291 S.E. 2d at 659. We held that the defendant's inculpatory statement was not rendered involuntary by any suggestion of hope reasonably induced by the interrogating officers' comment, and further stated that:

> [T]his statement by Lieutenant Turner could not have aroused in the defendant, a man 29 years of age and of sound intellect, any reasonable hope of reward if he confessed. In-

> stead, we think that any suspect of similar age and ability would expect that the substance of any statement he made would be conveyed to the District Attorney in the course or normal investigative and prosecutorial procedures. The statement by Lieutenant Turner in no way hinted that the defendant could expect easier or preferred treatment if he confessed to the crime under investigation. The absence of any such indication that preferential treatment might be given in exchange for his confession makes the present case easily distinguishable from *Fuqua*.

Branch, 306 N.C. at 109-10, 291 S.E. 2d at 659.

Similarly, in this case, the record does not reveal the slightest hint that the defendant was led to believe that he could expect any easier or preferred treatment in exchange for his consent to search his automobile. The trial court made detailed findings as to defendant's age and experience with police practices and procedures and his resulting understanding of all of his constitutional rights. As was true of the defendant in *Branch*, the defendant in this case certainly knew, as a result of his age and experience, that the District Attorney would be made aware of his cooperation as a matter of routine practice. Accordingly, we hold that the trial court correctly determined that Officer Cole's statement to the defendant did not constitute an inducement to defendant to consent to the search of his automobile as a matter of law, and correctly denied the defendant's motion to suppress the evidence discovered during the course of that search.

We find no error in the trial court's conclusion that the promise by Officer Cole, that the District Attorney would be informed of any cooperation, was not such an inducement as to render defendant's statements and his consent to have his automobile searched involuntary.

[4] Defendant also contends that his oral and written waivers of counsel were the product of the same promises and inducements which allegedly vitiated his consent to the search of his automobile. The test for determining the voluntariness of a waiver of counsel is similar to that for determining the voluntariness of a consent to search. Prior to any questioning, the suspect must be warned of his constitutional rights, including his right to remain silent and his right to have an attorney present during question-

ing. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694 (1966). "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444, 16 L.Ed. 2d at 707; *see State v. Dampier*, 314 N.C. 292, 333 S.E. 2d 230 (1985). The voluntariness of a waiver must be based on the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286 (1979).

The trial court made one set of findings of fact with respect to the alleged inducements to support both its conclusion that the consent was voluntarily given for the search and its conclusion that defendant was in full understanding of his constitutional rights when he "freely, knowingly, intelligently and voluntarily waived each of those rights," including the right to counsel. For the reasons stated above, we hold that the trial court's findings of fact on this issue are supported by competent evidence and that they, in turn, support its conclusion of law that defendant voluntarily waived his right to counsel at the time of his questioning.

[5] Finally, defendant contends that his written statement was taken in violation of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). In *Edwards*, the United States Supreme Court held that once a suspected criminal invokes his right to counsel, he may not be questioned further until counsel is provided unless the suspected criminal himself initiates the dialogue, at which time he may waive his right to have an attorney present. Defendant argues that both Officer Cole's delivery of the inventory form and his subsequent contact with the defendant the following morning constituted the initiation of conversation by someone other than defendant.

In *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L.Ed. 2d 405 (1983), the defendant had already invoked his right to counsel when, while in transit from the police station to a jail, he asked of an officer, "Well, what is going to happen to me now?" The Supreme Court held that the defendant's question "evinced a willingness and a desire for a generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-46, 77 L.Ed. 2d at 412. In so holding, the Court reasoned that:

> While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

Bradshaw, 462 U.S. at 1045, 77 L.Ed. 2d at 412.

For similar reasons, we conclude that Officer Cole's delivery of the seizure inventory form to defendant was not an "initiation" of conversation as that term was used in *Edwards*. Indeed, law enforcement authorities are required "to make a list of the things seized, and . . . deliver a receipt embodying the list to the person who consented to the search." N.C.G.S. § 15A-223(b). The fact that delivery of the receipt was made after a request for the presence of an attorney does not alter the routineness of such a delivery nor does it thereby constitute the initiation of questioning.

We also conclude that Officer Cole's return to the jail the next day did not constitute an initiation of conversation in violation of *Edwards*, but was instead a continuation of the conversation begun by defendant on the evening of his arrest. The trial judge found that on 9 September 1983 Officer Cole handed defendant the inventory receipt and turned to walk away; that defendant indicated his desire to "tell his side of the story" after he had some sleep and a shower; that Cole told defendant he would return the next morning; and that when Cole returned on the morning of 10 September, he had a jailer contact defendant and ask him whether he still desired to speak with Officer Cole. The record fully indicates that it was defendant who, on the evening of his arrest, initiated the discussion which led to the making of his written statement the following morning. Defendant's desire

to rest and bathe merely delayed the carrying out of his desire to tell Officer Cole "his side of the story." By so doing, defendant simply postponed finishing the conversation already begun by him. We hold that the return of Officer Cole on the morning after defendant asserted his right to counsel was merely a continuation of the conversation initiated by defendant the previous evening and did not violate the rule in *Edwards.*

[6] Having found no violation of the *Edwards* rule, we must next determine whether under the totality of the circumstances, defendant's written statement was voluntarily and knowingly made. *Dampier*, 314 N.C. 292, 333 S.E. 2d 230; *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968). That is, we must determine whether defendant's waiver of counsel was "knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." *Edwards*, 451 U.S. at 486, n.9, 68 L.Ed. 2d at 387.

The trial court found that defendant was re-advised of his *Miranda* rights upon his being brought down to an interrogation room following Officer Cole's inquiry. There, defendant expressly waived these rights in the written statement of waiver which he signed. Having already concluded that this waiver was not induced and that defendant himself initiated the conversation following the assertion of his constitutional rights, we further conclude that defendant's waiver was knowingly and intelligently made under the totality of the circumstances.

On defendant's motion to suppress, the trial court concluded "that none of the Constitutional Rights, either Federal or State, of the Defendant were violated by his arrest, detention, interrogation or statements made on September 9th to Officer Cole, nor his statement written or oral statements made to Officer Cole on September 10th, 1983." We find that this conclusion is supported by the findings of fact which in turn are supported by the evidence. We hold that defendant's motion to suppress the evidence in question was properly denied.

II.

[7] Defendant next assigns as error the failure of the trial court to instruct the jury on certain lesser-included offenses of rape in

the first degree. The jury was instructed to find defendant guilty of first-degree rape or not guilty. Defendant contends that the evidence as to the essential element of penetration was equivocal and, therefore, additional instructions on attempted first-degree rape and assault on a female were required. We find no merit in this contention.

It is well established that the trial judge must declare and explain the law arising upon the evidence. N.C.G.S. § 15A-1232. Where there is evidence to support a charge upon a lesser-included offense, the judge must so instruct even absent a special request. *State v. Wright*, 304 N.C. 349, 283 S.E. 2d 502 (1981). "However, when the State's evidence is clear and positive with respect 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 trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E. 2d 711, 718-19 (1980). "Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration." *State v. Wright*, 304 N.C. 349, 353, 283 S.E. 2d 502, 505. Evidence of the slightest penetration of the female sex organ by the male sex organ is sufficient for vaginal intercourse and the emission of semen need not be shown to prove the offense of rape. *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984).

In support of his contention that the trial court erred in refusing to instruct on the lesser-included offenses, defendant relies on his written statement, the trial judge's summation of defendant's evidence elicited on cross-examination, and the trial court's alleged improper reliance on *State v. Strickland*, 307 N.C. 274, 298 S.E. 2d 645 (1983). Defendant's written statement reads in pertinent part as follows:

> I embarrassingly removed my pants to my knees, and without touching her elsewhere, *struggled to penetrate without an erection.* At this the girl began a muffled laugh, so I got up and dressed as Shannone was going through her purse. (Emphasis added.)

Defendant argues that when this excerpt is read in the context of his entire written statement, it is essentially a denial of penetration. The trial judge apparently agreed with defendant's interpre-

tation since he reiterated this portion of the statement in his summation of the evidence. However, we find no evidence in the record to support such a conclusion.

The simple fact that a person struggles to accomplish some feat, taken by itself, implies neither success nor failure. The fact that defendant "struggled to penetrate" is far from equivocal and in no way negates a completed act. A careful reading of defendant's statement as a whole fails to alter this observation. While penetration is best achieved when there is an erection, by no means can penetration to the degree necessary to satisfy the penetration element of rape be excluded because there is no erection. *See State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984). Luanne Odom testified unequivocally that defendant inserted "his penis . . . into my vagina." Though we find the trial judge's interpretation of defendant's statement unfortunate, we hold that Luanne Odom's testimony and defendant's failure to deny penetration compelled the instruction given by the trial court.

Although the trial court's instructions on first-degree rape were proper, there is some indication in the record that language from *Strickland*, 307 N.C. 274, 298 S.E. 2d 645, inappropriately provided the basis for those instructions. In *Strickland*, the defendant was convicted for first-degree murder although he alleged an alibi and thereby denied having committed any offense. We stated:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial court should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Strickland, 307 N.C. at 293, 298 S.E. 2d at 658.

[8] Where a defendant denies having committed a complete offense, such as murder, but there is evidence as to every element which negates that denial, application of *Strickland* would indeed be proper. In that situation, the jury would be correctly charged

to find the defendant guilty of murder or not guilty. However, in a case such as rape, where the only evidence of the defendant's innocence as to a particular *element* may rest solely on the defendant's denial, then reliance on *Strickland* would be misplaced. Had the defendant unequivocally denied the essential element of penetration, it would have been incumbent upon the trial judge to have placed that issue before the jury. This would have necessarily included an instruction on some lesser-included offense of first-degree rape. However, as we stated earlier, defendant's statement simply failed to constitute a denial of the element of penetration in this case. We merely take this opportunity to caution our trial judges against the reliance upon *Strickland* in giving jury instructions where the defendant denies only an element of the offense as opposed to denial of the complete offense.

[9] Defendant similarly assigns as error the trial court's failure to instruct the jury on a lesser-included offense of burglary in the first degree. The trial judge instructed the jury to find defendant guilty of either first-degree burglary or not guilty. Defendant contends that a rational trier of fact could find, based on his written statement, that he did not intend to commit the specified felonies of first-degree rape and armed robbery upon entering the Odom's mobile home; therefore, an instruction on misdemeanor breaking or entering was required. We find this contention meritless.

The statement which defendant gave to Officer Cole is as follows:

> On August 5th I was leaving McKell's to return to my fiancee's in Swannanoa when I met an old friend, Shannone Sherlin Brackett, in the parking lot. After becoming reacquainted he mentioned that someone in Fairview owed him some money and wanted a ride there to get it. I was hesitant in agreeing, since I was already late, but I did. Upon leaving we rode around and drank a beer, then headed to Fairview, where he told me—told where me [sic] to pull over and park. After getting out of the car, I noticed that he had a large knife in his belt. He started walking up the hill and motioned for me to be quiet. I followed him to a trailer where he tried to open the door and walked quietly around the window and motioned for me to do the same. I found that he was looking in the window at a girl lying in bed reading a book. Then he

motioned for me to wait there and again be quiet. I stood silently as Shannone walked around toward the front of the trailer. Then I heard a loud noise, and so did the girl, but she went back to reading, and I looked around the corner of the trailer to see Shannone going in the window. This puzzled me, but being under the impression that this was his girlfriend, I thought he was going to surprise her. I soon learned different. Then I returned to the window and observed and observed [sic] Shannone wearing a stocking over his head and holding the swordlike knife in his hand. He walked from the bedroom door and started toward her with the knife. He held his hand over her mouth so she wouldn't scream and in a low voice started threatening her with the knife. He had her turn over face down on the bed and placed a pillow over her head. He then threatened to kill her if she screamed or moved and got up and motioned for me to come in. At this point I was in a state of shock and panic. I went around the trailer and tried the door, but it was locked, so I went in the window and noticed an object on the floor. I stepped over the object and proceeded toward the bedroom. When I entered the room, Shannone was struggling with the girl, and she scratched his back with her long nails. He began to tie her up and realizing what was going on I said audibly, "No, Shannone." He then turned to me with the knife and started to get up when the victim got her head out from under the pillow and stared directly into my face. Shannone then covered her face and continued to restrain her arms and legs when she started kicking and in the fury kicked at me and stared at me again. He then began to threaten her with the knife and she relaxed totally, and I released her leg, ankle. Shannone then asked for my bandana which he used to blindfold her and began removing her undergarments. The girl remained totally relaxed as Shannone began to orally seduce her and snicker and giggle at me. It wasn't until Shannone tried to penetrate her through intercourse that she began to struggle and tried to scream. Shannone kept insisting that she liked it and that he had done it before. I wanted nothing to do with any lewd act of this nature. Shannone's continuing insistency led me to believe this was really his girlfriend. Her minimal struggle reassured me this was really his acquaintance. I embarrasingly removed my pants to my knees,

and without touching her elsewhere, struggled to penetrate without an erection. At this the girl began a muffled laugh, so I got up and dressed as Shannone was going through her purse. I started toward the door, and he began to untie her. I continued to the back door, where I waited outside. Shannone came out and said, "Let's go," in his usually excited voice and began running back to the car. Upon leaving he showed me her bank card and said he had to get to a Wachovia to get some money for her. I drove to Wachovia in Beverly Hills, and he went to the Teller II and withdrew $180. He then wanted to go to Patton Avenue and gave me some money for gas, so I took him. We stopped at another Wachovia Teller at Patton Avenue. I then took him to LaMancha and proceeded to my girlfriend's house in Swannanoa.

Common law burglary is defined as the breaking and entering of a dwelling house 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). Burglary in the first degree occurs when the crime is committed while the dwelling house or sleeping apartment is actually occupied by any person. N.C.G.S. § 14-51 (1981). If at the time of a breaking and entering a person does not possess the intent to commit a felony therein, he may only properly be convicted of misdemeanor breaking or entering. *State v. Peacock*, 313 N.C. 554, 330 S.E. 2d 190 (1985).

In his statement, defendant indicated that he agreed to go to the mobile home so that codefendant McClintick could collect some money which his girlfriend owed to him. According to defendant, he watched as McClintick entered the mobile home through a window, thinking that his friend was going to "surprise" the girl; and, once McClintick was inside, defendant watched as McClintick threatened the girl with a knife. Defendant was then motioned to come in, and he entered the mobile home "in a state of shock and panic." Defendant contends that this evidence was sufficient to justify a charge on non-felonious breaking or entering.

Instead of supporting his contention, it is defendant's own written statement that undermines it. Defendant admits having watched McClintick enter the mobile home wearing a mask and wielding a "swordlike knife." He then watched as McClintick

threatened the girl. At that point, it was amply clear to defendant that McClintick was not intending to merely "surprise" the girl. In spite of this, defendant entered the mobile home through a window after having failed to gain entrance through the door. This action negates any assertion on defendant's part that he did not possess the intent to commit the felonies specified in the indictment when he entered the mobile home. We, therefore, find that the evidence was clear and positive on the intent element of burglary at issue here and hold that because there was no evidence of the commission of a lesser-included offense than first-degree burglary, the trial court correctly charged only on that offense. *See State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980).

[10] Defendant next contends that the trial court erred by instructing the jury that defendant must have intended "to commit rape *or* robbery with a dangerous weapon, *or* both" at the time of the breaking and entering and that such instruction violated defendant's right to a unanimous jury verdict.

This Court has held that where an indictment is phrased in the conjunctive, e.g., rape *and* robbery, it is proper for the trial court to instruct the jury that it may convict for the indicted offense if it finds that defendant committed either or both of the particular felonies alleged to support the indictment. *State v. Simmons*, 286 N.C. 681, 213 S.E. 2d 280 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208 (1976). On 14 September 1983, defendant was charged in an indictment, proper in form, with the first-degree burglary of the home of Nina and Luanne Odom. In pertinent part, the indictment states that "defendant broke and entered the dwelling house with the intent to commit a felony therein: first degree rape & armed robbery." In its final mandate, the trial court instructed the jury that its verdict must be unanimous. Therefore, we find no merit in this contention.

III.

By his final assignments of error, defendant contends that the District Attorney's closing argument to the jury resulted in prejudicial error which denied him a fair trial. At the charge conference, defendant moved the trial court "to prohibit the State from arguing to the jury that the Defendant's confession is not, in fact, truthful." Following closing arguments, defendant moved for

a mistrial based upon alleged improper remarks made by the State during closing. The trial court denied both of these motions.

In support of his contention, defendant relies on the following pertinent portions of the State's final argument:

> If it were true that I had to be bound by this man's words when I put them into evidence, I never would have, because I would never stand in front of you and vouch for that man's credibility.
>
> . . . .
>
> I contend to you, ladies and gentlemen, if you listen to this statement, that it's so far fetched and incredible in and of itself that it's not worthy of belief.
>
> . . . .
>
> . . . I submit to you the truth has been in this courtroom and it came from the lips of that young lady sitting over there, ladies and gentlemen, and you can put your faith and trust in it. She is credible, and the other evidence presented to you corroborates her and validates her and substantiates her in every respect. You think about the evidence that does that, ladies and gentlemen, and when you do that and you contrast her credibility with the credibility of that man over there, I want you to put them on an imaginary scale of morality and character, and I guarantee you that that man over there wouldn't even begin to register on that scale.

[11] The introduction of an exculpatory statement by the State does not preclude it from showing facts concerning the crime to be different. *State v. May*, 292 N.C. 644, 235 S.E. 2d 178, *cert. denied*, 434 U.S. 928, 54 L.Ed. 2d 288 (1977). The State is entitled to comment during closing argument on any contradictory evidence as the basis for the jury's disbelief of the defendant's story. *State v. Brock*, 305 N.C. 532, 290 S.E. 2d 566 (1982). The record here plainly exhibits plenary evidence introduced by the State to contradict defendant's written statement. During her closing argument, the District Attorney indeed commented on the untruthfulness of that statement. This the law allowed her to do. We, therefore, hold that defendant's motion in limine at the

charge conference and his motion for mistrial at the close of the evidence were both properly denied.

[12] Defendant also contends that the trial court erred in failing to sustain timely objections to other alleged improper remarks by the District Attorney during closing argument. Defendant specifically argues that the prosecutrix "repeatedly disparaged the truthfulness of the defendant" and that such comments "culminated in direct, highly improper attacks on both his credibility and his morality and character." The law in this area is well settled:

> We have consistently held that counsel must be allowed wide latitude in the argument of hotly contested cases. He may argue to the jury the facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law so as to present his side of the case. Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury. Even so, counsel may not employ his argument as a device to place before the jury incompetent and prejudicial matter by expressing his own knowledge, beliefs and opinions not supported by the evidence[.] It is the duty of the trial judge, upon objection, to censor remarks not warranted by the evidence or the law and, in cases of gross impropriety, the court may properly intervene, *ex mero motu*. (Citations omitted.)

State v. Covington, 290 N.C. 313, 327-28, 226 S.E. 2d 629, 640 (1976).

Although we find the District Attorney's aforementioned commentary as to defendant's "morality and character" inappropriate, we do not find that such comments so exceeded the bounds of permissible argument as to require the trial court to sustain defendant's objections. The prosecutrix's entire argument indicates that the disputed comments were primarily directed towards defendant's written statement and the lack of credibility derived therefrom. We also note that when the District Attorney came close to commentary on defendant's failure to testify, the trial court interrupted *ex mero motu* and instructed the jury to ignore any such comment. Therefore, we hold that the trial court

did not err in failing to sustain defendant's timely objections during closing argument.

Finally, defendant argues that the trial court erred in failing to grant a motion for mistrial based on these alleged improper remarks by the State in its final argument. Having already concluded that there were no prejudicial remarks, we hold that the trial judge correctly denied defendant's motion.

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

No error.

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

STATE OF NORTH CAROLINA v. LARRY DOUGLAS SIMPSON

No. 193A84

(Filed 5 September 1985)

1. **Criminal Law § 75.14— confession—insufficient evidence that defendant lacked mental capacity to waive rights**

In a prosecution for first degree sexual offense, assault with a deadly weapon with intent to kill causing serious injury, first degree kidnapping, and taking indecent liberties with a child, the trial court did not err by denying defendant's motion to suppress statements made to law enforcement authorities after his arrest where, although it seemed clear that defendant had suffered psychological problems in the past, the evidence was insufficient to establish that he was mentally incompetent at the time of the confession and there was ample evidence to support the court's conclusion that defendant knowingly and intelligently waived his constitutional rights.

2. **Criminal Law § 169— failure to adequately include excluded evidence in record —issue not preserved**

Defendant did not preserve for appeal the issue of whether the trial court erred by refusing to permit defendant to call as witnesses to defendant's mental state the assistant district attorney and the district court judge from his initial appearance where defense counsel admitted that he did not know what the prosecutor's testimony would be, the prosecutor was in the courtroom and could have been called for an offer of proof, and statements by defense counsel as to what the judge said were inadequate to establish the essential content or substance of the judge's testimony.

3. Attorneys at Law § 4; Criminal Law § 75.14— prosecutor and district court judge not permitted to testify regarding defendant's mental state at initial appearance—no error

The trial court did not err by refusing to permit defendant to call as witnesses to his mental condition the assistant district attorney and district court judge from his initial appearance where there was no showing that there were not other witnesses, such as the deputy clerk, bailiffs, and other attorneys not involved in the case, who could have testified to defendant's behavior at the initial appearance and avoided the dangers of having judges and attorneys involved in the case testify as witnesses.

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

BEFORE *Stevens, J.*, at the 23 January 1984 Criminal Session of Superior Court, CARTERET County, defendant was convicted of first-degree sexual offense, assault with a deadly weapon with intent to kill causing serious injury, first-degree kidnapping, and indecent liberties with a child. Defendant was sentenced to the mandatory term of life imprisonment for the first-degree sexual offense conviction. The trial court consolidated the assault, kidnapping, and indecent liberties convictions and sentenced the defendant to forty years imprisonment, the sentence to commence at the expiration of the life term imposed for the first-degree sexual offense. Defendant appeals the first-degree sexual offense conviction of right pursuant to G.S. § 7A-27(a). On 29 October 1984, this Court allowed defendant's motions to bypass the Court of Appeals on his appeal in the assault, kidnapping, and indecent liberties cases. Heard in the Supreme Court 10 April 1985.

Lacy H. Thornburg, Attorney General, by Michael Rivers Morgan, Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

MEYER, Justice.

Defendant raises two issues. He first argues that the trial court erred in denying his motion to suppress his custodial statements on the basis that the State failed to show that the statements were preceded by a knowing and intelligent waiver of his constitutional rights to counsel and to be free from self-incrimination. Defendant also contends that the trial court deprived him of his right to offer competent evidence in support of his defense when it denied his request to call an assistant district

attorney and a district court judge to testify as to his behavior at his initial appearance. We find no error.

The State's evidence tended to show that, in June 1983, the defendant was living in a camper trailer behind the home of Donald and Barbara Wesley in Beaufort, North Carolina. Iantha Whitaker and her husband lived across the street from the Wesleys.

On the afternoon of 10 June 1983, Mrs. Whitaker allowed her six-year-old daughter, Beverly, to ride her bicycle and play with friends and instructed her not to leave the neighborhood and to be home before dark. When Beverly failed to return within a reasonable period of time, Mrs. Whitaker went to look for her. This search was unsuccessful, and Mrs. Whitaker began to be concerned.

Connie Adams, a neighbor of the Whitakers, testified that she knew both Beverly Whitaker and the defendant. She stated that she observed Beverly riding with the defendant in his blue Chevrolet Nova between 8:00 and 8:30 p.m. on 10 June 1983. Miss Adams testified that Beverly appeared to be frightened. Miss Adams immediately went to the Whitaker home and informed Mrs. Whitaker of what she had seen. When Mrs. Whitaker went to look for her youngest son, she discovered Beverly's bicycle on the sidewalk across from the Wesleys' house. Mrs. Whitaker then notified the police.

William Mason testified that, at approximately 10:00 p.m. on 10 June 1983, he and his wife were driving along Highway 101. At that time, he saw a man standing in the middle of the road, flicking a cigarette lighter over his head. Mason stopped and the man, identified at the trial as the defendant, came over to his car and said that a little girl had been attacked with an axe. He asked Mason to call the rescue squad for assistance. Mason testified that the defendant's speech was understandable, although a bit loud and somewhat slurred. He stated that, although it appeared the defendant had been drinking, he was not drunk. He also stated that the defendant's shirt was torn, and he had what appeared to be blood on the side of his face. Mason proceeded to drive to a friend's house and called the authorities. He then returned to the scene.

Carteret County Deputy Sheriff Ron Reynolds testified that he was instructed to investigate the report. When he reached the

scene, he saw a blue Nova parked on a dirt road just off Highway 101. At that time, Reynolds observed the defendant running toward the Nova. Reynolds pulled up beside the defendant and asked what had happened. The defendant responded by merely stating, "In the car, in the car." Upon investigation of the Nova, Deputy Reynolds discovered Beverly Whitaker sitting in the passenger side of the front seat. She was naked; had severe lacerations on her right shoulder, right arm, and upper body; and was covered with blood. Reynolds immediately notified the rescue squad.

Soon Sergeant Lynn Trigleth of the Beaufort Police Department arrived on the scene. Sergeant Trigleth had received emergency medical training, and she proceeded to render first-aid treatment to the victim. Reynolds then noticed the defendant standing in a ditch next to the Nova. Reynolds escorted the defendant back to his patrol car and had him sit in the front seat. At that time, the defendant told Reynolds that several black men had attacked the victim.

Sergeant Trigleth stated that Beverly was conscious while she was giving her first-aid treatment. Trigleth testified that, in response to her inquiry as to what had occurred, Beverly stated, "Larry cut me." Trigleth informed Deputy Reynolds of Beverly's accusation. Reynolds then went back to the patrol car, handcuffed the defendant, and placed him in the back seat of the cruiser. At some point after handcuffing the defendant, Reynolds observed him banging his head against the patrol car window in an effort to get his attention. At this time, Reynolds noticed that the defendant had a stong odor of alcohol about his person. Shortly, the rescue squad arrived, and the victim was transported to Carteret General Hospital.

Dr. Peter Kuers was the surgeon on call at Carteret General Hospital the night of 10 June 1983. He testified that he treated Beverly when she was brought in and he observed severe lacerations on her right shoulder and right arm and a number of minor lacerations on her chest, neck, and abdomen. He also detected a laceration at the back of the vagina. Dr. Kuers testified that, in his opinion, the two major wounds were caused by a heavy instrument that was wider than a knife. However, he also opined that the minor cuts were too delicate to have been inflicted by a heavy weapon such as a hatchet.

Dr. George Oliver was qualified as an expert in the field of gynecology and obstetrics. He testified that, in the early morning hours of 11 June 1983, he also treated Beverly. He testified that Beverly had suffered a deep laceration of the vagina and that the laceration extended from the back of the vagina to the sphincter of the rectum. Dr. Oliver testified that, in his opinion, the vaginal laceration had been caused by the insertion of some object into Beverly's vagina.

After Beverly was transported to the hospital, Detective Frank Galizia of the Carteret County Sheriff's Department arrived at the scene and took charge of the crime scene investigation. Detective Galizia testified that after speaking with Deputy Reynolds, he got in the patrol car to talk with the defendant. The defendant began telling Galizia that he was "going to get" the black men who had attacked the girl. Galizia attempted to cut him off and advise him of his *Miranda* rights. However, the defendant immediately interrupted and began telling Galizia that the attack had been perpetrated by two black men. At that point, Detective Galizia told the defendant to stay calm and that he would talk with him later.

Galizia testified that he proceeded to examine the interior of the car. On the front seat, he discovered a pair of pink shorts and a pair of white underwear. Both items of clothing were stained with blood. Galizia also detected blood stains both in the interior and on the exterior of the car. Within two or three feet of the car, he discovered a pair of black socks, a beer can, and a bayonet.

After the investigation of the crime scene was completed, the defendant was transported to the Beaufort County Sheriff's office. The defendant was taken to an interrogation room, and Deputy Reynolds conducted a pat-down search of the defendant. Reynolds testified that a fish filet knife was discovered in the defendant's right-hand, front pants pocket and that a small pocketknife was discovered in his left-hand, front pants pocket. The handcuffs were then removed, and Reynolds gave the defendant a cup of coffee and a cigarette. Deputy Reynolds then advised the defendant of his *Miranda* rights. Reynolds testified that the defendant stated that he understood his rights and that he did not want to speak with a lawyer prior to questioning. The defendant then executed a written waiver of his rights.

Detective Galizia testified that the defendant proceeded to give a statement in which he said that, upon returning to Beaufort from Morehead City, the victim, who was playing near the Wesleys' house, asked him to take her for a ride. He stated that they got stuck on a dirt road and that two black men in an orange car pulled in behind them. The defendant said he later found the girl in a ditch. He then put her in his car and ran to the end of the road to get help. Detective Galizia indicated that he did not believe the story and told the defendant that he wanted to talk further with him about the incident.

The defendant then gave a second version of the incident in which he stated that the girl had asked him for a ride. After driving to a store to get some beer, they drove down a dirt road off Highway 101 where he and the girl had an argument. He stated that the next thing he remembered was hearing the girl screaming and that he pulled her out of some water and put her in the car. He took off her clothes to see how badly she was hurt and then ran to get help. Once again, Detective Galizia expressed doubt as to the truth of the story, and the defendant was asked to start over.

Galizia testified that the defendant than gave a third version of the incident in which he stated that he was drunk and had gotten into an argument with the girl. He then went over to the ditch to chop some wood with a hatchet that had been in the back seat. The defendant stated that the girl came over to the ditch bank and he accidentally hit her with the hatchet. According to Galizia, the defendant said that he did not know what to do and that he struck her three or four additional blows. He then undressed the victim to see if she was hurt and then went for help. Galizia told the defendant that he was concerned about the veracity of the statement. Galizia testified that he told the defendant that the statement was inconsistent with the physical evidence and "that it was time to start telling the truth." At that point, the defendant began to cry, stood up and banged his head against the interrogation room door, and indicated that he would now tell the truth.

The defendant stated that he had driven off with the girl and had, at some point, removed her clothes. He admitted putting his fingers in her "private area." He then got the hatchet and was by

the ditch cutting something when the victim came over to him. He stated that he hit her with the hatchet. He said that when he saw that she was bleeding, he stated, "Oh, God, what have I done?" and that he "must have" hit her with several additional blows. He then placed her in the car and went for help.

Detective Galizia noted that, during the questioning, the defendant was bouncing his legs up and down on the balls of his feet, but when he completed the statement, this behavior ceased and he became noticeably relaxed. The interview session lasted slightly over one hour. Later, the defendant told the authorities the location of the hatchet. The hatchet was recovered in the general vicinity of the location specified by the defendant. When found, it was covered with wet blood stains.

In response to the State's case, the defendant raised an insanity defense. The defendant's brother, James Simpson, and his landlady, Mrs. Barbara Wesley, testified concerning the background of the defendant and related specific incidents involving the defendant's behavior. The brother's testimony showed that the defendant was the third of five children and that intelligence tests administered to the defendant when he was in school indicated that he was on the low end of the intelligence scale, scoring significantly below his two older brothers. The defendant failed several grades in school and eventually dropped out. The defendant's brother testified that the defendant had few friends while growing up and was ostracized by his siblings. He further testified that the defendant exhibited bizarre behavior during his adolescent years and that he continued to demonstrate such behavior into adulthood. The defendant joined the Army, but subsequently received a medical discharge based on mental reasons. The defendant's brother testified regarding several instances of bizarre behavior on the part of the defendant after his discharge from the military. These included defendant's claim of having sex with his ex-wife at his place of employment when, in fact, she was remarried and living in another state at the time and an incident later in the same day where the defendant repeatedly threw himself into the street in front of oncoming vehicles. The defendant's landlady also testified concerning instances of unusual behavior exhibited by the defendant.

Dr. Barry Moore, a board-certified psychiatrist, testified on behalf of the defendant. Dr. Moore was appointed by the trial

court to examine the defendant and to assist defense counsel on the issue of defendant's sanity at the time of the alleged offenses. After being qualified as an expert in the field of psychiatry, Dr. Moore testified that he had examined the defendant approximately six times. Dr. Moore stated that the defendant's medical records indicated that other physicians had at previous times diagnosed the defendant as schizophrenic, depressed, or as possessing other personality disorders. Dr. Moore testified that he was of the opinion that, at the time of the incident, the defendant was laboring under defective reasoning due to mental disease or defect so as to be incapable of knowing the nature and quality of his acts.

In rebuttal, the State presented the testimony of Dr. Bob Rollins, Clinical Director of the Forensic Unit at Dorothea Dix Hospital. After being qualified and accepted as an expert in forensic psychiatry, Dr. Rollins testified that he examined the defendant on 13 June 1983, upon defendant's commitment to Dorothea Dix Hospital for a competency examination. Dr. Rollins testified that, based on his examination of the defendant and a review of the defendant's medical records, it was his opinion that the defendant was not, at the time of the incident, suffering from a mental illness which would have kept him from understanding the nature and quality of his acts.

Based on this evidence, the jury returned verdicts finding the defendant guilty of first-degree sexual offense, assault with a deadly weapon with intent to kill causing serious injury, first-degree kidnapping, and indecent liberties with a child.

[1] The defendant first assigns as error the trial court's denial of his motion to suppress any statements made by him to law enforcement authorities subsequent to his arrest. Prior to trial, a hearing was held on the defendant's suppression motion. At the hearing, Deputy Reynolds and Detective Galizia gave testimony substantially similar to their trial testimony. Dr. Moore testified at the hearing on behalf of the defendant. Dr. Moore testified that, in his opinion, the defendant was unable to comprehend his *Miranda* rights as they were then explained to him. He based this conclusion on his opinion that the defendant has difficulty thinking and comprehending under stress, a condition which would be exacerbated by the consumption of alcohol. He also noted that the

defendant is very compliant when confronted with authority figures.

Following the presentation of evidence, the trial court found that, at the time he made the statement, the defendant was not under the influence of an impairing substance, that no promises or threats were made against him, that he was read his *Miranda* rights, and that he waived these rights. Based on these and other findings, the trial court concluded that the statement was voluntarily made following a knowing and intelligent waiver of his constitutional rights.

The defendant contends that the State failed to show that his custodial statements were preceded by a knowing and intelligent waiver of his right to counsel and his right to be free from self-incrimination. We do not agree.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, *reh'g denied*, 385 U.S. 890, 17 L.Ed. 2d 121 (1966), the Supreme Court of the United States held that the prosecution was prohibited from using any statements resulting from a custodial interrogation of a defendant unless, prior to questioning, the defendant had been advised of his right to remain silent; that any statement may be introduced as evidence against him; that he has the right to have counsel present during questioning; and that, if he cannot afford an attorney, one will be appointed for him. The Supreme Court went on to say that a defendant may waive effectuation of these rights by a voluntary, knowing, and intelligent waiver. *Id.* at 444, 16 L.Ed. 2d at 707. *See also State v. Steptoe*, 296 N.C. 711, 252 S.E. 2d 707 (1979). Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981); *see Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461 (1938). The prosecution bears the burden of demonstrating that the waiver was knowingly and intelligently made, *Miranda*, 384 U.S. 436, 16 L.Ed. 2d 694; and an express written waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a valid waiver. *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286 (1979).

The defendant argues the evidence clearly indicates that he did not possess sufficient mental capacity to execute a knowing

and intelligent waiver of his right to counsel and his right to be free from self-incrimination. In *Blackburn v. Alabama*, 361 U.S. 199, 4 L.Ed. 2d 242 (1960), the Supreme Court stated that a confession is inadmissible if the defendant was mentally incompetent at the time the statement was given. In order to ascertain whether the defendant was competent at the time of the statement, we must examine the totality of the circumstances surrounding the defendant and the confession. *State v. Ross*, 297 N.C. 137, 254 S.E. 2d 10 (1979).

The defendant points to several circumstances which he contends show that he lacked the required mental capacity for a knowing and intelligent waiver. There was evidence that the defendant possessed subnormal intelligence, that his judgment and comprehension faculties were impaired during times of stress, and that this condition could be aggravated by the consumption of alcohol. There was evidence tending to show that the defendant had consumed alcohol at some point in the evening prior to the confession. The defendant also points to the testimony of Deputy Reynolds and Detective Galizia concerning the defendant's unusual behavior at the crime scene and in the interrogation room. Finally, Dr. Moore testified that, in his opinion, the defendant was unable to comprehend his *Miranda* rights when they were explained to him.

Initially, we note that the trial court's findings of fact after a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts if supported by competent evidence. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984); *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). This is true even though the evidence is conflicting. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540. The trial court's conclusions of law, however, are reviewable by the appellate courts. *Id.*

With these principles in mind, we conclude that, while it seems clear that the defendant had suffered psychological problems in the past, the evidence is insufficient to establish that he was mentally incompetent at the time of the confession. It is well established that although subnormal intelligence is a factor to be considered in determining whether a waiver is valid, this condition standing alone will not render a confession inadmissible if it is in all other respects voluntarily and understandingly made.

State v. Jenkins, 300 N.C. 578, 268 S.E. 2d 458 (1980). We have also said that previous incidents of mental instability are not necessarily dispositive of the issue of mental competence at the time of the confession. *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982). Therefore, evidence of the defendant's below-average intelligence and his previous psychological problems do not compel suppression of the statement.

The defendant was found competent to stand trial following a psychiatric evaluation conducted after his arrest. In *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981), we found such a finding to be significant in supporting the trial court's conclusion that the defendant's confession was knowing and voluntary. In *Misenheimer*, we also found it significant that the questioning was conducted in a well-lighted room and lasted less than two hours. Here, there was evidence that the interrogation room was well lit and that the questioning lasted one hour and ten minutes. There was also evidence that the defendant was coherent and able to move about under his own power at the time of the confession, a factor found indicative of a knowing and intelligent waiver in *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599. Furthermore, Detective Galizia testified that the defendant was not under the influence of alcohol during the period of questioning. The trial court found that the defendant was informed of his *Miranda* rights and that he responded coherently to the questioning. We hold that, though there was evidence to the contrary, there was ample evidence to support the trial court's conclusion that the defendant fully understood his constitutional rights; that he knowingly and intelligently waived those rights; and that his statement was freely, voluntarily, and understandingly made.

The defendant next assigns as error the trial court's refusal to permit him to call as witnesses the assistant district attorney who represented the State at his initial appearance and the district court judge who presided over the initial appearance. The defendant sought to examine them concerning their observations of his behavior at that time. Since the initial appearance was conducted slightly more than forty-eight hours after the incident, the defendant argues that this testimony was material to his insanity defense. We agree that such evidence may have been material on the issue of the defendant's sanity at the time of the crimes. However, we conclude that the defendant failed to properly pre-

serve this issue for appellate review. Furthermore, assuming, *arguendo*, that the issue is before us, we find no error in the trial court's refusal to allow the defendant to call these witnesses.

[2] It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify. *State v. Cheek*, 307 N.C. 552, 299 S.E. 2d 633 (1983); *State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980); *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971).

In *Currence v. Harden*, 296 N.C. 95, 249 S.E. 2d 387 (1978), we held that, in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. We also held that the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred. *Id.* This standard has been applied to criminal cases. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). We have also said:

> The practice of permitting counsel to insert answers rather than have the witness give them in the presence of the court should not be encouraged. The words of the witness, and not the words counsel thinks the witness might have used, should go in the record. Ordinarily the trial judge should hear the answers. The better practice is to excuse the jury and complete the record in open court in the absence of the jury.

State v. Willis, 285 N.C. 195, 200, 204 S.E. 2d 33, 36 (1974). While the principles are usually cited in situations where particular testimony of a witness already on the stand is excluded, they apply with equal vigor when the witness is not permitted to testify at all.

Initially, defendant made a motion to introduce the assistant district attorney's motion to have the defendant examined to determine his competency to proceed. The motion was denied. Defendant then asked to have the assistant district attorney testify. In response to the trial court's inquiry as to what his testimony would be, defense counsel stated:

> His observations, if Your Honor please, are what I'm interested in, what he observed on the 13th of June 1983 and what he saw and how the defendant appeared to him; *whether or not it would be the same as what's in the motion, Judge, I don't know.* (Emphasis added.)

The trial court then denied the request. Defense counsel subsequently stated, "Your Honor please, I would like to put in the record that we made the offer of proof, if Your Honor please." These are the only indications in the record concerning the substance of the prosecutor's proffered testimony. We hold that this is insufficient to establish the "essential content or substance" of the witness' testimony. Defense counsel himself admitted that he did not know what the prosecutor's testimony would be. Without a showing of what the excluded testimony would have been, we are unable to say that the exclusion was prejudicial. We also note that the assistant district attorney was present in the courtroom when defense counsel made the request to call him as a witness. We fail to discern any reason why defense counsel could not have made an offer of proof by having the prosecutor called to the stand in the absence of the jury and questioned about his observations of the defendant at the competency hearing.

With regard to the district court judge, the trial court again asked defense counsel what the witness would testify to. Counsel responded:

> Judge, I can tell you exactly because it wasn't very long ago that I talked to him. He told me, Your Honor please, *that he has conducted, as a district attorney and as a district court judge, several hundred first appearances and he's never seen anybody like this man.* (Emphasis added.)

After the trial court denied the request to have the district court judge testify, defense counsel stated, "Your Honor please, of course I would make that offer of proof." We hold that these statements by defense counsel were inadequate to establish the essential content or substance of the judge's testimony. The statement that the judge said he had "never seen anybody" like the defendant does not show that the witness would have testified that he felt the defendant was insane or mentally ill, nor does it set out any specific instances of behavior observed by him at the

initial appearance which would aid the jury in ascertaining the defendant's mental state.

We wish to make it clear that there may be instances where a witness need not be called and questioned in order to preserve appellate review of excluded evidence. *See, e.g., State v. McCormick*, 298 N.C. 788, 259 S.E. 2d 880 (1979) (where witness answered defense counsel's question before the district attorney's objection was sustained); *Lloyd v. Babb*, 296 N.C. 416, 251 S.E. 2d 843 (1979) (where opposing counsel stipulated to the existence of the testimony which the offering party stated it would present). In the case *sub judice*, however, defense counsel's statements, apparently intended to establish the content of the excluded testimony without questioning the witnesses themselves, were not adequate to preserve the excluded evidence for judicial review.

[3] Additionally, assuming, *arguendo*, that defense counsel's efforts had constituted an adequate offer of proof for the usual witness, we find other compelling reasons to uphold the trial judge's refusal to permit the defendant to call these particular witnesses. It is generally accepted that a judge is competent to testify as to some aspects of a proceeding previously held before him. *Hale v. Wyatt*, 78 N.H. 214, 98 A. 379 (1916); *People v. Bevilacqua*, 12 Misc. 2d 558, 170 N.Y.S. 2d 423, *rev'd on other grounds*, 5 N.Y. 2d 867, 155 N.E. 2d 865, 182 N.Y.S. 2d 18 (1958). However, the propriety of calling a judge as a witness in cases not on trial before him has been questioned by many courts. Some courts have taken the position that allowing judges to testify would be prejudicial to the rights of the opposing party due to the fact that the jury would likely accord greater weight to the testimony of a judge than an ordinary witness. *E.g., Merritt v. Reserve Insurance Company*, 34 Cal. App. 3d 858, 110 Cal. Rptr. 511 (1973); *Commonwealth v. Connolly*, 217 Pa. Super. 201, 269 A. 2d 390 (1970). Other courts have viewed with trepidation the possibility that judges might be subjected to questioning as to the mental processes they employed to reach a particular decision. *E.g., State v. Donovan*, 129 N.J.L. 478, 30 A. 2d 421 (1943); *State ex rel. Carroll v. Junker*, 79 Wash. 2d 12, 482 P. 2d 775 (1971). Because of these problems, it has been held that a judge should not be called as a witness if the rights of the party can be otherwise protected. *E.g., Woodward v. City of Waterbury*, 113 Conn.

457, 155 A. 825 (1931); *State v. Donovan*, 129 N.J.L. 478, 30 A. 2d 421.

It appears well settled that a prosecutor is also competent to testify on behalf of a defendant. *People v. Boford*, 117 Cal. App. 2d 576, 256 P. 2d 334 (1953); *People v. Gendron*, 41 Ill. 2d 351, 243 N.E. 2d 208 (1968), *cert. denied*, 396 U.S. 889, 24 L.Ed. 2d 164 (1969); *State v. Stiltner*, 61 Wash. 2d 102, 377 P. 2d 252 (1962), *cert. denied*, 380 U.S. 924, 13 L.Ed. 2d 810 (1965). There is, however, a natural reluctance to allow attorneys to appear in a case as both advocate and witness. Therefore, the decision of whether to permit a defendant to call a prosecuting attorney to the stand is within the discretion of the trial court. *E.g., People v. Gendron*, 41 Ill. 2d 351, 243 N.E. 2d 208 (1968), *cert. denied*, 396 U.S. 889, 24 L.Ed. 2d 164 (1969); *State v. Tuesno*, 408 So. 2d 1269 (La. 1982); *Johnson v. State*, 23 Md. App. 131, 326 A. 2d 38 (1974). The circumstances under which a court will permit a lawyer for a party, even a prosecuting attorney, to take the witness stand must be such that a compelling reason for such action exists. *United States v. Tamura*, 694 F. 2d 591 (9th Cir. 1982); *United States v. Maloney*, 241 F. Supp. 49 (W.D. Pa. 1965). Where other witnesses are available to testify as to the information sought, the court does not abuse its discretion in refusing to allow a defendant to call the prosecutor. *State v. McClellan*, 125 Ariz. 595, 611 P. 2d 948 (App. 1980); *see State v. Tuesno*, 408 So. 2d 1269.

Guided by these principles, we conclude that the trial court did not err in refusing to permit the defendant to call these witnesses. The defendant has made no showing that the district court judge and the assistant district attorney were the only witnesses who could testify as to his behavior at the initial appearance. There were undoubtedly other persons present in the courtroom at the time of the defendant's initial appearance who may have noticed his behavior, including the deputy clerk, the bailiffs, and other attorneys not involved in the case. By calling them, the defendant could have presented evidence of his behavior at the initial appearance, while avoiding the previously cited dangers of having judges and attorneys involved in the case testify as witnesses. Absent a showing that there were no other available witnesses who could testify as to the defendant's behavior during the initial appearance, we are unable to say that

the trial court erred by refusing to permit the defendant to call these witnesses.

No error.

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

STATE OF NORTH CAROLINA v. JEANINE LYNN SPANGLER

No. 417A84

(Filed 5 September 1985)

1. **Criminal Law § 5.1— insanity—burden of proof properly on defendant**

The trial court in a prosecution for the murder of defendant's ten-month-old son properly placed the burden of proving insanity on defendant even though defendant's attorney was frustrated by defendant in his efforts to obtain the optimum evidence necessary to the insanity defense.

2. **Criminal Law § 112.2— instruction on role of jury—no error**

The trial court did not err in a first degree murder prosecution by instructing the jury that its only concern was to determine whether defendant was guilty, rather than instructing the jury that it was to determine whether or not defendant was guilty, because the judge's remarks viewed contextually conveyed to the jury venire what the jury's appropriate role in the trial was to be.

3. **Constitutional Law § 63; Jury § 7— death qualifying jury—no error**

The trial court in a first degree murder prosecution did not err by excluding a prospective juror for cause solely because of his unequivocal opposition to capital punishment.

4. **Criminal Law § 63.1— cross-examination restricted—no error**

In a prosecution for first degree murder in which defendant claimed insanity, the trial court did not err during cross-examination of defendant's cell mate by sustaining objections to questions intended to elicit testimony that defendant had acted abnormally while incarcerated. The testimony would have been repetitive because defense counsel intended to call a psychologist and defendant herself to testify about defendant's mental condition; moreover, defendant was able to ask the desired questions after rephrasing them.

5. **Criminal Law § 43.4— first degree murder—pathologist's slides of victim admissible**

In a prosecution for the first degree murder of a ten-month-old child, the trial court did not err by permitting a pathologist to use photographic slides to

illustrate the nature and severity of the injuries sustained by the child prior to his death and to illustrate the cause of his death; furthermore, the slides were not especially gruesome or gory.

6. Homicide § 21.5— first degree murder of child—evidence sufficient

In a prosecution for the murder of defendant's ten-month-old child, the trial court properly denied defendant's motions to dismiss where defendant's cell mate testified that defendant told her that she smashed her baby's head against the bathtub in order to kill him and that she had read books prior to killing the baby on how to administer lethal head blows and then position the body so that the blood flowed away from the wound in order to camouflage it; the pathologist's evidence tended to corroborate the cell mate's testimony regarding the cause of death; and there was evidence that defendant admitted striking the child when she brought the baby to the hospital. G.S. 15A-1227.

7. Criminal Law § 63.1— first degree murder—insanity defense—psychiatrist's opinion limited to killing

In a prosecution for first degree murder in which defendant pled insanity, the trial court did not err by allowing a psychiatrist to give her opinion regarding defendant's ability to distinguish right from wrong with reference to the particular offense. The fact in issue was defendant's ability to distinguish right from wrong precisely in relation to taking another human being's life and the expert opinion rendered by the psychiatrist was relevant to this issue because it tended to prove that defendant knew it was wrong to kill her baby or anyone else. G.S. 8-58.13.

8. Criminal Law § 53— psychiatrist's testimony—reliance on test performed by others—admissible

In a prosecution for first degree murder in which defendant pled insanity, the trial court did not err by permitting a psychiatrist to testify about the results of a test she did not personally perform where the testimony was admissible under the exception to the hearsay rule enunciated in *State v. Wade*, 296 N.C. 454.

9. Homicide § 30.2; Criminal Law § 115— first degree murder—failure to charge on voluntary manslaughter—no error

The trial judge in a prosecution for first degree murder correctly declined to instruct the jury on voluntary manslaughter where defense counsel wanted the trial judge to submit the charge of voluntary manslaughter to the jury without any evidence to justify it in order to give the jury an offense upon which it could compromise.

10. Criminal Law § 130; Trial § 50— verdict returned after fifteen minutes—no error

The trial court in a first degree murder prosecution did not err by denying defendant's motion to set aside the verdict on the grounds that the jury returned its verdict fifteen minutes after it retired. Shortness of time in deliberating a verdict in a criminal case does not constitute grounds for setting aside a verdict; brevity of deliberation should be questioned only if there is evidence of some misconduct on the part of the jury or the trial judge believes that the jury acted with a contemptuous or flagrant disregard of its duties.

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

DEFENDANT appeals as a matter of right pursuant to G.S. 7A-27 from the judgment entered by *Allsbrook, J.*, during the 13 February 1984 Criminal Session of Superior Court, EDGECOMBE County, sentencing defendant to life imprisonment upon her conviction of murder in the first degree.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Assistant Attorney General, for the State.

Cameron S. Weeks, for defendant-appellant.

FRYE, Justice.

Defendant raises eleven assignments of error on her appeal to this Court. We conclude that defendant received a fair trial free from prejudicial error. Therefore, each of defendant's arguments on appeal is rejected.

The evidence introduced during a jury trial tended to show that on the afternoon of 26 October 1983, defendant took her ten-month-old son, Jacob Harley Warner, to the emergency room of Nash General Hospital. She placed the baby in a nurse's arms and said, "I think my baby died yesterday, but I think he took a breath today." It was determined that the baby had been dead for some time. The baby's body was stiff and was bruised in various places.

At the hospital, defendant told medical personnel "that she had occasionally slapped the child and had slapped the baby around because the baby made her nervous; that they were very poor, that they hadn't had a lot of food to eat and that the baby was fussing and crying and that she had never hit the child with her fist and . . . that the bruises that were on the child then were not places that she had hit the child but places where the blood had been pooled after it died." Certain witnesses for the State testified that defendant showed very little emotion, seemed very nervous, but not remorseful, after the incident.

Defendant had been living in a trailer at the Wesleyan Circle Trailer Park near Whitakers since approximately July, 1983 and prior to that time had lived in Daytona Beach, Florida, with the

child's father, Joseph Warner. Defendant consistently denied mistreatment of the child and explained that she had not brought the child to the hospital earlier because of the previous experience when she had been suspected of child neglect or abuse when the child had been scalded.

An autopsy revealed multiple injuries on the body, abrasions or scraping wounds over the back and top of the head, bruises or contusion abrasions on the forehead and various other bruises and fractures to the body, particularly the skull. The child also had internal injuries. Defendant testified that the baby had been attempting to walk and had pulled up on the couch, taken a couple of steps from the couch, then fell and hit its head at approximately 10:30 a.m. on 25 October 1983, the day before she took the baby to the hospital.

An expert pathologist who performed the autopsy concluded that death was caused by the skull fracture and hemorrhage into the skull and injury to the brain. It was his opinion that the fracture of the skull was caused by a blunt force injury to the back of the head, which occurred just prior to death. Furthermore, the pathologist testified that in his opinion the injury that caused the child's death could not have been caused by a child of Jacob Warner's size and weight falling to the floor and striking his head because "[t]he head would have had to have been in a fixed position and an object would have had to hit it, at least the head would have had to be affixed with regard to the body."

Paulette Gibbs, a fellow inmate of defendant, testified that defendant first denied being responsible for her son's death and told her it was all a mistake and that she would be released as soon as the autopsy report came in. Defendant made statements to Ms. Gibbs, such as, "Since when is it against the law to beat your own child?" The witness described defendant's conduct in the jail as being odd in various ways. She testified that later defendant told her of books she had read that described the three vulnerable spots in a person's skull that were susceptible to skull fracture and also how you could lay a body a certain way, so that blood would flow in the direction away from the wound to disguise the way a person had been killed. Furthermore, Ms. Gibbs testified that defendant confessed to her that she had killed her child by taking the child's head in her hands and hitting it on the

side of the bathtub and that she only had to do it twice because she knew exactly where to do it this time.

Testimony further revealed that defendant had been hospitalized several years earlier in Florida. Defendant testified that she had been suffering catatonic withdrawal and received electric shock treatment as well as continued medication afterward. Defendant distrusted medical doctors and frustrated her attorney's attempts to obtain her medical records in an effort to assist in her defense of insanity. A social worker, a medical doctor, and a psychotherapist all testified that they were of the opinion that defendant did not on 25 October 1983 have sufficient mental capacity to be able to distinguish between right and wrong. Also, defendant's father and mother testified about her background and history, expressing essentially the same opinion regarding her mental incapacity at the time of the baby's death. A psychiatrist for the State testified on rebuttal that in her opinion defendant did have the ability to distinguish right from wrong with reference to this particular offense.

After the judge gave his charge, the jury deliberated for fifteen minutes and returned with a verdict of guilty of first-degree murder. After being convicted, defendant agreed to an examination by a psychiatrist, who testified that defendant was and had been, a schizophrenic and that on 25 October 1983 she could not have had the capacity to appreciate the criminality of her conduct. Thereafter, the jury recommended that defendant be sentenced to life imprisonment. Defendant gave timely notice of appeal to this Court pursuant to G.S. 7A-27 after the judge sentenced her to life imprisonment.

I.

[1] This Court will resolve each of the eleven assignments of error raised by defendant. First, defendant argues that the trial court committed reversible error in placing the burden of proof regarding the insanity defense on defendant. Certainly, the thrust of defendant's defense was that she was insane when she killed her ten-month-old child. Defendant acknowledges the rule in this State, which places the burden of proof on the defendant to establish the affirmative defense of insanity. *State v. Wetmore*, 298 N.C. 743, 259 S.E. 2d 870 (1979); upheld in *State v. Heptinsall*, 309 N.C. 231, 306 S.E. 2d 109 (1983). However, defendant argues that,

considering the circumstances of this case, the State should be required to prove that defendant was sane at the time of the crime.

This Court recognizes that defendant's attorney was frustrated in his efforts to obtain the optimum evidence necessary to the insanity defense. This reason alone is not sufficiently compelling to persuade us to change a rule that has been espoused by this Court as the correct rule. This assignment of error is therefore overruled.

II.

[2] Next, defendant argues that the trial judge committed error by giving instructions to the jury that could have led them to believe that they were required to find defendant guilty of some criminal charge and could not acquit defendant. This assignment of error stems from the following remarks made by the court:

> In this case the defendant, Ms. Spangler, is charged as a result of an incident that allegedly occurred on October 25, 1983 with first-degree murder, which allegedly results from the death of one Jacob Harley Warner.
>
> Now, to this charge and as to any other charge about which you will be instructed, the defendant has entered a plea of not guilty and says that she is not guilty. Furthermore, the defendant has raised the defense of insanity and says that she is not guilty also by reason of insanity.
>
> Now, as I said, the defendant in this case is accused of murder in the first degree. The fact that she has been charged with this offense is no evidence of her guilt and the State must prove that she is guilty and the State must do so beyond a reasonable doubt, which I later shall define for you.
>
> * * * *
>
> (However, prior to that time [referring to a G.S. § 15A-2000 sentencing hearing] the only concern of the trial jury is to determine whether the defendant is guilty of the crime charged, or of any lesser included offenses about which you will be instructed.) DEFENDANT EXCEPTS.

Defendant argues that the portions of the foregoing remarks to which defendant excepts "could well have given the prospec-

tive jurors the impression that they would be required to find defendant guilty of first degree murder or some lesser included offense." Defendant cites no authority to support this particular argument. Defense counsel failed to object to this portion of the judge's introductory remarks. Employing a plain error analysis, we do not view such remarks, when read in context, to be prejudicial to defendant. Defendant contends that the trial judge should have charged, "the only concern of the trial jury is to determine whether *or not* the defendant is guilty . . . ," as opposed to what he actually said. When viewed contextually, the judge's remarks conveyed to the jury venire what the jury's appropriate role in the trial was to be. We do not agree with defendant's contention that the judge conveyed to the jury that their job was to convict defendant, there being no other alternative available to them. This assignment of error is rejected.

III.

[3] Defendant further argues that the trial court committed reversible error by excusing a prospective juror for cause solely because of his unequivocal opposition to capital punishment, in violation of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In the recent case of *State v. Jenkins*, 311 N.C. 194, 317 S.E. 2d 345 (1984), this Court rejected this argument and explained as follows:

> Defendant next contends that the trial judge erred by permitting the State to 'death qualify' the jury prior to the guilt phase of the trial. He argues that permitting challenges for cause of jurors who would be unwilling to impose the death penalty denied him a fair determination of his guilt or innocence by a jury constituting a representative cross-section of the community.
>
> This Court has consistently rejected this argument, *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E. 2d 170 (1983); *State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980). We do not elect to overrule these well-reasoned cases. This assignment of error is overruled.

Id. at 204, 317 S.E. 2d at 351; *see also, State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984), and *Keeten v. Garrison*, 742 F. 2d

2d 129 (4th Cir. 1984) which reject the argument that "death qualified" juries are "guilt prone."

We continue to reaffirm our prior holdings regarding this issue and reject defendant's argument that she was deprived of her right to a fair trial because her jury was "death qualified."

IV.

[4] Next, defendant contends that the trial judge committed error when he limited defense counsel's cross-examination of the State's witness, Paulette Gibbs. Ms. Gibbs was a prisoner incarcerated in the same cell with defendant at the Edgecombe County Jail for several days after defendant was arrested. Ms. Gibbs testified that defendant had made a number of incriminating statements to her on October 26-27, 1983, including the statement that defendant had smashed her baby's skull against the bathtub in order to kill him. On re-cross examination, defense counsel attempted to elicit testimony from Ms. Gibbs that defendant had acted abnormally while incarcerated with her, apparently in an effort to bolster her insanity defense. The following exchange took place:

Q. (By defense attorney Weeks): You know, do you not, that she was sent to Dix Hill right after you talked to her, a little while afterwards?

MR. BONEY: OBJECTION.

COURT: SUSTAINED. THE DEFENDANT EXCEPTS. THIS IS DEFENDANT'S EXCEPTION NO. 4.

MR. WEEKS: It is in the record, Judge.

COURT: SUSTAINED. THE DEFENDANT EXCEPTS. THIS IS DEFENDANT'S EXCEPTION NO. 5.

MR. WEEKS: She went there by order signed by the Superior Court . . .

COURT: Go to something else, please.

Q. She did go to Dix Hill—before she went, if she did . . . .

MR. BONEY: OBJECTION.

MR. WEEKS: Let me finish the question.

Q. Didn't you tell the matron down there she was mighty peculiar and giggling?

MR. BONEY: OBJECTION.

COURT: SUSTAINED. Restate the question, please.

THE DEFENDANT EXCEPTS. THIS IS DEFENDANT'S EXCEPTION NO. 6.

Defense counsel then rephrased the questions and the answers were admitted.

Generally, control of the manner and scope of cross-examination of a witness is left to the discretion of the trial judge. *See State v. Burgin*, 313 N.C. 404, 329 S.E. 2d 653 (1985). Absent a manifest abuse of discretion, the trial judge's ruling will not be overturned on appeal. *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981). The record reveals that the trial judge controlled the cross-examination of Ms. Gibbs' testimony in what seems to be an effort to avoid needless consumption of time since defense counsel intended to call a psychologist and defendant herself to testify about defendant's mental condition. Eliciting the additional testimony from Ms. Gibbs would have been repetitive in nature. Assuming, *arguendo*, error was committed, it was cured when defendant was able to ask the desired questions after rephrasing them.

V.

[5] The next assignment of error relates to the forensic pathologist's use of photographic slides to illustrate his testimony. Dr. Robert Zipf, the pathologist who performed the autopsy on the body of Jacob Warner, observed multiple external and internal injuries to the child's body. Based on the examination, Dr. Zipf testified that the child died from hemorrhage of and injury to the brain, which occurred as a result of a blunt force injury to the head. In order to explain the number, size, nature and location of the child's injuries and to explain to the jury the cause of death, Dr. Zipf used photographic slides to illustrate his testimony. Defendant objected to the slides, arguing that they were inflammatory and highly prejudicial.

This Court has held that photographs and slides are admissible in evidence to illustrate the testimony of a witness. Further-

more, photographs or slides which depict a gruesome and revolting scene indicating a vicious crime do not render them incompetent in evidence when they are properly authenticated as accurate portrayals of conditions observed and related by the witness who uses them to illustrate his testimony. *State v. Williams*, 308 N.C. 47, 301 S.E. 2d 335 (1983); *State v. Dobbins*, 306 N.C. 342, 293 S.E. 2d 162 (1982); *State v. Gibbons*, 303 N.C. 484, 279 S.E. 2d 574 (1981).

The slides were properly used to illustrate the nature and severity of the injury sustained by the child prior to his death and to illustrate the cause of his death, as Dr. Zipf was testifying. Furthermore, our review discloses that the photographic slides were not especially gruesome or gory. Therefore, the trial judge did not err when he denied defendant's motion to prevent the witness from using the slides to illustrate his testimony.

VI.

[6] Defendant further argues that the trial court committed reversible error when it denied defendant's motions to dismiss at the close of the State's case and again at the close of all the evidence. It is axiomatic that, upon a motion for dismissal of charges against a defendant pursuant to G.S. 15A-1227, the evidence must be considered in the light most favorable to the State. The State is entitled to every reasonable inference that can be drawn from the evidence. Contradictions and discrepancies do not warrant dismissal of a case. They are for the jury to resolve. The trial judge must consider all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

After reviewing the evidence presented in the instant case, we conclude that there was ample evidence to take the case to the jury. Ms. Gibbs testified concerning admissions made to her by defendant. Defendant told her that she smashed the baby's head against the bathtub in order to kill him. Defendant also told Ms. Gibbs that she had read books prior to killing the baby, which described how to administer lethal head blows and then position the victim's body so that the blood flowed away from the wound in order to camouflage it. If the jury chose to believe Ms. Gibbs, this alone could be sufficient evidence of malice, premeditation, and deliberation.

Additionally, there was evidence from the pathologist that tended to corroborate Ms. Gibbs' testimony regarding the cause of death. When defendant brought the baby to the hospital, there was evidence that she admitted to striking the child. At the morgue she reached for her child, cried, and said, "I'm sorry Jacob, I'm so sorry, I'm so sorry." All of this evidence, when viewed in the light most favorable to the State, was sufficient to carry the State's case to the jury. From this evidence, the jury could infer that defendant intended to kill her child, thought about the manner and method in which to do it, and then carried out her plan. The trial judge correctly denied defendant's motions to dismiss.

VII.

[7] Next, defendant argues that the court committed reversible error in allowing Dr. Rood to give her opinion regarding defendant's ability to distinguish right from wrong with reference to the particular offense. The State called Dr. Rood, a psychiatrist, as a rebuttal witness after defendant had concluded her defense. Dr. Rood testified that she was a psychiatrist, and defendant stipulated to the fact that the doctor was an expert. Dr. Rood examined defendant between 18 November and 6 December 1983, pursuant to a court order to evaluate defendant's mental capacity to proceed to trial. Based upon this evaluation, the doctor testified that it was her expert opinion "that she [defendant] would have known right from wrong with respect to killing." This conclusion was reached after administering certain evaluative tests to defendant while she was at Dorothea Dix Hospital. Defendant contends that it was erroneous to allow Dr. Rood to render her opinion that defendant had the mental capacity to distinguish right from wrong *only* with respect to killing someone. Defendant argues that this limitation to her opinion was erroneous. We disagree.

Under the provisions of G.S. 8-58.13, a witness is allowed to render an expert opinion if scientific, technical, or other specialized knowledge will assist the jury to understand the evidence or to determine a fact in issue, as long as the witness has the requisite expertise to be considered an expert. In the instant case, Dr. Rood was clearly an expert psychiatrist. The defendant stipulated to this.

The fact in issue was defendant's ability to distinguish right from wrong, precisely in relation to taking another human being's life. The expert opinion rendered by Dr. Rood was relevant to this issue because it tended to prove that defendant knew it was wrong to kill her baby or anyone else. However, the doctor also testified that defendant may not have known it was wrong to lie to cover it up. It was not erroneous to allow Dr. Rood to narrowly confine her expert opinion. Therefore, defendant's argument is rejected.

VIII.

[8] Defendant next maintains that the court committed reversible error in allowing Dr. Rood to testify about results of a test she did not personally perform. Defendant contends that the admission of this evidence was in violation of the hearsay rule. It is true that Dr. Rood relied upon certain tests administered by staff psychologists at Dorothea Dix Hospital. This testimony was properly admissible under an exception to the hearsay rule enunciated by this Court in *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974) and *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979). These cases stand for the propositions that: (1) a physician, as an expert witness, may render his or her opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied to him or her by others, including the patient, if the information is inherently reliable even though it is not independently admissible into evidence; and (2) if the expert's opinion is admissible, the expert may testify to the information he or she relied upon in forming it for the purpose of showing the basis of the opinion. *Wade*, 296 N.C. at 462, 251 S.E. 2d at 412.[1] The *DeGregory* and *Wade* cases both involved hearsay information a psychiatrist utilized in formulating an expert opinion on the sanity of a defendant on trial for murder.

Under the rules contained within *DeGregory* and *Wade*, this testimony was properly admitted. Therefore, defendant's argument is rejected.

1. This rule has now been codified in the new Rules of Evidence at G.S. § 8C-1, Rule 803(4).

IX.

[9] Defendant next argues that the trial court committed reversible error in denying defendant's request to charge the jury on the crime of voluntary manslaughter. During the charge conference, the trial judge explored with the prosecutor and defense counsel the possible verdicts to be presented to the jury. In the discussion, defense counsel Mr. Weeks stated that, "I think I agree with you Judge, there is no evidence of voluntary manslaughter." He then retracted this statement with the following explanation:

> MR. WEEKS: What I am trying to say is I think there should be on the question of the verdicts, manslaughter in the case, instead of what I just told you should be in the case.
>
> COURT: You are asking that I charge on both voluntary and involuntary manslaughter?
>
> MR. WEEKS: Yes, sir, on account of the nature of the case and her condition, which I am in a position to know.
>
> COURT: I'll be glad to hear from you on why you feel this would be a possible case of voluntary manslaughter.
>
> MR. WEEKS: *I'll be perfectly honest with Your Honor and tell you I think it is something the jury could compromise. The Courts have said many times whether there's evidence of it or not they can use a little mercy if they want to and compromise and the Supreme Court doesn't bother it.*
>
> (Emphasis original.)

At the charge conference, defense counsel wanted the trial judge to submit the charge of voluntary manslaughter to the jury without any evidence to justify it in order to give the jury an offense upon which it could compromise. The trial judge correctly declined defense counsel's offer to permit this.

The defendant reasons that "[t]he jury was not bound to believe all or any portion of the testimony of the witness Gibbs. Indeed, we have seen in previous argument substantial reasons why her testimony is suspect." Without accepting Gibbs' testimony, she reasons, there was a basis to submit the voluntary manslaughter verdict to the jury because defendant testified that she had no intent to kill and did not kill her child.

The defendant's argument is based on faulty reasoning. The trial judge could not decide that Ms. Gibbs was unworthy of belief —nor can this Court. The credibility of Ms. Gibbs' testimony was a matter for the jury to evaluate. In determining whether sufficient evidence exists to take a case to the jury, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference that can be drawn from the evidence. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Accordingly, we uphold the trial court's ruling on this motion.

X.

[10] Defendant's next argument is that the trial judge committed error when he denied defendant's motion to set aside the verdict, since the jury returned its verdict fifteen minutes after it retired to deliberate. Defendant in her brief observes that there are no North Carolina cases in which the Court has addressed the question of whether the jury's deliberation for a brief period of time can be grounds for setting aside the verdict. However, the general rule applied in state and federal courts in criminal cases is that a jury is not required to deliberate for any particular period of time, and the mere fact that a jury deliberates for a short period of time is generally insufficient to indicate that the verdict was the result of passion, prejudice, or bias. 23A C.J.S. Criminal Law § 1368 (1961).

There is no dispositive case on this point in this State in the context of a criminal case. However, this Court decided this issue in the context of a civil case in *Urquhart v. Durham and South Carolina Railroad Co.*, 156 N.C. 581, 72 S.E. 630 (1911). This Court addressed this issue as follows:

> The last exception is that the jury did not remain out more than twenty minutes before bringing in their verdict. The case had doubtless been so fully, carefully, and indeed minutely, presented to their consideration in every aspect by the able counsel in the cause, both in presenting the testimony and in arguing the case, as well as by the lucid instructions of his Honor, that the jury doubtless thoroughly understood the points at issue and did not need more time. Of that they are usually the best judges. We know of no rule by which this Court can estimate the time, or lay down a

> rule, as to how long a jury shall remain in consultation before bringing in their verdict. Of course, if there was misconduct on the part of the jury or a contemptuous or flippant disregard of their duties in considering a matter submitted to them, the trial judge is intrusted with the power and the duty to rebuke them and either send them back to reconsider the case or to set aside their verdict. But this is a matter which is left to his sound discretion, and cannot be intelligently reviewed by this Court.

Id. at 586, 72 S.E. at 632; *accord, Segars v. Atlantic Court Line Rail Road*, 286 F. 2d 767 (4th Cir. 1961) (wherein the Court concluded that there was no error when a verdict was returned in four minutes).

We conclude that shortness of time in deliberating a verdict in a criminal case, in and of itself, simply does not constitute grounds for setting aside a verdict. The brevity of deliberation should only be questioned if there is evidence of some misconduct on the part of the jury or the trial judge believes that the jury acted with a contemptuous or flagrant disregard of its duties in considering the matters submitted to it for decision. For these reasons, this assignment of error is also rejected.

XI.

Finally, defendant argues that the trial judge committed error when he denied defendant's motions to set aside the verdict and to arrest judgment and also when he entered judgment in this case. By this assignment of error, defendant asserts that the verdict should be set aside and judgment arrested if this Court finds reversible error in any of the ten arguments previously set forth in her brief, or if the cumulative effect of a number of harmless errors adds up to prejudice necessitating a new trial in the interest of fundamental fairness. Because we have found that no reversible error was committed by the trial court in connection with defendant's trial and because there were no harmless errors considered cumulatively that prevented defendant from receiving a fair trial, this argument is likewise rejected.

Accordingly, defendant received a fair trial, free from prejudicial error.

No error.

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

CAROLISTA C. FLETCHER v. BURTON H. JONES

No. 424A84

(Filed 5 September 1985)

1. **Vendor and Purchaser § 2.3— contract for sale of land—waiver of closing date—reasonable time for performance**

A seller who continues to assure the buyer orally that he intends for closing to take place on real property pursuant to the terms of the parties' written sales contract, even though the date for closing contained in the written contract has expired, effectively waives the time provision in the written contract. In such case, one of the parties to the contract must thereafter tender performance, pursuant to the terms of the contract, within a reasonable time.

2. **Vendor and Purchaser §§ 2, 2.3— contract for sale of land—waiver of closing date—tender of performance within reasonable time**

Where a contract for the sale of realty was contingent upon defendant seller obtaining a divorce; the contract contained no time-is-of-the-essence clause; the parties extended the closing time until 10 March 1981 but defendant continued orally to assure plaintiff buyer after that date that closing would take place as soon as his divorce was final; on 4 August 1981 defendant's attorney advised plaintiff's attorney that defendant's divorce and property settlement were final and defendant was ready to close, but neither party took any action to arrange the closing; defendant contracted to sell the property to a third party for a higher price; on 24 September 1981 plaintiff's attorney received a letter from defendant's attorney that the contract was declared to be null and void; and on 26 September 1981 plaintiff's attorney mailed to defendant's attorney a letter stating plaintiff's intent to consummate the sale and tendering the entire amount of cash due at the closing along with a properly executed promissory note for the balance of the purchase price as required by the contract, it was *held* that (1) defendant waived the 10 March closing date by continuing to assure plaintiff of his willingness to perform the contract after that date had passed, and (2) the trial court's findings were sufficient to support its conclusion that plaintiff made a full and sufficient tender within a reasonable time after being notified that defendant was ready to close.

3. **Vendor and Purchaser § 5— specific performance of land sale contract—no entitlement to special damages**

Plaintiff was not entitled to recover special damages for development costs in addition to obtaining specific performance of a contract for the sale of land.

Justice MITCHELL dissenting in part and concurring in part.

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

APPEAL by plaintiff as a matter of right pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, 69 N.C. App. 431, 317 S.E. 2d 411 (1984), *Becton, J.*, dissenting, in which judgment for plaintiff entered by *Stevens, III, J.*, at the 24 January 1983 civil session of DARE Superior Court and signed out of term by consent of the parties on 17 March 1983 was affirmed in part.

Aycock & Spence, by W. Mark Spence, for plaintiff-appellant.

Pritchett, Cooke & Burch, by W. W. Pritchett, Jr., for defendant-appellee.

FRYE, Justice.

[1] The issues on this appeal are, first, whether a defendant-seller who continues to orally reassure plaintiff-buyer that he, seller, intends for closing to take place on certain real property pursuant to the terms of the parties' written sales contract, even though the date for closing contained in the written contract has expired, effectively waives the time provision for closing in that contract? Secondly, if such oral reassurances by the seller constitute an effective waiver of the time for closing contained in the contract, must one of the parties to the contract thereafter tender performance, pursuant to the terms of the contract, within a reasonable time? Our answer is yes to both issues.

On 18 August 1980, plaintiff buyer and defendant seller entered into a contract in which plaintiff was to purchase for $45,000 certain real property from defendant, such property being located in Dare County, North Carolina. The contract provided for a closing date of 9 January 1981, and contained the following condition: "Contract is subject to seller obtaining absolute divorce from present spouse or present spouse agreeing to execute deed." Neither condition was met prior to the closing date, and on 29 January 1981, the parties entered into an addendum to the original contract, which extended the closing date to 10 March 1981. Closing did not take place on 10 March 1981 because the condition again was not satisfied.

No other written extensions of time were executed by the parties; however, on 23 March 1981, defendant, through his attorney, Mr. Crouse Gray, requested an additional extension of time to close the transaction. Plaintiff, through her attorney, Mr. Charlie Aycock, agreed to an extension. On 26 March 1981, Mr. Aycock sent a Note-A-Gram to Mr. Gray, suggesting that "You [Mr. Gray] just type on the bottom of the original Extension the fact that it is extended for another ninety days. And submit same to your client for signature." A written addendum extending closing to 10 June 1981 was prepared by defendant's attorney and forwarded to defendant, who did not execute the document.

Subsequent to these written communications in March 1981, plaintiff's attorney received oral assurance from defendant's attorney that defendant intended to close soon. Plaintiff's attorney kept her abreast of the status of the contract and continued to assure her that defendant still intended to go through with closing. Plaintiff and her husband also spoke with defendant subsequent to 10 March 1981. On one of these occasions, defendant said to plaintiff that "he wasn't ready to close on the contract but that he would be ready fairly soon." On another occasion, plaintiff's husband asked defendant, "When are we going to be able to close?" Defendant told him "that the divorce wasn't final, and that it would have to be subsequent to the divorce before anything could happen."

On 4 August 1981, Mr. Gray, defendant's attorney, contacted Mr. Aycock, plaintiff's attorney, by telephone and advised that the divorce and property settlement between defendant and his wife were final and that the defendant was then ready to close according to the terms of the original contract. Neither party took any action subsequent to this communication to arrange closing on the property.

During the third week in September 1981, defendant accepted an offer for $67,500 from a third party to purchase the same property described in plaintiff's contract. Both prior and subsequent to accepting this offer, defendant gave no indication to plaintiff, plaintiff's attorney, or his own attorney, that he did not intend to consummate the transaction with plaintiff according to the terms within the original contract.

On 24 September 1981, plaintiff's attorney received a letter from defendant's attorney returning plaintiff's $1,000 earnest money deposit and stating that the "contract is hereby declared to be null and void." On 26 September 1981, plaintiff's attorney mailed to defendant's attorney a letter stating plaintiff's intent to enforce the contract according to its original terms, together with a promissory note and deed of trust as required by the contract.

Thereafter, on 28 September 1981, plaintiff filed a complaint together with a lis pendens on the real property owned by defendant. Plaintiff sought specific performance and special damages. Defendant's answer pleaded as a defense the statute of frauds and "plaintiff's failure to tender performance a reasonable time after all conditions and extensions of the contract had expired," thus rendering the contract null and void. Defendant also counterclaimed, alleging that plaintiff's filing of a lis pendens constituted a cloud upon defendant's title, causing damage in the amount of $50,000. The trial court, sitting without a jury, granted plaintiff's request for specific performance and ordered defendant to convey the property. Plaintiff's claim for special damages was denied. Defendant's counterclaim was also denied.

Defendant appealed and plaintiff cross-appealed from the trial court's judgment. The Court of Appeals affirmed in part and remanded for further findings of fact and conclusions of law on the question of whether a reasonable time had elapsed between the 10 March 1981 closing date and the time of defendant's termination. However, plaintiff's cross-appeal from the denial of special damages was denied. Plaintiff timely gave notice of appeal pursuant to G.S. 7A-30(2), based upon a dissenting opinion from that court.

[2] Plaintiff argues that the Court of Appeals erroneously concluded that the parties to the contract had not entered into a valid oral modification extending the date for closing past the 10 March 1981 deadline contained in the prior written addendum. Plaintiff contends that the "facts taken together show that at least on August 4 both the plaintiff and the defendant felt that a reasonable time past the March 10 closing date had not yet expired and that the contract was still open and valid between the parties." Thorough analysis of the facts and applicable law convince this Court that plaintiff's argument is essentially correct.

However, our approach to the resolution of this issue is slightly, though significantly, different from that employed by plaintiff or the Court of Appeals.

Both parties and the court below agree that the parties' written agreement of 29 January 1981 effectively extended the date for closing to 10 March 1981. However, the Court of Appeals rejected plaintiff's argument that "defendant further modified the contract by virtue of his conversations with plaintiff between 10 March and 4 August 1981, indicating his continued willingness to convey the land as soon as his divorce became final." *Fletcher v. Jones*, 69 N.C. App. at 435, 317 S.E. 2d at 414. The court below characterized such oral representations as "unilateral, oral statements . . . insufficient to constitute a valid modification of the contract closing date." *Fletcher*, 69 N.C. App. at 435-36, 317 S.E. 2d at 414. That court correctly observed that the parties' contract contained no time-is-of-the-essence clause and that absent such a clause the law generally allows the parties a reasonable time after the date set for closing to complete performance. *Scarborough v. Adams*, 264 N.C. 631, 142 S.E. 2d 608 (1965). Therefore, it was concluded that such conversations were some evidence "relevant to the question of whether defendant acted within a reasonable time after the March closing date." *Fletcher*, 69 N.C. App. at 436, 317 S.E. 2d at 415.

We agree with the Court of Appeals that the contract in this case was not implicitly or explicitly governed by a time-is-of-the-essence clause, and that the parties had a reasonable time after the 10 March 1981 closing date to complete performance.[1]

Generally, when time is not of the essence, the date selected for closing can be viewed as

1. There is some question of whether the date contained within the contract for closing is also applicable to the condition precedent. Neither party contends that it is not. Since the contract is silent respecting this matter, we must conclude that the closing date also governs the time within which the condition precedent must be fulfilled. If the condition precedent were of crucial import to either or both parties and needed to be fulfilled by a certain date, other than that set for closing, a separate date should have been explicitly included to govern the condition precedent, along with a separate time-is-of-the-essence provision if necessary. It would then have been clear that this particular condition, separate from the act of closing, must be strictly performed by a different date. *See Kakalik v. Bernardo*, 184 Conn. 386, 439 A. 2d 1016 (1981); *see also* R. Cunningham, W. Stoebuck and D. Whitman, *The Law of Property* § 10.9, at 672 (1984).

> an approximation of what the parties regard as a reasonable time under the circumstances of the sale. The vendor, therefore, had a right to expect that the vendees would be ready *about* that time. The vendees, on the other hand, were under an obligation to make the necessary efforts to consummate their purchase within the period they had agreed upon.

Drazin v. American Oil Company, 395 A. 2d 32, 34 (D.C. Ct. App. 1978) (emphasis in original) (citations omitted).

We do not concur in the Court of Appeals' determination, however, that the date set for performance was strictly confined to the 10 March 1981 date contained in the executed addendum which extended the original date of closing. Neither do we agree that the reasonable time for performance was to be computed from that date. Instead, we are persuaded that the oral representations and assurances by defendant to plaintiff of defendant's willingness to perform subsequent to 10 March 1981 indicated an intent on defendant's part to waive the 10 March 1981 date and further extend the time in which the parties could perform. A waiver can be defined as an "excuse of a non-occurrence or of a delay in the occurrence of a condition of a duty." E. Farnsworth, *Contracts* § 8.5, at 561 (1982);[2] *see Tantillo v. Janus*, 87 Ill. App. 3d 231, 42 Ill. Dec. 291, 408 N.E. 2d 1000 (1980); *Kimm v. Andrews*, 270 Md. 601, 313 A. 2d 466 (1974). The basis for a waiver can be inferred from conduct or expressed in words. E. Farnsworth, *supra*, at 562. "[C]onduct such as continuing performance with knowledge that the condition has not occurred might be questionable as the manifestation needed for a modification but sufficient for waiver." E. Farnsworth, *supra*, at 562.

The facts in the present case undeniably indicate that defendant and defendant's attorney continued to orally reassure and represent to plaintiff and her husband that defendant intended to close and consummate the transaction beyond the 10 March 1981 closing date. In fact, as late as 4 August 1981, nearly five months

2. Professor Farnsworth in his treatise explains why the courts have a fondness for treating certain conduct as a "waiver" rather than a "modification." By characterizing the conduct as a "waiver" rather than as a "modification," a court may avoid three requirements for a modification: the requirement of assent, the requirement of a writing under the Statute of Frauds, and the requirement of consideration or of detrimental reliance.

after the expected date of closing, defendant's attorney contacted plaintiff's attorney by telephone to inform plaintiff that defendant considered the contract to be "in full force and effect." Plaintiff's attorney testified on direct, "I specifically recall . . . Mr. Gray contacted me by phone and advised me that Mr. Jones had settled with his wife, and they were now ready to convey the property, and for me to advise my client they were ready to close." This evidence certainly supports the conclusion that defendant did indeed intend to perform well beyond the earlier projected date for closing.

After defendant had waived the closing date beyond 10 March 1981, what were the parties' contractual duties when defendant's attorney notified plaintiff's attorney on 4 August 1981 that "they were ready to close?" According to basic principles of hornbook law, the parties are thereafter required to tender performance concurrently. 3A Corbin on Contracts § 663, at 177 (1960). This concurrent performance on the part of both parties in the context of real estate transactions means "that the seller will deliver a deed and simultaneously the buyer will pay part or all of the price." E. Farnsworth, *Contracts* § 8.11, at 585 (1984). These acts are normally performed at the closing or settlement.

The legal effect of these concurrent conditions of performance is explained by Professor Corbin in his treatise as follows:

> When two performances, agreed equivalents, are to be exchanged simultaneously, a tender of his performance by either one of the parties is a condition precedent to the duty of performance by the other. This is a case of so-called concurrent conditions. . . . If the stated time is not of the essence, then each party has a 'reasonable time' within which he can tender his performance and enforce the contract.

6 Corbin on Contracts § 1258, at 26 (1962).

However, there does come a point in time when a party's tender would be too late. "At that time the legal duties of the two parties will be simultaneously discharged." 3A Corbin on Contracts, *supra*, at 178.

The only tender of performance in the present case was by plaintiff on 26 September 1981 when plaintiff's attorney advised defendant's attorney that plaintiff intended to enforce the con-

tract and also tendered the entire amount of cash due at closing, along with a properly executed promissory note for the balance of the purchase price as required by the contract. However, this tender of performance by plaintiff was almost seven weeks after 4 August 1981, the date that plaintiff's attorney was advised that defendant was ready to close on the property. Since time was not of the essence in the parties' contract, the question then becomes whether plaintiff had tendered her performance within a reasonable time after 4 August 1981.

In *Yancey v. Watkins*, 17 N.C. App. 515, 195 S.E. 2d 89, *cert. denied*, 283 N.C. 394, 196 S.E. 2d 277 (1973), the Court of Appeals, quoting extensively from earlier cases decided by this Court, set forth the following legal principles relevant to the determination of whether a reasonable amount of time has elapsed in situations like the present:

> In *Etheridge v. R.R.*, 209 N.C. 326, 183 S.E. 2d 539 (1936), we find:
>
> While it is a maxim of English law that "how long a 'reasonable time' ought to be is not defined in law, but is left with the discretion of the judge" (Coke Litt. 50), this applies only where the facts are admitted, or clearly proved, and 'Where the question of reasonable time is a debatable one, it must be referred to the jury for decision.' Hoke, J., in *Holden v. Royall*, 169 N.C. 676 (678), said: 'And, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision.' (Citations.)
>
> In *Trust Co. v. Insurance Co.*, 199 N.C. 465, 154 S.E. 743 (1930), we find:
>
> * * * If no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time. Reasonable time is generally conceived to be a mixed question of law and fact. 'If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if different inferences may be drawn, or the circumstances are numerous and complicated,

> and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law.' (Citations.)
>
> In *Claus v. Lee*, 140 N.C. 552, 53 S.E. 433 (1906), the court said:
>
> * * * The result of our examination leads us to the conclusion that what is 'reasonable time' is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. (Citations.)

Id. at 519-20, 195 S.E. 2d at 93.

In the present case, the trial was by the judge without a jury.

> In that setting the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968). The trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him. *Hodges v. Hodges*, 257 N.C. 774, 127 S.E. 2d 567 (1962). If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected. *Hodges v. Hodges, supra.* . . . Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E. 2d 835 (1971).

Williams v. Pilot Life Insurance Co., 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975) (emphasis original).

The Court of Appeals decided in the present case that the judge did not make adequate findings of fact or conclusions of law regarding whether a reasonable time had elapsed. The trial judge concluded as a matter of law:

2. That this contract was valid, and legally binding on both plaintiff and the defendant, the same being in full force and effect according to its terms, through and including September 26, 1981.

3. That on September 26, 1981 the plaintiff made full and sufficient tender of the purchase price pursuant to the terms of the said contract.

4. That the defendant failed and refused to comply with the terms of said contract and did, as a matter of law, breach said contract.

5. That the plaintiff is entitled to specific performance of said contract according to its terms.

Although the trial judge did not specifically state within his conclusions of law that plaintiff had tendered performance within a "reasonable time," we view his legal conclusions, particularly number 3, to be correct. Our view of the record further indicates that the following findings of fact, which are supported by the evidence, are sufficient to support the foregoing conclusions of law:

21. That from the execution of the original contract in August of 1980 through September 24, 1981 the defendant, Burton Jones, had never advised anyone, and in particular had not advised his attorney, Crouse Gray, the plaintiff's attorney, or the plaintiff that he had any intention of not complying with the contract and conveying the property described therein to the plaintiff.

. . . .

23. That through September 24, 1981, when the defendant advised his attorney to attempt to cancel the contract, his attorney, Crouse Gray, was under the impression that the transaction would close according to the terms of the original contract.

. . . .

27. That the escrow deposit paid by the plaintiff to the defendant and deposited in Mr. Crouse Gray's Trust Account was retained in trust by Mr. Gray until September 24, 1981;

that the defendant at no time prior to September 24, 1981 instructed Mr. Gray to return the escrow deposit to the plaintiff herein.

28. That on or about September 17, 1981, Mr. Ken Smith, real estate broker for Joe Lamb, Jr. & Associates Realty, was contacted by a Mr. Vodrey who expressed an interest in purchasing the three lots described in the Complaint filed herein; that Mr. Ken Smith contacted the defendant who advised him that he would like to sell the three lots and that he would accept the purchase price of $67,500.00 for same; that Mr. Smith prepared an Offer to Purchase and Contract reflecting a total purchase price of $67,500.00 and forwarded same to Mr. Vodrey, who signed and returned it to Mr. Smith; that Mr. Smith forwarded said offer to defendant herein pursuant to the defendant's earlier agreement with Mr. Smith to accept the purchase price of $67,500.00.

29. *That prior to receiving said offer to purchase the lots described in the Complaint filed herein for $67,500.00, the defendant represented to all concerned that he intended to fully comply with the original contract between the parties.* That he notified no one, including his own attorney, that he intended otherwise until after he received an offer of purchase on the property for $67,500.00.

. . . .

34. That up until approximately the third week in September, when the defendant received the offer from Mr. Vodrey to purchase the subject property for $67,500.00, the defendant intended to convey the property to the plaintiff herein pursuant to the terms of the original contract described above.

(Emphasis added.)

Different inferences could possibly be drawn from the evidence presented to the judge. From this evidence, however, the judge made findings of fact that support his conclusion of law that plaintiff "made full and sufficient tender" within a reasonable time after being notified that defendant was ready to close. Although it would have been more desirable for the judge to include within his conclusions of law that plaintiff's tender of performance

was within a "reasonable time," we do not think that omission alone is fatal to the validity and correctness of the judgment.

[3] The Court of Appeals also held that plaintiff's claim for special damages should be denied. We agree with that holding. "To award plaintiff specific performance as well as compensate for her development costs would be to place her in a better position than she would have occupied had defendant conveyed." *Fletcher*, 69 N.C. App. at 437, 317 S.E. 2d at 415; *see* D. Dobbs, *Remedies* § 12.8, n. 73 (1973).

Accordingly, that portion of the Court of Appeals' opinion remanding the case to the trial court for further findings and conclusions of law concerning whether a reasonable time had elapsed is reversed. However, we affirm the court's denial of special damages to plaintiff.

Reversed in part; affirmed in part.

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

Justice MITCHELL dissenting in part and concurring in part.

Like the Court of Appeals, I am convinced that:

> The trial court made findings of fact concerning the passage of time between the March closing date and the time of defendant's termination, but made no adequate findings of fact or conclusions of law concerning whether a reasonable time had elapsed. Because the trial court failed to apply the proper legal standard to the facts in reaching its judgment, the case must be remanded for further proceedings . . . .

Fletcher v. Jones, 69 N.C. app. 431, 436, 317 S.E. 2d 411, 415 (1984). Therefore, I dissent from that portion of the opinion of the majority of this Court reversing that part of the decision of the Court of Appeals which remanded this case to the trial court for further findings and conclusions of law concerning whether a reasonable time had elapsed. Otherwise, I concur in the opinion of the majority.

STATE OF NORTH CAROLINA v. SUPORA WELDON

No. 12PA84

(Filed 5 September 1985)

1. **Criminal Law § 34.7; Narcotics § 3.1— heroin found in defendant's house on other occasions—admissibility to show guilty knowledge**

In a prosecution for trafficking in heroin, evidence that police found heroin in or near defendant's house on two occasions other than the one for which defendant was on trial was properly admitted for the purpose of showing defendant's guilty knowledge even though it revealed defendant's commission of other offenses.

2. **Criminal Law § 34.1; Narcotics § 3.1— other drug offenses—disposition to deal in drugs—disapproval of language in Court of Appeals cases**

Language in *State v. Richardson*, 36 N.C. App. 373, 243 S.E. 2d 918, quoted by the Court of Appeals in this case, to the effect that evidence of other drug offenses is admissible to show "disposition to deal in illicit drugs" is disapproved.

3. **Narcotics § 3.1— reputation of house for narcotics—inadmissible hearsay—harmless error**

In a prosecution for trafficking in heroin, testimony by police officers that defendant's house had a reputation as a place where illegal drugs were bought and sold was inadmissible hearsay, but the admission of such testimony was harmless error where the State offered abundant evidence of defendant's guilt and a different result would not have likely ensued absent such testimony, and where defendant solicited the same evidence on cross-examination. G.S. 15A-1443.

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

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of a decision of the Court of Appeals, 65 N.C. App. 376, 309 S.E. 2d 263 (1983), finding no error in defendant's conviction of trafficking in heroin and sentence of fourteen (14) years' imprisonment, entered at the 3 August 1982 Criminal Session of WAKE County Superior Court, *Judge Braswell* presiding.

Rufus L. Edmisten, Attorney General, by George W. Lennon, Assistant Attorney General, for the state.

Adam Stein, Appellate Defender, by Lorinzo L. Joyner and Gordon Widenhouse, Assistant Appellate Defenders, for defendant appellant.

EXUM, Justice.

This case presents two dispositive issues: (1) Whether the trial court erred in admitting evidence that on two occasions other than that for which defendant was convicted, police found heroin in or near defendant's house; and (2) whether the trial court erred in admitting the testimony of police officers that defendant's house had a reputation as a place where illegal drugs were bought and sold? We answer the first question no and the second yes. However, finding this latter error to be harmless, we affirm the decision of the Court of Appeals.

I.

Defendant was arrested and charged with trafficking in heroin on 8 February 1982 after police, armed with a search warrant, discovered thirty (30) bindles (6.1 grams) of heroin hidden beneath a pile of clothing in defendant's living room. Police obtained the search warrant after an informant advised them that he observed a sale of heroin at defendant's house earlier in the day. In addition to the heroin, police found $449 in cash on defendant's person.

Defendant shared the house, which was leased solely to her, with a boyfriend, four adult children, a teenaged daughter and a nephew. Friends of defendant's adult children habitually congregated to drink alcoholic beverages beside a large oil drum which stood in front of defendant's house and in which a fire was maintained in cold weather.

At trial, police officers were allowed to testify over objection that defendant's house had a reputation as a place where illegal drugs could be bought or sold. Police also testified that on two other occasions, a search of defendant's house led to the discovery of heroin. On 9 December 1981, police discovered a number of bags of heroin beneath a sofa on which defendant was seated with two other people. On a table in front of defendant police on this occasion also found two bags of marijuana, a needle and syringe, and $648. On 30 May 1982, police discovered heroin under a garbage container five feet from the rear door of defendant's house and found approximately $200 on defendant's person.

Defendant testified in her defense. She denied knowing to whom the heroin belonged or how it got into her house. She also

testified that on 8 February she had $449 in cash because she had recently received her government fuel assistance check for almost $200, a Social Security check for her grandson for $239; and her daughter had given her $25 to pay off a parking ticket.

II.

[1] In her first assignment of error, defendant contends the trial court erred in allowing police officers to testify about their discoveries at defendant's premises on two occasions other than the one for which defendant was on trial. Defendant contends this testimony amounted to evidence that defendant committed other distinct crimes and was therefore inadmissible.

To convict defendant of trafficking in heroin, a violation of N.C.G.S. § 90-95(h)(4)a, the state was required to prove that defendant *knowingly* possessed the 6.1 grams of heroin found in her house on 8 February 1982. "Felonious possession of a controlled substance has two essential elements. The substance must be possessed, and the substance must be knowingly possessed." *State v. Rogers*, 32 N.C. App. 274, 278, 231 S.E. 2d 919, 922 (1977). "An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material . . . when he has both the power and intent to control its disposition or use." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972). "The requirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it." *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E. 2d 61, 62 (1973), *disc. rev. denied*, 284 N.C. 618, 202 S.E. 2d 274 (1974). "When such materials are found on the premises under the control of the accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey*, 281 N.C. at 12, 187 S.E. 2d at 714.

Defendant here did not deny that the heroin was found on her premises on all three occasions. She does not contest the sufficiency of the evidence. Her entire defense was directed toward persuading the jury that she had no knowledge of the presence of the heroin and, in the words of her brief, "would not knowingly allow anyone to use drugs in her house."

The Court of Appeals, in upholding the trial court's admission of the contested evidence, said: "The evidence complained of

was expressly offered by the state to show defendant's 'guilty knowledge' of the presence and character of the drugs found during the February 1982 search." 65 N.C. App. at 378, 309 S.E. 2d at 265. The Court of Appeals concluded that evidence of other discoveries of heroin at defendant's house was relevant to the issue of defendant's guilty knowledge.

The well-established rule in North Carolina is that evidence of other crimes is generally inadmissible on the issue of guilt if its only relevance is to show defendant's bad character or disposition to commit an offense similar to the one charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). *McClain* also teaches, however, as defendant acknowledges, that the general rule prohibiting admission of "other crimes" evidence does have exceptions. *See State v. McClain*, 240 N.C. at 174-76, 81 S.E. 2d at 366-68. Two of those exceptions, held applicable to the present case by the Court of Appeals, were discussed by this Court in *State v. Willis*, 309 N.C. 451, 456, 306 S.E. 2d 779, 782-83 (1983):

> The rule in *McClain* establishes that evidence of other crimes is inadmissible if its *only* relevance is to show the character of the accused. The exceptions to this rule of inadmissibility, also set out in *McClain*, are as well established as the rule itself. Two of these exceptions read as follows:
>
> 2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. . . .
>
> 3. Where guilty knowledge is an essential element of the crime charged evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, even though the evidence reveals the commission of another offense by the accused. . . . 240 N.C. at 175.

Defendant contends that notwithstanding these exceptions, admission of the disputed evidence in this case was error because there is no *direct* evidence linking defendant to commission of the other crimes offered by the state to show guilty knowledge.

Where "other crimes" evidence does not sufficiently connect defendant to the other crimes, it is not admissible for any purpose, defendant argues.

Defendant relies heavily upon *State v. Breedin*, 306 N.C. 533, 293 S.E. 2d 788 (1982). In *Breedin*, defendant was being tried for the armed robbery of Horne's Grocery and Package Store on Person Street in Fayetteville. The evidence tended to show that defendant and an accomplice entered the store, wearing ski-type masks and, at gunpoint, took money from the cash register and personal items from two employees and two customers. Three of the victims identified defendant as one of the perpetrators. As further evidence of defendant's identity, the state sought to offer evidence which it contended tended to show that defendant and his accomplice had within fourteen hours of the grocery store robbery also robbed a Wiener King located approximately 100 yards from the grocery store. The state contended that the two robberies were so similar that the jury could infer both offenses were committed by the same persons; therefore evidence that defendant had committed the Wiener King robbery tended to prove that he also committed the grocery store robbery. Further the state argued that the evidence tended to show that both robberies were the product of a common scheme or plan; therefore evidence that defendant committed one tended to show that he also committed the other.

The witness to the Wiener King robbery, Thomas Odom, was not able positively to identify defendant as one of the two robbers of that establishment. He testified to certain circumstances which tended to indicate that defendant might have been one of the robbers but as this Court noted there was "no direct evidence that defendant was one of the two men who robbed the Wiener King." 306 N.C. at 536, 293 S.E. 2d at 791. This Court concluded, therefore, that evidence of the "other crime" was not admissible on the issue of identification. The Court said, "Had the defendant been identified as one of the participants in the Wiener King robbery, the evidence of that crime would have been admissible here on the issue of identification . . . but the failure to identify defendant as a participant in the Wiener King robbery . . . makes the evidence inadmissible. . . ." 306 N.C. at 537, 293 S.E. 2d at 791.

Defendant argues the evidence offered by the state in this case to show her guilty knowledge suffers from the same fatal

flaw as that offered in *Breedin* to show identity. She says there is no direct evidence that she knowingly possessed the contraband on the other occasions and the evidence relating to these other occasions is at best circumstantial on the issue of her guilt of these other possessions, like it was in *Breedin.*

Defendant fails to appreciate the difference between the theories upon which admissibility of the evidence rested in *Breedin* and the theory upon which it rests in the instant case. In *Breedin* one theory of admissibility was that defendant allegedly had *committed* two crimes under circumstances so similar that evidence of defendant's commission of one tended to show that he also committed the other. The other theory was that the evidence tended to show that both *crimes* arose out of a common plan or scheme; therefore evidence that defendant *committed* the other crime tended to prove that he committed the crime charged. In *Breedin*, therefore, admissibility under both theories rested on proving that defendant did, in fact, commit the other crimes.

In the instant case admissibility of evidence of the discovery of other controlled substances on other occasions on defendant's premises rests on an entirely different theory. At issue here is not defendant's identity. At issue is her guilty knowledge. Guilty knowledge, being a state of mind, is almost never provable by direct evidence. Its existence almost always must be proved, if at all, by circumstantial evidence. Thus "[w]here guilty knowledge is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite guilty knowledge, *even though* the evidence reveals the commission of another offense by the accused." *State v. McClain*, 240 N.C. at 175, 81 S.E. 2d at 367 (emphasis added). Any fact or facts tending to prove defendant's guilty knowledge may be offered against defendant when guilty knowledge is, as here, an issue in the case. Such facts may or may not show that defendant is guilty of another crime. Obviously such a showing is not prerequisite to admissibility. The only prerequisite to admissibility is that the evidence be probative on the question of defendant's guilty knowledge.

The challenged evidence is probative of defendant's guilty knowledge in connection with the crime for which she was being tried. The evidence was that on two separate occasions, one oc-

curring before defendant's arrest on the present charge and one after, police discovered heroin in or near defendant's house. On one occasion the heroin was in close proximity to defendant, as were marijuana and drug paraphernalia. On both occasions defendant had relatively large amounts of cash on her person as she did on the occasion for which she was being tried. The likelihood of defendant's knowledge of the drugs at her premises increases as the instances of discovery of drugs there accumulate. Her excuse for having a large sum of money on the occasion for which she was tried also loses weight before the trier of fact in the face of evidence that on two other occasions both drugs on defendant's premises and large amounts of cash on her person coexisted. As instances of the coexistence of drugs at her premises and cash on her person accumulate, the more likely it becomes that defendant knowingly possessed the drugs. The challenged evidence tends strongly to negate defendant's claim that she was unaware of the presence at her premises of that heroin which is the basis for the trafficking charge. The evidence is strongly probative on the major contested issue in the case, defendant's guilty knowledge.

[2] We take this opportunity, however, to correct a misstatement of the law occurring in the Court of Appeals' opinion. In its discussion of the exception to the prohibition of "other crimes" evidence stated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364, the Court of Appeals said: "On drug cases, however, 'evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, *disposition to deal in illicit drugs*, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found.' *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E. 2d 918, 919 (1973)." (Emphasis added.) In *State v. Willis*, 309 N.C. 451, 306 S.E. 2d 779 (1983), this Court expressly disapproved that portion of the *Richardson* language quoted above allowing admission of evidence of other drug offenses to show "disposition to deal in illicit drugs." We note, as we did in *Willis*, that the Court of Appeals itself disapproved this language and declared it dictum in *State v. Bean*, 55 N.C. App. 247, 284 S.E. 2d 760 (1981). We now reiterate our disapproval of this language.

The validity of the Court of Appeals' decision is not affected by inclusion of this language since the court correctly identified a permissible purpose for which the disputed evidence in this case was admitted, *i.e.*, to show defendant's guilty knowledge.

III.

[3] Defendant next contends that the trial court erred in admitting evidence that defendant's house had a reputation as a place where heroin and other illegal drugs could be bought or sold. We agree. The applicable general rule is that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay. *State v. Springs*, 184 N.C. 768, 114 S.E. 851 (1922). The Court of Appeals held, however, that "evidence concerning the reputation of a place or neighborhood is admissible where it goes to show the intent of the person charged," 65 N.C. App. at 379, 309 S.E. 2d at 265, citing *State v. Lee*, 51 N.C. App. 344, 276 S.E. 2d 501 (1981).

In *Lee*, defendant was charged with felonious possession of a controlled substance. The evidence tended to show that defendant presented a forged prescription to a pharmacist for Talwin, a controlled substance. Defendant testified at trial that a woman he knew as Katie Cummings gave him the prescription and asked him to get it filled. The Katie Cummings who lived at the address shown on the prescription did not know defendant and had never given him a prescription in her name. Defendant denied knowing the prescription was forged or that Talwin was a controlled substance. The state was allowed to introduce evidence that the area where defendant claimed he received the prescription from Katie Cummings was known as a "drug-use" area. On appeal, the Court of Appeals noted the general rule prohibiting the admission of such evidence. It held, however, that the evidence was admissible to refute defendant's claim of ignorance regarding the forged prescription and the nature of the drug he sought to acquire. The Court of Appeals supported this result by citing, without discussion, *State v. Chisenhall*, 106 N.C. 676, 11 S.E. 518 (1890).

An examination of *Chisenhall* leads us to conclude that the Court of Appeals' reliance upon it in *Lee*, and therefore its

reliance upon *Lee* in the present case, was misplaced. In *Chisenhall*, defendant was charged with abduction of defendant's 13-year-old sister in violation of what is now codified as N.C.G.S. § 14-41. The statute makes it a crime for anyone to "induce a child under the age of fourteen years . . . to leave" a person with whom or school where the child "resides." Although the statute does not require "that the abduction . . . be with a particular intent . . .," *id.* at 682, 11 S.E. at 520, the state's theory was that Chisenhall's motive in abducting her sister was to take her to a house of prostitution. The state offered in evidence Chisenhall's out-of-court declaration that: one Mag Bush had requested Chisenhall to bring her sister to Mag Bush's house; Chisenhall did so in response to the request; and Chisenhall "knew the character of Mag's house and it was a 'whore-house.'" The state also offered evidence from another witness that Mag Bush's house had a reputation as a house of prostitution.

The Court in *Chisenhall* first concluded that there was no error in offering defendant's out-of-court declaration against her. In finding no error in the admission of the testimony as to the reputation of Mag Bush's house, the Court said:

> It is also objected that the court erred in allowing a witness to testify as to the general reputation of Mag Bush's house. Such evidence is held to be admissible in Connecticut, even against a defendant charged with the keeping of a house of ill-fame. *Cadwell v. State*, 17 Conn., 467. Such is not, however, the law in this State, but we think it competent when the character of the house is only collaterally involved, and is attended with evidence of *scienter*, on the part of the defendant, and is only used for the purpose of showing the intent with which an act is done, as, in this case, to show that the defendant's object was to prostitute the child. Moreover, the defendant could not have been prejudiced by the evidence, as it was shown by her own declaration that Mag Bush was a common prostitute and kept a house of prostitution. Besides, it was unnecessary for the State to have shown the intent of the defendant. There is nothing in our statute which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced "to leave" its custodian. We think the exception is without merit.

Id. at 681-82, 11 S.E. at 520.

Chisenhall does not hold that the reputation of a place is admissible to show the intent or guilty knowledge of one charged with illicit possession of contraband in that place. *Chisenhall* expressly recognized that the law in North Carolina did not permit evidence of a place's reputation to be admitted against a defendant charged with maintaining the place as a house of prostitution. *Chisenhall* held only that in light of competent evidence that defendant said she knew the place where she took her sister to be a brothel, it was permissible on the question of defendant's motive, which was not an element of the crime, to show the place did have such a reputation. The great bulk of the quoted passage from *Chisenhall* demonstrates why the reputation evidence was not prejudicial to defendant in that case. In any event, insofar as *Chisenhall* holds that such reputation evidence is competent, the holding should be limited to the particular theory which the Court enunciated in light of the peculiar facts of the case.

The general rule in this state may be found in *State v. Tessnear*, 265 N.C. 319, 144 S.E. 2d 43 (1965), a case indistinguishable in principle from the instant case. In *Tessnear*, defendant was charged with possession of non-taxpaid liquor after officers discovered numerous containers of liquor in defendant's home. The defense was that the liquor belonged to someone else who, unbeknownst to defendant, had placed it in defendant's home moments before the officers seized it. Police had observed the house, noting large amounts of traffic to and from the residence, and had arrested several intoxicated persons as they left defendant's house. At trial, several of the state's witnesses testified that defendant's house had the reputation of having whiskey for sale. This Court held the admission of that evidence error and granted defendant a new trial. It said, "North Carolina is included among those jurisdictions which hold 'that evidence of the general reputation of defendant's premises is inadmissible in prosecutions for liquor law violations involving a charge of unlawful sale or possession of intoxicants at particular premises.' " *Id.* at 322, 144 S.E. 2d at 46. The same rule is articulated in a number of our cases involving violations of the state's liquor laws. *See, State v. Turpin*, 203 N.C. 11, 164 S.E. 2d 926 (1932); *State v. Springs*, 184 N.C. 768, 114 S.E. 851 (1922); *State v. McNeill*, 182 N.C. 855, 109 S.E. 84 (1921).

We perceive no factual distinctions between violations of the state's liquor laws and our drug laws which would justify application of a different rule. We therefore hold that the trial court erred in admitting at defendant's trial for trafficking in heroin evidence that defendant's house had a reputation as a place where illegal drugs could be bought and sold.

We conclude, however, that the error is not such as to warrant a new trial. Trial errors not amounting to constitutional violations do not warrant awarding a new trial unless "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." N.C.G.S. § 15A-1443. Erroneous admission of evidence may be harmless where there is an abundance of other competent evidence to support the state's primary contentions, *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965), or where there is overwhelming evidence of defendant's guilt. *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Cox*, 281 N.C. 275, 188 S.E. 2d 356 (1972). Moreover, the admission of testimony over objection may be harmless where defendant elicits similar testimony on cross-examination. *State v. Fletcher*, 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Brown*, 272 N.C. 512, 158 S.E. 2d 354 (1968).

In the instant case, the state offered abundant evidence of defendant's guilt. The house in which 30 bindles of heroin were discovered was leased solely to defendant. Defendant testified that she had control of the house. Police informants observed a heroin sale take place at defendant's home on the day of her arrest. Defendant admitted that her house was a place where many friends of her adult children congregated and that heroin had been discovered by police at the house on two other occasions. On one of these occasions the heroin was beneath a sofa where defendant sat and in front of which on a table were marijuana, drug paraphernalia and a large amount of cash. Although defendant testified that she had no regular employment, she had large sums of money either on her person or in close proximity to her both on the night of her arrest and the two other occasions on which police discovered heroin at her home. We do not believe it can be said that, absent the admission of the disputed reputation evidence, a different result would have likely ensued. *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971).

Moreover, on cross-examination of one of the state's witnesses who had testified about the reputation of defendant's house, defendant asked, "You only know—you do not know the reputation of the house when she (defendant) is there, do you?" The witness's response was, "The information that I received would indicate that her reputation, as well as the reputation of the house, is related to the sale and use of illegal drugs." The effect of this question was that defense counsel put before the jury the very reputation evidence which he contends was prejudicially admitted when offered by the state. Introduction of this evidence by the state was, therefore, made harmless by the defendant's solicitation of the same evidence on cross-examination.

The decision of the Court of Appeals is

Affirmed.

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

IN THE MATTER OF THE LEGITIMATION OF: STANLEY LOCKLEAR BY EARL JONES

No. 157PA84

(Filed 5 September 1985)

1. Clerks of Court § 1; Bastards § 13— legitimation—jurisdiction of clerk

A legitimation procedure is in the nature of a special proceeding and is within the jurisdiction of the clerk of superior court. North Carolina Constitution, Art. IV, § 12(3), G.S. 7A-40, G.S. 7A-246, G.S. 49-10.

2. Bastards § 13— legitimation—putative father

Petitioner was the putative father of Stanley Locklear within the meaning of G.S. 49-10 where petitioner had lived openly and notoriously in an adulterous relationship with the mother of the child since 1960, had continued to maintain and care for the child born of that relationship, the mother's husband had discontinued living with the mother in 1960, and Stanley Locklear was born in 1965.

3. Bastards § 11— legitimation—born out of wedlock

The phrase "born out of wedlock" in G.S. 49-10 refers to the status of the parents of the child in relation to each other, and a child born to parents who

did not acquire the status of wedlock was "born out of wedlock" even though his mother was married to another man. G.S. 49-14.

4. **Bastards § 11— married woman's child—presumption of legitimacy—paternity not in dispute**

The presumption of legitimacy of a child born to a married woman did not require that a man other than the husband who sought to legitimate the child first establish paternity under G.S. 49-14 before proceeding under G.S. 49-10 to legitimate the child because paternity was not in dispute. G.S. 49-15.

5. **Bastards § 13— paternity of married woman's child by another man—procedure**

In an action in which a man other than the husband seeks to establish his paternity of a married woman's child, the child is a necessary party to the action; the married woman's husband is a potentially adverse party on whom summons must be served; the factual issue of paternity, when based on a presumption of legitimacy, must be resolved by a jury; and G.S. 49-10 requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of the mother to another man. G.S. 49-14, G.S. 1A-1, Rule 17(b)(3) (1983), G.S. 1-273, G.S. 1-393.

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

ON discretionary review of the decision of the Court of Appeals, 66 N.C. App. 722, 311 S.E. 2d 691 (1984), affirming the order entered by *Herring, J.*, at the 10 January 1983 civil session of Superior Court, ROBESON County, in which the dismissal of Petitioner's petition by the Clerk of Superior Court, ROBESON County, was affirmed.

Lumbee River Legal Services, Inc., by William L. Davis, III, for petitioner-appellant.

Rufus L. Edmisten, Attorney General, by Debbie K. Wright, Associate Attorney, for the State.

Amicus Curiae, Civil Legal Assistance Clinic, by Lucie E. White, Supervising Attorney.

FRYE, Justice.

The issue to be decided in this case is whether the clerks of superior court have authority, pursuant to G.S. 49-10, to enter an order legitimating a minor child of a man who alleges that he is the child's natural father, if the child is presumed to be legitimate because he was born to his mother while she was lawfully married to another man. Our answer is yes, with the proviso that the

issue of paternity must be submitted to and decided by a jury after the child and the husband have been properly made parties to the proceeding.

A petition for legitimation was filed on 18 January 1982 by Earl Jones (Petitioner), who claims to be the natural father of Stanley Locklear, a minor, to have Stanley Locklear declared the legitimate child of Petitioner. This petition and related affidavits and motions tended to show that Petitioner and Burline Locklear (mother), the deceased mother of Stanley Locklear, cohabited with each other beginning in approximately 1960. The mother and James O. Locklear, her husband, lived separate and apart since that year and did not thereafter resume their marital relationship. Stanley Locklear was born to Burline Locklear and Petitioner on 26 November 1965. Petitioner, Stanley, and Stanley's mother continued to live together until the time of the mother's death on 10 September 1975.

In a motion filed by Petitioner in this legitimation action, Petitioner also requested that the court make James O. Locklear a party to the action and that he be served by publication and required to respond. Petitioner alleged that the husband's "whereabouts are unknown . . . and could not with due diligence be ascertained." Although the birth certificate contained in the record lists the mother's husband as the child's father, Petitioner contends that he "is the natural father of the . . . minor child and acknowledges paternity of the said minor child . . . ." Furthermore, the facts alleged indicate that the minor child has been supported and maintained by Petitioner and has been living, for the past several years, with him.

On 26 January 1982, the Clerk of Superior Court, Robeson County, dismissed the petition for legitimation, which was filed pursuant to G.S. 49-10, *et seq.*, because "it appears to the Court that at the time Stanley Locklear was born that his mother, Burline Locklear, was married to James O. Locklear; that Clerk of Superior Court is without jurisdiction to hear this matter because the minor child, Stanley Locklear, is presumed to be the legitimate child of James O. Locklear and Burline Locklear." Petitioner gave timely notice of appeal from the clerk's ruling. On 10 January 1983, the trial court entered an order affirming the clerk's dismissal of Petitioner's petition. From this order, Peti-

tioner again appealed, this time to the Court of Appeals. That court affirmed the decision of the superior court. Thereafter, Petitioner filed a petition for discretionary review pursuant to G.S. 7A-31 with this Court, which was allowed.

I.

G.S. 49-10, the statute at the heart of this controversy, provides:

> The putative father of any child born out of wedlock, whether such father resides in North Carolina or not, may apply by a verified written petition, filed in a special proceeding in the superior court of the county in which the putative father resides or in the superior court of the county in which the child resides, praying that such child be declared legitimate. The mother, if living, and the child shall be necessary parties to the proceeding, and the full names of the father, mother and the child shall be set out in the petition. A certified copy of a certificate of birth of the child shall be attached to the petition. If it appears to the court that the petitioner is the father of the child, the court may thereupon declare and pronounce the child legitimated; and the full names of the father, mother and the child shall be set out in the court order decreeing legitimation of the child. The clerk of the court shall record the order in the record of orders and decrees and it shall be cross-indexed under the name of the father as plaintiff or petitioner on the plaintiff's side of the cross-index, and under the name of the mother, and the child as defendants or respondents on the defendants' side of the cross-index. (Code, s. 39; Rev., s. 263; C.S., s. 277; 1947, c. 663, s. 1; 1971, c. 154; 1977, c. 83, s. 1.)

The Court of Appeals, without citation of authority, declared: "It is clear that the Clerk of Superior Court is without authority pursuant to N.C. Gen. Stat. Sec. 49-10 to enter an order legitimating an already-legitimate child." *In re Locklear*, 66 N.C. App. 722, 723, 311 S.E. 2d 691, 692 (1984). That court also placed emphasis on the phrase, "born out of wedlock," contained in G.S. 49-10, without actually offering an explanation regarding its significance to that court's holding. We presume the Court of Appeals interpreted the phrase to mean that a child born to a married woman is not "born out of wedlock." For reasons to be

discussed *infra*, we disagree with that court's reasoning and conclusion.

A.

[1] The jurisdiction of the clerk of superior court is governed by our State constitution which provides:

> Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.

N.C. Const. Art. IV, § 12(3).

Thus, the clerk's subject matter jurisdiction can only be conferred upon him by statute. *Pruden v. Kreemer*, 262 N.C. 212, 136 S.E. 2d 604 (1964). G.S. 7A-40 confers certain judicial powers upon the clerk:

> The Superior Court Division of the General Court of Justice consists of the several superior courts of the State. The clerk of superior court . . . in the exercise of other judicial powers conferred upon him by law in respect of special proceedings . . . is a judicial officer of the Superior Court Division and not a separate court.

This statute confers judicial power in special proceedings upon the clerk. Furthermore, G.S. 7A-246 provides:

> The superior court division is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings except proceedings under the Protection of the Abused or Neglected Elderly Act (Chapter 108, Article 4, of the General Statutes), except proceedings for involuntary commitment to treatment facilities (Chapter 122, Article 5A, of the General Statutes) and of all proceedings involving the appointment of guardians and the administration by legal guardians and trustees of express trusts of the estate of their wards and beneficiaries, according to the practice and procedure provided by law for the particular proceeding.

The statute in question, G.S. 49-10, specifically identifies the legitimation procedure as "a special proceeding in the superior court of the county in which the putative father resides . . . ." Thus, this procedure, in the nature of a special proceeding, is within the jurisdictional purview of the clerk of superior court.

B.

[2] Having decided that the statute vests the clerks with jurisdiction and power in a special proceeding pursuant to G.S. 49-10, we must next interpret certain phrases contained in the statute to determine whether Petitioner can pursue such proceeding. The statute states that "[t]he putative father of any child born out of wedlock" may institute such a legitimation action in a special proceeding. Thus, our task is to decide whether Petitioner may be a "putative father" and whether Stanley Locklear may be a child "born out of wedlock" as those terms are used in G.S. 49-10. The State argues in its brief that the word "putative" contained within G.S. 49-10 should be interpreted to mean "commonly accepted or supposed," or "assumed to exist." Webster's New Collegiate Dictionary (1973). The State contends that "Petitioner cannot say his paternity is 'commonly accepted' or 'assumed to exist' because the child's mother was lawfully married to a third person." This argument misses the mark.

Assuming that the proffered definition of "putative" is correct, it would certainly appear that Petitioner, who had lived openly and notoriously in an adulterous relationship with the mother of the child since 1960, continuing to maintain and care for the child born of that relationship, would most likely be the "commonly accepted or supposed" father of the child. In fact, it certainly seems more reasonable to conclude that Petitioner is the "putative father" rather than the mother's husband who discontinued living with the mother in 1960, years before the child was born. Therefore, the facts alleged in this case indicate that Petitioner is the putative father of the minor child.

[3] Qualifying as the putative father alone, however, does not enable Petitioner to bring a legitimation proceeding pursuant to G.S. 49-10. He must be the putative father of "a child born out of wedlock." Therefore, we must next determine whether the phrase, "born out of wedlock," which is contained within the

statute, in some way divests the clerk of jurisdiction and forecloses Petitioner's action in cases like the instant one.

The State in its brief does not offer any argument concerning the correct interpretation of the phrase. However, Petitioner and amicus have included such arguments in their briefs. Petitioner urges this Court to adopt the interpretation placed upon the same phrase, although within the context of G.S. 49-14, by the Court of Appeals in *Wright v. Gann*, 27 N.C. App. 45, 217 S.E. 2d 761, *cert. denied*, 288 N.C. 513, 219 S.E. 2d 348 (1975). The plaintiff in *Wright*, a minor child, sought to establish paternity and obtain support pursuant to G.S. 49-14. Plaintiff alleged that defendant was his father, but defendant denied paternity, contending that plaintiff was born while plaintiff's mother was married to another man. Defendant argued, *inter alia*, that plaintiff could not bring his action pursuant to G.S. 49-14 "because the statute applies only to children born to single women." *Id.* at 47, 217 S.E. 2d at 763. Since plaintiff's mother was married to another man at the time plaintiff was born, defendant maintained that plaintiff was not "born out of wedlock."

The Court of Appeals in that case interpreted the phrase contained within G.S. 49-14, identical to the phrase contained in G.S. 49-10, "as referring to the status of the child and not to the status of the mother." *Id.* Thus, the court concluded that the illegitimate child, plaintiff in that case, would not be precluded from bringing a paternity action for support simply because his mother was married to another man at the time of his conception and birth. In the case *sub judice*, the Court of Appeals rejected this interpretation of the phrase by stating, "Suffice it to say that neither case nor statute has application in the present case." *In re Locklear*, 66 N.C. App. at 723, 311 S.E. 2d at 692.

Our research indicates that the phrase, "born out of wedlock," should refer "to the status of the parents of the child in relation to each other." *Pursley v. Hisch*, 119 Ind. App. 232, 235, 85 N.E. 2d 270, 271 (1949). "A child born to a married woman, but begotten by one other than her husband, is a child 'born out of wedlock' . . . ." *Id.* citing *State of North Dakota v. Coliton*, 73 N.D. 582, 17 N.W. 2d 546 (1945). This same interpretation of the phrase is also consistent with the position taken by the Uniform Act on Paternity, § 1, 9A U.L.A. 626 (1979) (act withdrawn 1973),

which states, "A child born out of wedlock includes a child born to a married woman by a man other than her husband." Finally, the Uniform Illegitimacy Act of 1922, § 1, 9 U.L.A. 391 (1942) (act withdrawn 1960) interprets the term "wedlock" as referring "to the status of the parents of the child in relation to one another." S. Schatkin, *I. Disputed Paternity Proceedings* § 1.01, at 1-2 (rev. ed. 1984). The alleged parents of Stanley Locklear, Petitioner herein and Stanley's mother, in their relation to one another, did not acquire the status of wedlock. Thus, the minor child was "born out of wedlock," although his mother was married to another man, not his natural father.

II.

[4] Closely aligned with the State's earlier argument that Petitioner should not be considered the "putative father" is an additional argument that Petitioner cannot be the "putative father" of the minor child "until he rebuts the presumption recognized in *Eubanks*, thereby making a legitimate child illegitimate." Essentially, the State maintains that "N.C.G.S. § 49-10 only authorizes the clerk to declare an illegitimate child legitimate . . . . Here, the clerk has no authority under N.C.G.S. § 49-10 to declare as illegitimate a child who is presumed to be legitimate.

In *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968), this Court stated, "When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, as that he was impotent or could not have had access to his wife." *Id.* at 197, 159 S.E. 2d at 568. This rebuttable presumption of legitimacy of a child born to a married woman "is one of great antiquity, and, doubtless to avoid the serious disabilities attaching to the status of illegitimacy, was applied . . . ." 10 Am. Jur. 2d *Bastards* § 11, at 852 (1963). The presumption is universally recognized and considered one of the strongest known to the law. *Id.* However, the use of this presumption is normally applied in cases where paternity is denied by the alleged father, not readily admitted as in the present case.

The present action is not against a man who is denying paternity. At this point in the proceedings, in fact, there is no party to the proceeding disputing the paternity of the married woman's child. If paternity were being disputed in this case, "[a] married

woman may [be] found to have given birth to a 'child out of wedlock,' provided the presumption of legitimacy is rebutted." S. Schatkin, *supra* § 1.03, at 1-9. Instead, here we have a proceeding instituted by a man who is admitting his paternity, not seeking to avoid it. Therefore, we do not think the rebuttable presumption of legitimacy should be employed in this proceeding pursuant to G.S. 49-10 in the manner advocated by the State.

In its conclusion to this argument, the State contends that the appropriate procedure for a petitioner in this situation, when legitimacy is presumed, is to first establish paternity pursuant to G.S. 49-14, then proceed under G.S. 49-10 to legitimate the child. This argument is illogical. If Petitioner were prevented from proceeding under G.S. 49-10, only because the child of a married woman is presumed to be legitimate, then it seems just as obvious that Petitioner could not proceed under G.S. 49-14[1] since the purpose of that section is to establish the paternity of an "illegitimate child." *See* N.C. Gen. Stat. § 49-15. Obviously, then, the presumption of legitimacy would also completely bar Petitioner's action to establish himself as the lawful parent of his minor child under either statute, since the basic premise underlying both G.S. 49-10 and G.S. 49-14 is that the child is illegitimate. The use of the presumption of legitimacy in this manner does not seem to have been intended by the Legislature and should not be applied as a deterrent to Petitioner in his attempts to proceed pursuant to G.S. 49-10.

[5] The State's written Motion to Dismiss Appeal and Response filed with this Court proposes that the natural father of a child born during a lawful marriage must first establish his paternity pursuant to its two-step recommendation, via G.S. 49-14 then G.S. 49-10, because the factual issue of paternity should be resolved in a procedure that provides for a jury trial. The State is concerned that a special proceeding, such as a legitimation under G.S. 49-10, cannot provide these protections in "Locklear" situations.

G.S. 49-10, as a special proceeding, should provide procedural mechanisms for the full and fair resolution of cases like the pres-

1. G.S. 49-14 further provides:

(a) Such establishment of paternity shall not have the effect of legitimation.

ent. To ensure the parties' right to a trial by jury, G.S. 49-10 can and should be read in conjunction with the procedural statutes that apply to all special proceedings. *See* N.C. Gen. Stat. §§ 1-273, 1-393 to -408.1 (1983). These procedural statutes are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. Because of the strong presumption of legitimacy involved in cases like the one before us, the lawful husband of the mother has an obvious interest in a legitimation proceeding involving a child born to his wife while the two were married. The rebuttal of this presumption should be presented to and resolved by a jury to ensure that the parties' rights are adequately protected. Therefore, we agree with the State that in Locklear-type proceedings the factual issue of paternity, when premised on a presumption of legitimacy, must be resolved by a jury. However, this may be accomplished by transferring the case to the civil issue docket for trial at the next ensuing session of the superior court pursuant to G.S. 1-273. Therefore we find it unnecessary to require that the putative father first file a paternity action under G.S. 49-14 before proceeding under G.S. 49-10 to have the child legitimated.

Another argument advanced by the State is that G.S. 49-10 does not require that the issue of paternity be proved "beyond a reasonable doubt," as does G.S. 49-14. We do not view this as a valid concern. In such a proceeding, the mother's husband will have the benefit of the strong presumption of his paternity of any child born to his wife during their marriage. In such situations, courts generally require proof beyond a reasonable doubt to rebut this presumption of legitimacy. S. Schatkin, *supra*, § 1.02. Therefore, we conclude that G.S. 49-10, just as G.S. 49-14, requires proof beyond a reasonable doubt to establish paternity in rebuttal of the presumption of legitimacy arising from the lawful marriage of the mother to another man.

We also note that G.S. 49-10 provides that the child is a necessary party to the proceeding. Rule 17 of the North Carolina Rules of Civil Procedure requires that a minor defend only by general or testamentary guardian or by guardian ad litem. Rule 17 also gives the court authority to appoint a guardian ad litem for the minor notwithstanding the existence of a general or testamentary guardian "in any case when it is deemed by the court . . . expedient to have the [minor] . . . so represented . . . ." N.C.

Gen. Stat. § 1A-1, Rule 17(b)(3) (1983). In the case *sub judice*, Vivian Locklear, the sister of Stanley Locklear, petitioned the court to be appointed guardian ad litem of the minor child. No action was taken on this petition by the courts below, since the proceeding was dismissed on jurisdictional grounds. Upon remand, the clerk of superior court may consider and act upon the petition, pursuant to Rule 17 of the North Carolina Rules of Civil Procedure.

Finally, we address the issue of procedural due process in cases like the present. Although neither party addresses this precise issue, amicus observes the omission from G.S. 49-10 of a requirement of notice to the man to whom the mother was married at the time of the child's conception and birth. As a potentially adverse party in this special proceeding, the married woman's husband should be construed as one of the respondents on whom summons must be served. *See* N.C. Gen. Stat. § 1-394. The requirement that a summons be served upon the man to whom the child's mother was married when the child was conceived and born would further be governed by G.S. 1-393, which provides:

> Special Proceedings.
>
> § *1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.*
>
> The Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Code, s. 278; Rev., s. 710; C.S., s. 752; 1967, c. 954, s. 3.)

It is observed that in the case *sub judice*, Petitioner did indeed move to have the mother's husband joined as a party to the proceeding.

Accordingly, we conclude that the clerk of superior court should not have dismissed the petition filed herein on jurisdictional grounds. The clerk could have appointed a guardian ad litem for the minor child; allowed the petitioner's motion to have the mother's husband joined as a party to the proceeding; and transferred the case to the superior court for trial of the issue of paternity. Upon return of the jury verdict, the judge could have entered an order of legitimation or if it appeared to him that justice would be more cheaply and speedily administered by send-

ing the case back to the clerk for further proceedings, he could have done so. N.C. Gen. Stat. 1-276 (1983). The decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the Superior Court of Robeson County for an additional remand to the Clerk of Superior Court of Robeson County for proceedings not inconsistent with this opinion.

Reversed and remanded.

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

SQUARE D COMPANY v. C. J. KERN CONTRACTORS, INC. AND SIX ASSOCIATES, INC.

No. 530A84

(Filed 5 September 1985)

1. **Corporations § 22; Seals § 1— *corporate seal on contract*—no sealed instrument**

It was not error for the trial court to conclude as a matter of law that a contract to which a corporate seal had been affixed was not a contract under seal and thus governed by the ten-year statute of limitations of G.S. 1-47(2) where the body of the contract contained no language indicating that the parties intended the contract to be a sealed instrument, or specialty, there was no extrinsic evidence indicating that the parties intended the instrument to be a specialty, and the uncontradicted affidavit of defendant corporation's president stated that the parties never discussed whether the contract was intended to be a sealed instrument.

2. **Architects § 3; Limitation of Actions § 4.2— action against designers and builders—constitutionality of statute of limitations**

The statute of limitations set forth in G.S. 1-50(5) (1983) for actions against designers and builders of improvements to realty does not violate the open courts provision of Art. I, § 18 of the N. C. Constitution or the equal protection clauses of the U. S. and N. C. Constitutions.

Justice MARTIN dissenting in part.

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

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, 70 N.C. App. 30, 318 S.E. 2d 527 (1984), affirming summary judgment for defendants entered on 7 January 1983 by *Lewis, J.*, during the 13 December 1982 Civil Session of Superior Court, BUNCOMBE County.

Long, Howell, Parker & Payne, P.A., by Ronald K. Payne and Mary E. Arrowood, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., and Reid L. Phillips; and Roberts, Cogburn, McLure & Williams, by Isaac N. Northup, Jr., for defendant-appellee, C. J. Kern Contractors, Inc.

Kennedy, Covington, Lobdell & Hickman, by F. Fincher Jarrell, for defendant-appellee, Six Associates, Inc.

FRYE, Justice.

Two basic issues are presented to this Court on plaintiff's appeal. The first issue is whether it was erroneous for the trial judge, under the facts of this case, to conclude as a matter of law that a contract to which a corporate seal had been affixed is not a contract under seal, and thus not governed by the ten-year statute of limitations contained within G.S. 1-47(2). The second issue is whether G.S. 1-50(5) and G.S. 1-15(c) are unconstitutional because they violate the open courts provision of our state constitution and also the equal protection clauses of the state and federal constitutions. Our answer to both issues is no.

On 16 March 1982, plaintiff filed a complaint against both defendants, alleging that defendant C. J. Kern Contractors, Inc., (Kern), had breached a contract to construct an addition to a building on land owned by plaintiff and located in Asheville, North Carolina; that Kern had negligently constructed an exterior masonry wall in the addition; and that defendant Six Associates, Inc. (Six Associates), the architects for the addition, had breached their contract with plaintiffs by deviating from contract specifications and had negligently designed and inspected the wall constructed by Kern.

Both defendants filed Rule 12(b)(6) motions to dismiss pursuant to the North Carolina Rules of Civil Procedure, stating that plaintiff's "action is barred by the applicable statute of limita-

tions." In response to certain requests for admissions filed by defendants, plaintiff stated that more than six years had passed since the work had been completed on or about 1 January 1974 and that the acts and omissions complained of by plaintiff had occurred more than six years prior to the institution of plaintiff's action. An affidavit was filed on behalf of defendant Kern stating that the corporate seal of Kern was attached to the contract entered into by defendant Kern and plaintiff for the purpose of indicating that the execution of the contract was duly authorized by the corporation and to confirm the fact that the corporation was the party to the contract.

The matter was heard before the Honorable Robert D. Lewis, Superior Court Judge presiding over the 13 December 1982 Civil Session of Superior Court, Buncombe County. During the hearing on the motions to dismiss, which were converted to motions for summary judgment upon stipulation of the parties, plaintiff filed a reply to defendant Six Associates' motion to dismiss arguing that if the statute of limitations contained in G.S. 1-15(c) did apply to plaintiff's claims and barred plaintiff's action against either of the defendants, such statute would be unconstitutional because it violates the open courts provision of the North Carolina constitution and the equal protection clause of the fourteenth amendment of the federal constitution. On 7 January 1983, the court entered two orders allowing both defendants' motions for summary judgment. Plaintiff excepted to entry of judgment in favor of defendants and gave timely notice of appeal. The Court of Appeals affirmed the trial court's entry of summary judgment in favor of defendants. From that decision, plaintiff appeals as a matter of right to this Court. N.C. Gen. Stat. § 7A-30(2).

I.

[1] Plaintiff's only argument with regard to defendant Kern is that the Court of Appeals should not have affirmed the trial court's entry of summary judgment in favor of defendant Kern because the contract sued upon was a contract under seal governed by the ten-year statute of limitations contained within G.S. 1-47(2) (1969) and plaintiff's action had been commenced within this ten-year period. Plaintiff's stance is that the contract entered into with defendant Kern is a contract under seal because defendant Kern's corporate seal is affixed to the contract. If the contract

were determined to be a "sealed instrument," it would come within the purview of the ten-year statute of limitations contained in G.S. 1-47(2) which provides:

> Within ten years
>
> . . . .
>
> (2) Upon a sealed instrument against the principal thereto.

If G.S. 1-47(2) were applicable to plaintiff's action against defendant Kern, then plaintiff's action would not be barred until ten years after the cause of action had accrued. *Coleman v. Fuller*, 105 N.C. 328, 11 S.E. 175 (1890). Plaintiff's cause of action against defendant Kern would have accrued when defendant Kern breached the contract with plaintiff. This breach by defendant could only have occurred at some point after plaintiff and defendant Kern entered into the contract on 16 March 1972. Plaintiff filed its complaint on 16 March 1982, a date plaintiff contends was within ten years after the earliest possible date for accrual of plaintiff's cause of action. Therefore, plaintiff vigorously urges this Court to conclude that the question of whether the parties' contract was a sealed instrument was one for the jury and should not have been decided as a matter of law by the trial judge. We disagree with plaintiff.

"The seal of a corporation is not in itself conclusive of an intent to make a specialty [sealed instrument]." 18 Am. Jur. 2d, Corporations § 158, at 693 (1965). Furthermore, the determination of whether an instrument is a sealed instrument, commonly referred to as a specialty, is a question for the court. *Security National Bank v. Educator's Mutual Life Insurance Company*, 265 N.C. 86, 143 S.E. 2d 270 (1965). The question for the court on defendant's motion for summary judgment then was whether, based on the undisputed facts, the corporate seal impressed on the contract by defendant Kern transformed the contract into a specialty.

Although the corporate seal was impressed on the contract, we do not consider such a symbol, without more, sufficient to convert the contract into a specialty. In *Mayor & Council of Federalsburg v. Allied Contractors, Inc.*, 275 Md. 151, 338 A. 2d 275, *cert. denied*, 423 U.S. 1017 (1975), the highest court in Maryland was also confronted with the issue of whether the impression of a corporate seal on a contract would transform the contract into a

specialty, so that a longer statute of limitations would be applicable to plaintiff's action. As in the present case, the appellant in that case argued that the impression of a corporate seal on a contract entered into with appellee converted the instrument into a specialty. The Maryland Court of Appeals responded to appellant's argument, citing the applicable law, as follows:

> The law in Maryland . . . requires more than the mere affixing of the corporate seal to transform a would-be simple contract into one under seal. Indeed . . . if a corporate seal is impressed on an agreement it will remain a simple contract unless either the body of the contract itself indicates that the parties intended to establish an agreement under seal, or sufficient extrinsic evidence, in the nature of 'how and when and under what circumstances the corporate seal was affixed,' *General Petroleum Corp. v. Seaboard Terminals Corp., supra* at 139, establishes that the parties desired to create a specialty. In *Seaboard* Judge Chesnut in discussing the Maryland law applicable to seals stated:
>
> . . . .
>
> '[W]ith respect to a contract executed by a *corporation*, the mere presence of its seal on the paper without any other reference therein to the seal, does not *necessarily* make the contract a specialty, because it is possible the corporate seal was impressed merely as prima facie evidence of corporate authority for the execution of the paper; and in that case extrinsic evidence is admissible to show whether the use of the seal was intended to make the paper a specialty or merely as evidence of its authorized execution, or that it was in fact used without authority.'

Id. at 155-56, 338 A. 2d at 279 (citation omitted) (emphasis in original).

The court then concluded:

> In this case it is undisputed that the only seal attached to this document is Allied's corporate seal; no reference to a seal is made in the body of the instrument; and no extrinsic evidence was presented to prove that the town, through adoption of the other party's seal or otherwise, intended the contract, at least as to itself, to operate as a specialty. Thus,

> as the contract in this case is a simple one, for this suit to have been timely against the appellant, if not the appellee, it had to have been filed within the three-year period of limitations mandated by § 5-101 of the Courts Article.

Id. at 157, 338 A. 2d 279-80; *see also Levin v. Friedman*, 271 Md. 438, 317 A. 2d 831 (1974).

We are persuaded by that court's reasoning and are convinced that the law set forth in that case is correct and should be applied in the case *sub judice*. In applying the foregoing principles of law to the instant case, the question to be answered in order to determine whether the corporate seal transforms the party's contract into a specialty is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention. The evidence in this case does not establish an intention on the part of the parties to create a specialty. The contract contains no language in the body which would indicate that the parties intended the contract to be a specialty. There is no language such as "I have hereunto set my hand and seal," "witness our hands and seals," or other similar phrases contained within the contract that would explicitly support plaintiff's assertion that the instrument is a specialty under seal. *See* 68 Am. Jur. 2d, Seals § 3-4 (1973). Neither is there any extrinsic evidence that would indicate the parties intended the instrument to be a specialty. According to the uncontradicted affidavit of Mr. Kern, President of defendant corporation, the parties never discussed whether the contract was intended to be a sealed instrument. Plaintiff offered no forecast of evidence to dispute this affidavit.

Therefore, absent any evidence that would tend to indicate that the parties intended that the contract was to be a sealed instrument, we conclude, as did the court in *Mayor & Council of Federalsburg*, that the contract in this case was not a specialty and that the ten-year period of limitation contained within G.S. 1-47(2) would be inapplicable to plaintiff's action. Our conclusion is in accord with the reasoning of the majority of the panel of the Court of Appeals in the instant case, which relied on a recent decision of the Court of Appeals, *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 301 S.E. 2d 459, *cert. denied*,

309 N.C. 319, 306 S.E. 2d 791 (1983). In that case the Court of Appeals stated: "Because routine use of a corporate seal is merely to demonstrate authority to execute a document, the mere presence of a corporate seal, without more, does not convert the document into a specialty." *Id.* at 362. The court then held that the trial court correctly granted summary judgment in favor of the corporate defendant because the evidence showed no intention to create a specialty. We agree with the court below that the instant case is indistinguishable from *Blue Cross and Blue Shield.* Thus, we agree with the Court of Appeals that plaintiff's argument is without merit and that the trial court correctly ruled as a matter of law in favor of defendant.

Defendant Kern also argues that counts one and two in plaintiff's complaint were properly dismissed because they were compulsory counterclaims in a previous action between plaintiff and defendant. As did the Court of Appeals, we choose not to discuss this issue since plaintiff's action against defendant is effectively barred by the statute of limitations.

II.

[2] Next, plaintiff contends that the Court of Appeals erred in deciding that the trial court properly granted defendant Six Associates' motion for summary judgment because G.S. 1-15(c) (1981) and G.S. 1-50(5) (1983) are unconstitutional. Plaintiff poses a two-prong constitutional attack on these statutes, arguing that they violate the open courts provision contained in Article I, Section 18, of the North Carolina Constitution and also violate the equal protection clauses under both the United States and North Carolina Constitutions. We reject these arguments.

The Court of Appeals held that G.S. 1-50(5) is the applicable statute of limitations to be applied in this case, although defendant Six Associates contends that G.S. 1-15(c) should be the appropriate period of limitation. Regardless of which statute is chosen, plaintiff's action against defendant Six Associates would be barred. However, we agree with the Court of Appeals for the reasons advanced by that court that the appropriate period of limitation is G.S. 1-50(5).

This Court in *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983) rejected substantially the same constitu-

tional attack upon the 1963 version of G.S. 1-50(5).[1] *See also Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 332 S.E. 2d 67 (1985). For the same reasons adopted by this Court in *Lamb*, we reject plaintiff's constitutional arguments.

Accordingly, the decision of the Court of Appeals is affirmed.

Affirmed.

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

Justice MARTIN dissenting in part.

I concur in the majority opinion with respect to the defendant Six Associates, Inc. Because I firmly believe that there is a factual question as to whether the contract with the defendant C. J. Kern Contractors, Inc. was under seal, I dissent from the holding of the majority opinion in favor of that defendant.

This is an appeal from entry of summary judgment against plaintiff. If there is a genuine issue of material fact, summary judgment cannot be allowed. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The contract in this case was prepared on a form of the American Institute of Architects. It recited that the contract was between Square D Company, as owner, and C. J. Kern Contractors, Inc., as contractor. It contains no reference to C. J. Kern individually or personally. The contract was executed by C. J. Kern Contractors, Inc., by C. J. Kern, President, and the corporate seal affixed.

This contract would have been valid without the affixing of the corporate seal. A corporation is not required to use its corporate seal except in those instances when an individual is required to use his seal. *Mortgage Corp. v. Morgan*, 208 N.C. 743, 182 S.E. 450 (1935); *Warren v. Bottling Co.*, 204 N.C. 288, 168 S.E. 226 (1933). In fact, Square D Company, a corporation, did not use its corporate seal in executing the contract. Defendant's use of its corporate seal was optional and not required to make the contract valid.

1. In *Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985), this Court rejected a constitutional attack, similar to that of plaintiff's, against G.S. 1-15(c).

A seal appearing upon an instrument in the place where the seal belongs will, in the absence of proof otherwise, be valid as a seal. *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270 (1965). The appearance of the seal on the subject contract is prima facie evidence of its effect as a seal. Whether the parties intended it to make the contract one under seal, a specialty, is a question for the jury. *Id.* This Court has not adopted the "extrinsic evidence" rule relied upon by the majority. Rather, the rule in North Carolina is that the use of a seal is prima facie evidence that it has the effect of a seal. *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270.

The construction of a contract cannot be controlled by the uncommunicated intent of one of the parties. Such undisclosed intent is immaterial in the absence of fraud or mistake. *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144 (1962). It is not what either thinks, but what both agree. *Prince v. McRae*, 84 N.C. 674 (1881). It is the mutual intent of the parties that controls. *Croom v. Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921).

The "after the fact" affidavit of C. J. Kern as to *his* intent is certainly irrelevant to the issue. The "intent" of his company was never communicated to plaintiff or agreed to by plaintiff. Therefore, it is irrelevant and immaterial on the question of the effect of the use of the corporate seal. *Howell v. Smith*, 258 N.C. 150, 128 S.E. 2d 144. The trial court erred in its reliance upon the Kern affidavit. There being no competent evidence to the contrary, plaintiff has at least made out a jury case on the issue of whether the contract was a specialty under seal.

The majority's reliance upon *Blue Cross and Blue Shield v. Odell Associates*, 61 N.C. App. 350, 301 S.E. 2d 459, *cert. denied*, 309 N.C. 319 (1983), is misplaced. *Blue Cross* is contrary to *Bank v. Insurance Co.*, 265 N.C. 86, 143 S.E. 2d 270, and the cases cited therein. In *Blue Cross* the Court of Appeals failed to recognize and discuss the prima facie rule applied by this Court in *Bank* and the cited authorities. So does the majority here.

To follow *Blue Cross* would allow a corporation to pick and choose from the instruments it executes with its corporate seal those that it desires to treat as being under seal. Such rule places individuals at a decided disadvantage in dealing with corporations. Because corporations are only required to use their cor-

porate seals to the same extent as individuals use their seals, the use of the seal by corporations and individuals should have the same legal effect.

The contract here was not required to be under seal; the seal was not required to show that the contract was the act of the corporation and not Kern individually. Nevertheless, the defendant saw fit to affix its corporate seal. Under the prior authorities of this Court, this constitutes presumptive evidence that the contract was under seal. This is sufficient to survive the motion for summary judgment.

STATE OF NORTH CAROLINA v. ROGER LEE FREEMAN

No. 695A84

(Filed 5 September 1985)

1. **Kidnapping § 1— indictment alleging kidnapping for rape or robbery—sufficient**

An indictment for kidnapping was sufficient where it alleged that the kidnapping was ". . . for the purpose of committing a felony: rape or robbery . . ." because the requirements of G.S. 15A-924(a)(5) were met by the allegation that the confinement, restraint, or removal was for the purpose of facilitating a felony; the additional rape or robbery language was mere harmless surplusage. G.S. 15-39(a)(2).

2. **Jury § 7.14— peremptory challenge after previously accepted juror reexamined**

The trial court erred in a prosecution for armed robbery, burglary, larceny, kidnapping, and rape by refusing to allow defendant to exercise his last peremptory challenge after a juror who had been previously passed by both sides spontaneously told the court that she had heard about the case at work and the trial court permitted both the defendant and the State to reexamine her. The trial court has discretion as to whether to reopen examination of a juror under specific conditions, but the parties have an absolute right to exercise any remaining peremptory challenges to exercise such a juror once the trial court in its discretion reopens examination. G.S. 15A-1214(g).

Justice EXUM dissenting in part.

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

APPEAL by the defendant from the judgment of *Judge Edward K. Washington*, entered July 26, 1984 in Superior Court, GUILFORD County.

The defendant was convicted of armed robbery, second degree burglary, felonious larceny, first degree kidnapping, first degree rape and first degree sexual offense. He received two consecutive life sentences for the rape and sex offense convictions and a fourteen year sentence for the armed robbery conviction to be served consecutive to the life terms. On the additional convictions the defendant received other sentences of imprisonment for specified terms. The defendant appealed the rape and sexual offense convictions as a matter of right pursuant to N.C.G.S. 7A-27 (a). On December 18, 1984, the Supreme Court allowed the defendant's motion to bypass the Court of Appeals on his appeal in the burglary, larceny, kidnapping and armed robbery cases. Heard in the Supreme Court May 13, 1985.

Lacy H. Thornburg, Attorney General, by Claude W. Harris, Special Deputy Attorney General and Charles M. Hensey, Assistant Attorney General, for the State.

Robert L. McClellan, Assistant Public Defender for the Eighteenth Judicial District, for the defendant-appellant.

MITCHELL, Justice.

The defendant brings forward assignments of error in which he contends that the indictment for first degree kidnapping is fatally defective and that the trial court erred in denying him the right to exercise a peremptory challenge. We conclude that the indictment for kidnapping is not defective. The trial court's error in denying the defendant the use of his remaining peremptory challenge, however, entitles him to a new trial.

The State presented evidence which tended to show that on the evening of March 24, 1984, the victim returned to High Point from a vacation. As she was unpacking her car, a man identified at the trial as the defendant, approached her. He pointed a gun at the victim's head and ordered her to come with him or he would kill her. The defendant took the victim to an abandoned house near her apartment complex. The defendant forced the victim to disrobe. He then placed a knife to her throat and forced her to engage in sexual intercourse. He also forced her to perform fellatio.

Subsequently the defendant forced the victim to accompany him to her apartment to search for a twenty-four hour bank card.

The card was soon located, and the defendant ordered the victim to drive him to a local shopping center where a twenty-four hour bank machine was located. The victim was forced at gunpoint to withdraw one hundred dollars and to turn it over to the defendant.

After returning to the apartment the defendant discovered that the victim was employed by a pizza restaurant. He then forced her to drive him to the restaurant in order to get money. When they arrived the restaurant was occupied, and the defendant instructed the victim to drive back to the apartment. He then released her. She called the police and subsequently gave a statement including a full description of her assailant. She also discovered that a gold bracelet and a gold necklace were missing from her jewelry box. The defendant was apprehended two days later at the High Point Bus Station.

The defendant testified that he met the victim at a bar on the night of March 24 and bought some illicit drugs from her. He further testified that he took some LSD later that evening and began hallucinating. He denied committing any of the alleged crimes.

At the close of all the evidence the defendant moved to dismiss the charges against him. The motion was denied and the case was submitted to the jury.

[1] The defendant first assigns as error the trial court's denial of his motion to quash the indictment for first degree kidnapping on the ground that it was fatally defective. The indictment alleges that:

> 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 kidnap [the victim], a person over the age of sixteen (16) years of age, by unlawfully confining, restraining, or removing her from one place to another without her consent, for the purpose of committing a felony: Rape or Robbery; said victim having been sexually assaulted.

The defendant argues that the phrase "rape or robbery" is an allegation in the alternative or disjunctive and in this case ren-

ders the kidnapping indictment fatally defective. We do not agree.

N.C.G.S. 15A-924(a)(5) provides in pertinent part that an indictment or other criminal pleading must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

This provision incorporates the view expressed in prior holdings of this Court that an indictment must allege all of the essential elements of the offense charged. *E.g., State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Gallimore*, 272 N.C. 528, 158 S.E. 2d 505 (1968); *State v. Barnes*, 253 N.C. 711, 117 S.E. 2d 849 (1961). It also incorporates our long held view that the purposes of an indictment include giving a defendant notice of the charge against him so that he may prepare his defense and be in a position to plead prior jeopardy if he is again brought to trial for the same offense. *E.g., State v. Burton*, 243 N.C. 277, 90 S.E. 2d 390 (1955); *State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953).

The indictment in question complies with N.C.G.S. 15A-924 (a)(5). An essential element of kidnapping under N.C.G.S. 14-39 (a)(2) is that the confinement, restraint or removal be for the purpose of facilitating the commission of *any* felony or facilitating escape following the commission of *a* felony. The requirements of N.C.G.S. 15A-924(a)(5) are met for purposes of alleging this element by the allegation in the indictment that the confinement, restraint, or removal was carried out for the purpose of facilitating "a felony" or escape following "a felony." The allegations in the indictment adequately notify the defendant that he is charged with the crime of kidnapping. It is not required that the indictment specify the felony referred to in N.C.G.S. 14-39(a)(2).

The indictment in the present case alleges that the defendant kidnapped the victim "by unlawfully confining, restraining, or removing her from one place to another without her consent for the purpose of committing *a felony* . . . . (Emphasis added.) Therefore, the indictment charges the offense in the language of

the statute and is sufficient. *See State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339 (1983). All of the elements of the crime of kidnapping are clearly alleged in the indictment. The additional "Rape or Robbery" language in the indictment is mere harmless surplusage and may properly be disregarded in passing upon its validity. *State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974).

We are well aware that in burglary cases we have required that the indictment specify the particular felony which the defendant intended to commit. *E.g., State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976); *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. Allen*, 186 N.C. 302, 119 S.E. 504 (1923). It is unnecessary for us to decide here whether that rule drawn from the ancient strict pleading requirements of the common law has survived the more liberal criminal pleading requirements of our new Criminal Procedure Act and other recent legislation designed to remove from our law unnecessary technicalities which tend to obstruct justice. It is sufficient here to say that, in light of the adoption of our new Criminal Procedure Act, our new Evidence Code, and other statutory revisions, this Court will not engraft additional unnecessary burdens upon the due administration of justice. The new statutory enactments were adopted for the purpose of making the law more understandable and improving the administration of justice. N.C.G.S. 15A-924, a part of our new Criminal Procedure Act, only requires that an indictment contain a plain and concise factual statement supporting every element of a criminal offense with sufficient precision to clearly apprise the defendant of the conduct which is the subject of the accusation. Evidentiary allegations are not required. The purpose of the statute is to simplify criminal proceedings. N.C.G.S. 15A-924, Official Commentary (1983).

The indictment here charges the offense of kidnapping in a plain, intelligible, and explicit manner and contains sufficient allegations to enable the trial court to proceed to judgment and to bar a subsequent prosecution for the same offense, and it is sufficient. *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976). It also informs the defendant of the charge against him with sufficient certainty to enable him to prepare his defense. *State v. Gates*, 107 N.C. 832, 12 S.E. 319 (1890). A part of that preparation is the making of a motion for a bill of particulars if the defendant

feels he is in need of further factual information. N.C.G.S. 15A-925. This assignment of error is overruled.

[2] The defendant's next assignment of error concerns his contention that the trial court erred in refusing to permit him to peremptorily challenge a juror. The record indicates that during jury selection, a juror who had previously been passed by both sides spontaneously told the trial court that she had mistakenly stated earlier that she had not heard about the case. She said that she had in fact heard about the case at work. The trial court permitted both the defendant and the State to reexamine her. The juror stated that she gave no credence to what she had heard, that she had no preconceived ideas regarding the case and that she could be fair and impartial. Counsel for the defendant then sought to use his final peremptory challenge to remove her. The request was denied and jury selection continued.

In noncapital cases each defendant is allotted six peremptory challenges. N.C.G.S. 15A-1217(b)(1). The defendant in the present case had used five of his peremptory challenges and sought to use his remaining peremptory challenge to excuse the juror after she had been accepted by both parties. Under N.C.G.S. 15A-1214(g) a party in certain situations may use a remaining peremptory challenge to remove a juror he has already accepted if the challenge is made before the jury is impaneled. When construing this statute we have explicitly stated: "The decision whether to reopen examination of a juror previously accepted by both the State and defendant *and to excuse such juror either peremptorily or for cause* is a matter within the sound discretion of the trial judge." *State v. Parton*, 303 N.C. 55, 70-71, 277 S.E. 2d 410, 421 (1981) (emphasis added). Upon further reflection, however, we conclude that the quoted sentence from *Parton* was overbroad and must be disavowed in part.

In *Parton* we cited and relied upon *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980) and *State v. Kirkman*, 293 N.C. 447, 238 S.E. 2d 456 (1977). Those cases and the statute itself justified our stated view that the decision whether to reopen examination of a juror previously accepted by the parties is a matter within the sound discretion of the trial court. N.C.G.S. 15A-1214(g)(1). But they do not support the proposition that once the trial court has decided to reopen the examination, the deci-

sion whether to permit a defendant to use one of his peremptory challenges to excuse such a juror is discretionary. Instead, we conclude that the intent of the legislature in adopting N.C.G.S. 15A-1214(g) was that the trial court have discretion as to whether to reopen examination of a juror under certain specific conditions, but that the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror once the trial court in its discretion reopened the examination. This interpretation of the law better reflects the unchanging principle that: "The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused . . . ." *Pointer v. United States*, 151 U.S. 396, 408 (1894). *See State v. Colbert*, 311 N.C. 283, 285, 316 S.E. 2d 79-80 (1984).

To the extent that the previously quoted statement in *State v. Parton*, 303 N.C. 55, 70-71, 277 S.E. 2d 410, 421 is inconsistent with our conclusion and holding in the present case, it is disavowed. The trial court having committed reversible error by failing to permit the defendant to use his remaining peremptory challenge, the defendant must be awarded a new trial on the charges against him which are the subject of this appeal.

New trial.

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

Justice EXUM dissenting in part.

Believing so much of the Court's opinion that holds it is not necessary for a kidnapping indictment to specify the felony referred to in N.C. Gen. Stat. § 14-39(a)(2) is an unwise departure from our applicable precedents, I dissent only from that portion of the opinion.

G.S. 14-39(a) requires that the state prove as an essential element of kidnapping that the "confinement, restraint or removal" of the victim 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, restrained or removed or any other person.

N.C. Gen. Stat. § 14-39(a) (1981). In this case the theory of the indictment was that defendant removed the victim "for the purpose of committing a felony: Rape or Robbery . . . ." The indictment thus called into play subsection (2) of section (a) of the kidnapping statute.

This Court recognized, in an opinion by the Chief Justice: (1) unless a "short form" has been authorized by the legislature, indictments must allege all elements of the crime "accurately and clearly"; (2) the legislature has not authorized a short-form indictment for kidnapping; therefore (3) "the general rule governs the sufficiency of the indictment to charge the crime of kidnapping." *State v. Jerrett*, 309 N.C. 239, 259, 307 S.E. 2d 339, 350 (1983).

In *State v. Dammons*, 293 N.C. 263, 269, 237 S.E. 2d 834, 839 (1977), this Court held, at least by implication, that a kidnapping indictment must specify the particular felonious purpose which the abduction was meant to facilitate. In *Dammons* a kidnapping indictment charged that defendant removed the victim for the purpose of committing "a felony, to wit: Assault With a Deadly Weapon, With Intent to Kill, Inflicting Serious Injury, for the purpose of doing serious bodily injury to her, and for the purpose of terrorizing her." This Court unanimously held that it was reversible error for the trial court to instruct the jury that they could convict defendant if they found he removed her for the purpose of sexually assaulting her. The Court said: "While this theory of the case might be supported by the evidence, it is not charged in the indictment." 293 N.C. at 272-73, 237 S.E. 2d at 841. Had the indictment in *Dammons* been sufficient without specifying the felonies and had this language so specifying them been mere surplusage, it would not have been error for the trial court to instruct on a felonious purpose not charged in the indictment but supported by the evidence.

N.C. Gen. Stat. § 14-54 (1981) makes it a crime to "break or enter any building with intent to commit any felony or larceny

therein. . . ." As the majority recognizes, in prosecutions under this statute and in common law burglary prosecutions this Court has consistently held the indictment must specify the particular felony which defendant intended to commit when he entered the building. *State v. Norwood*, 289 N.C. 424, 222 S.E. 2d 253 (1976); *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). With regard to a prosecution under G.S. 14-54, this Court said: "Felonious intent, an essential element of the felony defined in G.S. 14-54, 'must be alleged and proved, and the felonious intent proven, must be the felonious intent alleged, which, in this case, is the "intent to steal." ' *State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751, and cases cited." *State v. Jones*, 264 N.C. 134, 136, 141 S.E. 2d 27, 29 (1965).

There is no difference in principle between the necessity to allege the specific felony in prosecutions under G.S. 14-54 and prosecutions under subsection (2) of section (a) of the kidnapping statute.

An essential element of the crime of kidnapping as defined by subsection (2) of section (a) of the statute, just as in G.S. 14-54, is not that defendant have a purpose, or intent, to commit any felony generally. An essential element in both statutes is that defendant have the "purpose," or "intent" to facilitate the commission of, or to commit, some specified felony. The majority would concede that at trial it will be necessary for the state to prove in a kidnapping case that defendant had a purpose of facilitating the commission of some specified felony. It will not be enough to prove that he had a purpose of facilitating the commission of some unspecified felony. Further, the trial court must instruct the jury that in order to convict the defendant it must find beyond a reasonable doubt, among other things, that defendant's purpose was to facilitate the commission of some specified felony. Indeed, in *State v. Dammons*, 293 N.C. at 274, 237 S.E. 2d at 841, we held it error for the trial court to instruct the jury that it could convict defendant if it found, among other things, that he removed the victim "for the purpose of facilitating the commission of any felony . . . ."

Proof, in a kidnapping case, that defendant's purpose in removal was to facilitate the commission of some specified felony is necessary because it is this purpose that constitutes one of the essential elements of the crime if it is prosecuted under subsec-

tion (2) of section (a). To fail to prove at trial the specific felony which the removal was designed to facilitate would amount to failure to prove an essential element of the offense. Likewise, failure to allege the specific felony in the indictment is to fail to allege an essential element. In kidnapping indictments, failure to allege an essential element is fatal. *State v. Jerrett*, 309 N.C. 239, 307 S.E. 2d 339.

Failure in a kidnapping indictment brought under subsection (2) of section (a) to allege the specific felony which the removal was meant to facilitate is to fail adequately to inform defendant of the crime charged against him. A defendant, without the benefit of this allegation, would be hard pressed adequately to prepare a defense, especially if the defense turned on the absence of that element defined by subsection (2).

The result will be that in almost every case in which this element is not alleged in the indictment, defendant will move for a bill of particulars to require the state to reveal the element. This, inevitably, will add further paperwork and contribute to further delay of trials in a court system already well burdened with these attributes. On the other hand, it is no real impediment to the prosecution to insist that the element be alleged in the indictment. In cases where the purposes facilitated by the victim's removal are uncertain, or multiple, the state may simply allege all possible purposes in the conjunctive. It need at trial prove only one.

For these reasons I would vote to arrest judgment in the kidnapping case on the ground that the kidnapping indictment was fatally defective in that it alleged an essential element of the crime in the disjunctive. *State v. Helms*, 247 N.C. 740, 102 S.E. 2d 241 (1958). I would grant leave to the state to send a new bill to the grand jury in the kidnapping case. *Id.* Since all charges will have to be retried in any event, the state's interests in this case would not be prejudiced by such a holding.

STATE OF NORTH CAROLINA v. WONALD BORUM WESTMORELAND

No. 356A84

(Filed 5 September 1985)

1. Criminal Law § 75— refusal to answer questions during first interrogation— not assertion of right to silence

A defendant in a prosecution for murder and assault did not assert his right to remain silent, and a subsequent incriminating statement was not required to be excluded, where defendant willingly submitted to questioning, often remained silent when asked questions, repeated denials from time to time, and did nothing else that might indicate he wished to invoke his right to silence. The mere failure of a suspect who has consented to interrogation to answer some or even the majority of the questions put to him is not enough, standing alone, to indicate that he desires to exercise his right to silence.

2. Criminal Law § 75.8— resumption of interrogation—renewed Miranda warnings not required

In a prosecution for murder and assault, an incriminating statement made during defendant's second interrogation was not inadmissible because he was not again advised of his rights where there was no evidence that defendant was unaware of his rights at the commencement of the second interrogation, the second interrogation began within two and a half hours of the initial warning, defendant stated at the beginning of the second interrogation that he understood his rights, the second interrogation was conducted by the same officer and took place in the same location as the initial interrogation, defendant's second statement varied from his first only in the inclusion of the incriminating statement, and defendant was a high school junior of average intelligence and ability who could read and write and who gave no indication of having mental or emotional problems.

3. Criminal Law § 73— admission of hearsay—no error

In a prosecution for murder and assault, hearsay evidence that a victim had said that defendant had given him a .22 caliber semi-automatic rifle to hold until defendant paid off a bet on a football game was admissible where there was other evidence strongly corroborating the hearsay testimony and establishing the truthfulness and reliability of the statements of the victim. Moreover, any error was harmless because the hearsay merely repeated what defendant had already admitted in his custodial statement.

4. Criminal Law § 138.29— aggravating factor—joined offenses—erroneous

In a prosecution in which defendant was convicted of one count of first degree murder, two counts of second degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred by finding as an aggravating factor for the non-capital offenses that the offenses were committed within a short time of one another and that the first degree murder was a part of other crimes involving violence against other persons. An offense covered by the Fair Sentencing Act could not be aggravated by contemporaneous convictions of joined offenses even where the

trial judge relied on a course of conduct and did not explicitly use the convictions where the effect was to use defendant's contemporaneous convictions of joined offenses as an aggravating factor.

5. Constitutional Law § 63; Jury § 7— death qualifying jury—no error

The trial court did not err in a prosecution for murder and assault by death qualifying the jury.

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

APPEAL by defendant as a matter of right pursuant to N.C.G.S. § 7A-27(a) from the judgments entered by *Kirby, J.*, at the 23 January 1984 Criminal Session of MECKLENBURG County Superior Court. Heard in the Supreme Court 13 May 1985.

Defendant was convicted of one count of first degree murder, two counts of second degree murder and one count of assault with a deadly weapon with intent to kill inflicting serious injury. Following the sentencing hearing on the first degree murder charge the jury recommended a sentence of life in prison. Defendant was then sentenced to three consecutive terms of life imprisonment on the murder counts and a concurrent term of imprisonment for twenty years on the assault count.

The State's evidence tended to show that shortly before 9:00 p.m. on the night of 28 January 1983 defendant left the residence of Joseph Johnson at Tanglewood Apartments after being ordered to leave by Mr. Johnson. Defendant returned at about 10:00 p.m. and shot Bryant Butler and Joseph Johnson. Joseph Johson later died. Defendant was identified as the killer by Bryant Butler and by Alberta Cochran who testified that Joseph Johnson had told her that defendant shot him. Other witnesses saw a man with a rifle walk to the parking lot of Tanglewood Apartments and drive away in a yellow Ford EXP. Defendant owned a yellow Ford EXP. Earlier on the same night between 9:30 and 10:00 p.m. John Blakemore and his mother Patricia Blakemore were murdered. All of the shootings were done with a .22 caliber weapon. Roger Thompson, a firearms and toolmark examiner, examined the markings on spent shell casings found at the scenes of both crimes and testified that in his opinion the casings were fired from the same weapon. He also testified that spent projectiles recovered from both scenes had been fired from the same type of weapon. Prior to the shooting defendant had given John

Blakemore a .22 caliber rifle as security or payment for a ten dollar football bet. The rifle was not recovered.

Shortly after 11:30 p.m. on the night of his arrest defendant executed a waiver of his *Miranda* rights and agreed to answer questions. For the most part defendant was unresponsive but did make several comments during the course of the questioning and denied that he had shot anyone. The interrogation ended at approximately 1:00 a.m. and defendant was taken to the county jail. At no point did defendant state that he wanted to invoke his right to remain silent.

Later that morning Investigator Charlie VanHoy learned of the murders of Patricia and John Blakemore. He was informed that the shootings at the Blakemore residence and at Tanglewood Apartments both involved a .22 caliber weapon. At about 2:00 a.m. Officer VanHoy had defendant brought back for further interrogation. Defendant was informed that the police had discovered the Blakemore murders and had information that he had given a .22 caliber rifle to John Blakemore. Officer VanHoy also told him that his rights were still in effect unless he wanted something explained. Defendant said that he understood his rights and wanted to continue. During the second interrogation he admitted that he had given John Blakemore a .22 caliber rifle for a ten dollar football bet.

Defendant did not offer any evidence.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

Ann B. Petersen, for defendant-appellant.

BRANCH, Chief Justice.

[1] Defendant first assigns as error the admission into evidence of his custodial statement that he had given John Blakemore a .22 caliber rifle as payment for a football debt. He contends that the statement was obtained through an interrogation conducted after he had asserted his right to silence. We hold that defendant did not invoke his right to silence and that the trial court properly admitted this statement into evidence.

Once warnings have been given, questioning of a suspect must cease if he indicates in any way his desire to remain silent.

Miranda v. Arizona, 384 U.S. 436, 473-74 (1966). Defendant argues that his failure to answer questions during his first interrogation amounted to an exercise of his right to silence. We disagree.

The trial judge conducted an extensive *voir dire* and made the following findings of fact.

When questioned by Officer VanHoy during the first interrogation defendant stated that he did not shoot anyone, he did not own a gun, and the police could not prove anything without a gun. He also stated that he had not been drinking even though he had a faint odor of alcohol about his person. Officer VanHoy was in possession of highly incriminating evidence and knew that defendant had been identified as the killer of Joseph Johnson. In the questions put to defendant this evidence was presented in various ways but defendant either gave no answer or merely repeated his earlier statements. Since defendant either did not answer his questions or gave repetitious answers Officer VanHoy concluded that further questioning based on the information available to him at that time would not be helpful and terminated the interrogation. The trial judge specifically found that "defendant never expressed a desire to stop talking or answering questions." Upon learning of the Blakemore murders and evidence which implicated defendant in those murders, Officer VanHoy brought defendant back to the Law Enforcement Center for additional interrogation. Based on these findings and his conclusions of law the trial judge denied defendant's motion to suppress his custodial statement. These findings are supported by competent evidence in the record and are binding on appeal. *See State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). They in turn support the trial judge's conclusion that defendant's constitutional rights were not violated.

The facts as found by the trial judge indicate that defendant willingly submitted to questioning and made such answers and denials as he deemed prudent. Though he often remained silent when asked questions, he did repeat his denials from time to time. Since defendant did nothing else that might indicate he wished to invoke his right to silence, his failure to answer only showed that he did not desire to respond to specific questions. A suspect charged with a crime may have reasons for agreeing to submit to interrogation other than a desire to confess or clear

himself of suspicion by giving satisfactory answers to an investigator's questions. A desire to discover what evidence the police have against him and to know the strength of that evidence may well be the primary reason a suspect waives his fifth amendment rights and submits to interrogation in which he answers questions of his own selection. Therefore, we hold that the mere failure of a suspect who has consented to interrogation to answer some or even the majority of the questions put to him is not enough, standing alone, to indicate that he desires to exercise his right to silence. Under the facts and circumstances of this case we do not think that defendant asserted his right to remain silent.

[2] Defendant next argues that any statements he made during the second interrogation are inadmissible because he was not again advised of his rights. Defendant relies on a number of cases from other jurisdictions for support. Three of these cases, *United States v. Collins*, 462 F. 2d 792 (2d Cir.), *cert. denied*, 409 U.S. 988 (1972); *Scott v. State*, 251 Ark. 918, 475 S.W. 2d 699 (1972); *People v. Gary*, 31 N.Y. 2d 68, 334 N.Y.S. 2d 883, 286 N.E. 2d 263 (1972), concern the necessity of giving fresh warnings before interrogating for a second time a suspect who earlier asserted his right to silence. They are inapplicable to the case at bar in light of our decision that defendant did not indicate that he wished to exercise his right to silence. *Franklin v. State*, 6 Md. App. 572, 252 A. 2d 487 (1969), *cert. denied*, 399 U.S. 912 (1970), is distinguishable on its facts because it concerns the necessity of giving fresh warnings when a second interrogation is begun one to two days after *Miranda* warnings are first given. These decisions are not binding on us, and we do not find them persuasive.

In determining whether *Miranda* warnings given at an initial interrogation are so stale and remote that a substantial possibility exists that the suspect was unaware of his constitutional rights at the time a subsequent interrogation was conducted, the following factors should be considered:

> (1) the length of time between the giving of the first warning and the subsequent interrogation; (2) whether the warnings and the subsequent interrogation were given in the same or different places; (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers; (4) the extent to which the subsequent statements

differed from any previous statements; and (5) the apparent intellectual and emotional state of the suspect.

State v. Artis, 304 N.C. 378, 382, 283 S.E. 2d 522, 524 (1981).

When these factors are applied to the case at bar it is clear that there is no evidence that defendant was unaware of his rights at the commencement of the second interrogation. The second interrogation began within two and a half hours of the initial warning and defendant stated at the beginning of the second interrogation that he understood his rights. The second interrogation was conducted by the same officer and took place at the same location as the initial interrogation. Defendant's second statement varied from his first only in that he admitted having given a rifle to John Blakemore. Defendant was a high school junior of average intelligence and ability who could read and write and who gave no indication of having mental or emotional problems. The evidence in this case simply is not susceptible of any reasonable interpretation which would suggest that defendant was unaware of or could not understand his rights. Defendant has failed to carry his burden of showing error, and we hold that the trial court properly admitted his custodial statement into evidence.

[3] Defendant next assigns as error the admission of certain hearsay evidence. At trial Frankie Rossus, a friend of John Blakemore, and Ronald Hawkins, Patricia Blakemore's boyfriend, both testified that John Blakemore told them that defendant had given him a .22 caliber semi-automatic rifle to hold until defendant paid off a bet on a football game. Defendant argues that this evidence was admitted in violation of his right to confront the witnesses against him guaranteed by the sixth and fourteenth amendments to the United States Constitution. We disagree.

Hearsay statements may not be admitted into evidence against a criminal defendant absent a showing that the declarant is unavailable. *Ohio v. Roberts*, 448 U.S. 56 (1980); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). If the declarant is shown to be unavailable the hearsay statement is admissible only if it is attended by adequate indicia of reliability. *Roberts*, 448 U.S. at 66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of

particularized guarantees of trustworthiness." *Id.* In the past this Court has held that hearsay evidence is admissible upon a showing of necessity, *i.e.*, unavailability, and a reasonable probability of truthfulness. *Vestal*, 278 N.C. at 582, 180 S.E. 2d at 769; *State v. Davis*, 305 N.C. 400, 420, 290 S.E. 2d 574, 587 (1982).

The only evidence that might indicate that the hearsay is unreliable is the testimony of Linda Cagle, Patricia Blakemore's sister, to the effect that Patricia was afraid of guns and that she had never known of a gun to be in Patricia's house. Defendant speculates that John Blakemore had acquired the gun on his own and said that he was only holding the gun as security for a bet because of his mother's disapproval of firearms. This theory does not square with the evidence in the case. Defendant and John Blakemore were known to bet on football games, and defendant admitted that he had given the rifle to John Blakemore as security for a bet. This evidence strongly corroborates the testimony of Rossus and Hawkins and establishes the truthfulness and reliability of the statements made by John Blakemore. After carefully reviewing the evidence we hold that the hearsay testimony of Rossus and Hawkins meets the requirements of *Roberts* and *Vestal*. Even if it is assumed that admission of the hearsay was error, it was harmless error beyond a reasonable doubt in light of the fact that it merely repeated what defendant had already admitted in his custodial statement.

[4] At the sentencing hearing on the noncapital offenses the trial judge found as a mitigating factor that defendant had no prior arrests or convictions.

The sole aggravating factor found by the trial judge was that "these four offenses were committed within a short time of one another, and that the course of conduct in which defendant committed the first degree murder of Joseph R. Johnson was a part of other crimes involving violence against other persons . . . ."[1] He then found that the aggravating factor outweighed the mitigating factor and thereupon, in addition to the mandatory life sentence in the capital offense, the trial judge imposed consecutive life terms on the two convictions of second degree

1. This aggravating factor is found in N.C.G.S. § 15A-2000(e)(11) but is not included in N.C.G.S. § 15A-1340.4. For that reason it is treated as a nonstatutory aggravating factor.

murder and a sentence of twenty years imprisonment on the conviction of assault with a deadly weapon with intent to kill inflicting serious bodily injuries, the latter sentence to run concurrently with the consecutive sentences.

Defendant contends that the trial judge erroneously found and used the single aggravating factor as a basis for the enhancement of the punishment for the convictions in the noncapital offenses. We agree.

In *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984), the defendant was convicted of attempted robbery with a firearm and second degree murder and given sentences in excess of the presumptive sentence for each crime. The trial judge found as an aggravating factor in the attempted robbery that the defendant had killed the victim. Likewise, in sentencing the defendant for second degree murder the judge found as an aggravating factor that the murder was committed during the course of the attempted armed robbery. *Id.* at 300, 311 S.E. 2d at 880. In remanding for a new sentencing hearing we held that "[t]o permit the trial judge to find as a non-statutory aggravating factor that the defendant *committed* the joinable offense would virtually eviscerate the purpose and policy of . . . ." N.C.G.S. § 15A-1340.4(a)(1)(o). *Id.* at 299, 311 S.E. 2d at 879. Although the *Lattimore* court mistakenly relied on N.C.G.S. § 15A-1340.4(a)(1)(o), which only concerns the use as aggravating factors of *prior* convictions of joinable offenses, the result reached in that case was correct. Recognizing that the result in *Lattimore* was correct, we hold that a conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense.

In the case before us the trial judge did not explicitly use defendant's convictions as aggravating factors. Rather, he relied on defendant's murderous course of conduct in committing the offenses that support the convictions. The State contends that this does not violate the rule of *Lattimore*. We cannot agree. Whatever name is given to it, the effect of the trial judge's action was to use defendant's contemporaneous convictions of joined offenses as an aggravating factor in violation of the rule of *Lattimore*. Of course, a trial judge is not precluded from finding as an aggravating factor that a defendant has engaged in a criminal

course of conduct when such conduct is not the basis of either of the joined offenses.

We also reject the State's contention that *Lattimore* and *State v. Abee*, 308 N.C. 379, 302 S.E. 2d 230 (1983), are in conflict. In *Abee* the defendant was indicted for first and second degree sexual offense. 308 N.C. at 380, 302 S.E. 2d at 231. Pursuant to a plea bargain he pled guilty to one count of second degree sexual offense based on an act of fellatio. *Id.* At sentencing the trial judge found as an aggravating factor that Abee had engaged in repeated acts of fellatio with the victim and had inserted his finger into the victim's rectum. *Id.* at 381, 302 S.E. 2d at 231. The Court upheld the trial judge's finding of the aggravating factors on the basis that only one act of fellatio was needed to support the conviction. *Id.* The remaining acts of fellatio and the insertion of a finger into the defendant's rectum could properly be considered as factors in aggravation because they were not a basis of the offense of which defendant was convicted. *Id.* In *Lattimore* and the case before us the aggravating factors were based on joined offenses of which defendant had been contemporaneously convicted.

Since the trial judge erred in using defendant's commission of joined offenses which were the subject of his contemporaneous convictions as an aggravating factor, this case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[5] Lastly, defendant assigns as error the imposition of sentence based on a verdict returned by a death qualified jury. This assignment of error is without merit. *See State v. Freeman*, --- N.C. ---, --- S.E. 2d --- (1985).

For the reasons stated there must be a new sentencing hearing on the second degree murder and felonious assault charges. We find no error in the guilt-innocence phase of the case.

No. 83CRS5947—First degree murder—no error.

No. 83CRS5946—Second degree murder—new sentencing hearing.

No. 83CRS5945—Second degree murder—new sentencing hearing.

No. 83CRS5902—Assault with a deadly weapon with intent to kill inflicting serious injury—new sentencing hearing.

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

STATE OF NORTH CAROLINA v. MARVIN JULIUS McNEELY

No. 609A84

(Filed 5 September 1985)

1. **Witnesses § 1.2— competency of child as witness—no abuse of discretion in ruling**

The trial court's ruling that a five-year-old prosecution witness was competent to testify was the result of a reasoned decision and thus not an abuse of discretion, notwithstanding the child's answers during the *voir dire* were somewhat vague and self-contradictory, where the child stated at points in her testimony that she knew what it meant to tell the truth and to tell a lie, that it was bad to tell a lie, and that she was going to tell the truth and was not going to tell a lie.

2. **Rape and Allied Offenses § 5— sexual offense with child—sufficiency of evidence**

The State's evidence was sufficient to establish that defendant touched a five-year-old female child's sexual organs with his tongue so as to support his conviction of the sexual offense of cunnilingus on the child.

3. **Criminal Law § 165— jury argument—effect of failure to object**

Failure of defendant to object at trial to the prosecutor's jury argument in a non-capital case waived alleged errors in such argument.

4. **Rape and Allied Offenses § 6.1— first degree sexual offense—submission of attempt not required**

The trial court in a prosecution for the commission of a first degree sexual offense on a child did not err in failing to submit to the jury the offense of attempt to commit a first degree sexual offense where the State's evidence in the form of the child's testimony, if believed, was positive as to every element of the crime charged, and the only contrary evidence was defendant's mere denial of the charge.

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

APPEAL by the defendant from judgment entered by *Judge F. Fetzer Mills* at the June 4, 1984 Criminal Session of Superior Court, CATAWBA County.

The defendant was tried on an indictment charging him with committing a first degree sexual offense. He entered a plea of not guilty. The jury found him guilty of first degree sexual offense, and he was sentenced to the mandatory term of life imprisonment by the trial court. 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 on May 16, 1985.

Lacy H. Thornburg, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, and Thomas B. Wood, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for the defendant appellant.

MITCHELL, Justice.

The defendant has brought forward assignments of error in which he contends that the trial court abused its discretion by finding a five-year-old witness competent to testify, that the evidence presented was insufficient to support his conviction, that the prosecutor's closing argument was improper, and that the trial court committed plain error by failing to instruct on attempted first degree sex offense. These assignments and contentions are without merit.

The defendant was charged with the commission of the sexual offense of cunnilingus against a five-year-old child. The State's evidence tended to show that on February 2, 1984, Roberta Akers asked the defendant to take care of her eight-year-old daughter. Her daughter had invited the five-year-old victim and another child to spend the night with her. The three girls slept together in one large bed that night in a room next to the room where the defendant slept. During the night, the five-year-old went into the bedroom where the defendant was in bed. The defendant pulled down her panties and touched her genital area with his tongue. He then returned her to the bedroom where the other two little girls were sleeping.

The defendant testified. He acknowledged that the five-year-old girl came into his room and got in bed with him, but he denied engaging in any sexual acts with her. He said that he tried to get her to leave by pinching her. When she resisted he carried her back to the girls' bedroom. He also said that he and the mother of the five-year-old had argued two weeks prior to the incident.

[1] The defendant first assigns as error the trial court's ruling that the five-year-old prosecution witness was competent to testify. The test of competency is whether the witness understands the obligation of an oath or affirmation and has sufficient capacity to understand and relate facts which will assist the jury in reaching its decision. *State v. Higginbottom*, 312 N.C. 760, 324 S.E. 2d 834 (1985); *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984). There is no fixed age limit below which a witness is incompetent to testify. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984); *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). The ruling on the competency of a witness is within the trial court's discretion. *Id.* A ruling committed to a trial court's discretion may be upset only when it is shown that it could not have been the result of a reasoned decision. *State v. Lyszaj*, 314 N.C. 256, 333 S.E. 2d 288 (1985); *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). The defendant has made no such showing in the present case.

The defendant contends that the child's statements at the *voir dire* hearing demonstrated her lack of competence as a witness. He argues that the child gave no indication that she could explain facts, was equivocal on her understanding of the difference between truth and falsehood, and did not show that she appreciated the importance of telling the truth.

In support of his argument the defendant points out that the child was unwilling to respond to any questions at all when the prosecutor first called her to the witness stand. After a break during which other witnesses testified, the child was recalled. At that time she was allowed over objection to sit in the lap of one of the other prosecution witnesses who had just testified. Even then the child failed to respond to the first several questions posed to her or to put her hand on the Bible as requested by the prosecutor.

The defendant also points out that the child's *voir dire* testimony was equivocal on the questions of whether she understood the difference between truth and falsehood or the importance of telling the truth. The following are pertinent excerpts of her testimony:

Q. Do you know what it means to tell the truth? Say that again. Yes or no.

A. Yes.

Q. Do you know what it means to tell a lie or a story? Say it again.

A. Yes.

Q. Is it good or bad to tell a lie?

A. Bad.

Q. What does your mama tell you about telling lies? What does your mama say about telling lies? Does she ever talk to you about that?

A. No.

Q. Has she ever punished you? Has she ever punished you for telling a lie?

A. No.

Q. Have you ever told a lie that she talked to you about?

A. No.

Q. Do you always tell the truth?

A. Yeah.

Q. Has anybody ever talked to you about what would happen to you if you didn't tell the truth?

A. No.

. . . .

(ON *VOIR DIRE* CROSS EXAMINATION)

Q. Do you know what a story is [calling the child by name]?

A. No.

Q. Can you tell me what a story is?

A. I know what it means.

Q. Do you know what it means to tell the truth?

A. No.

. . . .

Q. Do you know what it means to tell a story?

(The witness moved her head from side to side.)

Q. What happens to you if you tell a story? Do you know what happens to you if you tell a story?

A. No.

Q. Have you ever told a story before to anybody?

A. No.

Q. So, have you ever been punished for telling a story?

A. I never told a story.

Q. Do you know what it means to tell the truth?

A. No.

. . . .

(ON *VOIR DIRE* REDIRECT)

Are you supposed to tell the truth?

A. Yes.

Q. Do you know why?

A. No.

Q. Do you know what a lie is?

A. No.

Q. When you don't tell the truth, do you know what happens?

A. No.

. . . .

Q. Do you understand that you are supposed to tell what happened?

A. Yeah.

Q. Do you understand that you're not supposed to say something that didn't happen?

A. No.

Q. Are you going to say anything that didn't happen?

A. Yes.

Q. Are you going to make up something?

A. No.

Q. Do you understand what making up stuff means?

A. No.

Q. If you don't tell exactly what happened, that's making up stuff. Do you understand that?

A. Yes.

Q. Yes or no.

A. Yes.

Q. If you don't tell exactly what happened that means to tell a story; do you understand that?

A. Yeah.

. . . .

Q. If you tell something that didn't happen that will be a lie. Do you understand that?

A. Yeah.

Q. Is it good or bad to tell a lie?

A. Bad.

Q. Are you goint [sic] to tell a lie?

A. No.

. . . .

(ON RECROSS)

Q. What happens to you if you tell a lie [calling the child by name]?

A. I don't know.

Q. You don't know.

A. (The witness moved her head from side to side.)

Q. Have you ever told any lies before?

A. No.

Q. Has your mother ever talked to you about the difference between telling the truth and telling a lie?

A. No.

. . . .

THE COURT: You going to tell the truth?

A. Yes.

The trial judge had the responsibility for determining in his discretion whether the child should be allowed to testify. His presence at the *voir dire* hearing allowed him to listen to the child's responses and to observe her demeanor first hand. From his observations, the trial judge found that

> this child does have the capacity to understand and relate under obligation of oath facts which will assist the jury in determining the truth with respect to the ultimate facts. And the Court further finds this child possesses sufficient mental capacity to testify as to the things which she observed and seen [sic] and has the mental capacit[y] to inform the jury of what she has heard and seen.

It is true that certain of the child's answers during the *voir dire* were somewhat vague and self-contradictory, just as might be expected of a little child of such tender years. *See State v. Robinson*, 310 N.C. 530, 313 S.E. 2d 571 (1984). Nevertheless, at points in her testimony she said quite clearly that she knew what it meant to tell the truth and to tell a lie and that it was bad to

tell a lie. She also said that she was going to tell the truth and was not going to tell a lie. Since the trial judge's discretionary ruling was supported by such evidence, the defendant has failed to show that the ruling could not have been the result of a reasoned decision. Therefore, we leave the ruling undisturbed.

[2] In his second assignment of error, the defendant contends that the evidence was insufficient to support his conviction because the State did not adequately establish that he touched the child's sexual organs. This assignment is without merit.

The defendant was charged with the commission of the sexual offense of cunnilingus on the five-year-old child. This offense is defined as "stimulation by the tongue or lips of any part of a woman's genitalia." *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981). The child witness here testified in pertinent part as follows:

> Q. Where did he touch you at?
>
> A. Down here.
>
> Q. Are you pointing to where you go to the bathroom?
>
> A. (The witness moves her head up and down.)
>
> MR. JONES: I'd like the record to indicate that your honor.
>
> THE COURT: Let the record so indicate.
>
> Q. What did Marvin touch you with?
>
> A. His tongue.

The child's mother corroborated her by testifying that the child pointed "down there," and said that the defendant "went down there with his tongue and started licking her." Two police officers also testified that the child told them that the defendant "licked her popsicle," and that she pointed to her vagina when asked where her popsicle was. Such evidence was sufficient to take the case to the jury on the crime charged.

[3] The defendant next assigns error to several parts of the prosecutor's closing argument to the jury. He contends that the prosecutor incorrectly stated the law and repeatedly commented on matters outside the record. The defendant did not object at

trial to any of the remarks of which he now complains. As this Court stated in *State v. Brock*, 305 N.C. 532, 536, 290 S.E. 2d 566, 570 (1982), in non-capital cases:

> Ordinarily, objection to the prosecuting attorney's jury argument must be made prior to the verdict for the alleged impropriety to be reversible on appeal. *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978); *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970) [death sentence vacated, 403 U.S. 948, 29 L.Ed. 860 (1971)]. Failure to object waives the alleged error. *Id.*

The defendant here was not charged with a capital offense. Since he failed to object at trial to the prosecutor's jury argument, he has waived these alleged errors.

[4] In his final assignment of error, the defendant contends that the trial court erred by failing to submit to the jury the offense of attempt to commit a first degree sex offense. He argues that such an instruction was warranted because the evidence did not clearly show what part of the child's body he touched. We do not agree.

It is well established that the trial court need "submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. *State v. Boykin*, 310 N.C. 118, 121, 310 S.E. 2d 315, 317 (1985). But if "the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense." *Id.* Further, "mere denial of the charges by defendant does not entitle the defendant to the submission of a lesser included offense." *State v. Horner*, 310 N.C. 274, 283, 311 S.E. 2d 281, 288 (1985). Here, the State's evidence in the form of the child's testimony, if believed, was positive as to every element of the crime charged. Since the only evidence to the contrary was the mere denial of the charges by the defendant, the defendant was not entitled to the submission of a lesser included offense. The assignment of error is without merit.

No error.

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

STATE OF NORTH CAROLINA v. DENNIS RAY HAYES AND WINDELL FLOWERS AND CARLTON EUGENE ROBERTS

No. 542A82

(Filed 1 October 1985)

1. **Constitutional Law § 72; Criminal Law § 77.3— sanitized confessions of non-testifying defendants—no implication of specific individuals—Bruton rule not violated**

Confessions of two non-testifying defendants in which those portions that mentioned accomplices were sanitized by the substitution of "the other person," "two others" or "they" for specific names did not implicate a specific individual within the meaning of the *Bruton* rule, and the admission of each of those confessions did not deny the other defendants their right of confrontation in a consolidated trial of three defendants for murder, burglary, kidnapping, breaking or entering, larceny and armed robbery, where the evidence of one victim established that three perpetrators were at the crime scene, all three defendants admitted to being at the victims' residence and participating in the robbery, and the discrepancies between the confessions concerned only the identification of the persons who actually assaulted the victims.

2. **Constitutional Law § 72; Criminal Law § 77.3— confession of non-testifying defendant—violation of Bruton rule—harmless error**

Even if the confession of one non-testifying defendant that he attacked the male victim while the "other two men" assaulted the female victim implicated the other two codefendants within the meaning of the *Bruton* rule in this prosecution for murder, burglary, kidnapping, breaking or entering, larceny and armed robbery, the admission of this confession was harmless error and did not entitle the codefendants to a new trial where all three defendants made extrajudicial statements amounting to interlocking confessions; each defendant admitted having participated in the planning of a burglary and to being present at the victims' home at the time of the burglary; the only discrepancies among the confessions concerned the issue of who actually assaulted the victims; the question of which of the defendants actually committed the assaults was irrelevant to the jury verdicts finding each of the defendants guilty of all of the crimes charged; and the interlocking confessions and evidence that certain items taken from the victims were found in the possession of some of the defendants provided overwhelming evidence of each defendant's guilt as to each charge. Furthermore, any violation of G.S. 15A-927(c)(1) which may have occurred due to the admission of such confession does not entitle the two codefendants to a new trial since there is no possibility that, had the error not been committed, a different result would have been reached at trial.

3. **Criminal Law § 92.1— consolidation of charges against multiple defendants**

The trial court did not abuse its discretion in granting the State's motion to join various charges against three defendants for trial pursuant to G.S. 15A-926 and in denying defendants' motions for severance under G.S. 15A-927 where the charges against each defendant arose out of a common scheme or

plan entered into by all defendants, the evidence against each would be almost identical, and the admission of the extrajudicial statement of each defendant did not prejudice the other defendants.

4. **Constitutional Law § 63— first degree murder—death qualification of jury**

The practice of "death qualifying" a jury before the guilt-innocence phase of a first degree murder trial did not result in a jury biased in favor of the prosecution on the issue of guilt and deprive defendants of a fair trial.

5. **Criminal Law § 138.18— pecuniary gain aggravating factor—insufficient evidence**

The trial court erred in finding as an aggravating factor for first degree burglary, second degree kidnapping, breaking or entering and larceny that the offenses were "committed for hire or pecuniary gain" where there was no evidence that defendants were paid or hired to commit these crimes.

6. **Criminal Law § 138.40— mitigating circumstance—voluntary acknowledgment of wrongdoing—confession after arrest**

Where the evidence showed that defendant confessed after he was arrested, he was not absolutely entitled to a finding of the mitigating circumstance that he voluntarily acknowledged wrongdoing in connection with the offenses prior to arrest or at an early stage of the criminal process, G.S. 15A-1340.4(a)(2)(l). Instead, *it was for the trial judge to decide, in his discretion,* whether the confession was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor, and the trial court's ruling that a defendant who confessed four hours after his arrest was not entitled to this mitigating factor was not an abuse of discretion.

7. ***Criminal Law § 138.40— mitigating circumstance—voluntary acknowledgment of wrongdoing—repudiation of confession***

If a defendant repudiates his inculpatory statements, he is not entitled to a finding of the mitigating circumstance that he voluntarily acknowledged wrongdoing in connection with the crimes prior to arrest or at an early stage of the criminal process.

8. **Constitutional Law § 68— no denial of defendant's right to testify**

In the absence of an indication to the trial court that defendant wished to take the stand, it cannot be said that the court denied defendant his constitutional or G.S. 8-54 right to testify.

9. ***Criminal Law § 75.2— confession—statement by officer—no reasonable hope of reward***

An officer's statement to defendant that "it could possibly be of some help if he talked" could not have aroused in defendant, a man twenty-eight years old with experience in dealing with law enforcement officials, any reasonable hope of reward if he confessed so as to render his confession involuntary.

10. **Criminal Law § 74.1— motion to suppress portion of confessions—denial as harmless error**

Although the trial court erred in denying defendant's motion to suppress a portion of his confessions in which he referred to an incident that occurred

several hours prior to the crimes in question, the admission of such evidence was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant's guilt.

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

APPEAL as of right by each defendant pursuant to N.C.G.S. § 7A-27(a) from judgments entered by *Rousseau, J.*, at the 21 June 1982 Special Criminal Session of Superior Court, IREDELL County, the case having been transferred from WILKES County where the incident which is the subject of this case occurred. Each of the defendants was convicted of first-degree murder, first-degree burglary, second-degree kidnapping, breaking or entering, and larceny and armed robbery. Judgment on each defendant's conviction of armed robbery was arrested. Each defendant received the following sentences: For the Class A felony of first-degree murder—life imprisonment; for the Class C felony of first-degree burglary—50 years; for the Class E felony of second-degree kidnapping—30 years to begin upon expiration of the sentence for the Class C felony; and for the Class H felonies of breaking or entering and larceny—10 years to begin at the expiration of the sentence imposed for the Class E felony. We allowed defendants' motion to bypass the North Carolina Court of Appeals on the non-Class A felonies on 22 September 1982 as to defendant Hayes and on 22 November 1982 as to defendants Flowers and Roberts.

Rufus L. Edmisten, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the State.

Adam Stein, Appellate Defender, by Malcolm Ray Hunter, Jr., Assistant Appellate Defender, for defendant-appellant Hayes.

Dennis R. Joyce, for defendant-appellant Flowers.

Kurt R. Conner, for defendant-appellant Roberts.

MEYER, Justice.

On Sunday, 13 December 1981, Thomas Greer, age 81, and his wife, Clara Greer, age 76, operated their small country store at Boomer in Wilkes County, North Carolina, as they had done for some 42 years. Mr. and Mrs. Greer lived in a house located behind

and near their store. At approximately 8:30 p.m., they closed the store and went to their house. They went to bed around 9:00 p.m. and shortly thereafter, at approximately 9:15 p.m., someone knocked on the door. Mrs. Greer answered the door and talked to the caller, who was a black man, at the door but refused to let him come in because her husband was asleep and she did not want to awaken him. The man left and Mrs. Greer returned to bed and fell asleep.

Earlier that same evening, at about 6:00 p.m., James Bailey loaned his white 1972 four-door Chevrolet Impala automobile (license number RPW-159) to defendant Dennis Ray Hayes at Hayes' mobile home at the Sturdivant Trailer Park located near Wilkesboro. Hayes took the car to Statesville to pick up the defendant Carlton Eugene Roberts and then returned to the mobile home. Around 9:00 p.m., Hayes and Roberts, together with the defendant Windell Flowers, went to the Greers' store. They then went to the Greer house and knocked on the door but, as indicated, Mrs. Greer would not let them in. The three defendants then went to Lenoir where they obtained a blanket from a friend and then went to a club called the Two Spot where they had some drinks and got into a fight with others over who was to pay for the drinks. The three obtained a sawed-off shotgun and consumed additional liquor.

In the early morning hours of 14 December 1981, at approximately 1:00 a.m., the three defendants returned to the Greer home at Boomer. Hayes wrapped the blanket they had obtained over his head and crashed through a bedroom window. Roberts and Flowers followed through the same window. Roberts grabbed Mr. Greer and started beating him with a stick or pipe, while at the same time demanding that Mr. Greer tell him where the money was hidden. The defendants Flowers and Hayes grabbed Mrs. Greer, put a pistol to her neck, and demanded that she tell where they kept the money. She was also hit over the head with a flashlight, causing a five-inch wound. As one of the three defendants searched the bedroom where the Greers slept, the other two held Mr. and Mrs. Greer. They found a wallet containing between $800.00 and $1,000.00.

Mrs. Greer took Flowers to a back bedroom where she showed him the location of an envelope under a rug. The envelope

contained $1,000.00 in bills and old coins. As the beating of Mr. Greer continued, Mrs. Greer led the two men outside, telling them there might be money hidden in a playhouse in the yard. She attempted to escape and was caught and thrown down. She then took them to the store where they opened the door with a key and went inside. After tying up Mrs. Greer, they stole a number of items from the store, including two cases of cigarettes, a watch with a diamond in it, and a .22 caliber Luger pistol. The three men then left in a four-door white Chevrolet automobile. A white Chevrolet was observed parked on Highway 18 near the Country Squire Trailer Park at the end of a guardrail at about 2:55 a.m. At that time, defendants were gone to get gasoline for the automobile after leaving the Greer residence.

Mrs. Greer struggled out of her bonds and made her way to a nearby mobile home, where her granddaughter, Martha Brown, lived. Martha Brown helped her grandmother into the trailer and then called the sheriff and members of her family. The Greers' son-in-law, Clay Brafford, was the first to arrive at the house. He found Mr. Greer lying on his back with his head at the end of the bed and his hands tied to the foot of the bed. His face was beaten so badly that Brafford could hardly recognize him. There was blood all over the bed and on the bedroom floor, and the room had been ransacked. Mr. Greer was alive but obviously badly hurt. Other people arrived, and Mr. Greer was taken away by ambulance. Mr. Greer subsequently died on 1 January 1982 from severe complications resulting from the severe beating about his face and head which resulted in swelling and bruises about the face, a fractured jaw, and extensive brain damage.

Mrs. Greer was unable to identify any of her assailants and knew only that three black males were involved and that they wore masks and gloves. No fingerprints or footprints were found on the Greer premises.

There was testimony that, on the morning of 14 December 1981, the defendant Hayes returned to his mobile home at about 6:30 a.m. He sat on the bed and cried, saying, "I'll not never [sic] go out on another deal as long as I live. You should have seen what we did to that old man last night." From the butt of a gun, Hayes removed a tie tack and dropped it into a heat duct. Subsequently, this tie tack was found in the mobile home by police.

About a week later, Hayes and his girlfriend, Nancy Cole, and Roberts and his girlfriend, Teresa Smith, met in a room at Motel 21 at Statesville. Roberts said at one point, "This old white man had more money than any black man was ever going to have."

Several days after the incident at the Greers', the defendant Flowers sold old coins, a watch, and a .22 caliber Luger pistol in Taylorsville. As early as 16 December 1982, Hayes and Flowers were questioned in Wilkesboro about the crimes. Flowers was in custody at the time in connection with another matter which occurred in Statesville. He was transferred to Statesville on 3 January 1982, where he gave the first of two statements to Investigating Officer Roberts. Later, after having been brought back to Wilkes County, he gave a second statement to Investigating Officer Cabe.

On 3 January 1982, the defendant Hayes was arrested by Sheriff Gentry in Alexander County and, after having been brought back to Wilkes County, gave a statement to the sheriff at about 11:00 a.m. On 20 April 1982, defendant Carlton Roberts told his cellmate, Grover Bauguess, about what happened at the Greer house back in December, including the fact that he was the person who had beaten Mr. Greer.

Certain of defendants' assignments of error and arguments thereon are common to all three defendants. Others relate only to defendants Hayes and Flowers, and still others relate only to either Flowers or Hayes individually. We will address the assignments, contentions, and arguments of the defendants accordingly.

ALL DEFENDANTS

Each of the three defendants challenged the consolidation of their cases for trial and the admission into evidence of extrajudicial statements of each defendant which referred to the other defendants, determination of their guilt by a so-called "death-qualified" jury, and the use of the aggravating factor that "the offenses were committed for hire or pecuniary gain" in enhancing their sentences for first-degree burglary, second-degree kidnapping, and breaking or entering and larceny.

Prior to trial, each defendant filed a written motion to sever his trial from that of his codefendants. These motions were heard by the trial judge on 6 May 1982, but a ruling was deferred. Im-

mediately prior to trial on 21 June 1982, the prosecutor moved to join all three defendants' cases in one trial on grounds specified in N.C.G.S. § 15A-926. Over all defendants' objections, this motion was allowed.

We address first the consolidation of the defendants' cases for trial and the admission into evidence of extrajudicial statements of each defendant. Prior to trial the prosecution was granted a motion to join the three defendants' cases for trial. The motion was granted upon the grounds specified in N.C.G.S. § 15A-926, to wit: that the cases were based on identical charges, they arose out of the same series of transactions, and the evidence was the same.

The defendants, in their challenge to the consolidation, contend that the trial court erred in admitting into evidence expurgated extrajudicial statements which implicated the other codefendants. All three defendants made extrajudicial statements amounting to interlocking confessions which were subsequently admitted into evidence. Each defendant's statement admitted participation in the crimes with other persons. The only real conflict in their statements was as to which of the defendants beat Mr. and Mrs. Greer. Each defendant's statement or statements that mentioned accomplices was sanitized either prior to or during the course of the trial by inserting in the place of the names mentioned "the other person," "two others," "others," or "they," so as not to implicate specific individuals.

Defendant Flowers made two statements. His first statement was made in the Iredell County Sheriff's Office at approximately 3:07 a.m. on 3 January 1982. His second statement was made the same day at approximately 5:29 a.m. at the Wilkes County Sheriff's Office. Before allowing these to be read into evidence, the trial judge instructed the jury that the statements could be considered only against Flowers and nobody else. Both of these statements referred to two other people who were with him during the time the crimes were being perpetrated.

Defendant Hayes made a statement to the Sheriff of Wilkes County at 11:00 a.m. on 3 January 1982 in which he admitted that he was the one who crashed through the window into the Greer residence but in which he denied touching either Mr. or Mrs. Greer. In his statement, he said that he was in the company of

two others. The trial judge carefully limited the statement to Hayes and instructed the jury not to consider it as to the other two defendants.

Defendant Roberts made a statement to his cellmate while he was confined in the Wilkes County Jail awaiting trial on or about 20 April 1982. He told his cellmate, Grover Bauguess, that he beat Mr. Greer while the other two beat Mrs. Greer to make her tell where the money was hidden. The trial judge carefully instructed the jury that this statement was limited to Roberts only.

Nancy Cole, Hayes' girlfriend, testified as to a conversation between Hayes, Roberts, Roberts' girlfriend, and herself to the effect that Roberts was the one who beat Mr. Greer.

There was also independent evidence that certain items from the Greer home and store were found in the possession of the defendants.

In his final instructions, the trial judge again instructed that the statements were limited to the defendant who made them and that they were not to be used against codefendants.

None of the defendants testified.

All three defendants argue strenuously that the consolidation of their cases for trial and the subsequent admission into evidence of their extrajudicial statements violates the holding in *State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984). The defendants generally contend that they were denied their sixth amendment right to confront and cross-examine the witnesses against them by the admission of the statements of non-testifying codefendants in the consolidated trial. More specifically, they argue that the admission of these statements into evidence runs afoul of the holding in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476 (1968).

In *Paoli v. United States*, 352 U.S. 232, 1 L.Ed. 2d 278 (1957), the United States Supreme Court said that a confession made by a defendant was not admissible against codefendants. The Court went on to hold that a confession implicating codefendants could be admitted against the confessor in a joint trial if the trial court clearly instructs the jury that the statement may not be considered against the codefendants. In *Bruton*, the Court held that

the admission of a non-testifying codefendant's confession implicating a defendant violates his constitutional right of confrontation. The Supreme Court went on to reject *Paoli*'s holding that encroachment upon this right could be avoided simply by an instruction to the jury to disregard the confession as to the confessor's codefendants.

In *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968), we noted that the Sixth Amendment's confrontation clause had been made applicable to the states through the fourteenth amendment in *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed. 2d 923 (1965), and therefore recognized that *Bruton* was binding on this Court. We went on to hold in *Fox* that, in joint trials, extrajudicial confessions must be excluded unless all portions which implicate the confessor's codefendants can be deleted from the statement without prejudice to either the State or to the confessor. If the confession cannot be "sanitized," the State must choose between relinquishing the confession or trying the defendants separately. The *Fox* holding was subsequently codified by the legislature as N.C.G.S. § 15A-927(c)(1), which provides:

> When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:
>
> a. A joint trial at which the statement is not admitted into evidence; or
>
> b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
>
> c. A separate trial of the objecting defendant.

[1] All three defendants earnestly contend that the confessions of their codefendants implicated them in the crimes. As noted previously, those portions of the confessions that mentioned accomplices were sanitized by the substitution of the words "the other person," "two others," "others," or "they" for specific names. However, the defendants point out that, in *State v. Woods*, 311 N.C. 80, 316 S.E. 2d 229 (1984), we held that a defend-

ant's name need not be mentioned in the confession in order to implicate him. In *Woods*, three defendants were tried jointly for the armed robbery of a service station. The extrajudicial statement of one of the defendants was admitted into evidence and provided in pertinent part, "I told him I was with some guys, but that I didn't rob anyone, they did." *Id.* at 94, 316 S.E. 2d at 237. We held that, because the confessor's two codefendants were being tried jointly with him, and since only two persons were seen in the service station at the time of the robbery, the statement clearly implicated the appellant Woods. The defendants argue that *Woods* is controlling here.

With regard to the confessions of Flowers and Hayes, it is clear that *Woods* is not controlling. In *Woods*, there were three defendants, but only two persons were seen in the service station at the time of the robbery. The confessor placed the other two defendants at the scene of the robbery. Here, however, the testimony of Mrs. Greer established that three perpetrators were at the scene, and all three defendants admit to being at the Greer residence and participating in the robbery. The discrepancies between the confessions of Flowers and Hayes concern the identification of the persons who actually assaulted the Greers. According to Flowers' confessions, "one of the two people that had already been in" assaulted Mr. Greer while Mrs. Greer was beaten by "one of the other people that was with him." Hayes' confession states that "one man with a stick got to the bed and started beating Mr. Greer" and that "he and one man began to search the house for money." In light of the fact that all three perpetrators were at the scene of the crime, we find these vague and ambiguous references to be incapable of implicating a specific individual.

[2] However, Roberts, in his confession, stated that he attacked Mr. Greer while the "other two men" assaulted Mrs. Greer. It could be argued that, under *Woods*, this implicated Flowers and Hayes. Also, Roberts' confession included the statement that "the third man drove the car that belonged to Dennis Hayes." Assuming, *arguendo*, that this statement did implicate Roberts' codefendants, we hold that this does not entitle them to a new trial.

A *Bruton* violation does not automatically require reversal of an otherwise valid conviction. On at least three occasions, the

United States Supreme Court has applied a harmless error analysis to claimed *Bruton* violations. *Brown v. United States*, 411 U.S. 223, 36 L.Ed. 2d 208 (1973); *Schneble v. Florida*, 405 U.S. 427, 31 L.Ed. 2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284 (1969). In their confessions, each defendant admitted having participated in the planning of the burglary and to being present at the Greer home at the time of burglary. The only discrepancies among the confessions revolved around the issue of who actually assaulted the Greers. However, it is well established that where two or more persons join together to commit a crime, each of them, if actually or constructively present, is guilty of the particular crime and any other crime committed by the other or others in furtherance of or as a natural consequence of the common purpose. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 33 L.Ed. 2d 761 (1972). The assaults on the Greers and the subsequent death of Mr. Greer as a result of the beating inflicted upon him were clearly in furtherance of or a natural consequence of the burglary committed by all three defendants. The question of which of the defendants actually committed the assaults was irrelevant to the jury verdicts finding each of the defendants guilty of all of the crimes charged. The interlocking confessions combined with the fact that certain items taken from the Greers were found in the possession of some of the defendants provided overwhelming evidence of each defendant's guilt as to each charge and any *Bruton* error which *may* have occurred was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b).

We further hold that any violation of N.C.G.S. § 15A-927(c)(1) which *may* have occurred due to the admission of Roberts' confession does not entitle Flowers and Hayes to a new trial. Under N.C.G.S. § 15A-1443(a), a defendant is prejudiced by errors relating to rights arising other than under the constitution when there is a reasonable possibility that, had the error not occurred, a different result would have been reached at trial. Applying this standard, we hold that there is no possibility that, had the error not been committed, a different result would have been reached at the trial, and thus any violation of N.C.G.S. § 15A-927(c)(1) that may have occurred as a result of the admission of Roberts' confession was not prejudicial as to Flowers or Hayes.

[3] In light of this analysis, we conclude that the trial court did not err in granting the State's motion to join the cases for trial pursuant to N.C.G.S. § 15A-926 and in denying the defendants' motions for severance under N.C.G.S. § 15A-927. It is well established that a trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion. *E.g., State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982); *State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981). 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. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). In light of the fact that the charges against each defendant arose out of a common scheme or plan entered into by the defendants and the evidence against each would be almost identical, we are unable to say that the trial judge abused his discretion by joining the defendants' cases for trial.

[4] The defendants next contend that the practice of "death-qualifying" the jury before the guilt-innocence phase of the trial resulted in a jury biased in favor of the prosecution on the issue of guilt and deprived them of a fair trial. We have repeatedly upheld North Carolina's jury selection process in first-degree murder cases as constitutional. *E.g., State v. Vereen*, 312 N.C. 499, 324 S.E. 2d 250, *cert. denied*, --- U.S. ---, 85 L.Ed. 2d 526 (1985); *State v. Noland*, 312 N.C. 1, 320 S.E. 2d 642 (1984), *cert. denied*, --- U.S. ---, 84 L.Ed. 2d 369, *reh'g denied*, --- U.S. ---, 85 L.Ed. 2d 342 (1985). This assignment of error is overruled.

[5] The defendants' next argument concerns the sentences which were imposed by the trial judge for their convictions for first-degree burglary, second-degree kidnapping, breaking or entering, and larceny. On the first-degree burglary convictions, each defendant was sentenced to the maximum term of 50 years. On the second-degree kidnapping convictions, each received the maximum sentence of 30 years. On the breaking or entering and larceny convictions, each defendant was sentenced to the maximum term of 10 years. In support of these sentences, the court made separate findings of aggravating and mitigating factors for each judgment. The trial court found as an aggravating factor for each crime as to each defendant that the offenses were "committed for hire or pecuniary gain." The defendants argue that this finding

in aggravation was error in each case and that they are entitled to new sentencing hearings on these convictions. We agree.

Subsequent to the trial of these defendants, we held in *State v. Abdullah*, 309 N.C. 63, 306 S.E. 2d 100 (1983), that under the Fair Sentencing Act there must be evidence that the defendant was paid or hired to commit the offense before this aggravating factor may be found. The State concedes that there was no evidence that the defendants were paid or hired to commit these crimes. When the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). The terms imposed for each offense exceeded the presumptive terms set out in N.C.G.S. § 15A-1340.4(f). Therefore, each defendant is entitled to a new sentencing hearing on his convictions for first-degree burglary, second-degree kidnapping, breaking or entering, and larceny.

DEFENDANTS HAYES AND FLOWERS

[6] Defendants Hayes and Flowers assign as error the trial court's failure to find as a mitigating factor for the sentences imposed on the first-degree burglary, second-degree kidnapping, breaking or entering, and larceny convictions that prior to arrest or at an early stage of the criminal process, they voluntarily acknowledged wrongdoing in connection with the offenses to law enforcement officials. We conclude that the trial court did not err in refusing to find this mitigating factor as to either defendant.

Under the Fair Sentencing Act, the trial court must consider every statutory mitigating factor prior to imposing a sentence in excess of the presumptive term. N.C.G.S. § 15A-1340.4(a). N.C.G.S. § 15A-1340.4(a)(2)(1) lists as a mitigating factor that "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." In *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), we said that with regard to this mitigating factor, "criminal process" begins either upon the issuance of a warrant or information, upon the return of a true bill of indictment or presentment, or upon arrest. We went on to hold that a defendant was *entitled* to a finding of this statutory mitigating factor if his confession was made prior to the issuance

of a warrant or information, the return of a true bill of indictment or presentment, or prior to arrest, *whichever comes first.*

The evidence shows that Hayes made his confession *after* he was arrested. He, therefore, was not absolutely *entitled* to a finding of this mitigating circumstance. Instead, it was for the trial judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor. *See id.* A matter committed to the discretion of a trial court is not subject to review except upon a showing of an abuse of discretion. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967). As noted previously, 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. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985). The record indicates that Hayes confessed approximately four hours after he was arrested. We cannot say in this case that the trial court's ruling that the defendant was not entitled to this mitigating factor was so arbitrary that it could not have been the result of a reasoned decision. Although we decline to establish a *per se* rule establishing a specific length of time beyond which a confession cannot be considered as being made at an early stage of the criminal process, we hold that in this case the defendant has failed to show an abuse of discretion.

[7] In regard to defendant Flowers, the record indicates that he had been incarcerated in the Iredell County jail on an unrelated charge since 30 December 1981. After first denying any involvement in the crimes, the defendant made an inculpatory statement during the early morning hours of 3 January 1982. He was then arrested in connection with these crimes. A few hours later, Flowers gave another statement admitting his involvement in the offenses. Flowers' first inculpatory statement was, therefore, clearly made at an early stage of the criminal process. However, Flowers repudiated the first statement prior to the second, and later repudiated the second confession as well.

The mitigating factor set out in N.C.G.S. § 15A-1340.4(a)(2)(1) reflects the assumption that a person who admits guilt and acknowledges a responsibility for his actions shows a possibility of rehabilitation which should be rewarded. *See Graham.* However, when a defendant later retracts an inculpatory statement, this

assumption of the potential for rehabilitation disappears, and it is as though no inculpatory statement was ever made. We hold that if a defendant repudiates his inculpatory statement, he is not entitled to a finding of this mitigating circumstance. Here, the record indicates that Flowers repudiated *both* of the inculpatory statements attributed to him. Therefore, the trial court did not commit error in refusing to find as a mitigating factor that prior to arrest or at an early stage of the criminal process, he voluntarily acknowledged wrongdoing in connection with the crimes.

DEFENDANT HAYES

[8] Defendant Hayes argues that the trial court committed prejudicial error by denying him his right to testify in his own defense. Under N.C.G.S. § 8-54, a criminal defendant is, at his own request, a competent witness in the proceeding against him. The defendant also contends that he has a constitutional right to testify on his own behalf.[1] Assuming, *arguendo*, that a constitutional right to testify does exist, we conclude that neither it nor N.C.G.S. § 8-54 has been violated. The record clearly indicates that the defendant, despite several opportunities to do so, did not express to the trial court a desire to testify. In the absence of an

1. Although it appears the United States Supreme Court has never explicitly held that a criminal defendant has a constitutional right to testify on his own behalf, it has in several cases intimated that such a right exists. *E.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1, 53 L.Ed. 2d 594, 612, *reh'g denied*, 434 U.S. 880, 54 L.Ed. 2d 163 (1977) (Burger, C.J., concurring) ("Only such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make."); *Faretta v. California*, 422 U.S. 806, 819 n.15, 45 L.Ed. 2d 562, 572 (1975) ("It is now accepted, for example, that an accused has a right to . . . testify on his own behalf . . . ."); *Brooks v. Tennessee*, 406 U.S. 605, 612, 32 L.Ed. 2d 358, 364 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."); *Harris v. New York*, 401 U.S. 222, 225, 28 L.Ed. 2d 1, 4 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so."). A number of other courts, however, have expressly held that a criminal defendant does possess a constitutional right to testify on his own behalf. *E.g.*, *Whiteside v. Scurr*, 744 F. 2d 1323 (8th Cir. 1984), *rev'd on other grounds*, 475 U.S. ---, 89 L.Ed. 2d 123 (1986); *United States v. Bifield*, 702 F. 2d 342 (2d Cir.), *cert. denied*, 461 U.S. 931, 77 L.Ed. 2d 304 (1983); *Alicea v. Gagnon*, 675 F. 2d 913 (7th Cir. 1982); *State v. Superior Court County of Pima*, 142 Ariz. 375, 690 P. 2d 94 (1984); *People v. Curtis*, 681 P. 2d 504 (Colo. 1984); *People v. Simmons*, 140 Mich. App. 681, 364 N.W. 2d 783 (1985). The majority of the courts recognizing a constitutional right to testify have concluded that it emanates from the due process clauses of the fifth and fourteenth amendments and from the sixth amendment's guarantees of the right to confrontation and compulsory process.

indication to the trial court that he wished to take the stand, it cannot be said that the court denied the defendant his right to testify. This assignment of error is without merit and is overruled.

DEFENDANT FLOWERS

[9] Defendant Flowers argues that the trial court erred in denying his motions to suppress the inculpatory statements he made to the authorities. Flowers contends that the statements should be held to be involuntary due to inducements and promises made to him by Captain Roberts of the Wilkes County Sheriff's Department.

At the suppression hearing, Captain Roberts testified that he questioned Flowers during the early morning hours of 3 January 1982. Prior to the interview, the defendant was informed of his *Miranda* rights. Roberts testified that he told the defendant that the authorities had information that he was involved with the crimes which occurred at the Greer residence. Roberts acknowledged that he had told Flowers that if he cooperated, "it could possibly be helpful to him." However, Roberts testified that he told the defendant that he could not make any promises and, in response to defendant's inquiry, specifically told him that he did not have the authority to promise that any sentence he might receive would be served concurrently with any other sentence.

The defendant testified at the suppression hearing that Roberts told him that he knew that he was going to have to return to prison due to a parole violation and that if he confessed he would try to see that any sentence imposed was made to run concurrent with any other sentence he was required to serve. The trial court made findings of fact based on the evidence presented at the suppression hearing. Among these findings were:

> [T]hat Captain Roberts, in talking with the defendant concerning the fact that the defendant was already serving a prison sentence and was wanting some help, Captain Roberts stated that it could possibly be of some help if he talked, but that he—that is Captain Roberts—could not make any promises and did not make any promises.

Based upon this and other findings of fact, the court concluded that the confession was voluntarily made, "without threats or

promises or hope of reward." Flowers argues that the evidence at the motion hearing establishes that the confession was induced by assurances from law enforcement officials that they would assist him in connection with the offenses. We disagree.

Findings of fact made by a trial court are conclusive and binding upon appellate courts if supported by competent evidence in the record. *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). The trial court's conclusions of law, however, are reviewable on appeal. *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984); *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968).

It is well established that a confession obtained as a result of an inducement of hope promising relief from the criminal charge to which the confession relates is involuntary and inadmissible. *E.g., State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975). However, here, the trial court found that Roberts told the defendant that he could not make any promises and, in fact, made no promises concerning relief as to these or any other charges. This finding was amply supported by the evidence and is conclusive on appeal. The only evidence that could possibly support the defendant's argument is the court's finding that Roberts stated that "it could possibly be of some help if he talked." We conclude, however, that this statement by Captain Roberts could not have aroused in the defendant, a man 28 years old with experience in dealing with law enforcement officials, any reasonable hope of reward if he confessed to the crimes. *See State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982). This assignment of error is overruled.

[10] The defendant also contends that the trial court erred in denying his motion to suppress a portion of his confessions in which he refers to an incident that occurred several hours prior to the events at the Greer residence. In the confessions, the defendant stated that, while at a nightclub, two men started fighting and knocked over his drink. Flowers said that he confronted the two men and told them that if they did not pay for his drink, he would kill them. We agree with the defendant that this portion of the confession was irrelevant to any of the charges for which he was being tried and should have been excluded. However, in light of the overwhelming evidence of the defendant's guilt, its admission was harmless beyond a reasonable doubt.

For the foregoing reasons, we reach the following results in the cases against the defendants:

No. 82CRS6057, No. 82CRS6056, and No. 82CRS6066—First-Degree Murder (All Defendants)—No error.

No. 82CRS6058, No. 82CRS6052, and No. 82CRS6064—First-Degree Burglary (All Defendants)—Sentences vacated and remanded for resentencing.

No. 82CRS6059, No. 82CRS6055, and No. 82CRS6063—Second-Degree Kidnapping (All Defendants)—Sentences vacated and remanded for resentencing.

No. 82CRS6061, No. 82CRS6053, and No. 82CRS6067—Breaking or Entering and Larceny (All Defendants)—Sentences vacated and remanded for resentencing.

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

ELIZABETH COFFEY LADD, MARGARET COFFEY GRADDY, AND MARION COFFEY HENSLEY v. THE ESTATE OF MAY GORDON LATHAM KELLENBERGER, R. D. DOUGLAS, JR. AS CO-EXECUTOR OF THE ESTATE OF MAY GORDON LATHAM KELLENBERGER; NORTH CAROLINA BANK, AS CO-EXECUTOR OF THE ESTATE OF MAY GORDON LATHAM KELLENBERGER; MARY GARDNER NOVOTNEY; EILEEN TAYLOR LOVE; HELEN L. EUBANKS; RUTH L. SMITH; AGNES L. COX; BLANCHE L. SUTTON; MARTHA LOUISE L. WALKER; FRANK B. LATHAM; EDWARD L. LATHAM; LUCILLE L. REDFEARN; GABRIEL RUFFIN LATHAM; JOHN L. SNIPES; W. LUBY SNIPES, JR.; JAMES E. SNIPES; RUTH S. BROWN; MABEL S. TALTON; LELA S. WHITLEY; HAZEL S. HARDEE; MILDRED S. SORTINO; JOHN L. LATHAM, JR.; LOUISE L. NYGARD; MAY GORDON L. LUTHI; EDYTHE V. LATHAM; AND ALL UNKNOWN HEIRS OF MAY GORDON LATHAM KELLENBERGER

No. 572PA83

(Filed 1 October 1985)

1. Adoption § 1— breach of contract to adopt—equitable adoption—Rule 12(b)(6) dismissal proper

An action in the alternative for breach of a contract to adopt, adoption by estoppel, or equitable adoption was properly dismissed as failing to state a

claim upon which relief could be granted where the deceased's will, attached to and incorporated into the complaint, bequeathed forty percent of her residual estate to "various relatives, both on my father's and my mother's side of the family, who would inherit from me if I died intestate." The phrase "various relatives" plainly denotes relatives in varying degrees; the reference to "my father's and my mother's sides of the family" inevitably excludes children, adopted or otherwise, and refers to collateral kin; and the children would not have shared in the estate even if they had been adopted. G.S. 1A-1, Rule 12(b)(6).

2. **Wills § 2.2— agreement to adopt and make heirs at law—not a contract to make a will**

An agreement to adopt the plaintiffs and to make them heirs at law did not constitute a contract to make a will in plaintiffs' favor because it did not identify with any degree of particularity property to which the agreement referred; without more it is a mere agreement to treat plaintiffs as if they were natural children who were nevertheless disinheritable by will.

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

ON plaintiffs' petition for discretionary review of a decision of the North Carolina Court of Appeals, 64 N.C. App. 471, 307 S.E. 2d 850 (1983), affirming the dismissal of plaintiffs' action by *Judge Helms*, presiding in GUILFORD County Superior Court.

Crisp, Davis, Schwentker and Page by William T. Crisp and Cynthia M. Currin; Pree and Pree by Robert O'Shea for plaintiff appellants.

Douglas, Ravenel, Hardy, Crihfield and Bullock by Robert D. Douglas, III, and James M. Lung; Nichols, Caffrey, Hills, Evans and Murrelle by Edward L. Murrelle and R. Thompson Wright; Daughtry, Hinton, Woodard and Murphy, P.A., by W. Kenneth Hinton for defendant appellees.

EXUM, Justice.

Plaintiffs were not provided for in the will of May Gordon Latham Kellenberger, deceased. They bring this action claiming the Court should either enforce what they allege to be a contract made by Mrs. Kellenberger to adopt them or declare them to have been equitably adopted. Then, as adopted children, they should be entitled to share in Mrs. Kellenberger's estate.

The principal question is whether the complaint states a claim for relief sufficient to withstand a motion to dismiss under

Rule 12(b)(6). The trial court concluded it does not and the Court of Appeals affirmed, holding that no cause of action for equitable adoption exists in North Carolina. We find no occasion to address the question of whether North Carolina recognizes the doctrine of equitable adoption, but we affirm on other grounds the result reached by the courts below. Although it is unclear from their brief whether appellants even contend that the complaint states a claim for breach of a contract to make a will, we conclude that it does not.

I.

In considering a complaint's sufficiency when attacked by a motion to dismiss under Rule 12(b)(6), a court must take as true the facts alleged. *Smith v. Ford Motor Co.*, 289 N.C. 71, 80, 221 S.E. 2d 282, 288 (1976). These allegations here are:

Elizabeth Coffey Ladd, Margaret Coffey Graddy, and Marion Coffey Hensley, appellants herein, are the daughters of H. Wilson Coffey and Letha May Coffey, a second cousin of May Gordon Latham Kellenberger. Appellants, who were born just before the Great Depression, lived with their parents in Greensboro. In 1933 appellants' father, in an effort to provide for his children's welfare, visited Mrs. Kellenberger, deceased herein, and her husband, John Kellenberger. The Kellenbergers were wealthy and childless. During this visit the Kellenbergers agreed to rear and educate the Coffey daughters, adopt them, and make them their heirs at law. In return, the Coffeys agreed to surrender all rights to their daughters.

Thereafter, the Kellenbergers took custody and control of appellants. Instead of keeping appellants in their home, however, the Kellenbergers placed them in the Barium Springs Home for Children. Throughout the appellants' childhoods, the Kellenbergers made all decisions concerning their maintenance and support. Although their natural parents, the Coffeys, were still alive, appellants remained beyond their contact and control. The Kellenbergers provided them with clothing, toys, gifts and music lessons.

In 1948, Mr. Coffey again visited the Kellenbergers, who repeated their agreement to adopt his daughters and also agreed to finance their higher educations if Coffey would continue to

avoid contact with and exert no control over them. The Kellenbergers paid all expenses for Elizabeth and Margaret to attend Greensboro College and for Marion to receive training in practical nursing. The Coffeys had no further contact with appellants.

Mrs. Kellenberger continued to present appellants with gifts throughout her life. Furthermore, she provided financial assistance for appellants' children to attend college. In numerous instances she held appellants out to the public as "her girls." Appellants continued to maintain close contact with the Kellenbergers through visits, telephone calls, and correspondence. The Kellenbergers never formally adopted appellants.

On 1 May 1978 Mrs. Kellenberger died testate, without natural children and predeceased by her husband. Appellants and their father survived her. In her will, which was attached to the complaint and incorporated therein by reference, she made numerous contributions and donations to various charities. The provision upon which all parties rely bequeaths 40 percent of her residuary estate to her "various relatives, both on my father's and my mother's sides of the family, who would inherit from me if I died intestate."

Deceased's last will and testament was filed for probate on 6 December 1978. The clerk issued letters testamentary to R. D. Douglas, Jr. and North Carolina National Bank as coexecutors. Most, but not all, of the proceeds from the estate have been distributed. Appellants filed this civil action on 30 April 1981 against the coexecutors and distributees who have received estate proceeds. Appellants pray that the court specifically enforce what they say was a contract to adopt them made by the Kellenbergers and their father or, in the alternative, decree their equitable adoption.

The trial court dismissed the case for lack of personal jurisdiction as to four defendants: May Gordon L. Luthi, Mary Gardner Novotney, Martha Louise Walker, and Blanche L. Sutton. It dismissed the case against all defendants for failure to state a claim upon which relief could be granted. The North Carolina Court of Appeals affirmed the dismissals for failure to state a claim for relief. That court reasoned that the doctrine of equitable adoption had not been recognized in North Carolina and was contrary to both the prevailing law and the public policy of this

state. *Ladd v. Estate of Kellenberger*, 64 N.C. App. 471, 473-74, 307 S.E. 2d 850, 853 (1983). We granted appellants' petition for discretionary review on 10 January 1984.

II.

[1] We initially consider appellants' claim that the Kellenbergers agreed to adopt them. Appellants couch their argument, in the alternative, as the breach of a contract to adopt, adoption by estoppel, or equitable adoption.

As the Court of Appeals correctly observed, North Carolina has not recognized the doctrine of equitable adoption. Appellants urge us to adopt this principle, as have a majority of other states which have considered the issue. Note, *Equitable Adoption: They Took Him into Their Home and Called Him Fred* 58 Va. L. Rev. 727 (1972) (recognizing that some twenty-five states have adopted this rule, while eight have rejected it).

After careful study of the complaint, we find that it contains facts which operate to bar the recovery sought by appellants under both alternative theories of equitable adoption and breach of contract to adopt. We therefore find it unnecessary to decide whether we shall recognize the equitable adoption doctrine in this state or whether the complaint sufficiently alleges breach of contract to adopt.

The result flows from the scope of our review of a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss. "This rule . . . generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 166 (1970) (quoting *American Dairy Queen Corp. v. Augustyn*, 278 F. Supp. 717, 721 (N.D. Ill. 1967)). A complaint should not be dismissed under Rule 12(b)(6) ". . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979).

In this case the face of the complaint discloses an insurmountable bar to appellants' recovery on any adoption theory.

The deceased's will, attached to the complaint and incorporated therein by reference, fully disposes of her estate to collateral relatives, not including appellants.

Appellants rely on Item Five of the will which bequeaths 40 percent of deceased's residual estate to "various relatives, both on my father's and my mother's sides of the family, who would inherit from me if I died intestate." Appellants suggest that if a court were to decree their adoption under either theory advanced by them, then they would take the entire Item Five bequest. Deceased left no lineal descendants, since she died without natural children and was predeceased by her husband, her parents, and her grandparents. Appellants argue that as deceased's adopted children they would take this bequest under N.C. Gen. Stat. §§ 29-16(a) and 29-17(a) (surviving children take all of intestate's estate; adopted children treated like natural children for purposes of intestate succession).

We disagree. We conclude that Item Five of Mrs. Kellenberger's will would have been effective to disinherit appellants even if they had been her natural or adopted children. Therefore, it is not necessary to determine whether Mrs. Kellenberger breached a contract to adopt them or whether the Court should decree that the children were in equity adopted. Even if they had been adopted, they would not, under this will, share in Mrs. Kellenberger's estate.

When the language of a testator's will is unambiguous and leaves no occasion for judicial interpretation, effect must be given its clear and recognized legal meaning. *Rhoads v. Hughes*, 239 N.C. 534, 80 S.E. 2d 259 (1954) (*per curiam*). If the testator's intent is ascertainable from the will itself, extrinsic evidence is not admissible to overrule the will's expressed intent. *Wachovia Bank & Trust Co. v. Green*, 239 N.C. 612, 80 S.E. 2d 771 (1954). "[T]he intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E. 2d 465, 468 (1960).

We are satisfied that Mrs. Kellenberger intended by Item Five to make a bequest only to her *collateral* relatives who would take her property had she died intestate. Her use of the phrase

"various relatives, both on my father's and my mother's side of the family" plainly refers to collateral, not lineal relatives. While children are indeed relatives of their parents, it is unusual for parents to refer to their children, adopted or natural, as "relatives." The phrase "various relatives" plainly denotes relatives in varying degrees; and the reference to "my father's and my mother's sides of the family" inevitably excludes children, adopted or otherwise, and refers to collateral kin.

Item Five did not, contrary to appellants' contention, purport to be a bequest to *all* those who would take as in intestacy; it purported to be a bequest only to Mrs. Kellenberger's *collateral* kin who would take as in intestacy. Thus Item Five would operate to exclude appellants even if a court decreed them to be the adopted children of Mrs. Kellenberger.

The law in North Carolina does not prohibit parents from disinheriting children. The right to give or take property is not a natural or inalienable right, but one of positive law, created and controlled by the legislature. *Pullen v. Commissioners of Wake County*, 66 N.C. 361, 363-64 (1872). *Accord Peace v. Edwards*, 170 N.C. 64, 86 S.E. 807 (1915). Moreover the very freedom to make a will implies a concomitant freedom of every person "to disinherit by will persons who would otherwise inherit his property if the testator had died intestate." 1 N. Wiggins, Wills and Administration of Estates in North Carolina § 158 at 291 (2d ed. 1983). Only the legislature is empowered to limit this freedom.

The North Carolina General Assembly has elected to restrict this testamentary freedom only in respect to a testator's spouse. *See* N.C. Gen. Stat. § 30-1 (1984) (allowing a spouse to dissent from a will and take his or her intestate share of the testator's estate rather than the share provided for him or her under the will). Since the legislature has not restricted the power of a parent to disinherit her natural or adopted children, deceased's decision to exclude appellants from her testamentary bequests violates neither the law nor the public policy of North Carolina.

A Maryland case closely parallels the one before us. In *Besche v. Murphy*, 190 Md. 539, 59 A. 2d 499 (1948), plaintiff, an orphan, was taken in at age eight by the Herrmans, who promised to adopt her and raise her as their own. Plaintiff lived with the Herrmans, took their name, and was known and treated as their

daughter, despite the foster parents' failure to adopt her formally. In her will the foster mother, who died without a husband or issue surviving her, left a residuary bequest to "those persons who under the laws of the State of Maryland would take in case of intestacy." Plaintiff sought to have the agreement to adopt specifically enforced to provide her the same rights of inheritance as if she had been formally adopted.

The Court affirmed the dismissal of the complaint on demurrer. The Court rejected the principle of adoption by private contract, thus precluding specific enforcement of an agreement to adopt. The Court then recognized cases from other states which gave effect to oral contracts to adopt after the child had fully performed its obligations. These cases awarded the child its intestate share. Nevertheless, these cases also recognized that any natural or adopted child may be disinherited by will. In *Besche*, although the foster mother's will directed that her residual beneficiaries be determined by the intestacy statute, it did not create an intestacy; the beneficiaries took under her will. The Court held that only those beneficiaries answering a class description at testatrix' death were entitled to share in the class gift. Plaintiff sought to be declared testatrix' adopted daughter after testatrix' death; she was not and could not be made by post-mortem adoption a member of the class described in the will.

Appellants in the present case attempt to distinguish *Besche* by pointing out that in that case plaintiff received a general pecuniary bequest under another section of her foster mother's will. But under North Carolina law, a testator is not required to mention by name or make some provision for a child in order to disinherit that child even if the child is born or adopted after the will is made. It is enough even as to an after-born or after-adopted child that "it is apparent from the will itself that the testator intentionally did not make specific provision therein for the child." N.C. Gen. Stat. § 31-5.5(a). The language in Mrs. Kellenberger's residuary bequest indicates even more specifically than the will in *Besche* that appellants are excluded, by limiting the class of takers to various collateral relatives rather than to all who would inherit by intestacy. If we apply the rationale in *Besche* to the present case, appellants would be disinherited by Mrs. Kellenberger's will even if they were entitled to be declared, post-mortem, equitably or otherwise, her adopted children, and

even if Mrs. Kellenberger's bequest had been to all who would take in intestacy.

Appellants' complaint contains an insurmountable bar to relief inasmuch as it shows they were disinherited by deceased. Therefore, we affirm the result reached by Court of Appeals insofar as it affirms the trial court's dismissal of appellants' complaint for failure to state a claim for equitable adoption or breach of a contract to adopt.

III.

[2] In their complaint, appellants allege that the Kellenbergers agreed "to adopt plaintiffs and to make them their heirs at law." This agreement alone, if made, does not constitute a contract to make a will in appellants' favor.

Both parties call our attention to *Chambers v. Byers*, 214 N.C. 373, 199 S.E. 398 (1938). In *Chambers*, a written agreement was entered into which provided, in pertinent part:

> 'And we the said John and Isabelle Tucker of the (2nd) second part do hereby covenant and agree to adopt the said Lucy Bowers (herein mentioned) as our own child, and that we will well clothe, feed and educate her, providing for all her temporal wants to the best of our ability. And we, the said John and Isabelle Tucker of the (2nd) second part do still further agree to make said Lucy Bowers (herein mentioned) our sole and only heir to what we, the said John and Isabelle Tucker of the (2nd) second part may die possessed of, and that any violation of the above on our part shall make this contract null and void.'

214 N.C. 373, 375, 199 S.E. 398, 400 (1938). The Tuckers died intestate and Lucy Bowers Knight claimed she was entitled to a certain tract of land included in the Tucker estate. On appeal from the trial court's dismissal of Lucy Bowers Knight's action, this Court reversed. Concluding that the contract was neither a will nor a contract to adopt, the Court held it was a specifically enforceable contract to make a will. This Court had said earlier:

> It is settled by a line of authorities which are practically uniform, that while a court of chancery is without power to compel the execution of a will, and therefore the specific ex-

> ecution of an agreement to make a will cannot be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will.

Stockard v. Warren, 175 N.C. 283, 285, 95 S.E. 579, 580 (1918) (quoting Annot., 1914A Am. Ann. Cases 394, 399); *see Naylor v. Shelton*, 102 Ark. 30, 143 S.W. 117 (1912). In *Naylor*, decedent contracted to devise a certain tract of land to his daughter in exchange for room, board and care, which they provided for him until his death. The Court enforced this agreement as to the tract specified in the agreement.

The facts alleged here are not sufficient to bring this case within the above principle or the holding of *Chambers*. The agreement in *Chambers* is more specific than that alleged in the instant case. In *Chambers*, John Tucker, the "adoptive" father, agreed to adopt the child and to make her his "sole and only heir *to what* [he and his wife] *may die possessed of*." (Emphasis supplied.) Appellants in the instant case allege an oral contract to the effect that the Kellenbergers agreed "to adopt plaintiffs and make them their heirs at law." Further, in *Chambers* plaintiff's foster parents died intestate, but in the instant case Mrs. Kellenberger left a will completely disposing of her property, with no bequest at all in favor of appellants.

An agreement otherwise enforceable that the child shall receive the parent's property at the parent's death is sufficient to establish a contract to devise or bequeath property to that child. *Best v. Gralapp*, 69 Neb. 811, 96 N.W. 641, *aff'd on rehearing*, 69 Neb. 815, 99 N.W. 837 (1903); *Kofka v. Rosicky*, 41 Neb. 328, 59 N.W. 788 (1894). A mere contract to adopt a child, however, is not a contract to devise or bequeath property to that child. *Finger v. Anken*, 154 Iowa 507, 131 N.W. 657 (1911). Indeed, a contract to adopt a child and make it promisor's heir, without a clear and specific indication of an agreement to devise or bequeath identifiable property, may mean no more than that the child is to be treated as a natural child of the promisor who may nevertheless

be disinherited at the parent's pleasure. The Idaho Court held that an oral contract to will property to another will be enforced in equity, where the contract is clear, definite and certain, supported by the evidence, not unjust to innocent third parties, and already has been performed by the promisee and the beneficiary. *Bedal v. Johnson*, 37 Idaho 359, 218 P. 641 (1923). A New York court held that an agreement to adopt a child, make him an heir and give him the interest of a son in whatever property the promisor owned at death was enforceable against the estate of the promisor, who died intestate without natural children. *Gates v. Gates*, 34 A.D. 608, 54 N.Y.S. 454 (1898). The contract may state that adoptive parents agree to make the child their heir, which may be enforced in equity, but that agreement alone does not create in the child such an interest in the foster parent's property as to preclude the parent from freely disposing of that property by will. *Pemberton v. Perrin*, 94 Neb. 718, 144 N.W. 164 (1913).

Here the agreement appellants allege, *i.e.*, that the Kellenbergers would adopt them and make them their heirs, fails as a contract to make a will. It does not identify with any degree of particularity property to which the agreement may refer. Without more, it means a mere agreement to treat appellants as if they were natural children, who are nevertheless disinheritable by will. The complaint, therefore, states no claim for breach of a contract to make a will favorable to appellants.

IV.

In addition to granting their motions to dismiss under Rule 12(b)(6), the trial court also dismissed appellants' action as to defendants May Gordon L. Luthi, Mary Gardner Novotney, Martha Louise Walker, and Blanche L. Sutton for a lack of personal jurisdiction. N.C. R. Civ. P. 12(b)(2). Inasmuch as it affirmed the trial court's ruling regarding other motions to dismiss, the Court of Appeals had no occasion to review these dismissals by the trial court for an absence of personal jurisdiction. As we also affirm the dismissals under Rule 12(b)(6), we need not reach the question of personal jurisdiction as to these four defendants.

V.

In conclusion, an insurmountable bar to appellants' claim for relief on the grounds of either equitable adoption or breach of a

contract to adopt appears on the face of their complaint. We also find that the complaint does not allege facts which are sufficient to state a claim for breach of a contract to make a will. Thus, we affirm the dismissal by the Court of Appeals of appellants' action for failure to state a claim upon which relief can be granted.

Affirmed.

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

AKZONA, INC. v. SOUTHERN RAILWAY COMPANY

No. 628PA83

(Filed 1 October 1985)

1. **Eminent Domain § 2.6— flooding of property—not inverse condemnation**

The flooding of plaintiff's downstream property caused by the erosion of an embankment, lawfully and purposely constructed by defendant railway across a stream, does not constitute a taking of plaintiff's downstream property where the embankment was not replaced and thus could not cause recurrent flooding of plaintiff's property. Therefore, the trial court erred in instructing the jury on inverse condemnation.

2. **Rules of Civil Procedure § 50— failure to charge—implied directed verdicts**

Where the trial court did not instruct the jury with respect to negligence, trespass, and strict liability, the charge amounted to an implied directed verdict on those issues.

3. **Appeal and Error § 47— remand for new trial—failure to direct verdict on issue as harmless error**

The appellate court's decision to remand this case for a new trial renders harmless any error by the trial court in failing to direct a verdict for defendant on the issue of interference with plaintiff's riparian rights since, on remand, plaintiff is not bound by the evidence presented at the former trial.

4. **Negligence § 7— inadequate culverts—willful and wanton negligence—sufficiency of evidence**

Plaintiff's evidence was sufficient for the jury on the issue of willful and wanton negligence by defendant railway in the flooding of plaintiff's downstream property when an embankment constructed by defendant across a creek burst after causing water to back up during heavy rain where the jury could find from the evidence that defendant was aware that its culverts through the embankment were inadequate to accommodate the flow of water

in the creek during peak periods, that defendant's management adopted a recommendation that the culverts be removed and replaced with a bridge, but that defendant terminated the plan to remove the embankment and replace it with a bridge after it was sued by upstream landowners for damage done in a prior flood.

Justices MARTIN and BILLINGS did not participate in the consideration or decision of this case.

ON defendant's petition for discretionary review prior to determination by the North Carolina Court of Appeals of a judgment entered by *Judge C. Walter Allen* in the BUNCOMBE County Superior Court.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Albert L. Sneed, Jr.; Roberts, Cogburn, McClure and Williams by Landon Roberts; J. Frank Huskins for plaintiff appellee.

Bennett, Kelly & Cagle, P.A., by Harold K. Bennett; Brooks, Pierce, McLendon, Humphrey & Leonard by L. P. McLendon, Jr., for defendant appellant.

EXUM, Justice.

This case presents the issue of whether the flooding of downstream property caused by the erosion of an embankment, lawfully and purposely constructed across a stream, constitutes a taking as the trial court instructed the jury. We hold that this situation does not constitute a taking and the trial court erred in its instructions. Accordingly, we vacate the trial court's judgment and remand the case for a new trial.

I.

Defendant, Southern Railway Company (Railroad), owns, maintains, and operates a railroad line which runs from Asheville to Murphy in North Carolina. This railroad track crosses over Pole Creek at a point just west of Asheville. At that junction the railroad track lies generally in an east-west direction, while Pole Creek flows generally north-south. Pole Creek does not approach its intersection with the railroad track in a perpendicular fashion, but rather approaches it at an acute angle.

Approximately 1,000 feet south of this intersection, Pole Creek empties into Hominy Creek, which flows generally west-

east. Approximately one and one-half miles downstream, Hominy Creek passes by the American Enka Plant and runs through lands owned by plaintiff, Akzona, Inc. Akzona owns and operates the Enka Plant.

In times of heavy rainfall, this basin is susceptible to flooding. In the 1940's Akzona constructed a 12- to 15-foot dike between its plant and Hominy Creek. The dike, designed to provide some measure of protection to the Enka Plant from flooding, had four openings or passageways, each designed to permit access to the Enka Plant. Gate A allowed State Road 112 to pass through the dike; Gate B was located at the filter plant; Gates C and D permitted the railroad spurs into the plant. These gates could be closed to protect the plant by forming a solid wall between it and Hominy Creek but permission was required from the State Highway Department before Gate A could be closed.

Prior to 1956 Railroad passed its track across Pole Creek across an open trestle. This structure provided a large area through which the water in Pole Creek might pass. It also accommodated the natural creek bed intersecting the path of the railroad at an acute angle.

Railroad altered the Pole Creek crossing in 1956 by placing under the trestle three culvert pipes, each seven feet in diameter. These pipes, placed side-by-side at the extreme eastern end of the trestle, were perpendicular to the railroad tracks. In order for these culverts to accommodate the flow of Pole Creek, the natural flow and direction of the creek had to be altered. Railroad left the trestle supports in place and filled in the area beneath the trestle with gravel and dirt. When the trestle was filled to the level of the rails, some twenty feet above the creek bed, it formed a solid earthen wall across Pole Creek except for the three seven-foot culverts. The embankment, made of gravel and fill, had no shielding or spilling-type covering to prevent erosion should water overtop it. The embankment was covered with grass and vegetation.

After the embankment was created in 1956, water occasionally backed up behind it to form a pond. Some flooding occurred upstream. Blanche Young, a local resident and an upstream landowner, complained to Railroad about the flooding.

After a heavy rainfall in April 1977, Pole Creek began to rise. Water backed up behind the embankment and Pole Creek came out of its banks. Water rose to a level five feet above the top of the culverts. Considerable flooding resulted to upstream property.

After the flooding, Henry VeHaun, coordinator of the Buncombe County Civil Preparedness Agency, corresponded with J. W. DeValle, Railroad's Chief Engineer for Bridges, concerning the flooding at the Pole Creek crossing. Railroad sent John Maclin, a graduate engineer, to investigate the waterway at Pole Creek. Using customary engineering standards, Maclin calculated the size of the waterway area needed to carry off water at the embankment. In his report Maclin noted: (1) he was informed that high water had occurred at this location three or four times within the last two years; (2) the culverts do not have the capacity to carry the rainfall run-off from a storm the size of the 4 April 1977 storm; (3) an examination of the vegetation indicated that the water crested during that storm at approximately five feet above the top of the culverts; (4) significant sources of debris existed upstream which might be carried by floodwaters and block the culverts; and (5) United States Highway 19-23, which crosses Pole Creek about 500 feet upstream of the embankment, uses a highway bridge with a larger waterway that was still inadequate to carry off peak flows of Pole Creek, even though this bridge was above the sources of debris.

In accordance with Railroad's standard procedure, a report of the study was sent to DeValle. Based upon this report, DeValle reported in writing to his superiors that the culverts were inadequate to carry peak flows of the creek and recommended that the culverts be removed and the embankment replaced with a bridge. Railroad began plans to construct a bridge across Pole Creek. On 3 June 1977 several upstream landowners sued Railroad in a single action unrelated to the present case. They alleged that because of the inadequacy of the culverts and the diverting of the natural flow of Pole Creek, their property had been damaged. These plaintiffs alleged damages resulting from three different floods which occurred on 23 September 1975, 22 May 1976, and 5 April 1977. After these actions were initiated, Railroad discon-

tinued its plans to remove the embankment and replace it with a bridge.[1]

In late October and early November 1977, periodic rainfall fell in western North Carolina. On 5 November 1977 heavy rains began to fall in the Hominy Creek basin. The water in Pole Creek backed up behind the embankment. By 12:10 a.m. on 6 November 1977, the water had already come out of Pole Creek's banks; it overflowed the State Road upstream of the embankment.

At 12:20 a.m. that same day, Enka's flood crews were called to the plant to initiate a flood control procedure. They began the procedure for closing the various gates, which included digging out asphalt plugs in the holes which had been drilled into the highway.[2] The crews cleared only a small number of the holes before Hominy Creek came out of its banks and reached waist level at approximately 1:30 a.m. The crew was forced to evacuate the area near Gate A without having closed the gate. Enka was in full operation when the waters poured through Gate A. Enka was flooded to a depth of fifty-nine and one-half inches.

Akzona initiated this action alleging an unreasonable interference with surface waters, negligent design and modification of the embankment, inverse condemnation through the design of the embankment, trespass, and the creation of a dangerous instrumentality. At the beginning of the trial, Judge Allen allowed Akzona's motion to amend its complaint to allege a sixth count, *i.e.*, willful and wanton conduct by Railroad. After a three-week trial, Judge Allen directed a verdict against Akzona on the issue of willful and wanton conduct. He denied Railroad's motion for a directed verdict on the other five counts. He submitted the following issue to the jury: "Did the defendant Southern Railway Company obstruct, divert, or otherwise interfere with the natural flow of surface water proximately causing damage to the proper-

1. Railroad has since reversed this decision. It removed the embankment and its track now crosses Pole Creek via a bridge.

2. These holes formed a part of the gates which, when erected, would close the four gaps in the dike. Ten or more of these holes had been drilled into the pavement to accommodate metal stanchions. After the stanchions were in place, they would be braced with steel and would hold two rows of approximately fifty timbers, with the rows separated by a small space. This space would be filled with clay to form a solid wall.

ty of the plaintiff, Akzona, Inc.?" He also instructed the jury on inverse condemnation. The jury answered this issue affirmatively and awarded Akzona $2,317,700 in damages. The trial court added prejudgment interest of $866,375.03. Railroad gave notice of appeal to the North Carolina Court of Appeals. On 20 December 1983 Railroad petitioned this Court for discretionary review prior to determination, N.C. Gen. Stat. § 7A-31(b). We allowed this petition on 2 February 1984.

II.

[1] Railroad contends the trial court erred in giving instructions to the jury relating to inverse condemnation. Judge Allen charged the jury, in pertinent part:

> Now, members of the jury, Southern Railway had the right and authority to appropriate and make use of the property on which the railway was placed for railway purposes, with or without the consent of Akzona or the owners of property on which the railway was located. We justify this right on the grounds that the rights of the individual must yield to the consideration of the public good and common welfare, which is recognized by the construction of railway systems throughout the country. However, when an entity, such as the Southern Railway, takes or appropriates private property for public use, fair play and the Constitution and laws of this State impose upon Southern Railway, and other entities in the same light, a correlated duty to make just compensation to the owner for the property appropriated. Where by compulsory process and for the public good, Southern Railway or any other entity clothed with the authority of eminent domain, appropriates property of its citizens in the exercise of its right to eminent domain it must pay just compensation, and compensation must be full and complete and include everything which affects the value of the property taken in relation to the property affected.

Railroad argues a single, nonrecurrent instance of flooding cannot constitute a taking of plaintiff's property under either the federal or state constitutions.

In *Lea Co. v. N.C. Board of Transportation*, 308 N.C. 603, 611, 304 S.E. 2d 164, 171 (1983) (quoting *Midgett v. North Carolina*

State Highway Commission, 260 N.C. 241, 248, 132 S.E. 2d 599, 606 (1963)) (citations and emphasis in original omitted), we reviewed the elements of an inverse condemnation action:

> 'In order to create an enforceable liability against the government it is, at least, necessary [1] that the overflow of water be such as was reasonably to have been anticipated by the government, to be the direct result of the structure established and maintained by the government, and [2] constitute an actual permanent invasion of the land or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property.'

We need not address the first element of the *Lea* standard in this case because the evidence does not show that "the defendant's structures caused an actual, permanent invasion of the plaintiff's land . . . ." *Id.* at 618, 304 S.E. 2d at 175. Railroad constructed an embankment of earth and gravel across Pole Creek. The embankment acted as a dam when a large volume of water backed up behind it. Under pressure caused by relentless rainfall and the inability of a saturated ground to absorb moisture, the dam burst. It was not replaced after it burst. Railroad's embankment, therefore, cannot subject plaintiff's property to "[p]ermanent liability to intermittent, but inevitably recurring, overflows . . . ." *Id.* at 618, 304 S.E. 2d at 175. A single instance of flooding with no possibility of recurrence, even if the direct result of Railroad's structure, is not a taking of Akzona's property. Because the trial court should not have instructed the jury on inverse condemnation, this case must be remanded for a new trial.

III.

In addition to inverse condemnation, plaintiff's complaint alleged interference with riparian rights, negligence, willful and wanton conduct, trespass and strict liability. At the close of all the evidence, defendant moved for a directed verdict on each of plaintiff's allegations. The trial court directed a verdict on the issue of willful and wanton conduct but otherwise denied defendant's motion. Railroad assigns error to the trial court's denial of its motion and plaintiff cross-appeals from the granting of a directed verdict on the issue of willful and wanton conduct.[3]

3. Railroad moves to dismiss Akzona's cross-appeal because Akzona failed in its brief to make "reference to the exceptions pertinent to each question and . . . to

[2, 3] Although the trial court denied Railroad's motion for a directed verdict, it charged the jury on only one issue other than inverse condemnation, *i.e.*, interference with Akzona's riparian rights. Because the trial court did not instruct the jury with respect to negligence, trespass and strict liability, its jury charge amounted to an implied directed verdict on those issues. We express no opinion on the correctness of this determination. It suffices to say that any error by the trial court in failing to direct a verdict with respect to these issues as to Railroad was harmless. Our decision to remand this case for a new trial also renders harmless any error by the trial court in failing to direct a verdict for interference with Akzona's riparian rights. On remand, Akzona is not bound by the evidence presented at the former trial. Whether its evidence at the new trial will support submission of the case on any or all of these theories cannot now be decided.

[4] On plaintiff's cross-appeal, we find error in the trial court's order directing a verdict on its claim that Railroad acted willfully and wantonly. We discussed willful and wanton negligence in *Foster v. Hyman*, 197 N.C. 189, 148 S.E. 36 (1929):

> An act is done wilfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. 'The true conceptions of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law.'
>
> An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

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identify those exceptions by their numbers and by the pages of the printed record on appeal at which they appear" in violation of App. R. 28(b)(5). Akzona's brief on its cross-appeal does refer to the assignment of error which in turn refers to the exception and page number in the record on which the argument is based. Although Akzona has not strictly complied with App. R. 28(b)(5), inasmuch as only one exception is involved and was properly preserved in the record and referred to in the assignment of error, we decline to apply the extreme sanction of dismissing the cross-appeal. We elect, instead, to deny Railroad's motion and to consider the merits of the cross-appeal.

Id. at 191, 148 S.E. at 37-38 (citations omitted). While "[o]rdinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act," we have said "[w]anton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results." *Wagoner v. North Carolina Railroad*, 238 N.C. 162, 168, 77 S.E. 2d 701, 706 (1953).

Plaintiff produced evidence in this case that Railroad's engineering department conducted an investigation of the embankment in Pole Creek after the April 1977 flood. Mr. J. W. DeValle, Chief Engineer of Bridges for Southern Railway filed a report which concluded:

> We have reviewed the drainage area tributary to our culverts, and find that, from the Enka topography map the total drainage area is approximately 5,900 acres. Based on the stream flow calculations, a waterway area of 484 square feet is theoretically required. As pointed out earlier the highway bridge which carries U.S. 19 and 23 across Pole Creek just upstream from our culverts has only 277 square feet. Our three culverts which are located downstream from the highway bridge have only 114 square feet.
>
> It seems apparent that the culverts which were installed in 1956 at this location are inadequate to carry peak flows of the creek. It also seems obvious that the highway bridge immediately upstream is inadequate to carry peak flows of the stream. It further seems obvious that the local poor housekeeping, resulting in drift and debris clogging this stream upstream from our culverts, and the constriction of the stream immediately downstream from our culverts are all contributing factors.
>
> Considering all factors, including the possibility of litigation arising out of our culverts which are inadequate in size, we believe that our drainage structure at this location needs revision. There is no apparent way to straighten out Pole Creek in its devious approach to the upstream side of our culverts, for to do so would cause it to be diverted through adjacent property. There is no way also to move the location of the creek through the downstream area, because of its de-

> velopment by the sawmill interests. The most obvious solution would be to remove the culverts and to install a bridge without intermediate supports, which would cause no interference with the flow of the creek.
>
> . . . .
>
> . . . [W]e are obviously at least a contributory factor to the flooding, ...
>
> It is my suggestion that Mr. Morgret tell local affected interests that our culverts have been in place since 1956, that we have photographs of the stream restrictions which indicate that their ability to transport the flood waters was seriously diminished, but that Southern's Engineering Department is making plans to provide additional waterway opening at this location, in order to minimize future possibility of drift clogging the stream opening under our track.

The Bridge Department observed "[m]aintaining the existing culvert will make the Railroad liable for flood damage claims estimated to average at least $10,000.00 per year" and recommended the culverts be removed and replaced with a bridge. These recommendations were adopted by Railroad's management. After Railroad was sued by upstream landowners for damage done in the April 1977 flood, Railroad terminated its plans to remove the embankment and replace it with a bridge.

We think a jury could find from the evidence stated above that Railroad was aware that its culverts were inadequate to accommodate the flow of water through Pole Creek. We think a jury could find further that Railroad, while conscious of the consequences of its failure to act, "purposely and deliberately" neglected to renovate its crossing at Pole Creek or at least acted with "reckless indifference to the rights" of the flood basin landowners. The trial judge, therefore, erred in directing a verdict in defendant's favor on the issue of willful and wanton negligence.

IV.

Both Railroad in its appeal and Akzona in its cross-appeal assign error in the admission and exclusion of various items of evidence. Since we are remanding the case for a new trial, we decline to consider these assignments. Some of this evidence,

whether admitted or excluded at the previous trial, may not be offered at retrial. Our trial judges are eminently capable of ruling on evidentiary issues. We feel it is proper to defer these matters to the trial judge who presides over the continuation of this case.

In addition, a new evidence code became effective in North Carolina on 1 July 1984. It is likely that these rules will have an impact on the law of evidence in this state. *See* Crumpler & Widenhouse, "An Analysis of the New North Carolina Evidence Code: Opportunity for Reform," 20 Wake Forest L. Rev. 1 (1984) (analyzing several changes made by the new rules). These new rules will govern the evidentiary questions which arise at retrial, and the trial court deserves an opportunity to rule on such questions under these rules in the first instance. Accordingly, we express no opinion on these issues.

V.

We conclude that the trial court erred in charging the jury on the theory of a taking of Akzona's property. This instruction constitutes reversible error. We also conclude that the trial court erred in granting Railroad's motion for a directed verdict on the issue of willful and wanton conduct. Accordingly, we vacate the judgment of the trial court and remand this case to the Buncombe County Superior Court for a

New trial.

Justices MARTIN and BILLINGS did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CLEATUS AARON FORD

No. 503A84

(Filed 1 October 1985)

1. Criminal Law § 91.1— denial of continuance—no prejudice

There was no prejudice from the trial judge's denial of defendant's motion for a continuance where defendant was arraigned on three bills of indictment for first degree sexual offenses against a nine-year-old girl, the dates in two of the indictments were changed on the day the case was called for trial, and

defendant was convicted only of the offense charged in the unchanged indictment.

2. Rape and Allied Offenses § 4.2— first degree sexual offense—testimony of pediatric expert who had not examined victim—admissible

In a prosecution for first degree sex offenses against a nine-year-old girl, the trial court did not err by admitting the testimony of an expert in pediatrics and infectious diseases who had not examined the victim or defendant where the victim had testified that she had engaged in an act of fellatio with defendant and the State had previously established that the victim had gonorrhea in her throat. The witness was in a better position than the jury to form an opinion as to how children contract the disease; moreover, there was no prejudice because defendant was acquitted of the two charges to which the testimony related.

3. Criminal Law § 89.10— first degree sexual offense—cross-examination of victim's mother by State—no prejudice

In a prosecution for first degree sexual offenses with a nine-year-old girl, the trial court did not err by permitting the State to cross-examine the victim's mother, a defense witness, concerning two hypodermic syringes, alcohol swabs, and two gag wedding gifts found by the police during a search of her home. The purpose of the questions was to create some inference in the minds of the jury that the mother was either a drug addict or a thief, the State made no effort to connect the items to defendant, and it was questionable whether the cross-examination had an impeaching effect on the mother's character.

4. Criminal Law § 117.1; Rape and Allied Offenses § 11.1— first degree sexual offense against a nine-year-old child—requested instruction on credibility of child witness not given—no error

In a prosecution for first degree sexual offenses against a nine-year-old girl, the trial court did not err by refusing to give a cautionary instruction on the credibility of a child witness where the witness was ten years old at the time of the trial and had been found competent to testify, the trial court instructed the jury that they were the sole judges of the credibility of each witness, the judge highlighted in his summation the inconsistencies in the child's statement to the police and her testimony, and the judge recounted the testimony of the child's psychologist and mother concerning her propensity to lie. Moreover, the record does not contain the instruction defendant would have had the trial court give and the transcript does not show that defendant ever submitted his proposed instruction in writing.

5. Criminal Law § 122.1— jury's request to review evidence denied—no prejudice

In a prosecution for three first degree sexual offenses against a nine-year-old girl where the dates of two of the offenses were in dispute, the trial court did not erroneously or prejudicially refuse the jury's request to review some of the evidence as to a particular date, even if the judge refused the request on the mistaken belief that he had no discretion. It would have been difficult for the trial judge to extract all of the testimony given about the dates of the offenses without seeming to give improper regard to certain portions of the

evidence, any attempt by the court to clarify the evidence on the two disputed dates would have certainly created more confusion, and defendant was convicted only of the offense for which there was no conflict concerning the date. N.C.G.S. 15A-1233(a).

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

APPEAL by defendant from the judgment entered by *Mills, J.*, at the 14 May 1984 Criminal Session of CABARRUS County Superior Court.

Defendant was charged in separate indictments with first degree sexual offense. The charges against him were consolidated for trial. The jury returned a verdict of guilty on one charge of first degree sexual offense and not guilty on the remaining two charges. Defendant was sentenced to the mandatory term of life imprisonment.

At trial, the State offered evidence tending to show that on 17 December 1983, defendant, age forty-three, entered the bathroom in the home of his girlfriend, Phyllis Bennett, while it was occupied by her nine year old daughter, Marla R. Bennett, and sexually assaulted her by inserting his fingers into her vagina. Marla testified that defendant, who had spent the previous night at her home with her mother, came into the bathroom while her mother was next door washing clothes at the laundromat. Marla stated that defendant told her not to tell her mother what he had done or that he would tell her that she had done something bad. Marla testified that she did run and tell her mother, but that her mother would not believe her. Mrs. Jane Wike, Marla's maternal grandmother, testified that later that day as she was preparing to give Marla a bath she spotted blood in Marla's panties. To Mrs. Wike's knowledge, no one has ever found blood on Marla's underwear again. Mrs. Wike further related that one afternoon thereafter Marla broke down and told her that as she was wiping herself after using the bathroom defendant walked in and stuck two of his fingers in her.

The State also produced evidence through Marla Bennett that she had been sexually abused on two other occasions. According to Marla's testimony, on 24 January 1984 and 31 January 1984, defendant again entered the bathroom in her home which she was using, pulled down his pants, and forced her to perform fellatio.

Marla told other individuals about these incidents, including her teacher, her grandmother, her aunt, a medical doctor, Dr. George Engstrom, her psychologist, Peter Bishop, and two police officers. Dr. Engstrom testified that he examined Marla in February of 1984 and discovered that she had Neisseria gonorrhea in her throat.

The testimony of these witnesses substantially corroborated Marla's testimony. Mr. Peter Bishop also testified however that he had been seeing Marla since 22 September 1983 concerning her serious problem with lying.

Defendant testified on his own behalf and denied any knowledge of the alleged sex offenses committed against Marla Bennett. Defendant cooperated with the police request that he be examined for gonorrhea. The results of this testing were negative.

Defendant offered the testimony of Phyllis Bennett, among others, to show that defendant was not alone with or even around either of her children on some of the occasions Marla had indicated. Mrs. Bennett stated that on 17 December 1983 she did not go to the laundromat and that Marla did not tell her at any time that she had been inappropriately touched by defendant. Mrs. Bennett also explained that her daughter has a serious problem with lying and has been receiving help to overcome this tendency.

At the conclusion of the evidence, the jury found defendant guilty only of the count of first degree sexual offense committed on 17 December 1983.

Lacy H. Thornburg, Attorney General, by David S. Crump, Special Deputy Attorney General, for the State.

Romallus O. Murphy and Herman L. Taylor, for defendant-appellant.

BRANCH, Chief Justice.

[1] By his first assignment of error, defendant contends that the trial court violated his constitutional right to a fair trial and to the effective assistance of counsel by denying his motion for a continuance.

On the day the case was called for trial, defendant was arraigned on the three bills of indictment presented against him. In two of the three indictments, Nos. 84CRS3915 and 84CRS3916, the State had changed the dates of the alleged offenses from 20 January to 24 January 1984 and from 2 February to 31 January 1984. The date of the alleged sex offense charged in Indictment No. 84CRS3914 remained 17 December 1983. Defendant moved for a continuance on the basis that the changed dates in two of the three indictments materially affected his defense because he needed more time to investigate and to locate additional witnesses to account for his whereabouts on the new dates. The State, citing *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983), argued that because the victim was a nine year old child defendant was put on notice that the dates alleged in the indictments could not be relied on for any degree of certainty. In denying defendant's motion, the trial court stated that the amended dates in the indictments did not constitute such a material change to justify a continuance of the trial.

Ordinarily, a motion to continue is addressed to the sound discretion of the trial judge and his ruling, absent an abuse of discretion, is not reviewable on appeal. *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975). However, if the motion is based on a constitutional right, the question presented is not one of discretion, but is a reviewable question of law. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977). Nevertheless, the denial of a motion to continue, regardless of its nature, is "grounds for a new trial only upon a showing by the defendant that the denial was erroneous and also that his case was prejudiced as a result of the error." *State v. Branch*, 306 N.C. 101, 104, 291 S.E. 2d 653, 656 (1982).

In the present case, the record clearly reveals that defendant was not convicted of the charges contained in the indictments in which the dates were changed. Defendant was only convicted for the sex offense charged in Indictment No. 84CRS3914. This indictment had consistently provided since 5 March 1984 that this sex offense had been committed on 17 December 1983. By the time of defendant's 14 May 1984 trial, defendant had been given more than two months' notice that he would be tried for his alleged commission of the crime occurring on 17 December 1983. Thus, defendant's argument that he needed more time to prepare his de-

fense because of the changed date obviously does not apply to the 17 December offense. Because defendant was not convicted under the indictments containing the amended dates, he cannot show that he was prejudiced by the trial judge's denial of his motion to continue. As a result, we need not address the propriety of the trial court's ruling. This assignment of error is overruled.

By his second assignment of error, defendant argues that the trial court improperly admitted into evidence the testimony of a State's expert witness and the fruits of a search of a defense witness's home.

[2] The first portion of this assignment of error questions the admissibility of the testimony of State's witness, Dr. Laura Gutman. Dr. Gutman is an expert in the field of pediatrics and infectious diseases. Although Dr. Gutman had not examined Marla Bennett or defendant in this case, she was called by the State as an expert to explain how sexually transmittable diseases, gonorrhea in particular, are in fact contracted.

Defendant objected to the admission of this testimony on the grounds that it was irrelevant and incompetent because the witness had not personally examined any person related to the case and that it would improperly inflame the passion and the prejudice of the jury.

The substance of Dr. Gutman's testimony revealed that Neisseria gonorrhea is a bacterial infection which is transmitted by direct contact of the infected tissue of one person with a mucous membrane of another. These mucous membranes include the throat, the eyes, the vagina, the rectum, and the urethra. Dr. Gutman explained that although the available means of transmitting the disease in children and in adults were identical, the most common methods of contracting the disease in the two groups were different. With adults, Dr. Gutman stated that the disease is normally transmitted through standard sexual intercourse. The most common methods for transmitting the disease to children, however, are by rectal intercourse or by oral intercourse with an adult. In Dr. Gutman's opinion, gonorrhea is transmitted to the throat of a child during sexual activity in which infected secretions from the penis are applied to the throat through the child's mouth.

We hold that the trial court properly overruled the defendant's objections to this testimony. First, defendant's objection on the basis of relevancy is unfounded. Dr. Gutman's testimony was relevant for the purpose of medically corroborating the testimony of Marla Bennett that she had engaged in an act of fellatio with defendant. The State had previously established that Marla had contracted gonorrhea in the throat. Dr. Gutman's testimony as to how this venereal disease is normally transmitted to children supported the State's contention that Marla had contracted gonorrhea as a result of being forced to perform fellatio on defendant.

Secondly, evidence offered by Dr. Gutman was competent expert opinion testimony. In determining the admissibility of an expert opinion, the test is "whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 569, 247 S.E. 2d 905, 911 (1978). Under this test, Dr. Gutman's testimony was properly admitted. Her specialized knowledge in the area of pediatrics and infectious diseases aided the jury in understanding the relationship between the act of fellatio and the transmission of gonorrhea in children. Because of her medical expertise, Dr. Gutman was in a better position to form an opinion as to how children, like Marla Bennett, contract this venereal disease. Obviously, Dr. Gutman's testimony assisted the jury's understanding of the evidence in this case even though she had not personally examined defendant or the victim.

Furthermore, defendant's contention that Dr. Gutman's testimony unfairly stirred the passion and the prejudice of the jury against him is without merit. Again, defendant cannot show that he was prejudiced by this evidence when he was acquitted of the two charges to which Dr. Gutman's testimony related.

[3] Defendant also contends in his second assignment of error that the trial court improperly permitted the State to cross-examine defense witness, Phyllis Bennett, concerning items found by the police during a search of her home. During their investigation of this case, the police seized from the Bennett home two hypodermic syringes, alcohol swabs, and two gag wedding gifts purchased for friends. Defendant asserts that the cross-examination was improper because the seized items were never connected to him, but were introduced to inflame the jury and

suggest misconduct on his part. The State contends that the seized items were relevant on the issue of defense witness Phyllis Bennett's credibility and were not offered to impeach the character of defendant.

On cross-examination a witness in a criminal action may be impeached or discredited by a wide range of disparaging questions, including whether she had committed specified criminal acts or had been guilty of specified reprehensible or degrading conduct. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1210, 96 S.Ct. 3211 (1976).[1] The scope of the cross-examination, however, rests within the discretion of the trial judge and his rulings will not be disturbed absent a showing that the verdict was thereby improperly influenced. *State v. Ziglar*, 308 N.C. 747, 304 S.E. 2d 206 (1983).

We hold defendant has failed to demonstrate how a discussion of these items on cross-examination constituted an abuse of discretion or prejudicial error. This record does not disclose what type of gag gifts the wedding presents were. Furthermore, defendant does not attempt to show how these items in Phyllis Bennett's possession in any way suggested misconduct on his part. The record indicates that the State made no effort to connect the items to defendant, although the syringes and alcohol swabs were the kind of thing defendant himself could have taken from the hospital where he and the witness both worked as nursing aides.

Rather, the purpose behind the State's questions in this regard was not to impeach the character of defendant, but to create some inference in the minds of the jury that Phyllis Bennett was either a drug addict or a thief. In any event, defendant has not shown how the State's reference to Mrs. Bennett's property negatively reflected upon his character. It is also questionable whether this cross-examination had an impeaching effect on Mrs. Bennett's character. On redirect examination, Mrs. Bennett explained that in her nurse's aide work she uses hypodermic syringes to withdraw urine from the catheters of diabetic patients in order to check their sugar. She stated that the uniform

1. Defendant's case was tried before the North Carolina Evidence Code became effective on 1 July 1984.

has pockets and that she places alcohol swabs, pencils, syringes and anything else she uses daily in her pockets, forgets about them, and accidentally carries them home. She testified that she always returned those items to the hospital. Because defendant cannot show how he was prejudiced or how the verdict might have been improperly influenced by the State's cross-examination of Mrs. Bennett, we overrule this assignment of error.

[4] Defendant next assigns as error the trial court's refusal to give a cautionary instruction concerning the credibility of a child witness. Defendant argues that such an instruction should have been given in view of Marla Bennett's age and Peter Bishop's testimony concerning Marla's problem with lying. Although the transcript indicates that the trial court denied defendant's timely specific request for an instruction on "the credibility of the child as a witness," it does not show that defendant ever submitted his proposed instruction in writing to the trial court for the record. Likewise, the record on appeal does not contain the instruction defendant would have had the trial court give.

In this jurisdiction, our law clearly provides that if a specifically requested jury instruction is proper and supported by the evidence, the trial court must give the instruction, at least in substance. *State v. Spicer*, 285 N.C. 274, 204 S.E. 2d 641 (1974); *State v. Hooker*, 243 N.C. 429, 90 S.E. 2d 690 (1956). Without a copy of the proposed instruction, our review of whether the instruction was proper under the evidence in this case is extremely difficult. The notion that a trial court is required to give an instruction on the credibility of a child's testimony has been previously rejected by the Court of Appeals in *State v. Bolton*, 28 N.C. App. 497, 221 S.E. 2d 747, *cert. denied*, 289 N.C. 616, 223 S.E. 2d 390 (1976), and *State v. Jenkins*, 35 N.C. App. 758, 242 S.E. 2d 505, *cert. denied*, 295 N.C. 470, 246 S.E. 2d 11 (1978). These cases, in accordance with the prevailing view from other jurisdictions, have taken the position that the decision whether or not to instruct the jury respecting its evaluation of a child witness's credibility in a criminal case must be left in the trial judge's discretion. Annot., 32 A.L.R. 4th 1196 (1984). We agree that better reasoning supports this view since "the trial judge can more accurately determine those instances when the instruction would be appropriate." *Bolton*, 28 N.C. App. at 499, 221 S.E. 2d at 748.

In the present case, Marla Bennett was ten years old at the time of trial and had been found competent to testify. The trial court instructed the jury that they were the sole judges of the credibility of each witness. In his summation of the evidence to the jury, the trial judge highlighted the inconsistencies in Marla's statement to the police and her testimony. He further recounted the testimony of Marla's psychologist and her mother concerning Marla's propensity to lie. Therefore, viewed in its totality, the instructions given by the trial court adequately addressed all the concerns that would have been emphasized to the jury through defendant's special instruction. We hold the trial court did not abuse its discretion by denying defendant's request for a special instruction on the credibility of the child-victim's testimony.

[5] In his final assignment of error, defendant complains that the trial judge erred in refusing to exercise his discretion concerning whether to review some of the evidence at the jury's request after it had begun its deliberations. After deliberating for nearly an hour and a half, the jury returned to the courtroom with a question and the following exchange occurred:

> THE COURT: The bailiff tells me you all have a question of the Court. Who is the spokesman for the jury? Yes, sir?
>
> FOREMAN: In our discussions, we have agreed among ourselves there is some confusion as to some of the evidence on a particular date. Is there any possibility we can have that read to us?
>
> THE COURT: I'll have to put it this way. The evidence has been presented, and you all have to recall it the best you can.

This Court has repeatedly stated that the decision whether to grant or refuse a request by the jury, after beginning its deliberations, for a restatement of the evidence lies within the discretion of the trial court. *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980); *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). Likewise, N.C.G.S. § 15A-1233(a) in pertinent part provides that if a jury after retiring for deliberation requests a review of certain testimony, "[t]he judge in his discretion . . . may direct that requested parts of the testimony be read to the jury." It is also well settled that "there is error when the trial court refuses to exercise its discretion in the erroneous belief that it has no

discretion as to the question presented." *Lang*, 301 N.C. at 510, 272 S.E. 2d at 125.

In the case *sub judice*, defendant contends that the exchange between the court and the jury clearly demonstrates that the trial judge refused to grant the jury's request on the mistaken belief that he had no discretion in the matter. Without further explanation by the trial judge for his ruling, such a determination is merely speculative. In any event, even assuming the trial court refused to exercise its discretion, defendant must demonstrate that the trial court's ruling constituted prejudicial error.

In *State v. Ford*, 297 N.C. 28, 252 S.E. 2d 717 (1979), the jury during its deliberations asked the trial court to review the evidence presented as to the date and time the defendant and a State's witness had been arrested. Although the trial judge refused to grant the jury's request based on his mistaken belief that he could not do so, this Court held his actions were not prejudicial and added:

> The requested evidence was, for the most part, conflicting, inconclusive, or not in the record. We note that the trial judge correctly instructed the jury that it was their duty "as best you can to recall all of the evidence that was presented. . . ." It would have been difficult, if not impossible, for the trial judge to review this evidence in a comprehensible manner. Here, any attempt to review such evidence would likely have raised more questions than it would have answered.

Ford, 297 N.C. at 31, 252 S.E. 2d at 719.

Similarly, the jury in the case currently before us had a question concerning a particular date. It would have been equally difficult for the trial court in this case to extract all the testimony given about the dates of the offense without seeming to give improper regard to certain portions of the evidence. For this reason and others, we have maintained that the granting of such a request by the jury is generally inadvisable. *Fulcher*, 294 N.C. at 514, 243 S.E. 2d at 346. Moreover, in light of the State's concession in its brief that it could not prove the dates of the two fellatio sex offenses with any degree of certainty, any attempt by the trial court to clarify the evidence on this point would have certainly created more confusion. Furthermore, defendant cannot

demonstrate that he was prejudiced by the trial court's ruling because he was acquitted on the two charges in which there had been a question concerning the dates on which these crimes had been committed. There was no conflicting evidence presented concerning the date of the only crime for which defendant was convicted. We hold that defendant has failed to show that the trial judge erroneously refused to exercise his discretion and that his rulings resulted in prejudicial error.

Defendant received a fair trial free from prejudicial error.

No error.

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

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND HENSLEY ENTERPRISES, INC. v. LACY H. THORNBURG, ATTORNEY GENERAL

No. 91A85

(Filed 1 October 1985)

1. **Utilities Commission § 55— judicial review of Commission order—minimal consideration to competent evidence—arbitrary or capricious decision**

An order of the Utilities Commission which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal. Furthermore, findings, inferences, conclusions or decisions of the Commission which are arbitrary or capricious and which prejudice the substantial rights of the appellants are not binding on a reviewing court. G.S. 62-94(b)(6) (1982).

2. **Utilities Commission § 57— continuation of capital improvements surcharge—more than minimal consideration to competent evidence**

In ordering that a 15% capital improvements surcharge previously approved by the Utilities Commission for a water company be continued, the Commission gave more than minimal consideration to the water company's violations of previous orders of the Commission that first established the 15% surcharge where it is clear that the Commission was aware of those violations but concluded that the water company's use of the surcharge funds to make needed capital improvements, coupled with the need for further improvements, justified continued collection of the surcharge with essentially the same restrictions as before, and where the Commission further provided that

failure of the water company to apply a substantial portion of its net income to the making of improvements could result in termination of the surcharge upon the Commission's motion or upon the motion of any party.

3. Utilities Commission § 57— continuation of capital improvements surcharge— decision not arbitrary and capricious

The Utilities Commission's decision to continue a 15% capital improvements surcharge for a water company was not arbitrary and capricious because of the water company's failure to comply with prior orders, particularly its payment of excessive salaries, where the Commission was aware of the water company's violations of its previous orders, the evidence showed that proceeds of the surcharge had been used to make needed improvements and that further improvements are needed that are beyond the capacity of the water company to finance alone, and the Commission in the exercise of its judgment simply determined that continuation of the surcharge was necessary to insure adequate service to the water company's customers.

APPEAL by Lacy H. Thornburg, Attorney General, pursuant to N.C.G.S. § 7A-29 from the final order of the Utilities Commission entered 10 January 1985 in Docket No. W-89, Sub 24.

On 2 April 1984 Hensley Enterprises, Inc. (Hensley) filed an application with the North Carolina Utilities Commission (Commission) to increase its rates for water utility service in all of its service areas in North Carolina. Hensley also requested that the 15% capital improvements surcharge previously authorized by the Commission be continued. Various parties, including the Attorney General, were allowed to intervene. They opposed both the requested rate increase and continuation of the surcharge.

Following the public hearing on 12 September 1984, the Hearing Examiner issued his Recommended Order. In Finding of Fact No. 9 he stated that:

> 9. The 15% assessment approved in the Applicant's last two rate cases should be continued under the conditions hereinafter set forth in this Order. The assessment, as well as a substantial part of the net income of the Company, should be used to make the needed capital improvements to the Applicant's existing water systems.

The Hearing Examiner then ordered that the surcharge be continued through 31 January 1987 unless terminated sooner by the Commission. The full Commission overruled the Attorney General's exceptions and affirmed and adopted the Recommended Order as its Final Order of 10 January 1985.

Lacy H. Thornburg, Attorney General, by Angeline M. Maletto, Associate Attorney, for the State.

Parker, Sink, Powers, Sink & Potter, by Charles F. Powers III, for applicant-appellee Hensley Enterprises, Inc.

BRANCH, Chief Justice.

The question posed by this appeal is whether Finding of Fact No. 9 and the decision of the Commission are supported by competent, material and substantial evidence in view of the whole record or are arbitrary or capricious. N.C. Gen. Stat. § 62-94(b)(5) and (6) (1982). We find no error in the Commission's Final Order and affirm its decision.

[1] Through Chapter 62 of the General Statutes the legislature has conferred upon the Commission the power and the duty to compel public utilities to render adequate service to their customers in return for reasonable rates. *Utilities Comm. v. Morgan*, 277 N.C. 255, 177 S.E. 2d 405 (1970). Rates set by the Commission are to be as low as may be reasonably consistent with the due process requirements of the state and federal constitutions. *Utilities Comm. v. Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974). In setting rates the Commission must consider not only "those specific indicia of a utility's economic status set out in G.S. 62-133(b), but also 'all other material facts of record' which may have a significant bearing on the determination of reasonable and just rates." *Utilities Comm. v. Edmisten*, 299 N.C. 432, 437, 263 S.E. 2d 583, 587-88 (1980) (quoting N.C.G.S. § 62-133(d)). On appeal the findings and determinations made by the Commission under the provisions of Chapter 62 are prima facie just and reasonable. N.C. Gen. Stat. § 62-94(e) (1982). Findings of fact made by the Commission that are supported by competent, material and substantial evidence are binding on appeal. *State ex rel. Utilities Commission v. Conservation Council*, 312 N.C. 59, 320 S.E. 2d 679 (1984). However, an order "which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal." *Utilities Comm. v. Edmisten*, 299 N.C. at 437, 263 S.E. 2d at 588. Findings, inferences, conclusions or decisions of the Commission which are arbitrary or capricious and which prejudice the substantial rights of the appellants are not binding on a reviewing court. N.C. Gen. Stat. § 62-94(b)(6) (1982).

[2] In attacking the Commission's findings and conclusions the Attorney General does not strongly argue that the evidence relied on by the Commission to support its findings and conclusions is unreliable, but forcefully argues that the Commission gave only minimal consideration to competent evidence. This argument is based primarily on the fact that Hensley had violated prior orders of the Commission that first established the 15% surcharge for capital improvements. In a previous order the Commission found that the surcharge was necessary so that Hensley could make needed substantial improvements to its water systems such as new wells, pumps, tanks, fittings, etc. Evidence and Conclusions for Finding of Fact No. 10 Docket W-89, Sub 18, 25 January 1982. The Commission authorized Hensley to collect a 15% surcharge on each monthly bill to its customers upon the condition that Hensley follow the terms and conditions set forth in the order and use the proceeds solely for the purpose of making the necessary capital improvements to its system. *Id.* The Commission noted that:

> The approval of the 15% assessment herein is an extraordinary remedy. Consequently, this Order will set forth the terms and conditions governing the collection of the assessment and the expenditure thereof. The assessment will be used *solely* to make those improvements approved by the Commission in a Schedule of Improvements to be prepared and submitted by Applicant. The Schedule shall be compiled in consultation with the Public Staff and the Division of Health Services. The funds received under the assessment shall be recorded and maintained in a separate account. There will be reporting requirements. The assessment shall expire at the end of three years, but the Applicant shall have the right to request an extension thereof.
>
> The improvements to be made with the assessment shall give priority to the regulations of the Division of Health Services governing the safety and adequacy of drinking water.
>
> The approval of the assessment herein does not relieve the Applicant of making improvements with funds secured through its own financing.

Id.

The Commission further directed that a report of the receipts and expenditures be filed, with a copy to the Public Staff, every quarter. *Id.* Each report was to show the total assessments collected, the assessments collected for that quarter, the improvements made in that quarter, the expenditure for the improvements and the location of these improvements. *Id.*

In a subsequent order the Commission found a continuation of the surcharge to be necessary but cautioned Hensley that in light of the fact that the ratepayers were buying capital assets for the utility, it would be expected to substantially supplement the surcharge by reinvesting a portion of its profits and by raising capital from traditional sources. Evidence and Conclusions for Finding of Fact No. 8, Docket W-89, Sub 20, 23 December 1982. Continuation of the surcharge was to be based on the following factors:

> (1) that the surcharge funds be strictly accounted for and expended strictly in accordance with the prior approval of the Commission, (2) that the surcharge funds result in substantial capital improvements obtained and made in the most economical possible manner, (3) that the Applicant substantially supplement the surcharge funds by reinvesting a significant portion of its profits in the capital improvements needed, (4) that the Applicant make on-going efforts to obtain capital funds from traditional sources and means other than surcharging its ratepayers, and (5) that the Applicant take immediate action to fix the numerous small deficiencies in its systems which require little, if any, investment of effort or money.

Id.

The Commission again required that all surcharge collections be deposited in a separate bank account and further directed that Hensley would hold those funds in trust. Final Order of the Commission, Docket W-89, Sub 20.

As the Attorney General has pointed out, Hensley violated many of these guidelines and restrictions. Funds collected from the surcharge were not segregated, the required reports were not filed, expenditures were made without consultation with the Commission, and surcharge collections were expended for projects not included in the Commission's list of priority improvements.

Hensley also added new water systems without authorization and failed to correct many of the small deficiencies in the systems in question. The salary paid by Hensley to its president, Arnold T. Hensley, was nearly double what the Commission had determined was a reasonable salary and the salaries paid to administrative personnel were somewhat more than twice what the Commission had recommended. These increases prevented Hensley from using profits to finance improvements and were coupled with a failure to obtain capital funds from traditional sources.

Though Hensley failed to comply with the terms of the Commission's previous orders, there is competent and material evidence to support the Commission's finding that Hensley's use of the surcharge funds resulted in substantial capital improvements and benefits to customers. Arnold Hensley testified that the surcharge proceeds had been used to construct well houses, grade and gravel lots, install treatment facilities, air compressors, switches, meters, blow-offs, etc. Many of these improvements were required by the Department of Health Services and the Utilities Commission. There was also evidence from Public Staff witness, Andy Lee, that the surcharge proceeds had been used for improving well sites in approximately two-thirds of Hensley's systems and that these improvements should enable Hensley to provide better service to its customers. Jim Adams of the Division of Health Services testified that the number of Hensley's approved systems had gone from zero to eight because of the surcharge funds. Lastly, there was evidence that further improvements were needed and that Hensley was unable to borrow funds for capital improvements from other sources.

In answer to the Attorney General's suggestion that the Commission did not give proper weight to the evidence of Hensley's violations of the Commission's prior orders, it is sufficient to point out that the Commission was aware of those violations but concluded that Hensley's use of the surcharge funds to make needed capital improvements, coupled with the need for further improvements, justified continued collection of the surcharge with essentially the same restrictions as before. The Commission further provided that the failure by Hensley to apply a substantial portion of its net income to the making of improvements could result in termination of the surcharge upon the Commission's own motion or upon the motion of any party. This evidence

is sufficient to show that the Commission gave more than minimal consideration to Hensley's violations of previous Commission orders. *See Utilities Comm. v. Edmisten*, 299 N.C. 432, 263 S.E. 2d 583; *State ex rel. Utilities Comm. v. Conservation Council*, 312 N.C. 59, 320 S.E. 2d 679 (Commission's summary of appellant's argument and rejection of same is sufficient to allow reviewing court to ascertain controverted question presented by the proceeding). It is a well-established rule that "it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E. 2d 547, 565 (1980). Findings of fact and determinations of the Commission as to what rates are reasonable may not be reversed or modified merely because the reviewing court might reach a different result based on the same evidence. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972). Although the Commission's findings of fact are somewhat skimpy and in some cases are more like conclusions, we hold that they are supported by the evidence and therefore are binding on appeal.

[3] Lastly, we reject the Attorney General's contention that the Commission's decision to continue the 15% surcharge was arbitrary and capricious. Decisions are arbitrary and capricious when, among other things, they indicate a lack of fair and careful consideration or fail to display a reasoned judgment. *Comr. of Insurance v. Rate Bureau*, 300 N.C. at 420, 269 S.E. 2d at 573. The Attorney General bases his argument that the Commission acted arbitrarily and capriciously on its extensive use of language from its prior order in the present order authorizing continuation of the surcharge in the face of Hensley's failure to comply with prior orders, particularly Hensley's actions in paying excessive and unreasonable salaries. However, as the Attorney General acknowledges, the Commission was aware of Hensley's violations of its previous orders. The Commission in the exercise of its judgment simply determined that continuation of the surcharge under the same conditions was necessary to ensure adequate service to Hensley's customers. In light of the evidence that proceeds of the surcharge had been used to make needed improvements and that further improvements are needed that are beyond the capacity of

Hensley to finance alone, we cannot say that the Commission acted arbitrarily and capriciously in continuing the surcharge. Therefore, we hold that the Commission did not act arbitrarily or capriciously in issuing its Final Order.

We do not mean to indicate by this decision that the Commission has unbridled discretion in exercising its judgment. We find Hensley's failure to comply with the terms of previous orders in handling proceeds of the surcharge to be very disturbing. Hensley's duties in collecting and applying these funds are similar in nature to those of a trustee and should be strictly complied with. Should Hensley violate the conditions and restrictions placed on the collection and disbursement of surcharge funds contained in the present order, it is difficult to see how continued collection of the surcharge could be justified.

For the reasons stated we affirm the Final Order of the Utilities Commission.

Affirmed.

STATE OF NORTH CAROLINA v. JOHN ROBERT CAMERON

No. 11A85

(Filed 1 October 1985)

1. Criminal Law §§ 138.42, 161.2— failure to find non-statutory mitigating factors — prevention of jailbreak — model prisoner — no abuse of discretion — not properly raised on appeal

In a prosecution for second degree murder and assault with a deadly weapon, the trial court did not err by not finding as a non-statutory mitigating factor that defendant aided in the prevention of a possible jailbreak. The failure of a trial judge to find a non-statutory mitigating factor, even if the factor is proven by uncontradicted, substantial, manifestly credible evidence, will not be disturbed on appeal absent a showing of abuse of discretion. Defendant did not show that the court's ruling could not have been the result of a reasoned decision; furthermore, an additional assignment of error concerning evidence that defendant was a model prisoner was not presented to the Court of Appeals and was not referred to in the Court of Appeals' dissent. G.S. 15A-1340.4(a), North Carolina Rules of Appellate Procedure 14(b)(1).

2. Criminal Law § 138.38— failure to find mitigating factor—provocation or extenuating relationship—no error

In a prosecution for second degree murder and assault with a deadly weapon, the trial court did not err by failing to find as a mitigating factor that the defendant acted under strong provocation or that the relationship between defendant and the victim was otherwise extenuating where defendant's wife informed him that she loved another man and that she desired a separation, defendant and his wife presented contradictory testimony concerning telephone conversations between defendant and his wife's lover which defendant claimed were taunting, defendant broke his wife's jaw after a session with a marriage counselor, defendant became involved in an affair of his own, and defendant shot his wife and a man he mistook for her lover six weeks after the last telephone conversation. The evidence as to the alleged provocation of the telephone calls and of defendant's relationship with his wife was too conflicting to compel a single, rational conclusion. G.S. 15A-1340.4(a)(2).

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

BEFORE *Preston, J.*, at the 18 April 1983 Criminal Session of Superior Court, ALAMANCE County, defendant pled guilty to murder in the second degree and assault with a deadly weapon with intent to kill inflicting serious injury.

The defendant was charged with having committed the murder in the first degree of Harry Clifford Shaw, a man he mistook for his wife's alleged paramour. He was also charged with having, on the same day, feloniously assaulted his wife, Brenda Cameron, with a deadly weapon with intent to kill inflicting serious bodily harm. Following defendant's plea, the trial court conducted an extensive sentencing hearing. In aggravation of defendant's sentence, the trial court specifically found that defendant acted with premeditation and deliberation. Defendant expressly requested that the trial court consider one non-statutory and five statutory mitigating factors. Three mitigating factors were specifically found to exist: that the defendant had no record of criminal convictions; that prior to arrest, or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing to a law enforcement officer; and that the defendant has been a person of good character or has had a good reputation in the community in which he lived and worked. The trial court concluded that the aggravating factor outweighed the mitigating factors and sentenced defendant to forty-five years imprisonment for second-degree murder and ten years imprisonment for feloni-

ous assault, the sentences to run concurrently. Each sentence was in excess of the presumptive term.

From the decision of the Court of Appeals affirming defendant's sentences, 71 N.C. App. 776, 323 S.E. 2d 396 (1984), one judge dissenting, defendant appeals as of right. G.S. § 7A-30(2). As to matters not addressed in Judge Phillips' dissent, this Court denied defendant's writ of certiorari on 2 April 1985.

Other facts which are necessary for a determination of the issues presented for review will be included in the discussion of those issues.

Lacy H. Thornburg, Attorney General, by George W. Boylan, Assistant Attorney General, for the State.

Wishart, Norris, Henninger & Pittman, by June K. Allison, for defendant-appellant.

MEYER, Justice.

[1] Defendant assigns as error the failure of the trial court to specifically find as an additional mitigating factor the defendant's conduct while confined in the Alamance County jail, in aiding in the prevention of a possible jailbreak by providing information which led to the recovery of eighteen hacksaw blades and the discovery of sawed-through window bars. Defendant contends that, as is the case with a *statutory* mitigating factor, where a *non-statutory* mitigating factor urged is supported by substantial, uncontradicted, and credible evidence and is clearly related to the purposes of sentencing, the Fair Sentencing Act requires the trial judge to consider it. We disagree.

If a sentence greater than the presumptive term is to be imposed upon a defendant, the trial judge must make written findings of aggravating and mitigating factors. G.S. § 15A-1340.4(b). The record must specifically reflect each factor in mitigation or aggravation which the trial judge finds proven by a preponderance of the evidence. *Id.* G.S. § 15A-1340.4 expressly distinguishes between factors which the General Assembly requires trial judges to consider ("statutory factors") and other, "non-statutory," factors which *may* be considered. Regarding non-statutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentenc-

ing, such as conduct while awaiting sentencing, the trial judge *may* consider them, but such consideration is not required. G.S. § 15A-1340.4(a); *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). *See State v. Locklear*, 34 N.C. App. 37, 237 S.E. 2d 289 (1977), *rev'd on other grounds*, 294 N.C. 210, 241 S.E. 2d 65 (1978).

In *State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985), this Court reviewed the precise issue urged by defendant here, except that in *Spears* the non-statutory mitigating factor urged was the rendering of aid by the defendant to his victim. There, we held that "a trial judge's consideration of a non-statutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge under N.C.G.S. § 15A-1340.4(a). Thus, his failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion." *Spears*, 314 N.C. at 322-23, 333 S.E. 2d at 244.

Defendant argues that evidence was also presented at the sentencing hearing that he was a "model inmate" while incarcerated. Defendant did not present this assignment of error to the Court of Appeals, but instead presented only the question of his aiding in prevention of a possible jailbreak. Though defendant's assignment of error before this Court includes this new contention, our review must be limited to the issue or issues presented to the Court of Appeals and which are the basis of the dissenting opinion where, as is the case here, an appeal is premised on the dissent. N.C.R. App. P. 14(b)(1). Because Judge Phillips' dissenting commentary addressed only defendant's "preventing a jailbreak" and made no reference to defendant's otherwise exemplary conduct while incarcerated, our consideration of whether the trial judge abused his discretion is confined to the evidence regarding defendant's "preventing a jailbreak."

A ruling committed to a trial judge's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision. *State v. Lyszaj*, 314 N.C. 256, 333 S.E. 2d 288 (1985); *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). Defendant has failed to make such a showing, and we fail to find any abuse of discretion to have occurred. Therefore, we hold that the trial court did not err in failing to find defendant's possible

prevention of a jailbreak as a mitigating factor. This assignment of error is overruled.

As we indicated in *Spears*, the power to determine those statutory mitigating and aggravating factors which *must* be considered by the sentencing judge lies solely within the discretion of the legislature. Should the legislature deem it appropriate to amend G.S. § 15A-1340.4(a)(2) to include "aiding in the prevention of a jailbreak," it may do so. We decline to add this factor to that list under the guise of judicial construction.

[2] Defendant also assigns as error the failure of the trial court to find as an additional mitigating factor that the defendant acted under strong provocation or that the relationship between defendant and victim was otherwise extenuating. Defendant contends that the breakup of his marriage and certain events associated therewith contributed to his conduct and should have been found by the trial court in mitigation. This contention is without merit.

Enumerated in G.S. § 15A-1340.4(a)(2) are the statutory factors which *must* be considered by the sentencing judge. The mitigating factor urged here is included. G.S. § 15A-1340.4(a)(2)(i). A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors even absent a request by counsel. *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984). The sentencing judge is required to find a statutory factor when the evidence in support of it is uncontradicted, substantial, and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Failure to find a statutory factor so supported is reversible error. *See State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242.

The evidence presented at the sentencing hearing revealed the following sequence of events. On 19 February 1982, defendant's wife of nineteen years, Brenda Cameron, informed defendant that she loved another man and that she desired a separation. Brenda Cameron testified that defendant demanded that she call her lover and tell him that she did not love him and that she wished to remain with defendant, and that defendant jerked the telephone from her hand and told the man that "if he did not stay away from me that he was going to kill him." According to defendant, his wife handed him the telephone and, when he inquired

into the paramour's identity, the man laughed at him, taunted him, and told him to kill himself.

On 24 February 1985, Brenda Cameron accompanied defendant to a marriage counsellor. While there, Mrs. Cameron openly confessed her affair with Roger Gerringer and indicated that her only purpose in meeting with the counsellor was that the defendant "needed help." Defendant testified that his wife told the counsellor that the affair was some two years old; but, according to Brenda Cameron, the affair had only existed for some six months. After returning home from the marriage counsellor, defendant struck his wife and broke her jaw, which required her hospitalization. Brenda Cameron further testified that the next day, while at the hospital, defendant again ordered her to call Roger Gerringer, that he grabbed the phone from her, and that he threatened Gerringer over the telephone. Defendant's testimony contradicted that of his wife and paralleled his testimony concerning the original telephone call.

In mid-March 1982, defendant became involved in his own sexual affair with Angela Barnette, an associate from his place of employment.

On 4 April 1982, defendant telephoned his wife and requested that she attend to their youngest child, who defendant stated was sick. Defendant met his wife in the driveway of their home and, after she refused to go inside with him, shot her in the shoulder with a .38 caliber pistol. Later that afternoon, defendant carried a .30 caliber rifle to the mobile home where Roger Gerringer resided and shot Harry Clifford Shaw, who defendant mistook for Gerringer.

Defendant argues that the evidence of provocation of the telephone calls was "uncontradicted." We fail to see any basis for this argument. Any connection between defendant's criminal actions for which he later pled guilty and the taunting telephone calls, even in the light most favorable to defendant, is tenuous at most, especially in view of the almost six weeks that separated the last telephone conversation between defendant and his wife's paramour and his criminal actions. Likewise, defendant's professed concern for his wife is questionable in view of his sexual relationship with Angela Barnette. The evidence as to the alleged provocation of the telephone calls and of defendant's relationship

with his wife is simply too conflicting to compel a single, rational conclusion. The trial judge did not err in denying defendant the benefit of this statutory factor.

For the foregoing reasons, we affirm the decision of the Court of Appeals.

Affirmed.

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

STATE OF NORTH CAROLINA v. LAWRENCE CURTIS HINES

No. 73A84

(Filed 1 October 1985)

1. **Criminal Law § 138.21— aggravating factor—especially heinous, atrocious or cruel—no error**

The trial court did not err by finding that a second degree murder was especially heinous, atrocious, or cruel where defendant confessed that he first slapped, then choked the victim with his hands, left him on the couch gasping for breath, and later returned with an extension cord and choked him five times with the cord before finally choking off his air supply.

2. **Criminal Law § 138.24— aggravating factor—victim very old—error**

The trial court erred by finding as an aggravating factor that a sixty-two-year-old victim of a second degree murder was very old where the victim had been a brickmason until he retired five years before his death, his retirement was due to a disability that was not age related, and he maintained a lively business selling drinks after his retirement and occasionally went fishing. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed. G.S. 15A-1340.4(a) (1983).

3. **Constitutional Law § 63; Jury § 7.11— exclusion of jurors opposed to death penalty—no error**

The trial court did not err by excluding jurors who had scruples against capital punishment.

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

BEFORE *Farmer, J.*, at 14 November 1983 Criminal Session of Superior Court, WAKE County, defendant was convicted of second

degree murder. Pursuant to N.C. Gen. Stat. § 7A-27 (1981), he appeals from a judgment sentencing him to life imprisonment.

Rufus L. Edmisten, Attorney General, by Thomas J. Ziko, Assistant Attorney General, for the state.

Ann B. Petersen for defendant appellant.

EXUM, Justice.

This case arises under the Fair Sentencing Act, N.C. Gen. Stat. § 15A-1340.4 (1983). That section establishes for certain felonies presumptive prison terms which must be imposed unless the sentencing judge determines after consideration of aggravating and mitigating factors, that a term longer or shorter than the presumptive term should be imposed. The trial judge found as aggravating factors in this case that defendant's crime was especially heinous, atrocious or cruel, G.S. 15A-1340.4(f), that the victim was very old, G.S. 15A-1340.4(j), and another factor not contested. He then imposed life imprisonment, a sentence in excess of the presumptive term for second degree murder. Defendant appeals from the imposition of life imprisonment. The issue is whether there is sufficient evidence to prove (1) that the crime was especially heinous, atrocious or cruel and (2) that the victim was very old. We find the evidence sufficient to prove only the first of these two aggravating factors and therefore remand the case to the trial court for a new sentencing hearing.

I.

Sometime during the night on 3 April 1983 Paul Stewart was strangled. He was found the following morning lying on a couch with a six-foot long extension cord wrapped around his neck.

Paul Stewart was average in height, 5 feet 10 inches, weighed 125 pounds and was sixty-two years old when his life was cut short. He had been a brickmason until he retired in 1978 after he was struck with a lead pipe and a bone was removed from one of his wrists. Since then he had been conducting a lively business selling liquor by the drink from his home. His son testified that occasionally "[h]e might go out fishing or something like that." There was no evidence he suffered from poor health and his autopsy did not reveal any debilitating condition.

After Stewart's body was found, defendant Curtis Hines visited the home of Harold and Geraldine Watson. Harold Watson had a conversation with Hines about the murder. He asked Hines if he killed Stewart. After first denying responsibility, Hines confessed he did it. Watson testified that Hines told him he "asked Paul Stewart, he wanted a drink, a drink of liquor for fifty cent." When Stewart refused to sell him a drink, Hines slapped Stewart. Hines then "went in" and "he choked, he choked him first." He left the room with Stewart lying on the couch gasping for breath. After "he thought about it," "[h]e went back" Hines told Watson. "That is when he took and choked him five times like this with a cord."

II.

Defendant contends there is insufficient evidence to support two aggravating factors relied upon by the trial judge to impose a sentence in excess of the presumptive term. Defendant argues the evidence does not prove the murder was especially heinous, atrocious, or cruel or that the victim was very old.

A.

[1] In *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), we set forth a standard for determining whether a murder is especially heinous, atrocious or cruel:

> [T]he focus should be on whether the facts of the case disclose *excessive* brutality or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*

Id. at 414, 306 S.E. 2d at 786 (emphasis in the original). Whether death resulted from multiple acts of violence and was immediate are factors properly considered under that standard.

We think the facts of this case demonstrate the murder was especially heinous, atrocious or cruel under the *Blackwelder* standard. Defendant murdered Stewart by choking him once and then strangling him five times with a cord. Defendant confessed to Watson that he first slapped and choked Stewart with his hands and then left him on the couch gasping for breath. Later he returned with an extension cord and finished the deed. Defendant strangled Stewart five times with the cord before finally choking

off his air supply. Choking a victim on two different occasions and five times on the second occasion is excessive brutality not necessary even to the offense of murder by strangulation.

Although we do not decide whether strangulation is in itself more heinous, atrocious or cruel than other murders, the grisly facts of this case disclose excess brutality, pain and suffering not normally present in murders of this type. The trial judge, therefore, did not err in characterizing this defendant's crime as especially heinous, atrocious or cruel.

B.

[2] Defendant also contends the evidence does not prove as an aggravating factor that the victim was "very old." He argues that the sole evidence upon which the prosecutor asked for and the trial judge found the victim's age to be an aggravating factor was a statement by the prosecutor that Paul Stewart was sixty-two years old. Defendant asserts the trial judge should not have applied mechanically a chronological measure in deciding if age was an aggravating factor. Rather, the judge should have determined if the victim by reason of his years was more vulnerable to the assault committed against him than he otherwise would have been.

One of the purposes of sentencing is to impose a punishment commensurate with the offender's culpability. N.C. Gen. Stat. § 15A-1340.4(a) (1983). Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act. *See State v. Rivers*, 64 N.C. App. 554, 307 S.E. 2d 588 (1983); *State v. Monk*, 63 N.C. App. 512, 305 S.E. 2d 755 (1983); *State v. Mitchell*, 62 N.C. App. 21, 302 S.E. 2d 265 (1983); *State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983).

As this Court observed in *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E. 2d 689, 701 (1983) (emphasis in original), "*vulnerability* is clearly the concern addressed by this factor [of the victim's age]." *Ahearn* was a felonious child abuse case in which we sustained a finding as an aggravating factor that a 24-month-old victim was very young. Without the need for any special showing by the prosecution that the victim was vulnerable, the victim's vulnerability was established simply by the victim's especially tender age and the nature of the crime. A 24-month-old child obviously was more vulnerable to child abuse than an older child would have been. In cases like *Ahearn* involving victims near the beginning or end of the age spectrum, the prosecution may establish vulnerability merely by relating the victim's age and the crime committed.

In this case the prosecution asked the sentencing judge to find as an aggravating factor, based on Paul Stewart's sixty-two-year-old age, that the victim was very old. Stewart's age, by itself, does not demonstrate that he was more vulnerable to the assault at issue in this case than a younger person would have been. Many sixty-two-year-old men lead robust, active lives. Paul Stewart was a brickmason until the five years preceding his death. In those years he maintained a lively business selling drinks. He occasionally went fishing. There was no evidence he was in poor health or disabled. Although Stewart's son testified his father retired from his job when a bone was removed from his wrist following an injury caused by a lead pipe, that disability was not age-related. In short, we do not believe the mere fact that Paul Stewart was sixty-two years old would support finding in this case as an aggravating factor that he was "very old."

Because the sentencing judge improperly relied upon age as an aggravating factor, this case must be remanded to the trial court for a new sentencing hearing. Any error with respect to finding an aggravating factor necessarily is prejudicial because the weight given to each aggravating and mitigating factor is within the discretion of the sentencing judge. Reliance on an aggravating factor determined to be erroneous may have affected the balancing of mitigating and aggravating factors which resulted in a sentence in excess of the presumptive term. *Ahearn*, 307 N.C. at 600, 602, 300 S.E. 2d at 699, 701.

III.

[3] Defendant also assigns as error the trial court's exclusion of jurors who had scruples against capital punishment from the jury panel. Defendant contends such exclusion deprived him of his Fourteenth Amendment right to due process and his Sixth Amendment right to trial by jury as guaranteed by the United States Constitution. Although acknowledging that this Court considered and rejected this argument in *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980), defendant asks us to reconsider our decision there. The Court declines to reconsider that decision at this time.

The case is remanded to the Superior Court, Wake County, for a new sentencing hearing conducted consistent with this opinion.

Remanded for a new sentencing hearing.

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

HOMER JEFFERSON SIZEMORE v. JEFFREY EUGENE RAXTER AND DILLARD EUGENE RAXTER

No. 228A85

(Filed 1 October 1985)

APPEAL by defendants as a matter of right pursuant to N.C. Gen. Stat. § 7A-30(2) from a decision of the Court of Appeals, reported at 73 N.C. App. 531, --- S.E. 2d --- (1985) (*Judge Johnson, Judge Phillips* concurring and *Judge Webb* dissenting) which affirmed *Judge Sitton's* judgment for the plaintiff entered 28 July 1983 in GASTON County Superior Court.

Joseph B. Roberts, III, for plaintiff-appellee.

George C. Collie and Charles M. Welling, for defendant-appellants.

PER CURIAM.

This is an action for damages for personal injuries arising out of a collision between the plaintiff's person and the automobile driven by the defendant, Jeffrey Eugene Raxter, and owned by the defendant, Dillard Eugene Raxter. Judge Webb dissented from the decision of the Court of Appeals on the basis that it was error for the trial judge to submit the issue of last clear chance to the jury.

After reviewing the records and briefs and hearing the oral argument on the question presented by this appeal, we conclude that the majority opinion of the Court of Appeals is correct and should be affirmed.

Affirmed.

PENN COMPRESSION MOULDING, INC. v. MAR-BAL, INC.

No. 184A85

(Filed 1 October 1985)

APPEAL by plaintiff as a matter of right pursuant to G.S. § 7A-30(2) from decision of the Court of Appeals, reported at 73 N.C. App. 291, 326 S.E. 2d 280 (1985) (*Judge Johnson, Judge Whichard* concurring, and *Judge Phillips* dissenting), which reversed *Judge Bailey's* entry of summary judgment for plaintiff at the 8 November 1983 Session of JOHNSTON County Superior Court and remanded the cause for entry of summary judgment for defendant.

Mast, Tew, Armstrong & Morris, P.A., by L. Lamar Armstrong, Jr. and George B. Mast, Attorneys for plaintiff-appellant.

Narron, O'Hale, Whittington and Woodruff, P.A., by Gordon C. Woodruff and John P. O'Hale, for defendant-appellee.

PER CURIAM.

This was an action to recover commissions allegedly due plaintiff as a result of a contract between plaintiff and defendant.

The facts of this case are fully and accurately set forth in the opinion of the Court of Appeals and need not be repeated herein.

After reviewing the records and briefs and hearing the oral argument question presented by this appeal, we conclude that the majority opinion of the Court of Appeals is correct and should be affirmed.

Affirmed.

SHERRI R. SNIDER v. ANNE HOPKINS

No. 195A85

(Filed 1 October 1985)

APPEAL pursuant to N.C.G.S. § 7A-30(2) by defendant from a decision of the Court of Appeals, 73 N.C. App. 326, 326 S.E. 2d 385 (1985), *Chief Judge Hedrick* dissenting.

Casstevens, Hanner & Gunter, P.A., by W. David Thurman and Nelson M. Casstevens, Jr., for defendant appellant.

No brief contra.

PER CURIAM.

This is an action to recover $90 allegedly due plaintiff for babysitting services she rendered to defendant. The defense is that plaintiff failed substantially to perform pursuant to the agreement reached between the parties. So far, the small claims court, the district court, and a majority of the Court of Appeals panel have ruled that plaintiff was entitled to recover. The district court entered a directed verdict for plaintiff, and the Court of Appeals affirmed. Chief Judge Hedrick dissented on the ground that whether plaintiff breached the babysitting agreement is a question for the jury. We agree with the position taken by Chief Judge Hedrick. The decision of the Court of Appeals is, therefore, reversed, and the case remanded to that court for further remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

ALLEGHANY COUNTY, AND THROUGH ITS CHILD SUPPORT ENFORCEMENT AGENCY, EX REL. BARBARA ABSHER, MOTHER, JESSICA BETH ABSHER, MINOR CHILD	)	
v.	)	ORDER
V. WAYNE CAUDILL	)	

No. 414P85

(Filed 19 September 1985)

UPON consideration of the defendant's petition filed in this matter for a writ of certiorari to the North Carolina Court of Appeals to review its decision dismissing the defendant's appeal, the petition is allowed for the purpose of entering the following order:

> "This case is remanded to the Court of Appeals for further remand to the District Court, Alleghany County, for the purpose of a hearing upon the defendant's request for assignment of counsel and determination of whether the defendant was entitled, under *Carrington v. Townes*, 306 N.C. 333 (1982), to assigned counsel at the time of trial on 2 October 1984. By order of the Court in conference, this the 19th day of September 1985.
>
> BILLINGS, J.
> For the Court"

Evans v. Mitchell

WILLIAM M. EVANS AND WIFE HILDA G. EVANS	)	
v.	)	ORDER
VESTER MITCHELL	)	

No. 358P85

(Filed 19 September 1985)

UPON consideration of the plaintiff's petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, plaintiff's petition is allowed for the purpose of entering the following order:

"The case is remanded to the Court of Appeals for reconsideration in light of this Court's opinion in *Oates v. Jag, Inc.*, 314 N.C. 276 (1985). By order of the Court in conference, this the 19th day of September, 1985.

BILLINGS, J.
For the Court"

Flaherty v. Hunt

DAVID T. FLAHERTY AND TOM HANNON	)	
v.	)	ORDER
JAMES B. HUNT, JR. AND JAMES G. MARTIN, GOVERNOR	)	

No. 493P85

(Filed 11 September 1985)

PURSUANT to Rule 2 of the North Carolina Rules of Appellate Procedure, the plaintiffs are hereby allowed ten days from the date of this order within which to file with the Clerk of this Court a response to the petition for discretionary review filed by defendant Hunt on 15 August 1985.

By order of the Court in Conference, this 11th day of September, 1985.

MARTIN, J.
For the Court

In re Clark

IN THE MATTER OF:)
) ORDER
WILLIE MICHAEL CLARK)

No. 444A85

(Filed 24 September 1985)

UPON consideration of Clark's petition for Writ of Supersedeas and the Attorney General's motion to dismiss the petition, to dissolve the Temporary Stay previously entered by this Court, and to dissolve the order providing a schedule for settlement of the record on appeal, the following order was entered and is hereby certified to the Superior Court, PITT County: Clark's Petition for Writ of Supersedeas is

> "Dismissed by order of the Court in conference, this the 24th day of September, 1985.
>
> s/ FRYE, J.
> For the Court"

The temporary stay entered on 2 August 1985 is

> "Dissolved by order of the Court in conference, this the 24th day of September, 1985.
>
> s/ FRYE, J.
> For the Court"

The order providing times for settlement and filing the record on appeal in this Court, entered on 20 August 1985 is

> "Vacated by order of the Court in conference, this the 24th day of September, 1985.
>
> s/ FRYE, J.
> For the Court"

In re Creech

IN THE MATTER OF WILLIAM A. CREECH, DISTRICT COURT JUDGE, TENTH JUDICIAL DISTRICT

ORDER

No. 522P85

(Filed 19 September 1985)

THIS cause is before the Supreme Court of North Carolina upon petition of the District Attorney, Tenth Prosecutorial District, for Writ of Mandamus. Although the time for filing a response has expired, no response has been filed to the petition.

On 4 June 1985, in case number 85CR37814, Jimmie Wayne Barnes was charged with the offense of aiding and abetting possession of a malt beverage by a person under the age of 19, the defendant being over the age of 19, in violation of N.C.G.S. 18B-302(c)(2).

The matter came on for trial on 5 August 1985 in the District Court of Wake County before Judge Creech, and the defendant, Barnes, was allowed to enter a plea of no contest. After hearing evidence from the State and from the defendant, Judge Creech stated, "upon a plea of *nolo contendere*, I find the defendant not guilty" and entered upon the record a verdict of not guilty. The assistant district attorney for the State took exception to the action of Judge Creech on the basis that a verdict of not guilty was improper upon a plea of no contest.

Under N.C.G.S. 15A-1011(a) "a defendant may plead not guilty, guilty, or no contest '(*nolo contendere*).' " As stated in the official commentary to N.C.G.S. 15A-1011, "[i]n line with its policy of eliminating Latin and Law French phraseology from the code, the Commission renamed the plea of *nolo contendere* as a plea of no contest. The Commission did not intend to change the legal effect of the plea as developed by North Carolina's common law." As stated by this Court in *State v. Barbour*, 243 N.C. 265, 266 (1955): "In this jurisdiction and apparently in all the State and Federal Courts where such a plea is allowed, a plea of *nolo contendere* to a warrant or an indictment, good in form and substance, when accepted by the court, becomes an implied confession of guilt, and for the purpose of that case only is equivalent to a plea of guilty. [Citations omitted.]"

Further, the court in *Barbour* stated at page 267: "When a plea of *nolo contendere* has been accepted by the court, and as long as it stands, it is not within the province of the court to adjudge the defendant guilty or not guilty. [Citations omitted.]" The court in *Barbour* went on to say that the judge may then only proceed to hear evidence to aid him in fixing punishment, and if the defendant contends that he is not guilty of the offenses charged in the warrant, the judge should permit him to withdraw his plea, and proceed to trial. However, the judge is without authority to enter a verdict of not guilty upon the plea of no contest.

IT IS THEREFORE ORDERED that Judge William A. Creech, District Court Judge, Tenth Judicial District, be, and he is hereby, directed in case number 85CR37814 to strike the verdict of not guilty entered 5 August 1985 in the case of *State of North Carolina v. Jimmie Wayne Barnes* and to proceed either to sentence the defendant on his plea of no contest, or to determine whether said defendant should, under the law of North Carolina, be allowed to withdraw his plea and proceed to trial.

It is further ordered that Ernest Edward Paronto is hereby designated as Assistant Marshal of the Supreme Court of North Carolina to forthwith personally serve upon Judge Creech a certified copy of this writ and make his return hereon.

By order of the Court in conference this 19th day of September 1985.

BILLINGS, J.
For the Court

In re Ward

IN THE MATTER OF:	)	
	)	ORDER
JEFFREY LAMONT WARD	)	

No. 443A85

(Filed 24 September 1985)

UPON consideration of Ward's petition for Writ of Supersedeas and the Attorney General's motion to dismiss the petition, to dissolve the Temporary Stay previously entered by this Court, and to dissolve the order providing a schedule for settlement of the record on appeal, the following order was entered and is hereby certified to the Superior Court, PITT County: Ward's Petition for Writ of Supersedeas is

> "Dismissed by order of the Court in conference, this the 24th day of September, 1985.
>
> s/ FRYE, J.
> For the Court"

The temporary stay entered on 2 August 1985 is

> "Dissolved by order of the Court in conference, this the 24th day of September, 1985.
>
> s/ FRYE, J.
> For the Court"

The order providing times for settlement and filing the record on appeal in this Court, entered on 22 August 1985 is

> "Vacated by order of the Court in conference, this the 24th day of September, 1985.
>
> s/ FRYE, J.
> For the Court"

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

ASHLEY v. DELP

No. 432P85.

Case below: 75 N.C. App. 363.

Petition by respondent (Hobert Delp) for discretionary review under G.S. 7A-31 denied 19 September 1985.

BEASLEY v. NATIONAL SAVINGS LIFE INS. CO.

No. 395PA85.

Case below: 75 N.C. App. 104.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 19 September 1985.

BJORNSSON v. MIZE

No. 483P85.

Case below: 75 N.C. App. 289.

Petition by defendants (Mize) for discretionary review under G.S. 7A-31 denied 19 September 1985.

BROWER v. ROBERT CHAPPELL & ASSOC., INC.

No. 281P85.

Case below: 74 N.C. App. 317.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

CAVENAUGH v. CAVENAUGH

No. 180PA85.

Case below: 73 N.C. App. 179.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 19 September 1985.

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

CHATTERTON v. CHATTERTON

No. 388P85.

Case below: 75 N.C. App. 363.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

CITICORP v. CURRIE, COMR. OF BANKS

No. 430P85.

Case below: 75 N.C. App. 312.

Petition by Citicorp and several plaintiffs for discretionary review under G.S. 7A-31 denied 19 September 1985. Motion by Commissioner of Banks to dismiss appeal for lack of substantial constitutional question allowed 19 September 1985.

COUNCIL v. BALFOUR PRODUCTS GROUP

No. 372P85.

Case below: 74 N.C. App. 668.

Petition by Claude V. Jones for discretionary review under G.S. 7A-31 denied 19 September 1985.

DEAN v. PURITAN LIFE INS. CO.

No. 319P85.

Case below: 74 N.C. App. 607.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

DONOVANT v. HUDSPETH

No. 429PA85.

Case below: 75 N.C. App. 321.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 19 September 1985.

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

DUNN v. HERRING

No. 524P85.

Case below: 75 N.C. App. 308.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 19 September 1985.

E. L. MORRISON LUMBER CO., INC. v.
VANCE WIDENHOUSE CONSTRUCTION, INC.

No. 402P85.

Case below: 75 N.C. App. 190.

Petition by Savings and Loan Association for discretionary review under G.S. 7A-31 denied 19 September 1985.

ESTRADA v. BURNHAM

No. 338PA85.

Case below: 74 N.C. App. 557.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 19 September 1985.

GASPERSOHN v. HARNETT CO. BD. OF EDUCATION

No. 378P85.

Case below: 75 N.C. App. 23.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

HARGETT v. GOUCH

No. 385P85.

Case below: 75 N.C. App. 363.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

IN RE APPEAL OF REYNOLDS TOBACCO CO.

No. 222P85.

Case below: 73 N.C. App. 475.

Petition by R. J. Reynolds Tobacco Company for discretionary review under G.S. 7A-31 denied 19 September 1985. Motion by Forsyth and Durham Counties to dismiss appeal for lack of substantial constitutional question allowed 19 September 1985.

IN RE CHAMPION INTERNATIONAL CORP.

No. 371P85.

Case below: 74 N.C. App. 639.

Petition by Champion International Corporation for discretionary review under G.S. 7A-31 denied 19 September 1985. Motion by counties to dismiss appeal for lack of substantial constitutional question allowed 19 September 1985.

IN RE FORECLOSURE OF BOWERS v. BOWERS

No. 357P85.

Case below: 74 N.C. App. 708.

Petition by respondents for discretionary review under G.S. 7A-31 denied 19 September 1985.

IN RE WILL OF BRINSON

No. 225P85.

Case below: 74 N.C. App. 206.

Petition by propounders for discretionary review under G.S. 7A-31 denied 19 September 1985.

KIDDSHILL PLAZA v. FOSTER-STURDIVANT CO.

No. 401P85.

Case below: 75 N.C. App. 199.

Petition by Foster-Sturdivant Co. for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

KIRK v. R. STANFORD WEBB AGENCY, INC.

No. 405P85.

Case below: 75 N.C. App. 148.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

LAWRENCE v. LAWRENCE

No. 439P85.

Case below: 75 N.C. App. 592.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

LOWDER v. ALL STAR MILLS, INC.

No. 427P85.

Case below: 75 N.C. App. 233.

Petition by several defendants for discretionary review under G.S. 7A-31 denied 19 September 1985. Petition by intervening defendants for discretionary review under G.S. 7A-1 denied 19 September 1985.

McKNIGHT v. CAGLE

No. 504P85.

Case below: 76 N.C. App. 59.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 19 September 1985.

McMILLAN v. SEABOARD COASTLINE R.R.

No. 330P84.

Case below: 68 N.C. App. 162.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 2 October 1984.

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

METCALF v. McGUINN

No. 235P85.

Case below: 73 N.C. App. 604.

Petition by defendants for discretionary review under G.S. 7A-31 denied 19 September 1985.

MYRVIK v. RICHARDSON

No. 421P85.

Case below: 75 N.C. App. 511.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 19 September 1985.

NARRON v. HARDEE'S FOOD SYSTEMS, INC.

No. 423P85.

Case below: 75 N.C. App. 579.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

PATE v. TOWN OF ST. PAULS

No. 496P85.

Case below: 75 N.C. App. 511.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 19 September 1985.

PEARCE v. AMERICAN DEFENDER LIFE INS. CO.

No. 468PA85.

Case below: 74 N.C. App. 620.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 19 September 1985.

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

POORE v. POORE

No. 463P85.

Case below: 75 N.C. App. 414.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

SERVOMATION CORP. v. HICKORY CONST. CO.

No. 298PA85.

Case below: 74 N.C. App. 603.

Petition by defendant and third-party plaintiff for discretionary review under G.S. 7A-31 allowed as to issue of whether defendant waived its right to compulsory arbitration 19 September 1985.

STATE v. ALLEN

No. 413PA85.

Case below: 74 N.C. App. 449.

Petition by defendant for discretionary review under G.S. 7A-31 Allowed 19 September 1985.

STATE v. BLAKNEY

No. 337P85.

Case below: 74 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. CANNADY

No. 369P85.

Case below: 74 N.C. App. 785.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

STATE v. DUNCAN

No. 393P85.

Case below: 75 N.C. App. 38.

Petition by defendants for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. HIGSON

No. 334P85.

Case below: 74 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. JOHNSON

No. 374P85.

Case below: 75 N.C. App. 363.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. JONES

No. 426P85.

Case below: 75 N.C. App. 615.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. JORDAN

No. 425P85.

Case below: 75 N.C. App. 637.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

STATE v. KING

No. 505A85.

Case below: 75 N.C. App. 618.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 19 September 1985. Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 19 September 1985. Petition by Attorney General for writ of supersedeas allowed 30 August 1985, but writ of supersedeas dissolved 19 September 1985.

STATE v. LAMSON

No. 386P85.

Case below: 75 N.C. App. 132.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. McKAY

No. 433P85.

Case below: 75 N.C. App. 364.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. McMILLAN

No. 412P85.

Case below: 75 N.C. App. 364.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 19 September 1985.

STATE v. MOORE

No. 285PA85.

Case below: 74 N.C. App. 464.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 19 September 1985.

STATE v. O'QUINN

No. 373P85.

Case below: 74 N.C. App. 786.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 19 September 1985.

STATE v. OWENS

No. 479P85.

Case below: 75 N.C. App. 513.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. PARKER

No. 583P85.

Case below: 76 N.C. App. 465.

Petition by defendant for writ of supersedeas denied 25 September 1985.

STATE v. SMITH

No. 501P85.

Case below: 76 N.C. App. 164.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. STANLEY

No. 261P85.

Case below: 74 N.C. App. 178.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

STATE v. TAYLOR

No. 251P85.

Case below: 74 N.C. App. 326.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 19 September 1985.

STATE v. WEST

No. 545PA85.

Case below: 76 N.C. App. 459.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 26 September 1985. Petition by Attorney General for writ of supersedeas and temporary stay allowed 26 September 1985.

STATE v. WHITE

No. 300P85.

Case below: 74 N.C. App. 504.

Petition by defendant for discretionary review under G.S. 7A-31 denied 19 September 1985. Existing temporary stay dissolved 19 September 1985.

STATE v. WILLIAMS

No. 364P85.

Case below: 74 N.C. App. 695.

Petition by Attorney General for discretionary review under G.S. 7A-31 and petition for writ of supersedeas and temporary stay denied 30 September 1985.

STATE ex rel. COMR. OF INSURANCE v. N. C. RATE BUREAU

No. 435P85.

Case below: 75 N.C. App. 201.

Petition by appellant for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

STOTT v. TRANSAMERICAN PREM. INS.

No. 360P85.

Case below: 74 N.C. App. 786.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

TROXLER v. ROACH

No. 431P85.

Case below: 75 N.C. App. 512.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 19 September 1985.

VEPCO v. TILLETT

No. 227PA85.

Case below: 73 N.C. App. 512.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 19 September 1985.

WATTS v. CUMBERLAND COUNTY HOSP. SYSTEM

No. 383A85.

Case below: 75 N.C. App. 1.

Petition by defendant Hall for discretionary review under G.S. 7A-31 denied as to additional issues 19 September 1985.

WATTS v. SCHULT HOMES CORP.

No. 440P85.

Case below: 75 N.C. App. 110.

Petition by defendant (Schult Homes Corporation) for discretionary review under G.S. 7A-31 denied 19 September 1985.

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

WERTZ v. WERTZ

No. 199P85.

Case below: 73 N.C. App. 701.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 27 August 1985.

WILLIAMS v. BURLINGTON INDUSTRIES, INC.

No. 436PA85.

Case below: 75 N.C. App. 273.

Petition by respondent-appellees for discretionary review under G.S. 7A-31 allowed 19 September 1985.

J. W. WILDER v. AMATEX CORPORATION, THE CELOTEX CORPORATION, OWENS-CORNING FIBERGLAS CORPORATION, UNARCO INDUSTRIES, INC., FIBREBOARD CORPORATION, GAF CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., RAYBESTOS-MANHATTAN, INC., NICOLET INDUSTRIES, FORTY-EIGHT INSULATION, INC., EAGLE-PICHER INDUSTRIES, INC., KEENE CORPORATION, CAREY-CANADA, INC., JOHNS-MANVILLE SALES CORPORATION, STANDARD ASBESTOS INSULATION, INC., PITTSBURGH CORNING CORPORATION, H. K. PORTER, EMPIRE ACE INSULATION MANUFACTURING AND INSULATING COMPANY, TURNER-NEWALL, LTD., ROCK WOOL MANUFACTURING COMPANY, THE FLINTKOTE COMPANY, LAKE ASBESTOS OF QUEBEC, LTD., SOUTHERN TEXTILES CORPORATION, STARR-DAVIS, INC., STARR-DAVIS COMPANY, INC. OF SOUTH CAROLINA, NATIONAL GYPSUM COMPANY, A.C.&S., INC., U.S. MINERAL PRODUCTS COMPANY, NORTH BROTHERS, INC., JOHNS-MANVILLE AMIANTE CANADA, INC.

No. 239PA84

(Filed 5 November 1985)

1. **Sales § 22.2— asbestosis from exposure to defendant's products—summary judgment improperly granted**

In an action to recover damages for asbestosis allegedly caused by plaintiff's exposure to defendant's asbestos-containing products, summary judgment was improperly entered for defendant where the forecast of evidence at the summary judgment hearing did not demonstrate that plaintiff at trial will not be able to show that he was exposed to asbestos-containing insulation products manufactured, sold or distributed by defendant at various times during his working career as an insulation installer at construction sites.

2. **Limitation of Actions § 4.2; Negligence § 20; Sales § 22— civil asbestosis claim —statute of repose inapplicable**

The ten-year statute of repose set forth in former G.S. 1-15(b) (interim Supp. 1976, repealed 1979) does not apply to claims arising from disease and thus does not apply to plaintiff's civil action to recover damages for asbestosis allegedly caused by exposure to defendants' asbestos-containing products. Plaintiff's claim accrued on the date he was diagnosed as having the disease asbestosis, and under G.S. 1-52(16) he had three years from that date to bring suit.

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

Justice MEYER concurring in part and dissenting in part.

APPEAL by plaintiff from trial court orders granting several defendants' motions for summary judgment, entered at the 12 December 1983 Special Session of ORANGE County Superior

Court, *Judge E. Lynn Johnson* presiding. Defendants' petition to consider the appeal before its determination by the Court of Appeals allowed pursuant to N.C.G.S. § 7A-31.

Haywood, Denny, Miller, Johnson, Sessoms & Haywood by Michael W. Patrick and George W. Miller, Jr., for plaintiff appellant.

Maupin, Taylor & Ellis, P.A., by Armistead J. Maupin, Richard M. Lewis and Mark S. Thomas for defendant appellee Eagle-Picher Industries, Inc.; Bell, Davis & Pitt, P.A., by Richard V. Bennett and William Kearns Davis for defendant appellee Pittsburgh Corning Corporation; Stith & Stith by F. Blackwell Stith for defendant appellee The Celotex Corporation; Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by Thomas N. Barefoot and James Billings for defendant appellee Keene Corporation; Brown & Johnson by C. K. Brown, Jr. for defendant appellee Starr-Davis Company; Poisson, Barnhill & Britt by Donald E. Britt, Jr. and Stuart L. Egerton for defendant appellee Owens-Corning Fiberglass.

Taft, Taft & Haigler by Thomas F. Taft, Vickie Bletso and Kenneth E. Haigler for the amicus curiae, North Carolina White Lung Association.

EXUM, Justice.

Plaintiff seeks damages for the disease asbestosis which he claims was caused by his exposure to products manufactured, sold or distributed by defendants.[1] Plaintiff alleges that he contracted the disease asbestosis through years of on-the-job contact with asbestos products manufactured, sold or distributed by the various defendants. Defendant appellees, after answering, moved for summary judgment, asserting in their motions that the "applicable statutes of limitations and/or repose" barred plaintiff's claim. The trial court granted their motions and entered summary

1. Only defendants Eagle-Picher Industries, Inc. ("Eagle-Picher"); Pittsburgh Corning Corporation ("Pittsburgh Corning"); The Celotex Corporation ("Celotex"); Keene Corporation ("Keene"); Starr-Davis Company ("Starr-Davis"); and Owens-Corning Fiberglass ("Owens-Corning") remain parties to this appeal. Fibreboard Corporation was originally an appellee but plaintiff voluntarily dismissed his appeal as to this defendant on 17 September 1984. The six defendants who remain will be referred to jointly as defendant appellees.

judgment against plaintiff. As to all defendant appellees except Owens-Corning, the trial court's orders were based exclusively on the ten-year statute of repose contained in former N.C. Gen. Stat. § 1-15(b). In these orders the trial court recited that plaintiff's claims were "barred by the provisions of N.C.G.S. Sec. 1-15(b), as written prior to its repeal on October 1, 1979." As to Owens-Corning, the trial court's order recited merely "that there is no genuine issue as to any material fact and that the Defendant is entitled to a Judgment as a matter of law . . . ."

The trial court apparently allowed Owens-Corning's motion for summary judgment on the ground that plaintiff would be unable at trial to show that he was ever exposed to any asbestos products manufactured, sold or distributed by this defendant. After examining the forecast of evidence before the trial court, we believe there is nothing in this forecast to demonstrate that plaintiff will not at trial be able to show an exposure to asbestos products manufactured, sold or distributed by Owens-Corning. We therefore reverse the entry of summary judgment in favor of Owens-Corning. Concluding that G.S. 1-15(b) has no application to claims arising from disease, we also reverse the trial court's entry of summary judgments in favor of all other defendant appellees.

I.

[1] Whether the trial court properly allowed Owens-Corning's motion for summary judgment depends on whether the forecast of evidence demonstrated that plaintiff at trial would not be able to show any exposure to asbestos products manufactured, sold or distributed by this defendant. The theory underlying this defendant's motion and the trial court's ruling is that the forecast of evidence demonstrates that plaintiff at trial "cannot produce evidence to support an essential element of his" claim. *Burnick v. Jurden*, 306 N.C. 435, 450, 293 S.E. 2d 405, 415 (1982); *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981).

Plaintiff's forecast of evidence tended generally to show as follows: He worked as an insulator from 1938 until 1979 on at least seventy-five jobs in nine states installing insulation at construction sites. In this work he used asbestos-containing cloth and cements. His work as an insulator required that he cut and saw asbestos-containing insulation products, the cutting and sawing of which produced dust which he breathed. He began experiencing

shortness of breath in the late 1960's, but it was not until August 1979, following a biopsy, that plaintiff was diagnosed as suffering from asbestosis, an irreversible scarring of the lung tissue caused by the presence of asbestos fibers. He filed his complaint on 29 July 1981.[2]

Owens-Corning's forecast of evidence tended to show that it manufactured asbestos-containing Kaylo pipe covering and Kaylo block in November 1972, but it stopped selling these products in early 1973. Owens-Corning's sales records showed that it did ship its Kaylo product in 1970 to a Carolina Power & Light Company job site at Roxboro, North Carolina, where plaintiff was working. The company sold its Kaylo product to plaintiff's employer, the Mancine-Klinchuck Company, Endicott, New York, in 1972, but the place where the product was actually delivered was not known.

Plaintiff's forecast of evidence regarding Owens-Corning's Kaylo tended to show he had been exposed to Kaylo pipe covering and block insulation during his working career. An affidavit filed by plaintiff tended to show that he was exposed to Kaylo on job sites where he worked as an insulator in 1945, 1954, 1957, 1958, and 1966-67. An affidavit of W. E. Thompson, one of plaintiff's coworkers, tended to show that he worked on various jobs with plaintiff as an insulator and that Kaylo was one of the products they used on these jobs in 1968-69, 1971-72, 1973-75, and 1976-77. Owens-Corning's answers to certain of plaintiff's interrogatories indicate that Kaylo was shipped to a number of job sites listed by plaintiff in his affidavit as work sites where he was exposed to asbestos-containing products. Plaintiff's own affidavit says that he was exposed to Kaylo pipe covering and block on job sites in 1970, 1954, 1956-57 and to "pipe covering and block" (brand name unspecified) in 1966-67 and 1973-75. According to plaintiff's deposition, he recalled specifically working with Kaylo as an insulator on a job for Carolina Power & Light Company in Moncure, North Carolina.

We agree with defendants' contention that at trial plaintiff's evidence must demonstrate that he was actually exposed to the

2. This original complaint was dismissed because plaintiff's prayer for damages violated Civil Procedure Rule 8(a)(2), but the order of dismissal permitted plaintiff to file a new action based on the same claim within one year. On 17 March 1982 plaintiff filed the action now under consideration.

alleged offending products. It will not be enough for plaintiff simply to show that various products were shipped to various job sites on which he worked. We are satisfied, however, that the forecast of evidence in the record at the summary judgment hearing falls far short of demonstrating that plaintiff will not be able at trial to show exposures to Owens-Corning's asbestos-containing product. Indeed, the forecast indicates that plaintiff will be able to make such a showing.

Summary judgment in favor of Owens-Corning, therefore, is reversed.

II.

[2] Whether entry of summary judgment in favor of defendants other than Owens-Corning was proper depends on whether N.C. Gen. Stat. § 1-15(b) (Interim Supp. 1976) (repealed 1979) applies to claims arising out of disease. That statute was enacted to become effective 21 July 1971, Ch. 1157, 1971 N.C. Laws 1706, amended in 1975, Ch. 977, § 2, 1975 N.C. Laws 3, and repealed effective 1 October 1979. Ch. 654, § 3, 1979 N.C. Laws 687, 689. It provided at all times material to the present case as follows:

> (b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance or failure to perform professional services, 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, whichever event first occurs; provided that in such cases the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief.

G.S. 1-15 (Interim Supp. 1976).

Plaintiff and *amicus*, the North Carolina White Lung Association, argue that G.S. 1-15(b) was never intended by the legislature to apply to claims arising out of a disease. After careful consideration, we agree.

In determining the intent of the legislature, the cardinal rule of construction is to consider the statute's purpose, the state of the law to which the statute was addressed, and the changes in that law the statute was designed to effect. *Stevenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Galligan v. Chapel Hill*, 276 N.C. 172, 171 S.E. 2d 427 (1970); *Domestic Electric Service Co., Inc. v. Rocky Mount*, 20 N.C. App. 347, 201 S.E. 2d 508, *aff'd*, 285 N.C. 135, 203 S.E. 2d 838 (1974). We note, importantly, that G.S. 1-15(b) is not intended to be a statute of limitations governing all negligence claims, such as the statute of limitations contained in the first clause of G.S. 1-52(16). Its primary purpose was to change the accrual date from which the period of limitations begins to run on latent injury claims. In addition, it added a ten-year statute of repose which runs from "the last act of defendant giving rise to the claim for relief" and which applies only to latent injury claims.

The purpose of G.S. 1-15(b) was thoroughly considered and delineated in *Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976). The Court noted in *Raftery* a line of cases which established the rule that the statute of limitations in negligence and warranty claims begins to run when the injury, however slight, is first inflicted, notwithstanding that the injured claimant might then be justifiably unaware of the injury. *Jewell v. Price*, 264 N.C. 459, 142 S.E. 2d 1 (1965); *Motor Lines v. General Motors Corp.*, 258 N.C. 323, 128 S.E. 2d 413 (1962); *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957); *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320 (1952). *Motor Lines* held that a claim for breach of warranty in the sale of a truck accrued upon the sale, not upon the truck's subsequent destruction by fire because of a defect in its manufacture. *Jewell* followed with a similar holding in a case involving property damage from a fire caused by a defective oil burning furnace. *Shearin* and *Lewis* were medical malpractice actions involving, respectively, a sponge left within the plaintiff's body and the alleged unauthorized tying of plaintiff's Fallopian tubes. In each of the cases the Court held that the claim accrued when the injury to claimants first occurred, rather than when claimants discovered their injuries.

Plaintiffs Shearin and Lewis were first injured when the sponge was left in Shearin's body and Lewis's Fallopian tubes were mistakenly tied. Likewise plaintiffs in *Motor Lines* and

Jewell were first injured, *i.e.*, they suffered some loss, when they purchased latently defective products. The Court elaborated on this theory of claim accrual in *Jewell v. Price*, 264 N.C. at 461-62, 142 S.E. 2d at 3-4:

> Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in G.S. 1-17. . . . Nominal damages may be recovered in actions based on negligence. . . . The accrual of the cause of action must therefore be reckoned from the time the first injury, however slight, was sustained. . . . It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. . . . '[P]roof of actual damage may extend to facts that occur and grow out of injury, even up to the day of the verdict. If so, it is clear the *damage* is not the cause of action'. . . . It is likewise unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued.

The Court said in *Raftery*, 291 N.C. at 188-89, 230 S.E. 2d at 409-10:

> The purpose of G.S. 1-15(b) was to give relief to injured persons from the harsh results flowing from this previously established rule of law. By the enactment of this statute in 1971, the Legislature provided that a cause of action, having as an essential element bodily injury or a defect in 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 of the injury, was discovered or ought reasonably to have been discovered by the claimant. Thus, the purpose of this statute was to enlarge, not to restrict the time within which an action for damages could be brought.
>
> To prevent the statute from subjecting tort feasors to suit for alleged acts or defaults so far in the past that evidence as to the event would be difficult to secure and intervening causes would be likely, though difficult to prove,

> the Legislature added this proviso: '[p]rovided that *in such cases* the period [i.e., the period within which the action may be brought] shall not exceed ten years from the last act of the defendant, giving rise to the claim for relief.' (Emphasis added.) Expressly, the proviso is limited to 'such cases'; that is, *the proviso applies only to cases in which the bodily injury, or defect in property, for which damages are sought was not readily apparent to the claimant at the time of its origin.* In such case, the action must be brought within ten years from the wrongful act or default even though the plaintiff did not discover the injury until later. (Emphasis supplied.)

None of the cases toward which the statute was directed involved disease. They all involved situations in which it was possible to identify a single point in time when plaintiff was first injured.

A disease presents an intrinsically different kind of claim. Diseases such as asbestosis, silicosis, and chronic obstructive lung disease normally develop over long periods of time after multiple exposures to offending substances which are thought to be causative agents. It is impossible to identify any particular exposure as the "first injury." Indeed, one or even multiple exposures to an offending substance in these kinds of diseases may not constitute an injury. The first *identifiable* injury occurs when the disease is diagnosed as such, and at that time it is no longer latent. *See, generally, Borel v. Fiberboard Paper Products Corp.*, 493 F. 2d 1076, 1083 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974) (asbestosis; disease does not ordinarily manifest itself until "ten to twenty-five or more years after exposure"); *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983) (chronic obstructive lung disease; 24 years' exposure to respirable cotton dust and cigarette smoking ultimately resulted in diagnosis); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981) (chronic obstructive lung disease, or byssinosis; 34 years' exposure after which disease diagnosed); *Haynes v. Feldspar Producing Co.*, 222 N.C. 163, 22 S.E. 2d 275 (1942) (silicosis; 10 years' exposure before disease was diagnosable). In *Booker v. Medical Center*, 297 N.C. 458, 483, 256 S.E. 2d 189, 204 (1979), a hepatitis case, this Court recognized:

> Most occupational diseases, however, are not the result of a single incident but rather of prolonged exposure to hazardous conditions or a disease-causing agent. *In such cases it is seldom posible to identify a specific isolated event to which the injury may be attributed.*

Even with diseases which might be caused by a single harmful exposure such as, for example, hepatitis, it is ordinarily impossible to determine which of many possible exposures in fact caused the disease. *Id.*

Both the Court and the legislature have long been cognizant of the difference between diseases on the one hand and other kinds of injury on the other from the standpoint of identifying legally relevant time periods. This is demonstrated by examination of some of the workers' compensation statutes and this Court's decisions interpreting them.

In *Blassingame v. Asbestos Co.*, 217 N.C. 223, 7 S.E. 2d 478 (1940), this Court had occasion to consider a then relatively recent amendment to the Workers' Compensation Act providing for compensation in cases of death or disability resulting from occupational disease, including asbestosis. Although the Workers' Compensation Act requires that an injured employee give his employer written notice of accident within thirty days after its occurrence, the statute construed then specifically barred occupational disease claims unless: (1) "written notice of the first distinct manifestation" of the disease was given to the employer within 30 days "after such manifestation"; (2) if death occurred, written notice of death was given by the beneficiary to the employer or the Industrial Commission within 90 days after death; and (3) the claim was filed within one year after "disablement or death." *Id.* at 231-32, 7 S.E. 2d at 483. Claimant's husband died 1 April 1937. Although treated by a physician in his last illness, cause of death was not available until an autopsy was performed and the autopsy filed on 10 May 1937. The autopsy listed cause of death as "pneumonia . . . ; asbestosis, early." *Id.* at 230, 7 S.E. 2d at 482. There was medical testimony from a number of physicians, largely through hypothetical questions, to the effect that asbestosis had contributed to the worker's death. The worker's widow gave notice to the employer and filed a claim for compensation with the Industrial Commission on 20 July 1937. The Industrial Com-

mission concluded that the periods of time for giving notice should begin to run from the time the asbestosis was diagnosed and that the first diagnosis of asbestosis was the autopsy report. This Court affirmed saying, "The cause of deceased's death could only be ascertained by autopsy, as above set forth, and notice was given within 90 days after discovery and action brought within one (1) year." *Id.* at 233, 7 S.E. 2d at 484.

In *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951), claimant's lung disease rendered him unable to work in April 1948. The disease was first diagnosed in November 1948 as silicosis. Claimant filed his claim with the Industrial Commission on 25 April 1949, more than one year after he left work but less than a year after his disease was diagnosed. The Court was construing G.S. 97-58(b). Although that statute relieves an employee with asbestosis, silicosis, or lead poisoning from giving the employer thirty days' notice, it provides that in other occupational disease cases the 30-day-notice time period begins to run "from the date that the employee has been advised by competent medical authority that he has" the disease. G.S. 97-58(b). But another subsection of G.S. 97-58 requires that claims for occupational diseases "shall be barred unless . . . filed with the Industrial Commission within one year after death, disability or disablement as the case may be." G.S. 97-58(c).

Defendants argued that since plaintiff had not filed his claim with the Commission within one year of his disability or disablement, the claim was barred by the clear language of the statute. The Court, however, refused to so construe the statute. It said to do so "would make the time for filing a claim for compensation for an occupational disease identical with that fixed for filing a claim for an accident, resulting in injury or death . . . irrespective of the date the employee was advised by competent medical authority that he had such disease." 233 N.C. at 426, 64 S.E. 2d at 413. The Court applied the canon of construction that "where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded." *Id.* at 426, 64 S.E. 2d at 413-14. The Court went on to hold that the legislature intended to measure the time for filing a claim for an occupational disease, not from the time of disablement, but from the time the employee was "notified by

competent medical authority that he had such disease." *Id.* at 426-27, 64 S.E. 2d at 414. The Court said:

> Were we to rule otherwise, it would be necessary to hold that it was the legislative intent to require an employee, in many instances, suffering from any one of these occupational diseases to make a correct medical diagnosis of his own condition or to file his notice and claim for compensation before he knew he had such disease, or run the risk of having his claim barred by the one year statute.

Id.

From the foregoing we see that when the legislature considered occupational diseases, it almost always equated the disease's manifestation or its diagnosis as being the "injury" from which various time periods began to run. The earliest version of the occupational disease statute required, for example, that the 30-day-notice-to-employer period began to run from the disease's "first distinct manifestation." Later the statute made the period begin to run from the time the employee was advised by medical authority that he suffered from the disease. We also see from the foregoing that this Court interpreted other statutes, which were less clear, consistently with the notion that in disease cases the event from which relevant time periods should be measured was the employee's notification of the disease's existence.

By this treatment of occupational disease claims, the legislature and the Court have recognized that exposure to disease-causing agents is not itself an injury. The body is daily bombarded by offending agents. Fortunately, it almost always is capable of defending itself against them and remains healthy until, in a few cases, the immune system fails and disease occurs. That, in the context of disease claims, constitutes the first injury. Although persons may have latent diseases of which they are unaware, it is not possible to say precisely when the disease first occurred in the body. The only possible point in time from which to measure the "first injury" in the context of a disease claim is when the disease is diagnosed. When the disease is diagnosed, it is no longer latent.

There was, therefore, no need in 1971 for the legislature to treat diseases as "latent injury claims" for the purpose of deter-

mining when legally material time periods begin to run. That point had already been well established by both the legislature and this Court in the occupational disease context as the date of diagnosis. It is extremely unlikely that the legislature or the Court would have adopted a time of accrual other than date of diagnosis for statute of limitation purposes in disease claims based on negligence. Yet if G.S. 1-15(b) is applied to disease then the time of claim accrual is not the date of diagnosis but the time the disease "was discovered or ought reasonably to have been discovered"—a time which may in some disease claims occur before actual diagnosis. It is inconceivable that the legislature enacted G.S. 1-15(b) in 1971 intending that claims for injuries caused by disease accrue before the disease is diagnosed.

The legislature, as noted above, was reacting to the law of *Jewell, Motor Lines, Shearin* and *Lewis* which permitted latent, undiscovered, first injury to cause the statute of limitations to begin running. In a disease claim, as we have demonstrated, the diagnosed disease is the first injury. A manifested, diagnosed disease is not latent. There was, therefore, no need for a statute changing the accrual date for disease claims, and the statute by its terms does not purport to do so. The only need was for a statute changing the accrual date for *latent* injury claims such as those in *Jewell, Motor Lines, Shearin* and *Lewis*, and the statute by its terms is directed to these type claims.

We are bolstered in our opinion that the legislature did not intend for G.S. 1-15(b) to apply to a disease claim by certain changes made in the bill as originally introduced and before its final enactment into law. As originally introduced, Senate Bill 572, entitled "A Bill to be Entitled an Act to Provide that a Cause of Action Accrues when Injury is or should have been Known," provided as follows:

> A cause of action where injury, *disease*, death or damage occurs shall not be deemed to accrue until (1) the injury or damage is actually inflicted or (2) death occurs or (3) the *disease*, damage or injury *is diagnosed* or should have reasonably been discovered, whichever event occurs later.

H.B. 572, Gen. Assembly of 1971, § 1 (codified at N.C. Gen. Stat. § 1-15(b) [Interim Supp. 1976]) (emphasis supplied). The bill was later amended so that the section in question read:

> A cause of action which results in injury not immediately apparent shall not be deemed to accrue until (1) the injury or damage is actually discovered or (2) death occurs or (3) the *disease*, damage, or injury *is diagnosed* or should have reasonably been discovered, whichever event first occurs.

Id. (incorporating amendment of 20 May 1971) (emphasis supplied). As finally enacted the statute omitted all references to claims arising out of disease. Ch. 1157, § 1, 1971 N.C. Laws 1706.

In construing statutes, "[i]t is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E. 2d 793, 804 (1970). In light of the statute's purpose, the state of the law when the statute was enacted, and the deliberate omission of reference to disease as this statute made its way through the legislative process, we are satisfied that the legislature intended the statute to have no application to claims arising from disease. G.S. 1-15(b) having no application to this case, plaintiff's claim accrued on the date he was diagnosed as having the disease asbestosis, and under G.S. 1-52(16) he had three years from that date to bring suit.

For the foregoing reasons, summary judgment in favor of all defendant appellees is

Reversed.

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

Justice MEYER concurring in part and dissenting in part.

As I understand the majority opinion, it holds that neither the repealed N.C.G.S. § 1-15(b) nor its successor N.C.G.S. § 1-52 (16) applies to occupational disease claims in general, and asbestosis claims in particular, in which the diagnosis was made prior to 1 October 1979 and, therefore, that there is no statute of repose applicable to those claims and that the statute of limitations applicable to all occupational disease claims, including asbestosis claims, is the usual three-year statute, N.C.G.S. § 1-52, which begins to run when the disease is "diagnosed."

As to Part I of the majority opinion relating to Owens-Corning in particular, the evidence in plaintiff's forecast that would tend to show exposure to that manufacturer's product is marginal at best but I would tend to agree with the majority that it is sufficient (though barely so) to survive a motion for summary judgment bottomed on that narrow basis.

I cannot concur in Part II of the majority opinion which concludes that our legislature did not intend that occupational disease cases in general and asbestosis in particular should be covered by the statute of repose contained in the then applicable but later repealed N.C.G.S. § 1-15(b). With regard to legislative intent, the majority seems to ascribe to the members of the General Assembly an unawareness of developments in the legal arena in the early 1970s, when that statute was enacted, that I find naive. At that point in time, delayed manifestation injuries, together with the time-delayed product injuries, constituted a giant wave that was breaking upon the courts. Many legal writers say the crest of that wave has now passed us, but I disagree. These two categories of cases may well dominate tort litigation in our courts in the decades of the 1980s and 1990s.

There are an estimated 25,000 asbestosis related suits pending in the United States, with perhaps 1,500 to 2,000 of them pending in the courts of this State and the United States District Courts in North Carolina, and the asbestosis cases are just the tip of the iceberg. Agent Orange plaintiffs are estimated to number 50,000 or more. There are estimated to be over 1,000 DES suits pending, with many more to come as more of the estimated three million DES daughters bring suit. Add to these the so-called cigarette and smokeless tobacco cases, the toxic shock syndrome cases, the atomic veterans radiation cases, the Dalkon Shield cases, the toxic waste cases, the formaldehyde cases, the microwave cases, and the cornucopia of other potential "occupational disease" cases; and the problems seem insurmountable.

The onslaught of these cases and the accompanying increase in the number and amount of jury awards are forcing some manufacturers into bankruptcy and resulting in raised insurance premiums of hundreds and even thousands of percent for others. The business and insurance worlds have been permeated by a feeling of crisis. As a result, a majority of state legislatures

enacted statutes like the repealed N.C.G.S. § 1-15(b) and its successor N.C.G.S. § 1-52(16), and federal legislation in the near future is not unlikely. To hold that our legislature intended that occupational disease cases (of all kinds and whatever that term may include) not be covered by the statute of repose if diagnosed prior to 1 October 1979 is nothing short of ludicrous.

Contrary to the majority, I conclude that our legislature specifically intended that the now repealed N.C.G.S. § 1-15(b) cover asbestosis claims in particular and occupational diseases claims in general. Beyond the inevitable recognition of the burgeoning problem as previously discussed, I find this affirmative expression in the words of the statute itself. The statute of repose then applicable, N.C.G.S. § 1-15(b) (Interim Supp. 1976, repealed 1979), provided, at all times pertinent to the present case, as follows:

> (b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death or one for malpractice arising out of the performance or failure to perform professional services, 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, whichever event first occurs; provided that in such cases the period shall not exceed ten years from the last act of the defendant giving rise to the claim for relief.

N.C.G.S. § 1-15(b) (Interim Supp. 1976).

I find the intent that occupational diseases should be covered in that (1) the statute specifically provided that it should apply "[e]xcept where otherwise provided by statute," and no other statute provided otherwise for asbestosis claims in civil actions; and (2) the statute also specifically excluded two categories of cases, wrongful death actions and malpractice actions in which the damage or injury was not readily apparent at the time of its origin; thus, it is obvious that although the legislature knew how to exclude from the repose statute certain categories of cases, it

did not exclude occupational disease claims in general or asbestosis claims in particular.

It is irrefutable that our legislature was well aware of the unique nature of asbestosis and silicosis claims as it had made specific provisions for their uniqueness in numerous parts of the North Carolina Workers' Compensation Act. N.C.G.S. § 97-57 through 97-64. Indeed, N.C.G.S. § 97-58(a) specifically provides (with exceptions relating to death claims not pertinent here):

> § 97-58. Claims for certain diseases restricted; time limit for filing claims.
>
> (a) . . . [A]n employer shall not be liable for any compensation for asbestosis unless disablement or death results within ten years of the last exposure to that disease . . . .

(At the time our legislature adopted the now repealed N.C.G.S. § 1-15(b) allowing the filing of civil suits within ten years, the time period in N.C.G.S. § 97-58(a) was only two years from the last exposure.)

Under the majority holding, today, even under the present N.C.G.S. § 97-58(a), the employee covered by the Workers' Compensation Act whose asbestosis was diagnosed prior to 1 October 1979 is barred after ten years from *the last exposure*; but the same worker, if not covered by the act, would not be barred by any statute of repose at all and could bring his action within three years of the diagnosis, though that diagnosis be made for the first time a half century or more after the last exposure. Our legislature could not have intended such an absurd result.

If my understanding of the majority opinion is correct, the majority has today removed any time bar whatsoever to a civil action on an asbestosis claim where the diagnosis was prior to 1 October 1979 so long as the claimant files his complaint within three years of the diagnosis. In such cases, the relationship between the claimant's employment and the diagnosis of the disease is no longer of any importance though the employment relationship may have terminated a half century or more prior to the diagnosis. Nor does it any longer matter in those situations that a claimant's last exposure was a half century or more prior to diagnosis. Nor that the claimant may have suffered severe respiratory problems for a half century or more—so long as his con-

dition had not been previously diagnosed as "asbestosis." Nor that the asbestosis claimant has suffered and been treated for a half century, if his condition had been misdiagnosed through the years as another condition.

It should be noted that although the majority opinion restricts its holding to civil actions for asbestosis claims in which the diagnosis was made prior to 1 October 1979 (and those suits must have been filed by 2 October 1982), it applies to literally thousands of claims already in the judicial pipeline. Indeed, we have already identified the possibility of some 1,500 to 2,000 such suits pending in this State.

Having personally concluded that the statute of repose—former N.C.G.S. § 1-15(b) as written prior to its repeal on 1 October 1979—is applicable to plaintiff's claim, I would vote to affirm the trial judge's granting of summary judgment for all defendants. I would also vote to hold that N.C.G.S. § 1-52(16) is applicable to all occupational disease claims in which the diagnosis occurred subsequent to the effective date of 1 October 1979, a fact which the majority seems to concede but does not state.

CLARENCE R. HARRELL, EXECUTOR OF THE ESTATE OF ANNIE MAE HARRELL,[1] EMPLOYEE, PLAINTIFF v. HARRIET & HENDERSON YARNS, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 198PA83

(Filed 5 November 1985)

1. Master and Servant § 68— workers' compensation—obstructive lung disease—cotton dust exposure as cause

There was sufficient evidence from which the Industrial Commission could have found that cotton dust exposure was a significant causal factor in the development of plaintiff's obstructive lung disease where a physician specializing in pulmonary diseases testified that "She probably has obstructive impairment caused by cotton dust exposure" and "I feel there is an element of

1. While this matter was pending in the Court of Appeals, Annie Mae Harrell died. After this Court allowed the petition for further review Clarence R. Harrell, executor under Annie Mae Harrell's will, moved to be substituted as party plaintiff and this Court allowed the motion.

pulmonary impairment present which could have been contributed to by her cotton dust exposure."

2. Master and Servant § 68— workers' compensation—cause of disability—occupational and nonoccupational diseases—remand for findings

Where the Industrial Commission made contradictory findings supported by the evidence as to whether occupational obstructive lung disease (byssinosis) or nonoccupational restrictive lung disease (pulmonary fibrosis) was the cause of plaintiff's wage-earning disability, the case must be remanded to the Industrial Commission for a determination of the cause of plaintiff's disability. Because the evidence in this case does not permit any reasonable apportionment of plaintiff's disability between occupational and nonoccupational disease, plaintiff is entitled to an award for her entire disability under G.S. 97-52 and G.S. 97-29 if her occupational disease was a substantial and material factor in bringing about that disability.

3. Master and Servant § 68— workers' compensation—recovery under G.S. 97-31—disability not required

G.S. 97-52 does not require that disability be shown as a condition to recovery under G.S. 97-31 for an occupational disease.

4. Master and Servant § 68— workers' compensation—award for partial loss of lungs

G.S. 97-31 applies to occupational disease, and "loss" as used in G.S. 97-31(24) includes loss of use. Therefore, an award for partial loss of lung function from an occupational disease falls within the scope of G.S. 97-31(24).

5. Master and Servant § 68— workers' compensation—disability—partial loss of lungs—separate awards not permitted

The Industrial Commission may not award plaintiff compensation under G.S. 97-52 and G.S. 97-29 for disability resulting from an occupational disease and also award compensation under G.S. 97-31(24) for partial loss of lung function because compensation under G.S. 97-31 is "in lieu of all other compensation."

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

Justice MEYER dissenting.

Chief Justice BRANCH joins in this dissenting opinion.

ON plaintiff's petition for further review pursuant to N.C. Gen. Stat. § 7A-31 (1981) of a decision of the Court of Appeals, 56 N.C. App. 697, 289 S.E. 2d 846 (1982),[2] reversing a worker's compensation award by the Industrial Commission.

2. The Court of Appeals' opinion was filed 6 April 1982 but on 17 May 1982 the Court of Appeals allowed Annie Mae Harrell's petition for a rehearing. New briefs

Hassell & Hudson by Robin E. Hudson for plaintiff appellant.

Maupin, Taylor & Ellis, P.A., by Richard M. Lewis and David V. Brooks for defendant appellees.

EXUM, Justice.

This is a lung disease case in which the Industrial Commission awarded plaintiff $4,000 in benefits for "permanent and irreversible loss of lung function" pursuant to N.C. Gen. Stat. § 97-31(24) (1979). Both plaintiff and defendants appealed to the Court of Appeals. Plaintiff contended that the Commission erred in not making an award for incapacity to earn wages due to lung disease. Defendants contended that the Commission erred in making any award because N.C. Gen. Stat. § 97-31(24) has no application to occupational disease cases unless plaintiff suffers death or disablement as a result of such disease. The Court of Appeals agreed with defendants and reversed the Commission. It concluded that while the Commission's findings were conflicting on whether plaintiff suffered any incapacity to earn wages as a result of an occupational disease, the evidence before the Commission would not have supported a finding that she did. It also concluded that N.C. Gen. Stat. § 97-31(24) had no application to occupational disease cases. The questions presented are: (1) Whether there is enough evidence in the record to support a finding by the Industrial Commission that some part of plaintiff's disability resulted from occupational disease and (2) whether N.C. Gen. Stat. § 97-31(24) has any application to occupational diseases.

I.

Evidence before the Commission consisted essentially of the testimony of Annie Mae Harrell, plaintiff-employee, and several physicians who treated or examined her. According to her testimony, Annie Mae Harrell was born 16 January 1925 in Johnston County and finished the eighth grade in school. She began working in the textile industry in 1943. She went to work in 1959 in defendant's North Henderson Mill in the weave room where she "filled batteries, weaved, smashed, cleaned up, trained battery

were prepared and submitted by the parties. Thereafter on 28 March 1983 the Court of Appeals determined that its order for rehearing was improvidently granted and rescinded the order.

fillers" and helped "blow off the top of the weave room and the looms." In 1962 she began to work in the winding room at the North Henderson Mill and worked until she quit work in June 1969. She testified:

> I first had breathing problems when I . . . worked in the weave room at [the North Henderson Mill]. I first remember when we were blowing off, we really were coughing and sucking in lint, a whole lot of lint. That would make me have a breathing problem. That was probably about 1960 I guess. I had breathing problems off and on the whole time at that time or after that time. . . .

Annie Mae Harrell quit work in order to look after her son who was ill, her husband having moved away and taken another job. She testified further:

> Since I have stopped working in the mill, the activities I have been able to do on a daily basis are I did my housework as long as I could. Since 1977 I haven't done very much housework . . . There are other kinds of activities besides my housework that I sure can't do any more. I knit . . . . I could get out and work in the garden and work in the yard and all. I can't do it no more. Since 1977 I haven't done anything.

Dr. Ted R. Kunstling, a physician specializing in pulmonary diseases, testified he first saw Mrs. Harrell on 5 October 1979. He took a history, conducted a physical examination, made laboratory studies and examined test results available to him from other medical sources. He felt her medical history "indicates that she was unable to perform even light housework" and "is not capable of working in the mill." Mrs. Harrell has no work experience except in the cotton mill industry, and her incapacity to earn wages is not controverted.

Dr. Kunstling's studies indicated "an amount of irreversible pulmonary impairment that was present at the time of examination." He attributed this impairment to a number of different lung diseases. X-rays revealed markings on the lung "consistent with pulmonary fibrosis . . . . Pulmonary fibrosis is a process of scarring which occurs in the lungs." Although "[i]t has a variety of causes," he testified "it cannot be the end results of long term ex-

posure to cotton dust. I do not think the results of scars is from exposure to cotton dust."

In response to a hypothetical question, Dr. Kunstling testified further as follows:

> Based upon these facts and upon your examination of the plaintiff and your testing, do you have an opinion satisfactory to yourself based upon a reasonable medical certainty as to whether or not her exposure to cotton dust in her employment could or might be a cause of her lung disease?
>
> A: Yes, I do.
>
> Q: What is that opinion?
>
> A: I feel that there is an element of pulmonary impairment present which could have been contributed to by her cotton dust exposure.

Dr. Kunstling also testified:

> I concluded that there were other factors in her history besides exposure to cotton dust that could have caused her problem. I feel like she has a pulmonary condition with pulmonary fibrosis and restrictive impairment which is coexisting with the amount of airway obstructive disease which is present. And that this is probably contributing to her pulmonary impairment to a certain extent. The etiology or the cause of this fibrosis is not known. And I can only state that fibrosis is a type of response which can't be correlated with her occupation. I believe there is some other causes for this. It is not uncommon for this type of disease to be present without there being a diminishable cause. In addition, she had others present: hypertension, and chronic rhinitis, and sinusitis.

"[A]ssessing the relative contribution of restrictive and obstructive diseases" to Mrs. Harrell's lung condition was "somewhat speculative" in Dr. Kunstling's judgment.

On cross-examination Dr. Kunstling testified "the vast majority of Mrs. Harrell's lung disease is restrictive in nature" but "she does have evidence of airway obstruction, and I believe this may be related to her cotton dust exposure and hence could be

termed 'byssinosis.' " Dr. Kunstling testified that Mrs. Harrell's "airway obstruction is something that may have been present from the time of her retirement from work to the present time" but that "the intervening process that has occurred has contributed significantly to her pulmonary impairment."

On redirect examination Dr. Kunstling testified, "Mrs. Harrell's obstructive lung disease may well have been caused by her exposure to cotton dust. I would say that she probably has obstructive impairment caused by cotton dust exposure."

With this evidence before it, the Commission, adopting the findings and conclusions of the Hearing Commissioner, made findings and conclusions as follows (paraphrased except where quoted):[3]

. . . .

3. Mrs. Harrell began to work at defendant's mill in Henderson in October 1959 where she was employed in the weave room. Her duties involved "filling batteries, weaving, smashing and cleanup activities" including blowing off the equipment by use of a compressed air hose. This mill processed cotton during Mrs. Harrell's employment. Dust accumulated to the extent that the looms were blown off two to three times weekly. At times Mrs. Harrell was required to be under cloth covering the looms while the looms were being blown off. Occasionally she would assist in the blow off operations "on an all-day basis."

. . . .

8. Dr. Ted Kunstling, a pulmonary expert and member of the Industrial Commission's Textile Occupational Disease Panel, saw Mrs. Harrell on 5 October 1979. He diagnosed her "as having pulmonary fibrosis (chronic restrictive lung

3. All parties stipulated: When the employee allegedly contracted her occupational disease, they were subject to and bound by the provisions of the Workers' Compensation Act; the employment relationship existed between the worker and the defendant employer; Liberty Mutual Insurance Company was the compensation carrier on the risk; the worker last worked for defendant-employer on 28 June 1969; her average weekly wage covering the one-year period before the date on which she last worked was $95.62; and defendant-employer's textile mills processed cotton during the worker's term of employment there.

disease) with moderate restrictive impairment as well as chronic obstructive lung disease with mild obstructive impairment. In Dr. Kunstling's opinion both conditions resulted "in permanent and irreversible pulmonary impairment in the range of 40 to 50 percent impairment of lung function" but he attributed the major element thereof to the fibrosis. Dr. Kunstling felt that Mrs. Harrell "is currently disabled from performing work with the exception of light work . . . and then only in a clean environment." In Dr. Kunstling's opinion Mrs. Harrell's "mild chronic obstructive lung disease, which he attributes to her occupational exposure to cotton dust, would not be significantly disabling in the absence of claimant's intervening pulmonary fibrosis which disease in his opinion is definitely not causally related to claimant's occupational exposure but rather is of unknown origin."

9. "As a result of her exposure to respirable cotton dust while employed within the weave and winding rooms of defendant-employer's textile mill claimant has contracted chronic obstructive lung disease (byssinosis) with evidence of permanent and irreversible airway obstruction. Plaintiff has contracted an occupational disease."

10. "Although at the time of her retirement claimant retained permanent and irreversible pulmonary impairment as a result of her occupational obstructive lung disease, she was not disabled (from work) as a result of this or any other physical condition until the year 1977, at which time she became disabled (from work) as a result of and following contracting non-occupational pulmonary fibrosis. The significant aspect of claimant's current pulmonary disability is as a result of her restrictive lung disease (pulmonary fibrosis) which arose independently of and following her voluntary retirement from the defendants' employ in 1969."

11. "At the time of her retirement and as a result of the aforenamed occupational disease, claimant has a permanent disability in that she has permanent injury to two important internal organs; to wit: her lungs, in the form of permanent and irreversible loss of lung function. It can be reasonably presumed that the claimant has suffered diminution of her future earning power by reason of such loss."

Upon the foregoing findings of fact the Commission made the following conclusions of law:

> 1. "Plaintiff has contracted chronic obstructive lung disease (byssinosis) with permanent and irreversible airway obstruction as a result of exposure to cotton dust in her employment with defendant employer. This disease is compensable under the provisions of G.S. 97-53(13) as it existed prior to its amendment in 1971. *Taylor v. J. P. Stevens and Co.*, Opinion filed on May 6, 1980 by the N.C. Supreme Court."
>
> 2. "As a result of the occupational disease giving rise hereto plaintiff has a permanent partial loss of both her lungs and is entitled to compensation in the amount of $4,000.00 therefor. G.S. 97-31(24) as it existed prior to its amendment in 1969. *Arrington v. Stone and Webster Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965)."

Upon the foregoing findings of fact and conclusions of law the Commission made an award of $4,000.00 "for partial loss of lung function," attorney's fees and costs to Mrs. Harrell.

II.

Appellant's primary contention is that the Industrial Commission erred in failing to award benefits for disability resulting from occupational disease under N.C. Gen. Stat. §§ 97-52, 97-29. The Court of Appeals held the record lacked sufficient evidence to find that occupational disease caused any of Mrs. Harrell's incapacity to earn wages. It based that holding, in part, upon the fact that the chronic obstructive lung disease component of her pulmonary condition, the only component in her condition linked to cotton dust exposure, resulted not only from occupational exposure but also from other nonoccupational factors and "there is insufficient evidence from which the obstructive component . . . could be allocated between occupational and non-occupational causes." 56 N.C. App. at 701, 289 S.E. 2d at 848 (1982). The Court of Appeals, in other words, set aside the Commission's finding that Mrs. Harrell's obstructive lung disease was an occupational disease.

[1] Since the Court of Appeals had this case before it, we have decided *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301

S.E. 2d 359 (1983). *Rutledge* held obstruction caused by chronic obstructive lung disease need not be apportioned between occupational and nonoccupational causes and a claimant may recover the entire disability resulting from such obstruction so long as the occupation-related cause was a significant causal factor in the disease's development. *Id.* at 101, 301 S.E. 2d at 369-70. In this case there is sufficient evidence from which the Commission could have found that cotton dust exposure was a significant causal factor in the development of Mrs. Harrell's obstructive lung disease. Dr. Kunstling testified: "She probably has obstructive impairment caused by cotton dust exposure" and "I feel there is an element of pulmonary impairment present which could have been contributed to by her cotton dust exposure." The record, therefore, contains adequate support for the Industrial Commission's conclusion that Mrs. Harrell's entire obstructive lung disease was an occupational disease.

[2] Although the obstructive component of Mrs. Harrell's condition need not be apportioned between occupational and nonoccupational causes, the question remains whether the evidence is sufficient to find that her obstructive lung disease was the cause of any of her wage-earning disability. The Commission found as a fact that "[i]t can be reasonably presumed that the claimant has suffered diminution of her future earning power" as a result of loss of lung function caused by occupational obstructive lung disease. This finding would seem to be supported by Dr. Kunstling's testimony quoted above that obstructive impairment caused by cotton dust exposure was an element in Mrs. Harrell's pulmonary condition.

The Commission, however, made a contradictory finding as to the cause of Mrs. Harrell's disability:

> [Mrs. Harrell] became disabled (from work) as a result of and following contracting non-occupational pulmonary fibrosis. The significant aspect of claimant's current pulmonary disability is as a result of her restrictive lung disease (pulmonary fibrosis) which arose independently of and following her voluntary retirement from the defendants' employ in 1969.

This finding is supported by other testimony of Dr. Kunstling that Mrs. Harrell's disease was mostly restrictive in nature.

In the face of these inconsistent fact findings, we think the proper course is to remand the case to the Commission to determine whether occupational or nonoccupational disease was the cause of Mrs. Harrell's disability. If the medical evidence would support a finding that her occupational, obstructive lung disease partially contributed to her disability and her nonoccupational, restrictive lung disease independently and not aggravated by occupational disease also partially contributed to her disability, she would be entitled to compensation for so much of her wage-earning incapacity as was attributable to her occupational disease. *See Rutledge*, 308 N.C. at 100, 301 S.E. 2d at 369; *Morrison v. Burlington Industries*, 304 N.C. 1, 14, 282 S.E. 2d 458, 467 (1981). In this case, however, the medical evidence does not permit any reasonable apportionment of her disability between occupational and nonoccupational disease. Dr. Kunstling characterized the task of "assessing the relative contribution of restrictive and obstructive elements" of Mrs. Harrell's disease as "speculative." Because the evidence will permit no such apportionment, plaintiff is entitled to an award for her entire disability if her occupational disease was a substantial and material factor in bringing about that disability. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 375, 64 S.E. 2d 265, 267 (1951); *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 92, 63 S.E. 2d 173, 176 (1951); *see* 1 Larson, Workmen's Compensation Law § 12-20 (1985) (nonoccupation-related disease of employee does not disqualify a claim if employment combined with disease to produce disability).

III.

Even if the Industrial Commission determines that Mrs. Harrell's wage-earning disability was not substantially due to occupational disease, the Commission may consider awarding compensation under N.C. Gen. Stat. § 97-31(24). G.S. 97-31 is a schedule of losses for which compensation is payable even if a claimant does not demonstrate loss of wage-earning capacity. Losses included in the schedule are conclusively presumed to diminish wage-earning ability. *Perry v. Hibriten Furniture Co.*, 296 N.C. 88, 94-95, 249 S.E. 2d 397, 401 (1978); *Watts v. Brewer*, 243 N.C. 422, 424, 90 S.E. 2d 764, 767 (1956); *Loflin v. Loflin*, 13 N.C. App. 574, 577, 186 S.E. 2d 660, 662, *cert. denied*, 281 N.C. 154, 187 S.E. 2d 585 (1972).

[3] Defendants argue no compensation may be awarded under G.S. 97-31 unless claimant suffers disablement or death as a result of occupational disease. They rely upon G.S. 97-52 which provides, "*Disablement or death* of an employee resulting from occupational disease . . . shall be treated as the happening of an injury by accident" within the meaning of the Workers' Compensation Act. N.C. Gen. Stat. § 97-52 (1979) (emphasis provided). Disablement (or death), they argue, is a condition that must occur before G.S. 97-52 makes occupational diseases compensable.

Defendant's argument is based on an overly technical reading of the statute. The purpose of G.S. 97-52 is to enable a worker to recover for disability caused by occupational disease under G.S. 97-29. The words "disablement or death" merely describe a condition that must occur before recovery may be had under G.S. 97-29. They do not predicate recovery under G.S. 97-31 upon disability. Recovery under that section, as noted above, is permitted regardless of actual ability or inability to earn wages. The obvious intent of the legislature in enacting G.S. 97-52 was to permit and not restrict recovery for occupational diseases. G.S. 97-52, therefore, does not require that disability be shown as a condition to recovery under the schedule for occupational disease.

The Court of Appeals, nonetheless, reversed the Commission's award under G.S. 97-31(24) and held that injury caused by occupational disease does not fall within the scope of that section. G.S. 97-31(24) provides:

> In case of the *loss of* or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000).

N.C. Gen. Stat. § 97-31 (1979) (emphasis added). The Court of Appeals reasoned that lung damage caused by occupational disease could not be a permanent "injury" within the meaning of G.S. 97-31(24) because injury is defined in G.S. 97-2(6) so as not to include injury caused by occupational disease. Although G.S. 97-52 specifies that occupational disease resulting in "disablement" satisfies the injury requirement, that section does not, in cases of nondisabling disease, prevent the exclusion of disease from the

definition of injury. Because, in its judgment, Mrs. Harrell's disease was not disabling, her disease was not an injury and G.S. 97-31(24) could not apply.

We need not decide whether the Court of Appeals is correct that "injury" caused by occupational disease is outside the scope of G.S. 97-31. The Industrial Commission did not make an award to Mrs. Harrell under G.S. 97-31(24) for "injury" to her lungs but for partial "loss of both her lungs."

[4] The only question that need concern us is whether "loss" as used in G.S. 97-31(24) means loss of use. This question is one of legislative intent. We believe the legislature intended for G.S. 97-31 to apply to occupational disease and hold that loss as used in G.S. 97-31(24) includes loss of use.

All the organs of the body have a function and when an organ ceases functioning in whole or in part, it is a loss to the body as surely as if it or that part which no longer functions were physically detached. In Mrs. Harrell's case, it is hard to imagine that the removal of that part of her lungs affected by occupational disease could have any greater debilitating effect upon her than the loss of the use of those affected parts. She testified:

> Since 1977 I haven't done very much housework . . . . There are other kinds of activities besides my housework that I sure can't do anymore . . . . I could get out and work in the garden and work in the yard and all. I can't do it no more. Since 1977 I haven't done anything.

Our interpretation that loss means loss of use is not novel nor is it inconsistent with the compensation scheme enacted by the legislature. The legislature has provided in G.S. 97-31(19) that with respect to the extremities and the optic organ, loss of use "shall be considered as the equivalent of loss." N.C. Gen. Stat. § 97-31(19) (1979).

If loss does not mean loss of use in G.S. 97-31(24) and the Court of Appeals is correct that "injury" as used in that same section does not include injury caused by disease, we will have foreclosed the schedule as a means of compensating victims of occupational disease. We do not believe the legislature intended such a result. G.S. 97-59 requires an employer to provide medical treatment "in cases in which awards are made for disability *or damage to organs* as a result of occupational disease. . . ." N.C.

Gen. Stat. § 97-59 (Supp. 1983) (emphasis provided). The legislature must have intended for occupational disease to be compensable under the schedule or it would not have expressly provided that medical treatments be provided both in cases of disability and in cases of damage to organs. Furthermore, we are mindful that the legislature intends for the Workers' Compensation Act to be construed liberally in favor of the injured worker to the end that its benefits not be denied upon technical, narrow or strict interpretation. *Cates v. Hunt Construction Co.*, 267 N.C. 560, 148 S.E. 2d 604 (1966). Finally, when confronted with this issue on another occasion, the Court of Appeals also decided the legislature intended G.S. 97-31 to apply in occupational disease cases. *Cook v. Bladenboro Cotton Mills*, 61 N.C. App. 562, 300 S.E. 2d 852 (1983); *see also Priddy v. Cone Mills*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982); *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982) (upholding awards in occupational disease cases under the schedule).

We hold, therefore, an award for partial loss of lung function does fall within the scope of G.S. 97-31(24).

[5] In summary, the Industrial Commission, on remand of this case, may find that claimant had a disability resulting from an occupational disease and make an award under G.S. 97-52 and 97-29. There is also evidence from which the Commission could find that no disability resulted from an occupational disease. It may then award compensation under 97-31(24) for partial loss of lungs. It cannot, however, make an award under both sections because compensation under G.S. 97-31 is "in lieu of all other compensation." N.C. Gen. Stat. § 97-31 (1979). *See Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985); *West v. Bladenboro Cotton Mills*, 62 N.C. App. 267, 302 S.E. 2d 645 (1983); *Cook v. Bladenboro Cotton Mills, supra.*

The decision of the Court of Appeals is reversed and the case remanded to that court for further remand to the Industrial Commission so that it may conduct further proceedings consistent with this opinion.

Reversed and remanded.

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

Justice MEYER dissenting.

I respectfully dissent from the majority opinion.

The claimant cannot recover under G.S. § 97-29 or G.S. § 97-30 because the Commission found that her disability *arose from and following her contraction of pulmonary fibrosis, a nonoccupational related condition,* which she contracted long after her retirement from the defendant's service. Likewise, claimant cannot recover under G.S. § 97-31(24) based upon findings of disability, presumed or proven, related to an occupational disease. If, indeed, disability exists, the recovery must be had pursuant to G.S. § 97-29 or 97-30.

This claimant has already received an award of $4,000 pursuant to G.S. § 97-31(24) of which the majority apparently approves, as it has not set that award aside but simply remanded the case for consideration of an *alternative* recovery under G.S. § 97-29 or 97-30. The majority apparently recognizes that if the claimant suffers disability (i.e., inability to earn wages) and recovers for total or partial disability under G.S. § 97-29 or 97-30, she cannot then recover under G.S. § 97-31(24), or vice versa. G.S. § 97-31 plainly provides that recovery thereunder "shall be in lieu of all other compensation." The majority clearly concedes that recovery cannot be had under both G.S. § 97-29 or 97-30 and G.S. § 97-31(24).

The North Carolina Workers' Compensation Act, as it relates to occupational diseases, is very specific and does not support the majority's conclusion. I need only repeat what this Court said in *Hansel v. Sherman Textiles*, 304 N.C. 44, 51-52, 283 S.E. 2d 101, 105 (1981):

> G.S. 97-52 provides in effect that disablement of an employee resulting from an "occupational disease" described in G.S. 97-53 shall be treated as the happening of an injury by accident. This section provides specifically:
>
> > The word "accident" . . . shall not be construed to mean a series of events in employment of a similar or like nature occurring regularly, continuously . . . whether such events may or may not be attributable to the fault of the employer and *disease attributable to such causes shall be compensable only if culminating in an oc-*

> *cupational disease mentioned in and compensable under this article.* (Emphasis added.)

G.S. 97-53 contains the comprehensive list of occupational diseases for which compensation is provided in the Act.

By the express language of G.S. 97-53, only the diseases and conditions enumerated therein shall be deemed to be occupational diseases within the meaning of the Act.

Byssinosis is not "mentioned in and compensable under" the Act, except by virtue of G.S. 97-53, which provides in pertinent part as follows:

> Section 97-53. Occupational diseases enumerated; . . . the following diseases and conditions only shall be deemed to be occupational diseases within the meaning of this Article:
>
> . . . .
>
> (13) Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

My interpretation of our Act is detailed in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981). It suffices here to say only that any disease, in order to be compensable, must be an *occupational disease*, or must be *aggravated or accelerated* by an occupational disease or by an injury by accident arising out of and in the course of the employment. G.S. § 97-53 (13); *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979); *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). We also said in *Hansel*: "The clear language of G.S. 97-53 is that for any disease, other than those specifically named, to be deemed an 'occupational disease' within the meaning of the Article, it must be 'proven to be due to,' causes and conditions as specified in that statute." *Hansel v. Sherman Textiles*, 304 N.C. at 52, 283 S.E. 2d at 105. I fail to see how the "significant contribution" principle can satisfy the "proven to be due to" requirement of the statute.

I also continue to adhere to my position that there is no basis in law or in fact for the proposition that "for the purposes of awarding workers' compensation benefits, there is no practical difference between chronic obstructive lung disease and byssinosis." There is indeed a vast practical difference in "chronic obstructive lung disease" and "byssinosis." Chronic obstructive lung disease can be due solely to any one or a combination of diseases such as asthma, emphysema, bronchitis, etc., which may be totally unrelated to an individual's occupation. It is correct to say that whether chronic obstructive lung disease is compensable depends upon other factors. In my view, those factors are aggravation or extenuation by conditions of the workplace. The claimant here does not have an occupational disease as defined in our Workers' Compensation Act because her condition is due to pulmonary fibrosis. It is obvious that whatever condition this claimant might have could not have been aggravated or accelerated by the inhalation of cotton dust because she had not been exposed to cotton dust during the numerous years of her retirement before the onset of her pulmonary fibrosis.

However, even if I could agree with the principles expressed in *Rutledge v. Tultex Corp./Kings Yarn*, 308 N.C. 85, 301 S.E. 2d 359 (1983), and that those principles are applicable to this claimant's situation, the medical evidence in this case does not meet the *Rutledge* requirement of "a significant contributing factor."

Even in *Rutledge*, the majority required that the occupation-related cause be "*a significant causal factor*" in the disease's development. Even the medical evidence most favorable to the claimant in this case does not meet the "significant" contribution test. The majority flatly holds that it is sufficient if the pulmonary impairment "could have been contributed to" by the occupation-related cause. The majority's acceptance of something less than the *Rutledge* standard is obvious, and its holding in this regard is internally contradictory. I quote from the majority opinion:

> In this case *there is sufficient evidence from which the Commission could have found that cotton dust exposure was a significant causal factor* in the development of Mrs. Harrell's obstructive lung disease. Dr. Kunstling testified: "She probably has obstructive impairment caused by cotton dust ex-

posure" and "I feel there is an element of pulmonary impairment present which *could have been contributed to* by her cotton dust exposure." The record, therefore, contains adequate support for the Industrial Commission's conclusion that Mrs. Harrell's entire obstructive lung disease was an occupational disease. (Emphasis added.)

In order to properly address what I believe to be the majority's primary error, it is necessary to recount briefly the procedural course of this claim prior to its reaching this Court.

The claimant filed a claim on 25 July 1979, seeking disability benefits for lung disease which she claimed was related to cotton dust in her prior textile mill employment. On 27 May 1980, Deputy Commissioner Lawrence B. Shuping, Jr., issued his opinion and award, wherein he found that the claimant had contracted an occupational disease, but that she was not disabled from work as a result of the occupational disease or any other physical condition until the year 1977, at which time she became disabled from work as a result of and following contraction of a nonoccupational pulmonary fibrosis. Deputy Commissioner Shuping concluded, as a result of the occupational disease which he found, that claimant had suffered permanent injury to two important internal organs and that it could reasonably be "presumed" that she had suffered a diminution of her future earning power by reason of such loss. The Deputy Commissioner subsequently awarded the claimant $4,000 for permanent damage to her lungs pursuant to the provisions of G.S. § 97-31(24). The Full Industrial Commission (Commissioner Robert S. Brown dissenting) affirmed the Deputy Commissioner's opinion and award.

The claimant appealed to the Court of Appeals from the decision of the Industrial Commission, and the defendants cross-appealed. Based upon the cross-appeals, the Court of Appeals held that the Industrial Commission had erred, as a matter of law, in awarding benefits for an occupational disease under the provisions of G.S. § 97-31(24). *Harrell v. Harriet & Henderson Yarns*, 56 N.C. App. 697, 289 S.E. 2d 846 (1982).

The claimant-appellant petitioned the Court of Appeals for a rehearing pursuant to Rule 31, and the rehearing was allowed. On 29 March 1983, the Court of Appeals entered an order rescinding

the previous order granting the petition for rehearing and denied the claimant's petition.

Any fair and impartial review of the evidence presented in this case will reveal overwhelming evidence in support of the Commission's finding that the claimant's presumed disability resulted entirely from a nonoccupational pulmonary fibrosis of unknown etiology. I would point out that the claimant had not been exposed to cotton dust since she last worked in a weave room, which was more than 16 years prior to her death, and she had not worked at all since her voluntary retirement from defendant's employment over 15 years ago. She was not examined by Dr. Kunstling, on whose testimony the majority relies, until 1979, some 10 years after she retired. The claimant's evidence tended to show that she had worked for many years in cotton mills and had last worked for defendant Harriet & Henderson Yarns in 1969. Her reason for leaving the mill employment was related to the transfer of her husband and was unrelated to her health. Thereafter, the claimant remained at home in order to care for her son. The claimant testified to the occurrence of "cold symptoms" prior to leaving the defendant's employ, but there was no evidence that she suffered disability, or severe breathing problems, until 1977.

Medical evidence presented at the hearing clearly showed that the claimant suffered from chronic lung disease which rendered her incapable of physical exertion. The medical evidence overwhelmingly attributed claimant's lung impairment primarily to nonoccupational "restrictive lung disease." There was some evidence, however, that claimant also suffered from "obstructive lung disease," which Dr. Ted R. Kunstling, of the Textile Occupational Disease Panel, thought "could have been contributed to by her cotton dust exposure." Dr. Kunstling further stated that it would be "speculative" for him to assess any relative contribution of obstructive impairment to the claimant's overall condition and stated that the tests "indicate that the impairment is restrictive" in nature.

The claimant's major exception involves that portion of the Full Commission's Finding of Fact No. 10, which states:

> . . . at which time she became disabled (from work) *as a result of* and following contracting *nonoccupational pulmo-*

nary fibrosis. The significant aspect of claimant's current pulmonary disability is as a result of her restrictive lung disease (pulmonary fibrosis) *which arose independent of and following her voluntary retirement from the defendant's employ* in 1969. (Emphasis added.)

Dr. Kunstling stated that "[p]ulmonary fibrosis is a process of scarring which occurs in the lungs . . . . It cannot be an end product of long-term exposure to cotton dust." He further stated his belief that the intervening process (pulmonary fibrosis) which had occurred (after the claimant left work) had contributed significantly to her pulmonary impairment. Additionally, his comment, contained within his written evaluation, specifically states that:

> This minor degree of airway obstruction (from cotton dust) would probably not be significantly disabling in the absence of restrictive lung disease.

Dr. Kunstling also testified that he believed the claimant to be unable of performing even light housework as the result of her impaired pulmonary function and that he believed the spirometric tests indicated that the claimant's impairment was restrictive. Dr. Kunstling's notes of 5 October 1979 also reflect the fact that in 1977 the claimant began experiencing increased difficulty with breathing, which he ascribed to her pulmonary fibrosis with moderate restrictive pulmonary impairment.

Dr. Allen H. Lee's notes also indicate that, to his knowledge as her family physician between 1949 and 1977, she had no respiratory complaint prior to 1977.

A third physician, Dr. Harvey Grode, testified with respect to the etiological factor behind the claimant's lung disease. He testified that:

> I did *not* arrive at a diagnosis of byssinosis with regard to Mrs. Harrell. . . . It is still my opinion that I prefer to look upon it as if *Mrs. Harrell were suffering from pulmonary fibrosis of unknown etiology.* (Emphasis added.)

Additionally, the claimant introduced into evidence medical records from Eastern North Carolina Hospital in Wilson, North Carolina. Those records contained the opinions of several physicians who treated the claimant during 1978. One physician, Dr. H. Banerjee, stated:

> X-ray of the chest shows peribronchial fibrosis, particularly at the bases, extending up to the costodiaphragmatic recesses, from the cardiac margins. She had been investigated in the past, and was proved to be tuberculosis negative. There are some granulomatous appearances in the rest of the lung field, which are faint, *and this corresponds to her history of having worked on a farm, especially with all kinds of vegetables, tobacco, and even in close contact with the soil.*

Based on the foregoing, it is readily apparent that there is overwhelming evidence to support the Commission's finding that the claimant's disability resulted from a nonoccupational related pulmonary fibrosis. The evidence overwhelmingly *rebuts* any finding that the claimant had contracted obstructive pulmonary disease as a result of occupational exposure. There is not one scintilla of evidence to indicate that at the time of claimant's retirement she was suffering from any permanent impairment, of any form. Specifically, the claimant testified that around the time she quit work in 1969, she was having cold symptoms, but that she left work because her husband had moved away and taken another job and she needed to be around to take care of a sick son. Dr. Kunstling's testimony indicated that the claimant was not noticeably impaired from performing work at the time she stopped in 1969 and that the history which he had received indicated that the claimant was more symptomatic in 1979 than she had been at the time of her retirement 10 years earlier. This essentially echoed the remarks which Dr. Kunstling had made in his formal evaluation report, wherein he stated, "Mrs. Harrell's history suggests that she was not significantly impaired at the time she stopped working in 1969 . . . ."

Additionally, Dr. Allen H. Lee of Selma, North Carolina, the claimant's family physician, wrote a short note (which was stipulated into evidence) in which he stated that he had known the claimant since 1949 and that "from 1949 until 1977, she had no lung disease that I am aware of. . . . As far as I know, she had no lung symptoms before July 1977."

There is a plethora of evidence to support the finding that claimant's impairment arose as the result of pulmonary fibrosis

and not as the result of obstructive lung disease due to cotton dust exposure.

The consensus of all the testimony with respect to the nature of the claimant's impairment is perhaps best set forth in the concluding paragraph of Dr. Kunstling's report:

> It is my feeling that Mrs. Harrell was not disabled at the time of her retirement, that her restrictive pulmonary impairment is not characteristic of cotton dust exposure, but that she may have a *minor* element of airway obstruction which *could have been* exacerbated by exposure to cotton dust. This minor degree of airway obstruction would probably not be significantly disabling in the absence of restrictive lung disease. (Emphasis added.)

This testimony assuredly does not meet the "significant causal effect" test.

I would also note that I find some aspects of the majority opinion quite confusing. The opinion seems to approve apportionment in this language:

> [W]e think the proper course is to remand the case to the Commission to determine whether occupational or nonoccupational disease was the cause of Mrs. Harrell's disability. If the medical evidence would support a finding that her occupational, obstructive lung disease partially contributed to her disability and her nonoccupational, restrictive lung disease independently and not aggravated by occupational disease also partially contributed to her disability, she would be entitled to compensation for so much of her wage-earning incapacity as was attributable to her occupational disease.

Yet it seems to actually hold that the facts here do not permit apportionment:

> In this case, however, the medical evidence does not permit any reasonable apportionment of her disability between occupational and nonoccupational disease. Dr. Kunstling characterized the task of "assessing the relative contribution of restrictive and obstructive elements" of Mrs. Harrell's disease as "speculative."

I also find the majority opinion confusing on the question of whether disability (i.e., inability to earn wages) is required in this claimant's situation. The majority opinion seems to require a showing of "disability":

> Because the evidence will permit no such apportionment, plaintiff is entitled to an award for her entire disability if her occupational disease was a substantial and material factor in bringing about that disability.

Yet, the majority seems to go further and hold that the existence of a "disability" is not a predicate to recovery:

> Disablement (or death), they argue, is a condition that must occur before G.S. 97-52 makes occupational diseases compensable.
>
> Defendant's argument is based on an overly technical reading of the statute. The purpose of G.S. 97-52 is to enable a worker to recover for disability caused by occupational disease under G.S. 97-29. The words "disablement or death" merely describe a condition that must occur before recovery may be had under G.S. 97-29. They do not predicate recovery under G.S. 97-31 upon disability. Recovery under that section, as noted above, is permitted regardless of actual ability or inability to earn wages.

Frankly, I am unable to determine what the majority holds in this regard.

I would hold that the Court of Appeals was correct in refusing to allow the award of benefits pursuant to G.S. § 97-31(24) because it was based on a finding of disability (i.e., inability to earn wages) related to an occupational disease. If there is disability, recovery must be pursuant to G.S. § 97-29 or 97-30.

I would also hold that the Court of Appeals was correct in refusing to remand to the Industrial Commission for an award pursuant to G.S. § 97-29 or 97-30 because the Commission had already found that claimant's disability *arose from and following the contraction of nonoccupational related pulmonary fibrosis.*

Chief Justice BRANCH joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. CALVIN BROWN

No. 358A84

(Filed 5 November 1985)

1. **Criminal Law § 138.21— aggravating factor—especially heinous, atrocious or cruel—evidence sufficient**

There was sufficient evidence in a prosecution for second degree murder to find as an aggravating factor that the offense was especially heinous, atrocious or cruel where defendant led his unsuspecting victim into a room in which he was surprised by defendant's codefendant brandishing a gun, defendant and the codefendant constrained the victim to plead for his life while they held the gun on him, bound his legs and arms together with strips of electric cord and tied them to a bedpost, forced a towel down his throat and secured it with a scarf wound around his mouth and nose, rummaged through his pockets and robbed him, carted him to a basement and dumped him there, the defendant's medical expert stated that the victim suffered pain, experienced fear and was traumatized for up to an hour, and an autopsy showed that the victim died of asphyxiation. G.S. 15A-1340.4(a)(1)f.

2. **Criminal Law § 138.28— aggravating factor—prior conviction—nolo contendere—no error**

The trial court did not err when sentencing defendant for second degree murder by finding as an aggravating factor that defendant had a prior conviction for a crime punishable by imprisonment for more than sixty days where defendant had pleaded nolo contendere to a charge of failure to provide child support. The definitional section of the Fair Sentencing Act makes a plea of no contest a prior conviction for purposes of sentencing. G.S. 15A-1340.2(4), G.S. 15A-1340.4(a)(1)o.

3. **Criminal Law § 138.40— second degree murder—confession after arrest—finding of mitigating factor not precluded**

The trial court was not precluded by *State v. Graham*, 309 N.C. 587 from finding as a mitigating factor that defendant had voluntarily acknowledged wrongdoing when his confession came after his arrest for murder. Because defendant acknowledged wrongdoing after he was arrested, he had no claim as of right to this mitigating factor; but the confession was not so tardy as to preclude consideration of it as an early acknowledgment of wrongdoing.

4. **Criminal Law § 138.40— homicide—mitigating factor—acknowledgment of wrongdoing—failure to find no abuse of discretion**

The trial court did not abuse its discretion when sentencing defendant for second degree murder by refusing to find as a mitigating factor that defendant had voluntarily acknowledged wrongdoing in an early stage of the proceeding where officers extracted defendant's statement only after substantial time and effort and repeated refusals on the part of defendant to admit wrongdoing in connection with the offense. One purpose of the mitigating factor is to allow a sentencing judge to give some credit to a defendant who by early confessions spares law enforcement officers expense and trouble which might otherwise be

required, and another purpose is to allow a sentencing judge to recognize that the earlier one admits responsibility, the better one's chance of rehabilitation.

5. Criminal Law § 138.33— mitigating factor—passive participant—abuse of discretion in not finding

The trial court did not abuse its discretion when sentencing defendant for second degree murder by refusing to find as a mitigating factor that defendant was a passive participant in the offense where defendant, as a part of a prearranged plan, lured the victim into a bedroom; helped bind, gag and rob him; helped dispose of his body; and each codefendant implied that he was absent from the room when the victim was murdered. G.S. 15A-1340.4(a)(2)c.

6. Criminal Law § 138.41— mitigating factor—good character or reputation in the community—evidence insufficient

The uncontradicted evidence of a defendant convicted of second degree murder did not compel a finding of the mitigating factor that he was a person of good character or reputation in the community where his evidence was that he was a high school student of good standing, and the mother of his child testified that she had known defendant since he was twelve, that she and defendant remained good friends, that she had never known defendant to be violent or mean around her, and that he was a nice guy.

7. Criminal Law § 138.13— sentencing hearing—attitude of judge

The trial judge's questioning of defendant's expert witness during a sentencing hearing for second degree murder did not indicate a failure to maintain an impartial attitude where the questions of the judge were directed toward matters relevant to the issue of sentencing but which were not rendered altogether clear by the testimony, including whether the defendant battered the victim or caused him to suffer pain at or before his death. The inquiry was for the purpose of insuring the judge that he carried out his responsibility for imposing an appropriate sentence.

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

APPEAL by defendant pursuant to N.C. Gen. Stat. § 7A-27(a) from a sentence of life imprisonment imposed by *Seay, J.*, at the 19 January 1984 Criminal Session of FORSYTH Superior Court upon defendant's plea of guilty to second degree murder. Defendant's motion to bypass the Court of Appeals on a consecutive two-year sentence upon a guilty plea to possessing stolen property allowed on 10 July 1984.

Rufus L. Edmisten, Attorney General, by Henry T. Rosser, Assistant Attorney General, for the state.

E. Vernon F. Glenn, Attorney for defendant appellant.

EXUM, Justice.

This appeal arises under the Fair Sentencing Act, N.C. Gen. Stat. § 15A-1340.4 (1983). Defendant contends the sentencing judge erred in finding as aggravating factors during sentencing: (1) The offense was especially heinous, atrocious or cruel, G.S. 15A-1340.4(a)(1)f; and (2) Defendant had a prior conviction for an offense punishable by more than sixty days' imprisonment, *id.* at (a)(1)o. Defendant also contends the judge erred in failing to find as factors in mitigation of his offenses that defendant (1) voluntarily acknowledged wrongdoing in connection with the offense at an early stage of the criminal process, *id.* at (a)(2)l; (2) was a passive participant or played a minor role in the commission of the offense, *id.* at (a)(2)c; (3) has been a person of good character or good reputation in the community in which he lives, *id.* at (a)(2)m. He contends finally the judge failed to maintain an impartial attitude during the sentencing hearing.

I.

The following evidence was presented at the sentencing hearing. On or about 28 February 1983 defendant lured the victim, David Shelton, to codefendant Willie Lilly's home and into a bedroom. Defendant and Shelton were alone for a few minutes. Lilly then entered with a pistol and pointed it at Shelton who began pleading for his life. Defendant and Lilly forced Shelton's arms and legs together and tied them to a bedpost. They stuffed a towel into his mouth, secured it with a scarf knotted at the back of his head and robbed him. Defendant and Lilly wrapped the victim in two blankets, put him in a grocery cart, and wheeled him to the basement of the house. There they stood him on his head, with his face against the dirt floor, and his legs propped up against the wall.

Defendant and Lilly next went to Shelton's residence and stole some of his personal property. Later that day Lilly was stopped driving Shelton's automobile and arrested for driving without a valid license. Because Shelton had been reported missing since February 25, the police questioned Lilly about his disappearance. He told them that Shelton had last been seen with defendant. The police were unable to locate defendant for questioning at that time, but two weeks later defendant and Lilly were arrested driving a stolen vehicle. When questioned, defend-

ant initially denied knowing anything about Shelton, but after hearing that the police had been told that he was one of the last persons to be seen with the victim, he made a statement.

Acting on defendant's statement, the police obtained a search warrant and found the victim's body in the basement of Lilly's home. An autopsy showed that although there was evidence of blows to the victim's head, he died of asphyxiation caused by either suffocation or strangulation.

In the opinion of defendant's medical expert, a physician, suffocation provided a plausible explanation for the victim's death. Although there were hemorrhages about the neck, other evidence of external pressure to the neck was lacking. He also stated that since the body was found in a feet-up, head-down position, the hemorrhages about the neck could have been caused by blood settling toward the lowest part of the body after death, rather than by strangulation. He could not say for certain, however, whether he was strangled or merely suffocated. Defendant's expert also could not determine when or in what manner the blows to the victim's head were inflicted. In his opinion they could have been inflicted any time before or after death, during the robbery, the ride to the basement or when the victim was left on the floor there. He testified the victim suffered no great physical outrage before he died. Responding to questions by the sentencing judge, the doctor testified that Shelton had "obviously experienced physical pain" and "was in a state of fear and . . . traumatized . . . for at least a half an hour to perhaps an hour." He could not say whether death came before the victim was moved to the basement, or whether the towel and scarf completely blocked the victim's nose and mouth.

Defendant also introduced character evidence through the mother of his child. She testified that she thought defendant was a nice person and that she had never known him to be violent or mean. She also testified that they had remained friends despite her having filed an action of nonsupport against him. She did not, however, testify to defendant's reputation in the community in which he lived. Defendant also offered evidence that he was a student in good standing in his junior year in high school.

The state introduced evidence at the sentencing hearing that defendant had pled *nolo contendere* to the charge of nonsup-

port—an offense punishable by a sentence of no more than six months' confinement.

On the basis of this evidence the sentencing judge found as aggravating factors that the murder was especially heinous, atrocious, or cruel, G.S. 15A-1340.4(a)(1)f, and that defendant had a prior conviction, G.S. 15A-1340.4(a)(1)o. Finding no mitigating factors, he increased defendant's sentence for second degree murder beyond the presumptive term of fifteen years to life imprisonment.

II.

The Fair Sentencing Act sets forth presumptive prison terms for certain felonies. A judge may vary a sentence from the presumptive term if he makes appropriate findings of aggravating or mitigating factors. G.S. § 15A-1340.4. Defendant raises several assignments of error with respect to findings by the sentencing court of factors in aggravation and its failure to find factors in mitigation.

A.

[1] Defendant first argues the trial judge erred in finding as an aggravating factor that the offense was especially heinous, atrocious or cruel. G.S. 15A-1340.4(a)(1)f. Defendant contends the evidence was insufficient to support such a finding.

In determining whether an offense is especially heinous, atrocious or cruel, "the focus should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983) (emphasis in original deleted). A factor bearing on physical and psychological suffering is the length of time between a defendant's acts of violence and the victim's death. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

We believe there is sufficient evidence in this case from which the sentencing judge could find that the victim suffered both psychologically and physically in a manner not normally present in second degree murders. Defendant led his unsuspecting victim into a room in which he was surprised by defendant's codefendant, Willy Lilly, brandishing a gun. Defendant and Lilly

constrained Shelton to plead for his life while they held the gun on him. They bound his arms and legs together with strips of electric cord and tied them to a bedpost. They forced a towel down his throat and secured it with a scarf wound around his mouth and nose. They rummaged through his pockets and robbed him. Then they carted him to the basement and dumped him there. It is fair to infer from these facts that the victim suffered extraordinary physical and emotional distress during this ordeal before he finally died of asphyxiation.

Defendant and Lilly stated to a police officer they thought the victim had died 15 to 20 minutes after he was tied to the bedpost and robbed. The defendant's medical expert stated the victim suffered pain, experienced fear and was traumatized for up to an hour.

We believe the foregoing constitutes sufficient evidence of both psychological and physical suffering beyond that normally present in the offense of second degree murder. Judge Seay, therefore, did not err in finding the offense to be especially heinous, atrocious or cruel.

[2] Defendant also argues that the sentencing judge erred in treating his plea of *nolo contendere* to a charge of failure to provide child support as a prior conviction for a crime punishable by imprisonment for more than 60 days and an additional aggravating factor under G.S. 15A-1340.4(a)(1)o. Defendant contends the *nolo contendere*, or a "no contest," plea usually establishes guilt only for the purpose of imposing a sentence in the case in which the plea is entered but may not be treated as a conviction for purposes of other criminal actions. The definitional section of the Fair Sentencing Act, however, makes a plea of no contest a prior conviction for purposes of sentencing. It provides "[a] person has received a prior conviction when he . . . has entered a plea of guilty or *no contest* to a criminal charge . . . ." G.S. 15A-1340.2(4) (emphasis added).

Judge Seay, therefore, did not err in finding the defendant's prior plea of *nolo contendere* as an aggravating factor for purposes of sentencing in this case.

B.

[3] Defendant further contends the trial court erred in not finding three mitigating factors. Defendant first claims that prior to arrest or at early stage of the criminal process, he voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. G.S. 15A-1340.1(a)(2)l.

Defendant was arrested driving a stolen vehicle on 15 March 1983, taken to the police station, and charged with possession of that vehicle. After discussing with defendant the matter of the stolen vehicle, the police questioned him about David Shelton's disappearance. Although defendant at first denied any knowledge of Shelton's disappearance, he eventually made a statement implicating himself. On the basis of defendant's statement the police located Shelton's body. The next day a warrant for murder issued from the magistrate's office, and defendant was indicted on that offense on 5 July 1983.

The state contends that under *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), in order for a confession to be considered as a mitigating factor, it must be made before the first of either of these events: arrest, issuance of a warrant or return of an indictment. Defendant's confession was not timely because his arrest was, of these events, the first to occur, but he did not acknowledge wrongdoing until after his arrest. The state relies upon language in *Graham* which states:

> We hold that if defendant's confession was made prior to the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first, he is entitled to a finding of this statutory, mitigating circumstance.

Id. at 590, 308 S.E. 2d 314.

The state misconstrues our language in *Graham*. As we observed in *State v. Hayes*, 314 N.C. 460, 472-73, 334 S.E. 2d 741, 748-49 (1985), *Graham* held "that a defendant was *entitled* to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, the return of a true bill of indictment or presentment, or prior to arrest, *whichever comes first.*" That a defendant's confession comes after his arrest does not automatically disqualify it as a voluntary ac-

knowledgment of wrongdoing at an early stage of the criminal process. Rather, "it [is] for the trial judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process to qualify as a mitigating factor." *Id.* Because defendant acknowledged wrongdoing after he was arrested, he had no claim as of right to this mitigating factor; but the confession was not so tardy as to preclude consideration of it as an early acknowledgment of wrongdoing.

[4] We must decide whether Judge Seay abused his discretion in failing to find defendant's statement was made at an early stage of the criminal process. A decision entrusted to a trial judge's discretion may be reversed only if it is "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985), or so arbitrary that it could not have been a reasoned decision. *State v. Wilson*, 313 N.C. 516, 538, 330 S.E. 2d 450, 465 (1985). In deciding whether Judge Seay abused his discretion, we note that one purpose of this mitigating factor is to allow a sentencing judge to give some credit to a defendant who by early confession spares law enforcement officers expense and trouble which might otherwise be required to resolve the crime. Another purpose is to allow a sentencing judge to recognize that the earlier one admits responsibility, the better one's chance of rehabilitation.

When police questioned defendant about Shelton's disappearance, defendant "denied knowing him and anything about him." Even after he was confronted with Lilly's statement that he was one of the last people to be seen with Shelton, defendant apparently maintained his innocence. The interrogating officer testified that only "[l]ater through talking to him he gave us a confession." The police were able to obtain a search warrant which led to the discovery of Shelton's body on the basis of defendant's statement. They extracted this statement from defendant, however, only after substantial time and effort and repeated refusals on the part of defendant to admit wrongdoing in connection with the offense. The sentencing judge could have found that whatever consideration defendant earned by helping police locate Shelton's body was offset by his earlier persistent denials of wrongdoing. We cannot say that Judge Seay's failure to find defendant's statement to be an early acknowledgment of wrongdoing has no ra-

tional basis and hold he did not abuse his discretion by not finding this mitigating factor. *White v. White*, 312 N.C. 770, 778, 324 S.E. 2d 829, 833 (1985).

In rendering this holding, we nevertheless stress that judges at the sentencing level should be favorably disposed towards finding this factor in mitigation when it is supported evidentially. Early acknowledgment of wrongdoing should be strongly encouraged for the reasons noted above. Our holding here results from our reluctance in sentencing matters, which require a careful exercise of judgment on the part of the sentencing judge, to upset that judgment where some rational basis exists for it in the record.

[5] Defendant submits as a second mitigating factor that he was a passive participant in the commission of the offense. G.S. 15A-1340.4(a)(2)c. We find no error in the sentencing judge's failure to find this mitigating factor. Although defendant acknowledged robbing Shelton and helping dispose of his body, he claimed that after he and his codefendant Lilly bound and gagged Shelton, he left Lilly alone with Shelton for 15 or 20 minutes and returned to find Shelton dead. Lilly corroborated defendant's story in every respect, except that he claimed it was he, not Brown, who left the room and returned to find Shelton dead. Each defendant implied, therefore, that while he was absent from the room the other defendant murdered Shelton. In the face of such contradictory evidence, the trial judge was not compelled to find that defendant was a passive participant in the commission of the offense. It is the duty of the finder of fact, not this Court, to resolve disputed questions of fact. *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). Defendant, moreover, as part of a prearranged plan lured Shelton into Lilly's bedroom. He helped bind, gag and rob Shelton, and then helped dispose of his body. This evidence tends to show that far from being a passive participant, defendant played a major role in the commission of the crime.

[6] Defendant's final argument is that the sentencing judge erred in not finding as a mitigating factor that defendant was a person of good character or reputation in the community in which he lives. G.S. 15A-1340.4(a)(2)n. Defendant offered as a character witness the mother of his child. She testified she had known de-

fendant since he was twelve and that she and defendant remained good friends at the time of the hearing. She also testified without contradiction that she had never known defendant to be violent or mean around her and that he "was a nice guy." This and testimony that he was a high school student of good standing was the sole evidence offered on defendant's character.

In *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), we said:

> [W]hen a defendant argues, as in the case at bar, that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences as to the contrary can be drawn,' and that the credibility of evidence 'is manifest as a matter of law.'

Id. at 219-20, 306 S.E. 2d at 455 (citations omitted).

Defendant's character witness did not testify to defendant's reputation in the community. Her testimony related to her personal observations of defendant—that she thought him to be a nice person and never violent or mean to her. With respect to defendant's good character, we cannot say that this "evidence so clearly establishes the fact in issue that no reasonable inferences . . . to the contrary can be drawn." *Id.* In this case, as in *State v. Taylor*, 309 N.C. 570, 308 S.E. 2d 302 (1983), defendant's character witness testified, in essence, that defendant was well behaved around her. What we said in that case applies equally well here. "Good character, though, 'is something more than an absence of bad character.'" *Id.* at 577, 308 S.E. 2d at 307-08 (quoting *In re Applicants for License*, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926)). Defendant's evidence does not establish the fact of his good character or reputation in his community so clearly as to compel a finding of this mitigating circumstance.

III.

[7] Defendant's final assignment of error is that the sentencing judge failed to maintain an impartial attitude throughout the sentencing hearing. In support of this argument defendant cites "the manner in which he cross-examined the expert witness during the

sentencing hearing." A trial judge may examine witnesses called by either party for the purposes of clarifying their testimony. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). Further, since the sentence to be imposed rests ultimately and solely with the sentencing judge, he or she should be given even wider latitude in asking relevant questions than might ordinarily be permitted during trial when deliberation of guilt is made by the jury. Our examination of the transcript reveals that the questions of the sentencing judge were directed towards matters relevant to the issue of sentencing but which were not rendered altogether clear by the testimony. These matters included whether the defendant battered the victim or caused him to suffer pain at or before his death. That Judge Seay's inquiry happened to uncover answers prejudicial to defendant does not alone demonstrate any bias on the part of Judge Seay. Judge Seay's inquiry was, instead, for the purpose of insuring himself that he carried out his responsibility for imposing an appropriate sentence. This assignment of error is overruled.

For the reasons stated above, we find in defendant's sentencing hearing

No error.

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

JULIUS R. CAUBLE v. CITY OF ASHEVILLE

No. 150PA84

(Filed 5 November 1985)

1. **Penalties § 1; Schools § 1— fines for overtime parking—breach of State penal law—use for county schools**

The money penalty collected by the City of Asheville from a motorist who violates its ordinance prohibiting overtime parking constitutes a penalty or fine collected for a breach of a State penal law although the motorist has not been convicted for violating G.S. 14-4. Therefore, the "clear proceeds" of funds received from overtime parking violations must be paid to the Buncombe County Finance Officer for distribution pursuant to G.S. 115C-437 (replacing former G.S. 115-100.35).

2. Penalties § 1; Schools § 1— fines for overtime parking—clear proceeds—deductions for costs of collection

Reasonable costs of collection may constitutionally be deducted from the gross proceeds of the fines collected by a municipality for overtime parking in determining the "clear proceeds" of such fines which must be paid by the municipality to the county finance officer for maintaining free public schools. However, the costs of collection do not include the costs associated with enforcing the ordinance but are limited to the administrative costs of collecting the funds. Art. IX, § 7 of the N. C. Constitution.

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

Justice EXUM dissenting.

Justice MEYER joins in this dissenting opinion.

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of the unanimous decision of the Court of Appeals, reported at 66 N.C. App. 537, 311 S.E. 2d 889 (1984), reversing and remanding the judgment entered by *Lewis, J.*, on 14 October 1982 at Asheville, BUNCOMBE County. The judgment was entered out of session pursuant to a stipulation of the parties.

Swain, Stevenson and Freeman, by Joel B. Stevenson and Robert S. Swain, for plaintiff-appellant.

Patla, Straus, Robinson & Moore, P.A., by Victor W. Buchanan and Harold K. Bennett, for defendant-appellee.

Tharrington, Smith & Hargrove, by Richard A. Schwartz and Ann L. Majestic, for Amicus Curiae North Carolina School Boards Association, Inc.

Fred P. Baggett and Laura Kranifeld, for Amicus Curiae North Carolina League of Municipalities.

BRANCH, Chief Justice.

This action was brought in the name of plaintiff, for himself, and for the citizens, residents and taxpayers of the City of Asheville to compel the City of Asheville to pay into the County School Fund of Buncombe County all fines and forfeitures paid for overtime parking to be used exclusively for maintaining free public schools in Buncombe County.

At a pretrial conference held before Judge Robert D. Lewis, Resident Superior Court Judge of the Twenty-Eighth District, it was stipulated, *inter alia*,

> that this civil action would be tried in two steps. First, a hearing would be held to determine whether or not Article IX, Section 7 of the Constitution of North Carolina applies to the civil penalties for overtime parking. If the Court should rule in favor of the Plaintiff in that respect, a second hearing would be held at which a determination of the 'clear proceeds' of the civil penalties could be made.

Defendant in apt time moved for summary judgment and the motion was heard by Judge R. Michael Bruce at the 23 October 1978 Civil Session of Buncombe County Superior Court. After considering the documents introduced, stipulations of the parties and argument of counsel, Judge Bruce, after noting that there remained an unresolved issue, found facts, entered conclusions of law, and ordered that

> the Board of Education of the County of Buncombe have and recover of the Defendant City of Asheville an amount equal to the clear proceeds of all penalties, forfeitures, or fines collected for the violation of parking ordinances under color of the provisions of Ordinance 914 and Ordinance 384 of the City of Asheville at such time as said amounts have been determined pursuant to the provisions of this Order.

It was further ordered that until final determination of this litigation all proceeds collected under the City's Ordinance 914 be retained in a separate fund.

Defendants appealed and the Court of Appeals affirmed the judgment of the trial court. *Cauble v. City of Asheville*, 45 N.C. App. 152, 263 S.E. 2d 8 (1980). This Court allowed defendant's petition for discretionary review and affirmed the principal issue. We reversed that part of the Court of Appeals' decision which affirmed the portion of Judge Bruce's order directing that the "clear proceeds" be paid directly to the Board of Education of Buncombe County rather than to the Buncombe County Finance Officer for distribution according to N.C.G.S. § 115-100.35 (repealed 1981). The cause was remanded for entry of judgment consistent with the Court's opinion. *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E. 2d 258 (1980) (*Cauble II*).

Upon remand this matter came on to be heard before Judge Robert D. Lewis, Resident Judge of the Twenty-Eighth Judicial District, who, sitting without a jury, reviewed the record proper, received additional evidence, heard argument of counsel and after finding additional facts, in pertinent part, concluded as a matter of law that:

> 1. The term "clear proceeds" means the amount collected by the City for overtime parking and delinquent overtime parking violations undiminished by direct and indirect costs or expenses of collection.

Defendant appealed, assigning as error the trial judge's definition of the term "clear proceeds." In a unanimous opinion by Chief Judge Vaughn (later Associate Justice), reported at 66 N.C. App. 537, 311 S.E. 2d 889 (1984) (*Cauble III*), the Court of Appeals defined "clear proceeds" and formulated a test for determining the "clear proceeds" of monies received from all parking violations. The Court of Appeals thereupon reversed the trial court's definition of "clear proceeds" and the trial court's holding that the proceeds from all parking violations collected between 22 April 1975 and 30 June 1982 was *res judicata* upon the Board of Education. The cause was remanded for an accounting consistent with the Court of Appeals' definition of "clear proceeds."

[1] Plaintiff Julius R. Cauble petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31(c) and we allowed his petition on 28 August 1984. After hearing oral arguments this Court ordered that the parties submit new briefs addressing the following question: "Does the money penalty collected by the City of Asheville from a motorist who violates its ordinance prohibiting overtime parking constitute a penalty or fine collected for the breach of a State penal law, if the motorist has not been convicted for violating N.C.G.S. 14-4?" *Cauble v. City of Asheville*, --- N.C. ---, 326 S.E. 2d 630 (1985).

We had heretofore answered this question in *Cauble II*. There we stated that:

> The Asheville Code makes it unlawful to park overtime. G.S. 14-4 specifically makes criminal the violation of a city ordinance, unless 'the council shall provide otherwise' pursuant to G.S. 160A-175(b). Thus, where, as here, the ordinances do

> not provide otherwise, a person who violates the overtime parking ordinance also breaches the penal law of the State. . . . Consequently, fines collected for overtime parking constitute fines collected for a breach of the penal laws of the State. We, therefore, hold that the clear proceeds of all penalties, forfeitures and fines collected for breaches of the ordinances in question remain in Buncombe County and be used exclusively for the maintenance of free public schools.

Id. at 345, 271 S.E. 2d 261 (citations omitted).

We reaffirm that holding and therefore answer the question posed in the affirmative.

[2] Having determined that the "clear proceeds" of all funds received from traffic violations must be paid to the Buncombe County Finance Officer for distribution pursuant to N.C.G.S. § 115C-437 (replacing former N.C.G.S. § 115-100.35), we now turn to the original principal question presented by this appeal, that is, the meaning and determination of "clear proceeds."

Article IX, Section 7 of the North Carolina Constitution provides as follows:

> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

In *State v. Maultsby*, 139 N.C. 583, 51 S.E. 956 (1905), the Court considered a statute which provided that an informant should receive one half of the fine imposed as a result of a conviction based on information furnished by him. Holding the statute to be unconstitutional, the Court, in part, stated:

> [I]t is otherwise as to 'fines.' From their very nature, being punishment for violation of the criminal law, they are imposed in favor of the State and belonging to the State, the General Assembly cannot appropriate the clear proceeds of fines to any other purpose than the school fund. By 'clear proceeds' is meant the total sum *less only the sheriff's fees*

> *for collection*, when the fine and costs are collected in full. This also has been fully discussed and settled. *Board of Education v. Henderson*, 126 N.C., 689; *School Directors of Asheville*, 137 N.C., 508.

Id. at 585, 51 S.E. at 956 (emphasis added).

Our Court considered the disposition of funds upon forfeiture of an appearance bond in a criminal case in *Hightower v. Thompson*, 231 N.C. 491, 57 S.E. 2d 763 (1950). There the Court held that "[t]he clear proceeds of this forfeiture are for the use of the public school fund; . . . and the 'clear proceeds' have been judicially defined as the amount of the forfeit less the cost of collection, meaning thereby the citations and process against the bondsman usual in the practice." *Id.* at 493-94, 57 S.E. 2d at 765.

We find this interesting and pertinent language in *School Directors v. Asheville*, 137 N.C. 503, 50 S.E. 279 (1905). We quote:

> If we adopt the argument of counsel, we must hold that *fines* are in the same class as penalties, and, following *Katzenstein's case*, we would be forced to the conclusion that the disposition of both are entirely within the power of the Legislature, which nullifies the clearly expressed purpose of the people, that they shall go into the county school fund. If we stop short of this conclusion and limit the words 'clear proceeds' to the power to dispose of only a part of the fine, we might well say that the power of the Legislature is exhausted by giving to the clerk or sheriff a reasonable commission for collecting the fines—to be deducted from the amount before paying it over to the treasurer of the school fund. The words 'clear proceeds' could thus have full force and operation without giving the unlimited power claimed by the defendant. By reference to section 3739 of The Code, regulating the fees of the clerk, we find that he is given '5 per cent commission on all fines, penalties, amercements, and taxes paid to him by virtue of his office.' We might well conclude that the 95 per cent of the fines constitutes the 'clear proceeds,' and that this, or such other reasonable commission as should be fixed, exhausted the power of the Legislature to appropriate the amount so collected and was in the contemplation of the draftsman in using the term 'clear proceeds' as applied to fines.

Id. at 511-12, 50 S.E. at 282.

The Court of Appeals interpreted these cases to hold that the term "clear proceeds" as used in Article IX, Section 7 is synonymous with net proceeds and further concluded that the costs of collection should be deducted from the gross proceeds of monies received for traffic violations in order to determine the net or "clear proceeds." *Cauble III.* We agree with the reasoning of the Court of Appeals and therefore hold that reasonable costs of collection constitutionally may be deducted from the gross proceeds of the fines collected by the City of Asheville for overtime parking. There remains the question of what deductions are permissible.

The Court of Appeals in *Cauble III,* after noting that the General Assembly had not seen fit to provide municipalities with a formula for determining "clear proceeds,"[1] held "[t]hat the test

1. Subsequent to the filing of the opinion in *Cauble III* the General Assembly enacted legislation affecting the proceeds of parking violations.

On the 15th day of July 1985 the General Assembly ratified Chapter 764, H.B. 533, entitled "An Act to Classify Minor Traffic Offenses as Infractions and to Provide a Procedure for the Disposition of Such Infractions by the Courts." The Act, *inter alia,* amended Chapter 14 of the General Statutes by adding a new section 14-3.1 defining an infraction as follows: an infraction is a non-criminal violation of the law not punishable by imprisonment. N.C.G.S. § 14-4 was also amended by adding a new subsection (b) which provided that violators of parking ordinances shall be responsible for an infraction and shall be required to pay a *penalty* of not more than $50.00. The amending act also provided that "[t]he proceeds of penalties for infractions are payable to the county in which the infraction occurred for the use of the public schools." This act was made effective on 1 July 1986.

On the 17th day of July 1985 the General Assembly enacted Chapter 779, H.B. 1079. This bill provides:

"AN ACT TO CLARIFY G.S. 115C-437 BY ADDING A DEFINITION OF CLEAR PROCEEDS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 115C-437 is amended by adding the following language at the end of the first sentence: 'The clear proceeds of all penalties and forfeitures and of all fines collected for any breach of the penal laws of the State, as referred to in Article IX, Sec. 7 of the Constitution, shall include the full amount of all penalties, forfeitures or fines collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.'

Sec. 2. This act shall become effective upon ratification.

for determining permissible deductions from gross monies taken in is that the item to be deductible must bear a reasonable relation to the costs of collection of the fine." 66 N.C. App. at 543, 311 S.E. 2d at 893. In so holding the Court of Appeals must have realized the difficulty in balancing the equities between the constitutionally mandated directive to set aside revenues for the public schools as declared in Article IX, Section 7 and the possible resulting economic penalties which might be forced upon the municipalities charged with the collection of fines as a result of overtime parking. The Court also apparently recognized, and we think correctly so, the futility of trying to fashion a court-made specific mathematical formula for determining costs of collection and left the application of the formula to trained accountants.

We believe that the well reasoned and fully documented opinion in *Cauble III* reached the proper result by holding that the test for determining permissible deductions must bear a reasonable relation to the cost of collection of the fine and by noting that qualified accountants might properly resolve the question.

In reviewing the cases cited by Chief Judge Vaughn in *Cauble III*, we found some evidence of the types of expenses that this Court has considered to be proper costs of collection. In *Maultsby* the Court stated that "[b]y 'clear proceeds' is meant the total sum *less only the sheriff's fees for collection, when the fine and cost are collected in full.*" 189 N.C. at 585, 51 S.E. at 956 (emphasis added). In *Hightower* the Court stated that "the 'clear proceeds' have been judicially defined as the amount of the forfeit

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In the General Assembly read three times and ratified, this the 17th day of July, 1985."

The enactment of these amendments is not under attack in the case before us. Further it is generally recognized that a statute or an amendment to a statute will be given prospective effect only, and will not be construed to have retroactive effect unless such intent is clearly expressed or arises by necessary implication from its terms. *Housing Authority v. Thorpe*, 271 N.C. 468, 157 S.E. 2d 147 (1967), *rev'd on other grounds*, 393 U.S. 268, 21 L.Ed. 2d 474, 89 S.Ct. 518 (1969); *Lester Brothers v. Insurance Company*, 250 N.C. 565, 109 S.E. 2d 263 (1959); *Bank v. Derby*, 218 N.C. 653, 12 S.E. 2d 260 (1940). We find nothing in the language of these Acts which clearly expresses or by necessary implication indicates that the legislature intended that either of the acts be retroactive. Therefore, the Act defining "clear proceeds" could only be effective as to monies collected because of traffic violations occurring on and after 17 July 1985. The Act decriminalizing traffic violations by its terms is effective on 1 July 1986.

less the cost of collection, meaning thereby the citations and process against the bondsman usual in the practice." 231 N.C. at 493-94, 57 S.E. 2d at 765. In *School Directors v. Asheville*, we emphasize the language "that the power of the Legislature is exhausted by giving to the clerk or sheriff a reasonable commission for collecting the fines—to be deducted from the amount before paying it over to the treasurer of the school fund." 137 N.C. at 511-12, 50 S.E. at 282. In our opinion these cases indicate that the costs of collection do not include the costs associated with enforcing the ordinance but are limited to the administrative costs of collecting the funds. If we were to take the position that the costs of enforcing the penal laws of the State were a part of collection of fines imposed by the laws, there could never by any *clear proceeds* of such fines to be used for the support of the public schools. This would in itself contravene that portion of Article IX, Section 7 of the North Carolina Constitution which directs that clear proceeds of penalties, forfeitures and fines collected for any breach of the penal laws of the State shall be applied to the public schools. We do not believe that the framers of our Constitution intended such a result. Conversely it would be an impractical and harsh rule to deny municipalities the reasonable costs of collections.

We have examined the remaining assignments of error and conclude that the Court of Appeals correctly decided each of them.

The decision of the Court of Appeals is

Affirmed.

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

Justice EXUM dissenting.

For the reasons stated in my dissenting opinion in *Cauble v. City of Asheville*, 301 N.C. 340, 271 S.E. 2d 258 (1980), I continue to believe that the parking penalties voluntarily paid by motorists who violate the city's parking ordinances are neither penalties nor fines collected "for any breach of the penal laws of the state" under Article IX, Section 7 of the North Carolina Constitution.

Contrary to the majority's earlier reading of it in 301 N.C. at 343-45, 271 S.E. 2d at 259-61, I think *Board of Education v. Henderson*, 126 N.C. 689, 36 S.E. 158 (1900), supports my view of the matter. The Court there held that monies the city collected for violating its ordinances were "not penalties collected for the *violation of a law of the state*, but of a town ordinance," even though violations of town ordinances were made criminal offenses by section 3820 of the Code, the predecessor to N.C. Gen. Stat. § 14-4. 126 N.C. at 692, 36 S.E. at 159. (Emphasis original.) Relying on *Board of Education v. Henderson*, an expert in the field of local government finance has written:

> Article IX, § 7, of the State Constitution directs that 'the clear proceeds of all *penalties* and *forfeitures* and all *fines* collected in the several counties for any breach of the penal laws of the state' (emphasis added) remain in the county of collection, to be used for maintaining the public school system. A fine, of course, is imposed by a court when a person has been convicted of violating a state law. An example of a forfeiture occurs when a person free on bail does not appear in court; the bail is forfeited.
>
> Penalties create some confusion. A penalty is recoverable in a *civil* action; the unit brings the action much as an individual might sue to recover a debt. A penalty therefore differs from a fine, which results from a *criminal* action. Several state statutes provide for their enforcement by suit for a penalty; for example, G.S. 143-215.114 permits enforcement of the air pollution control statutes in this manner. It is the 'clear proceeds' of penalties recovered in these actions to which the school fund is entitled. *Confusion occasionally arises, however, because the statutes authorize cities (G.S. 160A-175) and counties (G.S. 153A-123) to enforce their ordinances by 'penalties.' The most common use of this power is with parking ordinances. This type of penalty need not, despite its label, be remitted to the schools. It is assessed to enforce local ordinances, while the Constitution intends penalties that enforce the penal laws of the state.*

D. Lawrence, *Local Government Finance in North Carolina* 57 (Institute of Government 1977) (emphasis supplied).

A holding of the Supreme Court of Michigan in *Delta County v. City of Gladstone*, 305 Mich. 50, 8 N.W. 2d 908 (1943), also bolsters my view. The issue in that case was whether certain fines received by the city as a result of prosecutions for violations of city ordinances for various offenses, such as "drunk and disorderly," "reckless driving," "disorderly" and "drunk," were fines collected "for any breach of the penal laws," as those terms were used in the Michigan Constitution. The cases in which the fines were imposed were also punishable, but had not been punished or prosecuted, under state statutes. The Court held that such fines were not collected for any breach of the penal laws of the state since they were collected "under ordinances enacted by the city, a creature of the sovereignty, and were not the direct result of the exercise of sovereign or state legislative power." 305 Mich. at 54, 8 N.W. 2d at 909.

I would hold that none of the parking fines collected are properly allocable to the Buncombe County School Fund.

Justice MEYER joins in this dissenting opinion.

G. REID DUSENBERRY, III v. SUE BROWN DUSENBERRY (NOW FOWLER)

No. 160PA85

(Filed 5 November 1985)

Divorce and Alimony § 30— equitable distribution—finding of affair as factor to consider—remanded

An equitable distribution action in which the trial court found that the wife's adulterous affair was a proper factor to consider in determining the distribution of marital assets was remanded for further proceedings in accord with the principles set forth in *Smith v. Smith*, 314 N.C. 80.

Justice MEYER dissenting.

Justice BILLINGS joins in the dissenting opinion.

ON plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31(a) of a decision of the Court of Appeals reported at 73 N.C. App. 177, 326 S.E. 2d 65 (1985), vacating and remanding Chief District Court Judge J. B. Allen's order entered at the January 17-20, 1984, Session of ALAMANCE County District Court,

determining distribution of marital property pursuant to N.C.G.S. § 50-20(c).

Holt, Spencer & Longest, by James G. Spencer, Jr., and Hunter, Wharton & Howell, by John V. Hunter III, attorneys for plaintiff-appellant.

Boyce, Mitchell, Burns & Smith, by Carole S. Gailor, attorney for defendant-appellee.

BRANCH, Chief Justice.

In this equitable distribution action Judge Allen found, *inter alia*, that defendant-wife "began having an adulterous affair . . . and began neglecting the plaintiff and their three minor children" which conduct was a "major reason for the break-up of this marriage . . . and . . . was the only serious and significant mistreatment of either party by the other party during the course of this marriage." There were other extensive findings concerning the fault of the defendant-wife in this connection. Based upon his findings, Judge Allen concluded that the "relative fault of the parties leading to the disintegration of their marriage" was a proper factor for consideration in determining the distribution of the marital assets. Subsequent to the entry of this order by Judge Allen, the Court of Appeals held that fault was not a relevant factor in determining the equitable distribution of marital property. *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260 (1984), *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985); *Smith v. Smith*, 71 N.C. App. 242, 322 S.E. 2d 393 (1984); and *Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984). The Court of Appeals vacated Judge Allen's order and remanded the cause for a new order "based solely upon relevant and appropriate findings." The Court of Appeals' decision in this case was filed 19 February 1985. In the meantime, we allowed plaintiff's petition in *Smith v. Smith*, one of the cases relied upon by the Court of Appeals in its decision in the case now before us.

In *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E. 2d 682, 687 (1985), filed subsequent to the Court of Appeals' decision in the instant case, we held that "marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under 50-20(c) and should not be considered."

This cause is remanded to the Court of Appeals for remand to the District Court of Alamance County for further proceedings in accord with the principles set forth in our opinion in *Smith.*

Modified and affirmed.

Justice MEYER dissenting.

Of the 58 separately numbered findings of fact made by Judge Allen in this case, approximately 10 relate to the defendant's moral or marital misconduct. Those are as follows:

> (22) The Court finds as a fact that both the Plaintiff, Dr. Dusenberry, and the Defendant, now Mrs. Fowler, are 38 years of age and both are in good health. That they lived together continuously as husband and wife until sometime in August, 1980, when the Defendant, Sue Dusenberry at the time, met Winston Fowler, whom she is now married to, and that the Defendant began having an adulterous affair with Mr. Fowler and began neglecting the Plaintiff and their three minor children.
>
> (23) The Court finds that in the spring of 1981 . . . the Defendant, Mrs. Dusenberry, began staying away from the marital home and her family more frequently, sometimes being gone for a week at a time. That in August or September of 1981, the Defendant, Sue Dusenberry, told the Plaintiff, G. Reid Dusenberry, she was seeing Winston Fowler and the Court finds that after September, 1981, . . . the Plaintiff made a good full faith effort to save their marriage and actually begged the Defendant to stop seeing Winston Fowler.
>
> (24) The Court finds that in December of 1981, the Defendant moved out of the marital home and lived at the Colony Apartments for approximately two months. That she then returned to the marital home but continued to leave for days at a time, leaving the Plaintiff and the three minor children.
>
> (25) The Court does find that in an attempt to save the marriage, . . . the Plaintiff arranged for the Plaintiff and Defendant to take a vacation trip to Key West, Florida, in late April, 1982. That the parties returned home at Burling-

ton, North Carolina, on Sunday and then on or about April 27, 1982, the Defendant left the home and her family again and moved to Reston, Virginia, with Winston Fowler and into a continuation of the adulterous affair.

(26) The Court finds as a fact that the Plaintiff and Defendant have lived separate and apart from April 27, 1982, and at no time have resumed the marital relationship and that an absolute divorce was granted by this Court on July 13, 1983.

(27) The Court finds [that] from April 27, 1982, when the Defendant abandoned the Plaintiff and her children and up and through the hearing of the matter on January 17-20, 1984, . . . the three minor children, Douglas, now 16, Paige, now 15, and Gregory, now 13, have continuously resided with their father, the Plaintiff in this case. And the Court finds that the Plaintiff, Dr. Dusenberry, is in fact a fit and proper person to have the primary care, custody and control of his minor children.

(28) The Court finds as a fact that the Plaintiff is not absolutely free of all fault in the break-up of this marriage, in particular, that he lost his temper on several occasions, but the Court does find as a fact from the evidence that the Plaintiff never physically assaulted the Defendant and the Court finds that the Plaintiff was faithful to the Defendant throughout the marriage. The Court further finds from all of the evidence that the Defendant's adulterous affair lasting over many months with Winston Fowler was a major reason for the break-up of this marriage between the Plaintiff and the Defendant and the Court does find as a fact that this adulterous affair was the only serious and significant mistreatment of either party by the other party during the course of this marriage.

(29) The Court does find as a fact that after the Defendant began this adulterous relationship with Winston Fowler in August of 1980, . . . she was away from the Plaintiff and their children frequently for lengthy periods of time without telling them where she was. That at one point, she lived with Winston Fowler in Virginia for 10 or 11 weeks. On many of these occasions she would not inform the Plaintiff or the

children where she was and in many instances, the Plaintiff learned of her absence when the children would call and tell him that no one had picked them up at school or at other places. The Court does find as a fact that these three minor children have suffered psychological problems as a result of the Defendant's behavior and the Plaintiff will be obligated to pay approximately $10,000.00 for continued treatment for these said problems for the minor children.

(30) The Court does find as a fact that when the Plaintiff learned of the Defendant's adulterous relationship with Winston Fowler, . . . he was hurt emotionally, that he repeatedly begged the Defendant to give up the relationship, and she consistently refused to do so, and in fact continued it until she married Winston Fowler in September of 1983. After learning of the relationship, the Plaintiff stated his willingness to forgive and forget and made considerable efforts to work on the marriage and restore it. That his efforts failed because of the refusal of the Defendant to give up the relationship with Winston Fowler. The Court does find that the Defendant committed adultery with Winston Fowler repeatedly over a period of more than two years.

(31) The Court does find as a fact that the Defendant's lengthly [sic], adulterous relationship with Winston Fowler and her refusal to give up that relationship were the factors primarily responsible for the break-down and eventually dissolution of this eighteen and a half year marriage.

(32) The Court does find as a fact that the Defendant after the divorce of the parties in July of 1983, married Winston Fowler on September 3, 1983, and now resides with her present husband, Mr. Winston Fowler, in Ohio. That Mr. Fowler has an approximate income of $75,000.00 per year.

Based upon his 58 findings of fact, including 10 of the 11 set out above relating to the marital fault of the wife, Judge Allen set out 12 conclusions of law relating to every conceivable aspect of the marital distribution. A part of conclusion number (5) relates to the marital fault of the wife:

(5) The Court, in reaching its determination as to what constitutes an equitable distribution of the marital property

> between the parties, has carefully considered the . . . services of both of the parties as spouse, parent, . . . and homemaker, as well as the lack thereof, . . . and the relative fault of the parties leading to the disintegration of their marriage, consideration of which factor in this case the Court finds to be just and proper.

Based upon his findings and conclusions, Judge Allen determined that the marital assets of a net value of $402,483.85 should be allocated $134,161.28 to the wife and $268,322.57 (including the home for his rearing of the children) to the husband. Judge Allen concluded that the wife should bear $7,500 of the $10,000 projected future costs of the treatment of the children for the adjustment disorders resulting from the break-up of the marriage and reduced the $134,161.28 distribution to the wife to $126,661.28.

I am convinced that the legislature fully intended that the trial judge, in his "equitable" distribution of the marital property, could and would consider "moral" or "marital" fault (as opposed to what has been termed "property" fault) which causes the marriage to break up, without regard to its impact on the extent or value of the marital property to be distributed. Such marital fault or misconduct might include adultery, spouse abuse, incest, alcoholism, drug abuse, etc.

We have noted that the intent of the legislature to vest in our trial judges *broad* discretion in distributing marital property under N.C.G.S. § 50-20 is made manifest by the inclusion of the catchall factor, codified as subsection (c)(12), "*any* other factor which the court finds to be just and proper." (Emphasis added.) *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985).

Without the benefit of an official legislative history, it is difficult to demonstrate legislative intent with record evidence. It is irrefutable, however, that when the legislature enacted the Marital Property Act, it did not *exclude* fault from the broad sweep of the language of factor (12), "*any* other factor." Also, from unofficial comments of legislators involved in its enactment, it seems clear that the act was represented to the legislative body as allowing consideration of moral fault in the distribution of marital property. For example, in 2 R. Lee, North Carolina Family Law § 169.5 (Supp. 1985), there appears the following commentary reflecting comments by one of the legislators as to certain

statements of the floor manager of the act made on the floor of the Senate during debate on the bill:

> By including factor (12), "Any other factor which the court finds to be just and proper" in the list of factors to be considered in determining what division of property is equitable, the General Assembly left open the possibility that in particular cases the marital fault of one or the other spouse might be a factor in determining equitable distribution.[17]
>
> In discussing the statutes shortly after their passage, W. Paul Pulley, Jr., a member of the General Assembly when the equitable distribution legislation was enacted, said:[18] "N.C.G.S. 50-10[sic](c)(12) provides as an additional factor 'any other factor which the court finds to be just and proper' [and] was another item inserted with the principal sponsors of the bill kicking and screaming all the way. Yes, I believe this does allow the potential for fault litigation in considering the amount of the equitable distribution. In fact, the floor manager for the Senate stated in floor debate that it would allow consideration of fault."

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17. N.C. Bar Ass'n Foundation, Institute on the Practical Effects of Equitable Distribution I-7 (article by Pulley), II-4 (article by Hunt), III-3 (article by Riddle), IV-6 (article by Cannon) (1981); Herring, *An Equitable Distribution—Now Showing at a Theater Near You*, N.C. Bar Ass'n Bar Notes, vol. 32, No. 7, p. 8 (1981); Note, *The Discretionary Factor in the Equitable Distribution Act*, 60 N.C.L. Rev. 1399 (1982); Wake Forest C.L.E., N.C. Family Law Practice Handbook 323 (article by Maxwell) (1984).

18. Pulley, *The Evolution of Equitable Distribution Nationally and the Legislative History and Intent of the N.C. Act*, N.C. Bar Ass'n Foundation, Institute on the Practical Effects of Equitable Distribution I-7 (1981).

2 R. Lee, North Carolina Family Law § 169.5 (Supp. 1985).

It is also clear that close observers of the development and passage of the new act felt that, in accord with the holdings of the majority of courts of the nation, our courts would consider moral or marital fault as a factor.

Professor Sally B. Sharp of the University of North Carolina School of Law, a teacher and writer in the field of domestic relations law, had this to say about the North Carolina equitable distribution statute:

> In summary, despite strong policy arguments for no-fault property division, a majority of courts that have addressed the question without the assistance of a statutory guideline have concluded that fault is a relevant consideration in equitable distribution. It can be anticipated that North Carolina courts will follow the majority approach and treat fault as one—though not a controlling or preclusive—consideration in the balancing process.

Sharp, *Family Law, Survey of Developments in North Carolina Law, 1981*, 60 N.C.L. Rev. 1379, 1406 (1982).

The notion that serious moral or marital fault and its consequences are relevant to the equitable distribution of marital property upon divorce has been accepted by the courts of many jurisdictions. For example:

Alabama. In *Wicks v. Wicks*, 379 So. 2d 612, 613 (Ala. Civ. App. 1980), the court stated:

> The court could also have considered the husband's admitted adultery and the part it played in the breakdown of the marriage. He is presently living openly with his paramour within sight of the home of his wife and daughter.

See also Ross v. Ross, 447 So. 2d 812 (Ala. Civ. App. 1984).

Georgia. In *Peters v. Peters*, 248 Ga. 490, 491-92, 283 S.E. 2d 454, 455 (1981), the court, stating that adultery does not absolutely bar an equitable distribution to the guilty party, also said:

> However, where equitable division of property is in issue, the conduct of the parties, both during the marriage and with reference to the cause of the divorce, is relevant and admissible.

Iowa. In *Cooper v. Cooper*, 259 Iowa 277, 282, 144 N.W. 2d 146, 148 (1966), the court stated that misconduct "is material in considering what is equitable in the way of division of property."

Michigan. In *Arnholt v. Arnholt*, 129 Mich. App. 810, 343 N.W. 2d 214 (1983), the court stated that fault, although not a factor to be considered in divorce, might be considered in property and alimony awards. *Accord Davey v. Davey*, 106 Mich. App. 579, 308 N.W. 2d 468 (1981).

Missouri. The court considered fault in the case of *In re Marriage of Cornell*, 550 S.W. 2d 823, 827 (Mo. Ct. App. 1977), stating:

> Finally, on the question of the conduct of the parties, the evidence warrants a finding that Harry's extra-marital activities with Ann were a major factor in the shipwreck of a twenty-six-year marriage upon the rock of dissolution.

See also Gray v. Gray, 654 S.W. 2d 309, 312 (Mo. Ct. App. 1983).

New Hampshire. In *Ebbert v. Ebbert*, 123 N.H. 252, 459 A. 2d 282 (1983), the court noted that where a fault ground has been alleged and properly pled, evidence of fault may be considered in any award of alimony or division of property.

North Dakota. In *Grant v. Grant*, 226 N.W. 2d 358 (N.D. 1975), interpreting a statute not mentioning fault as a factor, the court held that conduct of the parties could be considered. *See also Larson v. Larson*, 234 N.W. 2d 861 (N.D. 1975).

South Carolina. In South Carolina, equitable distribution exists as a common law doctrine created by the courts, in the absence of statute. In *Lyvers v. Lyvers*, 280 S.C. 361, 312 S.E. 2d 590 (S.C. Ct. App. 1984), the court pointed out that the relative fault of the parties is a factor which the trial court *must* consider in determining the proper portion of marital property that is owned by each spouse.

Texas. In *Thomas v. Thomas*, 603 S.W. 2d 356, 358 (Tex. Civ. App. 1980), the court said that a division could be based upon, among other factors, "the facts which led to the divorce." *See also Bell v. Bell*, 540 S.W. 2d 432 (Tex. Civ. App. 1976).

Particularly where the moral or marital fault diminishes the contribution of a spouse to the marriage and/or results in additional expenses and efforts on the part of the innocent spouse, it should be considered in determining the "equitable" distribution of marital property. Here, Mrs. Dusenberry's lengthy absences from the home during which she made no contribution to the mar-

riage or to the care of the children, with the concomitant additional effort and expenses required of her husband for the care and upkeep of the children, together with the estimated cost of $10,000 for the continued treatment of the psychological problems of the children, suffered by them as a result of her behavior, fully justify consideration of her marital fault.

The reason misconduct directly impacting the contribution of one spouse to the marriage should be considered was stated with clarity in *Burtscher v. Burtscher*, 563 S.W. 2d 526, 527-28 (Mo. Ct. App. 1978), as follows:

> We believe the conduct factor becomes important when the conduct of one party to the marriage is such that it throws upon the other party marital burdens beyond the norms to be expected in the marital relationship. The thrust of the dissolution law is to treat the marriage as a partnership to which each spouse presumably contributes equally. When the misconduct of one party changes that balance so that the other party must assume more than his or her share of the partnership load it is appropriate that such misconduct should affect the distribution of the property of that partnership. It is logical that if one party to the partnership has, because of the other's misconduct, contributed more to the partnership, he or she should receive a greater portion of the partnership assets.

I am fully convinced that, under the particular facts of this case, the marital fault of the wife was properly considered by the trial judge, even under the rigid holding of the majority in *Smith v. Smith*, 314 N.C. 80, 331 S.E. 2d 682 (1985). Even if one completely disregards the "moral" impact of the wife's conduct here, I believe the trial court properly considered as some of the factors in the distribution the repeated adultery of the wife, her consequent neglect of her husband and children, her lengthy absences from her family during her affair, the resultant lack of contribution by her to the marriage, the exclusive burden of child care and household management which she imposed on her working husband, and the severe emotional impact of her behavior on her husband and children. The Court of Appeals erred in ruling to the contrary, and the majority of this Court has erred in affirming that ruling.

Further, where matters are left to the discretion of the trial judge, he may be reversed for abuse of his discretion only upon a showing that his actions are *manifestly unsupported by reason* or that his decision is 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. Most assuredly, it cannot be said of Judge Allen's order in this case that it is either manifestly unsupported by reason or that it is so arbitrary that it could not have been the result of a reasoned decision.

I would vote to reverse the decision of the Court of Appeals and to reinstate Judge Allen's carefully considered and fully supported order of distribution dated and filed 19 April 1984.

Justice BILLINGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM E. THOMPSON

No. 663A84

(Filed 5 November 1985)

1. **Criminal Law § 26.5— judgments for burglary and breaking or entering—failure to raise double jeopardy issue at trial**

The trial court did not err in entering judgments against defendant for both first degree burglary and breaking or entering where defendant failed to raise the double jeopardy issue at trial and the multiple count indictment against him was valid on its face.

2. **Criminal Law § 138.24— aggravating circumstances—age and infirmity of victim—evidence from codefendant's trial**

The trial court erred in finding the age of the victim and her infirmity as aggravating circumstances on the basis of statements made by prosecutor at a codefendant's sentencing hearing earlier the same day and evidence in the prosecutor's file on the codefendant's case absent a stipulation that such evidence could be considered since reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation.

3. **Criminal Law § 138.26— guilty plea—aggravating circumstance based on allegations in indictment**

Where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance and fails to challenge or present any evidence to rebut these factual allegations, they are deemed admitted and may be utilized by the trial court to

establish the existence of the aggravating factor. Therefore, the trial court could properly find as an aggravating factor that the offense involved the taking of property of great monetary value based on an allegation in the indictment that the property had a value of $3,177.40 where defendant entered a plea of guilty and did not challenge the factual allegations in the indictment.

4. Criminal Law § 138.40— mitigating circumstance—voluntary acknowledgement of wrongdoing—finding not required

Defendant failed to establish that he was absolutely entitled to a finding of the statutory mitigating circumstance that he voluntarily acknowledged to law enforcement officials wrongdoing in connection with the offenses prior to arrest or at an early stage of the criminal process. Furthermore, defendant failed to show that the trial court abused its discretion in failing to find this mitigating circumstance where defendant failed to present any evidence regarding the timing of his confession in relation to the "criminal process."

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

BEFORE *Bailey, J.*, at the 26 June 1984 Criminal Session of Superior Court, CUMBERLAND County, defendant pled guilty to first-degree burglary, felony larceny, and breaking or entering.

The defendant was charged with several crimes arising out of events occurring at the home of Mrs. Mary McQueen on the evening of 28 December 1983. In addition to the burglary, larceny, and breaking or entering charges, the defendant was also charged with first-degree rape and first-degree sexual offense. The rape and sex offense charges were dismissed pursuant to a plea arrangement on the other charges and because the prosecution was convinced that a codefendant was the actual perpetrator of those offenses.

At the hearing, the trial judge informed the defendant of the charges to which he was pleading guilty and the maximum term to which he could be sentenced, informed him of his right to plead not guilty, and questioned him as to whether his plea was voluntary. The parties stipulated that the victim's testimony would be the same as the contents of a statement made by her which was introduced at the codefendant's sentencing hearing earlier that morning before the same judge. The prosecutor also read into evidence a statement made by the defendant to law enforcement officers in which he admitted his involvement in the crimes. According to the statement, the defendant and Bennie Johnson went to Mrs. McQueen's house with the intention of breaking in. They

initially broke out a window on the back door and attempted to unlock the door to gain entry. However, this was unsuccessful and, of necessity, they entered through a side window. Once inside, Johnson tied Mrs. McQueen to her bed, and he and the defendant proceeded to ransack the house. The defendant stated that they took money, silverware, jewelry, a television set, and other items of personal property from the house.

After this and other evidence had been presented, the trial court made findings of aggravation and mitigation. In aggravation of the defendant's sentences, the trial court found that the victim was very old, that the victim was physically infirm, and that the offense involved the taking of property of great monetary value. In mitigation of his sentences, the trial court found that the defendant had no record of criminal convictions. These aggravating and mitigating factors were found to exist as to each of the crimes to which defendant entered a plea of guilty. The court went on to find that the aggravating factors outweighed the mitigating circumstances and sentenced the defendant to a term of life imprisonment for the first-degree burglary, a ten-year term for the larceny, and a ten-year term for the breaking or entering. The sentence for the breaking or entering was ordered to run consecutively to the sentence imposed for the larceny. However, the two ten-year terms were ordered to run concurrently with the life sentence. Defendant appeals as of right from the imposition of the life sentence. G.S. § 7A-27(a). Defendant's motion to bypass the Court of Appeals on the other convictions and sentences was allowed 31 January 1985. Heard in the Supreme Court 11 June 1985.

Lacy H. Thornburg, Attorney General, by Eugene A. Smith, Senior Deputy Attorney General, for the State.

Adam Stein, Appellate Defender, by Robin E. Hudson, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

The defendant brings forward assignments of error in which he contends: (1) his right to be free from double jeopardy was violated by the trial court's entry of judgments against him for both burglary and felony breaking or entering; (2) the trial court found factors in aggravation of his sentence which were not sup-

ported by the evidence; and (3) the trial court erred in failing to find as a statutory mitigating circumstance that he voluntarily acknowledged wrongdoing at an early stage of the criminal process.

The defendant initially attempts to argue an issue not raised at trial—that the trial court violated his constitutional right to be free from double jeopardy when it entered judgment against him for both first-degree burglary and the lesser-included offense of breaking or entering, since both offenses arose out of the same transaction. The record clearly indicates that the defendant failed to bring this argument to the attention of the trial court.

[1] We have held that the failure of a defendant to properly raise the issue of double jeopardy before the trial court precludes reliance on the defense on appeal. *State v. McKenzie*, 292 N.C. 170, 232 S.E. 2d 424 (1977); *State v. Baldwin*, 226 N.C. 295, 37 S.E. 2d 898 (1946); *see also State v. Hopkins*, 279 N.C. 473, 183 S.E. 2d 657 (1971). Here, the defendant did not plead double jeopardy nor did he make any argument regarding this issue to the trial judge. Also, the record fails to show any objection or motion by the defendant asserting the defense. In light of the defendant's failure to raise this issue at trial and the fact that the multiple count indictment was valid on its face, we hold that the trial court did not err in entering judgments against him for both first-degree burglary and breaking or entering. This assignment of error is overruled.

[2] The defendant next argues that the trial court committed error in the finding of certain factors in aggravation of his sentences. The defendant was sentenced to the maximum term for each offense. The trial court found the same three aggravating factors for each crime: (1) the victim was very old (G.S. § 15A-1340.4(a)(1)(j)); (2) the victim was infirm (G.S. § 15A-1340.4 (a)(1)(j)); and (3) the offense involved the taking of property of great monetary value (G.S. § 15A-1340.4(a)(1)(m)). The defendant initially contends that the aggravating factors of the age of the victim and her infirmity are not reasonably related to the purposes of sentencing for these crimes because there is no showing that he took advantage of McQueen's age or health to gain entry to the house or to appropriate any property. We conclude, however, that this issue is not before us due to the fact that the State

failed to present any evidence whatsoever in support of these aggravating circumstances.

The defendant pled guilty and was sentenced on the afternoon of 26 June 1984. On the morning of 26 June 1984, the codefendant, Jackson, pled guilty and was sentenced for his involvement in the events occurring at McQueen's house on the night in question.[1] The same trial judge presided over both hearings. The record clearly shows that at Jackson's sentencing hearing, evidence was presented showing that the victim, Mrs. McQueen, was 79 years old and was suffering from angina and arthritis. However, the prosecution failed to introduce this evidence at this defendant's sentencing hearing. The only evidence presented by the State was the defendant's inculpatory statement and a statement by the victim which was introduced at Jackson's sentencing hearing, the contents of which were stipulated to by defense counsel in the case now before us. In her statement, the victim made no mention whatsoever of her age. The only reference she made to her health was the statement that she had contacted her physician a few days before the incident and had been instructed to take "Benitril" for a cold. The only thing in the defendant's statement which could be remotely said to refer to the age of the victim were his several references to the victim as "the old lady." The only reference in the defendant's confession concerning the victim's health was his statement that when Jackson jumped on McQueen, she stated, "Stop I might have a heart attack."

It is well established that the State bears the burden of proof to establish the existence of aggravating factors if it seeks a term of imprisonment greater than the presumptive sentence. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). The existence of such factors must be proved by a preponderance of the evidence. G.S. § 15A-1340.4(a). We find that the evidence presented by the State at the defendant's sentencing hearing utterly failed to meet this standard with regard to the aggravating circumstances of age and infirmity.

The State included as part of the record on appeal an affidavit by the trial judge that in finding these two aggravating

1. Pursuant to a plea arrangement, Jackson pled guilty to first-degree burglary, second-degree rape, and felony larceny.

factors, he relied on statements made by the prosecutor at the morning sentencing hearing of the other defendant, Jackson, as well as other evidence in the prosecutor's file on the Jackson case. The State appears to argue that the trial judge should have been entitled to rely on evidence adduced at Jackson's sentencing hearing to find the existence of the aggravating factors here. This contention overlooks our statement in *State v. Benbow*, 309 N.C. 538, 308 S.E. 2d 647 (1983), in which we said that for purposes of sentencing, reliance on evidence from the trials of others connected with the same offense is improper absent a stipulation. Here, there was no stipulation as to the prosecutor's statements or the contents of the files. We hold that the State presented insufficient evidence to support a finding of these two aggravating circumstances and that the defendant is therefore entitled to a new sentencing hearing on all offenses under *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

[3] The defendant also argues that the State failed to present any evidence of the value of the property which was stolen and therefore the trial court erred in finding as an aggravating factor that the offense involved the taking of property of great monetary value. It is correct that the State failed to produce any testimony as to the value of the items stolen and that there was also no stipulation by the defendant as to the value of the stolen property.

The multiple-count indictment charging the defendant with these crimes lists the items that were appropriated and sets their total value at $3,177.40. In his affidavit, the trial judge stated that he took judicial notice of the value set out in the indictment in finding as an aggravating factor that the offense involved the taking of property of great monetary value. The defendant argues that, though he pled guilty to the indictment as it related to the felony larceny charge, a trial judge may not base a finding of the existence of an aggravating factor on the allegations of an indictment. We disagree.

As the defendant points out, an indictment is merely a written accusation against a defendant and is not to be considered as any evidence of guilt. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). However, here, the defendant pled guilty to the felony larceny offense set out in the indictment. A valid guilty plea acts

as a conviction of the offense charged. *United States v. Davis*, 452 F. 2d 577 (9th Cir. 1971); *McCarther v. State*, 211 Kan. 152, 505 P. 2d 773 (1973). It also serves as an admission of all the facts alleged in the indictment or other criminal process. *United States v. Davis*, 452 F. 2d 577 (9th Cir. 1971); *Semet v. United States*, 422 F. 2d 1269 (10th Cir. 1970); *In the Matter of Colson*, 412 A. 2d 1160 (D.C. App. 1979); *McCarther v. State*, 211 Kan. 152, 505 P. 2d 773 (1973); *Robinson v. State*, 491 S.W. 2d 314 (Mo. 1973); *State v. Bargen*, 219 Neb. 416, 363 N.W. 2d 393 (1985); *State v. Cook*, 344 N.W. 2d 487 (N.D. 1984); *Commonwealth v. Petrillo*, 255 Pa. Super. 225, 386 A. 2d 590 (1978); *State v. Boles*, 151 W. Va. 194, 151 S.E. 2d 115 (1966).

The case of *People v. Welge*, 101 Cal. App. 3d 616, 161 Cal. Rptr. 686 (1980), involved a California statutory provision which provided that a defendant convicted of a nonviolent felony could receive a one-year enhancement in his sentence for each prior separate prison term served for any felony. The defendant pled guilty to a complaint which alleged that he served separate prison terms for two prior felony convictions. The California Supreme Court held that by pleading guilty, the defendant had admitted the allegations set out in the complaint and therefore enhancement of his sentence was proper. We hold that where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance and fails to challenge or present any evidence to rebut these factual allegations, they are deemed admitted and may be utilized by the trial court to establish the existence of the aggravating factor.

We wish to emphasize, however, that even where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment or other criminal process which could be used to establish the existence of an aggravating circumstance. Here, the defendant did not present such rebuttal evidence, and, in fact, did not challenge the factual allegations in question; therefore, the learned trial judge did not err in relying on the allegation in the indictment as to the value of the property in finding this aggravating factor. If, at the new sentencing hearing, the State attempts to rely on the contents of the indictment to establish this ag-

gravating factor, the defendant may challenge them and present rebuttal evidence on this issue.

[4] Finally, the defendant argues that the trial court erred in failing to find as a mitigating factor that prior to arrest or at an early stage of the criminal process, he voluntarily acknowledged to law enforcement officials wrongdoing in connection with the offenses. We disagree.

Under the Fair Sentencing Act, the trial court must consider every statutory *mitigating factor* where, as is the case here, sentences in excess of the presumptive term are imposed. G.S. § 15A-1340.4(a). G.S. § 15A-1340.4(a)(2)(l) lists as a mitigating factor that "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." In *State v. Graham*, 309 N.C. 587, 308 S.E. 2d 311 (1983), we said that, with regard to this mitigating factor, "criminal process" begins upon either the issuance of a warrant or information, upon the return of a true bill of indictment or presentment, or upon arrest. We went on to hold that a defendant was *entitled* to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, *whichever comes first.*

The record fails to show that the defendant specifically requested the trial court to find this mitigating factor. However, since it is a statutory mitigating factor, the trial court was required to find it if proved by a preponderance of the evidence, even in the absence of a specific request. *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984). The defendant bears the burden of proof to establish the existence of mitigating factors. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). According to the record, the defendant's inculpatory statement was made at 6:40 p.m. on 28 December 1983. However, the record does not indicate whether the statement was made prior to the issuance of a warrant or prior to the defendant's arrest.[2] Therefore, the defendant

2. A warrant for the defendant's arrest was issued on 28 December 1983. However, the record does not show the exact time the warrant was issued. A true bill of indictment charging the defendant with these offenses was returned 3 January 1984.

has failed to establish that he was absolutely *entitled* to a finding of this mitigating circumstance. Instead, it was for the trial judge to determine, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating circumstance. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). A matter committed to the discretion of a trial court is not subject to review except upon a showing of an abuse of discretion. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967). 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. *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985).

In light of the fact that the defendant failed to present any evidence regarding the timing of his confession in relation to the "criminal process" as defined in *Graham*, we hold that the defendant has clearly failed to show an abuse of discretion. Therefore, the trial court did not err in failing to find this mitigating circumstance. At the new sentencing hearing, the defendant may, of course, present any available evidence relevant to the timing of his statement which might support a finding of this mitigating circumstance.

The judgment entered by the trial court is vacated, and the case is remanded to the Superior Court, Cumberland County, for resentencing on all three offenses, consistent with this opinion.

Remanded for a new sentencing hearing.

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

TOWN OF NAGS HEAD v. ROBERT C. TILLETT, ZENOVA P. TILLETT, BRADFORD NEIL LOY, PETER L. MARSHALL AND WIFE, FLORA COSTIN MARSHALL, DOROTHY HAND WAGONER AND HUSBAND, JAMES L. WAGONER, SR., RICHARD L. RUSSAKOFF AND WIFE, RISE GURY RUSSAKOFF, JAMES T. RYCE AND WIFE, SUSAN RYCE, AND E. CROUSE GRAY, JR., TRUSTEE

No. 436PA84

(Filed 5 November 1985)

1. **Municipal Corporations § 30— violation of subdivision ordinance—zoning statute—no authority for denial of building permit**

The Court of Appeals erred by citing the broad enforcement provisions of G.S. 160A-389, a *zoning* statute, as the justification for vacating an order enjoining the town from denying a building permit to one whose lot violated the *subdivision* requirements of the Nags Head Code of Ordinances; however, the broader enforcement license of G.S. 160A-389 applies and would sustain such a remedy insofar as the Town rests its denial of a building permit upon violation of the zoning laws.

2. **Vendor and Purchaser § 11— purchase of nonconforming subdivision lot—violation of contract clause—contract not merged in the deed—rescission proper**

The purchasers of a lot in a subdivision in Nags Head which did not conform to provisions of the Nags Head Code of Ordinances are entitled to rescission for material failure of consideration under the contract of sale insofar as their attempts to obtain a building permit remain frustrated by the nonconforming nature of their property so that they cannot reasonably use their property for residential purposes where the contract of sale provided that there "must be no . . . governmental regulation that would prevent the reasonable use of the property for residential purposes," the contract contained a survival clause stating that any provision of the contract required to be observed or performed after closing should remain binding until satisfied, and the deed specifically stated that the conveyances were pursuant to the contract and its terms. G.S. 160A-389, G.S. 160A-375.

ON discretionary review of the decision of the Court of Appeals, 68 N.C. App. 554, 315 S.E. 2d 740 (1984), affirming in part and vacating in part judgment entered by *Stevens, J.*, 5 April 1984, in Superior Court, DARE County, and of the order of the Court of Appeals filed 4 December 1984 finding defendants Ryce's cross-assignment of error to be without merit. Heard in the Supreme Court 11 September 1985.

Kellogg, White, Evans, Sharp and Michael, by Thomas L. White, Jr., for plaintiff-appellee.

Shearin & Archbell, by Norman W. Shearin, Jr., for defendant-appellee Bradford Neil Loy.

LeRoy, Wells, Shaw, Hornthal & Riley, by L. P. Hornthal, Jr. and Donald C. Prentiss, for defendant-appellants James T. and Susan Ryce.

MARTIN, Justice.

In January of 1982, Susan and James T. Ryce applied to the Town of Nags Head for a building permit for a lot they had purchased from Bradford Neil Loy in 1980. The lot was one of four parcels created three years earlier by the subdivision of a 6.8-acre tract of land belonging to Robert C. and Zenova P. Tillett. The Ryces were denied a building permit on the grounds that their lot violated several provisions of the Nags Head Code of Ordinances, all of which appear in chapter 17, entitled "Subdivision of Land." Specifically, the subdivision had never been approved by the town planning board, the lot did not meet frontage requirements, and it did not front on an improved street as described in both subdivision and zoning ordinances.[1]

On 29 March 1982 the Town of Nags Head brought a declaratory judgment action seeking to have all deeds deriving from the original 1977 division of the Tillett tract declared void and to enjoin all future conveyances of the property that violate municipal and state subdivision laws. Defendants Ryce counterclaimed, alleging their entitlement to a mandatory injunction compelling the issuance of a building permit and enjoining interference with the use of their property. In the alternative, defendants Ryce cross-claimed against defendant Loy, asking that if the trial court found in plaintiff's favor, it grant rescission of the sales contract and deed between them and Loy and restitution of their purchase price and expenditures.

1. Section 17-27 of the Nags Head subdivision ordinance requires residential streets to be paved and of a minimum width. Section 3.08 of the town's zoning ordinance similarly prohibits structures on lots not abutting a public right-of-way of a minimum width. The narrow clay road serving the Ryce lot met the requirements of neither of these ordinances.

The trial court dismissed the town's declaratory judgment action and enjoined the town from denying a building permit to defendants Ryce. The Court of Appeals affirmed the dismissal of the declaratory judgment action but vacated the trial court's injunction concerning the denial of a building permit.

The appellate court did not address the Ryces' cross-assignment of error concerning the cross-claim against defendant Loy. A Ryce petition for rehearing was denied by that court on 12 July 1984. We reversed the Court of Appeals' denial and ordered a rehearing on the merits of the cross appeal. On 4 December 1984 the Court of Appeals filed an order finding the cross-assignment of error to be without merit. This Court granted defendants Ryce's petition for discretionary review in order to address two questions remaining in this case: (1) the validity of the denial of a building permit by the Town of Nags Head and (2) the merits of the Ryce cross-claim. We affirm in part, reverse in part, and remand.

The Court of Appeals concluded, and we agree, that the Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property, but that for "the [trial] court to find that the conveyances are void as a matter of law" was beyond the scope of the act. *Town of Nags Head v. Tillett*, 68 N.C. App. 554, 558, 315 S.E. 2d 740, 742. We agree as well that an injunction will not lie to restrain an act already completed at the time the action is instituted.[2] *Austin v. Dare County*, 240 N.C. 662, 83 S.E. 2d 702 (1954). In addition, the Court of Appeals correctly stated that the enabling statute at issue in this case provides no basis for voiding a conveyance of real property that fails to meet subdivision requisites. An exception to the general rule that an agreement that violates the law—whether constitution, statute, or municipal ordinance—is illegal and void was delineated by this Court in *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E. 2d 551 (1975). We held in *Financial Services* that where the statute expressly designates the offense and clearly states the punishment for its violation, "the legislative bodies dealt with the matter completely and did not intend to in-

2. Apropos, plaintiff's argument that N.C.G.S. 160A-175, which provides general equitable enforcement powers, authorizes invalidation of the conveyances is unavailing.

validate conveyances of real property because of failure to follow the provisions of this penal legislation." *Id.* at 135, 217 S.E. 2d at 560.

Of the two questions remaining for this Court to resolve, that of the validity of the town's denying a building permit to defendants Ryce can be fruitfully addressed by examining the town ordinances and state statutes supposedly authorizing that means of compelling compliance.

[1, 2] Chapter 160A of the General Statutes of North Carolina contains enabling legislation for city and town ordinances regulating subdivision and zoning. Article 19 of that chapter is deliberately divided into eight parts. Two of these provide separately for the regulation of subdivisions and for zoning. The specific penal and equitable relief set out in section 160A-375 is relief intended to deter those who violate subdivision ordinances;[3] section 160A-389 permits broader, "appropriate" action and proceedings to prevent or correct the violation of a zoning ordinance.[4]

3. § 160A-375. Penalties for transferring lots in unapproved subdivisions.

If a city adopts an ordinance regulating the subdivision of land as authorized herein, any person who, being the owner or agent of the owner of any land located within the jurisdiction of that city, thereafter subdivides his land in violation of the ordinance or transfers or sells land by reference to, exhibition of, or any other use of a plat showing a subdivision of the land before the plat has been properly approved under such ordinance and recorded in the office of the appropriate register of deeds, shall be guilty of a misdemeanor. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring land shall not exempt the transaction from this penalty. The city may bring an action for injunction of any illegal subdivision, transfer, conveyance, or sale of land, and the court shall, upon appropriate findings, issue an injunction and order requiring the offending party to comply with the subdivision ordinance.

4. § 160A-389. Remedies.

If a building or structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained, or any building, structure or land is used in violation of this Part or of any ordinance or other regulation made under authority conferred thereby, the city, in addition to other remedies, may institute any appropriate action or proceedings to prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate the violation, to prevent occupancy of the building, structure or land, or to prevent any illegal act, conduct, business or use in or about the premises.

The Nags Head Code of Ordinances similarly contains enforcement provisions for subdivision regulation that are distinctly separate from enforcement provisions for zoning regulation. The Code's chapter 17 is dedicated to subdivision regulation. Section 17-10 of that chapter tracks the language of N.C.G.S. 160A-375, authorizing a criminal penalty and injunctive remedies for violations of subdivision ordinances. Section 17-11 posits that before a building permit can be issued for the erection of any structure in a proposed subdivision by the subdivider or his agent, the subdivision must be approved in accordance with the chapter.[5] Section 3.08 of the Nags Head zoning ordinance also prohibits the issuance of a building permit for any lot that does not front on a public right-of-way at least thirty feet wide.

It is clear to us that the penal and injunctive provisions of section 17-10 do not exceed the scope of that section's parallel enabling legislation, N.C.G.S. 160A-375. It is likewise clear that the remedial breadth of N.C.G.S. 160A-389 supports the enforcement provisions of such zoning ordinances as section 3.08.

But it is another matter to cite the broad enforcement provisions of N.C.G.S. 160A-389, a *zoning* statute, as the statutory basis for denying a building permit to one whose lot violates the *subdivision* requirements of chapter 17 of the Nags Head Code of Ordinances. The Court of Appeals therefore erred in citing that statute and listing a number of subdivision ordinance violations by the Ryce lot as justification for vacating the order of the trial court that enjoined the town from denying the Ryces a building permit.

Insofar as the Town of Nags Head rests its denial of a building permit upon the violation of the zoning laws, however, the broader enforcement license of N.C.G.S. 160A-389 applies and would sustain such a remedy. In the event that the Ryces' attempts to obtain a building permit remain frustrated by the nonconforming nature of their property so that they cannot reasonably use their property for residential purposes, then they are entitled to rescission for a material failure of consideration under the contract of sale and deed with defendant Loy.

5. It is noteworthy that these sections govern the acts of the subdivider or his agent, not the purchaser of the lot.

The contract of sale between Loy and the Ryces provided that there "must be no . . . governmental regulation that would prevent the reasonable use of the property for residential purposes." The contract also contained a survival clause, stating that any provision of the contract required by its nature and effect to be observed or performed after the closing should remain binding after the closing until satisfied. The deed specifically stated that the conveyances were "pursuant to said contract and subject to its terms." Such language in the deed is irrefutable evidence of the parties' intention that the contract *not* merge into the deed.

In the event that the Ryces are unable to obtain a building permit for residential purposes, it would constitute a material breach of their contract with Loy, defeating the very terms of the contract. *Childress v. Trading Post*, 247 N.C. 150, 100 S.E. 2d 391 (1957). Whereupon, defendants Ryce would be entitled to be restored to the condition they occupied on the day the contract was entered into. *Id.* The 4 December 1984 order of the Court of Appeals, ruling that the Ryces' cross-claim was without merit, is reversed.

Accordingly, we hold that although the town may deny a building permit to applicants whose property violates zoning ordinances, as authorized by section 3.08 of the Nags Head Code of Ordinances and by N.C.G.S. 160A-389, its enforcement of subdivision ordinances is restricted to the penal and injunctive relief of N.C.G.S. 160A-375 and section 17.10 of the code of ordinances. In addition, insofar as defendants Ryce are thwarted by the execution of such ordinances and statutes from the reasonable use of their property for residential purposes, they are entitled to rescission of the instruments of conveyance with Loy and restitution.

Affirmed in part, reversed in part, and remanded.

STATE OF NORTH CAROLINA v. KIM RILEY McGILL

No. 163A85

(Filed 5 November 1985)

Automobiles and Other Vehicles § 113— driving under the influence—proof required for involuntary manslaughter

When a death is caused by one who was driving under the influence of alcohol, only two elements must exist for the successful prosecution of involuntary manslaughter: a willful violation of G.S. 20-138 and the causal link between that violation and the death. The State is not required to prove further that defendant's intoxication caused him to violate some other rule of the road and that such violation was a proximate cause of the victims' death.

APPEAL by the State of North Carolina pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, 73 N.C. App. 206, 326 S.E. 2d 345 (1985), granting a new trial to defendant on convictions of manslaughter before *Lane, J.*, at the 31 October 1983 session of Superior Court, ROBESON County. Heard in the Supreme Court 11 September 1985.

Lacy H. Thornburg, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for the State of North Carolina, appellant.

Robert D. Jacobson for defendant appellee.

MARTIN, Justice.

The single issue before this Court is whether, in a prosecution for manslaughter, the state must prove not only that the defendant was driving under the influence and that this proximately caused the victim's death, but that the defendant's intoxication caused him to violate some other rule of the road that in turn caused the death. We hold that only one causal link must be shown—that between the intoxication and the death. No additional misconduct need be alleged.

Around midnight of 26 April 1983, a state trooper arrived at the scene of a two-car accident on a paved, rural road. He found defendant and a passenger standing beside a Chrysler automobile, watching the other car, up-ended, burn in a roadside ditch. Defendant told the officer that he had rounded a curve, driven a short distance, and suddenly seen a car parked in the middle of

the road with its lights off. Defendant said he had then slammed on his brakes and skidded into the other car, flipping it into the ditch. He told the officer that he and his passenger had attempted to free the occupants of the burning car but were prevented from doing so by an explosion and flames. The occupants of the car were killed.

The trooper noticed a strong odor of alcohol on defendant's breath and saw that defendant was unsteady on his feet. He found a half-gallon bottle of whiskey, its seal broken, in defendant's car. A breathalyzer test administered two hours later revealed defendant's blood alcohol level to be 0.19 percent. Defendant's driver's license had been permanently revoked, and his record indicated numerous driving violations, including five convictions for driving under the influence.

An investigation of the accident scene revealed that defendant's car had been travelling about 55 m.p.h., the speed limit, and that it had travelled 450 feet after the curve before colliding with the victims' car. Investigators found defendant's car had left forty-eight feet of skid marks before the impact and thirty feet after, and they determined that defendant's car had been travelling at 35 m.p.h. on impact. Inspection of the victims' car revealed that both the lights and ignition were in the "on" position and that the transmission was in "drive."

The Court of Appeals considered a number of defendant's motions challenging the sufficiency of the evidence. It found ample evidence to support the jury's guilty verdicts regarding defendant's driving while his license was permanently revoked, driving under the influence of alcoholic beverages, and transporting liquor with the seal broken.

Defendant also challenged his conviction of two counts of involuntary manslaughter, based upon what he contended were erroneous jury instructions. The trial judge had instructed the jury that, in order to find defendant guilty of involuntary manslaughter, it must find three things: (1) that defendant had violated any one of the motor vehicle laws of this state; (2) that the violation constituted culpable negligence;[1] and (3) that the violation of that law was the proximate cause of the deaths in this case.

1. The trial judge instructed that this requisite could be satisfied by a finding that the violation of a safety statute resulting in injury or death was willful, wanton or intentional.

The Court of Appeals found that circumstantial and expert evidence concerning the accident was sufficient to support the jury's verdict of involuntary manslaughter, but not to compel that verdict. The trial judge's jury instructions were held to be in error. We agree that the evidence is sufficient to support defendant's conviction for manslaughter; however, we find the reasoning of the Court of Appeals concerning the jury instructions to be misguided.

The chief concern of the Court of Appeals' review was the causal connection between defendant's intoxication and the accident. Certainly causation is an indispensable element of the proof of manslaughter, as this Court has consistently held. *See, e.g., State v. Lowery*, 223 N.C. 598, 27 S.E. 2d 638 (1943); *State v. Cope*, 204 N.C. 28, 167 S.E. 456 (1933). In this instance, however, the appellate court's legitimate concern with causation seems to have engendered its error.

The Court of Appeals held that the jury must find not only a causal link between defendant's driving under the influence of alcohol and the victim's death, but another, interconnecting violation: "in order to convict an impaired driver of involuntary manslaughter based upon his impairment, the state must show that while driving impaired defendant violated some *other* rule of the road, and that *this* violation was the proximate cause of the accident." *State v. McGill*, 73 N.C. App. 206, 213, 326 S.E. 2d 345, 350 (emphases added).

The court below relied for its holding upon a rule reportedly set out in *Lowery*, 223 N.C. 598, 27 S.E. 2d 638, which the Court of Appeals interpreted to require "that the evidence must also show reckless driving or other misconduct on the part of defendant resulting from the intoxication which shows a proximate causal relation between the breach of the drunk-driving statute and the death of the victim." 73 N.C. App. at 211, 326 S.E. 2d at 349. In *Lowery*, the two statutes that allegedly had been violated were one prohibiting driving under the influence and one requiring the use of turn signals. The court's concern in that case was twofold: the causal relation between the violation and the death,[2]

2. In *Lowery*, the Court found (1) that under the circumstances defendant had had no obligation to signal and that his failure to do so therefore did not amount to criminal negligence, and (2) that, although there was evidence that defendant had

and a rule from *Cope*, 204 N.C. 28, 167 S.E. 456, that the inadvertent or careless accomplishment of an act prohibited by statute but not in itself dangerous would not signify culpable negligence.[3] The language in *Lowery* upon which the Court of Appeals relied was focused not upon the culpable negligence element, as the appellate court assumed, but upon the indispensable causal link: "The violation of the statutes referred to herein, if conceded, is not sufficient to sustain a prosecution for involuntary manslaughter *unless a causal relation is shown between the breach of the statute and the death* . . . ." 223 N.C. at 601, 27 S.E. 2d at 640 (emphasis added).[4]

By its decision the Court of Appeals seeks to engraft an additional requirement to the proof of involuntary manslaughter while driving under the influence of alcohol. Neither *Lowery* nor *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970), supports the holding in *McGill*, 73 N.C. App. at 213, 326 S.E. 2d at 350, that "the state must show that while driving impaired defendant violated some other rule of the road, and that this violation was the proximate cause of the accident." All that is required is that the state show that defendant willfully violated N.C.G.S. 20-138 and that this conduct was one of the proximate causes of the death of the victim. Proof of proximate cause *may* involve the violation of an additional safety statute, but it is not an essential element of involuntary manslaughter.

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been drinking, there was no evidence linking that misconduct to the accident: "conceding that there is some evidence of the intoxication of the defendant, there is no evidence on this record of reckless driving or other misconduct on the part of the defendant *resulting from intoxication* which shows such proximate causal relation between the breach of the statute and the death . . . ." 223 N.C. at 603, 27 S.E. 2d at 641 (emphasis added).

3. In both *Cope* and *Lowery* the Court was concerned with the defendant's intent to break the law. "But an unintentional violation of a prohibitory statute or ordinance, unaccompanied by recklessness or probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, is not such negligence as imports criminal responsibility." *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933). *See State v. Lowery*, 223 N.C. 598, 603, 27 S.E. 2d 638, 641 (1943). This latter rule is inapplicable in the case at bar: one who drives under the influence cannot be said to do so inadvertently. The act (and the violation) is willful by its very nature.

4. It is no different in this case: driving under the influence is not sufficient to sustain a conviction of manslaughter. A causal relation between the breach and the death must be shown.

We have held that "[i]nvoluntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976); *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974). Under the first alternative in this definition, one who causes the death of another merely by violating the statutory prohibition against driving while impaired would be guilty of involuntary manslaughter. However, this Court generally has considered violations of safety statutes in terms of culpable negligence, the second alternative: "An intentional, wilful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence." *Cope*, 204 N.C. at 31, 167 S.E. at 458.

There is no question that N.C.G.S. 20-138, which is included in Part 10, "Operation of Vehicles and Rules of the Road," of the motor vehicle chapter, is a statute designed for the protection of human life and limb, as is its successor, N.C.G.S. 20-138.1.[5] As such, it is a matter of law that a violation of its provisions constitutes culpable negligence.

We therefore hold that when a death is caused by one who was driving under the influence of alcohol, only two elements must exist for the successful prosecution of manslaughter: a willful violation of N.C.G.S. 20-138 and the causal link between that violation and the death. *See State v. Dills*, 204 N.C. 33, 167 S.E. 459 (1933). If these elements are present, the state need not demonstrate that defendant violated any other rule of the road nor

5. The Court of Appeals has itself held that the violation of the driving while impaired statute constitutes culpable negligence. "[I]t is clear that driving while impaired, *see* N.C. Gen. Stat. § 20-138.1 (1983), is culpable negligence . . . ." *State v. McGill*, 73 N.C. App. 206, 213, 326 S.E. 2d 345, 350 (1985). "We believe that . . . the violation of a statute prohibiting driving while intoxicated is culpable negligence. . . . We hold that driving under the influence of alcohol constitutes a 'thoughtless disregard of consequences or a heedless indifference to the safety and rights of others.' This is culpable negligence." *State v. Johnson*, 72 N.C. App. 512, 514, 325 S.E. 2d 253, 255 (1985). "A wilful violation of any one of these statutes [N.C.G.S. 20-165.1, 20-138, -139] would constitute culpable negligence if that violation was the proximate cause of [the victim's] death." *State v. Atkins*, 58 N.C. App. 146, 148, 292 S.E. 2d 744, 746, *cert. denied and appeal dismissed*, 306 N.C. 744 (1982).

that his conduct was in any other way wrongful.[6] In this regard, the instructions of the trial judge were essentially proper.[7]

The decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. ROGER LEE CLARK

No. 690A84

(Filed 5 November 1985)

1. **Criminal Law § 102.6— improper jury argument—failure to instruct jury to disregard—absence of prejudice**

If error was committed in the trial court's failure to instruct the jury to disregard the prosecutor's jury argument that defense counsel's efforts to interview defendant's estranged wife were "shady" and that defense counsel evaluated the case and knew that it was hopeless, defendant failed to show that he was prejudiced thereby. G.S. 15A-1443(a).

2. **Criminal Law § 138.38— mitigating factor—strong provocation or extenuating relationship—finding not required**

The trial court did not err in failing to find as a mitigating factor for second degree murder that defendant acted under strong provocation or the relationship between defendant and the victim was otherwise extenuating where the trial testimony and an earlier statement by defendant's estranged wife contradicted a statement she gave to defense counsel that deceased previously had pulled a pistol on defendant, had slapped defendant's minor daughter and had tried to run defendant's car off the road, and where defendant's contention that he acted under strong provocation by reason of his belief that deceased was going for a gun was contradicted by his wife's testimony and discounted by his own statement that he did not see a gun.

3. **Criminal Law § 138.40— mitigating factor—voluntary acknowledgment of wrongdoing—effect of claim of self-defense**

The trial court did not err in failing to find as a mitigating factor for second degree murder that defendant, at an early stage of the criminal process,

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6. Although it is difficult to visualize a situation where an intoxicated driver could cause another's injury or death by an act that could *not* be characterized as "misconduct," *Lowery*, 223 N.C. 598, 27 S.E. 2d 638, does not and should not foreclose that possibility.

7. As the facts in this case occurred prior to the effective date of N.C.G.S. 20-138.1, it is controlled by former N.C.G.S. 20-138. However, the law stated herein is equally applicable to prosecutions for manslaughter based upon N.C.G.S. 20-138.1.

voluntarily acknowledged wrongdoing to a law enforcement officer where defendant admitted after arrest that he killed the victim but denied culpability by contending that the shooting was justified by self-defense.

4. Criminal Law § 138.41— mitigating factor—good reputation in community—finding not required

Favorable testimony by defendant's probation officer did not compel the trial court to find as a mitigating factor for second degree murder that defendant had a good reputation in the community in which he lived where there was other evidence that defendant was on probation at the time of the offense, had a record of various assaults and trespasses, was under a restraining order not to go on the property where the killing took place, and lived across the street from his wife and children with his girlfriend.

APPEAL by the defendant from *Ellis, Judge*, at the 16 July 1984 Session of ROBESON County Superior Court.

The defendant was charged in indictments, proper in form, with the murder of Cordia Oxendine and assault with a deadly weapon with intent to kill inflicting serious injury upon Cattie Jane Clark. The defendant was convicted of second degree murder and assault with a deadly weapon and was sentenced to a term of life imprisonment for the murder and to a concurrent term of two years for the assault.

The defendant appeals the life sentence to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a). We allowed the defendant's motion to bypass the Court of Appeals on the assault conviction on 11 February 1985.

Evidence offered by the State tended to show that on 12 February 1984 the defendant and his wife, Cattie Jane Clark, were living separate and apart and that Mrs. Clark and the couple's two children were living in a mobile home owned by the defendant and his wife. On that date at about 12:00 noon, Cattie Jane Clark and Cordia (Pete) Oxendine were standing beside Mrs. Clark's automobile in front of a barn-type building beside the mobile home. The defendant drove by with several other people in his Volkswagen automobile. About five minutes later, the Volkswagen returned and pulled into the driveway, and the defendant got out of the car with a shotgun. He pointed the gun at Mrs. Clark and Oxendine and said, "You S.O.B.s. If you don't take up those papers, I'm going to kill you." Mrs. Clark ducked behind her car. One shot was fired. Oxendine said, "Oh, my God," and ran

across a field. The defendant assaulted Mrs. Clark by hitting her about the head, body and legs with the shotgun.

Oxendine's body was found shortly thereafter on the carport of a house about 1,000 feet from the scene. Death resulted from a gunshot wound to the neck.

The defendant did not offer evidence.

Lacy H. Thornburg, Attorney General, by Jo Anne Sanford, Special Deputy Attorney General, for the State.

Philip A. Diehl for defendant-appellant.

BILLINGS, Justice.

The defendant brings forward two assignments of error, claiming:

1. The trial court erred in allowing the State to argue improper and prejudicial matters to the jury; and

2. The trial court erred in sentencing the defendant by failing to find certain mitigating factors presented by the evidence.

[1] We first consider the defendant's contention that he is entitled to a new trial as a result of the prosecutor's allegedly prejudicial remarks during closing argument.

During the State's argument to the jury, defense counsel interposed objections four times. The first objection was made when the district attorney was arguing that a statement made by Mrs. Clark in the defense attorney's office to Kermit Locklear, the defense attorney's investigator, should not be given credence. The statement varied from her earlier statements and from her trial testimony by including assertions that Oxendine had called the defendant names, had once tried to run the defendant off the road, had pulled a gun before the defendant shot him, and earlier had struck one of the defendant's children. In his argument, the district attorney suggested that Mrs. Clark made these assertions in an effort to keep "the father of her children" from receiving a death sentence. He said:

> So, they called this witness in and Kermit Locklear—and it's been uncontradicted that he told her that the defendant

was going to get the chair; says, "We got to go down to the lawyer's office." And I would say to you you need to kind of shade this particular transaction a little shady, Ladies and Gentlemen, because I think it should be obvious to you what it was. They talked with all the witnesses, they evaluated the case, they knew it was a hopeless case—

At that point the defense attorney objected and requested "that the jury be instructed to disregard that argument." A bench conference was then held but is not recorded.

In his brief, the defendant argues that the district attorney "throughout the entire argument . . . berated efforts of the defense to adequately prepare for trial" and described defense efforts to interview witnesses as "shady." However, the quoted passage is the only portion of the argument identified by the defendant as making reference to the preparation of the defense case. It is unclear whether the objection is to the characterization of the transaction as shady or to the argument that the defense evaluation of the case was that it was hopeless. After the bench conference, the district attorney avoided any further characterization of the defense preparation. We find that if error was committed in the failure of the judge to instruct the jury to disregard the argument, the defendant has failed to show that he was prejudiced thereby. *See* N.C.G.S. 15A-1443(a).

We have examined the defendant's remaining objections to the district attorney's argument and have concluded that they either were appropriately handled by the trial judge or did not constitute prejudicial error. This assignment of error is overruled.

We next consider the defendant's assignment of error relating to sentencing.

After the defendant's conviction, the trial judge conducted a sentencing hearing and found as an aggravating factor that the defendant had a prior conviction or convictions for criminal offenses punishable by more than sixty days' confinement. He found no mitigating factors. The defendant contends that the trial judge erred in failing to find the following statutory mitigating factors under N.C.G.S. § 15A-1340.4(a)(2):

i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

l. Prior to arrest or at any early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.

m. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

[2] In regard to the first listed factor, the evidence concerning the relationship between the defendant and the deceased was conflicting. Although the defendant's estranged wife's statement, given to the defense counsel at some time after the defendant's arrest, indicated that the deceased previously had pulled a pistol on the defendant, had slapped the defendant's minor daughter, and had tried to run defendant's car off the road, this statement was in conflict both with an earlier statement by her and her trial testimony. The defendant's contention that he acted under strong provocation by reason of his belief that the deceased was going for a gun was contradicted by his wife's testimony and discounted by his own statement that he did not see a gun.

When evidence is offered to support a claim of a mitigating factor of strong provocation, the trial judge first must determine what facts are established by the preponderance of the evidence, *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982), and then determine whether those facts support a conclusion of strong provocation. *State v. Cameron*, 71 N.C. App. 776, 323 S.E. 2d 396 (1984). Only if the evidence offered at the sentencing hearing "so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn" is the court compelled to find that the mitigating factor exists. *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455 (1983). *See also State v. Michael*, 311 N.C. 214, 316 S.E. 2d 276 (1984).

Because the evidence does not compel a finding either of strong provocation or that the relationship between the defendant and the deceased was "otherwise extenuating," we reject the defendant's contention that the trial judge erred in failing to find that mitigating factor.

[3] To support his claim that the judge should have found as a mitigating factor that the defendant, at an early stage of the criminal process, voluntarily acknowledged wrongdoing to a law

enforcement officer, the defendant introduced a statement that he made to Detective Garth Locklear on 12 February 1985. In the statement, made after his arrest for the murder, the defendant said that he shot the deceased when the deceased "started pulling his left hand out of his pocket. I figured he had a gun, but I didn't see one."

In *State v. Michael*, 311 N.C. 214, 316 S.E. 2d 276 (1984), this Court held that a statement given by the defendant in a murder case after his arrest, in which he admitted that he had killed the victim but contended that the shooting was accidental, did not constitute an admission of wrongdoing. Likewise, here, the defendant admitted after arrest that he killed the victim but denied culpability by contending that the shooting was justified by self-defense. This assignment of error is rejected.

[4] Finally, the defendant contends that the testimony of his probation officer compelled the trial court to find as a mitigating factor that the defendant had a good reputation in the community in which he lived.

The basis for the probation officer's opinion is at best unclear, as the following questions and answers show:

> Q. Did you have an opportunity to talk with other people in the community about Mr. Clark?
>
> A. Yes, sir.
>
> Q. As a result of those conversations, did you become acquainted with the general reputation in the community?
>
> A. Yes sir, based on my contact with him, yes.
>
> Q. And what was that?
>
> A. He seemed to enjoy a good reputation in the community in which he lived. Described as a quiet person; didn't get involved in other people's business.

However, as the State pointed out, the defendant was on probation at the time of the offense. The same probation officer testified that the defendant was on probation for assault on a female, one Sarah Brayboy; that the defendant had a record of a number of assaults in Scotland and Robeson Counties and of various trespasses; and that, at the time of the offense, the de-

fendant was under a restraining order entered after a domestic disturbance which ordered the defendant not to go on the property where the shooting took place.

Additionally, in the defendant's statement to Detective Locklear he stated that at the time of the events in question he was living in a house trailer with Gladys Oxendine across the street from the trailer where his wife and children lived. His probation officer testified that the relationship between the defendant and Gladys Oxendine was a "boy friend, girl friend relationship."

Clearly, the evidence of the defendant's good reputation is not "substantial, uncontradicted and manifestly credible," compelling the trial court to find the suggested factor. *See State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983); *State v. Winnex*, 66 N.C. App. 280, 311 S.E. 2d 594 (1984).

The defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. AARON JONES, A/K/A AARON MILLER

No. 110A84

(Filed 5 November 1985)

Constitutional Law § 34; Criminal Law § 138— multiple sentencing hearings— finding of new aggravating factor at subsequent hearings—no error

The trial court did not err and defendant was not subject to double jeopardy at his second and third sentencing hearings for second degree murder and armed robbery where the court found as an aggravating factor that defendant had a prior criminal conviction but had not found that factor at the first sentencing hearing. Although double jeopardy principles apply to a second sentencing hearing before a jury in a capital case, proceedings under the Fair Sentencing Act do not involve the finding of elemental facts beyond a reasonable doubt in the nature of a guilt or innocence trial; each of the sentencing hearings in this case was a de novo proceeding brought about by the defendant at which the trial court could find aggravating and mitigating factors without regard to the findings in the prior sentencing hearings. G.S. 15A-1334(b) (1983), G.S. 15A-2000 (1983).

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

State v. Jones

APPEAL by defendant from judgments entered by *Strickland, J.*, on 29 June 1984 in Superior Court, CRAVEN County. Heard in the Supreme Court 11 March 1985.

Lacy H. Thornburg, Attorney General, by George W. Lennon, Assistant Attorney General, for the state.

Adam Stein, Appellate Defender, by Malcolm Ray Hunter, Jr., First Assistant Appellate Defender, for defendant.

MARTIN, Justice.

The defendant challenges on double jeopardy grounds the validity of his last sentencing hearing. We conclude that the sentencing hearing was free from error and must be affirmed.

In brief, the state's evidence showed that defendant, together with Rosa Lee Gibbs and Tonia Jamison, robbed Patricia Phillips, a nineteen-year-old night clerk at the Zip Mart in New Bern, with the use of a .38-caliber pistol. After the three robbers left the Zip Mart, Rosa Lee Gibbs returned and killed Patricia Phillips to eliminate her as a witness. The three also stole Patricia's automobile and were arrested in it at Brunswick, Georgia, soon thereafter. A more detailed review of the evidence may be found in the prior opinion in this case, *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

Defendant pled guilty to charges of murder in the second degree, armed robbery, conspiracy to commit armed robbery, and felonious larceny. He was sentenced 3 August 1982. Upon appeal to this Court the case was remanded for resentencing because of the failure of the trial judge to find a mitigating factor, N.C.G.S. 15A-1340.4(a)(2), and because the judge improperly found an aggravating factor, N.C.G.S. 15A-1340.4(a)(1)(c). *Jones*, 309 N.C. 214, 306 S.E. 2d 451.

A second sentencing hearing was held on 8 November 1983. Upon motion for appropriate relief, this Court ordered a third sentencing hearing because the second sentences were effectively greater than those originally imposed and thus violated N.C.G.S. 15A-1335.

The results of the three sentencing hearings may be outlined as follows:

State v. Jones

3 AUGUST 1982 SENTENCING HEARING

OFFENSE	AGGRAVATING FACTORS G.S. 15A-1340.4(a)(1)	MITIGATING FACTORS G.S. 15A-1340.4(a)(2)	SENTENCE
second degree murder	c	c	life
armed robbery	c, a	c	40 years
felonious larceny	c	c	5 years
conspiracy to commit armed robbery	c	c	3 years

8-9 NOVEMBER 1983 SENTENCING HEARING

OFFENSE	AGGRAVATING FACTORS G.S. 15A-1340.4(a)(1)	MITIGATING FACTORS G.S. 15A-1340.4(a)(2)	SENTENCE
second degree murder	o	c, e, l, defendant willing to testify against codefendant	life
armed robbery	a, o	e, l, defendant willing to testify against codefendant	40 years
felonious larceny	o	e, l, defendant willing to testify against codefendant	5 years
conspiracy to commit armed robbery	N/A	N/A	1 year

29 JUNE 1984 SENTENCING HEARING

OFFENSE	AGGRAVATING FACTORS G.S. 15A-1340.4(a)(1)	MITIGATING FACTORS G.S. 15A-1340.4(a)(2)	SENTENCE
second degree murder	o	c, e, l, defendant willing to testify against codefendant	life
armed robbery	a, o	e, l, defendant willing to testify against codefendant	40 years
felonious larceny	N/A	N/A	3 years
conspiracy to commit armed robbery	N/A	N/A	1 year

Defendant's sole argument on appeal is that his sentences on the charges of murder in the second degree and armed robbery violate the double jeopardy provisions of the Federal Constitution and the Constitution of North Carolina. Defendant argues that at the first sentencing hearing the trial judge considered and failed to find the aggravating factor that defendant had a prior criminal conviction.[1] Therefore, defendant concludes, principles of double jeopardy prevent the finding of that aggravating factor at the second and third sentencing hearings. Defendant does not contend that the evidence at the third sentencing hearing fails to support the finding of the prior conviction as an aggravating factor. We reject defendant's arguments.

Defendant relies upon *State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981). In *Silhan* this Court was concerned with the applica-

1. We note that the evidence does not support defendant's contention. The record discloses that no evidence of defendant's prior criminal record was before the trial judge at the first sentencing hearing. Therefore he could not have considered and rejected this factor.

tion of double jeopardy principles to a second sentencing hearing before a jury in a capital case. The Court held in *Silhan* that the sentencing requirements in a capital case are like elements of a criminal offense which the jury must find to exist beyond a reasonable doubt. Formal rules of evidence must be observed. The jury has much the same kind of duty that it has in deciding the guilt of a defendant. Therefore, the Court applied double jeopardy principles dealing with criminal convictions to the finding or failure to find aggravating circumstances in a capital sentencing hearing.

Defendant asks us to extend the rationale of *Silhan* to Fair Sentencing cases. This we decline to do. In the sentencing phase of capital cases the jury must find the facts beyond a reasonable doubt; it has very limited discretion, to be exercised under defined guidelines; it has only two alternatives for its verdict, and its verdict is not recommendatory but constitutes the sentence to be imposed. N.C. Gen. Stat. § 15A-2000 (1983).

In contrast, Fair Sentencing Act cases do not have the hallmarks of a trial on guilt or innocence. The judge hears the evidence without a jury. The formal rules of evidence do not apply. N.C. Gen. Stat. § 15A-1334(b) (1983). Although he must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist. The judge thereafter determines in his discretion what weight to give to the factors so found. He then must exercise his discretion to decide whether the aggravating factors outweigh the mitigating factors and whether defendant should receive an active sentence and, if so, the length and circumstances of the sentence. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). *See also Bullington v. Missouri*, 451 U.S. 430, 68 L.Ed. 2d 270 (1981); *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983); *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). In this respect the trial judge exercises relatively unbridled sentencing discretion. *Silhan*, 302 N.C. 223, 275 S.E. 2d 450. The proceedings under the Fair Sentencing Act do not involve the finding of elemental facts beyond a reasonable doubt in the nature of a guilt or innocence trial. In such proceedings the principles of double jeopardy do not bar the finding of ag-

gravating and mitigating factors different from those found at an earlier sentencing hearing.

Each of the sentencing hearings in this case was a de novo proceeding brought about by the defendant. At such subsequent hearings, the trial court may find aggravating and mitigating factors without regard to the findings in the prior sentencing hearings.

Defendant has received the benefit of three sentencing hearings in this case. By this appeal he seeks yet a fourth. We find no error in the sentencing hearing of 29 June 1984.

Affirmed.

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

STATE OF NORTH CAROLINA v. JAMES ERNEST GREENE

No. 254A85

(Filed 5 November 1985)

Homicide §§ 6.1, 30.3— involuntary manslaughter—lesser included offense of murder and voluntary manslaughter

Involuntary manslaughter is a lesser included offense of murder and of voluntary manslaughter since the essential element that the killing be unlawful is common to all four degrees of homicide, a showing that the killing was caused either by an unlawful act not amounting to a felony or by culpably negligent conduct is not evidence of an essential element of involuntary manslaughter but is proof that the killing was unlawful, and involuntary manslaughter thus does not contain an essential element not present in the crimes of murder and voluntary manslaughter. Therefore, involuntary manslaughter could properly be submitted to the jury as a possible verdict in a prosecution for second degree murder.

APPEAL by defendant pursuant to N.C.G.S. 7A-30(2) from the decision of a divided panel of the Court of Appeals, reported in 74 N.C. App. 21, 328 S.E. 2d 1 (1985), which found no error in the trial and conviction of defendant before *Lupton, J.*, at the 5 December 1983 session of Superior Court, CALDWELL County. Heard in the Supreme Court 17 October 1985.

Lacy H. Thornburg, Attorney General, by Charles M. Hensey, Assistant Attorney General, for the state.

Wilson and Palmer, by W. C. Palmer, for defendant.

MARTIN, Justice.

The sole issue in this appeal is whether involuntary manslaughter is a lesser included offense of murder in the second degree. Concluding that it is, we affirm the decision of the Court of Appeals.

A brief summary of the evidence is sufficient: After drinking beer and hanging out at the Country Boys night spot, defendant and David Whistine had a fistfight. Both apparently were wearing brass knuckles. Defendant testified that as he was leaving Country Boys he heard Whistine say, "Run, you son of a bitch. I know where you live. I'll get you." After he got to his home, defendant walked over to the home of Johnny Tilson, Whistine's brother-in-law. Tilson testified that defendant had a gun and was looking for and threatening to kill Whistine. Defendant testified that he went to Tilson's home looking for Whistine's brother, Buddy, to tell Buddy to keep Whistine away from defendant's home. Defendant then returned to his home. After a while Buddy went over to defendant's house, and shortly thereafter Whistine showed up. A confrontation between defendant and Whistine ensued. When defendant pointed a gun at Whistine, Buddy intervened. He grabbed defendant's gun by the barrel, but defendant wrenched it away. Buddy grabbed it a second time and the gun fired, wounding Buddy, who died from the injuries suffered from the gunshot.

Defendant was indicted on the charge of murder in the second degree. Possible verdicts of manslaughter, involuntary manslaughter, and not guilty were submitted to the jury, and defendant was convicted of involuntary manslaughter. The Court of Appeals, by a divided panel, found no error in the trial, with the dissenting judge contending that involuntary manslaughter is not a lesser included offense of murder.

Defendant argues that the trial court erred in submitting involuntary manslaughter as a possible verdict, contending that it is not a lesser included offense of murder. Defendant does not contest the sufficiency of the evidence to support the charge of involuntary manslaughter.

This Court, speaking through Huskins, J., held in *State v. Wrenn*, 279 N.C. 676, 681-82, 185 S.E. 2d 129, 132 (1971):

> Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Lamm*, 232 N.C. 402, 61 S.E. 2d 188 (1950). Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963). Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to kill or inflict serious bodily injury. State v. Foust, supra; State v. Honeycutt*, 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930).

Involuntary manslaughter has also been defined as the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

The single essential element common to all four degrees of homicide is that there be an *unlawful* killing of a human being. Involuntary manslaughter is not distinguished from murder or voluntary manslaughter by the presence of an essential element not contained in the greater offenses; it is distinguished from those offenses by the *absence* of elements that are essential to the greater offenses but not to involuntary manslaughter. It is the absence of malice, premeditation, deliberation, intent to kill, and intent to inflict serious bodily injury that separates involuntary manslaughter from murder and voluntary manslaughter.

Defendant argues in this Court that when the definitional test of *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), is applied to the charge in this case, involuntary manslaughter is not a lesser included offense of murder in the second degree. His theory is that involuntary manslaughter contains an essential element which is not found in murder: either (1) an unlawful act not

amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission. We disagree.

Contrary to defendant's arguments, these are not elements of involuntary manslaughter but are two methods of proving the essential element that the killing was unlawful. If the state proves beyond a reasonable doubt that the killing was caused either by an unlawful act not amounting to a felony or by culpably negligent conduct, it has proven that the killing was unlawful. That the killing be unlawful is the essential element that must be proved; showing that the killing was by an unlawful act not amounting to a felony or by culpable conduct is evidence to prove that the killing was unlawful.

Moreover, in *Wrenn*, 279 N.C. at 683-84, 185 S.E. 2d at 134, we find the following holding by this Court: "Since the evidence offered by defendant, if believed by the jury, is sufficient to support a verdict of involuntary manslaughter, *which is a lesser degree of the crime charged in the bill of indictment* [murder], the court erred in excluding it from the list of permissible verdicts." (Emphasis added.) Although this Court did not discuss the issue, this is a direct holding supporting the conclusion reached by the Court today.

As involuntary manslaughter does not contain an essential element not present in the crimes of murder and voluntary manslaughter and the essential element that the killing be unlawful is common to all four degrees of homicide, we hold that involuntary manslaughter is a lesser included offense of murder and of voluntary manslaughter.

This holding is in accord with the prior decisions of this Court which have consistently held by implication, if not directly, that involuntary manslaughter is a lesser included offense of murder and manslaughter. *See State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984) (not error to fail to submit involuntary manslaughter); *State v. Hill*, 311 N.C. 465, 319 S.E. 2d 163 (1984) (not error to fail to submit involuntary manslaughter); *State v. Buck*, 310 N.C. 602, 313 S.E. 2d 550 (1984) (error in failing to submit involuntary manslaughter); *State v. Holcomb*, 295 N.C. 608, 247 S.E. 2d 888 (1978) (not error to fail to submit involuntary manslaughter); *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (not error to fail to submit involuntary manslaughter); *State v. Foust*, 258 N.C.

453, 128 S.E. 2d 889 (not error in submitting involuntary manslaughter); *State v. Hovis*, 233 N.C. 359, 64 S.E. 2d 564 (1951) (not error in submitting involuntary manslaughter). *Accord State v. Vines*, 93 N.C. 493 (1885); *State v. Roane*, 13 N.C. 58 (1828).

The conclusion the Court reaches is also supported by the general rule:

> Since it is a general rule that an indictment for murder in the first degree involves all other grades of homicide which the evidence tends to establish, an indictment or information charging murder in the first degree includes therein murder in the second degree and manslaughter. . . . Where murder is charged, it includes both kinds of manslaughter and will therefore support a conviction of involuntary manslaughter.

40 Am. Jur. 2d *Homicide* § 216 (1968). *See also* 6 Strong's N.C. Index 3d *Homicide* § 30.3 (1977); 4 W. Blackstone, *Commentaries* *192.

The decision of the Court of Appeals is

Modified and affirmed.

STATE OF NORTH CAROLINA v. THOMAS BOOKER WILSON

No. 632A84

(Filed 5 November 1985)

Constitutional Law § 32; Criminal Law § 101.4— bailiff in charge of the jury married to prosecutor—new trial

The trial judge erred by denying defendant's motions for a mistrial and for appropriate relief where the bailiff in charge of the jury was the wife of the assistant district attorney who prosecuted the case. Although there was nothing in the record to remotely suggest that the bailiff actually attempted to influence the jury in any manner, it is the appearance of the opportunity for such influence that is determinative; an immediate family member of either a prosecutor trying the case, a defendant, a defendant's counsel defending the case, or a crucial witness for either the prosecution or the defense is prohibited from serving as custodian or officer in charge of the jury in a criminal case.

BEFORE *Freeman, J.*, at the 8 October 1984 Criminal Session of Superior Court, FORSYTH County, defendant was convicted of first-degree sexual offense and attempted rape. Defendant was sentenced to the mandatory term of life imprisonment for the first-degree sexual offense conviction and a concurrent term of six years imprisonment for the attempted rape conviction. Defendant appeals of right pursuant to N.C.G.S. § 7A-27(a) the first-degree sexual offense conviction. On 14 November 1984, this Court allowed defendant's motion to bypass the Court of Appeals on his appeal in the attempted rape case. Heard in the Supreme Court 9 September 1985.

Lacy H. Thornburg, Attorney General, by Steven Mansfield Shaber, Assistant Attorney General, for the State.

William L. Cofer for defendant-appellant.

MEYER, Justice.

A detailed recitation of the evidence is unnecessary to the disposition of this case. The State's evidence tended to show that on 19 May 1984 the defendant was living in a house in Winston-Salem with his eight-year-old daughter, Brenda, and his wife, Lillian Greer. Brenda testified to the effect that on that date the defendant removed her panties, touched her vagina with his tongue, put some hair grease on her vagina, and placed his fingers on her vagina. She testified that he had done this "lots of times" before. She also testified that the defendant placed his penis "on" her vagina. The child also related that defendant said to her that if she told anyone about these actions, he would kill her. Her testimony was corroborated by others to whom she had made statements concerning what her father had done to her.

The defendant testified on his own behalf and vehemently denied committing any sexual act with Brenda or any other child.[1] The defense also presented witnesses who testified as to the defendant's good character and as to the fact that his mental capacity was below average. The defendant was found guilty of

1. The defendant was also charged with committing first-degree sexual offenses against seven-year-old Krishauna Hines and eleven-year-old Tammy Stuckey. The defendant was acquitted of these charges.

the first-degree sexual offense and the attempted rape of his daughter, Brenda.

The defendant brings forward several assignments of error by which he argues that he is entitled to have the charges against him dismissed or, in the alternative, that he should be granted a new trial. We conclude that the defendant is entitled to a new trial due to the fact that the wife of the assistant district attorney who prosecuted the case served as the bailiff in charge of the jury. We therefore deem it unnecessary to address the defendant's remaining assignments of error.

The prosecuting attorney's wife was a courtroom officer and was the bailiff in charge of the jury. During a break in the jury's deliberations, one of the jurors spoke to the bailiff and said that she had seen her and the prosecuting attorney driving home together after work. Another juror mentioned that she had observed the bailiff and the prosecuting attorney driving to work together. There was also some conversation to the effect that the three of them lived in the same vicinity. As a result of these statements, the bailiff proceeded to engage in a few minutes of friendly conversation with these two jurors, including a statement to them, "Well, here we are, nearly neighbors and didn't even know it." However, she stated that at no time did she attempt to influence the jury's decision.

The defendant's attorney overheard the conversation between the prosecutor's wife and the two jurors, and following the return of the verdicts, he moved for a mistrial based on the bailiff's conversation with the jurors which defense counsel alleged emphasized her relationship with the prosecutor. The motion was denied. The defendant subsequently filed a motion for appropriate relief based on the same grounds. This motion was also denied.

This Court has held that where the custodian or officer in charge of the jury in a criminal case is a witness for the State, prejudice to the defendant is conclusively presumed and he is entitled to a new trial. *State v. Mettrick*, 305 N.C. 383, 289 S.E. 2d 354 (1982); *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970). *See also Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 2d 424 (1965). The defendant contends that this rule should also apply where the custodian or officer in charge of the jury is the spouse of the prosecuting attorney. We agree.

The State contends that this situation differs from that in *Mettrick*, because in *Mettrick* the close association between the law enforcement officers and the jurors gave them an opportunity to bolster their personal credibility *as witnesses* and thus directly influence the case, whereas here the bailiff was not a witness in the case. This argument, however, overlooks the underlying rationale of the *Mettrick* decision. There, we said the appearance of a fair trial before an impartial jury is as important as the fact that a defendant actually receives such a trial. *State v. Mettrick*, 305 N.C. at 385, 289 S.E. 2d at 356. We find this reasoning to be equally applicable here. Our jury system depends on the public's confidence in its integrity. We must zealously guard against any actions or situations which would raise the slightest suspicion that the jury in a criminal case had been influenced or tampered with so as to be favorable to either the State or the defendant. Any lesser degree of vigilance would foster suspicion and distrust and risk erosion of the public's confidence in the integrity of our jury system. Allowing the spouse of the prosecutor to serve as the bailiff in charge of the jury could lead some with cynical minds to believe that the jury could have been improperly influenced in some manner. We wish to emphasize that there is absolutely nothing in the record to remotely suggest that the bailiff actually attempted to influence the jury in any manner. However, whether any tampering or attempted tampering took place is irrelevant. It is the *appearance* of the *opportunity* for such influence that is determinative.

We hold that an immediate family member of either a prosecutor trying the case, a defendant, a defendant's counsel defending the case, or a crucial witness for either the prosecution or the defense is prohibited from serving as custodian or officer in charge of the jury in a criminal case.

For the foregoing reasons, we conclude that the trial judge erred in denying defendant's motions for mistrial and for appropriate relief. The defendant is entitled to a new trial. The judgment entered against the defendant is vacated, and the case is remanded to the Superior Court, Forsyth County, for a new trial.

The defendant's motion for appropriate relief filed with this Court on 9 September 1985 is denied.

New trial.

EDWARD C. HOOKS, EMPLOYEE, PLAINTIFF v. EASTWAY MILLS, INC. & AFFILIATES, EMPLOYER, FIREMAN'S FUND INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 345A85

(Filed 5 November 1985)

Master and Servant § 93— workers' compensation—reasonableness of refusal to submit to tests—remand for findings

A workers' compensation proceeding is remanded for a determination of whether the circumstances justified plaintiff's refusal to submit to certain diagnostic tests suggested by a doctor designated by defendant employer. G.S. 97-27(a).

APPEAL by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from an opinion of a divided panel of the Court of Appeals reported at 74 N.C. App. 432, 328 S.E. 2d 602 (1985) affirming a decision of the North Carolina Industrial Commission.

W. David McSheehan for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Martha W. Surles, Gregory C. York and Mel J. Garofalo, for defendants-appellees.

PER CURIAM.

Plaintiff sustained an injury by accident arising out of his employment as a warehouse manager for Eastway Mills, Inc. & Affiliates on 16 December 1980, resulting in pain in his back and right leg. The plaintiff was treated by Dr. Joseph John King, an orthopedic surgeon in Monroe, North Carolina who diagnosed the plaintiff's condition as sciatica.

The plaintiff made an application for compensation pursuant to the North Carolina Workers' Compensation Act, N.C.G.S. Chapter 97.

According to findings of fact by Morgan R. Scott, Deputy Commissioner, which were adopted by the Full Commission:

> At defendants' request plaintiff was examined by Dr. Caughran in Charlotte on August 27, 1981. Dr. Caughran recommended that plaintiff be admitted to the hospital for diagnostic tests including a myelogram. Plaintiff agreed to

the tests when the doctor spoke with him, but on the following day he saw Dr. King who indicated that the tests were not necessary at the time. Plaintiff then decided against having Dr. Caughran perform the tests because his doctor did not recommend them and because he preferred for his doctor to perform them since he did not know Dr. Caughran.

Subsequently, upon Dr. King's recommendation, the plaintiff did have the tests performed and provided the test results to Dr. Caughran. As a result, the plaintiff was diagnosed as having a herniated lumbar disc at the L4-5 interspace and was given a rating of 15% permanent partial disability of the back.

A majority of the Court of Appeals panel held that the plaintiff was not entitled to compensation for the period 27 August 1981, when he refused the tests recommended by Dr. Caughran, until 15 March 1982, when he submitted the test results to Dr. Caughran and submitted to further examination. Judge Phillips dissented on the bases that the myelogram and other diagnostic procedures suggested by Dr. Caughran are beyond the scope of an examination and that the Commission's finding quoted above constitutes a finding that the plaintiff's refusal to undergo the tests was justified under the circumstances.

As part of the North Carolina Workers' Compensation Act, N.C.G.S. § 97-27(a) provides, *inter alia*, as follows:

> After an injury, and so long as he claims compensation, the employee, if so requested by his employer or ordered by the Industrial Commission, shall, subject to the provisions of subsection (b), submit himself to examination, at reasonable times and places, by a duly qualified physician or surgeon designated and paid by the employer or the Industrial Commission. . . . If the employee refuses to submit himself to or in any way obstructs such examination requested by and provided for by the employer, . . . no compensation shall at any time be payable for the period of obstruction, unless in the opinion of the Industrial Commission the circumstances justify the refusal or obstruction.

Because we do not read the findings of fact of the Industrial Commission as a determination of whether the circumstances justified the plaintiff's refusal to submit to the procedures suggested

by Dr. Caughran, we reverse and remand to the Court of Appeals for further remand to the Industrial Commission for determination of whether the plaintiff's refusal to undergo the procedures was reasonable under the circumstances.

Reversed and remanded.

STATE OF NORTH CAROLINA v. LUIS MERCADO

No. 121PA85

(Filed 5 November 1985)

ON discretionary review of the decision of the Court of Appeals, 72 N.C. App. 521, 325 S.E. 2d 313 (1985), reversing judgment of *Bowen, J.*, entered at the 12 December 1983 Criminal Session of CUMBERLAND County Superior Court, sentencing defendant to three years' imprisonment upon a jury verdict finding defendant guilty of involuntary manslaughter.

Lacy H. Thornburg, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the state appellant.

James R. Parish for defendant appellee.

PER CURIAM.

We allowed the state's petition for discretionary review principally to consider whether the Court of Appeals erred in concluding that involuntary manslaughter was not a lesser included offense of murder. This question has now been addressed and answered in *State v. Greene*, 314 N.C. 649, 336 S.E. 2d 87 (1985) (involuntary manslaughter *is* a lesser included offense of murder).

The Court of Appeals also held there was no evidence of involuntary manslaughter and had it not been submitted there was a reasonable likelihood defendant would have been acquitted altogether. Therefore, the submission of involuntary manslaughter was reversible error; and defendant, having been acquitted of all other degrees of homicide, was entitled to be discharged. We do

not think this aspect of the Court of Appeals' opinion is deserving of further review.

The result is that the state's petition in the instant case may be considered improvidently allowed.

Discretionary review improvidently allowed.

DOROTHY LESNIAK COLE v. DONALD SCOTT COLE

No. 290A85

(Filed 5 November 1985)

PLAINTIFF appeals as a matter of right, pursuant to G.S. 7A-30(2), from a decision of a divided panel of the Court of Appeals, 74 N.C. App. 247, 328 S.E. 2d 446 (1985), reversing an Order entered on 8 March 1984 by *Peele, J.*, in District Court, ORANGE County. Heard in the Supreme Court 17 October 1985.

Hogue & Strickland, by Lucy D. Strickland, for plaintiff-appellant.

Clayton, Myrick & McClanahan, by Robert D. McClanahan, for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is

Affirmed.

Braswell v. Sauls

DEBRA RIGSBEE BRASWELL	)	
	)	
v.	)	ORDER
	)	
PATRICIA SAULS	)	

No. 575P85

(Filed 1 October 1985)

UPON consideration of the plaintiff's petition for a writ of certiorari to review the decision of the Court of Appeals, the Supreme Court enters the following order:

The order entered by Judge Bailey on 12 July 1985 vacating the order of immunity signed by Judge Brannon and filed 1 July 1985 is hereby vacated on the authority of *Wellons v. Lassiter*, 200 N.C. 474, 157 S.E. 434 (1931), without prejudice to any later procedurally appropriate challenge to the 1 July 1985 order.

By order of the Court in conference, this the 1st day of October, 1985.

BILLINGS, J.
For the Court

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

AETNA CASUALTY CO. v. PENN. NAT. MUT. CAS. CO.

No. 508PA85.

Case below: 75 N.C. App. 511.

Petition by defendants for discretionary review under G.S. 7A-31 allowed 1 October 1985.

APPELBE v. APPELBE

No. 400P85.

Case below: 75 N.C. App. 197.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985.

BIRMINGHAM STEEL v. BUTLER

No. 553P85.

Case below: 76 N.C. App. 345.

Petition by third-party defendant for discretionary review under G.S. 7A-31 denied 1 October 1985.

BRANCH BANKING AND TRUST CO. v.
KENYON INVESTMENT CORP.

No. 500PA85.

Case below: 76 N.C. App. 1.

Petition by several defendants for discretionary review under G.S. 7A-31 allowed 5 November 1985.

BRANCH BANKING AND TRUST CO. v. WRIGHT

No. 330PA85.

Case below: 74 N.C. App. 550.

Petition by defendant (Mary Dianne Wright) for discretionary review under G.S. 7A-31 allowed 1 October 1985.

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

BUTLER v. STEWART

No. 550P85.

Case below: 76 N.C. App. 345.

Petition by defendant and third-party plaintiff for discretionary review under G.S. 7A-31 denied 1 October 1985.

CAMP v. CAMP

No. 464P85.

Case below: 75 N.C. App. 498.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 October 1985.

CARPENTER v. HERTZ CORP.

No. 481P85.

Case below: 75 N.C. App. 511.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 October 1985.

CASTEEN v. DE NEMOURS & CO.

No. 523P85.

Case below: 75 N.C. App. 511.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1985.

CRAVEN COUNTY HOSP. CORP. v. LENOIR COUNTY

No. 455P85.

Case below: 75 N.C. App. 453.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985.

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

CUTTING v. FOXFIRE VILLAGE

No. 382P85.

Case below: 75 N.C. App. 161.

Petition by defendant for discretionary review under G.S. 7A-31 denied 10 October 1985.

DAILEY v. INTEGON INS. CORP.

No. 478P85.

Case below: 75 N.C. App. 387.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

DOUGLAS v. PENNAMCO, INC.

No. 462P85.

Case below: 75 N.C. App. 644.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985.

FALLSTON FINISHING v. FIRST UNION NAT. BANK

No. 629P85.

Case below: 76 N.C. App. 347.

Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1985.

FARLOW v. BD. OF CHIROPRACTIC EXAMINERS

No. 547P85.

Case below: 76 N.C. App. 202.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985. Notice of appeal by plaintiff under G.S. 7A-30 dismissed 5 November 1985.

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

FORD v. FORD DIST.

No. 543P85.

Case below: 76 N.C. App. 163.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985.

GELL v. MANUEL

No. 578P85.

Case below: 76 N.C. App. 163.

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 5 November 1985.

HARRISON REALTY v. GEN. HOMES CORP.

No. 589P85.

Case below: 76 N.C. App. 542.

Petitions by Realty and General Homes for discretionary review under G.S. 7A-31 and writ of supersedeas and temporary stay denied 1 October 1985.

HUNNICUTT v. GRIFFIN

No. 562P85.

Case below: 76 N.C. App. 259.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

IN RE CLARK

No. 486P85.

Case below: 76 N.C. App. 83.

Petition by Clark for discretionary review under G.S. 7A-31 denied 1 October 1985. Motion by respondent to dismiss appeal for lack of substantial constitutional question allowed 1 October 1985.

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

IN RE THOMPSON

No. 291P85.

Case below: 74 N.C. App. 329.

Petition by Thompson for discretionary review under G.S. 7A-31 denied 1 October 1985.

INDIANA LUMBERMENS MUT. INS. CO. v. UNIGARD INDEMNITY CO.

No. 491P85.

Case below: 76 N.C. App. 88.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 October 1985.

JOHNSON v. TOWN OF GARLAND

No. 343P85.

Case below: 74 N.C. App. 607.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 1 October 1985.

LAUGHTER v. SOUTHERN PUMP & TANK CO., INC.

No. 404P85.

Case below: 75 N.C. App. 185.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 October 1985.

LITTLE v. PENN VENTILATOR CO.

No. 398PA85.

Case below: 75 N.C. App. 92.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed 5 November 1985.

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

McCARROLL v. McCARROLL

No. 390P85.

Case below: 75 N.C. App. 363.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

MAFFEI v. ALERT CABLE TV OF N.C., INC.

No. 477PA85.

Case below: 75 N.C. App. 473.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 1 October 1985.

MILLER WIRE v. BUTLER

No. 554P85.

Case below: 76 N.C. App. 345.

Petition by third-party defendant for discretionary review under G.S. 7A-31 denied 1 October 1985.

MORTON v. MORTON

No. 560P85.

Case below: 76 N.C. App. 295.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985. Notice of appeal by defendant dismissed 5 November 1985.

N. C. ASSOCIATION OF ABC BOARDS v. HUNT

No. 541P85.

Case below: 76 N.C. App. 290.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 November 1985.

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

OLIVE v. GREAT AMERICAN INS. CO.

No. 555P85.

Case below: 76 N.C. App. 180.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 November 1985.

PHELPS v. DUKE POWER CO.

No. 549P85.

Case below: 76 N.C. App. 222.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985.

PROCTOR v. WARREN WILSON COLLEGE

No. 392P85.

Case below: 75 N.C. App. 199.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

RUSSELL FORD v. CURRY

No. 551P85.

Case below: 76 N.C. App. 345.

Petition by third-party defendant for discretionary review under G.S. 7A-31 denied 1 October 1985.

SANYO ELECTRIC, INC. v. ALBRIGHT DISTRIBUTING CO.

No. 489P85.

Case below: 76 N.C. App. 115.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 1 October 1985.

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

SHAW v. WILLIAMSON

No. 474P85.

Case below: 75 N.C. App. 604.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 October 1985.

SHELBY MUT. INS. CO. v. DUAL STATE CONSTR. CO.

No. 527P85.

Case below: 75 N.C. App. 330.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 October 1985.

SMITH v. STARNES

No. 424PA85.

Case below: 74 N.C. App. 306.

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 5 November 1985.

SOUTHERN GLOVE MANUFACTURING CO. v.
CITY OF NEWTON

No. 454P85.

Case below: 75 N.C. App. 574.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 November 1985.

SPERRY CORP. v. LYNCH

No. 556P85.

Case below: 76 N.C. App. 327.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 November 1985.

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

STANFORD v. OWENS

No. 548P85.

Case below: 76 N.C. App. 284.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 November 1985.

STATE v. BELL

No. 619P85.

Case below: 76 N.C. App. 680.

Petitions by defendant for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 16 October 1985.

STATE v. CASTLEBERRY

No. 530P85.

Case below: 73 N.C. App. 420.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 October 1985.

STATE v. CURTIS

No. 399P85.

Case below: 75 N.C. App. 200.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 October 1985. Motion by Attorney General to dismiss appeal for lack of significant public interest allowed 1 October 1985.

STATE v. DAVIDSON

No. 695P85.

Case below: 77 N.C. App. 540.

Petitions by Attorney General for discretionary review under G.S. 7A-31 and for writ of supersedeas under Rule 23 denied 25 November 1985. Notice of appeal by Attorney General under G.S. 7A-30 dismissed 25 November 1985.

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

STATE v. FIELD

No. 416P85.

Case below: 75 N.C. App. 647.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985. Notice of appeal by defendant under G.S. 7A-30 dismissed 5 November 1985.

STATE v. HALL

No. 599P85.

Case below: 77 N.C. App. 238.

Petitions by Attorney General for discretionary review under G.S. 7A-31 and for writ of supersedeas denied 5 November 1985.

STATE v. HERRING

No. 287A85.

Case below: 74 N.C. App. 269.

Petitions by defendant (Herring) and defendant (Meyer) for discretionary review under G.S. 7A-31 denied as to additional issues 2 October 1985.

STATE v. HOOD

No. 640P85.

Case below: 77 N.C. App. 170.

Petitions by Attorney General for discretionary review under G.S. 7A-31 and for writ of supersedeas and temporary stay denied 29 October 1985.

STATE v. HOPE

No. 625A85.

Case below: 77 N.C. App. 338.

Petition by Attorney General for writ of supersedeas allowed 24 October 1985.

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

STATE v. HORTON

No. 566P85.

Case below: 75 N.C. App. 632.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 October 1985.

STATE v. JONES

No. 651P85.

Case below: 77 N.C. App. 460.

Petition by defendant for writ of supersedeas and temporary stay denied 29 October 1985.

STATE v. KING

No. 505A85.

Case below: 75 N.C. App. 618.

Notice of appeal by Attorney General, filed pursuant to G.S. 7A-30 on the basis of a dissenting opinion in the Court of Appeals, dismissed by the Supreme Court *ex mero motu* 30 October 1985.

STATE v. LEDFORD

No. 328P85.

Case below: 74 N.C. App. 608.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

STATE v. MASSEY

No. 593P85.

Case below: 76 N.C. App. 660.

Petition by Attorney General for writ of supersedeas allowed 3 October 1985.

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

STATE v. MIDDLETON & KORNEGAY

No. 558P85.

Case below: 76 N.C. App. 345.

Petition by defendant (Middleton) for discretionary review under G.S. 7A-31 denied 5 November 1985.

STATE v. NELSON

No. 587A85.

Case below: 76 N.C. App. 371.

Petition by Attorney General for writ of supersedeas allowed 5 November 1985.

STATE v. PARKER

No. 583P85.

Case below: 76 N.C. App. 465.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

STATE v. PARKER

No. 580PA85.

Case below: 76 N.C. App. 508.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed and petition for writ of supersedeas and temporary stay allowed 1 October 1985.

STATE v. SANDERS

No. 623P85.

Case below: 76 N.C. App. 683.

Petition by defendant for writ of supersedeas and temporary stay denied 22 October 1985.

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

STATE v. SHIVER

No. 567P85.

Case below: 70 N.C. App. 496.

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 October 1985.

STATE v. SIDERS & BAKER

No. 336P85.

Case below: 74 N.C. App. 609.

Petition by defendant (Siders) for discretionary review under G.S. 7A-31 denied 1 October 1985. Petition by defendant (Baker) for writ of certiorari to the North Carolina Court of Appeals denied 1 October 1985.

STATE v. STAFFORD

No. 598A85.

Case below: 77 N.C. App. 19.

Petition by Attorney General for writ of supersedeas under Rule 23 allowed 22 October 1985.

STATE v. STALLINGS

No. 652P85.

Case below: 77 N.C. App. 375.

Petition by defendant for writ of supersedeas and temporary stay denied 30 October 1985.

STATE v. TALBERT

No. 394P85.

Case below: 75 N.C. App. 200.

Petition by defendant for discretionary review under G.S. 7A-31 denied 1 October 1985.

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

STATE v. THOMPSON

No. 526P85.

Case below: 76 N.C. App. 346.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

STATE v. TRAYWICK

No. 660P85.

Case below: 76 N.C. App. 683.

Petitions by defendant for writ of certiorari to the North Carolina Court of Appeals and for writ of supersedeas and temporary stay denied 1 November 1985.

STATE EX REL. UTILITIES COMM. v.
N. C. NATURAL GAS

No. 561P85.

Case below: 76 N.C. App. 330.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

TATE v. GARDNER

No. 542P85.

Case below: 76 N.C. App. 164.

Petition by Rossie G. Gardner for discretionary review under G.S. 7A-31 denied 5 November 1985. Notice of appeal under G.S. 7A-30 dismissed 5 November 1985.

UMSTEAD v. EMPLOYMENT SECURITY COMMISSION

No. 466P85.

Case below: 75 N.C. App. 538.

Petition by Department of Agriculture for discretionary review under G.S. 7A-31 denied 5 November 1985.

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

VAN SUMNER, INC. v.
PENN. NAT. MUT. CASUALTY INS. CO.

No. 380P85.

Case below: 74 N.C. App. 654.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

WACHOVIA BANK v. LANGLEY

No. 546P85.

Case below: 75 N.C. App. 512.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 November 1985.

WATTS v. CUMBERLAND COUNTY HOSP. SYSTEM

No. 384A85.

Case below: 75 N.C. App. 1.

Petition by plaintiff for discretionary review under G.S. 7A-31 allowed as to defendants Moress and Keranen and denied as to defendant Alexander 8 October 1985.

APPENDIXES

ADVISORY OPINION

AMENDMENTS TO RULES
OF APPELLATE PROCEDURE

NORTH CAROLINA RULES GOVERNING
PRACTICAL TRAINING OF
LAW STUDENTS

APPENDIX

IN RE RESPONSE TO REQUEST FOR ADVISORY OPINION

28 October 1985

The Honorable Robert B. Jordan, III
President of the Senate
North Carolina General Assembly
Raleigh, North Carolina 27611

The Honorable Liston B. Ramsey
Speaker of the House
North Carolina General Assembly
Raleigh, North Carolina 27611

Dear Mr. President and Mr. Speaker:

We acknowledge your request dated July 31, 1985, for an advisory opinion as to whether Sections 5 and 6 and subsection 7A-752 of Section 2, all being contained in Chapter 746 of the 1985 Session Laws, are consistent with the North Carolina Constitution. Sections 5 and 6 essentially seek to establish an "Administrative Rules Review Commission" as an agency within the Department of Justice with power to review and "disallow" administrative rules and regulations which do not comport with specified standards set out in Chapter 746. Subsection 7A-752 of Section 2 provides that the Chief Justice shall appoint the Director of the Office of Administrative Hearings, an agency newly created by Chapter 746. Section 18.1 amends subsection 7A-752 of Section 2 so as to substitute "Attorney General" for "Chief Justice."

We understand that your request is made pursuant to Section 19 of Chapter 746 which provides in part:

> Sections 5 and 6 shall become effective 30 days from the date the Supreme Court issues an advisory opinion on the constitutionality of those sections unless the opinion states that those sections are unconstitutional, in which event those sections shall not become effective. Section 18.1 shall become effective only if the Supreme Court issues an advisory opinion that the appointment of the chief hearing officer by the Chief Justice is unconstitutional.

Thus under Section 19, statutory creation of the "Administrative Rules Review Commission" is conditioned upon the issuance of an advisory opinion by the Supreme Court that such creation comports with the North Carolina Constitution. Further under Section 19 together with subsection 7A-752 of Section 2, the Chief Justice is empowered to appoint the Director of the Office of Administrative Hearings unless the Supreme Court issues an advisory opinion that such power to appoint contravenes the North Carolina Constitution, in which event the power is given to the Attorney General. The effect, therefore, of Section 19 of Chapter 746 is to make the creation of the Administrative Rules Review Commission dependent upon the issuance by the Court of a favorable advisory opinion and to leave the appointive power of the Chief Justice intact in the absence of the issuance by the Court of an unfavorable opinion.

We also have before us a letter from the Honorable James G. Martin, Governor of North Carolina, asking on several grounds that we not issue the advisory opinion you have requested.

Out of utmost respect for the Legislative and Executive Branches of our government, co-equals with each other and with the Judicial Branch, and for the high office and responsibility which each of you and the Governor hold, we have given your request our most careful attention and deliberation. Largely because of the nature and effect of the advisory opinion contemplated by Section 19 of Chapter 746, we most respectfully decline to issue such an opinion.

The North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions. But from time to time "as a matter of courtesy, and out of respect to a coordinate branch of the government," individual members of the Court acting in their individual capacities have given such opinions. In the Matter of Advisory Opinions, 196 N.C. 828 (1929). Because these opinions have been, and constitutionally can only be, opinions of individual members of the Court and not the Court itself, they have not and could not have had the force of law. Advisory opinions of the justices as individuals may be persuasive authority for the points of law addressed, but they are in no sense binding or obligatory on those points.

Yet Section 19 of Chapter 746, pursuant to which your request is made, seems to contemplate that the Court itself in its capacity as a court give its advisory opinion. Partly for the reason

that the Court was asked to give such an advisory opinion in In the Matter of Advisory Opinions, the Court in that instance declined to do so.

Even if we could construe Section 19 of Chapter 746 to refer simply to the opinions of the Justices individually, there are two even more fundamental principles which we are satisfied would be violated were we in our individual capacities to give an opinion in this instance.

The first is that the opinion would, in effect, have the force of law. An opinion favorable to the creation of the Administrative Rules Review Commission would mean that 30 days thereafter the commission would in law be created. An unfavorable opinion would mean, it seems, that no commission would be created at all pursuant to Chapter 746. An advisory opinion that the Chief Justice may not constitutionally appoint the Director of the Office of Administrative Hearings would confer in law the appointive power upon the Attorney General. A contrary advisory opinion would leave the power with the Chief Justice. To grant your request the members of the Supreme Court would have to place themselves directly in the stream of the legislative process. This kind of legislative power, we believe, should not be conferred upon or accepted by this Court or the Court's individual members.

Second, the General Assembly, as a branch of government coordinate with the Judicial Branch, should be given full opportunity to make its own determination in the first instance of whether any proposed legislation is constitutional. Neither the Court nor its individual members should interpose, except perhaps in a purely advisory capacity, opinions on constitutional issues before the Legislative Branch has made its own determination of such issues. That the final word on constitutionality may rest with the Judicial Branch in no way denigrates or makes less crucial the General Assembly's initial determination as to the constitutionality of proposed legislation. Were we to issue the opinion requested before the General Assembly has made its own determination of constitutionality, we would discount too much the General Assembly's prerogative to first address and determine the constitutionality of its legislation.

We recognize that under Section 19 of Chapter 746 some legal effect may attach even to our decision not to issue an advisory opinion. Whatever the effect of this decision, it will not be of our own making but of the General Assembly's, which is as it

should be. By declining to issue an advisory opinion, at least we will not have put ourselves in the stream of the legislative process. The issuance of such an opinion under the circumstances here presented would have that undesirable effect.

Trusting that our views on the matter will be respected and understood, we, for the reasons given, respectfully decline to give the advisory opinion you request.

Respectfully yours,

JOSEPH BRANCH,
Chief Justice

JAMES G. EXUM, JR.,
Associate Justice

LOUIS B. MEYER,
Associate Justice

BURLEY B. MITCHELL, JR.,
Associate Justice

HARRY C. MARTIN,
Associate Justice

HENRY E. FRYE,
Associate Justice

RHODA B. BILLINGS,
Associate Justice

AMENDMENTS TO RULES OF APPELLATE PROCEDURE

Appendix A of the North Carolina Rules of Appellate Procedure, 306 N.C. 759, is hereby amended to read as in the following pages.

Appendix F of the North Carolina Rules of Appellate Procedure, 306 N.C. 788, is hereby amended in the fifth paragraph thereof to delete the amount "$200.00" and replace it with the amount "$250.00" pertaining to the amount of appeal bond required in civil cases.

Adopted by the Court in Conference this 7th day of October, 1985. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

BILLINGS, J.
For the Court

APPENDIXES

APPENDIX A.

TIMETABLES FOR APPEALS

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THESE RULES

Action	Time (Days)	From date of	Rule Ref.
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)
Taking Appeal (crim.)	10	entry of judgment (unless tolled)	4(a)(2)
Filing and serving proposed record on appeal	60	taking appeal	11(b)
Filing and serving objections or proposed alternative record on appeal	15	service of proposed record	11(c)

Action	Time (Days)	From date of	Rule Ref.
Requesting judicial settlement of record	10	last day within which an appellee served could file objections, etc.	11(c)
Judicial settlement of record	20	service on judge of request for settlement	11(c)
(Certification of Record	10	settlement of record on appeal but only if Notice of Appeal filed prior to 1 February 1985. NO CERTIFICATION IS REQUIRED FOR RECORDS ON APPEAL WHERE NOTICE IS FILED ON OR AFTER THAT DATE.)	
Filing Record on Appeal in appellate court	15	settlement of record on appeal (or 10 days from certification of record under old rules)	12(a)
Filing appellant's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	service of appellant's brief	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time. Practical time is 60-90 days)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THESE RULES

Action	Time (Days)	From date of	Rule Ref.
Petition for Discretionary Review prior to determination	15	docketing appeal in Court of Appeals	15(a)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or from order of Court of Appeals denying petition for rehearing)	14(a), 15(a)
Cross-Notice of Appeal	10	filing of first notice of appeal	14(a)
Response to Petition for Discretionary Review	10	service of petition	15(d)
Filing appellant's brief (or mailing brief under Rule 26(a))	20	Clerk's mailing of printed record—or from docketing record in civil appeals in forma pauperis	13(a)
Filing appellee's brief (or mailing brief under Rule 26(a))	20	service of appellant's brief	13(a)
Oral Argument	30	filing appellant's brief (usual minimum time. Practical time is 60-90 days)	29
Certification or Mandate	20	Issuance of opinion	32
Petition for Rehearing (civil action only)	15	Mandate	31(a)

* * * * *

NOTES

All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review or for rehearing may be extended by order of the Court wherein the appeal is docketed at the time. Note that Rule 27(c) also explains the significance of the 150-day time period so often misunderstood. The trial tribunal may extend any times during the prepa-

ration of the record on appeal, so long as the record may be filed in the appellate court by the 150th day after the notice of appeal was filed. Any extensions of time which would cause the record to be so filed later than the 150th day after the notice of appeal was filed may only be granted by the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c))

The following amendments to the rules and regulations of The North Carolina State Bar were originally adopted by the Council of The North Carolina State Bar at its quarterly meetings on October 26, 1972; April 15, 1977; April 13, 1979 and October 25, 1985. These rules, regarding the practical training of law students, were originally approved by the Supreme Court of North Carolina on the 14th day of March, 1973. Since that date these rules have been amended from time to time. Therefore it is imperative that these rules be reprinted in full in this issue of the Supreme Court Reports.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

ARTICLE I—Purpose:

The Bench and Bar are primarily responsible for making available competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to attorneys representing clients unable to pay for such services and to encourage law schools to provide their students with supervised practical training of varying kinds during the period of their formal legal education, the following rules are adopted.

ARTICLE II—General Definition:

Subject to additional definitions contained in these rules which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in these rules:

A. *Legal Aid Clinic*—An established or proposed department, division, program or course in a law school under the supervision of at least one full time member of the school's faculty or staff who has been admitted and licensed to practice law in this state and conducted regularly and systematically to render legal services to indigent persons.

B. *Indigent Persons*—A person financially unable to employ the legal services of an attorney as determined by a standard of indigence established by a Judge of the General Court of Justice.

C. *Legal Aid*—Legal services of a civil, criminal or other nature rendered for or on behalf of an indigent person without charge to such person.

D. *Supervising Lawyer*—Supervising lawyer means sole practitioner, one or more lawyers sharing offices but not partners, one or more lawyers practicing together in a partnership or in a professional corporation.

ARTICLE III—Eligibility:

In order to engage in activities permitted by these rules, the law student must:

A. Be duly enrolled in a law school approved by the Council of The North Carolina State Bar.

B. Be a student regularly enrolled and in good standing in a law school who has satisfactorily completed the equivalent of three semesters of the requirements for a first professional degree in law (J.D. or its equivalent).

C. Be certified by the Dean of his law school, on forms provided by The North Carolina State Bar, as being of good character with requisite legal ability and training to perform as a legal intern. Certification may be denied or, if granted, withdrawn by the Dean without a hearing or any showing of cause and for any reason.

D. Be introduced to the court in which he is appearing by an attorney admitted to practice in that court.

E. Neither ask for nor receive any compensation or remuneration of any kind from any client for whom he renders services, but this shall not prevent an attorney, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

F. Certify in writing that he has read and is familiar with the Canons of Professional Ethics of North Carolina and the opinions interpretive thereof.

ARTICLE IV—Form and Duration of Certification:

A certification of a student by the Law School Dean:

A. Shall be filed with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh and, unless it is sooner withdrawn, it shall remain in effect until the expiration of 18 months after it is filed, or until the announcement of the results of the first Bar Examination following the student's graduation, whichever is earlier.

For any student who passes that examination, a certification shall continue in effect until the date he is admitted to the Bar.

B. May be withdrawn by the Dean at any time without a hearing and without any showing of cause and shall be withdrawn by him if the student ceases to be duly enrolled as a student prior to his graduation, by mailing a notice to that effect to the Secretary of The North Carolina State Bar at the office of The North Carolina State Bar in Raleigh, to the supervising attorney and to the student.

C. May be withdrawn by any Resident Superior Court Judge or Judge holding the Court of the judicial district in which the student is appearing or has appeared at any time without notice or hearing and without any showing of cause. Notice of the withdrawal shall be mailed to the student, to the supervising attorney, to the student's Dean, and to the Secretary of The North Carolina State Bar, at the office of The North Carolina State Bar in Raleigh.

D. Forms to be used for certification and withdrawal of certification are attached.

ARTICLE V—Supervision:

A supervising lawyer shall:

A. Be an active member of The State Bar of North Carolina, and before supervising the activities specified in Rule VI hereof, shall have actively practiced law as a full time occupation for at least two years.

B. Supervise no more than five students concurrently, unless such lawyer is a full time member of a law school's faculty or staff whose primary responsibility is supervising students in a clinical program.

C. Assume personal professional responsibility for any work undertaken by the student while under his supervision.

D. Assist and counsel with the student in the activities mentioned in these rules, and review such activities with such student, all to the extent required for the proper practical training of the student and the protection of the client.

E. Read, approve and personally sign any pleadings or other papers prepared by such student prior to the filing thereof, and read and approve any documents which shall be prepared

by such student for execution by any person or persons not a member or members of The State Bar of North Carolina prior to the submission thereof for execution.

F. As to any of the activities specified by Rule VI hereof:

1. Before commencing supervision of any student, file with the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh, a notice in writing, signed by him, stating the name of such student, the period or periods during which he expects to supervise the activities of such student, and that he will adequately supervise such student in accordance with these rules.

2. Notify the Secretary of The North Carolina State Bar in the office of The North Carolina State Bar in Raleigh in writing promptly whenever his supervision of such student shall cease.

ARTICLE VI—Activities:

A properly certified student may engage in the activities provided in this section under the supervision of an attorney qualified and acting in accordance with the provisions of Article V:

A. Without the presence of the supervising attorney, a student may give advice to a client on legal matters provided that the student gives a clear prior explanation to the client that he is not an attorney and provided that the supervising attorney has given the student permission to render legal advice in the subject area involved.

B. Without being physically accompanied by the supervising attorney, a student may represent indigent persons or the State in the following hearings or proceedings:

1. Administrative hearings and proceedings before Federal, State and local administrative bodies.

2. Civil litigation before courts or magistrates, provided the case is one which could be assigned to a magistrate under North Carolina General Statute Section 7A-210(1) and (2), whether or not assignment is in fact requested or made to a magistrate.

3. In any criminal matter, except those criminal matters in which the defendant has the right to the assignment of counsel under any constitutional provision, statute or rule of court.

C. Without being physically accompanied by the supervising attorney, a student may represent the State in the prosecution of all misdemeanors with consent of the District Attorney.

D. When physically accompanied by the supervising lawyer who has read, approved and personally signed any briefs, pleadings or other papers prepared by the student for presentment to the Court, a student may represent indigent clients or the State in the following hearings or proceedings, provided however, that approval of the presiding judge is first secured:

1. All juvenile proceedings
2. The presentation of a brief and oral argument in any civil or criminal matter in the District or Superior Court
3. All misdemeanor cases
4. Preliminary hearings in all criminal cases
5. All post-conviction proceedings
6. All civil discovery

E. A student may accompany his supervising attorney when the supervising attorney is attorney of record for an indigent client in any civil or criminal action, but may take part in the proceedings only with the consent of the presiding judge.

F. In all cases under this rule in which a student makes an appearance in court or before an administrative agency on behalf of a client, he shall have the written consent in advance of the client and his supervising attorney. The client shall be given a clear explanation, prior to the giving of his consent, that the student is not an attorney. These consents shall be filed with the Court and made a part of the record in the case.

G. In all cases under this rule in which a student is permitted to make an appearance in court or before an administrative agency on behalf of a client, he may engage in all activities appropriate to the representation of the client, including, without limitation, selection of and argument to the jury, examination and cross-examination of witnesses, motions and arguments thereon, and giving notices of appeal.

H. Except as herein allowed, the certified student shall not be permitted to participate in any activity in the connection with the practical training of law students unless he is under the direct and physical supervision of the supervising attorney.

ARTICLE VII—Use of Student's Name:

A. A student's name may properly:

1. Be printed or typed on briefs, pleadings and other similar documents on which the student has worked with or under the direction of the supervising lawyer, provided the student is clearly identified as a student certified under these rules, and provided further that a student shall not sign his name to such briefs, pleadings or other similar documents.

2. Be signed to letters written on the supervising attorney's letterhead which relate to the student's supervised work, provided there appears below his signature a clear identification that he is certified under these rules, such as "Certified Law Student Under the Supervision of ....." (supervising lawyer).

B. A student's name may not appear:

1. On the letterhead of a supervising lawyer; or

2. On a business card bearing the name of a supervising lawyer; or

3. On a business card identifying the student as certified under these rules.

ARTICLE VIII—Miscellaneous:

A. Nothing contained in these rules shall affect the right of any person who is not admitted to practice law to do anything that he might lawfully do prior to the adoption of these rules.

B. These rules are subject to amendment, modification, revision, supplement, repeal, or other change by appropriate action in the future without notice to any student certified at the time under these rules.

NORTH CAROLINA RULES GOVERNING PRACTICAL TRAINING OF LAW STUDENTS

IN RE:
APPLICATION OF .....
.....
.....

CERTIFICATION OF ELIGIBILITY AND GOOD MORAL CHARACTER TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR.
TO: THE NORTH CAROLINA STATE BAR:

The undersigned certifies as follows:

1. Name and address of person signing this certificate.
.....
2. Name and address of law school and official connection with same .....
.....
3. ..... is duly enrolled in the State of North Carolina in a law school approved by the Council of The North Carolina State Bar and is in good standing in said law school and has satisfactorily completed at least two-thirds of the requirements for a first professional degree in law (J.D. or its equivalent).
4. ..... is of good character with the requisite legal ability and training to perform as a legal intern pursuant to the Rules and Regulations Governing Practical Training of Law Students.

Seal (of school)

..... Dean
.....
Name of School

....., Dean of ..... Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief, and, as to those, he believes them to be true.

Sworn and subscribed to before me
this ..... day of ....., 19.....
..... Notary Public
My commission expires
Form: Dean's Certificate

NORTH CAROLINA RULES
GOVERNING PRACTICAL TRAINING
OF LAW STUDENTS

IN RE:
APPLICATION OF .....
.....
.....

WITHDRAWAL OF ELIGIBILITY TO PARTICIPATE IN THE PRACTICAL TRAINING OF LAW STUDENTS PROMULGATED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR.

TO: THE NORTH CAROLINA STATE BAR:

The undersigned, having previously certified to the Council of The North Carolina State Bar as to the eligibility for the above named individual to participate in the Practical Training of Law Students Program promulgated by The North Carolina State Bar, does hereby WITHDRAW said certificate of eligibility and does hereby notify The North Carolina State Bar that .... is no longer eligible to participate in said program:

Seal (of school)

....., Dean
.....
Name of School

....., Dean of ..... Law School being first duly sworn on oath deposes and says that he has read the foregoing certificate and he knows the contents thereof; that the statements contained therein are true of his own knowledge, except as to those matters stated upon information and belief and, as to those, he believes them to be true.

Sworn and subscribed to before me
this the ..... day of ..... 19.....
....., Notary Public.
My Commission expires

Form: Withdrawal of Dean's Certificate

NORTH CAROLINA
WAKE COUNTY

I, B. E. JAMES, *Secretary-Treasurer* of The North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting, unanimously adopt said amendments to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 26th day of June, 1986.

B. E. JAMES, *Secretary*
The North Carolina State Bar

After examining the foregoing amendments to the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 14th day of July, 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 14 day of July, 1986.

BILLINGS, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACTIONS

§ 5. Where Plaintiff's Own Wrongful Act Constitutes Element of Cause of Action

The fact that a plaintiff has dealt in securities upon purported inside information will not give rise to the defense of in pari delicto in an action under state law against a corporate insider or securities professional who provided the information. *Skinner v. E. F. Hutton & Co.*, 267.

ADOPTION

§ 1. Nature and Operation of Statutes in General

An action in the alternative for breach of a contract to adopt, adoption by estoppel, or equitable adoption was properly dismissed as failing to state a claim upon which relief could be granted. *Ladd v. Estate of Kellenberger*, 477.

ADVERSE POSSESSION

§ 6. Tacking Possession

The trial court's finding that defendants and their predecessors were in privity as to "possession and use" of the disputed land was unsupported by the evidence. *Harris v. Walden*, 284.

§ 25.2. Particular Cases; Evidence Insufficient

The trial court's finding that defendants and their predecessor actually possessed the tract in dispute continuously and without interruption was unsupported by the evidence. *Harris v. Walden*, 284.

APPEAL AND ERROR

§ 3. Review of Constitutional Questions

The issue of whether G.S. 1-50(6) is constitutional was properly presented to the trial court and was properly before the Supreme Court where the petition for rehearing in the Court of Appeals included an affidavit signed by the presiding judge stating that the issue had been raised, presented, and argued at a hearing on a motion for summary judgment. *Tetterton v. Long Manufacturing Co.*, 44.

§ 6.8. Appeals on Motions for Nonsuit or Summary Judgment

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. *Harris v. Walden*, 284.

§ 31.1. Necessity for Objection to Charge

Defendant was barred from assigning error to the court's instruction on implied contract where she did not object to the instruction at trial. *Penley v. Penley*, 1.

§ 47. Harmless and Prejudicial Error in General

The appellate court's decision to remand this case for a new trial renders harmless any error by the trial court in failing to direct a verdict for defendant on the issue of interference with plaintiff's riparian rights. *Akzona, Inc. v. Southern Railway Co.*, 488.

ARCHITECTS

§ 3. Liability for Defective Conditions

The statute of limitations set forth in G.S. 1-50(5) for actions against designers and builders of improvements to realty does not violate the open courts provision of Art. I, § 18 of the N.C. Constitution or the equal protection clauses of the U.S. and N.C. Constitutions. *Square D Co. v. C. J. Kern Contractors*, 423.

ARREST AND BAIL

§ 3.7. Legality of Arrest for Rape

It is not necessary to read a defendant his *Miranda* rights in order to make a lawful arrest for rape. *S. v. Kinch*, 99.

ATTORNEYS AT LAW

§ 4. Testimony by Attorneys

The trial court did not err by refusing to permit defendant to call as witnesses to his mental condition the assistant district attorney and district court judge from his initial appearance where there was no showing that there were not other witnesses who could have testified to defendant's behavior at the initial appearance. *S. v. Simpson*, 359.

AUTOMOBILES AND OTHER VEHICLES

§ 2.8. Reinstatement of Driving Privileges

The crime of odometer alteration can serve as a basis for denial of reinstatement of a driver's license following permanent revocation even though it is not a moving violation. *Evans v. Roberson, Sec. of Dept. of Trans.*, 315.

§ 113. Sufficiency of Evidence of Involuntary Manslaughter

For a successful prosecution of involuntary manslaughter for a death caused by one driving under the influence of alcohol, the State must show only a willful violation of G.S. 20-138 and a causal link between that violation and the death and is not required to prove further that defendant's intoxication caused him to violate some other rule of the road which was a proximate cause of the victims' death. *S. v. McGill*, 633.

§ 128. Argument to Jury in DUI Case

The trial court erred by not sustaining defendant's objection to the prosecutor's closing argument regarding public sentiment in a prosecution for involuntary manslaughter where defendant was also charged with driving under the influence. *S. v. Scott*, 309.

BASTARDS

§ 11. Civil Action by Father of Illegitimate Child to Establish Paternity

The phrase "born out of wedlock" refers to the status of the parents of the child in relation to each other, and a child born to parents who did not acquire the status of wedlock was born out of wedlock even though his mother was married to another man. *In re Legitimation of Locklear*, 412.

The presumption of legitimacy of a child born to a married woman did not require that a man other than the husband who sought to legitimate the child first establish paternity. *Ibid.*

BASTARDS — Continued

§ 13. Legitimation

A legitimation procedure is in the nature of a special proceeding and is within the jurisdiction of the clerk of superior court. *In re Legitimation of Locklear*, 412.

Petitioner was the putative father of a child where he had lived openly and notoriously in an adulterous relationship with the mother of the child since 1960, had continued to maintain and care for the child born of that relationship, the mother's husband had discontinued living with the mother in 1960, and the child was born in 1965. *Ibid.*

In an action in which a man other than the husband seeks to establish paternity of a married woman's child, the child is a necessary party to the action, the married woman's husband must be served with a summons, the factual issue of paternity must be resolved by a jury when based on a presumption of legitimacy, and paternity must be established in rebuttal of the presumption of legitimacy beyond a reasonable doubt. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.2. Sufficiency of Evidence of Time of Offense

The trial court correctly denied defendant's motions to dismiss a burglary charge based on the contention that the nighttime element of burglary was intended to protect people asleep in their homes and was not meant to be extended to the early evening hours. *S. v. Lyszaj*, 256.

§ 6.3. Instructions on Felony Committed During Burglary

In a prosecution for first degree burglary upon an indictment charging a breaking and entering with an intent to commit first degree rape *and* armed robbery, the trial court did not err in instructing the jury that defendant must have intended "to commit rape *or* robbery with a dangerous weapon, *or* both" at the time of the breaking and entering. *S. v. Williams*, 337.

§ 7. Instructions on Lesser Included Offenses

In a prosecution for first-degree burglary, defendant's statement to officers did not constitute evidence that he did not intend to commit the specified felonies of first-degree rape and armed robbery when he entered the victim's mobile home so as to require the trial court to instruct on misdemeanor breaking and entering. *S. v. Williams*, 337.

CLERKS OF COURT

§ 1. Jurisdiction and Authority Generally

A legitimation procedure is in the nature of a special proceeding and is within the jurisdiction of the clerk of superior court. *In re Legitimation of Locklear*, 412.

CONSTITUTIONAL LAW

§ 19. Monopolies and Exclusive Emoluments and Privileges

G.S. 1-50(6) does not grant an exclusive or separate emolument or privilege. *Tetterton v. Long Manufacturing Co.*, 44.

§ 20.1. Equal Protection in Actions Affecting Businesses and Professions

G.S. 1-50(6) does not violate the equal protection clauses of the state or federal constitutions because the act does not discriminate between manufacturers and sellers of retail products. *Tetterton v. Long Manufacturing Co.*, 44.

CONSTITUTIONAL LAW — Continued

§ 34. Double Jeopardy

Defendant was not subject to double jeopardy at his second and third sentencing hearings for second degree murder and armed robbery where the court found an aggravating factor at those hearings that it had not found at the first hearing. *S. v. Jones*, 644.

§ 40. Right to Counsel Generally

Defendant's counsel fully complied with the requirements of *Anders v. California*, 386 U.S. 738, in requesting the Supreme Court to review the record for any prejudicial error. *S. v. Kinch*, 99.

§ 53. Speedy Trial Where Delay Caused by Defendant

Defendant was not denied his constitutional right to a speedy trial where much of the considerable delay was attributable to motions on behalf of defendant. *S. v. Lyszaj*, 256.

§ 63. Exclusion from Jury for Opposition to Capital Punishment

The trial court in a first-degree murder prosecution did not err by death qualifying the jury. *S. v. Spangler*, 374; *S. v. Westmoreland*, 442; *S. v. Hines*, 522; *S. v. Hayes*, 460.

§ 65. Right of Confrontation Generally

The recorded testimony of a witness at defendant's first trial was properly admitted at his second trial where the witness could not be located. *S. v. Grier*, 59.

§ 68. Right to Present Evidence

The trial court did not deny defendant his constitutional or G.S. 8-54 right to testify where there was no indication to the trial court that defendant wished to take the stand. *S. v. Hayes*, 460.

§ 72. Use of Confession of Codefendant

Confessions of two non-testifying defendants in which those portions that mentioned accomplices were sanitized by the substitution of "the other person," "two others" or "they" for specific names did not implicate a specific individual within the meaning of the *Bruton* rule. *S. v. Hayes*, 460.

Even if the confession of one non-testifying defendant that he attacked the male victim while the "other two men" assaulted the female victim implicated the other two codefendants within the meaning of the *Bruton* rule, the admission of this confession was harmless error and did not entitle the codefendants to a new trial. *Ibid.*

CONTRACTS

§ 4.1. Circumstances Where Consideration Was Found

There was consideration for an oral contract between plaintiff husband and defendant wife to split the shares of an incorporated Kentucky Fried Chicken restaurant equally. *Penley v. Penley*, 1.

§ 7. Contracts Restricting Business Competition Generally

The Court of Appeals erred by holding that there was a material issue of fact in an action in which the sole issue was whether the acts of one defendant constituted a violation of a noncompetitive agreement. *Bicycle Transit Authority v. Bell*, 219.

CORPORATIONS — Continued

§ 22. Corporate Seal

It was not error for the trial court to conclude as a matter of law that a contract to which a corporate seal had been affixed was not a contract under seal and thus governed by the ten-year statute of limitations. *Square D Co. v. C. J. Kern Contractors*, 423.

COURTS

§ 1. Nature and Function; Open Courts

G.S. 1-50(6) does not violate the open courts clause of the North Carolina Constitution because its time period is not so short that it would effectively abolish all claims. *Tetterton v. Long Manufacturing Co.*, 44.

CRIMINAL LAW

§ 5.1. Determination of Issue of Insanity

The trial court properly placed the burden of proving insanity on defendant even though defendant's attorney was frustrated by defendant in his efforts to obtain the optimum evidence necessary to the insanity defense. *S. v. Spangler*, 374.

§ 26.5. Former Jeopardy; Same Acts or Transactions Violating Different Statutes

The trial court did not err in entering judgments against defendant for both first degree burglary and breaking or entering based on a multicount indictment. *S. v. Thompson*, 618.

§ 34.1. Evidence of Defendant's Guilt of Other Offenses Inadmissible to Show Disposition to Commit Offense

Language in *State v. Richardson*, 36 N.C. App. 373, to the effect that evidence of other drug offenses is admissible to show "disposition to deal in illicit drugs" is disapproved. *S. v. Weldon*, 401.

§ 34.6. Admissibility of Evidence of Other Offenses to Show Knowledge or Intent Generally

Testimony by a rape victim that she knew defendant had killed a girl before was competent to show the victim's state of mind when defendant threatened her with a loaded shotgun. *S. v. Kinch*, 99.

§ 34.7. Admissibility of Other Offenses to Show Guilty Knowledge

Evidence that police found heroin in or near defendant's house on two occasions other than the one for which defendant was on trial was properly admitted for the purpose of showing defendant's guilty knowledge. *S. v. Weldon*, 401.

§ 40. Evidence at Former Trial; Unavailability of Witness

The test for whether the prosecution can admit a transcript of prior testimony for an unavailable witness is only that it undertake in good faith some reasonable, affirmative measures to produce the witness for trial. *S. v. Grier*, 59.

§ 43.4. Gruesome or Inflammatory Photographs

The trial court did not err by permitting a pathologist to use photographic slides to illustrate the nature and severity of the injuries sustained by a child prior to his death and to illustrate the cause of his death. *S. v. Spangler*, 374.

CRIMINAL LAW — Continued

§ 53. Medical Expert Testimony in General

In a prosecution for first-degree murder in which defendant pled insanity, the trial court did not err by permitting a psychiatrist to testify about the results of a test she did not personally perform. *S. v. Spangler*, 374.

§ 63.1. Competency of Testimony as to Sanity of Defendant

In a prosecution for first-degree murder in which defendant pled insanity, the trial court did not err by allowing a psychiatrist to give her opinion regarding defendant's ability to distinguish right from wrong with reference to the particular offense. *S. v. Spangler*, 374.

In a prosecution for first-degree murder in which defendant claimed insanity, the trial court did not err during cross-examination of defendant's cell mate by sustaining objections to questions intended to elicit testimony that defendant had acted abnormally while incarcerated. *Ibid.*

§ 66.9. Photographic Identification of Defendant

Pretrial photographic identification procedures were not so impermissibly tainted as to give rise to a substantial likelihood of irreparable misidentification. *S. v. Lyszaj*, 256.

§ 66.14. Independent Origin of In-Court Identification

In-court identifications of defendant were of independent origin. *S. v. Lyszaj*, 256.

§ 73. Hearsay Testimony in General

In a prosecution for murder and assault, hearsay evidence was admissible where there was other evidence strongly corroborating the hearsay and establishing the truthfulness and reliability of the statements of the victim. *S. v. Westmoreland*, 442.

§ 74.1. Divisibility of Confession

The trial court's error in denying defendant's motion to suppress a portion of his confessions in which he referred to an incident that occurred several hours prior to the crimes in question was harmless beyond a reasonable doubt. *S. v. Hayes*, 460.

§ 75. Admissibility of Confession in General

A defendant in a prosecution for murder and assault did not assert his right to remain silent where defendant willingly submitted to questioning but often remained silent or repeated denials when asked questions. *S. v. Westmoreland*, 442.

§ 75.2. Effect of Promises or Other Statements of Officers

An officer's statements to defendant that his cooperation would be made known to the district attorney were not such an inducement as to render involuntary his oral and written waivers of counsel. *S. v. Williams*, 337.

An officer's statement to defendant that "it could possibly be of some help if he talked" could not have aroused in defendant any reasonable hope of reward if he confessed so as to render his confession involuntary. *S. v. Hayes*, 460.

§ 75.4. Confessions Obtained Prior to Appointment of Counsel

Defendant's Sixth Amendment right to counsel had not attached when North Carolina officers questioned him in Georgia about crimes committed in North Carolina. *S. v. Dampier*, 292.

CRIMINAL LAW — Continued

§ 75.8. Warning of Constitutional Rights Before Resumption of Interrogation

Where defendant invoked his Fifth Amendment right to counsel in the presence of Georgia authorities while being questioned about crimes in Georgia, North Carolina officers were not charged with defendant's request for counsel made to the Georgia authorities when they questioned defendant about unrelated crimes committed in North Carolina, and their initiation of questioning of defendant about the North Carolina crimes did not violate the rule of *Edwards v. Arizona*, 451 U.S. 477. *S. v. Dampier*, 292.

In a prosecution for murder and assault, an incriminating statement made during defendant's second interrogation was not inadmissible because he was not again advised of his rights. *S. v. Westmoreland*, 442.

§ 75.11. Waiver of Constitutional Rights

An officer's delivery of an inventory receipt form to defendant after defendant had invoked his right to counsel did not constitute an initiation of conversation with defendant by the officer as that term is used in *Edwards v. Arizona*, 451 U.S. 477; nor was the officer's return to the jail the next day after defendant asserted his right to counsel an initiation of conversation in violation of *Edwards* but was a continuation of a conversation begun by defendant the prior evening. *S. v. Williams*, 337.

Defendant's waiver of counsel and his written statement, made after having previously invoked his right to counsel, were voluntarily and knowingly made under the totality of the circumstances. *Ibid.*

§ 75.14. Mental Capacity to Confess or Waive Rights

The trial court did not err by denying defendant's motion to suppress statements made to law enforcement authorities after his arrest where the evidence was insufficient to establish that he was mentally incompetent at the time of the confession and there was ample evidence to support the conclusion that defendant knowingly and intelligently waived his rights. *S. v. Simpson*, 359.

§ 77.3. Admissions and Declarations of or Implicating Codefendants

Confessions of two non-testifying defendants in which those portions that mentioned accomplices were sanitized by the substitution of "the other person," "two others" or "they" for specific names did not implicate a specific individual within the meaning of the *Bruton* rule. *S. v. Hayes*, 460.

Even if the confession of one non-testifying defendant that he attacked the male victim while the "other two men" assaulted the female victim implicated the other two codefendants within the meaning of the *Bruton* rule, the admission of this confession was harmless error and did not entitle the codefendants to a new trial. *Ibid.*

§ 87. Direct Examination of Witnesses Generally; What Witnesses May Be Called

The trial court did not err in a prosecution for a first degree sexual offense by permitting a codefendant to testify pursuant to a plea bargain without written notice. *S. v. Arnold*, 301.

§ 87.1. Leading Questions

There was no abuse of discretion where the trial court permitted a prosecutor to ask a witness if her identification of defendant was independent of any photographs she may have seen. *S. v. Lyszaj*, 256.

CRIMINAL LAW — Continued

§ 89.10. Impeachment by Questions About Prior Degrading Conduct

The trial court did not err in a prosecution for first degree sexual offenses with a nine-year-old girl by permitting the State to cross-examine the victim's mother concerning items found by the police during a search of her home. *S. v. Ford*, 498.

§ 91. Statutory Speedy Trial

Defendant's Speedy Trial Action motion to dismiss was properly denied. *S. v. Lyszaj*, 256.

There was no error in the denial of defendant's motion for a speedy trial dismissal under the Interstate Agreement on Detainers. *Ibid.*

§ 91.1. Continuance Generally

There was no prejudice from the trial judge's denial of defendant's motion for a continuance where the dates in two of the three indictments against defendant were changed on the date the case was called for trial, but defendant was convicted only of the offense charged in the unchanged indictment. *S. v. Ford*, 498.

§ 92.1. Consolidation of Counts Against Multiple Defendants

The trial court did not abuse its discretion in granting the State's motion to join various charges against three defendants for trial. *S. v. Hayes*, 460.

§ 95.1. Request for Limiting Instruction

There was no error in failing to give a limiting instruction where testimony of sexual acts other than the crime charged was admitted because defendant failed to request the instruction. *S. v. Arnold*, 301.

The trial court did not err in a prosecution for a first degree sexual offense by not instructing the jury ex mero motu to disregard testimony to which it had sustained an objection and allowed a motion to strike. *Ibid.*

§ 98.1. Misconduct of Witnesses

The trial court did not abuse its discretion in refusing to grant a mistrial when a rape and assault victim had an emotional outburst during the jury instructions. *S. v. Blackstock*, 232.

§ 99.2. Expression of Opinion in Questions by Court

The trial judge's question as to whether certain marks shown in a photograph were on the victim's neck "prior to the Defendant placing his hand around your throat" did not constitute a prejudicial expression of opinion that defendant was the assailant. *S. v. Blackstock*, 232.

§ 101.4. Conduct or Misconduct Affecting Jury's Deliberation

The trial court erred in a prosecution for first-degree murder by refusing the jury foreman's request to review testimony on the grounds that the transcript was not available. *S. v. Ashe*, 28.

In a prosecution for first-degree murder, the trial court erred by not summoning all the jurors to the courtroom to hear both the foreman's request to review testimony and the court's response. *Ibid.*

Defendant's failure to object at trial did not waive the court's errors in refusing the jury's request to review testimony as a matter of law and in not returning the entire jury to the courtroom to hear the request and response. *Ibid.*

CRIMINAL LAW -- Continued

The trial judge erred by denying defendant's motions for a mistrial and for appropriate relief where the bailiff in charge of the jury was the wife of the prosecutor. *S. v. Wilson*, 653.

§ 102.6. Particular Comments in Argument to Jury

Defendant was not prejudiced by the trial court's failure to instruct the jury to disregard the prosecutor's improper jury argument that defense counsel's efforts to interview defendant's estranged wife were "shady" and that defense counsel evaluated the case and knew that it was hopeless. *S. v. Clark*, 638.

§ 102.9. Comment in Jury Argument About Defendant's Character and Credibility

The district attorney's comments during jury argument on the untruthfulness of defendant's written statement which had been introduced by the State were proper, and although the district attorney's comment that defendant wouldn't even begin to register on a scale of "morality and character" was inappropriate, such comment did not so exceed the bounds of permissible argument as to require the trial court to sustain defendant's objection thereto. *S. v. Williams*, 337.

§ 112.2. Particular Charges on Burden of Proof and Presumptions

The trial court did not err in a first-degree murder prosecution by instructing the jury that its only concern was to determine whether defendant was guilty rather than instructing the jury that it was to determine whether or not defendant was guilty. *S. v. Spangler*, 374.

§ 117.1. Charge on Credibility of Witnesses

The trial court did not err in a prosecution for first degree sexual offenses against a nine-year-old girl by refusing to give a cautionary instruction on the credibility of a child witness. *S. v. Ford*, 498.

§ 122.1. Jury's Request for Additional Instructions

In a prosecution for three first degree sexual offenses against a nine-year-old girl where the dates of two of the offenses were in dispute, the trial court did not erroneously or prejudicially refuse the jury's request to review some of the evidence as to a particular date. *S. v. Ford*, 498.

§ 128.2. Particular Grounds for Mistrial

The trial court did not abuse its discretion by refusing to grant a mistrial where the court allowed an S.B.I. chemist to testify out of order concerning hair and fiber found on defendant's trousers and the court later ruled that the State had not established a sufficient chain of custody to permit introduction of the trousers. *S. v. Primes*, 202.

§ 130. New Trial For Misconduct of Jury

The trial court in a first-degree murder prosecution did not err by denying defendant's motion to set aside the verdict on the grounds that the jury returned its verdict fifteen minutes after it retired. *S. v. Spangler*, 374.

§ 138.13. Fair Sentencing Act

The trial judge's questioning of defendant's expert witness during a sentencing hearing for second degree murder did not indicate a failure to maintain an impartial attitude. *S. v. Brown*, 588.

CRIMINAL LAW — Continued

§ 138.14. Consideration of Aggravating and Mitigating Factors in General

Although double jeopardy principles apply to a second sentencing hearing in a capital case, resentencing hearings under the Fair Sentencing Act brought about by defendant are de novo proceedings at which the court can find aggravating and mitigating factors without regard to the findings in prior hearings. *S. v. Jones*, 644.

§ 138.18. Pecuniary Gain Aggravating Factor

The trial court erred in finding as an aggravating factor that offenses were committed for hire or pecuniary gain where there was no evidence that defendants were paid or hired to commit such crimes. *S. v. Hayes*, 460.

§ 138.21. Especially Heinous, Atrocious or Cruel Aggravating Factor

The trial court did not err by finding that a second degree murder was especially heinous, atrocious, or cruel where defendant confessed that he first slapped, then choked the victim with his hands, and later returned with an extension cord and choked him five times. *S. v. Hines*, 522.

There was sufficient evidence to find that a second degree murder was especially heinous, atrocious or cruel. *S. v. Brown*, 588.

§ 138.24. Infirmity or Age of Victim as Aggravating Factor

The trial court erred by finding as an aggravating factor that a sixty-two-year-old victim of a second degree murder was very old where the victim's age did not make him more vulnerable than he otherwise would have been. *S. v. Hines*, 522.

The trial court erred in finding the age of the victim and her infirmity as aggravating factors on the basis of statements made by the prosecutor at a codefendant's sentencing hearing and evidence in the file on the codefendant's case absent a stipulation. *S. v. Thompson*, 618.

§ 138.26. Taking Property of Great Monetary Value as Aggravating Factor

The trial court could properly find as an aggravating factor that the offense involved the taking of property of great monetary value based on an allegation of the value of the property in the indictment where defendant entered a plea of guilty and did not challenge the factual allegations in the indictment. *S. v. Thompson*, 618.

§ 138.28. Prior Convictions as Aggravating Factor

The trial court erred at sentencing by concluding that certain convictions in which prayer for judgment was continued and no fines or other conditions imposed constituted prior convictions under the Fair Sentencing Act. *S. v. Southern*, 110.

The trial court did not err when sentencing defendant for second degree murder by finding as an aggravating factor that defendant had a prior conviction based on a nolo contendere plea to failure to provide child support. *S. v. Brown*, 588.

§ 138.29. Other Aggravating Factors

The trial court erred in a prosecution in which defendant was convicted of one count of first-degree murder, two counts of second-degree murder, and one count of assault with a deadly weapon with intent to kill inflicting serious injury by finding as an aggravating factor for the non-capital offenses that the offenses were committed within a short time of one another and that the first-degree murder was part of other crimes involving violence against other persons. *S. v. Westmoreland*, 442.

CRIMINAL LAW -- Continued

§ 138.38. Strong Provocation or Extenuating Relationship With Victim as Mitigating Factor

The trial court did not err in a prosecution for second degree murder and assault with a deadly weapon by failing to find as a mitigating factor that the defendant acted under strong provocation or that the relationship between defendant and the victim was otherwise extenuating. *S. v. Cameron*, 516; *S. v. Clark*, 638.

§ 138.40. Acknowledgment of Wrongdoing as Mitigating Factor

Where the evidence showed that defendant confessed after he was arrested, he was not absolutely entitled to a finding of the mitigating circumstance that he voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process, and the trial court did not abuse its discretion in ruling that a defendant who confessed four hours after his arrest was not entitled to this mitigating factor. *S. v. Hayes*, 460.

If a defendant repudiates his inculpatory statements, he is not entitled to a finding of the mitigating circumstance that he voluntarily acknowledged wrongdoing in connection with the crimes prior to arrest or at an early stage of the criminal process. *Ibid.*

A defendant who confessed after his arrest for murder was not precluded from the mitigating factor of early acknowledgment of wrongdoing, but was not entitled to it as a claim of right. *S. v. Brown*, 588.

The trial court did not abuse its discretion when sentencing defendant for second degree murder by refusing to find as a mitigating factor the early acknowledgment of wrongdoing where officers extracted defendant's statement only after substantial time and effort and repeated refusals by defendant. *Ibid.*

Defendant failed to show that he was entitled to a finding of the statutory mitigating circumstance that he voluntarily acknowledged wrongdoing in connection with the offenses prior to arrest or at an early stage of the criminal process. *S. v. Thompson*, 618.

The trial court did not err in failing to find voluntary acknowledgment of wrongdoing as a mitigating factor for second degree murder where defendant contended that he acted in self-defense. *S. v. Clark*, 638.

§ 138.41. Good Character or Reputation as Mitigating Factor

Favorable testimony by defendant's probation officer did not compel the trial court to find as a mitigating factor for second degree murder that defendant had a good reputation in the community where other contrary evidence was presented. *S. v. Clark*, 638.

The trial court did not abuse its discretion when sentencing defendant for second degree murder by refusing to find the mitigating factors that defendant was a passive participant or that he was a person of good character or reputation in the community. *S. v. Brown*, 588.

§ 138.42. Other Mitigating Factors

The trial court did not abuse its discretion in failing to find as a nonstatutory mitigating factor that defendant rendered aid to his assault victim where defendant was motivated by a selfish concern about the effect of the victim's possible death on his ultimate punishment. *S. v. Spears*, 319.

The trial court did not err in a prosecution for second degree murder and assault with a deadly weapon by not finding as a non-statutory mitigating factor that defendant aided in the prevention of a possible jailbreak. *S. v. Cameron*, 516.

CRIMINAL LAW — Continued

§ 158.2. Presumptions as to Matters Omitted from the Record

Defendant's contention that the trial judge erred by leaving the courtroom during closing arguments was not properly before the Court where there was nothing in the record to show that the judge left the courtroom and the arguments were not recorded. *S. v. Arnold*, 301.

§ 169. Harmless and Prejudicial Error in the Exclusion of Evidence

Defendant did not preserve for appeal the issue of whether the trial court erred by refusing to permit defendant to call as witnesses to defendant's mental state the assistant district attorney and the district court judge from his initial appearance where defense counsel admitted that he did not know what the prosecutor's testimony would be, the prosecutor was in the courtroom and could have been called for an offer of proof, and statements by defense counsel as to what the judge said were inadequate to establish the essential content of the judge's testimony. *S. v. Simpson*, 359.

§ 177. Determination and Disposition of the Cause

Defendant's appeal from a conviction of first-degree rape was wholly frivolous and subject to dismissal. *S. v. Kinch*, 99.

Where one member of the Supreme Court did not participate in a case and the remaining six justices are equally divided, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *S. v. Majors*, 111.

§ 181. Post-conviction Hearing; Motions for Appropriate Relief

The trial judge erred by declaring a life sentence a nullity where defendant had been resentenced to life imprisonment by a different judge after North Carolina's mandatory death penalty was declared unconstitutional. *S. v. Primes*, 202.

DECLARATORY JUDGMENT ACT

§ 1. Nature and Purpose of Act

The Court of Appeals erred by determining that a declaratory judgment was not appropriate because there was no written agreement where plaintiff sought a declaratory judgment that he was the owner of forty-eight percent of the stock and half the assets of a Kentucky Fried Chicken restaurant. *Penley v. Penley*, 1.

DIVORCE AND ALIMONY

§ 30. Distribution of Marital Property in Divorce Action

Misconduct during marriage which dissipates or reduces the value of marital assets may properly be considered under G.S. 50-120(c)(12) in determining an equitable distribution of marital property. *Smith v. Smith*, 80.

An equitable distribution action in which the trial court found that the wife's adulterous affair was a proper factor to consider was remanded. *Dusenberry v. Dusenberry*, 608.

ELECTRICITY

§ 3. Rates

The portion of a Utility Commission's order which stated that an agreement with municipal and cooperative customers for the exchange of power between facilities in the event of an outage should be reflected in Duke's fuel expenses and

ELECTRICITY — Continued

demand jurisdictional allocation factor was in the form required by G.S. 62-79(a). *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 171.

The Commission made proper findings with regard to test period adjustments for growth in the number of customers and changes in economic conditions. *Ibid.*

The fact that five of the findings of fact in the present proceeding and in a prior proceeding to determine Nantahala's retail rates are similarly worded does not indicate that the Utilities Commission did not consider evidence presented before it in the present proceeding. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 246.

The record supported a finding by the Commission that Alcoa was the recipient of hidden benefits arising out of certain wholesale power transactions and agreements between and among Nantahala, Tapoco, Alcoa and TVA. *Ibid.*

The record supported a determination by the Utilities Commission that Nantahala and Tapoco should be treated as a single utility system for rate-making purposes. *Ibid.*

The evidence supported findings by the Utilities Commission that Tapoco does not wheel power Alcoa purchases from TVA to serve Alcoa in Tennessee, that this power was not integrated within the combined Tapoco-Nantahala system with respect to the public load served by these utilities, and that the costs of this purchased power should not be "rolled in" when determining Nantahala's retail rate base. *Ibid.*

The Commission did not err in using a roll-in methodology for determining Nantahala's costs which considered the actual Nantahala-Tapoco combined system capabilities rather than the way Nantahala and Tapoco share entitlements under certain interstate wholesale power agreements. *Ibid.*

The Commission erred in its order establishing Nantahala's retail rates on a "stand-alone" basis after a "roll-in" methodology had been utilized by the Commission and affirmed by the Supreme Court in two preceding rate cases involving Nantahala, Tapoco and Alcoa by failing to accord more than minimal consideration to competent evidence suggesting the continued propriety of utilizing the "roll-in" methodology and by failing to find facts with respect to certain issues. *State ex rel. Utilities Comm. v. Edmisten*, 122.

If the Commission again finds that Alcoa is a North Carolina public utility, it may require Alcoa to protect its subsidiary Nantahala financially as to future rates in much the same way as it has been held responsible for past locked-in rates. *Ibid.*

In a proceeding to establish retail rates for Nantahala Power Company, the Commission did not err in refusing to establish a new Large Industrial Service rate class which would apply only to Jackson Paper Manufacturing Company. *Ibid.*

EMINENT DOMAIN

§ 26. Taking Through Water Diversion or Casting

The flooding of plaintiff's downstream property caused by the erosion of an embankment constructed by defendant railway across a stream did not constitute a taking of plaintiff's downstream property where the embankment was not replaced and thus could not cause recurrent flooding of plaintiff's property. *Akzona, Inc. v. Southern Railway Co.*, 488.

HIGHWAYS AND CARTWAYS

§ 7. Construction of Highways; Signs and Warnings

Summary judgment was improperly entered for third party defendant Department of Transportation in an action arising from the failure of a bus driver to see a stop sign. *Jordan v. Jones*, 106.

HOMICIDE

§ 6.1. Involuntary Manslaughter

Involuntary manslaughter is a lesser included offense of murder and of voluntary manslaughter. *S. v. Greene*, 649.

§ 21.5. Sufficiency of Evidence of Guilt of First Degree Murder

The trial court properly denied defendant's motions to dismiss in a prosecution for the murder of defendant's ten-month-old child. *S. v. Spangler*, 374.

The State's evidence was sufficient to go to the jury on the theory of first degree murder despite defendant's statements to a fellow inmate which tended to show that defendant acted in the heat of passion. *S. v. Primes*, 202.

§ 30.2. Submission of Lesser Degree of Crime; Manslaughter

The trial court in a prosecution for first-degree murder correctly declined to instruct the jury on voluntary manslaughter where defense counsel wanted the charge to give the jury an offense upon which it could compromise. *S. v. Spangler*, 374.

INDICTMENT AND WARRANT

§ 6.2. Warrants; Sufficiency of Evidence to Support Issuance

Information an officer presented to a magistrate was sufficient to establish probable cause for the issuance of warrants for defendant's arrest, and statements made by defendant and items seized from his car were not obtained as a result of an illegal arrest. *S. v. Williams*, 337.

JAILS AND JAILERS

§ 1. Generally

Articles of clothing seized from defendant after he was detained by a correctional supervisor were not inadmissible on the ground that the supervisor lacked authority to arrest defendant. *S. v. Primes*, 202.

JURY

§ 7.14. Peremptory Challenges; Manner, Order, and Time of Exercising Challenge

The trial court erred in a prosecution for armed robbery, burglary, larceny, kidnapping, and rape by refusing to allow defendant to exercise his last peremptory challenge after a juror who had been previously passed by both sides was reexamined by the defendant and the State. *S. v. Freeman*, 432.

KIDNAPPING

§ 1. Elements of Offense; Indictment

An indictment for kidnapping was sufficient where it alleged that the kidnapping was for the purpose of committing a felony: rape or robbery. *S. v. Freeman*, 432.

LIMITATION OF ACTIONS

§ 4.2. Accrual; Negligence Actions

G.S. 1-50(6) is not unconstitutionally vague in its use of "initial purchase for use or consumption." *Tetterton v. Long Manufacturing Co.*, 44.

The proper statute of limitations to be applied to an action for negligent construction by the third purchaser of a house was G.S. 1-50(5)(a). *Oates v. JAG, Inc.*, 276.

The statute of limitations set forth in G.S. 1-50(5) for actions against designers and builders of improvements to realty does not violate the open courts provision of Art. I, § 18 of the N. C. Constitution or the equal protection clauses of the U. S. and N. C. Constitutions. *Square D Co. v. C. J. Kern Contractors*, 423.

The ten-year statute of repose set forth in former G.S. 1-15(b) does not apply to claims arising from disease and thus does not apply to plaintiff's civil action to recover damages for asbestosis allegedly caused by exposure to defendants' products. *Wilder v. Amatex Corp.*, 550.

§ 4.6. Accrual; Particular Contracts

Plaintiff's action for breach of an agreement to issue an equal number of shares in a family business to plaintiff and defendant was not barred by the statute of limitations where plaintiff brought his action within three years of the time defendant assumed exclusive control over the corporation and its assets. *Penley v. Penley*. 1.

MASTER AND SERVANT

§ 68. Occupational Diseases

For a substance to be a "hazard" of an occupational disease it must be one to which the worker has a greater exposure on the job than does the public generally because of the nature of the substance itself or because the concentrations of the substance in the workplace are greater than concentrations to which the public generally is exposed. *Caulder v. Waverly Mills*, 70.

The evidence was sufficient to permit the Industrial Commission to find that plaintiff's last injurious exposure to the hazards of his lung disease occurred while employed by Waverly Mills even though the synthetic fibers to which he was exclusively exposed during that period are not known to cause chronic obstructive lung disease. *Ibid.*

There was sufficient evidence from which the Industrial Commission could have found that cotton dust exposure was a significant causal factor in the development of plaintiff's obstructive lung disease. *Harrell v. Harriet & Henderson Yarns*, 566.

Where the Industrial Commission made contradictory findings as to whether occupational obstructive lung disease or nonoccupational restrictive lung disease was the cause of plaintiff's wage-earning disability, the case must be remanded for a determination of the cause of plaintiff's disability. *Ibid.*

G.S. 97-52 does not require that disability be shown as a condition to recovery under G.S. 97-31 for an occupational disease. *Ibid.*

An award for partial loss of lung function from an occupational disease falls within the scope of G.S. 97-31(24). *Ibid.*

The Industrial Commission may not award plaintiff compensation under G.S. 97-52 and G.S. 97-29 for disability resulting from an occupational disease and also award compensation under G.S. 97-31(24) for partial loss of lung function. *Ibid.*

MASTER AND SERVANT — Continued

§ 93. Proceedings Before the Commission

A workers' compensation proceeding is remanded for a determination of whether the circumstances justified plaintiff's refusal to submit to certain diagnostic tests suggested by a doctor designated by defendant employer. *Hooks v. Eastway Mills, Inc. and Affiliates*, 657.

MUNICIPAL CORPORATIONS

§ 30. Power of Municipality to Zone

The Court of Appeals erred by citing the enforcement provisions of a zoning statute as the justification for vacating an order enjoining the town from denying a building permit to one whose lot violated subdivision ordinances. *Town of Nags Head v. Tillett*, 627.

NARCOTICS

§ 3.1. Competency and Relevancy of Evidence

Evidence that police found heroin in or near defendant's house on two occasions other than the one for which defendant was on trial was properly admitted for the purpose of showing defendant's guilty knowledge. *S. v. Weldon*, 401.

Testimony by police officers that defendant's house had a reputation as a place where illegal drugs were bought and sold was inadmissible hearsay, but the admission of such testimony was harmless error. *Ibid.*

Language in *State v. Richardson*, 36 N.C. App. 373, to the effect that evidence of other drug offenses is admissible to show "disposition to deal in illicit drugs" is disapproved. *Ibid.*

NEGLIGENCE

§ 2. Negligence Arising from the Performance of a Contract

A subsequent purchaser can recover in negligence against the builder of the property if the subsequent purchaser can prove that he has been damaged as a proximate result of the builder's negligence. *Oates v. JAG, Inc.*, 276.

§ 7. Wilful or Wanton Negligence

Plaintiff's evidence was sufficient for the jury on the issue of willful and wanton negligence by defendant railway in the flooding of plaintiff's downstream property when an embankment constructed by defendant across a creek burst after causing water to back up during heavy rain. *Akzona, Inc. v. Southern Railway Co.*, 488.

PENALTIES

§ 1. Generally

Reasonable costs of collection may constitutionally be deducted from the gross proceeds of the fines collected by a municipality for overtime parking in determining the "clear proceeds" of such fines which must be paid by the municipality to the county finance officer for maintaining free public schools. *Cauble v. City of Asheville*, 598.

RAPE AND ALLIED OFFENSES

§ 1. Nature and Elements of the Offense

The element of infliction of serious personal injury in the crimes of first degree sexual offense and first degree rape is no longer limited to the period of time when the victim's resistance was being overcome or her submission procured or to the person who was the victim of the rape or sexual offense. *S. v. Blackstock*, 232.

The element of infliction of serious personal injury upon the victim or another person in the crimes of first degree sexual offense and first degree rape is sufficiently connected in time to the sexual acts when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. *Ibid.*

§ 4.1. Relevancy and Competency of Evidence; Proof of Other Acts and Crimes

Testimony by a rape victim that she knew defendant had killed a girl before was competent to show the victim's state of mind when defendant threatened her with a loaded shotgun. *S. v. Kinch*, 99.

Testimony by a codefendant who was allowed to plead guilty to a lesser offense was not so vague and indefinite that it should have been excluded. *S. v. Arnold*, 301.

There was no error in admitting testimony concerning sexual acts other than the crime charged where the testimony clearly tended to prove that defendant engaged in a scheme to take sexual advantage of the availability and susceptibility of his young nephews. *Ibid.*

There was no prejudice where the court permitted testimony of other similar sexual offenses, then interrupted testimony of another similar offense and instructed the jury that it was not to consider that testimony. *Ibid.*

§ 4.2. Relevancy and Competency of Evidence; Physical Condition of Victim

Laboratory proof of the source of semen was not a prerequisite to the admission of testimony that a medical examination disclosed the presence of semen in an alleged rape victim's vagina. *S. v. Kinch*, 99.

In a prosecution for first degree sex offenses against a nine-year-old girl, the trial court did not err by admitting the testimony of an expert in pediatrics and infectious diseases who had not examined the victim or defendant. *S. v. Ford*, 498.

§ 5. Sufficiency of Evidence

Assignments of error challenging the sufficiency of the evidence to sustain a charge of first-degree rape and the court's failure to submit second-degree rape to the jury were wholly frivolous. *S. v. Kinch*, 99.

The State's evidence was sufficient to establish that defendant touched a female child's sexual organs with his tongue so as to support his conviction of the sexual offense of cunnilingus. *S. v. McNeely*, 451.

§ 6.1. Lesser Degrees of Crime

Defendant's statement in a rape case that he "struggled to penetrate without an erection" did not constitute a denial of penetration which required the trial court to instruct on lesser offenses of attempted rape and assault on a female. *S. v. Williams*, 337.

The trial court in a prosecution for the commission of a first-degree sexual offense on a child did not err in failing to submit to the jury the offense of attempt to commit a first-degree sexual offense. *S. v. McNeely*, 451.

RULES OF CIVIL PROCEDURE

§ 50. Motions for Directed Verdicts

Where the trial court did not instruct the jury with respect to certain issues, the charge amounted to an implied directed verdict on those issues. *Akzona, Inc. v. Southern Railway Co.*, 488.

§ 56.7. Summary Judgment; Appeal

The denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits. *Harris v. Walden*, 284.

SALES

§ 6.4. Warranties in Sale of House by Builder-Vendor

The Court of Appeals erred by ruling that defects in a house were not latent in an action by the third owner of a house against the builder. *Oates v. JAG, Inc.*, 276.

§ 22. Actions for Personal Injuries Based Upon Negligence; Manufacturer's Liability

The ten-year statute of repose set forth in former G.S. 1-15(b) does not apply to claims arising from disease and thus does not apply to plaintiff's civil action to recover damages for asbestosis allegedly caused by exposure to defendants' products. *Wilder v. Amatex Corp.*, 550.

§ 22.2. Defective Goods or Materials; Sufficiency of Evidence

Summary judgment was improperly entered for defendant in an action to recover damages for asbestosis allegedly caused by plaintiff's exposure to defendant's asbestos-containing products. *Wilder v. Amatex Corp.*, 550.

SCHOOLS

§ 1. Establishment, Maintenance and Supervision

Reasonable costs of collection may constitutionally be deducted from the gross proceeds of the fines collected by a municipality for overtime parking in determining the "clear proceeds" of such fines which must be paid by the municipality to the county finance officer for maintaining free public schools. *Cauble v. City of Asheville*, 598.

SEALS

§ 1. Generally

It was not error for the trial court to conclude as a matter of law that a contract to which a corporate seal had been affixed was not a contract under seal and thus governed by the ten-year statute of limitations. *Square D Co. v. C. J. Kern Contractors*, 423.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

The seizure of defendant's clothing was not unlawful as being the product of an unconstitutional detention where defendant was a prison inmate. *S. v. Primes*, 202.

§ 14. Voluntary, Free, and Intelligent Consent

An officer's statements to defendant that his cooperation would be made known to the district attorney was not such an inducement as to render involuntary defendant's consent to a search of his automobile. *S. v. Williams*, 337.

TRIAL

§ 5. Course and Conduct of Trial

Defendant did not show prejudice where the court recessed for lunch until 2:15 p.m. but began its charge at 2:00 p.m. without defense counsel. *Penley v. Penley*, 1.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

Contributory negligence is not a defense to a Chapter 75 violation. *Winston Realty Co. v. G.H.G., Inc.*, 90.

The trial court was not required to submit an issue to the jury concerning unfair and deceptive trade practices in an action arising from the failure of an employment agency to investigate the background and references of an applicant for employment as a bookkeeper. *Ibid.*

The trial court correctly concluded as a matter of law that the jury's finding that defendant employment agency violated the provisions of either or both G.S. 95-47.6(2) and (9) constituted unfair and deceptive acts or practices. *Ibid.*

Securities transactions are beyond the scope of the unfair trade practices statute. *Skinner v. E. F. Hutton & Co.*, 267.

UTILITIES COMMISSION

§ 24. Rate Making

The Utilities Commission did not violate G.S. 62-79(a) in a general rate case by stating that it had found in a number of other cases that demand ratchets are a less efficient peak load pricing device than time of use rates, then continuing the use of demand ratchets and limiting the availability of time of use rates. *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 171.

§ 27. Test Period

The Utilities Commission in a general rate case is required to adjust test period data to reflect abnormalities which had a probable impact on the utility's revenues and expenses during the test period; however, there was evidence to support the Commission's refusal to find an abnormality where the record tended to show that any adjustment based on economic conditions would be largely speculative and the expert testimony relied on by appellants to show an abnormality, which the Commission was not bound to accept, was flawed in its methodology. G.S. 62-133(c). *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 171.

The Utilities Commission did not err in a general rate case by taking into consideration an estimated reduction in revenue due to increased availability of time of use rates even though the reduction did not occur during the test period. *Ibid.*

§ 36. Transactions with Subsidiaries or Affiliates

The record supported a determination by the Utilities Commission that Nantahala and Tapoco should be treated as a single utility system for rate-making purposes. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 246.

The evidence supported findings by the Utilities Commission that Tapoco does not wheel power Alcoa purchases from TVA to serve Alcoa in Tennessee, that this power was not integrated within the combined Tapoco-Nantahala system with respect to the public load served by these utilities, and that the costs of this purchased power should not be "rolled-in" when determining Nantahala's retail rate base. *Ibid.*

UTILITIES COMMISSION — Continued

The Commission erred in its order establishing Nantahala's retail rates on a "stand-alone" basis after a "roll-in" methodology had been utilized by the Commission and affirmed by the Supreme Court in two preceding rate cases involving Nantahala, Tapoco and Alcoa by failing to accord more than minimal consideration to competent evidence suggesting the continued propriety of utilizing the "roll-in" methodology and by failing to find facts with respect to certain issues. *State ex rel. Utilities Comm. v. Edmisten*, 122.

If the Commission again finds that Alcoa is a North Carolina public utility, it may require Alcoa to protect its subsidiary Nantahala financially as to future rates in much the same way as it has been held responsible for past locked-in rates. *Ibid.*

§ 38. Current and Operating Expenses

The Utilities Commission properly refused to exclude from Duke Power Company's rate base and allowable expenses that portion of operating expenses and undepreciated costs of the McGuire Nuclear Station equal to the percentage of its generation received by municipalities and cooperatives under the Catawba Sale Agreements. *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 171.

§ 43. Classifications and Discrimination in Rates

The Utilities Commission did not err by refusing to order Duke Power Company to make time of use rates immediately available to all customers. *State ex rel. Utilities Comm. v. Carolina Utilities Customers Assoc.*, 171.

The Utilities Commission in a general rate case did not err by adjusting Duke Power Company's rates to offset losses in revenue occasioned by the increased availability of time of use rates. *Ibid.*

§ 56. Review of Findings; Rate Orders

The fact that five of the findings of fact in the present proceeding and in a prior proceeding to determine Nantahala's retail rates are similarly worded does not indicate that the Utilities Commission did not consider evidence presented before it in the present proceeding. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 246.

In a proceeding to establish retail rates for Nantahala Power Company, the Commission did not err in refusing to establish a new Large Industrial Service rate class which would apply only to Jackson Paper Manufacturing Company. *Ibid.*

§ 57. Specific Instances Where Findings Are Conclusive or Sufficient

In ordering that a 15% capital improvements surcharge previously approved by the Utilities Commission for a water company be continued, the Commission gave more than minimal consideration to the water company's violations of previous orders of the Commission that first established the 15% surcharge. *State ex rel. Utilities Comm. v. Thornburg*, 509.

The Utilities Commission's decision to continue a 15% capital improvements surcharge for a water company was not arbitrary and capricious because of the water company's failure to comply with prior orders, particularly its payment of excessive salaries. *Ibid.*

VENDOR AND PURCHASER

§ 2.3. Time of Performance; Extension of Time

A seller who continues to assure the buyer orally that he intends for closing to take place on real property pursuant to the terms of the parties' written sales con-

WORD AND PHRASE INDEX

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